APPENDIX A

PETITIONER'S MOTION FOR A NEW TRIAL

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CRAIG FARLEY

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

vs.

CRAIG FARLEY,

Defendant.

Case No. SCD 229026
DA Case No. ACU368

NOTICE OF MOTION AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR A NEW TRIAL

Date: September 7, 2012
Time: 9:00 a.m.
Dept: 50

TO: BONNIE DUMANIS, DISTRICT ATTORNEY OF SAN DIEGO COUNTY AND DEPUTY DISTRICT ATTORNEY MICHAEL RUNYON:

PLEASE TAKE NOTICE that on September 7, 2012 at 9:00 a.m. in Department 50 or as soon thereafter as may be heard, CRAIG FARLEY will move this Court for a new trial pursuant to Penal Code § 1181.[1/]

1 Unless otherwise specified, all statutory references are to the Penal Code.

This motion is based on the instant Notice of Motion, Memorandum of Points and Authorities, declarations and exhibits filed in support of the motion, the files and records in this case, any other evidence which may be presented to the Court at the time of the hearing on this motion, and finally on the 29 page letter submitted to this Court by Craig Farley.

DATED: August 5, 2012

Respectfully submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR A NEW TRIAL

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STATEMENT OF THE CASE

On October 28, 2011, in advance of the jury's verdicts, Craig Farley admitted the "strike" prior. (Reporter's Transcript, Volume 9, pages 2309-2310, hereinafter referenced 9RT 2309-2310.) Later that same day, he was found guilty of first degree murder, in violation of § 187, as charged in Count 1. Jurors found Mr. Farley did not personally use a firearm within the meaning of § 12022.53, subdivisions (b), (c) or (d). (9RT 2314.) Jurors did find two special circumstance allegations within the meaning of § 190.2, subdivision (a)(17) to be true, namely that Mr. Farley was engaged in the commission of the crimes of burglary and robbery. Jurors further found the offense was committed for the benefit of, or at the direction of, or in association with a criminal street gang with the specific intent to promote, further and assist in criminal conduct by gang members, within the meaning of § 186.22, subdivision (b)(1). (9RT 2314-2315.) Jurors further found Mr. Farley was a principal within the meaning of §§ 12022.53, subdivisions (b), (c), (d), and (e)(1). (9RT 2315.)

Craig Farley was also found guilty of robbery in violation of § 211, within the meaning of § 212.5, subdivision (a) as charged in Count 2. (9RT 2315-2316) Enhancements within the meaning of §§ 186.22, subdivision (b)(1) and 12022.53, subdivisions (b), (c), (d) and (e)(1) were also found true. (9RT 2316.) As to Count 2, jurors found Mr. Farley did not personally use a firearm within the meaning of § 12022.53, subdivisions (c) and (d). (9RT 2316-2317.)

As to Count 3, jurors returned a guilty verdict as to first degree burglary in violation of § 459 within the meaning of § 460 and found another person, other than an accomplice, was present in the residence during the commission of the burglary within the meaning of § 667.5, subdivision (c)(21). Jurors also found true the gang allegation within the meaning of § 186.22, subdivision (b)(1) and finally found Mr. Farley did not personally use a firearm during the commission of the residential burglary (§ 12022.5(a).) (9RT 2313-2318.)

On January 27, 2012, this Court heard and granted Craig Farley's *Marsden* [2] motion and appointed current counsel for the purpose of researching and preparing, if meritorious, a motion for new trial to supplement the 29 page letter written by the defendant to the court and considered by the court as a motion for new trial.

The instant motion supplements Mr. Farley's previous pro per filing.

STATEMENT OF FACTS

Current counsel was not present at the trial, but has reviewed 9 volumes of the reporter's transcript of trial, trial exhibits, the discovery in this case. Since this court and the prosecutor were present at the trial, rather than summarize the testimony and exhibits, counsel will provide citations to those portions of trial transcripts relevant to the arguments set forth in this motion for new trial and where appropriate, attach copies of the relevant documents.

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

The right to make a motion for new trial is statutory. Penal Code section 1181 provides in relevant part:

> **§ 1181. When court may grant new trial; Modification of verdict, finding, or judgment; Affidavits and postponement when motion for new trial on ground of newly discovered evidence; Relief when transcription of phonographic report of trial impossible**
>
> When a verdict has been rendered or a finding made against the defendant, the court may, upon his application, grant a new trial, in the following cases only:
>
> **3.** When the jury has separated without leave of the court after retiring to deliberate upon their verdict, or been guilty of any misconduct by which a fair and due consideration of the case has been prevented;

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2 *People v. Marsden* (1970) 2 Cal.3d 118.

> **6.** When the verdict or finding is contrary to law or evidence, but if the evidence shows the defendant to be not guilty of the degree of the crime of which he was convicted, but guilty of a lesser degree thereof, or of a lesser crime included therein, the court may modify the verdict, finding or judgment accordingly without granting or ordering a new trial, and this power shall extend to any court to which the cause may be appealed;
>
> **8.** When new evidence is discovered material to the defendant, and which he could not, with reasonable diligence, have discovered and produced at the trial. When a motion for a new trial is made upon the ground of newly discovered evidence, the defendant must produce at the hearing, in support thereof, the affidavits of the witnesses by whom such evidence is expected to be given, and if time is required by the defendant to procure such affidavits, the court may postpone the hearing of the motion for such length of time as, under all circumstances of the case, may seem reasonable.

A motion for new trial is addressed to sound discretion of the court. (*People v. Beard* (1956) 46 Cal.2d 278, 282; *People v. Quaintance* (1978) 86 Cal.App.3d 594, 602.) The ruling of the trial court will not be disturbed except for clear abuse of discretion. (*People v. Martinez* (1984) 36 Cal.3d 816, 821; *People v. McGarry* (1954) 42 Cal.2d 429, 432-433.)

The standard of review by a trial court acting under Penal Code § 1181 in deciding upon a motion for new trial is different from the standard used by an appellate court under the same section. In ruling upon a motion for a new trial, the trial court is required to independently weigh the evidence, but an appellate court will not set aside the verdict if there is any substantial evidence to support it. (*Veitch v. Superior Court* (1979) 89 Cal. App. 3d 722, 726; *People v. Drake* (1992) 6 Cal.app.4th 92, 98.) The function of the appellate court is to determine whether there is substantial evidence, including reasonable inferences derived therefrom, to support the finding actually made, and the decision of the trial court is not to be reversed absent a showing of clear abuse of discretion. (*People v. Longwith* (1981) 125 Cal

App 3d 400, 414.)

GENERAL PRINCIPLES AND LAW CONCERNING EFFECTIVE ASSISTANCE OF COUNSEL

There are, despite the limiting language of § 1181, nonstatutory grounds for a new trial. (*People v. Simon* (1989) 208 Cal.App.3d 841, 847.) As can be seen below, various claims are based in whole or in part on ineffective assistance of counsel. Although § 1181 enumerates nine grounds for ordering a new trial and expressly limits the grant of a new trial to those listed grounds – grounds which do not include ineffective assistance of counsel – appellate courts have held that this section should not be read to limit the constitutional duty of trial courts to insure that defendants are accorded due process of law. (*People v. Mayorga* (1985) 171 Cal.App.3d 929, 940; *People v. Davis* (1973) 31 Cal.App.3d 106, 109.)

Because issues are presented to this court concerning ineffective assistance of counsel, a review of general principles, under both state and federal law, is instructive.

Pursuant to both the Sixth Amendment to the United States Constitution as applied to the states through the Due process Clause of the Fourteenth Amendment (e.g., *Powell v. Alabama* (1932) 287 U.S. 45, 68-71 [77 L.Ed.2d 158, 53 S.Ct. 55]; *Holloway v. Arkansas* (1978) 435 U.S. 475, 481-487 [55 L.Ed.2d 426, 98 S.Ct. 1173]) and article I, section 15 of the California Constitution (e.g., *People v. Ledesma* (1987) 43 Cal.3d 171, 215; *People v. Chacon* (1968) 69 Cal.2d 765, 773-774, *overruled on other grounds, People v. Doolin* (2009) 45 Cal.3d 390), a defendant in a criminal case has the right to the assistance of counsel.

This constitutional guarantee "entitles the defendant not to some bare assistance, but rather to effective assistance." (*People v. Ledesma, supra,* 43 Cal.3d at p. 215; accord *Maxwell v. Superior Court* (1982) 30 Cal.3d 606, 612, *overruled on other grounds, People v. Doolin* (2009) 45 Cal.3d 390; *Holloway v. Arkansas, supra,* 435 U.S. at p. 481; *People v. Chacon, supra,* 69 Cal.2d at pp. 773-774 [discussing

both state and federal constitutional rights].)

An accused in a criminal case has a constitutional right to the assistance of counsel. (U.S. Const, Amend. VI: Ca. Const., art. I, § 15.) In order for the right to have meaning, however, counsel must be effective. (*Strickland v. Washington* (1984) 466 U.S. 668, 686 [80 L.Ed.2d 674 104 S.Ct. 2052]; *People v. Pope* (1979) 23 Cal.3d 412, 421, *overruled on other grounds, People v. Berryman* (1993) 6 Cal.4th 1048; *People v. Ledesma, supra,* 43 Cal.3d at p. 215.) An accused is entitled to "the reasonably competent assistance of an attorney acting as his diligent conscientious advocate." (*Ibid; In re Cordero* (1988) 46 Cal.3d 161, 180.)

Under this standard of competency, a defendant "may reasonably expect that before counsel undertakes to act at all he will make a rational and informed decision on strategy and tactics founded on adequate investigation and preparation." (*People v. Soriano* (1987) 194 Cal.App.3d 1470, 1479; *In re Hall* (1981) 30 Cal.3d 408, 426; *People v. Frierson* (1979) 25 Cal.3d 142, 166.)

An accused's claim of ineffective assistance of counsel must met two prongs; first that counsel's performance was deficient when reviewed by an objective standard of reasonableness under prevailing professional norms (*see People v. Ledesma, supra,* 43 Cal.3d at p. 216; *People v. Fosselman* (1983) 33 Cal.3d 572, 583-584) and second, that there has been prejudice. (*Strickland v Washington, supra,* 466 U.S. at pp. 691-692; *People v. Pope, supra,* 23 Cal.3d at p. 425; *People v. Jackson* (1996) 13 Cal.4th 1164, 1217, *cert. denied,* 520 U.S. 1216 [137 L.Ed.2d 830, 117 S.Ct. 1705] (1997).)

The standard against which counsel's effectiveness must be measured is that of a reasonably competent" attorney who acts as a "diligent, conscientious advocate." (*See People v. Ledesma, supra,* 43 Cal.3d at p. 215; *United States v. DeCoster* (D.C. Cir. 1973) 487 F.2d 1197, 1202.) Although great deference is accorded to tactical decisions of a trial counsel in order to avoid second-guessing tactics (*see In re Fields* (1990) 51 Cal.3d 1063, 1069-1070; *In re Cordero, supra,* 46 Cal.3d at p.180; *People*

v. Ledesma, supra, 43 Cal.3d at p. 216), "[D]eference is not abdication." (*In re Fields, supra,* 512 Cal.3d at p. 1070.)

