No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JERRY ADAMS, JR.,

Petitioner,

v.

ROBERT NEUSCHMID, WARDEN,

Respondent.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For the Ninth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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NOT FOR PUBLICATION

FILED

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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JERRY ADAMS, Jr., Petitioner-Appellant, v. GARY SWARTHOUT, Warden, Respondent-Appellee.	No. 15-56681 D.C. No. 5:13-cv-00124-MMM-JC MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Margaret M. Morrow, District Judge, Presiding

Argued and Submitted August 6, 2018
Pasadena, California

Before: HAWKINS, M. SMITH, and CHRISTEN, Circuit Judges.

Jerry Adams, Jr., a California state prisoner, challenges the denial of his 28 U.S.C. § 2254 habeas petition. Reviewing the denial of his petition de novo, *Stanley v. Cullen*, 633 F.3d 852, 859 (9th Cir. 2011), we affirm.

Adams first contends that his trial counsel rendered ineffective assistance by failing to move for severance of his case on the basis of prejudice resulting from

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

evidentiary spillover if tried with his co-defendants, and instead, moving for severance solely on the basis of undue delay.

Adams' petition is subject to the Antiterrorism and Effective Death Penalty Act of 1996; therefore, our review of this ineffective assistance claim is "doubly deferential." *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009). The California Court of Appeal determined that trial counsel's conduct was reasonable because evidence relevant to the charges against Adams' co-defendants would support Adams' alibi defense and would not be prejudicial. Given the presumption of reasonableness afforded to trial counsel's conduct, *see Strickland v. Washington*, 466 U.S. 668, 690 (1984), the California Court of Appeal's determination that Adams failed to demonstrate ineffective assistance of counsel was not an unreasonable application of the *Strickland* standard. *See Harrington v. Richter*, 562 U.S. 86, 102 (2011).

Adams also contends that the California Court of Appeal's rejection of his challenge under *Batson v. Kentucky*, 476 U.S. 79 (1986), was based on an unreasonable determination of the facts. *See* 28 U.S.C. § 2254(d)(2). The California Court of Appeal undertook a comparative juror analysis and evaluated the totality of the circumstances when considering Adams' contention that the State impermissibly exercised peremptory challenges to strike prospective jurors E.H. and P.B. on the basis of their race. Although reasonable minds certainly could doubt the veracity of

the prosecutor's explanations for the challenges at issue, we cannot say that, on this record, the state court "had no permissible alternative but to reject the prosecutor's race-neutral justifications and conclude [Adams] had shown a *Batson* violation." *Rice v. Collins*, 546 U.S. 333, 341 (2006).

AFFIRMED.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JERRY ADAMS, JR., Petitioner, v. G. SWARTOUT, Warden, Respondent.	Case No. EDCV 13-124 MMM(JC) ~~(PROPOSED)~~ ORDER ACCEPTING FINDINGS, CONCLUSIONS, AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition for Writ of Habeas Corpus by a Person in State Custody (the "Petition") and all of the records herein, including the attached Report and Recommendation of United States Magistrate Judge ("Report and Recommendation"). The Court approves and accepts the Report and Recommendation.

IT IS ORDERED that Judgment be entered denying the Petition and dismissing this action with prejudice.

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IT IS FURTHER ORDERED that the Clerk serve copies of this Order, the Report and Recommendation, and the Judgment herein on petitioner and counsel for respondent.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: September 5, 2015

HONORABLE MARGARET M. MORROW
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JERRY ADAMS, JR., Petitioner, v. G. SWARTOUT, Warden, Respondent.	Case No. ED CV 13-124 MMM(JC) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable Margaret M. Morrow, United States District Judge, pursuant to the provisions of 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California.

I. SUMMARY

On January 2, 2013, Jerry Adams, Jr. ("petitioner"), a state prisoner proceeding *pro se*, filed a Petition for Writ of Habeas Corpus by a Person in State Custody ("Petition") pursuant to 28 U.S.C. § 2254. Petitioner challenges a judgment in Riverside County Superior Court on the following grounds: (1) his trial counsel was ineffective for failing to move to sever petitioner's trial from that of his co-defendants; (2) the trial court erred by: (a) refusing to sever

petitioner's trial from that of his co-defendants; (b) denying petitioner's Wheeler/Batson[1] motion; and (c) denying petitioner's motion for a mistrial based on assertedly improper gang expert testimony; and (3) there was insufficient evidence to support the gang enhancements.[2]

On March 27, 2013, respondent filed an Answer and a supporting memorandum ("Answer").[3] On May 28, 2013, petitioner filed a Traverse and a supporting memorandum ("Traverse").

For the reasons stated below, the Petition should be denied, and this action should be dismissed with prejudice.[4]

II. PROCEDURAL HISTORY

On October 15, 2008, a Riverside County Superior Court jury found petitioner guilty of two counts of assault with a firearm and one count of shooting at an inhabited dwelling. (CT 1245-52). The jury also found true allegations that petitioner personally used a firearm and that the crimes were committed for the benefit of a criminal street gang. (CT 1245-52). The trial court sentenced petitioner to a total of 15 years to life in state prison. (CT 1521-24).

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[1]See Batson v. Kentucky, 476 U.S. 79 (1986) (purposeful discrimination in the jury selection process violates the Equal Protection Clause of the Fourteenth Amendment). People v. Wheeler, 22 Cal.3d 258 (1978), is the California equivalent of Batson. See Paulino v. Harrison, 542 F.3d 692, 695 n.1 (9th Cir. 2008).

[2]For ease of analysis, the Court addresses petitioner's claims in a different order than presented by petitioner.

[3]Respondent concurrently lodged multiple documents ("Lodged Doc."), including the Clerk's Transcript ("CT") and the Reporter's Transcript ("RT"). Respondent also lodged missing pages of the Reporter's Transcript on June 10, 2015.

[4]One of petitioner's co-defendants – Everett Lee Gholston ("Gholston") – also has a Petition for Writ of Habeas Corpus pending in this Court in the case entitled Gholston v. Barnes, CV 13-283-DDP(JC).

On February 18, 2011, the California Court of Appeal affirmed the judgment in a reasoned decision. (Lodged Doc. 5). On June 8, 2011, the California Supreme Court denied review without comment. (Lodged Doc. 7).

Petitioner thereafter sought, and was denied habeas relief in the Riverside County Superior Court, the California Court of Appeal, and the California Supreme Court. (Lodged Docs. 8-13).

III. FACTS

Since petitioner raises a sufficiency of the evidence claim, the Court has independently reviewed the state court record (see Jones v. Wood, 114 F.3d 1002, 1008 (9th Cir. 1997)), and based thereon adopts the following factual summary from the California Court of Appeal's opinion on direct review (replacing petitioner's name with "petitioner") as a fair and accurate summary of the evidence presented at trial. (Lodged Doc. 5 at 3-6).

Around noon on October 7, 2004, 16-year-old Lamar Lee and Anthony M. were in the garage of a house owned by the Young family on Sweeney Drive in Moreno Valley. Their friend Felton Young III was in the backyard of the house. The garage door was open, and Lee and Anthony M. watched as a car drove by and fired two guns at the garage. Lee and Anthony M. told the police that the shooters were Gholston and petitioner and that they believed Correyon Jefferson was also in the car.

Young's father, Felton Young, Jr., often referred to as "Pops,"[5] arrived home shortly after the shooting. Lee and Anthony M. told Pops that Gholston and petitioner shot at them. Pops was familiar with Gholston and petitioner, as his sons were friends with them, and Pops had started a competitive hip hop dance group called Cali Clowns, in which Gholston had participated.

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[5]For the sake of clarity, the Court refers to Felton Young, Jr., as "Pops" and Felton Young III as "Young."

Around 2:30 p.m., two vehicles headed out from the Young family's house to look for the perpetrators of the drive-by shooting. Pops drove a Mercedes with two passengers. Young drove a van with Anthony M. among his passengers. Nearby at Pattilynn Drive, in front of Moreno Valley High School, they located a group of people including Gholston and Jefferson. Petitioner was not present.

Pops exited his car and questioned Gholston and Jefferson about the drive-by shooting. When the occupants of the van joined the confrontation, tensions escalated. Several members of the group that included Gholston and Jefferson pulled out guns and started shooting. Anthony M. was shot in his buttocks, with the bullet exiting his left hip. Young was shot in the back near the top of his tailbone. According to Pops's testimony, immediately after being shot Young identified Gholston as his shooter, and Anthony M. identified Jefferson as his shooter. A few days after the shooting, Young told the police that five different people were shooting at them, Gholston shot him, and Jefferson shot Anthony M.

A shell casing from a .45 caliber gun found at the scene of the Sweeney Drive shooting matched shell casings found at the scene of the Pattilynn Drive shooting.

A second amended information charged crimes arising out of the Sweeney Drive shooting and the Pattilynn Drive shooting. For the Sweeney Drive shooting, petitioner, Jefferson, and Gholston were charged in counts 1 and 2 with the attempted murder of Lee and Anthony M., and in count 3 with shooting at an inhabited dwelling. For the Pattilynn Drive shooting, Gholston and Jefferson were charged with the attempted murder of Young and Anthony M. in counts 4 and 5. Count 6 charged petitioner with active participation in a criminal street gang, but that charge was later dismissed by the prosecutor during trial. The second amended information also contained gang and firearm allegations in counts 1 through 5.

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The case proceeded to a jury trial at which the defendants were petitioner, Jefferson, Gholston, and Jacob Allen Rogers.[6] The jury heard an expert testify that the defendants were associates of the Sex Cash Money (Sex Cash) gang at the time of the shootings, but they were not confirmed members. Petitioner presented an alibi defense through witnesses who testified that he was at home when the Sweeney Drive shooting occurred.

On counts 1 and 2, the jury convicted petitioner and Gholston of the lesser included offense of assault with a firearm, and on count 3 convicted petitioner and Gholston of shooting at an inhabited dwelling. It also found true the allegations on counts 1, 2 and 3 that petitioner and Gholston committed the crimes for the benefit or, at the direction of, or in association with a criminal street gang, and on count 3 that petitioner and Gholston personally used a firearm. The jury acquitted Jefferson on counts 1 through 3.

On count 4, the jury convicted Jefferson of the attempted murder of Anthony M. and convicted Gholston of the lesser included offense of assault with a firearm on Anthony M. On count 5, the jury convicted Gholston of the attempted murder of Young and convicted Jefferson of the lesser included offense of assault with a firearm on Young. On counts 4 and 5, the jury made a true finding on the allegation that Jefferson and Gholston committed the crimes for the benefit or, at the direction of, or in association with a criminal street gang, and with respect to the attempted murder conviction in counts 4 and 5, it made true findings on the firearm allegations.

IV. STANDARD OF REVIEW

This Court may entertain a petition for writ of habeas corpus on "behalf of a person in custody pursuant to the judgment of a State court only on the ground that

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[6]Rogers was alleged in counts 4 and 5 to have committed attempted murder during the Pattilynn Drive shooting. The jury returned guilty verdicts as to Rogers, convicting him of lesser included offenses in counts 4 and 5.

he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). A federal court may not grant an application for writ of habeas corpus on behalf of a person in state custody 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"; or (2) "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).[7]

In applying the foregoing standards, federal courts look to the last reasoned state court decision. See Smith v. Hedgpeth, 706 F.3d 1099, 1102 (9th Cir.), cert. denied, 133 S. Ct. 1831 (2013). "Where there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground." Ylst v. Nunnemaker, 501 U.S. 797, 803 (1991) (cited with approval in Johnson v. Williams, 133 S. Ct. 1088, 1094 n.1 (2013)); Cannedy v. Adams, 706 F.3d 1148, 1158 (9th Cir. 2013) (it remains Ninth Circuit practice to "look through" summary denials of discretionary review to the last reasoned state-court decision), as amended on denial of rehearing, 733 F.3d 794 (9th Cir. 2013), cert. denied, 134 S. Ct. 1001 (2014).

However, to the extent no such reasoned opinion exists, courts must conduct an independent review of the record to determine whether the state court clearly erred in its application of controlling federal law, and consequently, whether the

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[7]When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary. Harrington v. Richter, 562 U.S. 86, 99 (2011); see also Johnson v. Williams, 133 S. Ct. 1088, 1094-96 (2013) (extending Richter presumption to situations in which state court opinion addresses some, but not all of defendant's claims).

state court's decision was objectively unreasonable. Delgado v. Lewis, 223 F.3d 976, 982 (9th Cir. 2000), abrogated on other grounds, Lockyer v. Andrade, 538 U.S. 63, 75-76 (2003); see also Harrington v. Richter, 562 U.S. 86, 98 (2011) ("Where a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief."); Cullen v. Pinholster, 131 S. Ct. 1388, 1402 (2011) ("Section 2254(d) applies even where there has been a summary denial.") (citation omitted).

When it is unclear whether deference under the foregoing standards applies, federal habeas courts can deny writs of habeas corpus under Section 2254 by engaging in a *de novo* review. Berghuis v. Thompkins, 560 U.S. 370, 390 (2010). When it is clear that the state court has not decided an issue on the merits, or when a state court's adjudication of a claim on the merits results in a decision contrary to or involving an unreasonable application of clearly established federal law or is based on an unreasonable determination of the facts, review is also *de novo*. See Cone v. Bell, 556 U.S. 449, 472 (2009); Panetti v. Quarterman, 551 U.S. 930, 953 (2007); Hurles v. Ryan, 752 F.3d 768, 778 (9th Cir.), cert. denied, 135 S. Ct. 710 (2014).

V. DISCUSSION[8]

Petitioner claims he is entitled to federal habeas relief because of ineffective assistance of counsel, trial court error, and insufficiency of the evidence to support the jury's true finding on the gang enhancement allegations. Petitioner is not entitled to habeas relief on any of his claims.

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[8]The Court has read, considered and rejected on the merits all of petitioner's contentions. The Court discusses petitioner's principal contentions herein.

A. Petitioner's Ineffective Assistance of Trial Counsel Claim Does Not Merit Federal Habeas Relief

In Ground Two, petitioner contends that his trial counsel assertedly rendered ineffective assistance by failing to move to sever petitioner's trial from that of his co-defendants. (Petition, Ground Two; Traverse at 3-5). Prior to the start of trial, petitioner's counsel moved on three occasions to sever his trial because petitioner objected to the continuances his co-defendants had requested. (RT 17, 36; CT 107-11, 388-96). Counsel did not seek to have his trial severed on the ground that a joint trial would prejudice petitioner from association with his co-defendants. The trial court denied petitioner's counsel's motions to sever. (RT 20, 37; CT 164, 398).

Petitioner argues here as he did on direct appeal that his counsel's failure to move to sever petitioner's case on alleged prejudice grounds amounts to ineffective assistance of counsel for failing to raise the issue in the first instance and for failing to preserve the issue for appeal. (Traverse at 3-8; Lodged Doc. 3 at 17-18). The California Court of Appeal – the last state court to issue a reasoned decision addressing this claim – rejected it on the merits. (Lodged Doc. 5 at 10-12). Petitioner is not entitled to federal habeas relief on this claim.

1. Applicable Law

The Sixth Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment, guarantees a criminal defendant the effective assistance of counsel at trial. Evitts v. Lucey, 469 U.S. 387, 392 (1985). To warrant habeas relief, a petitioner must demonstrate both that: (1) counsel's performance was deficient; and (2) the deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687-93 (1984). Deficient performance is prejudicial only if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. The probability that the verdict would have been different

must be "substantial." Richter, 562 U.S. at 112 (citing id. at 693). That is, the criminal proceedings must have been rendered "fundamentally unfair" by attorney error such that "the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686, 700.

As both prongs of the Strickland test must be satisfied to establish a constitutional violation, failure to satisfy either prong requires that an ineffective assistance claim be denied. See Strickland, 466 U.S. at 697 (no need to address deficiency of performance if prejudice is examined first and found lacking); Hein v. Sullivan, 601 F.3d 897, 918 (9th Cir. 2010) (a court can deny a Strickland claim if either part of the test is not satisfied), cert. denied, 131 S. Ct. 2093 (2011).

Where, as here, there has been a state court decision rejecting a Strickland claim, review is "doubly deferential." Richter, 562 U.S. at 105 (citing Knowles v. Mirzayance, 556 U.S. 111, 123-24 (2009)); 28 U.S.C. § 2254(d). A state court's decision rejecting a Strickland claim is entitled to "a deference and latitude that are not in operation when the case involves review under the Strickland standard itself." Richter, 562 U.S. at 101; see also Padilla v. Kentucky, 559 U.S. 356, 372 (2010) (noting, "There is no reason to doubt that lower courts – now quite experienced with applying Strickland – can effectively and efficiently use its framework to separate specious claims from those with substantial merit."). "The pivotal question is whether the state court's application of the Strickland standard was unreasonable. Richter, 562 U.S. at 101; 28 U.S.C. § 2254(d). "[E]ven a strong case for relief does not mean the state court's contrary conclusion was unreasonable." Richter, 562 U.S. at 102 (citing Lockyer v. Andrade, 538 U.S. 63, 75 (2003)). The range of reasonable Strickland applications is "substantial." Richter, 562 U.S. at 105 (citing Mirzayance, 556 U.S. at 123).

2. Analysis

Petitioner's claim must be rejected because he fails to demonstrate either that his trial counsel was deficient or that he was thereby prejudiced.

First, petitioner's counsel reasonably could have chosen not to move to sever on prejudice grounds because petitioner may have benefitted from being tried with his co-defendants. As the Court of Appeal observed:

> . . . Once delay was no longer an issue and trial was set to start, defense counsel could have decided against severance because [petitioner] would benefit by being tried with his co[-]defendants in a trial where the jury would hear extensive evidence about the Pattilynn Drive shooting and learn that [petitioner] was not present. [Petitioner's] main defense was that he was mistakenly identified as having been in the car during the Sweeney Drive shooting and was instead at home during that shooting where several witnesses testified that they saw him. Evidence that [petitioner] was not with Gholston and Jefferson at the Pattilynn Drive shooting less than three hours later[] would lend credibility to his defense theory.

(Lodged Doc. 5 at 11-12).

Second, petitioner cannot show a reasonable probability that had petitioner's counsel predicated a motion to sever on the asserted prejudice arising from a joint trial with his co-defendants, such a motion would have been granted or that the denial of such a motion would have afforded relief on appeal. See Cal. Penal Code § 1098 ("When two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they must be trial jointly, unless the court order[s] separate trials."); People v. Coffman, 34 Cal. 4th 1, 40 (2004) (section 1098 expresses legislative preference for joint trials which "promote economy and efficiency" and "serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts") (quoting Zafiro v. United States, 506 U.S. 534, 537 (1993)), cert. denied, 544 U.S. 1063 (2005); see also Cal. Penal Code § 954 (for joinder of counts, a trial court has discretion to order that different offenses or counts in an accusatory pleading be tried separately in the interests of

justice and for good cause shown). "When defendants are charged with having committed common crimes involving common events and victims, as here, the court is presented with a classic case for a joint trial." Coffman, 34 Cal. 4th at 40 (citation and internal quotation marks omitted). In petitioner's case, the prosecution pursued identical attempted murder counts against all of the defendants for the two separate shooting incidents. As alleged, petitioner participated in the first shooting with Gholston and Jefferson, and Gholston, Jefferson, and Rogers participated in the second shooting. Each count contained firearm and gang allegations. Finally, the two separate shooting incidents involved one common victim, Anthony M. (CT 586-91).

Severance is not required simply because one defendant's defense makes it more difficult for another defendant to argue his or her defense. "[I]t is well settled that defendants are not entitled to severance merely because they have a better chance of acquittal in separate trials." Zafiro, 506 U.S. at 540. Even where prejudice from a joint trial is shown, severance is not necessarily mandatory; the relief is left to the trial court's sound discretion and any risk of prejudice often may be cured by "less drastic measures, such as limiting instructions." Id. at 539 (applying federal rules); see also Coffman, 34 Cal. 4th at 40 (discussing Zafiro as "helpful" in guiding a trial court's discretion in ruling on a severance motion). "The burden is on the party seeking severance to clearly establish that there is a substantial danger of prejudice requiring that the charges be separately tried." People v. Memro, 11 Cal. 4th 786, 849 (1995) (citation omitted), cert. denied, 519 U.S. 834 (1996). In petitioner's case, the cross-admissibility of the evidence would have dispelled any inference of prejudice. Memro, 11 Cal. 4th at 850. Each of the counts involved the testimony of at least three of the same witnesses (*i.e.*, Anthony M.,who was a victim in both shootings, Felton Young, III, who was present at both shootings, and the gang expert who testified about the co-defendants' association (including petitioner's association) with the Sex Cash

gang and the gang elements of the alleged shootings). Moreover, the evidence of Gholston's and Jefferson's alleged gang activity in general and in relation to the Pattilynn Drive shooting arguably was relevant to the prosecution's theory of the case for why both of the shootings occurred and to explain why some of the prosecution's witnesses were reluctant to testify. See United States v. Abel, 469 U.S. 45, 54 (1984) (evidence of gang membership admissible where probative of bias); United States v. Takahashi, 205 F.3d 1161, 1164 (9th Cir. 2000) (evidence of gang affiliation admissible when relevant to material issue); United States v. Santiago, 46 F.3d 885, 889-90 (9th Cir.) (gang evidence admissible to show motive, opportunity, intent, preparation, or plan, and to show credibility of witnesses who feared gang retaliation), cert. denied, 515 U.S. 1162 (1995) (citation omitted); People v. Sanchez, 58 Cal. App. 4th 1435, 1449-50 (1997) (gang evidence admissible to assess witness credibility where witness claims fear of gang retaliation).[9]

Since at least some of the evidence against the co-defendants would have been cross-admissible at petitioner's trial, and since there was no essential, allegedly exculpatory evidence that needed to be excluded due to the joint trial, there is little likelihood that the trial court would have granted a severance and it would have been futile for petitioner's counsel to seek one. In fact, at the outset of trial, the trial court advised, "The best possible result is a single trial with all six

[9]To the extent petitioner may have wanted to sever the Sweeney Drive counts from the Pattilynn Drive counts, it is unlikely the trial court would have found good cause for severance under California Penal Code section 954 because at least certain of the evidence was cross-admissible, the charges were identical and therefore not likely to inflame the jury, and petitioner's was not a case where a weak evidentiary case was joined with a strong one – for each of the shootings, eyewitnesses identified the defendants involved as the shooters. See People v. Marshall, 15 Cal. 4th 1, 27 (1997) (when considering severance under section 954, trial court's discretion is guided by: (1) whether the evidence would be cross-admissible; (2) whether some charges are likely to inflame the jury against the defendant; (3) whether a weak case has been joined with a strong one; and (4) whether any of the charges is potentially a capital offense).

defendants present in some courtroom that's big enough to hold them. . . . [T]hat's the solution the Court would prefer." (Lodged Doc. 2A at 6). The court also indicated, however, that it was not willing to continue the trial until all six defendants were ready to proceed (id. at 6-7), so it appears that petitioner's best argument for severance (scheduling) was the one counsel raised. Under such circumstances, trial counsel's failure to move to sever on prejudice grounds was neither unreasonable nor prejudicial. See Styers v. Schriro, 547 F.3d 1026, 1030 (9th Cir. 2008) (to show a Strickland violation, the petitioner must show a reasonable probability that, had counsel made the motion, the motion would have been granted), cert. denied, 558 U.S. 932 (2009); see generally Gonzalez v. Knowles, 515 F.3d 1006, 1017 (9th Cir. 2008) (counsel cannot be deemed ineffective for failing to raise meritless claim); Rupe v. Wood, 93 F.3d 1434, 1445 (9th Cir. 1996) ("the failure to take a futile action can never be deficient performance"), cert. denied, 519 U.S. 1142 (1997).

Finally, petitioner has not demonstrated a reasonable probability that had counsel made a severance motion on the grounds asserted herein and had the trial court granted it, the outcome of the trial would have been different. See Strickland, 466 U.S. at 697. Any speculation that, had the trials been severed, petitioner may have received a more favorable verdict does not establish prejudice. See Gonzalez, 515 F.3d at 1016 (speculation is "plainly insufficient" to establish Strickland prejudice).

The Court of Appeal's rejection of this claim was not contrary to, and did not involve an unreasonable application of clearly established federal law, and was not based on an unreasonable determination of the facts. Accordingly, petitioner is not entitled to habeas relief on Ground Two.

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B. Petitioner's Claims of Trial Court Error Do Not Merit Federal Habeas Relief

In Grounds One, Four, and Five, petitioner asserts that various trial court rulings violated petitioner's right to a fair trial. For petitioner to prevail on these claims, he must show that the alleged trial court errors, either singly or in combination, had a "substantial and injurious effect or influence on the jury's verdict." Parle v. Runnels, 505 F.3d 922, 927 (9th Cir. 2007) (citing, *inter alia*, Brecht v. Abrahamson, 507 U.S. 619, 637-38 (1993) and Chambers v. Mississippi, 410 U.S. 284, 290 n.3, 298, 302-03 (1973) (combined effect of individual errors can violate due process)); see also Fry v. Pliler, 551 U.S. 112, 119-20 (2007) (courts are to apply Brecht standard of review in assessing prejudicial impact of federal constitutional error at state court criminal trial). However, absent a finding of error, there is nothing for the Court to accumulate. See Mancuso v. Olivarez, 292 F.3d 939, 957 (9th Cir. 2002) ("Because there is no single constitutional error in this case, there is nothing to accumulate to a level of a constitutional violation."); see also Hayes v. Ayers, 632 F.3d 500, 524 (9th Cir. 2011) ("Because we conclude that no error of constitutional magnitude occurred, no cumulative prejudice is possible."). As discussed below, petitioner's contentions, considered either singly or in combination, fail to meet the Brecht threshold for relief.

1. The Trial Court's Refusal to Sever Petitioner's Trial from His Co-Defendants' Trial Does Not Merit Federal Habeas Relief (Ground One)

In Ground One, petitioner asserts that the trial court violated petitioner's right to a fair trial by refusing to sever petitioner's trial from that of his co-defendants due to the asserted prejudice arising from the association between he

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and the co-defendants.[10] (Petition, Ground One; Traverse at 3). As noted above, the joint trial concerned two separate shooting incidents that occurred on the same day, and the evidence was that petitioner had participated only in the Sweeney Drive shooting. Petitioner argues that the joint trial with his co-defendants on the Pattilynn Drive shooting prejudiced him by associating petitioner with Jefferson and Gholston – whom he described to the Court of Appeal as "two gun-wielding associates of the Sex Cash gang who shot at the same people who were involved in the Sweeney drive-by shooting." (Lodged Doc. 3 at 20). The California Court of Appeal rejected this claim on procedural grounds, finding that it had not been preserved for appeal since the motions to sever had been predicated only on delays attributable to scheduling a joint trial and his co-defendants' requests for continuances. (Lodged Doc. 5 at 6-10).[11]

Habeas relief based on a state court's refusal to grant a severance may be granted only if the joint trial was so prejudicial that it denied a petitioner his right to a fair trial. Zafiro, 506 U.S. at 538-39; United States v. Lane, 474 U.S. 438, 446

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[10]Although petitioner frames his claim as a challenge to the trial court's denial of the motions to sever, such motions, as noted above, were predicated solely on delays attributable to scheduling a joint trial and his co-defendants' requests for continuances – things about which petitioner does not complain here. Accordingly, it is more accurate to characterize petitioner's instant claim as a challenge to the trial court's failure *sua sponte* to sever petitioner's trial from that of his co-defendants on the ground asserted above.

[11]Respondent asserts that Ground One is procedurally defaulted. (Answer at 1-4). The Court need not decide if Ground One is procedurally defaulted since, as discussed herein, the Court concludes, based on a *de novo* review that Ground One lacks merit. See Franklin v. Johnson, 290 F.3d 1223, 1232 (9th Cir. 2002) ("appeals courts are empowered to, and in some cases should, reach the merits of habeas petitions if they are, on their face and without regard to any facts that could be developed below, clearly not meritorious despite an asserted procedural bar") (citing Lambrix v. Singletary, 520 U.S. 518, 525 (1997)); Barrett v. Acevedo, 169 F.3d 1155, 1162 (8th Cir.) ("judicial economy sometimes dictates reaching the merits if the merits are easily resolvable against a petitioner while the procedural bar issues are complicated"), cert. denied, 528 U.S. 846 (1999); see also Lewis v. Mayle, 391 F.3d 989, 996 (9th Cir. 2004) (standard of *de novo* review, rather then independent review, is applicable to claim that state court did not consider on the merits).

n.8 (1986) (improper joinder of defendants does not violate the Constitution unless "it results in prejudice so great as to deny a defendant his Fifth Amendment right to a fair trial"); but see Collins v. Runnels, 603 F.3d 1127, 1132 (9th Cir.) (referring to quote from Lane as dicta and therefore not clearly established federal law under 28 U.S.C. section 2254(d)(1) – an issue not present in the current case since the Court has reviewed Ground One *de novo*), cert. denied, 562 U.S. 904 (2010). When reviewing a trial court's refusal to grant a severance, the question presented in a state prisoner's petition for writ of habeas corpus is whether the state proceedings satisfied due process. Grisby v. Blodgett, 130 F.3d 365, 370 (9th Cir. 1997). To prevail, a petitioner bears the burden of demonstrating that the state court's refusal to grant a severance rendered his trial fundamentally unfair." Id.; see also Davis v. Woodford, 384 F.3d 628, 638-39 (9th Cir. 2004) (discussing same), cert. dismissed, 545 U.S. 1165 (2005). Fundamental unfairness is shown if the "impermissible joinder had a substantial and injurious effect or influence in determining the jury's verdict." Sandoval v. Calderon, 241 F.3d 765, 772 (9th Cir. 2000), cert. denied, 534 U.S. 847, 943 (2001). A petitioner must show that the prejudice arising from failure to sever was so "clear, manifest, or undue" that he was denied a fair trial. See Lambright v. Stewart, 191 F.3d 1181, 1185 (9th Cir. 1999) (citation omitted).[12]

Here, petitioner has pointed to nothing as assertedly rendering his trial unfair other than his association with co-defendants Gholston and Jefferson. See Petition, Ground One; Traverse at 3. There is no suggestion that petitioner's association with Gholston and Jefferson had a substantial and injurious effect on the jury's verdict. The trial court instructed the jury that it must separately

[12]To the extent petitioner contends the court's refusal to sever violated state law, petitioner is not entitled to habeas relief. See Estelle v. McGuire, 502 U.S. 62, 67-68 (1991); 28 U.S.C. § 2254(a). In addressing a challenge to a refusal to sever, a federal habeas court should neither "depend on the state law governing severance in state trials" nor "consider procedural rights to severance afforded in federal trials." Grisby v. Blodgett, 130 F.3d at 370.

consider the evidence as it applied to each defendant, and decide each charge for each defendant separately. (CT 1167). The verdicts suggest the jury followed this instruction. The jury found Jefferson not guilty of any of the counts charged for the Sweeney Drive shooting (CT 1253-58; see also CT 586-91 (information)), and found petitioner and Gholston guilty of the lesser included offense to attempted murder of assault with a firearm for the Sweeney Drive counts. (CT 1231-36, 1245-50). For the Pattilynn Drive counts, the jury found Gholston guilty of the attempted murder of Young and of assault with a firearm on Anthony, and found Jefferson guilty of the attempted murder of Anthony and of assault with a firearm on Young. (CT 1239-44, 1259-64).

Petitioner argued on direct appeal that, unlike for the Pattilynn Drive shooting involving his co-defendants, the eyewitness identifications of petitioner for the Sweeney Drive shooting were not strong and petitioner had an alibi defense. See Lodged Doc. 3 at 20-26. The Court disagrees. At trial, Anthony M. and Lee were both reluctant witnesses. (RT 190-91, 212-15, 237-38, 264, 285, 313, 341-42). Lee claimed he saw people inside the car from where the shots were fired but that he could not identify anyone. (RT 197, 200-01). Lee said his life was on the line for testifying. (RT 285-86). Anthony said he did not see the shooting because he was too busy running away and had no time to see who was in the car. (RT 339, 344-45, 423, 448-49, 452). Anthony did not want to testify or "snitch" to police investigators. (RT 313, 341-42). However, both Lee and Anthony knew petitioner and identified petitioner as one of the Sweeney Drive shooters. (RT 198-200, 313-19, 325, 356-57).

Lee admitted that he told police who responded to the shooting that it was Gholston and petitioner who shot from the car and that he told police the truth. (RT 202-08, 229, 279-81; see also RT 240-41, 250, 265-66, 273 (Lee testifying that he knew who was in the car); RT 903-09, 924 (responding police officer testifying that Lee told him that Gholston and petitioner were in the car and shot at

Lee); RT 1121-22, 1127-33 (detective testifying that Lee told him Gholston and petitioner shot at him, and playing an audiotape of Lee's interview for the jury)).[13] Lee had told police that petitioner was in the back seat and Gholston was driving the car. (RT 207, 229). When pressed, Lee said he was not positive it was Gholston or petitioner, that the shooters looked like them and could have been them. (RT 206-07, 289, 302-03, 310-11; but see RT 224, 255-56 (Lee later testifying that he felt bad when he saw Gholston and petitioner shoot at him because they were his friends, and that he was positive of who was in the car)).

Anthony said he did not recall telling the police who was in the car or who shot at him. (RT 337-40, 425; but see RT 909-11 (responding police officer testifying that Anthony told him that it was Gholston and petitioner who shot at Anthony and that both had tried to get Anthony to join their gang); RT 1180-92 (investigating detective testifying re same); CT 663-74 (transcript of police interview with Anthony wherein Anthony identified Gholston, Jefferson, and petitioner as being in the car and Gholston and petitioner as shooting)). While these witnesses were reluctant to testify at trial, their identifications were not weak.

Given the strength of the evidence against petitioner, the cross-admissibility of the evidence against petitioner, Jefferson, and Gholston, and the trial court's limiting instruction, the Court finds that joinder of petitioner's trial with that of his co-defendants did not render petitioner's trial fundamentally unfair. See Davis v. Woodford, 384 F.3d at 638-39 (finding no prejudice from joint trial where evidence was cross-admissible, weight of evidence for each count was roughly equivalent, and court gave a limiting instruction); Fields v. Woodford, 309 F.3d 1095, 1109-10 (9th Cir.) (no prejudice from failure to sever counts where evidence

[13]Lee also had identified petitioner and Gholston prior to trial from photographic lineups as the shooters. (RT 294-94).

was cross-admissible regarding motive and intent, and the evidence of guilt for all counts was strong), as amended, 315 F.3d 1062 (9th Cir. 2002); Sandoval v. Calderon, 241 F.3d at 772 (same). Petitioner is not entitled to habeas relief on Ground One.

2. The Trial Court's Denial of Petitioner's Wheeler/Batson Motion Does Not Merit Habeas Relief (Ground Five)

In Ground Five, petitioner asserts that the trial court violated petitioner's right to a fair trial by an impartial jury by denying petitioner's Wheeler/Batson motion. (Petition, Ground Five; Traverse at 11-23). The California Court of Appeal issued the last reasoned decision denying petitioner's claim on the merits, finding that the prosecution's reasons for striking the jurors at issue were reasonable and had a basis in accepted trial strategy, and that substantial evidence supported the trial court's conclusion that the prosecutor's stated race-neutral reasons for striking the jurors were credible. (Lodged Doc. 5 at 12-24). This finding was not unreasonable.

a. Applicable Law: The Batson Framework

In Batson v. Kentucky, 476 U.S. 79, 86 (1986), the Supreme Court held that "[t]he Equal Protection Clause guarantees the defendant that the State will not exclude members of his race from the jury venire on account of race." A trial court faced with a Batson challenge undertakes a three-step analysis to determine whether the State has improperly excluded members from the jury. Snyder v. Louisiana, 552 U.S. 472, 476-77 (2008). First, the defendant must make out a prima facie case showing that a peremptory challenge has been exercised on the basis of race. Id. at 476 (citation and quotation marks omitted). Second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question. Id. at 476-77 (citation and quotation marks omitted). Third, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination. Id. at 477 (citation

and quotation marks omitted). "[T]he ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." Purkett v. Elem, 514 U.S. 765, 768 (1995); see generally United States v. Alvarez-Ulloa, 784 F.3d 558, 565-67 (9th Cir. 2015), Gonzalez v. Brown, 585 F.3d 1202, 1206-09 (9th Cir. 2009), and Paulino v. Harrison, 542 F.3d 692, 699-703 (9th Cir. 2008) (discussing Batson analysis).

With this basic framework in mind, this Court turns to each of the Batson steps in light of the record at trial.

b. The State Court Record of Petitioner's Voir Dire Proceedings

Voir dire in petitioner's case took place over two court days and involved two panels of potential jurors from which 65 jurors were questioned. (Lodged Doc. 2A at 11-370).[14] The trial court conducted voir dire by seating 18 prospective jurors from the jury pool at a time and having those jurors answer a questionnaire. The attorneys were then permitted to question the jurors individually before making challenges for cause and then, after ruling on the for-cause challenges, the attorneys could exercise their peremptory challenges. When the parties exhausted their challenges for the 18 seated and questioned jurors, new jurors were called from the jury pool to fill open seats and those jurors were questioned by the court and counsel then subject to challenge. This process continued until the prosecution and defense accepted 12 jurors and three alternate jurors. (Lodged Doc. 2A at 11-370).

[14]There were approximately 75 jurors in each panel. (Lodged Doc. 2A at 11, 174). From the first jury panel, the court excused 40 jurors for language issues, scheduling problems, or for hardship, leaving approximately 35 jurors for questioning. (Lodged Doc. 2A at 11-58). From the second jury panel, the trial court excused 27 jurors for language issues or scheduling problems, leaving approximately 48 jurors for questioning. (Lodged Doc. 2A at 174-201). The record does not contain information about the racial makeup of either the jury pool or the jurors who were questioned.