The test for prejudice under the second prong of *Strickland* is not only of outcome determination. The pertinent inquiry is "whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair." (*Lockhart v. Fretwell* (1993) 506 U.S. 364, 372 [122 L.Ed.2d 180, 113 S.Ct. 838]; *In re Avena* (1996) 12 Cal.4th 694, 722.) Focus only on outcome, without attention to whether the proceeding was fundamentally unfair or unreliable is defective. (*Lockhart v. Fretwell, supra,* 506 U.S. at p. 369.) Given the negligible DNA evidence connecting Craig Farley to the homicide, the lack of identification of Craig Farley by witnesses who saw the person(s) who entered and ran from Jonathan Pleasant's apartment on the morning of June 29, 2010, it cannot be said that the failure to present the evidence at issue did not prejudice Craig Farley.

In addition to ineffectiveness claims in the argument concerning insufficiency of the evidence, three additional claims of ineffectiveness are raised: (1) counsel's failure to present evidence of third party culpability; (2) counsel's failure to present evidence concerning the live line-up on September 17, 2010; and (3) counsel's failure to present evidence concerning the reason for Craig Farley's trip to Louisiana and communications with his family about criminal proceedings and Pierre Terry.

Craig Farley makes this motion for new trial based on the following claims:

(1) The lack of sufficient evidence to support the convictions;

(2) The failure to obtain and present of evidence concerning Craig Farley's trip to Louisiana and computer searches done by Mr. Farley while in Louisiana to rebut the consciousness of guilt instruction and argument by the prosecutor;

(3) The failure to present evidence of third party culpability, namely that Leroy Thomas, and not Craig Farley, committed the murder of Jonathan Pleasant and discovery of new evidence;

(4) The failure to present evidence of lack of identification by percipient witnesses during the live line-up;

(5) Juror misconduct during the prosecution's final argument; and

(6) The cumulative impact of the above errors deprived Craig Farley of his state and federal constitutional rights to a fair trial, to due process, to confront his witnesses, and to effective assistance of counsel.

ARGUMENT

I

THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE VERDICTS AND TRUE FINDINGS

Both in his 29 page letter to this Court and in this motion, Craig Farley moves for a new trial because there was insufficient evidence to convict him of the murder burglary, and robbery of Jonathan Pleasant.

In ruling on a motion for new trial based on insufficiency of the evidence, the court must consider conflicts and inconsistencies in the evidence and the credibility of the testimony of witnesses. A long-line of California cases have supported the proposition that in arriving at a decision on a motion for new trial, the court must use its own discretion as distinguished from the conclusions reached by the jury. Assessing the weight of the evidence is exclusively the province of the trial court, not the appellate court. (*People v. Sarazzawski* (1945) 27 Cal. 2d 7, 15, *overruled on other grounds, People v. Braxton* (2004) 34 Cal. 4th 798 ; *People v. Bobo* (1960) 184 Cal.App.2d 285, 291.)

This court can grant a motion for a new trial where the evidence is legally sufficient and even where the only evidence is that of the prosecution. (*See People v. Sarazzawski, supra,* 27 Cal. 2d at p. 16; *Veitch v. Superior Court, supra,* 89 Cal. App. 3d 722.) In ruling on a motion for new trial based on insufficiency of the evidence, the examination of the record by the trial court is independent; all of the evidence is examined to determined to determine whether it is sufficient to prove each required element beyond a reasonable doubt. (*Porter v. Superior Court* (2009) 47 Cal.4th 125, 133.)

Jurors are not the sole judges of credibility. In *People v. Robarge* (1953) 41

Cal. 2d 628, the trial court was found to have misconceived its duty and failed to give the defendant the benefit of proper review of evidence where, in ruling on motion for new trial, it adhered to rule that jury are sole judges of credibility of witnesses to extent that, though court disbelieved what witness may have said, it stated that it was not in a position to upset the verdict of the jury if there was sufficient evidence on which jury could base their decision.

While it is true that it is the exclusive province of jury to find facts, it is duty of trial court to see that this function is intelligently and justly performed, and in exercise of its supervisory power over the verdict, the court, on motion for a new trial, should consider probative force of evidence and satisfy itself that evidence as a whole is sufficient to sustain verdict. (*People v. Robarge, supra,* 41 Cal. 2d at p. 633.)

The statement that "the Court sits as a thirteenth juror" does not properly describe the function of trial judge in passing on a motion for new trial, since it is his or her province to see that jury intelligently and justly performs its duty, and, in exercise of a proper legal discretion, to determine whether there is sufficient credible evidence to sustain verdict. (*Ibid.*)

In preparing to rule on Mr. Farley's motion for new trial, this court may draw inferences opposed to those at trial, and where the only conflicts consist of inferences deduced from uncontradicted probative facts, the court may resolve them in determining whether case should be retried. (*See People v. Sheran* (1957) 49 Cal. 2d 101, 107-108.)

In passing on motion for new trial, it is not only the power but also the duty of trial court to consider the weight of the evidence. (*People v. Borchers* (1958) 50 Cal. 2d 321, 328, superseded by statute as stated in *People v. Spurlin* (1984) 156 Cal. App. 3d 119.) As discussed in greater detail below, the weight of the evidence, particularly relating to the lack of identification by witnesses and the fact that at a crime scene where there was a great deal of blood and an apparent struggle, no blood was found matching Craig Farley, the weight of the evidence failed to support the

Weight

verdicts.

Where a motion for new trial in criminal case is made on ground that verdict is contrary to evidence, it becomes judge's duty to determine whether, in his or her opinion, there is sufficient credible evidence to support verdict, and in performing this function he or she has broad discretion and is not bound by conflicts in evidence. (*People v. Jaramillo* (1962) 208 Cal. App. 2d 620, 627.)

The fact that a defendant may be said to be entitled to two decisions on the evidence, one by jury and the other by the court on motion for new trial, does not mean that the court should disregard the verdict or that it should decide what result it would have reached if the case had been tried without a jury, but means instead that it should consider the proper weight to be accorded to the evidence and then decide whether or not, in its opinion, there is sufficient credible evidence to support the verdict. (*People v. Risenhoover* (1968) 70 Cal. 2d 39, 57-58.)

This court is not bound by the jury's decision as to conflicts in the evidence or inferences to be drawn. Rather, this court is under a duty to give Craig Farley the benefit of its independent conclusion as to the sufficiency of credible evidence to support the verdict. (*See Veitch v. Superior Court, supra,* 89 Cal App 3d at pp. 726-727.)

A conviction violates due process if it is not supported by substantial evidence. (*Jackson v. Virginia* (1979) 443 U.S. 307 [61 L.Ed.2d 560, 99 S.Ct. 2781].) In the instant case, the prosecution's evidence consisted of the following: (1) Craig Farley's presence at Pleasant's apartment on the night before the shooting and his expected arrival at the apartment at some time the following morning; (2) Craig Farley's DNA on a roll of duct tape found in the bathroom in Pleasant's apartment; (3) tracking of Craig Farley's cell phone activity/cell towers; and (4) his escape while in custody in Louisiana.

This evidence, and inferences drawn from this evidence, was insufficient to prove that Craig Farley was present in Jonathan Pleasant's apartment at the time of

the shooting. Despite Esther Magnus' testimony about not previously seeing duct tape in the apartment, there was ample evidence that Mr. Pleasant sold marijuana and that duct tape is often used to package marijuana. This, combined with the fact that Craig Farley had clearly been in the apartment in the past, does not make the existence of his DNA on the duct tape proof of his involvement in the murder. This is particularly true when one reviews the testimony and reports of criminalist Deborah Blackwell about the many items on which Craig Farley was not a contributor. For example, according to "Supplemental Report I" prepared by Ms. Blackwell and dated March 10, 2011:

1. Craig Farley was excluded as a possible source of DNA obtained from the red stain from the plastic sheet of artwork in the living room (Item 71) of Jonathan Pleasant's apartment;
2. Craig Farley was excluded as a possible source of DNA obtained from the red stain from the west wall of the living room (Item 60) of Jonathan Pleasant's apartment; [3/]
3. Craig Farley was excluded as a possible source of DNA obtained from the red stain from the bathroom door trim (Item 65) of Jonathan Pleasant's apartment;
4. Craig Farley was excluded as a possible source of DNA obtained from the apparent blood stain from the south wall of the living room (Item 57) of Jonathan Pleasant's apartment; and
5. Craig Farley was excluded as a possible source of DNA obtained from the red stain from the bathroom floor (Item 64) of Jonathan Pleasant's apartment.

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3 In Ms. Blackwell's subsequent report dated April 5, 2011, this sample was reported to match an individual identified as David Neil Foster.

According to Deborah Blackwell's report of January 12, 2012, titled "Supplemental Report 3":

1. Craig Farley was excluded as a possible major contributor of the mixture of DNA obtained from the locking/handle area of the safe (Item CS49-2) of Jonathan Pleasant's apartment;
2. Craig Farley was excluded as a possible major or mid-level contributor of the mixture of DNA obtained from the locking/handle area of the safe (Item CS49-3(2)) of Jonathan Pleasant's apartment;
3. Craig Farley was excluded as a possible source of the predominant DNA in the swab of the collar and hood strings (Item 127-1);
4. Craig Farley was excluded as a possible source of the predominant DNA in the swab of the cuffs (Item 127-2);
5. Craig Farley was excluded as a possible source of the predominant DNA in the swab of the baseball cap (Item 5);
6. Craig Farley was excluded as a possible source of the predominant DNA in the swab of the ends of the bandana and remainder of the bandana (Item 27-1 and 2);
7. Craig Farley was excluded as a possible source of the predominant DNA in the swab of the handcuff key (Item 37-1);
8. Craig Farley was excluded as a possible source of the DNA from thee apparent blood from the carpet in the hallway (Item 38), the red stain from the south wall of the living room (Item 57), the red stain from the exterior of the front door (Item 58), the red stain from the hallway closet door (Item 61), the red stain from the south wall in the hallway (Item 62), and the red stain from the exterior of the east bedroom door (Item 66) in Jonathan Pleasant's apartment;
9. Craig Farley was excluded as a possible source of the predominant DNA in the swab of the handcuffs (Item 40-1);

10. Craig Farley was excluded as a possible contributor to the mixture obtained from the swab of handgun slide/barrel return spring (Item 41-1);
11. Craig Farley was included as a possible major contributor to the mixture from the swab of the roll of duct tape (Item CS56-1);
12. Craig Farley was excluded as a possible source of the DNA obtained from the red stain from the west wall of the living room (Item 60) of Jonathan Pleasant's apartment;
13. Craig Farley was excluded as a possible source of the predominant DNA obtained from the red stain from the bathroom floor (Item 64) of Jonathan Pleasant's apartment;
14. Craig Farley was excluded as a possible source of the predominant DNA obtained from the red stain from the bathroom floor (Item 65);
15. Craig Farley was excluded as a possible source of the DNA obtained from the red stain from the plastic sheet of artwork in the living room (Item 71);
16. Craig Farley was excluded as a source of the DNA found from the debris from Jonathan Pleasant's right hand fingernail scrapings (Item 92);
17. Craig Farley was excluded as a source of the DNA found from the debris from Jonathan Pleasant's left hand fingernail scrapings (Item 93-1);
18. Craig Farley was excluded as a source of the DNA found from the debris from Jonathan Pleasant's left hand fingernail scrapings (Item 93-2);
19. Craig Farley was consistent with being the source of detected DNA types in the low-level DNA results obtained from the military-style boot for a left foot (Item 98-L) and right foot (Item 98-R). It should be noted that these boots were military-type boots with metal on the left foot and "C.L. FARLEY" imprinted on the metal tag and were recovered during

the search of Craig Farley's home in San Diego;

20. Craig Farley was excluded as a possible major contributor to the mixture of DNA results obtained from the swab of the camouflage cap (Item 101).