During voir dire, Juror No. 1 (E.H.)[15] said that her father had been incarcerated from 1996 until he passed away in 2004. (Lodged Doc. 2A at 59). E.H. agreed that her father had been "treated fairly by the system," and had no anger toward the police, court, or lawyers – her father had said it was his choice to commit his crime and the consequences were his. (Lodged Doc. 2A at 59-60). The prosecutor asked E.H. about a tattoo on the back of E.H.'s ear, which E.H. explained was her son's birth sign. (Lodged Doc. 2A at 124). The prosecutor exercised her third peremptory challenge to exclude E.H. (Lodged Doc. 2A at 168).

Later, in questioning a group of jurors prior to exercising challenges, the prosecutor asked the jurors if they had heard of circumstantial evidence and gave a bank robbery example, then asked the jurors if they would be comfortable with convicting on the basis of circumstantial evidence. (Lodged Doc. 2A at 287-88). The prosecutor explained:

> Circumstantial evidence they said this person who the police caught three blocks from the bank was wearing similar clothes. They were just down the street. They were holding a bag of money in their hands that came from that bank, but that witness inside can't positively say that is the person. But those little pieces of evidence build up to say that you guys could come to the decision that person was the one that did it. . . . So even though you don't have somebody specifically saying that person right there is the one, all those little pieces of evidence when they're put together they show beyond a reasonable doubt in your mind that that is the person. That is just as good as if somebody actually saw the person, or could identify the person. That is what the law says. ¶ Is everybody comfortable with that?

[15]The Court herein refers to the jurors by their seat number or initials.

(Lodged Doc. 2A at 288). The prosecutor noted that Juror No. 16 (P.B.) gave a "little bit of a grimace" in reply and asked what that meant, leading to the following exchange:

> [P.B.]: That could be a false witness. I don't think so, simply because the bank robbers were running through [the] neighborhood where lots of people are dressing the same and dropped their money, and a kid happened to pick it up and policeman [sic] drive up on them [sic], we see it happens all the time.
>
> [Prosecutor]: That's fair. That would be your prerogative when you're back there. But could you see evidence like that can be used[?] You don't have to have somebody physically actually see the person do it, because there is [sic] a lot of situations. Say a person's house gets robbed or burglarized. ¶ Very rarely do victims of that crime see the person that actually broke into their house. They come home, their house has been broken into, their items are stolen. So they don't actually see the person who did it. But say that person is caught down the street holding a ring that looks just like the person's in the house. They say, well, I walked by, but it wasn't me. Those little bits and pieces can be used to say he was the one. He had that evidence in his hand. He was walking by the neighborhood. If you feel that is enough, that can be used. ¶ Can you see that situation where you could use other evidence beside [sic] actually direct evidence?
>
> [P.B.]: Yes.
>
> [Prosecutor]: Do you feel comfortable with that?
>
> [P.B.]: No, I disagree with you. No, simply because there should still be some facts, I think to it. I mean after all again if the kid is running through the neighborhood and happened to stumble

upon those things. And if the person in the bank says, well, he was 6-5, and this kid they just happen to pick up is only 5-10. You have to have more facts, I think.

[Prosecutor]: That's a good point.

* * *

[Prosecutor]: A lot of people aren't very good about height; would you agree, [P.B.]?

[P.B.]: I agree.

[Prosecutor]: Because a little discrepancy like that doesn't necessarily mean that the crime didn't happen; right? Would you agree, [P.B.]?

[P.B.]: I agree.

[Prosecutor]: So, [P.B.], I just want to be clear, are you saying unless somebody specifically saw the person do it with their own eyes that that would be the only evidence that you would be able to accept?

[P.B.]: Well, along with the facts. You have fingerprints, and you got to have something in concrete in that area when you are identifying them. I mean you just can't assume anything.

[Prosecutor]: So the circumstantial evidence, that type of evidence you don't think that would be enough even if that is all I have, that is all I got is that circumstantial evidence?

The Court: Well, it depends on what it is counsel. I think he is saying it depends on how much it is, how you weigh it, how credible it is, whatever. And to tell him you got to find him guilty because there is some circumstantial evidence I think is an unfair inference to

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expect him to agree to. I think we have belabored this issue enough.

Let's move on.

(Lodged Doc. 2A at 288-91).

After the prosecution exercised its ninth peremptory challenge to remove Juror P.B. from the jury, defense counsel made a Wheeler/Batson motion arguing that the prosecution struck two jurors on the basis of race – specifically, two African Americans – Jurors E.H. and P.B.. (Lodged Doc. 2A at 294-99). Counsel acknowledged that E.H. had some family issues regarding her father's incarceration, but argued that everyone has some issues and E.H. said she could be fair no matter what. (Lodged Doc. 2A at 294-95). As for P.B., counsel argued that he said he could be fair and the prosecutor's "convoluted" questions to P.B. were not a reason to excuse P.B. (Lodged Doc. 2A at 295). Counsel suggested that the prosecutor focused the majority of her voir dire on P.B. to develop a basis for challenging him. (Lodged Doc. 2A at 295).

The trial court found that counsel had made a prima facie showing for the Batson inquiry and required the prosecution to explain the reasons for striking these jurors. (Lodged Doc. 2A at 295-96). The prosecutor explained that she asked E.H. specifically about the tattoo behind her ear and noted that no matter what the race, if prospective juror has a visible tattoo she will challenge the juror because the tattoo is "something outside of societal norm." (Lodged Doc. 2A at 296).[16] Additionally, the prosecutor struck E.H. because of her father's

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[16]It appears that the prosecutor did not strike one juror who had a tattoo on his neck, Juror No. 8 (TJ8). (RT 808). When defense counsel pointed out for the record that Juror No. 8 had a tattoo on the back of his neck, the prosecutor stated that she did not notice the tattoo prior to it being pointed out after trial was well under way; the juror had been wearing a collared shirt up to that point. (RT 808). Petitioner argues that at that point the prosecutor should have excused this juror and replaced him with an alternate. (Traverse at 19). However, voir dire was over and petitioner cites to no authority which would have permitted the prosecutor unilaterally to excuse the juror at that point. In fact, as discussed in note 18, infra, the prosecutor had earlier requested (continued...)

conviction, explaining that she strikes all potential jurors who have a family member "arrested recently," because of their "close ties to the system." (Lodged Doc. 2A at 296). For example, the prosecutor had struck Juror No. 6 (W.A.), who was a pastor and a white man, in part because he had a brother who was incarcerated on multiple occasions. (Lodged Doc. 2A at 296).[17] The prosecutor indicated that she intended to strike every prospective juror with a family member who has had negative contact with law enforcement, stating that she planned to challenge Juror No. 8 (S.S.) who was arrested, but she planned on keeping Juror No. 7 (TJ7) who was a black female and whose husband had been arrested over 20 years ago because the prosecutor did not believe that the experience would affect Juror No. 7. (Lodged Doc. 2A at 297).[18] The prosecutor also intended to strike another unidentified panelist with visible tattoos all over his body. (Lodged Doc. 2A at 299).

(...continued)
to reopen voir dire on the 12 seated jurors when it was pointed out that she "forgot" to excuse a juror she intended, but the trial court denied such request. (Lodged Doc. 2A at 315-17). There is no basis to conclude that the prosecutor could have removed the juror with the tattoo once trial was underway.

[17]The trial court found this reason for kicking Juror W.A. not credible, noting that the court thought the prosecutor struck Juror W.A. because he is a pastor and "soft hearted." (Lodged Doc. 2A at 296).

[18]After the prosecutor accepted the panel of 12 jurors and prior to choosing the alternates, defense counsel pointed out that the prosecutor had said she wanted to challenge a juror (Juror S.S.) who was not challenged. (Lodged Doc. 2A at 315-17). The prosecutor said she forgot and asked the court to reopen voir dire so she could challenge that juror. (Lodged Doc. 2A at 317). The court declined to reopen voir dire for the 12 seated jurors. (Lodged Doc. 2A at 317). Later in the proceedings, before any alternate jurors were chosen, Juror No. 9 (R.P.) informed the court that she had various issues that might affect her ability to serve and the prosecutor proposed that the court reopen peremptories and begin with jury selection again on the 12 seated jurors. (Lodged Doc. 2A at 333-38). The court excused for cause Juror No. 9 and reopened the parties peremptory challenges as to the first 12 seated jurors. (Lodged Doc. 2A at 340). When given the opportunity, the prosecution used a peremptory challenge to excuse Juror No. 8 (S.S.). (Lodged Doc. 2A at 342).

For Juror P.B., the prosecutor said that she struck him because she felt he would have a hard time with the concept of circumstantial evidence. (Lodged Doc. 2A at 297). P.B.'s answers to the prosecutor's questions suggested that he would not be able to vote guilty unless there was some kind of concrete evidence like the person who actually saw a crime. (Lodged Doc. 2A at 297). As for her attention to P.B., the prosecutor explained that she planned to challenge other jurors who were then available for questioning, *i.e.*, Juror Nos. 17 (E.W.) and 18 (B.S.), so she did not need to question those jurors. (Lodged Doc. 2A at 297-98).

The trial court expressed concern about both of the prosecution's challenges, in that the court would have made a different judgment as to P.B. (who seemed to the court to be a critical thinker) and to E.H. given the widespread occurrence of tattoos in society. (Lodged Doc. 2A at 298-99). Nonetheless, the judge noted that the issue was not whether the trial court would make decisions different than the prosecutor but rather the prosecutor's credibility. (Lodged Doc. 2A at 299). Given the way the prosecutor had managed the case and the decisions she had made, her explanations, tone and demeanor, the trial court denied the Wheeler/Batson motion, finding the prosecutor credible and that she had made her decisions for reasons other than racial bias. (Lodged Doc. 2A at 299).

c. Petitioner's Batson Step One Showing

At step one of the Batson analysis a prima facie case of discrimination can be made out by "offering a wide variety of evidence, so long as the sum of the proffered facts give 'rise to an inference of discriminatory purpose.'" Johnson v. California, 545 U.S. 162, 169 (2005) (quoting Batson, 476 U.S. at 94). A defendant may establish a prima facie case "solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. To establish such a case, the defendant first must show that he is a member of a cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race." Id.

(quoting Batson, 476 U.S. at 96).[19] "Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.' Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race." Id. (quoting Batson, 476 U.S. at 96); see also Crittenden v. Ayers, 624 F.3d 943, 946 (9th Cir. 2010) (prima facie case requires showing that prospective juror is member of cognizable racial group, that prosecutor used peremptory strike to remove juror, and that totality of circumstances raises inference that strike was on account of race); Boyd v. Newland, 467 F.3d 1139, 1143 (9th Cir. 2006) (as amended) (same), cert. denied, 550 U.S. 933 (2007). Once a prosecutor has offered a race-neutral explanation for a peremptory challenge and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant has made a prima facie showing becomes moot. Hernandez v. New York, 500 U.S. 352, 359 (1991).

In this case, the trial court found that petitioner's counsel established an inference of discrimination at step one of the Batson framework sufficient to call for further inquiry. (Lodged Doc. 2A at 295-96). As noted above, counsel argued that the prosecutor had used two peremptory challenges to remove from the venire African American jurors (where petitioner himself was African American), and the given second factor that those who are of a mind to discriminate may discriminate in exercising challenges. (Lodged Doc. 2A at 294-95). The prosecution had

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[19] But see Powers v. Ohio, 499 U.S. 400, 402 (1991) (holding that "a criminal defendant may object to race-based exclusions of jurors effected through peremptory challenges whether or not the defendant and the excluded juror share the same races"); see also Tolbert v. Page, 182 F.3d 677, 680 n.4 (9th Cir. 1999) (en banc) (noting that the Powers court "further liberalized Batson and abolished the requirement that the defendant and the stricken juror share the same race").

exercised nine peremptory challenges when petitioner's counsel proffered that two of those challenges had been used to strike African American jurors. (Lodged Doc. 2A at 137, 167-68, 267, 292-95). It appears that at the time the motion was made at least two African American jurors remained on the panel (*i.e.*, Juror TJ7 seated as Juror No. 7 and one other unspecified juror). (Lodged Doc. 2A at 297; RT 808-09). The jury that ultimately served included three African American jurors (*i.e.*, two regular jurors and one alternate juror). (RT 808-09).

d. The Prosecution's Batson Step Two Showing

At step two of the Batson analysis, the prosecutor must give a clear and reasonably specific explanation of his or her legitimate reasons for exercising a challenge – reasons that must be related to the particular case being tried. Purkett v. Elem, 514 U.S. at 768-69 (citations and internal quotation marks omitted). A "legitimate reason" need not be a reason that makes sense, is persuasive, or is even plausible. Id. It must, however, be a reason that does not deny equal protection. Id. at 769. The issue is the facial validity of the explanation. Id. at 768 (citation omitted). At this second step, the reason offered will be deemed race neutral "[u]nless a discriminatory intent is inherent in the prosecutor's explanation." Id. (citation omitted); see also Rice v. Collins, 546 U.S. 333, 338 (2006) (so long as reason offered is not inherently discriminatory, it suffices at step two of the analysis). Any determination about the credibility of the explanation is reserved for the third step of the analysis. Purkett v. Elem, 514 U.S. at 768. Steps two and three are independent inquiries that may not be collapsed into one. Id.

Here, the prosecutor told the trial court that she had excused Juror E.H. for having a tattoo and a father who had been in prison, and she excused Juror P.B. for his apparent difficulty with the concept of circumstantial evidence. The trial court and the Court of Appeal accepted the prosecutor's explanation for striking these jurors as legitimate, race-neutral reasons to satisfy Batson's step two showing. See Lodged Doc. 2A at 298-99; Lodged Doc. 5 at 20-24. This was not

unreasonable. See generally Rice v. Collins, 546 U.S. at 339; Purkett v. Elem, 514 U.S. at 769; see also United States v. Rutledge, 648 F.3d 555, 560 (7th Cir. 2011) (such "trivial race-neutral criteria as hair length, facial hair, tattoos, or piercings" pass the Batson step two filter; citing Purkett v. Elem, 514 U.S. at 768-69 (prosecution's reason for striking juror based on juror's appearance (*i.e.*, long, unkempt hair, mustache and beard) was race neutral; such characteristics are not peculiar to any race)); Cook v. LaMarque, 593 F.3d 810, 820-21 (9th Cir. 2010) (previous negative experience with law enforcement is an acceptable race-neutral reason for striking a potential juror); cf. United States v. Karl, 264 Fed. Appx. 550, 552 (9th Cir. 2008) (juror's lack of "capacity to understand the complicated tax prosecution" was legitimate race-neutral reason for striking juror). The prosecution's reasons for striking the jurors at issue as articulated carry no apparent inherent discriminatory intent and have support in the record.

e. Batson Step Three Analysis

Step three of the Batson analysis, involves an evaluation of the prosecutor's credibility. Snyder v. Louisiana, 552 U.S. at 477 (citation omitted). The decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed. Hernandez v. New York, 500 U.S. at 365. "The trial court must not simply accept the proffered reasons at face value; it has a duty to evaluate meaningfully the persuasiveness of the prosecutor's race-neutral explanation to discern whether it is a mere pretext for discrimination."[20] Williams v. Rhoades, 354 F.3d 1101, 1108 (9th Cir.) (citations, internal quotation marks,

[20]A criminal defendant bears the burden of proving pretext once a race-neutral explanation has been offered. United States v. Feemster, 98 F.3d 1089, 1091-92 (8th Cir. 1996). However, "[a] court need not find all nonracial reasons pretextual in order to find racial discrimination." Kesser v. Cambra, 465 F.3d 351, 360 (9th Cir. 2006) (en banc). "If review of the record undermines the prosecutor's stated reasons, or many of the proffered reasons, the reasons may be deemed a pretext for racial discrimination." Id. (citations and internal brackets omitted).

and internal brackets omitted), cert. denied, 543 U.S. 926 (2004). The trial court must evaluate the record and consider each explanation within the context of the trial as a whole. Kesser v. Cambra, 465 F.3d at 359. The court may consider factors such as the prosecutor's demeanor, the reasonableness of the explanation, and the nexus between the explanation and accepted trial strategies. Miller-El v. Cockrell, 537 U.S. 322, 339-40 (2003); see also Snyder v. Louisiana, 552 U.S. at 477 (demeanor of attorney who exercises challenge often will be best evidence of discriminatory intent); Mitleider v. Hall, 391 F.3d 1039, 1047 (9th Cir. 2004) (trial court must evaluate prosecutor's proffered reasons and credibility under totality of relevant facts "using all available tools including its own observations and the assistance of counsel"), cert. denied, 545 U.S. 1143 (2005).[21]

The court may also be required to conduct a comparative juror analysis to determine whether the basis upon which a prosecutor challenged a disputed juror is a pretext. Kesser v. Cambra, 465 F.3d at 360-61; see also Murray v. Schriro, 745 F.3d 984, 1005 (9th Cir. 2014) ("a comparative juror analysis is an important means for federal courts to review a trial court's ruling in a Batson challenge"; comparative juror analysis is used to review the reasonableness of the factual determinations underlying the state court's decision). The fact that a prosecutor accepts other jurors of the same race as the challenged juror on the jury is indicative, albeit not dispositive, of a nondiscriminatory motive. Turner v. Marshall, 121 F.3d 1248, 1254 (9th Cir. 1997), cert. denied, 522 U.S. 1153 (1998).

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[21] In a situation in which the prosecutor's race-neutral reason for a peremptory challenge is a juror's demeanor, the trial court must evaluate whether the prosecutor's demeanor belies a discriminatory intent, and "whether the juror's demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror by the prosecutor." Snyder v. Louisiana, 552 U.S. at 477; see also Thaler v. Haynes, 559 U.S. 43, 48 (2010) (noting that in reviewing explanation for peremptory challenge based on a juror's demeanor, the trial court should "take into account, among other things, any observations of the juror that the judge was able to make during voir dire").

The court need not make specific findings on all the evidence, beyond ruling on the objection to the challenge. United States v. Gillam, 167 F.3d 1273, 1278 (9th Cir.), cert. denied, 528 U.S. 900 (1999).

Here, the trial court accepted the prosecutor's facially-neutral reasons as permissible and credible. (Lodged Doc. 2A at 299). Petitioner argues here as he did on appeal that the prosecutor did not strike other jurors similarly situated to E.H. Specifically, petitioner argues that the prosecutor kept Juror No. 1 (TJ1) even though that juror's son had been arrested. (Traverse at 17 (citing Lodged Doc. 2A at 148-49)). It also appears from the record that the prosecutor kept Juror Nos. 6 (TJ6) and 12 (TJ12), whose family members had been arrested for driving under the influence. See Lodged Doc. 2A at 271-72 (Juror No. 6 reporting her father-in-law's arrest); Lodged Doc. 2A at 325-26 (Juror No. 12 reporting her brother's arrest). Petitioner argues that he need not show a pattern in that all of the African American jurors were stricken; the Constitution forbids striking even one juror for discriminatory purposes. (Traverse at 20 (citing, *inter alia*, United States v. Omoruyi, 7 F.3d 880, 882 (9th Cir. 1993)).