In summary, Craig Farley was a major contributor to only two items; the roll of duct tape found in the bathroom of Jonathan Pleasant's apartment and his (Farley's) own boots. Hardly the type or magnitude of evidence to convict given the amount of blood in the apartment in which he was alleged to have shot and killed Jonathan Pleasant. It bears remembering that there is no evidence of Pleasant's blood on Craig Farley's clothing, including his shoes seized at the time of his arrest, or in his car.

To the degree that the extent of this information – the lack of Craig Farley's DNA found on any item but a roll of duct tape that, incidentally had no blood on it – was not emphasized by counsel in presenting the defense, Craig Farley maintains trial counsel failed to effectively present this very important DNA evidence.

A second category of evidence on which there was a great deal of emphasis, both in the presentation of evidence and in the prosecutor's argument to the jury, was cell phone and cell tower evidence. Three civilian witnesses, from various service providers, were called by the prosecution: (Norman Ray Clark (Sprint-Nextel), Raymond McDonald (T-Mobile) and Elizabeth Faraimo (Cricket). Even more extensive was the testimony from Detective Paul Conley whose focus was on the calls made from the afternoon to the evening of June 28 and to approximately 1:00 p.m. on June 29, 2010. He also reviewed the cell site data from Sprint. (8RT 1874.) He identified calls made from (619) 218-8557 (determined to be Craig Farley's cell phone) to Jonathan Pleasant's number and researched, using MapQuest, cell site information for the various calls to try to plot out where the towers were. (8RT 1797-1800.) He testified that on June 29, 2010, at 11:30 am, a 59 second call from (619) 218-8557 was associated with a cell site located 1.5 miles from 7240 El Cajon. He

was able to determine there were cell towers located on the front of the building, the Roman Villa Apartments, located at 7240 El Cajon Blvd.. (8RT 1803-1804.)

Raymond McDonald, Senior Manager of the Law Enforcement Compliance Relation Group at T-Mobile, explained during his direct examination by the prosecution that cell sites are typically set up in 3 sectors. They typically, on the average, go out a 2 miles. Generally speaking, the radius of how far away someone is from the cell site when they make the call is about a mile and a half, two miles. (6RT 1098-1100.) Clearly then, the fact that there was a cell tower located on the front of the apartment building at 6240 El Cajon and the fact that (619) 218-8557 "pinged" at that cell tower does not mean that the person holding (619) 218-8557 was at 7240 El Cajon Blvd. at the time of the call.

But that is far from how the prosecution characterized the cell phone evidence. In his argument to the jury, Deputy District Attorney Runyon told jurors, with regard to the phone activity between Jonathan Pleasant's phone (619-366-0231) and Craig Farley's phone (619-218-8557), the following:

> And if those call detail records weren't enough for you, go back to Don Holmes' exhibit that he prepared for us and go back and look at the times. Okay. As he's got that phone and he's tracking that phone on the date of the 29th, where is it coming to rest right after 11:30? At that particular cell site. Where is that cell site? At 7240 El Cajon Boulevard. The cell sites are telling us where he is going, the cell sites are telling us where he is at this time period. (9RT 2147.)

That's not at all what the cell sites are "telling us."

In his final closing argument, the prosecutor once again characterized the evidence about the cell sites as showing Craig Farley was at 7240 El Cajon Blvd, still with no objection by trial counsel:

> And to make matters even worse for Mr. Farley, with all the cell phone activity that you have, what's the one time period that his cell phone goes dark? What was it for, like 11 minutes or so, that extended time period where there is no activity on his cell

> phone. Why isn't there any activities on his cell phone during that time period when his cell is right at that location? Because he and Mr. Terry are in the process of burglarizing, robbing and eventually murdering Mr. Pleasant. He was at that location with that cell site at 11:30. The call doesn't come in until 11:44 for 911. (9RT 2272.)

But the prosecution's own evidence showed that Craig Farley could have been in an area within a two mile radius of the apartment complex, not at the apartment building at the time of the shooting.

Attached as Exhibit G to this motion is the declaration of investigator Michael Newman. As this court can see in attachments 1 and 2 to the declaration, a radio of 2 miles represents a substantial area in which a cell phone could have "pinged" off the cell tower at the Roman Villa Apartments. This area, very close to (within 2 miles) of San Diego State University is not only a large area geographically, it is one that is dense with businesses and residences as well as buildings associated with the University. A review of the photographs attached to the Newman declaration shows that this is a busy residential area as well as a commercial area with businesses in strip malls. Again, the scope of the area in which Craig Farley's cell phone could have been physically when it "pinged" the cell tower attached to the apartment building at 7240 El Cajon Blvd. was not presented at trial by the defense. Instead, jurors were left to believe that Mr. Farley was at 7240 E Cajon because his cell phone "pinged" on the cell tower attached to the building.

Furthermore, witnesses did not identify Craig Farley in either the live or photo lineups. "It is a familiar rule that 'in order to sustain a conviction the identification of the defendant need not be positive. [Citations.] Testimony that a defendant "resembles" the robber [citation] or "looks like the same man" [citation] has been held sufficient. The testimony of one witness is sufficient to support a verdict if such testimony is not inherently incredible. [Citation.]" (*People v. Barranday* (1971) 20 Cal. App. 3d 16, 22.) As argued in greater detail below, not only was the evidence of identification insufficient, trial counsel was ineffective for failing to present

evidence that no witness had identified Craig Farley during the live line-up on September 27, 2010.

As compelling is the fact that when Mark Dobie came into Jonathan Pleasant's apartment after hearing the shot and finding Jonathan Pleasant had been shot, Pleasant said, "They got me, oh God, they shot me." (3RT 415.) [4/] According to Esther Magnus, Craig Farley had been at the apartment the night before and on other occasions. Jonathan Pleasant knew Craig Farley and yet, when he was dying, he failed to name Craig Farley, or "Icky" as his assailant and instead said "they" or "he shot me."

Craig Farley acknowledges that there was evidence concerning his escape from custody while in Louisiana, however this evidence (as jurors were instructed) could be used only to support an inference of consciousness of guilt, not to prove guilt. It was not, particularly when compared to the above evidence, sufficient to support the verdicts. The prosecution's evidence was entirely circumstantial and while circumstantial evidence can support a verdict of guilty, it did not in this case. The prosecution's evidence equally supported a verdict of not guilty. There was insufficient evidence to support the verdicts on Counts 1-3 as well as the true findings.

A conviction must be reversed for insufficiency of evidence under *Jackson* and *People v. Johnson* (1980) 26 Cal.3d 557, unless, in light of the whole record, there is "substantial" evidence of each of the essential elements. (*Id.* at pp. 576-577; see also *People v. Staten* (2000) 24 Cal.4th 434, 460.) There was insufficient evidence to support the verdicts in this case.

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4 Mark Dobie was unsure if Jonathan Pleasant said "they" or "he" in relation to this statement. (3RT 456, 470.) In fact, at the preliminary hearing, he testified Pleasant said "they."

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II

TRIAL COUNSEL FAILED TO PRESENT EVIDENCE OF LACK OF IDENTIFICATION OF CRAIG FARLEY IN THE LIVE LINE-UP

Although evidence of photo six-packs was presented at trial, there was no evidence presented by either the prosecution or defense about the live-lineup in which Craig Farley participated.

On September 10, 2010, Craig Farley was arranged in San Diego Superior Court. According to the report of Detective Paul D. Conley (see Bates 000307-308), Sergeant Dolan, Detective Conley and Deputy District Attorney Michael Runyon were present at the arraignment. Mr. Runyon petitioned the court for a "no hair cut" order pending the live line-up. The petition was granted; an order was issued to complete the lineup in 14 days. San Diego Sheriff's Deputy Browning was contacted to schedule the live line-up which was thereafter set for September 17, 2010.

On September 17, 2010, witnesses Esther Magnus (Jonathan Pleasant's girlfriend), Corey Wishom (a friend who had visited Pleasant that morning and who was present when two men came to the apartment) and Breanna Sandal-Reed (sister of one of Pleasant's neighbors who was present, in her car, when she saw two men leaving the complex; she thought there had been a robbery) came to police headquarters, met with detectives from Homicide Team III, and were driven to the Central Jail to view the live line-up. They were admonished prior to viewing the line-up.[5/]

Each of the participants in the live line-up was told to step to the center of the stage and face the front and then to make a quarter turn to their right so the witnesses could view them from all sides. They were then told the walk across the stage, returning to the center. Each was told to utter the phrase, "This is my brother, he's

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5 Craig Farley was represented by Alternate Public Defender Liesbeth Vandenbosch, not Jeffrey Martin, during the live line-up.

cool."[6/] Craig Farley was in the # 4 position.

Following the completion of the live line-up, Magnus, Wishom and Sandal-Reed filled out line-up identification cards. Esther Magnus identified #4. This is not a surprise since she was present in the apartment on the night before the shooting and saw Mr. Farley come and discuss buying marijuana with Jonathan Pleasant. This identification was meaningless because Ms. Magnus was not present in the apartment during the time of or immediately before the shooting. As this Court will recall, Jonathan Pleasant and Esther Magnus were going to go to the Del Mar Fair on June 29, 2010. She spent the night of June 28 at his apartment and the morning of the 29th, their plan was that they would go to the bike shop and then to her apartment so she could get ready and then they would go to the Fair. (2RT 258, 285.) At about 9:45 a.m., as she was making breakfast, a neighbor stopped by; he and Pleasant smoked marijuana. (2RT 287, 288.) Pleasant said he had to wait for someone (the person who had been at the apartment the night before), who Magnus believed was Farley; Magnus decided to leave and go to the bike shop herself and to meet Pleasant later at her apartment. (2RT 288-290.) Magnus testified that she left at about 11:15; she drove her car to the bike shop and then home. Pleasant was to meet her at her house no later than 12:15 p.m.. (2RT 290.) Clearly the identification by Magnus of Mr. Farley in the live line-up was an identification of him as the person who was in

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6 As this Court will recall, Corey Wishom testified at trial that this phrase was uttered by the first of the two males who came to Jonathan Pleasant's apartment just prior to Wishom leaving on the morning Pleasant was shot and killed. (RT 659.) What is particularly important is that during his interview on August 11, 2010, Leroy Thomas told law enforcement that on that morning, Pierre Terry didn't say where they were going, he just said "alright bro I will hit you up later." (Bates 001604.) He also referred to Terry as "my little partner, my little guy." (Bates 001606.) In an earlier interview, Thomas said he spoke with Terry every day and lived next door to him. (Bates 00544.) There was no evidence that Craig Farley and Pierre Terry were "like brothers" or were "bros."

the apartment the night before and not of someone who was at Pleasant's apartment on June 29, 2010 at the time of the shooting.

Breanna Sandal-Reed was an important witness because she was in her car, at the apartment complex, immediately after the shooting. Her brother Mark Dobie lived in the area of 7240 El Cajon Blvd on June 29, 2010. (5RT 994.) She would visit him at his apartment and would arrange for him to babysit her children who were 8 and 3 years old in June 2010. During late morning on June 29, 2010, she made arrangements to drop her children off at her brother's apartment. (5RT 995.) She arrived at the location with her children; she was driving a 2005 white Dodge Magnum and parked at back alley of the complex; using her cell phone, she called her brother to let him know she was there. (5RT 996-997.) She did not get out of her vehicle. She saw her son Isaiah get out of the front seat to get his scooter which was in the trunk. She then saw people running really fast down the stairs. (5RT 999.) Sandal-Reed called her brother and told him it looked like someone had been robbed or something; she then immediately hung up to see what had happened. The two men were black and in their 20's; they were about four steps down from the top of the staircase when she first saw them. (5RT 1000.) What drew her attention was they were running really fast and one of them had a backpack. She called her brother back to make sure it was safe for her kids to go in. (5RT 1001.) The two men got as close as six to eight feet from the driver's side of her car. (5RT 1003-1004.) Neither of the males said anything as they ran past her car; she tried to get a look at their faces, but didn't get a good look because it happened too fast. (5RT 1004.) Sandal-Reed testified at trial that the darker of the two males had braids or cornrows. She was familiar with the term "twists" or "twisties" which are different from braids or cornrows. (5RT 1005.) As they ran past, she had 10 second at most to make these observations. (5RT 1007.) She looked as they ran past her vehicle because they were running the same way where her son standing. (5RT 1007.)

Sandal-Reed was shown photo six-packs, but did not identify anyone. (5RT

1027-1028.) She participated in the live line-up on September 17, 2010, and again did not identify anyone. (See Exhibit "F", Bates 000314.) During the photo line-up, she pointed out two photos and indicated he may have been one of the people she may have seen run by. She picked #1 or #5 and then said "I don't know." She remembered telling the officer "I don't know." (5RT 1029-1036.) She did not see anyone depicted in Exhibit 88 (photo six pack shown to her on July 2, 2010) in court at trial. (5RT 1033, 1035.) Again, she did not identify anyone in the live line-up. (See Bates 000314, Exhibit "F".) When asked if any on the males in the live line-up looked familiar, she replied, "Number 6 was tall and had braids. He made me kind of think of the one guy but it was because he was tall. I don't think it's him." (Exhibit "F," Bates 000317.)

Corey Wishom, the third witness to view the live line-up, also failed to identify anyone. Wishom was a long-time friend of Pleasant and went to visit him on June 29, 2010 in order to buy marijuana. (4RT 626-627.) When he got to Pleasant's apartment, Mark Dobie and a female were inside; the female left a "split second" later. (4RT 631-636.) Dobie left a short time later; Pleasant began to describe the "product" he had. Wishom ordered a gram each of "double headband diesel" and "blackberry kush." (4RT 647-651.) Pleasant told Wishom about his plans to go to the Fair and as Wishom walked to the door and was saying goodbye, two black males arrived. As they stood by the metal security door, Pleasant said, "I was waiting for you." (4RT 655, 658.) As one of the males stepped into the apartment, Wishom heard him say, "This is my brother and he's cool" and pointed to the male behind him. (4RT 658.) The two men were black. JP did not make any introductions. The two men did not identify themselves to Wishom when they came in. The second guy was still outside, kind of coming in, when the first guy said he's cool" and pointed at him. (4RT 658.) Wishom testified at trial that he was "kind of squared off with the first male (they were facing one another; about 2 or two and a half feet away from one another). (4RT 662.) Wishom didn't look at the second male at all. (4RT 661, 662.)

Wishom thought he saw a tattoo on the man's arm when he reached into the backpack, but he did not get a good look at the tattoo. (4RT 668-670.) His testimony about the tattoos was confused at best. (4RT 570-676.) Wishom looked around the courtroom on the day he testified at trial and was not sure if he saw anyone in court that he had seen that day. (4RT 693-694.) He did not know if Farley was the male who was at Pleasant's apartment that day. (4RT 695.)

Evidence of the six-pack photo line-up shown to Wishom was presented at trial. At that six-pack line-up, Wishom picked the photo in the # 5 position as looking familiar. (4RT 724-727.) He did not tell the detective that the person in the # 5 position looked like the person who was at Pleasant's apartment on the day of the shooting. What he said was "looks familiar, like I've seen him on T.V. or something." (4RT 727.)

However, evidence of the live line-up was not introduced at trial. During the live line-up, Wishom said he was "about 80 percent" as to the identification of the person in the # 5 position, explaining "number 2 looks like the short one number 5 looks like taller 1." "You think 5 looks nervious looks fimilur." (Exhibit "F", Bates 000315-316.) He also said that the person in the # 2 position resembled the shorter person. (Exhibit "F", Bates 000322.)

The only person to identify Craig Farley in the live line-up was Esther Magnus who had left Pleasant's apartment long before the shooting and could not have possibly identified him as anything but someone who had been at the apartment at another time.

Trial counsel was ineffective for failing to present evidence that no witness had identified Craig Farley during the live line-up on September 27, 2010 should have been, but was not, presented to jurors.

III

TRIAL COUNSEL FAILED TO PRESENT EVIDENCE CONCERNING CRAIG FARLEY'S TRIP TO LOUISIANA AND INFORMATION HE RECEIVED REGARDING THE PROSECUTION AND ARREST OF PIERRE TERRY

Phone records for Craig Farley's phone showed he had frequent communication with his wife in Louisiana prior to traveling there with Shayla Moore. Exhibit A consists of a summary of Sprint Records shows calls between Craig Farley's phone (619) 218-8557) to Tamara Brumfield (504) 377-3510) between May 15 and June 14, 2010. Exhibit B contains a summary of such calls from June 15 to July 14, 2010.

As this court can see, the communication between Craig Farley and his wife Tamara Brumfield, who lived in Louisiana, was extensive. For example, between May 15 and June 14, 2010, there were 86 calls (or attempted calls) between the two. Between June 15 and July 5, 2010, there were 93 such calls or attempted calls. There was clearly a relationship between Mr. Farley and Ms. Brumfield and failure to present evidence of the scope of that relationship and the frequency of communication between them prior to Craig Farley traveling to Louisiana fell below the accepted level of competence.

However the frequency of phone calls between Craig Farley and Tamara Brumfield was not the only evidence that could and should have been presented at trial concerning Mr. Farley's travel to Louisiana and his actions while in Louisiana. As can be seen in the attached declarations of Carla Farley and Michael Farley (Exhibits D and E), Craig's parents, they spoke with their son while he was traveling and was in Louisiana about the search of their home. Mrs. Farley told her son Craig that the search was by homicide detectives and she also told him about the fact of Pierre Terry's arrest for the homicide. The fact that Craig Farley was conducting computer searches about the case and researching whether there was a warrant out for his arrest is not surprising given the information he was given by his parents.

The prosecutor characterized Craig Farley's travel to Louisiana as "jetting" the very next day, June 30, about a thousand miles, "two-thirds over the United States, all the way to Louisiana. Okay." (9RT 2221-2222.) He then argued the computer inquiries regarding Pierre Terry, "who's in jail" inquiries, dates of court hearings from databases. (9RT 2223.) This argument was particularly poignant when viewed in light of the comment of one of the juror's during prosecution's closing argument. (See discussion below for details of the juror's comment.)

Furthermore, during the prosecutor's closing argument concerning Craig Farley's computer searches while in Louisiana, Deputy District Attorney Runyon stated, "Now, it would have been fundamentally different for us if Mrs. Farley, who's been here every day, okay, in support of her son, which she has an absolute right to do. It would have been very, very different if Ms. Farley would have taken the witness stand ..." to which Carla Farley (Craig Farley's mother) responded, "I will." (9RT 2276.) Counsel for Craig Farley objected , after which Mrs. Farley again stated, "I will." This court then admonished Mrs. Farley and instructed the jury that it was not in any way to shift the burden to the defense, adding, "But it's fair to comment on the failure to call logical witnesses." (9RT 2276-2277.)

Both Carla and Michael Farley were logical witnesses on the issue of why their son went to Louisiana and their communications with him about the homicide at issue while he was in Louisiana. Such evidence would have been important to refute, at the very least address, the consciousness of guilt instruction and argument of counsel regarding Mr. Farley's trip to Louisiana.

IV

FAILURE TO PRESENT EVIDENCE OF THIRD PARTY CULPABILITY

On October 5, 2011, Deputy District Attorney Runyon asked to go to sidebar and stated there was a "material witness in the case, a Mr. Leroy Thomas." Mr. Runyon stated Leroy Thomas had been interviewed twice by SDPD officers and made statements about very detailed statements made to him by Pierre Terry as to what

Terry and Craig Farley did in this matter. (1RT 5.) Mr. Runyon stated that he initially intended to call Leroy Thomas a witness, however "after further legal analysis and tactical decisions, I do not anticipate calling him at all in regards to the Farley case." (1RT 5-6.) He explained he could not be 100% sure, but was 99.99% certain he would not be calling Thomas as a witness. (1RT 6.) Mr. Martin's response was that "the potentiality of Leroy Thomas being a witness creates lots of evidentiary issues, preparation issues – investigator issues. And if it's not to be an issue in tour case, I'm not going to expend the time, energy, and resources on that." (1RT 6.) This court's response was "That sounds like a plan." (1RT 6.)

Later in the hearing on *in limine* motions, Deputy District Attorney Runyon moved to exclude evidence of third party culpability. Counsel for Mr. Farley informed the court that there was evidence both from the preliminary hearing and discovery that pointed to a third party, David Foster, who was Jonathan Pleasant's half brother. (1RT 84.) He explained that according to Ms. Magnus, Foster was homeless at some point and lived in Jonathan Pleasant's apartment in March 2010, during which time Pleasant and Foster argued because it did not appear Foster was making any efforts to find a job and support himself. Foster was extremely angry and pushed his half brother, injuring his lip. According to Magnus, the two never really made up. (1RT 85.) Mr. Martin continued to explain that during the processing of Jonathan Pleasant's apartment, DNA from swabs of bloodstains recovered in the living room were determined to match Foster. "The ultimate argument is it seems that Ms. [sic] Foster has the same motive as anyone else in the universe of people that knew Mr. Pleasant, who was very openly a drug dealer and was indiscreet about making it known that he had a lot of marijuana in his apartment and had a lot of cash in that apartment, and that Mr. Foster's blood is, of course, recovered in the living room." (1RT 85-86.) Mr. Martin went on to argue that the evidence against Mr. Foster was very similar to the evidence against Craig Farley. (1RT 86.)

Deputy District Attorney Runyon opposed the introduction of third party

culpability evidence regarding David Foster. (1RT 88-94.) This Court granted the motion to exclude third party-culpability as to David Foster. No mention was made of Leroy Thomas.

The following is what we know about Leroy Thomas. On July 29, 2010, Thomas was interviewed following his arrest. During a Fourth Amendment search of his residence, officers found among other items, a pink make-up box containing handcuffs, black leather police style handcuff case, black motorcycle gloves, gun cleaning patches, a .40 caliber Smith & Wesson handgun with loaded magazine, a shoe box with 9mm magazine and loose 9 mm ammunition, one box of Remington .380 ammunition, two trays of 30-06 rifle ammunition, two 9mm Glock magazines with a bag of loose ammunition, two digital scales with marijuana residue, a Smith & Wesson gun case with two loaded .40 cal magazines, a tan pill bottle containing 50+ white pressed pills, two pill bottles with contents that "wreaked of marijuana," green pill bottle with unknown white pressed pill inside, and two cell phone chargers and one call phone. The .40 cal Smith & Wesson was firearm that had been reported stolen by victim Hogg on March 20, 2010. (Bates 000572.)