The Court of Appeal rejected petitioner's argument, concluding that petitioner had not shown that the prosecution's reasons for rejecting the jurors at issue were pretextual. (Lodged Doc. 5 at 21-24). The Court of Appeal explained:

> [T]he prosecutor explained that it was not solely the incarceration of E.H.'s father, but also the presence of E.H.'s tattoo, that convinced her to challenge E.H. The other jurors who had family members with an arrest history did not possess that additional factor [*i.e.*, the presence of a tattoo]. It is also significant that a fourth juror – juror no. 7, who was Black – had a family member with an arrest history. Specifically, her husband had been arrested over 20 years earlier. The prosecutor did not challenge juror no. 7, despite her race and her husband's arrest history. That fact undermines any inference that the

> prosecutor was using the arrest history of Black prospective jurors' family members as a pretext for challenging them based on racial animus.

(Lodged Doc. 5 at 22 (citation omitted)). For P.B., the Court of Appeal found that P.B. invited the prosecutor's dialogue by grimacing, gave the prosecutor a reason to continue her dialogue with P.B. after the first questions by his answers, and P.B.'s apparent skepticism toward circumstantial evidence and his insistence on corroborating facts could reasonably have led the prosecutor to believe that he would be more likely to favor a defense verdict than other jurors. (Lodged Doc. 5 at 23-24). This was not unreasonable.

The credibility of a prosecutor's race-neutral explanations for striking a potential juror "can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." Miller-El v. Cockrell, 537 U.S. at 339; see also Cook v. LaMarque, 593 F.3d at 831-32 (discussing same). There is no indication in the record that the trial court did not properly evaluate credibility of the prosecution's reasons for striking the jurors at issue considering these factors, and the Court of Appeal's deference to the trial court's credibility finding was appropriate. Miller-El v. Cockrell, 537 U.S. at 339 ("Deference [to the trial court] is necessary because a reviewing court, which analyzes only the transcripts from voir dire, is not as well positioned as the trial court to make credibility determinations."); see also Felkner v. Jackson, 562 U.S. 594, 131 S. Ct. 1305, 1307 (2011) (per curiam) (where trial court credited prosecution's race-neutral explanations and the California Court of Appeal reviewed the record at length in upholding trial court's findings, state appellate court's decision "was plainly not unreasonable" under AEDPA; AEDPA's "highly deferential standard for evaluating state-court rulings" "demands that state-court decisions be given the benefit of the doubt") (citations omitted).

This conclusion is bolstered by the Court of Appeal's comparative juror analysis of the two stricken jurors to those jurors who were questioned, which accurately reflects the voir dire proceedings. The Court of Appeal reviewed the record at length in upholding the trial court's findings. (Lodged Doc. 5 at 12-24). As the Court of Appeal found, it appears that none of the jurors who were questioned and allowed to remain on the jury panel and ultimately served as petitioner's jurors had been arrested or reported negative encounters by family members with law enforcement and had visible tattoos during voir dire (as Juror E.H. had). See Lodged Doc. 5 at 22; see also Lodged Doc. 2A at 148-49, 153, 158, 168 (Juror No. 1 (TJ1) reporting that her son had been arrested two years before, but no indication of the juror having any tattoos); Lodged Doc. 2A at 60-61, 109 (Juror No. 2 (TJ2) reporting no self or family arrests and no indication of the juror having any tattoos); Lodged Doc. 2A at 144-45, 154-55, 168, 292 (same for Juror No. 3 (TJ3)); Lodged Doc. 2A at 63-64, 123 (same for Juror No. 4 (TJ4)); Lodged Doc. 2A at 268 (same for Juror No. 5 (TJ5)); Lodged Doc. 2A at 271-72, 293 (Juror No. 6 (TJ6) reporting that her father-in-law had been arrested for driving under the influence, but no indication of the juror having any tattoos); Lodged Doc. 2A at 81-82, 111, 120-21, 123, 135-36 (Juror No. 7 (TJ7), who notedly was African American, reporting that her husband had been arrested over 20 years earlier but having no issues with it, and no indication in the record that the juror had any tattoos); Lodged Doc. 2A at 318, 329, 342, 356 (Juror No. 8 (TJ8) reporting no self or family arrests and no indication of the juror having any tattoos);[22] Lodged Doc. 2A at 308, 317, 341-42 (same for Juror No. 9 (TJ9)); Lodged Doc. 2A at 85-87, 100, 135 (same for Juror No. 10 (TJ10)); Lodged Doc. 2A at 218-21, 267 (same for Juror No. 11 (TJ11)); Lodged Doc. 2A at 325-26, 343

[22]But see RT 808 (defense counsel noting for the record during trial that Juror No. 8 had a tattoo on the back of his neck which the prosecutor claims was not visible during voir dire because Juror No. 8 had been wearing a collared shirt).

(Juror No. 12 (TJ12) reporting that her brother had been arrested a few times for driving under the influence, but no indication of the juror having any tattoos); Lodged Doc. 2A at 350, 357-60, 369 (Alternate Juror No. 1 (TA1) reporting no self or family arrests and no indication of the juror having any tattoos); Lodged Doc. 2A at 348-49, 362, 365-66, 369 (same for Alternate Juror No. 2 (TA2)); Lodged Doc. 2A at 349-50, 362, 369 (same for Alternate Juror No. 3 (TA3)).

While the Court might not lump the two reasons given for striking Juror E.H. together in evaluating the prosecutor's credibility as the Court of Appeal did, especially given the prosecutor's statement at the time of the Batson motion that she intended to strike all jurors whose family members had been arrested recently or had negative encounters with law enforcement (Lodged Doc. 2A at 296-97), under the Court's highly deferential standard of review the Court cannot say that the Court of Appeal's decision, which "carefully reviewed the record at some length" in light of the prosecutor's reasons as a whole, was unreasonable so as to merit federal habeas relief. Felkner v. Jackson, 131 S. Ct. at 1307; Briggs v. Grounds, 682 F.3d 1165, 1170 (9th Cir. 2012) (federal habeas review is "doubly deferential," *i.e.*, "unless the state appellate court was objectively unreasonable in concluding that a trial court's credibility determination was supported by substantial evidence, we must uphold it"), cert. denied, 133 S. Ct. 894 (2013). There is no clearly established federal law specifying the form of the comparative juror analysis the Court must undertake in determining whether a prosecutor's proffered reasons for striking a potential juror are pretext for purposeful discrimination. See Miller-El v. Dretke, 545 U.S. at 241-47 (generally discussing comparative juror analysis).

It also appears that none of the jurors permitted to serve expressed difficulty with the concept of circumstantial evidence (as Juror P.B. had). See Lodged Doc. 2A at 60-61, 63-64, 81-82, 85-87, 100, 109, 111, 120-21, 123, 135-36, 144-45,

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148-49, 153-55, 158, 168, 218-21, 267-68, 271-72, 292-93, 308, 317-18, 325-26, 329, 341-43, 348-50, 356-60, 362, 365-66, 369 (voir dire of the seated jurors).

Second, consistent with the prosecution's reasons for striking the jurors at issue, the prosecution exercised its peremptory challenges to excuse other unchallenged jurors for similar reasons. For example, the prosecution struck Juror No. 6 (A.G.) because she said she could not be fair and thought her father was treated unfairly when he was sent to prison in 2005. (Lodged Doc. 2A at 68-70, 134-35, 137).[23] The prosecutor struck Juror No. 6 (B.K.) whose husband had been arrested and convicted of driving under the influence and said she may have an issue if police witnesses "come off with an attitude." (Lodged Doc. 2A at 225-28, 266-67). The prosecutor struck Juror No. 6 (W.A.) whose brother was in prison 40 years ago. (Lodged Doc. 2A at 216-18, 266-67). The prosecutor struck Juror No. 8 (S.S.) who had prior arrests. (Lodged Doc. 2A at 268-69, 293, 342). The prosecutor struck Juror No. 9 (M.M.) who had been arrested for assault. (Lodged Doc. 2A at 82-84, 135, 293). The prosecutor struck Juror No. 9 (B.S.) who had been arrested for reckless driving and assault with a deadly weapon. (Lodged Doc. 2A at 274-75, 300). The prosecutor struck Juror No. 11 (D.R.) who reported that several family members had been convicted of crimes. (Lodged Doc. 2A at 77-80, 167). The prosecutor struck Juror No. 13 (G.H.) whose daughter had two arrests or convictions for driving under the influence for which she did jail time. (Lodged Doc. 2A at 348, 369). For these jurors, either there was a direct negative encounter that the juror had with law enforcement because the juror was arrested, or the family member's encounter with law enforcement led to a conviction.[24] The

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[23]The trial court had denied the prosecution's challenge for cause indicating that on further questioning Juror No. 6 said she could be fair and follow the court's instructions. (Lodged Doc. 2A at 135).

[24]The prosecutor also struck Juror No. 6 (S.V.) whose uncle had been arrested the year before but reportedly was treated fairly. (Lodged Doc. 2A at 224, 267, 293). There is no (continued...)

Court "need not strain to see the potential bias inhering in such a situation." Murray v. Schriro, 745 F.3d at 1008. In contrast, the prosecutor did not strike Juror No. 1 (TJ1) whose son had been arrested, where Juror No. 1 said that she was angry with her son for being arrested, but not law enforcement. (Lodged Doc. 2A at 149). Nor did the prosecutor strike Juror Nos. 6 and 12 whose family members had been arrested for driving under the influence but reported that the family members were treated fairly. (Lodged Doc. 2A at 272, 326). The Court cannot conclude from the prosecutor's decision to keep these jurors vis-a-vis Juror E.H. (whose father was not just arrested but convicted) proves a racial motivation for the prosecution's exercise of her peremptory challenges. Murray v. Schriro, 745 F.3d at 1010. Finally, similar to the reason the prosecutor struck Juror. P.B., the prosecutor also struck Juror No. 10 (D.M.), because Juror No. 10 said he could not pass judgment – *i.e.*, if he was not personally a witness to a crime, he would not be able to say if the person being tried was guilty or not guilty. (Lodged Doc. 2A at 76).

Third, as the trial court noted, the empaneled jury included two African American jurors and one of the alternate jurors was African American. (RT 808-09). This is indicative of a nondiscriminatory motive. Turner v. Marshall, 121 F.3d at 1254.

Because the prosecution's reasons for striking the jurors at issue shared a logical nexus to the prosecution's concerns in getting the most favorable jury for the prosecution, and because petitioner has not shown that the prosecution's reasons were pretextual and nothing in the record otherwise suggests that the prosecutor accepted other jurors with the same traits as the excused jurors, the state court finding that petitioner did not shown purposeful discrimination at step

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[24](...continued)
indication in the record whether Juror No. 6 had any tattoos or other race-neutral traits that may have influenced the prosecutor's decision to strike this juror.

three was not unreasonable. Compare United State v. Alvarez-Ulloa, 784 F.3d at 567 ("where the statistical evidence is not overwhelming and a comparative analysis is unhelpful," defendant did not meet burden in showing purposeful discrimination).

f. Conclusion

For the foregoing reasons, petitioner is not entitled to habeas relief on his Batson claim. Petitioner has failed to demonstrate that the prosecutor's challenges were racially motivated. Purkett v. Elem, 514 U.S. 768. The Court of Appeal's rejection of petitioner's Batson claim was not contrary to, or an unreasonable application of, clearly established federal law. Nor was it based on an unreasonable determination of the facts in light of the evidence presented.

3. The Trial Court's Denial of Petitioner's New Trial Motion Does Not Merit Habeas Relief (Ground Four)

In Ground Four, petitioner asserts that the trial court violated his right to a fair trial by denying petitioner's motion for a mistrial based on assertedly improper gang expert testimony. (Petition, Ground Four; Traverse at 9-10). Outside the presence of the jury, the parties examined the expert about the foundation for his opinions that the defendants were members of the Sex Cash gang and committed the crimes for the gang's benefit. (RT 656-86). The expert described incidents showing petitioner's alleged association with or participation in activities with known members of the Sex Cash gang from 2001 to 2004. (RT 659-66).[25] The

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[25]The expert opined that Sex Cash was a criminal street gang as of 2001 from his experience in responding reports of fights at the Moreno Valley High School between Sex Cash members and Dorner Blocc or Edgement Criminal gang members. (RT 659-60). In 2001, when petitioner was 13 or 14 years old, he fought another middle school student with the assistance of Quincy Booker known as "Big Dub" from the Sex Cash gang. (RT 659, 662). In November of 2002, petitioner was arrested with Jamail Hughes from the Sex Cash gang for stealing a car. (RT 662). In October of 2002, petitioner was arrested with Quincy Booker, Jamail Hughes, and Jecorey Jones from the Sex Cash gang for fighting with rival gang members from Edgemont (continued...)

expert assertedly knew that petitioner was a member of the Sex Cash gang, but did not know precisely when petitioner became a member of the Sex Cash gang. (RT 661, 674-75, 680). He did say that based on petitioner's contacts with other gang members, petitioner was at least an associate of the Sex Cash gang at the time of the shootings. (RT 674-75). The trial court ruled that the expert would not be allowed to testify about any of the defendants' conduct subsequent to the shootings. (RT 683-86).

When the expert testified, he was asked whether as of 2004 he knew of any Sex Cash gang members who lived in a specific apartment building. (RT 1272). The expert answered naming several individuals, including petitioner. (RT 1272). Petitioner's counsel objected and outside the presence of the jury moved to have the expert excluded, or alternatively for a mistrial since the gang expert did not have documentation showing that petitioner was a Sex Cash member as of 2004. (RT 1273-79). The trial court denied the motion but instructed the jury as follows: "You heard the witness testify that [petitioner] was an active member of the Sex Cash gang residing in the Webster Apartments. I'm going to instruct you to disregard that testimony and not consider that piece of testimony for any purpose." (RT 1280). Petitioner asserts that this instruction was inadequate since the jury found the gang allegations true and there allegedly was no evidence to support an inference that petitioner was a gang member. (Traverse at 10).

The Court of Appeal issued the last reasoned decision denying this claim on the merits, finding that the testimony was not incurably prejudicial in light of the remainder of the expert's testimony explaining that he did not have sufficient

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(...continued)
Criminals. (RT 664-65). In March of 2004, petitioner was at a gang party with members of the Sex Cash gang and the 1200 Blocc Crips, where a person was killed and petitioner was assaulted. (RT 665-66).

evidence to validate petitioner as a member of the Sex Cash gang in 2004.[26] Additionally, even if the jury focused on the assertedly improper testimony, that petitioner was a "member" versus an "associate" of the Sex Cash gang in 2004, the testimony was not "essential" to a finding that the petitioner committed the Sweeney Drive shooting for the benefit of the Sex Cash gang, since a person need not be a member to commit crimes for the benefit of a gang. (Lodged Doc. 5 at 33-36).

To the extent petitioner challenges the trial court's denial of his new trial motion under California law, this Court is bound by the Court of Appeal's

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[26]The expert explained: An active gang member is somebody for whom membership is validated by such things as self-admission, tattoos, commission of crimes with other members and/or against rivals, being in gang territory, having a nickname or moniker, and being identified by other active members. (RT 1281-83). Whereas, an associate of a gang is like a family member or prospect of the gang who will do work for the gang like hiding evidence or providing a safe house. (RT 1282). Associates are not actual members and have not been jumped into the gang, but they can commit crimes that benefit the gang. (RT 1282). One way for an associate to show allegiance to a gang is by committing crimes for the benefit of the gang. (RT 1282-83, 1300-01). Committing a crime against a rival or perceived rival benefits the gang by earning respect through intimidation and enhancing the gang's ability to control its turf. (RT 1289, 1301, 1309-13).

On cross-examination, the expert said it was possible for a gang member to have friends who are not associates. (RT 1324). A person is considered an associate only if there are "observable facts which would indicate that person was actively assisting the gang in some way." (RT 1330). The expert testified that he believed that Gholston, Jefferson, and petitioner were all associates of the Sex Cash gang as of October 2004 based on their participation in the shootings and the nature of the shootings. (RT 1298-1302). The expert admitted that for petitioner he did not have any self-admissions or field interview cards, or any reports of other officers where petitioner admitted any membership. (RT 1302, 1347). Nor did he know whether petitioner had a moniker or any tattoos. (RT 1347). When the expert searched petitioner's bedroom, he found no gang paraphernalia. (RT 1349-53). Nonetheless, the expert opined that petitioner was a gang associate based in part on petitioner's "series of crimes" beginning in 2001 when petitioner was in middle school involving a battery with a Sex Cash member, taking a vehicle without the owner's permission and assault, participating in a large gang fight in October of 2002, and attending a gang party in March of 2004. (RT 1353-57). The expert explained that these incidents showed repeated contact with others known to be Sex Cash members. (RT 1358, 1369-72).

reasonable determination under state law that the trial court did not abuse its discretion in denying the motion. See Lodged Doc. 5 at 36; Waddington v. Sarausad, 555 U.S. 179, 192 n.5 (2009) ("we have repeatedly held that it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions") (citation and internal quotation marks omitted); Bradshaw v. Richey, 546 U.S. 74, 76 (2005) ("a state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus").

To the extent petitioner claims that the trial court's ruling deprived him of a fair trial, petitioner has shown no constitutional violation. The Supreme Court has not clearly established that the admission of irrelevant or prejudicial evidence constitutes a due process violation sufficient to warrant habeas relief. Holley v. Yarborough, 568 F.3d 1091, 1101 (9th Cir. 2009); see also Pena v. Tilton, 578 Fed. Appx. 695 (9th Cir. 2014); Garza v. Yates, 472 Fed. Appx. 690, 691 (9th Cir. 2012).

Even assuming the trial court constitutionally erred in denying petitioner's new trial motion, any such error did not have a substantial and injurious effect or influence in determining the jury's verdict given the strength of the evidence against petitioner and other evidence suggesting petitioner was associated with the Sex Cash gang. See Merolillo v. Yates, 663 F.3d 444, 455 (9th Cir. 2011) (factors in determining under Brecht whether error was harmless include whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, and the overall strength of the prosecution's case) (citation omitted), cert. denied, 133 S.Ct. 102 (2012). As discussed above, both eyewitnesses to the Sweeney Drive shooting (Anthony and Lee) knew petitioner and on multiple occasions identified petitioner as one of the shooters. Additionally, beyond the expert's testimony about petitioner's involvement with the Sex Cash gang, Lee testified that he had seen

petitioner hanging out with Sex Cash members at school prior to the shooting. (RT 215, 252, 287, 292). Lee said that petitioner and Gholston had told Lee about the Sex Cash gang and had asked him to join. (RT 216; but see RT 252-53 (Lee saying that Gholston had never asked him to join)). One of the police investigators also testified that Young told him that Gholston and petitioner hung out with the Sex Cash gang. (RT 913-14).[27]

Petitioner has not shown that the trial court's denial of his new trial motion had a substantial and injurious effect or influence in determining the jury's verdict. The California courts' rejection of this claim was not contrary to, or an objectively unreasonable application of, any clearly established federal law and was not based on an unreasonable determination of the facts in light of the evidence presented. Accordingly, petitioner is not entitled to habeas relief on Ground Four.

C. Petitioner's Sufficiency of the Evidence Claim Does Not Merit Habeas Relief

In Ground Three, petitioner contends that there was insufficient evidence to support the jury's true finding on the gang enhancement allegations. (Petition, Ground Three; Traverse at 6-8). Specifically, petitioner argues that there was no evidence beyond the gang expert's testimony to support a true finding on the gang enhancement allegations, and that the expert's opinion – which was nothing more than speculation – was insufficient by itself to support such a finding. (Traverse at 6-8). The California Court of Appeal denied this claim, finding sufficient evidence to support the gang enhancements. (Lodged Doc. 5 at 28-32). Petitioner is not entitled to federal habeas relief on this claim.

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[27] Anthony did not recall whether he had testified at the preliminary hearing that he had been pressured to join Sex Cash, or that petitioner was a member of the Sex Cash gang. (RT 346; see also CT 1196-97 (excerpts from the transcript of Anthony's testimony at the preliminary hearing re same).

1. Applicable Law

On habeas corpus, the court's inquiry into the sufficiency of evidence is limited in that it is subject to two layers of judicial deference. Coleman v. Johnson, 132 S.Ct. 2060, 2062 (2012) (per curiam). First, on direct appeal, "it is the responsibility of the jury – not the court – to decide what conclusions should be drawn from evidence admitted at trial. A reviewing court may set aside the jury's verdict on the ground of insufficient evidence only if no rational trier of fact could have agreed with the jury." Id. (quoting Cavazos v. Smith, 132 S.Ct. 2, 4 (2011) (per curiam)); see Jackson v. Virginia, 443 U.S. 307, 319 (1979) (standard of review on sufficiency of the evidence claim is whether, "after viewing 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") (emphasis in original). "[T]he only question under Jackson is whether [the jury's] finding was so insupportable as to fall below the threshold of bare rationality." Coleman, 132 S.Ct. at 2065.

Second, on habeas review, "a federal court may not overturn a state court decision rejecting a sufficiency of the evidence challenge simply because the federal court disagrees with the state court. The federal court instead may do so only if the state court decision was 'objectively unreasonable.'" Coleman, 132 S.Ct. at 2062, 2065 (citations omitted); see Juan H. v. Allen, 408 F.3d 1262, 1274-75 (9th Cir. 2005) (as amended) (on federal habeas review, relief may be afforded on sufficiency of the evidence claim only if the state court unreasonably applied Jackson to the facts of the case), cert. denied, 546 U.S. 1137 (2006).[28]

Sufficiency of the evidence claims are judged by the elements defined by state law. Jackson, 443 U.S. at 324 n.16. Imposition of a gang enhancement

[28]The California standard for determining the sufficiency of evidence to support a conviction is identical to the federal standard enunciated by the United States Supreme Court in Jackson. People v. Johnson, 26 Cal.3d 557, 576 (1980).

under California Penal code section 186.22(b)(1) – which is in issue here – requires proof that the defendant (1) committed a felony for the benefit of, at the direction of, or in association with a criminal street gang; and (2) committed the crime with the specific intent to promote, further, or assist in any criminal conduct by gang members. Emery v. Clark, 643 F.3d 1210, 1214 (9th Cir. 2011) (per curiam); Cal. Penal Code § 186.22(b)(1).

California courts routinely have held that the prosecution may rely solely on expert testimony to prove the elements of the state's criminal street gang sentencing enhancement. See People v. Hernandez, 33 Cal. 4th 1040, 1047-48 (2004) (citing People v. Gardeley, 14 Cal. 4th 605, 617-20 (1997), cert. denied, 522 U.S. 854 (1997)); see also People v. Albillar, 51 Cal. 4th 47, 63 (2010) (expert opinion that criminal conduct benefitted gang by enhancing the gang's reputation for viciousness sufficient to show conduct committed for the benefit of a criminal street gang); People v. Ortega, 145 Cal. App. 4th 1344, 1356 (2006) (finding gang expert's testimony sufficient to establish that gang was criminal street gang). Additionally, on reviewing the sufficiency of the evidence, the testimony of a single witness is sufficient to uphold a conviction. Bruce v. Terhune, 376 F.3d 950, 957-58 (9th Cir. 2004) (per curiam). With these principles in mind, the Court turns to each element of the gang enhancement as applied in petitioner's case.

2. Sufficient Evidence Supports the Finding That the Sex Cash Gang Is a Criminal Street Gang Element

Petitioner does not challenge the sufficiency of the evidence to establish that the Sex Cash gang is a criminal street gang. To establish that Sex Cash is a criminal street gang, the prosecution had to prove (1) the group is an ongoing association of three or more persons sharing a common name, identifying sign, or symbol; (2) one of the group's primary activities is the commission of one or more statutorily enumerated criminal offenses (including burglary); and (3) the group's members must engage in, or have engaged in, a pattern of criminal gang activity.

See People v. Duran, 97 Cal. App. 4th 1448, 1457 (2002); Cal. Penal Code § 186.22(e)(11), (f). A "pattern of criminal gang activity" is "the commission of, attempted commission of, . . . or solicitation of, . . . two or more" enumerated predicate offenses "committed on separate occasions, or by two or more persons on the same occasion." Cal. Penal Code § 186.22(e); People v. Loeun, 17 Cal. 4th 1, 9 (1997), cert. denied, 523 U.S. 1129 (1998).

Here, the gang expert testified that he first began hearing about the Sex Cash gang in 2001 when he was assigned to the Moreno Valley High School as a resource officer. (RT 1263). Sex Cash was vying for turf and recruiting at the high school, sometimes by use of force, along with the Edgemont Criminal gang, Dorner Blocc, Cali Clowns, and Cali Franchise. (RT 1264-67; but see RT 1285 (expert testifying that Cali Clowns was a dance group and not a criminal street gang)). As of October 2004, there were 30 to 40 Sex Cash members, who identified by wearing large baggy t-shirts, clothing with dollar signs, and the color green for money. (RT 1266, 1269-70, 1286-87). Their primary activity was committing burglaries, but they also committed robberies, assaults with a deadly weapon, and sold drugs. (RT 1287). As examples, the expert testified about two active Sex Cash gang members in 2004 who committed specific burglaries. (RT 1283-84, 1293-96). The expert's testimony was sufficient to establish that Sex Cash was a criminal street gang. See People v. Hernandez, 33 Cal.4th at 1047-48; People v. Gardeley, 14 Cal.4th at 619-20; People v. Ortega, 145 Cal. App. 4th at 1356; see also People v. Sengpadychith, 26 Cal. 4th 316, 324 (2001) (sufficient proof of gang's primary activities may consist of expert testimony).

3. Sufficient Evidence Supports the Finding That the Crimes Were Committed for the Benefit of, at the Direction of, or in Association with the Sex Cash Gang

Petitioner argues that he was not a member of the Sex Cash gang and was not affiliated in any way with the gang. (Traverse at 6). Petitioner explains that

he grew up with (and was friends with) Sex Cash gang members but never joined or participated in any gang activities. (Traverse at 6). Petitioner assertedly never claimed to be a member or admitted to anyone that he was a member of the Sex Cash Gang, has no tattoos or gang moniker, wore no gang paraphernalia, and there was no field identification card for petitioner. (Petition, Ground Three; Traverse at 6-7). Petitioner argues that even if he conceded he associated with gang members, association alone would not support the gang enhancement. (Traverse at 7) (citing People v. Ramon, 175 Cal. App. 4th 843, 853 (2009) (holding that mere possibility that a crime was committed for the benefit of a gang is not sufficient to support a verdict)).

Petitioner is mistaken. The prosecution was not required to show anything more than petitioner's association with the gang – something the evidence amply established. When a defendant is charged with a gang enhancement under section 186.22(b)(1), as here, the prosecution is not required to show that the defendant is an active or current gang member of the criminal street gang that allegedly benefits from his crime. People v. Bragg, 161 Cal. App. 4th 1385, 1402 (2008). Section 186.22(b)(1) only mandates that the crime charged be "gang-related." See People v. Rodriguez, 55 Cal. 4th 1125, 1138 (2012); People v. Livingston, 53 Cal. 4th 1145, 1170 (2012) (quoting People v. Gardeley, 14 Cal. 4th at 622).[29]

To establish that a crime was gang-related, the prosecution had to show that the crime occurred under one of three possible circumstances: (1) "in association with" a criminal street gang; (2) "at the direction of" a criminal street gang; or

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[29]In contrast, to impose a gang enhancement under section 186.22(a), the prosecution must that the defendant "actively participates in a criminal street gang." Cal. Penal Code § 186.22(a); see also People v. Rodriguez, 55 Cal.4th at 1138 ("Section 186.22(a) and section 186.22(b) strike at different things. The enhancement under section 186.22(b)(1) punishes gang-related conduct. . . with section 186.22(a), the Legislature sought to punish gang members who acted *in concert* with other gang members in committing a felony regardless of whether such felony was gang-related.") (emphasis original; citations omitted).

(3) "for the benefit of" a criminal street gang. See Cal. Penal Code § 186.22(b)(1); see also People v. Albillar, 51 Cal.4th at 60 (describing the crimes as "gang related in two ways: they were committed in association with the gang, and they were committed for the benefit of the gang").

Here, as the Court of Appeal found, the non-expert evidence coupled with the gang expert's testimony was sufficient to prove that the shootings were committed for the benefit of the Sex Cash gang:

> The jury heard evidence that the Sex Cash gang was active in Moreno Valley High School and in the surrounding area, including Sweeney Drive, which it claimed as part of its turf. Gholston and [petitioner] were associates of Sex Cash. At the time, Sex Cash was competing for dominance with the Edgemont Criminal Gang and Dorner Blocc, which were allied together against Sex Cash.
>
> Colmer explained that one way gangs increase their membership is for someone to be "jumped in," which is a process in which the prospective member is beaten up and intimidated every day until he agrees to join the gang. The evidence at trial was that the Sex Cash gang was attempting to intimidate the victims of the Sweeney Drive shooting, namely Anthony M. and Lee, to join the Sex Cash gang, and that Sex Cash was also intimidating their friend, Eric Young, who lived at the Sweeney Drive house. All three boys were being harassed by Sex Cash at school and chased home. Lee told police that [petitioner] and Gholston were trying to get him to join the Sex Cash gang, and Anthony M. similarly reported being harassed to join the gang. Further, Colmer testified that Young was associated with the Edgemont Criminal Gang and Dorner Blocc, and that Anthony M. was associated with Dorner Blocc. Pops reported that members of Sex Cash often congregated at a house across the street,

> and on the morning of the shooting, he heard a member of Sex Cash outside yelling, "Sex Cash click, bring it on out," which he thought was directed at his children. Colmer explained that (1) associates of the gang – such as Gholston and [petitioner] – can commit crimes on behalf of a gang, (2) those crimes could be committed for the benefit of the gang without a gang member present, and (3) one way an associate can show allegiance to the gang or willingness to be a member is to commit crimes for the benefit of the gang.
>
> Based on this evidence, a reasonable jury could have concluded that Gholston and [petitioner], as associates of the Sex Cash gang, committed the Sweeney Drive shooting as part of the gang's intimidation campaign against Anthony M., Lee and Eric Young, and also generally show Sex Cash's dominance in the neighborhood at the time of a turf war between it and its two rival gangs, with whom two of the victims were associated.

(Lodged Doc. 5 at 31-32). This was not unreasonable.

The evidence included testimony from Anthony M., Lee, and Pops that: (1) the Sex Cash gang was harassing Anthony M., Lee, and Young to get them to join the gang (RT 216, 343, 346, 525, 573, 642, 712-15, 903-09, 913-14, 924, 1168; CT 1196-97); (2) members or associates of the gang congregated across the street from where the Sweeney Drive shooting occurred (RT 222, 292, 710-11, 1167-68); and (3) on the morning of the shooting Pops heard a member of Sex Cash yell "this is Sex Cash click, bring it out" (RT 881, 1170). This testimony, along with the expert's testimony that one way gangs increase their membership (and in turn become stronger) is by intimidating prospective members until they agree to join (RT 1266-68), was sufficient for a reasonable jury to conclude that the Sweeney Drive shooting was committed to benefit the gang.

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There was also sufficient evidence upon which the jury could have found that petitioner and Gholston, as associates of the gang, committed the Sweeney Drive shooting to benefit the gang. The expert testified that petitioner was an associate of the Sex Cash gang based on petitioner's repeated contact with others known to be Sex Cash members. (RT 1298-1302, 1353-58, 1369-72). The expert opined that Gholston was an associate of the Sex Cash gang based on his alleged participation in the Pattilynn Drive shootings which were done with at least two others the expert thought were associates, within the Sex Cash gang's turf, against a Cali Clown member. (RT 1298-99).[30] The expert explained that associates of gangs commit drive-by shootings with others to prove the crime actually occurred and to show their allegiance to a gang and willingness to participate in criminal activity with other gang members. (RT 1288). Respect in gang culture is based on fear, intimidation, and the level of work (or crime) a person is willing to put in for a gang. (RT 1289).

On this record, the Court cannot find that the Court of Appeal's findings constitute unreasonable determinations of the facts or that its analysis is objectively unreasonable.

4. Sufficient Evidence Supports the Finding That Petitioner Acted with Specific Intent to Promote, Further, or Assist in Criminal Conduct by Gang Members

"[T]he scienter requirement in section 186.22(b)(1) – *i.e.*, 'the specific intent to promote, further, or assist in any criminal conduct by gang members' – is

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[30]At the time of the shootings, Jacob Rogers (who was present at the Pattilynn Drive shooting) self-admitted to being a member of the Sex Cash gang with the moniker of Baby Non Stop. (RT 1296-97). Keymonnie Rander and Spencer Beeks, who were also present at the Pattilynn Drive shooting, were active, validated Sex Cash members at the time of the shooting. (RT 1302-05). The expert thought that the shootings were committed against rivals or "victims groups" because Young was a member of Cali Clowns and Anthony was affiliated in some way with Dorner Blocc. (RT 1298).

unambiguous and applies to *any* criminal conduct, without a further requirement that the conduct be 'apart from' the criminal conduct underlying the offense of conviction sought to be enhanced." People v. Albillar, 51 Cal. 4th at 66 (emphasis original); see also Emery v. Clark, 643 F.3d at 1215-16 (recognizing that California state courts have held that "evidence that the defendant had the specific intent to help a gang member commit the charged crime is enough to justify application of the enhancement" and applying California Supreme Court's "authoritative interpretation of section 186.22(b)(1)" in Albillar). Nonetheless, the prosecution is not required to prove what specific crime(s) the defendant intended to promote. Albillar, 51 Cal. 4th at 66; In re Cesar V., 192 Cal. App. 4th 989, 1000 (2011). Nor is it required "that the defendant act with the specific intent to promote, further, or assist a *gang*; the statute requires only the specific intent to promote, further, or assist criminal conduct by *gang members*." Albillar, 51 Cal.4th at 67 (emphasis original).

Here, the evidence was sufficient to support a finding that petitioner harbored the requisite intent to promote, further, or assist in criminal conduct by the Sex Cash gang. The jury heard evidence that petitioner and Gholston were at least associates of the Sex Cash gang. As noted above, the expert opined that petitioner and Gholston were associates of the Sex Cash gang based on their conduct with other gang members. All of the eyewitnesses who testified at trial were reluctant to indicate whether the defendants were gang members. Anthony M. denied knowing whether petitioner or Gholston were members of the Sex Cash gang. (RT 343, 346). However, the trial court admitted Anthony's prior grand jury testimony in which Anthony admitted that petitioner, Gholston, and Jefferson were all members of the Sex Cash gang. (CT 1196-98).

From this testimony, a reasonable jury could have inferred that petitioner, Gholston, and Jefferson, were Sex Cash members who acted in concert in committing the Sweeney Drive shooting and that petitioner committed the

shooting with the specific intent to promote, further, or assist in criminal conduct by gang members. Commission of a crime in concert with known gang members constitutes substantial evidence that a defendant acted with the requisite specific intent. See Albillar, 51 Cal.4th at 68 ("if substantial evidence establishes that the defendant intended to and did commit the charged felony with known members of a gang, the jury may fairly infer that the defendant had the specific intent to promote, further, or assist criminal conduct by those gang members."); see also Emery, 643 F.3d at 1216 (holding that the evidence sufficed to prove that the petitioner committed the charged crimes with the "specific intent" to assist in criminal conduct by gang members where it showed that the petitioner and his accomplice were fellow gang members); People v. Leon, 161 Cal. App. 4th 149, 162, 170 (2008) ("[T]here was evidence that [the defendant] intended to commit . . . the offenses in association with Rodriguez, and that he knew Rodriguez was a member of his gang. From this evidence, the jury could reasonably infer that [the defendant] harbored the 'specific intent to promote, further, or assist in any criminal conduct by gang members.'").

The expert's opinion that petitioner's offenses were committed for the benefit of the Sex Cash gang provided additional support for this inference. Cf. Emery, 643 F.3d at 1216 (evidence that the petitioner committed the crime with a fellow gang member coupled with expert testimony identifying a probable gang related motivation for the crime was sufficient to show specific intent). The expert testified that shootings benefit the Sex Cash gang by showing the gang's ability to control its turf through violence against others vying for control (namely members of Cali Clowns which was aligned with the Edgemont Criminals), and building the gang's reputation as a violent criminal street gang by instilling fear in the community, which would help the gang recruit members and become stronger. (RT 1309-13, 1332-39, 1364).

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On this record, the Court of Appeal correctly determined that there was sufficient evidence from which a rational trier of fact could conclude that petitioner participated in the Sweeney Drive shooting with the specific intent to benefit the Sex Cash gang.

5. Conclusion

Although petitioner presented the jury with a defense that he was not a gang member and had an alibi for the shooting, this does not render the evidence to the contrary insufficient to support the gang enhancements. As stated above, "it is the responsibility of the jury – not the court – to decide what conclusions should be drawn from evidence admitted at trial." Coleman, 132 S.Ct. at 2062 (quoting Cavazos, 132 S.Ct. at 4). Accordingly, although the evidentiary record supports conflicting theories about petitioner's involvement or lack thereof, the Court must presume that the jury resolved those conflicts in favor of the prosecution and defer to that resolution. See Jackson, 443 U.S. at 326.

For the foregoing reasons, the Court of Appeal's rejection of petitioner's challenge to the sufficiency of the evidence to support the jury's true findings on the gang enhancement allegations was neither contrary to, nor an unreasonable application of, clearly established federal law and was not based on an unreasonable determination of the facts in light of the evidence presented. Accordingly, petitioner is not entitled to federal habeas relief on Ground Three.