When asked about the Pleasant murder investigation, Thomas said he had nothing to do with the murder, but added, "I know which murder you are talking about. What about this though. If I am helping you out with what you need help with. If you can help me out, I can help you out. I can help you out. Yep, if you can help me out, I can help you out with this case. I can help you out like never before. (Bates 000542.) When told no promises could be made, Thomas added, "I would like to go home too." He explained he had previously had a "deal" in which "I got caught in the same kind of situation like what is going on right now. I solved the case. I got caught with some stuff and I helped the team out." (Bates 000542.) He explained he was not asking for money. "All I am asking for is to walk." (Bates 000543.) After repeating that he had "nothing to do with it," Thomas then explained that his "homie" Pierre Terry had spoken with him and said Craig Farley had come to get him and "it

all went bad." Terry allegedly told Thomas that "Craig had flipped out and ended by firing a shot." (Bates 000544.)

On August 11, 2010, Thomas was again interviewed and again said Terry had told him what happened and said "Man, shit went bad." (Bates 1605.) Thomas again said "No I did not have anything to do with this." (Bates 1605.) He denied providing either ammunition or a weapon to Pierre Terry. (Bates 1608.)

As discussed above, particularly in footnote 7, Wishom testified that when two men came to Pleasant's apartment as Wishom was leaving, one said, "This is my brother, he's cool." (RT 658-659.) The "brothers" or "bros" were Terry and Thomas. Thomas said during his interview on August 11, 2010 that on the morning of the shooting, Pierre Terry didn't tell him (Thomas) where they were going, he just said "alright bro I will hit you up later." (Bates 001604.) Thomas also referred to Terry as "my little partner, my little guy." (Bates 001606.) In an earlier interview, Thomas said he spoke with Terry every day and lived next door to him. (Bates 00544.) Again, there was no evidence that Craig Farley and Pierre Terry were "like brothers" or were "bros." It was Thomas and Terry who were close and "brotherly."

Attorney Martin should have moved to present evidence of third party culpability – the third party being not David Foster, but Leroy Thomas.

The above is information known to counsel for Craig Farley prior to trial. There is additional information now available about Leroy Thomas and his role in the homicide.

On November 3, 2011, following the verdicts in Craig Farley's case, an inmate by the name of Miguel Gonzaba was interviewed by DAI Ron Rea and Mr. Runyon about an incident in April 2011. Gonzaba had sent out "legal mail," the content of which had to do with another inmate (Pierre Terry) who was in another cell. Gonzaba admitted that when he sent out the "legal mail," knew it was a "green light" letter.

Miguel Gonzaba was interviewed again on December 13, 2011, this time not only with DAI Rea and Mr. Runyon, but with Gonzaba's attorney, Brian White.

Gonzaba stated that on April 15 or 17, 2011, he was in Module 6B at George Bailey Detention Facility and spoke with Little Pbrazy (spelling), who Gonzaba knew to be Pierre Terry. Gonzaba had been told by Don Diego that Terry was in custody for murder and Terry told Gonzaba that Pretty Boy (Leroy Thomas) was snitching against him. Gonzaba asked to see the paperwork about the "snitch" and later that same day, Terry showed it to him. Terry told Gonzaba that he and his partner were going to rob someone. When they got there, his crime partner went to use the bathroom and when he came out, they pulled out their guns. When the guy said, "I'm not giving you shit," Terry slapped the guy with his pistol which then broke. The guy sat back and Terry said he assumed the guy was reaching for his gun when Terry's partner shot him with a shotgun. Terry told Gonzaba that they got together some weed which they took out of the apartment in a backpack and in the process of leaving, Terry "fucked up, his hat." According to Terry, he and Pretty Boy were homeboys; neighbors and that Pretty Boy was the one who gave them the shotgun and was supposed to get half the weed.

Terry thought his mail was being read, so he went back to his cell, wrote a letter, and brought it back to Gonzaba to take care of. The package contained police reports, statements by Leroy Thomas, and a letter written by Terry to someone who was allegedly an attorney. The letter was put in the middle of the paperwork. Gonzaba said he'd handle it; he told Terry that he knew how to send paperwork out without deputies seeing it. Gonzaba admitted that the range of things that could happen as a result of this letter included murder. According to Gonzaba, Terry said he was trying to get Pretty Boy killed so he couldn't testify. Gonzaba then provided a detailed description of how legal mail is checked by deputies and sent out. After the deputy took the letter, Gonzaba hollered out to Terry, "it's in the air."

On January 19, 2012, Deputy District Attorney Runyon and DAI Rea met again with Miguel Gonzaba to ask some follow-up questions. Terry had told Gonzaba that the new statement by Leroy pretty much sealed his fate. "It's a wrap." The idea of

the letter being send out in "legal mail" was Gonzaba's; he knew it wouldn't be searched. The bulk of statements made in this interview was the same as in the previous interview of December 13, 2011. Gonzaba signed a Cooperation Agreement and agreed to testify in exchange for a sentence of between 4 and 11 years – a far cry from what he was facing.

The requirements for granting of a new trial based on newly discovered evidence are: (1) The evidence and not merely its materiality must be newly discovered; (2) the evidence may not be merely cumulative; (3) a different result must be probable on a retrial of the cause; (4) the party could not with reasonable diligence have discovered and produced it at the trial; (5) these facts must be shown by the best evidence which the case admits. (*People v. Warren* (1959) 175 Cal.App.2d 233; *People v. Trujillo* (1977) 67 Cal.App.3d 547.) As will be seen in the discussion below, each of these requirements has been met in Craig Farley's case.

Facts that are within a defendant's knowledge at the time of the trial are not newly discovered. (*People v. Miller* (1951) 37 Cal 2d 801; *People v. Greenwood* (1957) 47 Cal.2d 819.)

In *People v. Hall* (1986) 41 Cal.3d 826, the California Supreme Court set forth the standard our state courts apply in determining the admissibility of third party culpability evidence. The Court said: "To be admissible, the third-party evidence need not show 'substantial proof of a probability' that the third person committed the act; it need only be capable of raising a reasonable doubt of defendant's guilt. At the same time, we do not require that any evidence, however remote, must be admitted to show a third party's possible culpability." The Court went on to state that as it had observed in *People v. Mendez* (1924) 193 Cal. 39, 51, *overruled on other grounds, People v. McCaughan* (1957) 49 Cal.2d 409, "evidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant's guilt: there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime." (*People v.*

Hall, supra, 41 Cal.3d d. at p. 833.)

To be admissible, evidence of the culpability of a third party to demonstrate that a reasonable doubt exists concerning a defendant's guilt, such evidence must link the third person either directly or circumstantially to the actual perpetration of the crime. To assess an offer of proof concerning evidence of third party culpability, the court must decide whether the evidence could raise a reasonable doubt as to defendant's guilt and whether it is substantially more prejudicial than probative under Evidence Code § 352. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1325; *People v. Lynch* (2010) 50 Cal.4th 693, 756; *People v. McWhorter* (2009) 47 Cal.4th 318, 367-368.)

Evidence found in Thomas' residence combined with the close relationship between Thomas and Terry should have been presented as a third party culpability defense. Then, after Craig Farley's trial was over, it was learned that Leroy Thomas gave Pierre Terry a gun on or immediately before the day of the shooting of Jonathan Pleasant. This latter fact was not known, and could not have been known by trial counsel because the information from Gonzaba was not obtained until after Mr. Farley's trial. Evidence of Thomas' involvement in the homicide, particularly when combined with the evidence found in Thomas' residence at the time of the search, supports a new trial.

V

THE TRIAL COURT AND COUNSEL FOR CRAIG FARLEY FAILED TO OBJECT TO JUROR MISCONDUCT

Jurors were consistently told, both in pre-instructions and during the entire trial, that they were not to discuss the case outside the presence of all the other jurors during deliberations and that they were not to form an opinion about the case prior to deliberations.

During Deputy District Attorney Runyon's closing argument, when discussing Craig Farley's computer searches, the following truly remarkable interchange took

place:

> Why is he going to these databases? Because at the end of the day he's not just putting in Pierre Terry's name, is he? What other names did he put in when it came time to look for warrants? Who was he worried about for getting warrants?"
>
> UNIDENTIFIED JUROR: Himself
>
> MR. RUNYON: That's right, himself.
>
> Why am I looking up warrants for myself when I didn't do anything? On the other hand, if I did something and they got my homie, I'm worried that they're coming after me next. We know what we've got to do, right? We've got to get out of this hotel, we've got to move. But we don't have a car, it's totaled. We've got to go 60, 70 miles away. We've jut got to g et out of here. Okay. So it's not enough to get to Louisiana. After we're getting this information, okay, we're moving on, we're moving 60, 70 miles away, setting up in a new hotel. We' still pay cash at this new hotel. (9RT, see Exhibit C.)

No objection was made by counsel for Mr. Farley and this court failed to make any inquiry about this juror's obvious misconduct in forming an opinion about the case prior to deliberations and communicating that opinion to the prosecutor and other jurors during the prosecutor's closing argument.

The right to an unbiased jury predates Evidence Code § 1150. "The right to unbiased and unprejudiced jurors is an inseparable and inalienable part of the right to trial by jury guaranteed by the Constitution." (*People v. Galloway* (1927) 202 Cal. 81, 92.) The constitutional guarantee is to 12 impartial jurors. "For a juror to prejudge the case is serious misconduct." (*Clemens v. Regents of University of California* (1971) 20 Cal.App.3d 356, 360-361). Misconduct by a juror or jurors raises a presumption of prejudice (*People v. Tafoya* (2007) 42 Cal.4th 147, 192.) "The right to unbiased and unprejudiced jurors is an inseparable and inalienable part of the right to trial by jury guaranteed by the Constitution." (*Weathers v. Kaiser Foundation Hospitals* (1971) 5 Cal.3d 98, 110.)

In *People v. Johnson and Allen* (2011) 53 Cal.4th 60, the California Supreme Court restated the reality that a juror may hold an opinion at the outset of deliberations; it is "reflective of human nature." (*See also People v. Ledesma, supra,* 39 Cal.4th at pp. 729-730.) "We cannot reasonably expect a juror to enter deliberations as a *tabula rasa*, only allowed to form ideas as conversations continue. What we can, and do, require is that each juror maintain an open mind, consider all the evidence, and subject any preliminary opinion to rational and collegial scrutiny before coming to a final determination." (*People v. Johnson and Allen, supra,* 33 Cal.4th at p. 75.)

Although Penal Code § 1122 requires jurors not to form an opinion about the case until it has been submitted to them, "it would be entirely unrealistic to expect jurors not to think about the case during the trial . . . ." (*People v. Ledesma, supra,* 39 Cal.4th at p. 729.) What happened in Craig Farley's case was not a case of one juror merely "thinking about the case during the trial."

In *Grobeson v. City of Los Angeles* (2010) 190 Cal.App.4th 778, the Court held "I made up my mind during trial" was a statement of bias, showing that juror had prejudged the case. The same is true of the juror's state of mind in Mr. Farley's case.

Counsel respectfully maintains that this court had and obligation to discharge, or at the very least inquire about, this juror. A court may discharge a juror for good cause" at any time if the juror is found to be unable to perform his or her duty." "A juror who refuses to follow the court's instructions is 'unable to perform his duty' within the meaning of Penal Code section 1089." (*People v. Williams* (2001) 25 Cal.4th 441, 448.) Such instructions here included that each juror render a verdict "according to the evidence presented and the instructions of the court" (see Code Civ. Proc., § 232, subd. (b)), and that each juror "will consider all of the evidence, follow the law, exercise your discretion conscientiously, and reach a just verdict." "A juror who actually refuses to deliberate is subject to discharge by the court [citation] . . . ." (*People v. Engelman* (2002) 28 Cal.4th 436, 442, citing *People v. Cleveland* (2001)

25 Cal.4th 466, 484.) "A refusal to deliberate consists of a juror's unwillingness to engage in the deliberative process; that is, he or she will not participate in discussions with fellow jurors by listening to their views and by expressing his or her own views. Examples of refusal to deliberate include, but are not limited to, expressing a fixed conclusion at the beginning of deliberations and refusing to consider other points of view, refusing to speak to other jurors, and attempting to separate oneself physically from the remainder of the jury." *(People v. Cleveland, supra*, 25 Cal.4th at p. 485; see *People v. Engelman, supra*, 28 Cal.4th at p. 449.)