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VI. RECOMMENDATION

IT IS THEREFORE RECOMMENDED that the District Judge issue an Order: (1) approving and accepting this Report and Recommendation; and (2) directing that Judgment be entered denying the Petition and dismissing this action with prejudice.[31]

DATED: June 12, 2015

/s/

Honorable Jacqueline Chooljian
UNITED STATES MAGISTRATE JUDGE

[31] Petitioner's request for an evidentiary hearing (Traverse at 23) should be denied because he has not alleged any material fact which he did not have a full and fair opportunity to develop in state court and which, if proved, would show his entitlement to habeas relief. See Cullen v. Pinholster, 131 S. Ct. 1388, 1398 (2011) (scope of record for 28 U.S.C. § 2254(d)(1) inquiry limited to record that was before state court that adjudicated claim on the merits); Schriro v. Landrigan, 550 U.S. 465, 474 (2007) (if record refutes applicant's factual allegations or otherwise precludes habeas relief, court not required to hold evidentiary hearing); Gandarela v. Johnson, 286 F.3d 1080, 1087 (9th Cir. 2002) (evidentiary hearing properly denied where the petitioner "failed to show what more an evidentiary hearing might reveal of material import"), cert. denied, 537 U.S. 1117 (2003).

FILED

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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JERRY ADAMS, JR., Petitioner-Appellant, v. GARY SWARTHOUT, Warden, Respondent-Appellee.	No. 15-56681 D.C. No. 5:13-cv-00124-MMM-JC Central District of California, Riverside ORDER

Before: HAWKINS, M. SMITH, and CHRISTEN, Circuit Judges.

The panel has voted to deny Appellant's petition for rehearing.

Judges M. Smith and Christen have voted to deny the petition for rehearing en banc, and Judge Hawkins has recommended denying Appellant's en banc petition. The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

Appellant's petition for rehearing and petition for rehearing en banc are DENIED.

AG

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. EVERETT LEE GHOLSTON IV et al., Defendants and Appellants.	D058078 (Super. Ct. No. RIF119755)

APPEALS from judgments of the Superior Court of Riverside County, Roger A. Luebs, Judge. Affirmed with directions to modify abstract of judgment.

In a trial involving multiple defendants and arising out of two separate shootings on the same day, a jury convicted appellants Jerry Adams, Jr., Everett Lee Gholston IV, and Correyon Devon Jefferson.

Adams, who was charged only in the first shooting, was found guilty of two counts of assault with a firearm (Pen. Code,[1] § 245, subd. (a)(2)), and one count of

1 Unless otherwise indicated, all further statu

shooting at an inhabited dwelling (§ 246). Jefferson, who was charged in both shootings, but convicted only of charges arising out of the second shooting, was found guilty of the attempted murder of Anthony M. (§§ 187, subd. (a), 664) and one count of assault with a firearm (§ 245, subd. (a)(2)). Arising out of both of the shootings, Gholston was found guilty of three counts of assault with a firearm (§ 245, subd. (a)(2)); one count of shooting at an inhabited dwelling (§ 246); and the attempted murder of Felton Young III (§§ 187, subd. (a), 664). With respect to all three defendants, the jury made true findings on gang and firearm allegations. (§§ 186.22, subd. (b), 12022.53, subds. (d) & (e), 667, 1192.7, subd. (c)(8).)

The trial court sentenced Adams to an indeterminate prison term of 15 years to life and sentenced both Jefferson and Gholston to indeterminate prison terms of 30 years to life. All three of the defendants appeal.

Adams contends that the trial court improperly denied his motion to sever and his motion for mistrial. Adams and Gholston argue that insufficient evidence supports the true findings on the gang enhancements associated with the first shooting. Gholston argues that the trial court erred in not admitting, on due process grounds, a purportedly exculpatory statement made by an unavailable witness. All three of the defendants argue that the trial court improperly denied their *Wheeler/Batson*[2] motion alleging racial animus by the prosecutor during jury selection. Jefferson contends that the abstract of

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2 *People v. Wheeler* (1978) 22 Cal.3d 258, 276-277 (*Wheeler*); *Batson v. Kentucky* (1986) 476 U.S. 79, 97 (*Batson*).

judgment must be corrected to properly reflect the sentence imposed by the trial court. We conclude that only Jefferson's argument for correction of the abstract of judgment has merit and direct the trial court to correct the document. In all other respects, we affirm the judgments.

I

FACTUAL AND PROCEDURAL BACKGROUND

Around noon on October 7, 2004, 16-year-old Lamar Lee and Anthony M. were in the garage of a house owned by the Young family on Sweeney Drive in Moreno Valley. Their friend Felton Young III was in the backyard of the house. The garage door was open, and Lee and Anthony M. watched as a car drove by and fired two guns at the garage. Lee and Anthony M. told the police that the shooters were Gholston and Adams and that they believed Jefferson was also in the car.

Young's father, Felton Young, Jr., often referred to as "Pops,"[3] arrived home shortly after the shooting. Lee and Anthony M. told Pops that Gholston and Adams shot at them. Pops was familiar with Gholston and Adams, as his sons were friends with them, and Pops had started a competitive hip hop dance group called the Cali Clowns, in which Gholston had participated.

Around 2:30 p.m., two vehicles headed out from the Young family's house to look for the perpetrators of the drive-by shooting. Pops drove a Mercedes with two

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3 For the sake of clarity, we will refer to Felton Young, Jr., as "Pops" and intend no disrespect by doing so. We will refer to Felton Young III as "Young."

passengers. Young drove a van with Anthony M. among his passengers. Nearby at Pattilynn Drive, in front of Moreno Valley High School, they located a group of people including Gholston and Jefferson. Adams was not present.

Pops exited his car and questioned Gholston about the drive-by shooting. When the occupants of the van joined the confrontation, tensions escalated. Several members of the group that included Gholston and Jefferson pulled out guns and started shooting. Anthony M. was shot in his buttocks, with the bullet exiting his left hip.[4] Young was shot in the back near the top of his tailbone.[5] According to Pops's testimony, immediately after being shot Young identified Gholston as his shooter, and Anthony M. identified Jefferson as his shooter. A few days after the shooting, Young told the police that five different people were shooting at them, Gholston shot him, and Jefferson shot Anthony M.

A shell casing from a .45 caliber gun found at the scene of the Sweeney Drive shooting matched shell casings found at the scene of the Pattilynn Drive shooting.

A second amended information charged crimes arising out of the Sweeney Drive shooting and the Pattilynn Drive shooting. For the Sweeney Drive shooting, Adams, Jefferson and Gholston were charged in counts 1 and 2 with the attempted murder of Lee and Anthony M. (§§ 664, 187, subd. (a)) and in count 3 with shooting at an inhabited dwelling (§ 246). For the Pattilynn Drive shooting, Gholston and Jefferson were charged

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4 Anthony M. was treated in the hospital and released the same day.

5 As a result of the shooting, Young had some of his intestines removed.

with the attempted murder of Young and Anthony M. (§§ 664, 187, subd. (a)) in counts 4 and 5. Count 6 charged Adams with active participation in a criminal street gang (§ 186.22), but that charge was later dismissed by the prosecutor during trial. The second amended information also contained gang and firearm allegations in counts 1 through 5.

The case proceeded to a jury trial at which the defendants were Adams, Jefferson, Gholston and Jacob Allen Rogers.[6] The jury heard an expert testify that the defendants were associates of the Sex Cash Money (Sex Cash) gang at the time of the shootings, but they were not confirmed members. Adams presented an alibi defense through witnesses who testified that he was at home when the Sweeney Drive shooting occurred.

On counts 1 and 2, the jury convicted Adams and Gholston of the lesser included offense of assault with a firearm (§ 245, subd. (a)(2)), and on count 3 convicted Adams and Gholston of shooting at an inhabited dwelling (§ 246). It also found true the allegations on counts 1, 2 and 3 that Adams and Gholston committed the crimes for the benefit or, at the direction of, or in association with a criminal street gang (§ 186.22, subd. (b)), and on count 3 that Adams and Gholston personally used a firearm (§ 667, 1192.7, subd. (c)(8)). The jury acquitted Jefferson on counts 1 through 3.

On count 4, the jury convicted Jefferson of the attempted murder of Anthony M. (§§ 664, 187, subd. (a)) and convicted Gholston of the lesser included offense of assault with a firearm on Anthony M. (§ 245, subd. (a)(2)). On count 5, the jury convicted

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6 Rogers was alleged in counts 4 and 5 to have committed attempted murder during the Pattilynn Drive shooting. The jury returned guilty verdicts as to Rogers, convicting him of lesser included offenses in counts 4 and 5, but he is not a party to this appeal.

Gholston of the attempted murder of Young (§§ 664, 187, subd. (a)) and convicted Jefferson of the lesser included offense of assault with a firearm on Young (§ 245, subd. (a)(2)). On counts 4 and 5, the jury made a true finding on the allegation that Jefferson and Gholston committed the crimes for the benefit or, at the direction of, or in association with a criminal street gang (§ 186.22, subd. (b)); and with respect to the attempted murder convictions in counts 4 and 5, it made true findings on the firearm allegations (§ 12022.53, subds. (d) & (e)).

II

DISCUSSION

A. *Adams's Contention That His Trial Should Have Been Severed from His Codefendants to Prevent Prejudice to Him*

1. *The Issue Is Forfeited Because It Was Not Raised in the Trial Court*

We first consider Adam's argument that the trial court abused its discretion and violated his constitutional right to a fair trial and due process when it denied his motion to sever his trial from that of his codefendants.

Adams contends that the trial court should have severed his trial because of "the prejudicial association with co-defendants Jefferson and Gholston who hours after the Sweeney [Drive] shooting perpetrated another shooting with one of the weapons used during the Sweeney [Drive] shooting." According to Adams, a joint trial "prejudicially associated [him] with two gun-wielding associates of the Sex Cash gang who shot at the same people who were involved in the Sweeney drive-by shooting." Adams also argues

that joinder was improper under section 1098, which governs mandatory joinder,[7] because he was not jointly charged in any count with one of his codefendants — Rogers — as Rogers was charged only with crimes arising from the Pattilynn Drive shooting, and Adams was charged only with crimes arising from the Sweeney Drive shooting. (See *People v. Ortiz* (1978) 22 Cal.3d 38, 43 [§ 1098 means "that a defendant may not be tried with others who are charged with different crimes than those of which he is accused unless he is included in at least one count of the accusatory pleading with all other defendants with whom he is tried"].) The Attorney General contends that Adams did not preserve these arguments for appeal. As we will explain, we agree.

Adams moved on three occasions to sever his trial from that of his codefendants. Each of the motions was premised *solely* on the fact that Adams objected to the continuances requested by the codefendants, and he did not want to defer to his codefendants' scheduling delays. The first motion, filed early in the case in April 2006, cited section 1098, and was made as part of a motion for severance or in the alternative for dismissal for lack of a speedy preliminary hearing. In that motion, Adams argued that a defendant has a statutory right to have a preliminary examination conducted within a certain time frame, absent good cause (§ 859b), but "the attorneys in this case will never all be available at the same time for a joint preliminary hearing." In response to the

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7 Section 1098, which governs mandatory joinder, also gives the trial court the discretion to order separate trials. It provides in relevant part: "When two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they must be tried jointly, unless the court order separate trials." (§ 1098.)

motion, a joint preliminary hearing was set, and the motion was apparently denied. The second motion, filed in December 2007, as part of a motion for bail reduction, was also premised on scheduling delays. Citing "the regular unavailability of the Co-Defendant's [*sic*] attorneys," Adams sought a severance along with a bail reduction or release on his own recognizance, arguing that "the attorneys in this case will never all be available at the same time for a joint trial." The motion was denied. The third motion, made orally in June 2008, was based on the fact that Adams was "objecting to any continuance" of the trial to August 2008, as requested by some of his codefendants. The trial court denied that motion as well, and trial eventually commenced in September 2008.

The record contains no indication that Adams ever sought to have his trial severed from that of his codefendants on the ground that it would be prejudicial to him to be associated with them or because he was not charged in any of the same counts as Rogers. It is clear that he sought severance *only* because he was concerned about the delays caused by the logistical problems of coordinating the schedules of several different attorneys.[8] Accordingly, the trial court was never called upon to decide whether, as

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8 At oral argument Adams argued that his two written motions to sever were sufficient to raise the issues he now pursues on appeal because those motions cited section 1098 and *People v. Massie* (1967) 66 Cal.2d 899, 917. We disagree. The motions stated that section 1098 "gives the court the authority to order separate trials," and they cited *Massie* for the proposition that "[t]he exercise of this authority is within the sound discretion of the court." Specifically, the motions excerpted the following quotation from *Massie*: "Although we need not decide whether the court was *required* to grant a severance under the circumstances, or that such denial of the motion after proper consideration of its grounds would have been an abuse of discretion, the court erred in refusing to *exercise* its discretion." (*Massie*, at pp. 917-918.) Although *Massie* contains a list of the possible grounds on which a court may order severance, including

Adams now argues on appeal, that (1) to avoid the danger of prejudice from association with his codefendants the trial court should have ordered separate trials under section 954, which governs joinder of counts,[9] or (2) the trial court should have found joinder to be improper under section 1098 because Adams was not charged in any of the same counts as Rogers.

Because Adams did not move for a severance on the grounds that he now asserts, he has forfeited the right to make the argument on appeal. (*People v. Jenkins* (2000) 22 Cal.4th 900, 949 [specific argument for severance was forfeited on appeal because it was not raised in the trial court]; *People v. Mitcham* (1992) 1 Cal.4th 1027, 1049 [rejecting argument that the trial court erred in denying a severance, as "[d]efendant did not raise

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"prejudicial association with codefendants," Adams did not cite that portion of the opinion or provide citation to any case granting severance on the ground of prejudicial association. (*Massie*, at p. 917.) Thus, we conclude that the motions cited section 1098 and *Massie* only to establish that the trial court possesses the authority to order a severance, not to advance either of the arguments that Adams now makes on appeal.

9 Section 954 provides in relevant part: "An accusatory pleading may charge two or more different offenses connected together in their commission, or different statements of the same offense or two or more different offenses of the same class of crimes or offenses, under separate counts, and if two or more accusatory pleadings are filed in such cases in the same court, the court may order them to be consolidated . . .; provided, that the court in which a case is triable, in the interests of justice and for good cause shown, may in its discretion order that the different offenses or counts set forth in the accusatory pleading be tried separately or divided into two or more groups and each of said groups tried separately." When considering "joinder of counts under section 954, our Supreme Court set out four criteria to guide trial court discretion: (1) whether evidence of the crimes would be cross-admissible; (2) whether some charges are likely to inflame the jury against the defendant; (3) whether a weak case has been joined with a strong one, or with another weak case; and (4) whether any of the charges is a potentially capital offense." (*Calderon v. Superior Court* (2001) 87 Cal.App.4th 933, 939, citing *People v. Marshall* (1997) 15 Cal.4th 1, 27.)

the arguments he now makes, nor does he presently claim that the trial court abused its discretion in rejecting his prior arguments"].) There is no merit to Adams's attempt to distinguish *Mitcham* and *Jenkins* on the ground that that motions to sever in *his* case were "sufficient to alert the trial court to his claim, and this is the same claim he raises on appeal." Adams did not alert the trial court to the claims that he would be prejudiced by association with his codefendants or that joinder was improper. His argument for severance in the trial court, based on the delays occasioned by a multiparty trial, is in no way related to the ground for severance that he now advances on appeal.[10] We therefore reject Adams's appellate challenge regarding severance on the ground that it has not been preserved for appeal.

2. *Adams Has Not Established Ineffective Assistance of Counsel*

Adams contends that to the extent he forfeited his severance arguments because defense counsel did not raise them at trial, he received ineffective assistance of counsel. We conclude that Adams has not established ineffective assistance of counsel.

"Under both the Sixth Amendment to the United States Constitution and article I, section 15, of the California Constitution, a criminal defendant has the right to the assistance of counsel." (*People v. Ledesma* (1987) 43 Cal.3d 171, 215 (*Ledesma*).) That

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10 Adams argues that he should be excused from his forfeiture because "the trial court denied [his] two motions to sever made before trial" and "[a]ny objections to consolidation or renewal of the motion would have been futile." We reject the futility argument, as the trial court never indicated how it would rule on a severance motion premised on the argument that Adams would be prejudiced by association with his codefendants or that joinder was improper.

right "entitles the defendant not to some bare assistance but rather to *effective* assistance." (*Ibid.*) A defendant claiming ineffective assistance of counsel has the burden to show: (1) counsel's performance was deficient, falling below an objective standard of reasonableness under prevailing professional norms; and (2) the deficient performance resulted in prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 687 (*Strickland*); *Ledesma*, at pp. 216, 218.) Prejudice is shown when "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*, at p. 694.)

Further, "[r]eviewing courts reverse convictions on direct appeal on the ground of incompetence of counsel only if the record on appeal demonstrates there could be no rational tactical purpose for counsel's omissions." (*People v. Lucas* (1995) 12 Cal.4th 415, 442 (*Lucas*); see also *People v. Anderson* (2001) 25 Cal.4th 543, 569 ["When a claim of ineffective assistance is made on direct appeal, and the record does not show the reason for counsel's challenged actions or omissions, the conviction must be affirmed unless there could be no satisfactory explanation."].)

We are not able to conclude that "there simply could be no satisfactory explanation" for defense counsel's failure to seek severance on the ground that Adams would be prejudiced by association with his codefendants. (*People v. Carter* (2003) 30 Cal.4th 1166, 1211.) The record indicates that defense counsel's sole reason for bringing the severance motions was to avoid the delay caused by the codefendants. Once delay was no longer an issue and trial was set to start, defense counsel could have decided

against severance because Adams would benefit by being tried together with his codefendants in a trial where the jury would hear extensive evidence about the Pattilynn Drive shooting and learn that Adams was not present. Adams's main defense was that he was mistakenly identified as having been in the car during the Sweeney Drive shooting and was instead at home during that shooting where several witnesses testified that they saw him. Evidence that Adams was not with Gholston and Jefferson at the Pattilynn Drive shooting less than three hours later, would lend credibility to his defense theory. Therefore, Adams's argument for ineffective assistance of counsel fails because the record on appeal does not demonstrate that "there could be no rational tactical purpose for counsel's omissions." (*Lucas*, *supra*, 12 Cal.4th at p. 442.)

B. *The Trial Court Did Not Err in Denying the Wheeler/Batson Motion During Jury Selection*

Adams and Jefferson, joined by Gholston, argue that the trial court violated their state and federal constitutional rights by denying defense counsel's motion alleging racial animus in the prosecutor's exercise of peremptory challenges against two Black jurors: E.H. and P.B.[11]

1. *Factual Background*

E.H. was part of the original group of prospective jurors questioned on the first day of jury selection. During voir dire, E.H. stated that her father was incarcerated in 1996, and he passed away in 2004. She thought her father was treated fairly by the

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11 The challenge was asserted by counsel for Adams, Jefferson and Gholston. Appellants are Black.

system, and she was not angry at the police, court or lawyers, as her father told her "it was something he did" and "it was basically his choice and the consequences he had to pay." The prosecutor asked E.H. about a tattoo on the back of her ear and whether it symbolized anything in particular. E.H. stated that the tattoo represented her son's astrological sign. The prosecutor exercised a peremptory challenge against E.H.

P.B. later was added to the panel of prospective jurors to fill an empty seat. When questioning the group of prospective jurors that included P.B., the prosecutor asked a question about circumstantial evidence, giving a hypothetical about a bank robbery in which the police caught a suspect "just down the street" who was "wearing similar clothes" and "holding a bag of money in their hands that came from that bank." The prosecutor explained that "those little pieces of evidence build up to say that you guys could come to the decision that person was the one that did it." After stating that circumstantial evidence is "just as good as if somebody actually saw the person, or could identify the person," the prosecutor asked, "Is everybody comfortable with that?"

Turning to P.B., the prosecutor said, "[P.B.], you['re] kind of giving a little bit of a grimace there. What does that mean?" P.B. responded, "That could be a false witness. I don't think so, simply because the bank robbers were running through [the] neighborhood where lots of people are dressing the same and dropped their money, and a kid happened to pick it up and policem[e]n drive up on them, we see it happens all the time." The prosecutor pursued the issue with P.B., giving the example of a residential burglary. She stated that "very rarely do victims of that crime see the person that actually broke into their house," but if a suspect "is caught down the street holding a ring that looks just like

the person's in the house," then "those little bits and pieces can be used to say he was the one." The prosecutor asked "Can you see that situation where you could use other evidence besides actual direct evidence?" P.B. answered affirmatively. However, when the prosecutor followed up by asking P.B. "Do you feel comfortable with that?" he responded "No, I disagree with you. No, simply because there should still be some facts, I think to it. I mean after all again if the kid is running through the neighborhood and happened to stumble upon those things. And if the person in the bank says, well, he was 6'5", and this kid they just happen to pick is only 5'10". You have to have more facts, I think."

Upon further questioning, P.B. agreed with the prosecutor's statement that "a little discrepancy . . . doesn't necessarily mean that the crime didn't happen." The prosecutor then returned to the circumstantial evidence issue. She asked, "So, [P.B.], I just want to be clear, are you saying unless somebody specifically saw the person do it with their own eyes that that would be the only evidence that you would be able to accept?" P.B. answered, "Well, along with the facts. You have fingerprints, and you got to have something in concrete in that area when you are identifying them. I mean, you just can't assume anything." The prosecutor then asked, "So the circumstantial evidence, that type of evidence you don't think that would be enough even if that is all I have, that is all I got is that circumstantial evidence?"

At that point, the trial court intervened, stating: "Well, it depends on what it is, counsel. I think he is saying it depends on how much it is, how you weigh it, how credible it is, whatever. And to tell him you got to find him guilty because there is some

circumstantial evidence I think is an unfair inference to expect him to agree to. I think we have belabored this issue enough. Let's move on."

2. *The Trial Court's Ruling*

When the prosecutor exercised a peremptory challenge against P.B., defense counsel made a motion objecting to the alleged systemic exclusion of two Blacks from the jury, namely E.H. and P.B.

The trial court found facts sufficient to create "an inference that the challenges may have been exercised for improper motive" and asked the prosecutor to explain the basis for excusing E.H. and P.B.

Regarding E.H., the prosecutor pointed to E.H.'s tattoo and the fact that her father was convicted in 1996. The prosecutor explained that "if there is a tattoo showing on a person's body, I systematically do kick them off because . . . the tattoo, I feel, . . . is something outside of societal norm. I want to have people within the norm." She also explained that if prospective jurors "have a family member arrested recently, I do kick them off the jury because of their close ties to the system."

The trial court expressed some skepticism as to both grounds. With respect to the tattoo, the trial court took note of the "amount of tattoos in our society now," including among prosecutors in the district attorney's office. The prosecutor responded, "Your Honor, it is my personal belief that if someone has a tattoo showing, they don't respect or don't have the respect for society." With respect to the fact that E.H.'s father was convicted in 1996, the trial court asked, "You are going to kick everybody up there who has had some family member that had some negative contact with law enforcement?"

The prosecutor said that she was planning to challenge the jurors who fell into that category, including S.S., who had incurred an arrest for a misdemeanor, but that she would *not* be challenging one prospective juror — a Black woman, who ended up being impaneled as a juror — because her husband was arrested over 20 years ago.[12]

Regarding P.B., the prosecutor stated that she "felt that he would have a difficult time with the concept of circumstantial evidence." The prosecutor explained that "he gave multiple answers that said that the person who actually saw it, unless there is some kind of concrete evidence like that, he wouldn't be able to vote guilty. . . . The reason why I focused on him is because I wanted to see where he was at." The trial court stated that "I guess I would have made a different judgment than you did" about P.B., but "I can see that where you asked the questions and responses he gave that you might think that he has some difficulty with the concept of aiding and abetting, and natural and probable consequences, and circumstantial evidence." The trial court observed P.B.'s responses were "largely . . . in my opinion a product of the way you asked the questions," but it commented, "I can see where you may have come to that conclusion."

After considering the prosecutor's credibility, the trial court denied the motion. It stated, "Well, at the end of the day I'm supposed to assess your credibility, decide what is in your heart and mind. Whether I would make decisions different than you isn't really

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12 The prosecutor initially did not follow through on excusing S.S., and defense counsel brought that fact to the trial court's attention. However, the prosecutor stated that she had forgotten to challenge S.S., and when voir dire was reopened before the jury was sworn because one of the final jurors was excused for cause, the prosecutor took the opportunity to exercise a challenge against S.S.

the issue. The issue is whether your explanations are credible to me. . . . [G]iven the way you've managed the case so far, the decision you've made with respect to these various jurors, and the explanation you've given me, evaluating your tone and demeanor, I'm going to find that you're credible; that you're making those decisions for reasons other than racial bias."

Later during the trial, counsel for Gholston brought to the court's attention that one of the jurors had a tattoo on the back of his neck. The prosecutor stated that she had not seen the tattoo because the juror had been wearing collared shirts. At that point, the trial court also pointed out for the record that two of the jurors and one of the alternate jurors were Black.

3. *Applicable Legal Standards*

Both the state and federal Constitutions prohibit the use of peremptory challenges to exclude prospective jurors on the basis of race or ethnicity. (See *Wheeler*, *supra*, 22 Cal.3d at pp. 276-277; *Batson*, *supra*, 476 U.S. at p. 97.) "A prosecutor's use of peremptory challenges to strike prospective jurors on the basis of group bias — that is, bias against 'members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds' — violates the right of a criminal defendant to trial by a jury drawn from a representative cross-section of the community under article I, section 16 of the California Constitution. [Citations.] Such a practice also violates the defendant's right to equal protection under the Fourteenth Amendment to the United States Constitution." (*People v. Avila* (2006) 38 Cal.4th 491, 541.)

A *Wheeler/Batson* motion to challenge the use of peremptory challenges initiates a three-step process. "First, the trial court must determine whether the defendant has made a prima facie showing that the prosecutor exercised a peremptory challenge based on race. Second, if the showing is made, the burden shifts to the prosecutor to demonstrate that the challenges were exercised for a race-neutral reason. Third, the court determines whether the defendant has proven purposeful discrimination. The ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." (*People v. Lenix* (2008) 44 Cal.4th 602, 612-613 (*Lenix*).)

At the first step, "[t]o make a prima facie showing of group bias, 'the defendant must show that under the totality of the circumstances it is reasonable to infer discriminatory intent.'" (*People v. Davis* (2009) 46 Cal.4th 539, 582.) At the second step, "[a] prosecutor asked to explain his conduct must provide a '"clear and reasonably specific" explanation of his "legitimate reasons" for exercising the challenges.' [Citation.] 'The justification need not support a challenge for *cause*, and even a "trivial" reason, if genuine and neutral, will suffice.'" (*Lenix*, *supra*, 44 Cal.4th at p. 613.) "At the third stage of the *Wheeler/Batson* inquiry, 'the issue comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible. Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy.' [Citation.] In assessing credibility the court draws upon its contemporaneous observations of the voir dire. It may also rely on the court's own

experiences as a lawyer and bench officer in the community, and even the common practices of the advocate and the office that employs him or her." (*Ibid.*, fn. omitted.)

"Review of a trial court's denial of a *Wheeler/Batson* motion is deferential, examining only whether substantial evidence supports its conclusions. [Citation.] 'We review a trial court's determination regarding the sufficiency of a prosecutor's justifications for exercising peremptory challenges "'with great restraint.'" [Citation.] We presume that a prosecutor uses peremptory challenges in a constitutional manner and give great deference to the trial court's ability to distinguish bona fide reasons from sham excuses. [Citation.] So long as the trial court makes a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal.'" (*Lenix*, *supra*, 44 Cal.4th at pp. 613-614.) "The best evidence of whether a race-neutral reason should be believed is often 'the demeanor of the attorney who exercises the challenge,' and 'evaluation of the prosecutor's state of mind based on demeanor and credibility lies "peculiarly within a trial judge's province."'" (*People v. Stevens* (2007) 41 Cal.4th 182, 198 (*Stevens*).)

4. *The Trial Court's Decision Is Supported by Substantial Evidence*

The trial court expressly determined that defense counsel had made a prima facie case of group bias, and thus proceeded to the second and third steps of the inquiry, in which it asked for and evaluated the prosecutor's explanations for excusing E.H. and P.B. to determine the ultimate factual issue of whether the challenges were motivated by purposeful discrimination. We, too, focus on that ultimate finding, to determine whether it is supported by substantial evidence. (See *Lenix*, *supra*, 44 Cal.4th at p. 613, fn. 8

["Here, the trial court requested the prosecutor's reasons for the peremptory challenges and ruled on the ultimate question of intentional discrimination. Thus, the question of whether defendant established a prima facie case is moot."].)

In their appellate briefing, Jefferson and Adams argue that the prosecutor's explanations for challenging E.H. and P.B. were not credible, and thus substantial evidence does not support the trial court's finding regarding the lack of racial animus. We now turn to an examination of that issue.

a. *Challenge to the Credibility of the Explanation Regarding E.H.*

Appellants' first argument regarding E.H. focuses on the trial court's observation that because tattoos are increasingly common in society, it was finding it "very difficult to find that explanation credible" when the prosecutor relied on E.H.'s tattoo as the motivation for exercising a peremptory challenge. Appellants argue that because of this observation by the trial court, substantial evidence does not support its ultimate decision that the prosecutor's motives for challenging E.H. were legitimate. We are not convinced by appellants' argument.

As we have explained, "[t]he best evidence of whether a race-neutral reason should be believed is often 'the demeanor of the attorney who exercises the challenge,'" which the trial court is uniquely qualified to assess. (*Stevens*, *supra*, 41 Cal.4th at p. 198.) Although the trial court initially commented that it found it "very difficult" to credit the prosecutor's focus on the tattoo as a basis for her challenge of E.H., the prosecutor then elaborated on why she had focused on the tattoo. Having considered those comments, the trial court evaluated the prosecutor's "tone and demeanor" and found

that she was credible. The trial court was uniquely situated to make the evaluation, and we find no basis to question that assessment with respect to the explanation about E.H.'s tattoos, regardless of whether the trial court first reacted to the prosecutor's explanation with skepticism.[13]

Appellants also take issue with the credibility of the prosecutor's explanation that she also relied on the incarceration of E.H.'s father as a ground to excuse her from the jury. Appellants point out that the prosecutor did not strike other jurors who had family members who had been arrested, and they point out that the prosecutor initially forgot to exercise a challenge to S.S., who herself had been arrested for a misdemeanor. According to appellants, these actions show that the prosecutor was not in fact concerned about the fact that E.H.'s father had been incarcerated, but challenged E.H. because of her race.

At the outset, we do not find it significant that the prosecutor initially neglected to exercise a challenge against S.S. When the oversight was brought to the prosecutor's attention, she took the next opportunity to exercise the challenge.

With respect to the seated jurors with family members who were arrested, appellants point out that juror No. 1 had a son who was arrested, juror No. 6 had a father-in-law arrested for driving under the influence, and juror No. 12 had a brother who was

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13 Further, we attach no significance to the fact that one of the impaneled jurors apparently had a tattoo on the back of his neck. As the prosecutor explained when the tattoo was brought to her attention during trial, she had not noticed it during voir dire because the juror was wearing a collared shirt.

arrested "a few times" for driving under the influence." In essence, appellants ask us to perform a comparative juror analysis to determine whether the prosecutor's stated reason for challenging E.H. was credible. "Comparative juror analysis must be performed for the first time on appeal on review of claims of error at *Wheeler/Batson's* third stage . . . when the defendant relies on such evidence, and when the record is adequate to permit the comparisons." (*People v. Hamilton* (2009) 45 Cal.4th 863, 902, fn. 12.) "[C]omparative juror analysis is but *one form* of circumstantial evidence that is relevant, but not necessarily dispositive, on the issue of intentional discrimination." (*Lenix*, *supra*, 44 Cal.4th at p. 622, italics added.) "'[*A*]*ll* of the circumstances that bear upon the issue of racial animosity *must* be consulted.'" (*Ibid.*)

Looking at the totality of the circumstances, a comparative juror analysis does not lead us to question the credibility of the prosecutor's explanation that the incarceration of E.H.'s father was a genuine basis for the exercise of her challenge against E.H. Significantly, the prosecutor explained that it was not solely the incarceration of E.H.'s father, but also the presence of E.H.'s tattoo, that convinced her to challenge E.H. The other jurors who had family members with an arrest history did not possess that additional factor. It is also significant that a fourth juror —juror No. 7, who was Black — had a family member with an arrest history. Specifically, her husband had been arrested over 20 years earlier. The prosecutor did not challenge juror No. 7, despite her race and her husband's arrest history. That fact undermines any inference that the prosecutor was using the arrest history of Black prospective jurors' family members as a pretext for challenging them based on racial animus. (See *People v. Turner* (1994) 8

Cal.4th 137, 168 (*Turner*) ["While the fact that the jury included members of a group allegedly discriminated against is not conclusive, it is an indication of good faith in exercising peremptories, and an appropriate factor for the trial judge to consider in ruling on a *Wheeler* objection."].)[14]

b. *Challenge to the Credibility of the Explanation Regarding P.B.*

Appellants claim that the prosecutor's reason for challenging P.B. was not credible because "the prosecutor used her voir dire to manufacture a spurious reason to excuse P.B." According to Jefferson, the prosecution "badgered P.B. into appearing to disagree with her on the question of the import of circumstantial evidence." We do not agree.

The dialogue between the prosecutor and P.B. shows that the prosecutor could reasonably have concluded that P.B. may have had trouble applying the concept of circumstantial evidence. First, we note that the prosecutor singled out P.B. because, as she stated, he was grimacing when she asked whether the prospective jurors were comfortable with the concept that circumstantial evidence is "just as good as if somebody actually saw the person, or could identify the person." Thus, instead of the prosecutor manufacturing a dialogue with P.B., it appears that P.B. invited the dialogue by grimacing in response to the prosecutor's question. Second, P.B. gave the prosecutor a

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14 In conducting a comparative juror analysis to determine whether the prosecutor's challenges were based on racial animus toward having Blacks serve on the jury, we also find generally significant, as did the trial court, that two of the impaneled jurors were Black, as was one of the alternates. While not dispositive, this fact further supports a conclusion that the prosecutor was not motivated by racial animus in exercising her peremptory challenges. (*Turner*, *supra*, 8 Cal.4th at p. 168.)

reason to continue her dialogue with him after the first questions. When the prosecutor followed up with the burglary hypothetical, P.B. again stated that he was uncomfortable with the concept of circumstantial evidence as she described it. Third, based on what P.B. stated, we can understand — as the trial court did — why the prosecutor would view P.B. as an unfavorable juror, regardless of his race. P.B.'s expressed skepticism toward circumstantial evidence and his insistence on corroborating facts could reasonably have led the prosecutor to believe that he would be more likely to favor a defense verdict than other jurors.

Because the prosecutor's reasons for challenging P.B. were reasonable and had a basis in accepted trial strategy, substantial evidence supports the trial court's conclusion that they were credible. (See *Lenix*, *supra*, 44 Cal.4th at p. 613.) We therefore reject the argument that the prosecutor challenged P.B. based on racial animus rather than because of his statements during her voir dire dialogue with him.

In sum, applying our deferential standard of review, we conclude that substantial evidence supports the trial court's ruling on the *Wheeler/Batson* motion.

C. *Gholston's Contention That the Trial Court Violated His Constitutional Right to Due Process by Failing to Admit Out-of-Court Statements of an Unavailable Witness*

1. *Gholston Did Not Preserve the Issue for Appeal*

We next consider Gholston's contention that the trial court violated his constitutional right to due process by not admitting a statement made to police by Leshawn Lewis after Lewis refused to testify at trial.[15]

According to Lewis's statement during a recorded interview with police on the day of the shootings, he was in the van driven by Young to Pattilynn Drive and viewed the shooting at that location. When asked by police whether Gholston had a gun during the shooting at Pattilynn Drive, Lewis said, "I don't know, I was running." The investigator asked again, "And you didn't see [Gholston] with a gun?" Lewis answered, "Nah. I didn't . . . I done . . . all I seen was the White dude because I remember him." A short time later in the interview Lewis volunteered, "I think [Gholston] did shoot too because [Gholston] shot at the house this morning." He explained that his statement was based on the fact that the witnesses to the Sweeney Drive shooting had identified Gholston as involved in that shooting.

Lewis was called by Gholston as a trial witness, but Lewis refused to testify, invoking his right under the Fifth Amendment to the United States Constitution. The trial

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15 The statement was given to police under the name Deondre Lewis. Counsel learned that the statement was likely given by Leshawn Lewis, who used the name of his older brother Deondre, and thus Leshawn was called to testify about the statement. For the purpose of our discussion we assume that the statement was given by Leshawn, whom we will refer to as "Lewis."

court conferred use and derivative use immunity on Lewis, but he still refused to testify. The court found Lewis in contempt and imposed a monetary fine and a five-day jail term.

Counsel for Gholston sought to have Lewis's statement to the police introduced into evidence under the exception to the hearsay rule as a declaration against Lewis's penal interest under Evidence Code section 1230, but the trial court denied the request, ruling that the exception did not apply. Defense counsel did not make any other arguments for the admission of Lewis's statement.

For the first time on appeal, Gholston argues that by not admitting Lewis's statement, the trial court violated his due process rights. (See, e.g., *Chambers v. Mississippi* (1973) 410 U.S. 284, 302; *Green v. Georgia* (1979) 442 U.S. 95, 97; *Holmes v. South Carolina* (2006) 547 U.S. 319, 331.) Gholston argues that Lewis's statement should have been admitted to preserve his due process right to present a defense, despite the applicability of the hearsay rule. As *Chambers* observed, "the hearsay rule may not be applied mechanistically to defeat the ends of justice." (*Chambers*, at p. 302.)

To preserve the appellate argument that his constitutional right to due process compelled the admission of Lewis's statement, Gholston was required to present that argument to the trial court. (*People v. Loker* (2008) 44 Cal.4th 691, 729 [appellant's claim that the trial court was required to admit hearsay testimony during penalty phase was forfeited because constitutional grounds for admission were not raised at trial]; *People v. Smithey* (1999) 20 Cal.4th 936, 995 ["In seeking admission of [the witness's] testimony at trial, defendant did not contend that the federal Constitution compelled admission of this hearsay testimony, and he may not do so for the first time on appeal."].)