Jurors are to deliberate with an "open mind," however the juror who called out "himself" during the prosecutor's final argument had very clearly made up his mind prior to deliberations. It was error for this juror to continue to serve on the jury during deliberations. This court erred in not inquiring about and/or discharging that juror and trial counsel provided ineffective assistance for not objecting to this juror continuing on the jury.

VI

THE CUMULATIVE IMPACT OF THE ABOVE ERRORS DEPRIVED CRAIG FARLEY OF HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO A FAIR TRIAL, TO DUE PROCESS, TO CONFRONT HIS WITNESSES, AND TO EFFECTIVE ASSISTANCE OF COUNSEL

Where, as here, multiple errors occurred at trial, the court should consider together the cumulative prejudicial effect of these errors upon appellant. (*People v. Koontz* (2002) 27 Cal.4th 1041, 1094.) "'[A] series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error.' [Citation.]" (*People v. Cunningham* (2001) 25 Cal.4th 926, 1009.) Examined as a whole, both individually and collectively, the effect of the errors alleged herein deprived appellant of the constitutional right to a fair trial. (*In re Jones* (1996) 13 Cal.4th 552, 583.) Moreover, the number and magnitude of legal errors "raises the strong possibility the aggregate prejudicial effect of such errors was greater than the sum of the prejudice of each error standing alone."

PROOF OF SERVICE

I, Elizabeth A. Missakian, declare:

I am an attorney licensed to practice in the Courts of the State of California. My business address is P.O. Box 601879, San Diego, CA 92160.

On August 6, 2012, I electronically sent copies of the Motion for New Trial and Exhibits A-G to Deputy District Attorney Michael Runyon and Alternate Public Defender Jeffrey Martin.

On August 6, 2012, I personally placed copies of the Motion for New Trial and exhibits into the United States mail, with proper postage prepaid and addressed to:

Deputy District Attorney Michael Runyon
Office of the District Attorney
330 West Broadway
San Diego, CA 92101

Craig Farley, Booking No. 10770093A
Vista Detention Facility
325 South Melrose Drive
Vista California 92081

I declare under penalty of perjury that the foregoing is true and correct. Executed this 6th day of August 2012 at San Diego, California.

ELIZABETH A. MISSAKIAN

APPENDIX B

STATE COURT APPELLATE DECISION

Filed 11/14/14 P. v. Farley CA4/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. CRAIG FARLEY, Defendant and Appellant.	D062857 (Super. Ct. No. SCD229026)

APPEAL from a judgment of the Superior Court of San Diego County, Michael T. Smyth, Judge. Affirmed and remanded with directions.

Boyce & Schaefer and Laura Schaefer, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, Barry Carlton and James H. Flaherty III, Deputy Attorneys General, for Plaintiff and Respondent.

I.

INTRODUCTION

A jury found Craig Farley guilty of first degree murder (Pen. Code, § 187, subd. (a))[1] (count 1), robbery (§ 211) (count 2), and burglary (§ 459) (count 3). In addition, the jury found that Farley committed the murder while engaged in a robbery and a burglary, within the meaning of section 190.2, subdivision (a)(2). With respect to all three counts, the jury found that Farley committed the offenses for the benefit of a criminal street gang (§186.22, subd. (b)(1)). The jury further found that Farley committed each of the offenses while acting as a principal and another principal used a firearm (§ 12022.53, subds. (b), (e)(1)); while acting as a principal and another principal personally discharged a firearm (§ 12022.53, subds. (c), (e)(1)); and while acting as a principal and another principal personally used a firearm proximately causing great bodily injury and death (§ 12022.53, subds. (d), (e)(1)).[2] Farley also admitted that he had suffered a prior strike conviction.

On count 1, the trial court sentenced Farley to life in prison without the possibility of parole, plus a consecutive determinate sentence of 25 years to life. The trial court stayed execution of the sentences on the remaining counts pursuant to section 654.

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1 Unless otherwise specified, all subsequent statutory references are to the Penal Code.

2 The jury found not true allegations that Farley personally used a firearm as specified in section 12022.53, subdivisions (b), (c), and (d) (counts 1-3), and section 12022.5, subdivision (a) (count 3).

On appeal, Farley contends that the trial court erred in denying his motion for new trial, which was based on defense counsel's alleged ineffective assistance. Farley also contends that the trial court erred in permitting the People to present gang expert testimony; failing to question a juror about a potential instance of juror misconduct; permitting the People to present evidence of Farley's tattoos; and excluding potential third-party culpability evidence. In addition, Farley claims that the abstract of judgment should be amended to strike a parole revocation fine because Farley was sentenced to life without the possibility of parole.

We affirm the judgment, but direct the trial court to prepare a new abstract of judgment striking the parole revocation fine.

II.

FACTUAL BACKGROUND

A. *The murder*

Victim Jonathan Pleasant sold marijuana from his apartment. He often possessed considerable amounts of marijuana, which he kept in a backpack, as well as large amounts of cash. Pleasant kept a gun by his bed, and sometimes carried the gun on his person.

Pleasant spent the evening of June 28, 2010 at home with his girlfriend, Esther Magnus. During the evening, Pleasant left the apartment with about $2,000 in cash. He returned with several bags of marijuana. At about 10:30 p.m. that evening, Farley came to Pleasant's apartment. While at the apartment, the two men smoked marijuana and

discussed a marijuana purchase. Farley said that he did not have money, but that he would return. Ten minutes later, Farley returned and told Pleasant that he would come back the following morning to buy the marijuana. Farley departed the apartment.

The next morning, Pleasant and Magnus discussed their plan to go out together that day. At approximately 11:15 a.m., Magnus left Pleasant's apartment. The two planned for Pleasant to meet Magnus at her residence just after noon. Magnus testified that before she left, Pleasant told her that he was waiting for Farley to come to the apartment. Pleasant also told Magnus that his friend, Corey Wishom, was planning to stop by the apartment, as well.

As Magnus was leaving, Pleasant's neighbor, Mark Dobie, came to the apartment and smoked marijuana with Pleasant. While the two visited, Pleasant received a phone call. Dobie heard Pleasant tell the caller to "hurry up and come" because Pleasant had to leave soon.

Soon thereafter, Wishom arrived at Pleasant's apartment. Dobie met Wishom and then went back to his own apartment. Pleasant showed his marijuana to Wishom, who purchased some. Following a short visit, Wishom said goodbye to Pleasant and began to leave the apartment.

As Wishom was leaving, two men arrived at Pleasant's door. Pleasant said to one of the men, "Oh, I've been waiting for you." One of the men stepped into the living room and said, "This is my brother and he's cool." Wishom testified that both men were African-American. The man who said, "[t]his is my brother and he's cool" was wearing

black Nike shoes, black basketball shorts, white socks pulled up to his knees, a black hoodie, and a backpack strapped to his chest. The man had short clipped hair and a tattoo on the top of one of his arms. Apart from his race, Wishom was unable to provide any further description of the second man. After this short encounter, which occurred at approximately 11:30 a.m., Wishom left the apartment.

Pleasant's neighbor, Lynshel Reid-Jones, testified that at about this time, she heard a melee and a loud "boom" come from Pleasant's apartment. Reid-Jones then heard Pleasant crying for help. Reid-Jones looked outside and saw two young African-American males sprinting from Pleasant's apartment with a backpack that she believed belonged to Pleasant.

At 11:44 a.m., Dobie received a phone call from his sister, Breanna Sandle, saying that she had just seen two men running from the apartment complex and that it appeared that someone had been robbed. Sandle testified that she saw two African-American males, who appeared to be in their 20s, running from the apartment complex. One of the men was wearing a backpack. When shown a photographic lineup by police, Sandle focused on two of the photographs, one of which depicted Farley, before telling the officer that she could not be sure whether he was one of the men she had seen fleeing the apartment complex.

Immediately after the shooting, several neighbors attempted to help Pleasant, who was bleeding profusely. Pleasant cried, " 'They shot me. They shot me. Oh, God, they

shot me.' " Emergency personnel responded to the apartment and pronounced Pleasant dead at the scene.

B. *The crime scene*

Investigators determined that Pleasant sustained a large gunshot wound to his right buttock. The nature of the wound suggested that Pleasant had been shot from a range of approximately one to three feet away. Pleasant also suffered blunt force trauma to his head, consistent with his having been struck by a gun.

Pleasant's apartment was in disarray, consistent with a struggle or fight having occurred. Police found a slide from a firearm, handcuffs, and a handcuff key in a hallway. Police also found an open, empty safe on the floor of a bedroom and a bag of marijuana on the living room floor. In addition, police found a black Pittsburgh Pirates baseball cap in the living room and a roll of duct tape in the bathroom.[3]

C. *DNA and fingerprint evidence*

Investigators determined that Farley's DNA was on the duct tape. Police found DNA from a person named Pierre Terry on the baseball cap. Terry's DNA was also found on the gun slide, on blood samples collected from the apartment, and in fingernail scrapings taken from Pleasant. Terry's fingerprints were also found on artwork in the living room.

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[3] Magnus testified that when she left Pleasant's apartment shortly before he was shot, the roll of duct tape was not in the bathroom.

D. *Cell phone records*

On the morning of the murder, several short calls were made between Farley's and Pleasant's cell phones, between 10:37 a.m. and 10:39 a.m. At 11:30 on the morning of the murder, the signal from an outgoing phone call made on Farley's phone that lasted 59 seconds terminated at a cell phone tower located on Pleasant's apartment building. A text message was sent from Terry's phone to Farley's phone at 11:33 a.m. From 11:31 a.m. until 11:48 a.m. there was no activity on Farley's cell phone.[4] Beginning at 11:50 a.m., Farley and Terry exchanged numerous text messages. Less than two hours later, a request was made to Farley's cell phone provider for a new phone number. The request was granted. Cell phone records for Farley's new cell phone number showed him leaving California the following morning and traveling across the United States to Louisiana.

E. *Farley's arrest, escape and rearrest*

Approximately a month and a half after the murder, authorities in Baton Rouge, Louisiana arrested Farley and took him to a police station. Farley escaped from the station and ran down a nearby street. With the assistance of a police dog, police found Farley hiding in a garbage can.

While being transported back to San Diego, Farley asked one of the officers if he could be charged with a gang crime because the other defendant was a gang member.

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4 In their briefing, the parties do not address the discrepancy in testimony that a text message was sent to Farley's phone at 11:33 a.m. and testimony that there was no activity on Farley's phone between 11:31 a.m. and 11:48 a.m.

While the officer had made some statements about the case to Farley, he had not said anything to Farley about the other defendant in the case being a gang member.

Police found several items in a Baton Rouge hotel room where Farley had been staying, including a laptop computer. It was later determined that searches had been performed on the computer related to the murder and the ensuing investigation.

F. *Gang Evidence*

Detective Joseph Castillo of the San Diego Police Department testified as a gang expert. Detective Castillo stated that the Skyline "Piru" gang is the largest African-American gang in San Diego. Gang members wear the color red and sometimes wear Pittsburgh Pirates baseball caps. Detective Castillo stated that the primary activities of the Skyline Piru gang include murder and robbery.

Castillo testified that Pierre Terry is a documented Skyline gang member and that Farley also appeared to be a Skyline Piru gang member, although he had not previously been documented. In addition, as described in greater detail in part III.E., *post*, Castillo offered his opinion that a hypothetical crime based on the evidence in this case would benefit, promote, assist and further the criminal conduct of the Skyline Piru gang.

III.

DISCUSSION

A. *The trial court did not err in denying Farley's motion for new trial, which was based on defense counsel's alleged ineffective assistance*

Farley filed a motion for new trial in which he contended that defense counsel had provided ineffective assistance in failing to present certain exculpatory evidence at trial. Farley contends that the trial court erred in denying the motion for new trial.

1. *Governing law and standard of review*

A trial court shall grant a motion for new trial where the trial court finds that the defendant received ineffective assistance of counsel. (*People v. Fosselman* (1983) 33 Cal.3d 572, 582-583.) In order for a defendant to demonstrate that he received ineffective assistance of counsel, he must show both that his counsel's performance was deficient when measured against the standard of a reasonably competent attorney and that counsel's deficient performance resulted in prejudice in the sense that it "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." (*Strickland v. Washington* (1984) 466 U.S. 668, 686.)

In resolving a claim of ineffective assistance of counsel, a court is to give great deference to counsel's reasonable tactical decisions and indulge in the " ' " 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.' " ' " (*People v. Hinton* (2006) 37 Cal.4th 839, 876.) This presumption is warranted "because it is all too easy to conclude that a particular act or omission of

counsel was unreasonable in the harsh light of hindsight." (*Bell v. Cone* (2002) 535 U.S. 685, 702.) Accordingly, "a court must 'view and assess the reasonableness of counsel's acts or omissions . . . under the circumstances as they stood at the time that counsel acted or failed to act.' " (*In re Scott* (2003) 29 Cal.4th 783, 812.)

When, as in this case, a trial court has denied a motion for new trial based on a claim of ineffective assistance of counsel, we apply the standard of review applicable to mixed questions of law and fact, upholding the trial court's factual findings to the extent that they are supported by substantial evidence, but reviewing de novo the ultimate question of whether the facts established demonstrate a violation of the right to effective counsel and prejudice. (See *People v. Taylor* (1984) 162 Cal.App.3d 720, 724-725 (*Taylor*).)[5]

2. *Defense counsel did not provide ineffective assistance in failing to present evidence that two witnesses failed to identify Farley in a live police lineup*

Farley contends that defense counsel provided ineffective assistance in failing to present evidence that Wishom and Sandle failed to identify him in a live police lineup.

a. *Factual and procedural background*

At trial, neither Wishom nor Sandle was able to identify Farley as a person that they had seen on the day of the murder. When asked about a photographic lineup that

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5 This standard differs from the abuse of discretion standard applicable to orders *granting* a motion for new trial based on ineffective assistance of counsel (see, e.g., *People v. Callahan* (2004) 124 Cal.App.4th 198, 209) and orders denying a motion for new trial on *statutory* grounds not implicating a constitutional right. (See *Taylor*, *supra*, 162 Cal.App.3d at p. 723.)

police had shown him after the murder, Wishom testified that he told police that Farley looked familiar in that he resembled a person who Wishom had seen on television. Sandle testified that when she was shown the photographic lineup, she was unable to identify anyone as being a person she had seen on the day of the murder. However, Sandle acknowledged that she had selected Farley's photograph and the photograph of another individual as possibly being one of the persons she saw on the day of the murder.

In his motion for new trial, Farley contended that defense counsel should have presented evidence that both Wishom and Sandle had failed to identify Farley in a live police lineup, and that Wishom had tentatively identified two other people in the lineup as potential suspects.

At the hearing on the motion for new trial, defense counsel testified as to the reasons why he did not present evidence that Wishom and Sandle had failed to identify Farley in a live police lineup, as follows:

> "[The prosecutor]: Now, did you consider presenting [the] absence of identification at these live lineups as additional evidence in this case?
>
> "[Defense counsel]: I considered it, yes.
>
> "[The prosecutor]: And did you decide not to?
>
> "[Defense counsel]: Yes.
>
> "[The prosecutor]: Why?
>
> "[Defense counsel]: Because none of those witnesses identified him at trial. None of them made an in-court identification of Mr. Farley as the offender at trial. And given that nobody in the courtroom was

> pointing the finger at him as an offender in the case, I didn't want to go back and rehash the police's suspicion that he'd been one of the offenders and had been at a lineup. I made a conscious decision not to present that evidence."

Defense counsel also stated that he had not wanted to provide Wishom or Sandle the opportunity to reconsider their inability to identify Farley.

The trial court concluded that defense counsel should have presented the evidence of the witnesses' failure to identify Farley at the live lineup, and that counsel had not made a reasonable tactical decision in failing to do so. However, the court further concluded that introduction of the evidence would not have made a difference in the outcome of the trial, and denied the motion for new trial as to this claim.

b. *Application*

Farley contends that defense counsel provided ineffective assistance in failing to present the evidence of the witnesses' failure to identify him. He argues that the evidence could have been presented through the testimony of the officers who conducted the lineup, thus eliminating the possibility that either witness could have reconsidered whether they could identify Farley.

At the hearing on the motion for new trial, defense counsel explained that he had made a "conscious decision" not to offer the lineup evidence because neither Wishom nor Sandle had identified Farley at trial, and defense counsel did not want to emphasize to the jury that the police had considered Farley a suspect in the immediate aftermath of the murder. Given that neither witness had identified Farley during direct examination at

trial, Farley's trial counsel could have reasonably determined that additional evidence of the witnesses' failure to identify Farley was likely to be of marginal benefit to the defense. Against this limited potential benefit to be gained by presenting the evidence, trial counsel reasonably considered the possibility that such evidence would emphasize to the jury that the police considered Farley a suspect from the outset.

Without endorsing defense counsel's tactical decision, in light of the broad deference we accord to such decisions, we conclude that counsel's decision not to present the lineup evidence did not fall below "prevailing professional norms." (*People v. Hinton, supra*, 37 Cal.4th at p. 876; see *ibid.* [" ' "[W]e accord great deference to counsel's tactical decisions" [citation], and we have explained that "courts should not second-guess reasonable, if difficult, tactical decisions in the harsh light of hindsight" ' "].) Thus, even assuming that Farley is correct that the evidence of the witnesses' failure to identify him at the live lineup could have been presented though the testimony of the officers who conducted the lineup, we reject Farley's claim that defense counsel provided ineffective assistance in failing to present evidence that two witnesses who failed to identify him at trial also failed to identify him at a police lineup.

3. *Defense counsel did not provide ineffective assistance in failing to present evidence that Farley made numerous telephone calls to his wife in Louisiana in the months prior to the murder*

Farley contends that defense counsel was ineffective in failing to present evidence that he made numerous cellular telephone calls to his wife in Louisiana in the months prior to his trip to Louisiana. Farley contends that the introduction of this evidence

would have bolstered defense counsel's argument that Farley had planned the trip to Louisiana, prior to the date of the murder, to visit his wife rather than to flee California after committing the murder.

a. *Factual and procedural background*

The People presented cellular phone record evidence to demonstrate that on the morning after the murder, Farley left San Diego and traveled to Louisiana, where he remained until his arrest approximately two months later. The prosecutor argued that Farley's flight to Louisiana evinced a consciousness of guilt. The jury was instructed that it could use evidence of Farley's flight to infer a consciousness of guilt on his part.

In his motion for new trial, Farley maintained that defense counsel was ineffective in failing to offer in evidence additional cell phone records that would have demonstrated that Farley had made numerous calls to his wife in Louisiana in the months prior to the murder. Farley contended that this evidence would have provided an innocent explanation for his trip to Louisiana.

At the hearing on the motion for new trial, defense counsel explained that prior to trial, Farley had told him that the trip to Louisiana had been preplanned, and that he had taken the trip in order to "celebrate his anniversary with his wife," from whom he was separated. Farley also told defense counsel that he had travelled to Louisiana with his girlfriend, who was a prostitute, so that she could provide him with "female companionship" on the way. In addition, defense counsel stated that until a week before trial, Farley told defense counsel that he intended to testify at trial. Accordingly, defense

counsel anticipated that Farley's explanation for the Louisiana trip would be presented to the jury through his testimony. Defense counsel explained that Farley changed his mind and decided not to testify approximately a week before the trial. (RT 2551, 2564)!

In the wake of Farley's decision not to testify, defense counsel explained that he decided not to present evidence of the Louisiana trip to the jury because he found Farley's explanation for its purpose "preposterous," and counsel did not believe that the explanation would be well received by the jury. Defense counsel also explained that several of the witnesses who might be relevant to the presentation of Farley's explanation of the trip to the jury, including Farley's former wife and his girlfriend, would likely not be seen as credible witnesses by the jury.

In denying his motion for new trial, the trial court noted that evidence that Farley had been communicating with his wife in Louisiana prior to the murder might explain why he went to Louisiana rather than to another location, but that such evidence would not necessarily explain his decision to leave San Diego.

b. *Application*

Defense counsel's decision not to emphasize Farley's trip to Louisiana was a reasonable one. As the trial court stated in ruling on the motion for new trial, while evidence that Farley's wife lived in Louisiana might have explained why he went to Louisiana rather than to some other location, that fact is not inconsistent with the People's theory that Farley fled San Diego because he had committed the murder. In addition, evidence that Farley had made numerous telephone calls to Louisiana in the months prior

to the murder did not the lessen the impact of the most inculpatory aspect of the Louisiana evidence, namely, that Farley left San Diego for Louisiana *the day after the murder*. Further, defense counsel reasonably decided that it would not be in Farley's interest to present additional evidence of the Louisiana trip in light of counsel's assessment that Farley's explanation for the trip was "preposterous," and the possibility that the presentation of such evidence might permit the People to present rebuttal evidence demonstrating the lack of credibility of the explanation. Under these circumstances, defense counsel's decision not to present evidence of Farley's telephone calls to his wife in Louisiana was a reasonable tactical one. (See *People v. Mayfield* (1997) 14 Cal.4th 668, 765 [concluding defense counsel did not provide ineffective assistance in failing to present certain potentially exculpatory evidence where "counsel's decision not to elicit this evidence was a reasonable tactical decision"].)

Accordingly, we conclude that defense counsel did not provide ineffective assistance by failing to present evidence that Farley made telephone calls to his wife in Louisiana in the months prior to the murder, for the purpose of explaining to the jury why Farley travelled to Louisiana on the day after the murder.

4. *Defense counsel did not provide ineffective assistance in failing to present evidence that Farley's mother and father informed him that the police were investigating him in connection with Pleasant's murder*

Farley contends that defense counsel was ineffective in failing to call his mother and father as witnesses in order to testify that they informed him that the police were investigating him in connection with Pleasant's murder. Farley contends that the

presentation of their testimony was necessary to provide an innocent explanation for evidence demonstrating that Farley had performed computer searches related to the murder.

a. *Factual and procedural background*

The People presented evidence that Farley's computer had been used to perform several searches, including internet searches related to the shooting, searches on the San Diego County Sheriff's Web site to determine whether an arrest warrant had been issued for Farley, and a search of a Web site to determine whether Terry was in jail.