Because defense counsel did not raise the constitutional issue with the trial court, the issue is forfeited and we will not consider it on appeal.[16]

2. *Gholston Has Not Established Ineffective Assistance of Counsel*

Gholston argues that he received ineffective assistance from his counsel, who failed to argue that Gholston's due process rights compelled the admission of Lewis's statement.

As we explained above, a defendant claiming ineffective assistance of counsel must show both (1) deficient performance by counsel; and (2) prejudice. (*Strickland*, *supra*, 466 U.S. at p. 687; *Ledesma*, *supra*, 43 Cal.3d at pp. 216, 218.) Prejudice requires "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*, at p. 694.)

As we will explain, Gholston has not established a reasonable probability of a different result had counsel successfully obtained the admission of Lewis's statement into evidence. Lewis's statement was not strongly exculpatory of Gholston. Although Lewis stated to police that he did not see Gholston with a gun at Pattilynn Drive, the entire context of his statement reveals that this was because he was busy running away and was

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16 We decline to exercise our discretion to consider the issue, despite the forfeiture, on the grounds urged by Gholston, namely, "to forestall a later claim that trial counsel's failure to predicate his motion on those additional grounds reflects constitutionally inadequate representation, and because in the context of this case the new theories raise only issues of law and factual questions that this court decides independently." (*People v. Mattson* (1990) 50 Cal.3d 826, 854.)

not looking at Gholston. Lewis never stated to the police that he saw Gholston and that Gholston did not have a gun. Indeed, as part of his statement, Lewis stated that he believed that Gholston was one of the shooters at Pattilynn Drive because Gholston had been identified as a shooter at Sweeney Drive. Had Lewis's statement been admitted at trial, the jury would have been left with the impression that Lewis simply did not know from his *own* observation whether Gholston had a gun at Pattilynn Drive.

Further, the other evidence that Gholston had a gun at Pattilynn Drive was strong and would have negated Lewis's relatively weak statement that he did not see Gholston with a gun. Young told Pops and the police that he saw Gholston pull a gun out of his backpack and shoot him, and Pops saw Gholston with a .45 or .44 caliber gun at Pattilynn Drive. Further, shell casings from the same .45 caliber gun that was fired at Sweeney Drive by either Gholston or Adams, were found at Pattilynn Drive, where only Gholston, and not Adams, was present.

We therefore conclude that Gholston has not established ineffective assistance of counsel, as it is not reasonably probable that the outcome for Gholston would have been more favorable had defense counsel successfully sought admission of Lewis's statement at trial.

D. *Substantial Evidence Supports the Jury's True Finding That the Sweeney Drive Shooting Was Committed for the Benefit of a Criminal Street Gang*

Adams and Gholston contend that insufficient evidence supports the jury's true finding on the enhancement allegations that counts 1 through 3 (i.e., the counts arising

out of the Sweeney Drive shooting) were committed for the benefit of, at the direction of, or in association with a criminal street gang.

"In considering a challenge to the sufficiency of the evidence to support an enhancement, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence — that is, evidence that is reasonable, credible, and of solid value — from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. . . . We presume every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence. . . . If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. . . . 'A reviewing court neither reweighs evidence nor reevaluates a witness's credibility.'" (*People v. Albillar* (2010) 51 Cal.4th 47, 60, citations omitted (*Albillar*).)

The enhancement set forth in section 186.22. subdivision (b)(1) states that "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, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished . . . ." While the first portion of section 186.22. subdivision (b)(1) is relatively straightforward, requiring that the crime be gang related in the sense of being for the benefit of, at the direction or, or in association with a gang, our Supreme Court recently has explained that the specific intent portion of

the provision "applies to *any* criminal conduct, without a further requirement that the conduct be 'apart from' the criminal conduct underlying the offense sought to be enhanced." (*Albillar*, *supra*, 51 Cal.4th at p. 66.)

The prosecution's theory was that the Sweeney Drive shooting was committed for the benefit of the Sex Cash gang, and that Adams and Gholston committed the shooting with that specific intent. A gang expert, Lance Colmer, testified that Gholston and Adams were associates of Sex Cash, and he opined that the Sweeney Drive shooting was committed for the benefit of the Sex Cash gang because it would show Sex Cash's dominance in the area of the high school, and there was a turf war at the time between Sex Cash and two rival gangs — the Edgemont Criminal Gang and Dorner Blocc.

Adams and Gholston contend that insufficient evidence supports a true finding on the gang enhancement because without additional evidence that the crime was gang related, Colmer's expert opinion, standing alone, was insufficient to support a such a finding. In support of this argument, they cite case law holding that "[a] gang expert's testimony alone is insufficient to find an offense gang related. . . . '[T]he record must provide some evidentiary support, other than merely the defendant's record of prior offenses and past gang activities or personal affiliations, for a finding that the *crime* was committed for the benefit of, at the direction of, or in association with a criminal street gang.'" (*People v. Ochoa* (2009) 179 Cal.App.4th 650, 657, citations omitted; see also *People v. Ramon* (2009) 175 Cal.App.4th 843, 851.)

At the outset, we note that our Supreme Court's recent discussion in *Albillar* casts doubt on the proposition that an expert's opinion is insufficient to support a finding that a

crime was for the benefit of a gang. According to *Albillar*, "[e]xpert opinion that particular criminal conduct benefited a gang by enhancing its reputation for viciousness can be sufficient to raise the inference that the conduct was 'committed for the benefit of . . . a[] criminal street gang' within the meaning of section 186.22[, subdivision](b)(1)." (*Albillar*, *supra*, 51 Cal.4th at p. 63.) We nevertheless will discuss the evidence in the record, aside from Colmer's expert opinion, that supports a finding that Adams and Gholston committed the Sweeney Drive shooting for the benefit of the Sex Cash gang, with the specific intent to assist the gang by engaging in that criminal conduct.

The jury heard evidence that the Sex Cash gang was active at Moreno Valley High School and in the surrounding area, including Sweeney Drive, which it claimed as part of its turf. Gholston and Adams were associates of Sex Cash. At the time, Sex Cash was competing for dominance with the Edgemont Criminal Gang and Dorner Blocc, which were allied together against Sex Cash.[17]

Colmer explained that one way gangs increase their membership is for someone to be "jumped in," which is a process in which the prospective member is beaten up and intimidated every day until he agrees to join the gang. The evidence at trial was that the Sex Cash gang was attempting to intimidate the victims of the Sweeney Drive shooting,

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17 Colmer also stated that the Cali Clowns dance group was aligned with one of Sex Cash's rivals — the Edgemont Criminal Gang. However, the uncontested evidence at trial was that the Cali Clowns group was not a gang, and at most would participate in some street fighting at dance contests it attended. Thus, although there was evidence that Young and Anthony M. were involved in the Cali Clowns group, we do not find that fact significant in determining whether substantial evidence supports a finding that the Sweeney Drive shooting was committed for the benefit of the Sex Cash gang.

namely Anthony M. and Lee, to join the Sex Cash gang, and that Sex Cash was also intimidating their friend, Eric Young, who lived at the Sweeney Drive house. All three boys were being harassed by Sex Cash at school and chased home. Lee told police that Adams and Gholston were trying to get him to join the Sex Cash gang, and Anthony M. similarly reported being harassed to join the gang. Further, Colmer testified that Young was associated with the Edgemont Criminal Gang and Dorner Blocc, and that Anthony M. was associated with Dorner Blocc. Pops reported that members of Sex Cash often congregated at a house across the street, and on the morning of the shooting, he heard a member of Sex Cash outside yelling "Sex Cash click, bring it on out," which he thought was directed at his children. Colmer explained that (1) associates of a gang — such as Gholston and Adams — can commit crimes on behalf of a gang, (2) those crimes could be committed for the benefit of the gang without a gang member present, and (3) one way an associate can show allegiance to the gang or willingness to be a member is to commit crimes for the benefit of the gang.

Based on this evidence, a reasonable jury could have concluded that Gholston and Adams, as associates of the Sex Cash gang, committed the Sweeney Drive shooting as part of the gang's intimidation campaign against Anthony M., Lee and Eric Young, and also generally to show Sex Cash's dominance in the neighborhood at the time of a turf war between it and its two rival gangs, with whom two of the victims were associated. We therefore find substantial evidence to support the true finding on the gang enhancement for the counts arising out of the Sweeney Drive shooting.

E. *The Trial Court Did Not Abuse Its Discretion by Denying Adam's Motion for a Mistrial Following the Gang Expert's Statement That Adams Was a Member of the Sex Cash Gang*

In a hearing held pursuant to Evidence Code section 402, the People's gang expert, Colmer, testified that he did not have the documentation to show that Adams was a member of the Sex Cash gang at the time of the shootings in 2004, but that Adams was at least an associate of Sex Cash during that time. Colmer explained that Adams was validated as a member of Sex Cash for subsequent time periods.

At trial, Colmer was asked whether, as of 2004, he knew of any Sex Cash members who lived in a specific apartment building. In response, Colmer named several individuals, including Adams. Following an objection, the trial court held a sidebar conference, during which counsel for Adams moved for a mistrial. The trial court denied the motion and stated that it would instruct the jury to disregard Colmer's statement. The trial court instructed, "Ladies and gentlemen, I'm going to give you an instruction. You heard the witness testify that Jerry Adams was an active member of the Sex Cash gang residing in the Webster Apartments. I'm going to instruct you to disregard that testimony and not consider that piece of testimony for any purpose."

Adams contends that the trial court erred in denying his motion for a mistrial. According to Adams, despite the trial court's instruction to the jury, Colmer's statement that Adams was a member of Sex Cash as of 2004 was not the type of evidence that the jury would be able to disregard, and the testimony was highly prejudicial.

"We review the denial of a motion for mistrial under the deferential abuse of discretion standard. . . . 'A motion for mistrial is directed to the sound discretion of the trial court.'" (*People v. Cox* (2003) 30 Cal.4th 916, 953, citations omitted (*Cox*).)

"'"[A] mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction . . ."'" (*Cox*, *supra*, 30 Cal.4th at p. 953) so that "a party's chances of receiving a fair trial have been irreparably damaged" (*People v. Bolden* (2002) 29 Cal.4th 515, 555). "A jury is presumed to have followed an admonition to disregard improper evidence particularly where there is an absence of bad faith. . . . It is only in the exceptional case that 'the improper subject matter is of such a character that its effect . . . cannot be removed by the court's admonitions.'" (*People v. Allen* (1978) 77 Cal.App.3d 924, 934-935, citations omitted.) "'"Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions."'" (*Cox*, at p. 953.)

Adams argues that Colmer's statement was "highly prejudicial" because "the jury, untrained in these matters, would necessarily have relied on the opinion of the experienced gang investigator in deciding whether [Adams] committed the crime for the benefit of the Sex Cash gang." As we will explain, in the context of Colmer's testimony as a whole, Colmer's identification of Adams as a member of the Sex Cash gang was not incurably prejudicial. (See *People v. Wharton* (1991) 53 Cal.3d 522, 566 [motion for mistrial on the ground of incurable prejudice from a witness's statement was properly denied when, among other things, the remainder of the witness's testimony dispelled the possibly prejudicial impact of an earlier statement].)

The statement that the trial court instructed the jury to disregard was not Colmer's only statement about Adams's relationship to the Sex Cash gang. Colmer testified at length on that topic after the admonition. Colmer explained that he did not have sufficient evidence to validate that Adams was a member of Sex Cash in 2004, but that based on the information available to him, Adams was "at least an associate" of Sex Cash at that time. Colmer stated that "a series of crimes [were] documented in police reports, which showed [Adams] committing crimes with other members of the gang," qualifying Adams, at the least, as an associate of the gang. As set forth during Colmer's testimony, in 2001 Adams and a Sex Cash member battered another student at school. In 2002 Adams and a Sex Cash member were arrested for assault and stealing a car at school. Also in 2002, Adams and Sex Cash members were arrested for participating in a fist fight involving rival gang members. Finally, in 2004 Adams was at a party with Sex Cash members when members of another gang arrived and fired guns at Sex Cash members. Colmer also made it very clear that an associate of a gang is someone who is "actively assisting the gang in some way," and he explained that associates of a gang can commit crimes for the benefit of the gang.

It is probable that in light of (1) the trial court's instruction to disregard Colmer's statement; and (2) Colmer's subsequent nuanced testimony about Adams's relationship with Sex Cash, the jury would focus on that nuanced testimony rather than on the earlier statement listing Adams among the Sex Cash members who lived in a certain apartment building. Moreover, even if the jury *did* focus on Colmer's identification of Adams as a "member" of Sex Cash, Adams's status as a *member*, rather than an *associate*, was not

essential to a finding that Adams committed the Sweeney Drive shooting for the benefit of Sex Cash. As Colmer explained, Adams was "at least an associate" of Sex Cash and had participated in several criminal activities with Sex Cash members, and gang associates can commit crimes for the benefit of a gang, especially to show their allegiance or willingness to become a member. We therefore conclude that Colmer's statement was not unduly prejudicial, and the trial court therefore did not abuse its discretion in denying the motion for a mistrial.

F. *Correction of the Abstract of Judgment Regarding Jefferson's Sentence*

Jefferson points out, and the Attorney General agrees, that the abstract of judgment does not properly reflect the sentence imposed by the trial court. At sentencing, the trial court stated that Jefferson's sentence on count 5, including the gang enhancement imposed pursuant to section 186.22, subdivision (b), was to be served concurrently with the term imposed for count 4. However, the abstract of judgment does not show that the gang enhancement associated with count 5 is to be served concurrently with count 4.

"Courts may correct clerical errors at any time, and appellate courts . . . that have properly assumed jurisdiction of cases [will order] correction of abstracts of judgment that [do] not accurately reflect the oral judgments of sentencing courts." (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.) We therefore order that the abstract of judgment for Jefferson be amended to reflect that the gang enhancement imposed on count 5 pursuant to section 186.22, subdivision (b) run concurrently to the term for count 4.

DISPOSITION

The trial court is directed to modify Jefferson's abstract of judgment to state that the gang enhancement imposed under section 186.22, subdivision (b) for count 5, shall run concurrently with the term for count 4. The trial court shall forward to the Department of Corrections and Rehabilitation an amended abstract of judgment. In all other respects the judgments are affirmed.

IRION, J.

WE CONCUR:

HALLER, Acting P. J.

McINTYRE, J.

Court of Appeal, Fourth Appellate District, Division One - No. D058078

S191617

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

EVERETT LEE GHOLSTON IV et al., Defendants and Appellants.

The petitions for review are denied.

CANTIL-SAKAUYE
Chief Justice

Jerry Adams, Jr. v. G. Swartout, Warden
EDCV 13-124 MMM (JC)
Appendix F

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF RIVERSIDE

FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF RIVERSIDE
JUL 12 2012

In the Matter of the Petition of

JERRY ADAMS

For Writ of Habeas Corpus

Habeas Case #: RIC1208402

Criminal Case #:

ORDER RE PETITION FOR WRIT OF HABEAS CORPUS

The Court, having read and considered the Petition for Writ of Habeas Corpus filed on 06/04/12, hereby (denies / grants/ transfers / other) as follows:

A. DENIALS

1. _____ The petition is denied because the petition fails to state a prima facie factual case supporting the petitioner's release. (Cal. Rules of Court, rule 4.551 (c).) The petition makes assertions regarding the applicable law that are contrary to established California case decisions.

2. _____ The petition is denied because the petition fails to state a prima facie factual case supporting the petitioner's release. (Cal. Rules of Court, rule 4.551 (c).) While the petition states a number of factual conclusions, these broad conclusions are not backed up with specific details, and/or are not supported by the record in the case.

X The petition is denied with prejudice because the issues raised in the petition were raised and considered in a prior appeal. "[I]ssues resolved on appeal will not be reconsidered on habeas corpus..." (*In re Clark* (1993) 5 Cal.4th 750, 765.)

_____ The petition is denied because the petition fails to raise any new issue that has not previously been addressed in an earlier writ petition. "[A]bsent a change in the applicable law or the facts, the court will not consider repeated applications for habeas corpus presenting claims previously rejected." (*In re Clark* (1993) 5 Cal. 4th 750, 767.)

_____ The petition is denied because the issues raised in the petition could have been but were not raised in an appeal, and no excuse for failing to do so has been demonstrated. "[I]n the absence of special circumstances constituting an excuse for failure to employ that remedy, the writ will not lie where the claimed errors could have been, but were not, raised upon a timely appeal from a judgment of conviction." (*In re Clark* (1993) 5 Cal. 4th 750, 765.)

_____ The petition is denied because the petitioner has delayed the petition long after the facts occurred that allegedly justify relief, and he has failed to adequately explain the reason for the delay. A petitioner must justify any substantial delay in presenting a claim by, inter alia, stating when he became aware of the legal and factual bases for his claims, and explaining the reason for any delay since *Clark* (1993) 5 Cal. 4th 750, 783, 786-787.)

_____ The petition is denied without prejudice because the petitic the same detention or restraint but the current petition fails the claims made in those prior petitions. (Pen. Code 1475.

Jerry Adams, Jr. v. G. Swartout, Warden
EDCV 13-124 MMM (JC)
LODGMENT NO. 9

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re JERRY ADAMS, JR.,	D062625
on	(Riverside Super. Ct. No. RIF119755)
Habeas Corpus.	

THE COURT:

The petition for a writ of habeas corpus has been read and considered by Presiding Justice McConnell and Associate Justices Nares and Aaron. We take judicial notice of the opinion on direct appeal D058078.

A jury found Jerry Adams, Jr., guilty of two counts of assault with a firearm and one count of shooting at an inhabited dwelling. The jury also made true findings on gang and firearm allegations. The court sentenced Adams to an indeterminate prison term of 15 years to life. This court affirmed the judgment on February 18, 2011.

Adams now contends:

1. The trial court erred in denying his motion to sever his trial from the trial of his codefendants;

2. The admission of an expert's testimony that Adams was a member of Sex Cash gang prejudiced Adams and the trial court should have granted his motion for a mistrial;

3. The trial court erred in denying his *Wheeler/Batson* motions;

4. Trial counsel was ineffective for failing to file a proper severance motion.

Adams raised the jury selection and severance issues on direct appeal. A petition for a writ of habeas corpus based on the same grounds as those on appeal will be denied as repetitive when there has been no change in the facts or law substantially affecting the rights of the petitioner. (*In re Martinez* (2009) 46 Cal.4th 945, fn 1.) Also Adams

indicates he has not petitioned in the superior court. This is an appropriate petition to be filed in the superior court in the first instance.

The petition is denied.

NARES, Acting P. J.

Copies to: All parties

S206107

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re JERRY ADAMS, JR., on Habeas Corpus.

The petition for writ of habeas corpus is denied.

SUPREME COURT
FILED

DEC 19 2012

Frank A. McGuire Clerk

Deputy

CANTIL-SAKAUYE

Chief Justice

Jerry Adams, Jr. v. G. Swartout, Warden
EDCV 13-124 MMM (JC)
LODGMENT NO. 13