In his motion for new trial, Farley contended that defense counsel had failed to call Farley's mother and father as witnesses to testify that they told Farley about various aspects of the police investigation into the murder. In support of the motion, Farley's mother provided a declaration in which she stated that she had informed Farley about the execution of a search warrant related to the murder, and that Terry had been arrested for the murder. Farley's mother also stated that she told Farley that an attorney had advised her to check the sheriff's Web site in order to determine whether an arrest warrant had been issued for Farley. Farley's father stated that after he learned that Terry had been arrested, he told Farley about the existence of the "Who's In Jail" Web site. Farley argued that testimony from his parents would have provided an explanation for why he had conducted the computer searches.

At the hearing on the motion for new trial, defense counsel acknowledged that the computer searches had presented a "difficult" issue for the defense. Defense counsel

stated that he had spoken with Farley's parents on numerous occasions. Defense counsel stated that Farley's mother did not seem to be interested in providing counsel with information to assist in Farley's defense. Counsel also stated that he found Farley's mother to be "hostile" and adjudged her as likely to be a "terrible witness." Defense counsel stated that Farley's father was "much more reticent in demeanor than Mrs. Farley," and that he "had little to say." Counsel also stated that he did not recall any discussions with Farley's father concerning communications between Farley and his father while Farley was in Louisiana.

The trial court ruled that defense counsel's decision whether to call Farley's parents as witnesses was a matter of trial tactics and that his failure to call them as witnesses did not amount to ineffective assistance. The trial court also noted that while defense counsel had not formally interviewed Farley's parents, any omission in this regard was not prejudicial.

b. *Application*

"Whether to call certain witnesses is . . . a matter of trial tactics, unless the decision results from unreasonable failure to investigate." (*People v. Bolin* (1998) 18 Cal.4th 297, 334.) In the hearing on the motion for new trial, defense counsel testified that he had spoken with Farley's mother on several occasions before the trial and that he judged her to be a "terrible" potential witness. Defense counsel explained that Farley's mother was "hostile, aggressive, and very difficult to deal with." Defense counsel's decision not to call Farley's mother as a witness was a reasonable tactical choice given

counsel's assessment of her demeanor, and also because of the fact that evidence that she had informed Farley of the police investigation would not necessarily be inconsistent with Farley's guilt. Accordingly, we may not second-guess defense counsel's decision not to call Farley's mother as a witness. (*People v. Mitcham* (1992) 1 Cal.4th 1027, 1059 ["The decision[] . . . whether to put on witnesses [is a] matter[] of trial tactics and strategy which a reviewing court generally may not second-guess"].)[6]

With respect to his father, Farley does not contend that defense counsel could have adequately presented an explanation for Farley's computer searches solely through his father's testimony. On the contrary, he argues that Farley's *mother's* testimony "was critical to establish how her son learned about the homicide." Thus, Farley has not established that defense counsel was ineffective in failing to call his father as a witness.

Accordingly, we conclude that defense counsel did not provide ineffective assistance by failing to present evidence that Farley's mother and father informed him that the police were investigating him in connection with Pleasant's murder.[7]

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6 Farley does not contend on appeal that defense counsel failed to properly investigate Farley's parents as potential witnesses.

7 In light of our conclusion, we need not consider the People's contention that Farley cannot prevail on his ineffective assistance of counsel claim on this ground because defense counsel's presentation of this evidence would have violated counsel's ethical obligations since defense counsel "knew that [Farley] was involved and had participated in Pleasant's murder."

B. *The trial court did not err in admitting gang expert testimony*

Farley claims that the trial court erred in admitting portions of Detective Castillo's gang expert testimony. We review the trial court's ruling for an abuse of discretion. (See, e.g., *People v. Prince* (2007) 40 Cal.4th 1179, 1223.)

1. *Governing law and standard of review*

In *People v. Vang* (2011) 52 Cal.4th 1038, 1045 (*Vang*), the California Supreme Court concluded that an expert on criminal street gangs may testify that a charged gang crime was gang related, as long as the testimony is based on assumed hypothetical facts rooted in the evidence. The *Vang* court described a portion of the expert testimony at issue in that case as follows:

> "On direct examination, the prosecutor asked about a hypothetical assault on a 'young baby gangster.' After stating the hypothetical facts, the prosecutor asked: 'Based on the facts of that hypothetical, do you have an opinion as to whether *this particular crime* was committed for the benefit of and [in] association with or at the direction of the *Tiny Oriental Crips* street gang?' Detective Hatfield said he did have an opinion based on those facts. He believed that 'they did this to keep the gang strong because the gang set is only as strong as its weakest member. And that member did something to the TOC gang for him to be victimized *in this case*. They put him in check. They brought him back in line over some perceived wrong that this individual did to that set, and the victim may not even know what he or she did in this incident.' He stated that the assault *would benefit TOC* and was committed *in association with TOC* and at the *direction of TOC members*." (*Id*. at p. 1043, italics added.)

As the italicized portion of the quotation above demonstrates, the expert in *Vang* offered his opinion that the *charged crime* was committed by the defendant, based on a set of assumed hypothetical facts rooted in the evidence. The *Vang* court rejected the

defendant's claim that " 'the trial court abused its discretion when it allowed Detective Hatfield to testify in response to a hypothetical question that the assault on Phanakhon, thinly disguised in the hypothetical as "young baby gangster," was for the benefit of TOC and was gang motivated.' " (*Vang, supra*, 52 Cal.4th at p. 1044.) The *Vang* court explained that since Detective Hatfield had no personal knowledge as to whether defendant committed the charged crime, he could not offer his opinion as to whether the defendant actually committed the crime. However, the *Vang* court explained that the expert "could, and did, express an opinion, based on hypothetical questions that tracked the evidence, whether the assault, if the jury found it in fact occurred, would have been for a gang purpose." (*Id*. at p. 1048.)

2. *The challenged testimony*

As noted in part II.F., *ante*, Detective Castillo testified as a gang expert. As Farley states in his brief, "The prosecutor asked Detective Castillo . . . about a hypothetical robbery of a drug dealer committed by a Skyline gang member and another person who is not a documented gang member, and whether the crime would benefit the Skyline Piru street gang." Detective Castillo testified that such a hypothetical crime would be gang related, and would benefit the gang "by gaining respect and money for the gang."

On appeal, Farley contends that the trial court erred in admitting Detective Castillo's "inadmissible opinions" concerning whether the charged offenses were gang related, including the following:[8]

> "[The prosecutor]: Okay. *Based upon your review of the police reports in this case*, coupled with the brief hypothetical I gave you, okay, assuming one person is a documented Skyline gang member, the other person hasn't been documented, okay, do you have any opinion as to whether or not the information that you reviewed from the homicide books and that you testified to on a prior occasion, coupled with this brief hypothetical, can you give us a brief opinion as to whether or not you believe that *this* crime was committed in association with a criminal street gang?
>
> "[Defense counsel]: Objection; it's improper opinion.
>
> "The Court: Overruled.
>
> "[Detective Castillo]: Yes it is.
>
> "[The prosecutor]: Okay. What is your opinion based upon?
>
> "[Detective Castillo]: *Based upon the reports I've read, based upon the crime was done with a gang member, one of the subjects who did this crime was a gang member, documented Skyline gang member*.
>
> "[The prosecutor]: *Are you referring to Mr. Terry*?
>
> "[Detective Castillo]: *Yes, I am*.
>
> "[¶] . . . [¶]

---

8 In his brief, Farley quotes a lengthy portion of Detective Castillo's testimony, and suggests that the entire colloquy was inadmissible. We have considered this entire colloquy and conclude, for the reasons stated below, that the trial court did not err in admitting the testimony. We have quoted a representative sample of the colloquy in our opinion.

"[The prosecutor]: *Okay. Now, in that situation, what is it about this person's participation that leads you to the opinion that this crime was being committed in association, what is that other person doing?*

"[Detective Castillo]: He's committing a crime with a documented Skyline gang member and this crime is listed as . . . one of several crimes that are listed under 186.22, the gang.

"[¶] . . . [¶]

"[The prosecutor]: Detective Castillo, I'll ask you the question this way. Do you have an opinion as to whether or not *this incident, based upon all the materials that you reviewed,* the conversations with other law enforcement officers, your prior testimony in the preliminary hearing in this case, and the hypothetical that you've been presented, do you have an opinion as to whether or not *this conduct* would somehow promote, further or assist in criminal conduct by gang members?

"[Detective Castillo]: Yes.

"[The prosecutor]: Okay. First of all, *what is your opinion based upon*?

"[Detective Castillo]: *Through several pages of reports, I've read through discussions with homicide investigators who investigated this homicide, and basically all the reports, and talking with Detective Conley.*

"[The prosecutor]: *As well as other detectives on the homicide team*?

"[Detective Castillo]: *Yes*." (Italics added in Farley's brief.)

3. *Application*

Farley appears to make two arguments in support of his contention that the trial court erred in admitting Detective's Castillo's testimony. Farley suggests that the trial

court erred in permitting Castillo to testify that " 'this conduct,' 'this crime,' and 'this incident' " were committed for the benefit of the gang. We reject this argument because *Vang* makes clear that a gang expert is permitted to offer an opinion as to whether the *charged crime* was committed for the benefit of the gang, as long as the expert's opinion is based on assumed hypothetical facts rooted in the evidence. (*Vang, supra,* 52 Cal.4th at p. 1048.)

Farley also appears to contend that Detective Castillo's testimony was inadmissible because it was based on evidence in the case, rather than hypothetical questions based on the evidence in the case as required under *Vang*. We reject this contention, because a fair reading of the testimony to which Farley objects, including the prosecutor's repeated use of the word "hypothetical" during his direct examination of Detective Castillo makes clear that Castillo's testimony was consistent with *Vang* in that it was offered in response to "the prosecutor's hypothetical questions . . . based on what the evidence showed *these* defendants did, not what someone else might have done." (*Vang, supra*, 52 Cal.4th at p. 1046.)[9]

Accordingly, we conclude that the trial court did not err in admitting Detective Castillo's expert testimony.

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9 In his brief, Farley notes that Detective Castillo responded to questions about a "*hypothetical* robbery of a drug dealer . . . ." (Italics added.)

C. *The trial court did not err in failing to hold a hearing to determine whether a juror was biased in light of a remark that the juror made during the prosecutor's closing argument*

Farley contends that the trial court erred in failing to hold a hearing to determine whether a juror was biased against Farley after the juror answered a rhetorical question posed by the prosecutor during his closing argument. We apply the abuse of discretion standard of review to Farley's claim. (See, e.g. *People v. Williams* (2013) 58 Cal.4th 197, 290 [" ' " 'The decision whether to investigate the possibility of juror bias, incompetence, or misconduct—like the ultimate decision to retain or discharge a juror—rests within the sound discretion of the trial court' " ' "].)

1. *Factual and procedural background*

During the prosecutor's closing argument, the following exchange occurred:

> "[The prosecutor]: . . . But the important question you can't get around, and there's no reasonable alternate explanation for it, is why, why is he going to these databases? Because at the end of the day he's not just putting in Pierre Terry's name, is he? What other name did he put . . . in when it came time to look for warrants? Who was he worried about for getting warrants?
>
> "[Unidentified juror]: Himself.
>
> "[The prosecutor]: That's right, himself."

Defense counsel did not object to the juror's remark.

In a motion for new trial, Farley contended that the trial court had an obligation to either discharge the juror or, at a minimum, conduct an inquiry into the remark.

In the hearing on the motion for new trial, the trial court stated that it had heard the juror's remark. The court noted that defense counsel had not objected and that the court believed that defense counsel may have decided not to object in order to avoid highlighting the juror's response. The court explained that, in the absence of any objection, it had decided not "to step in and cause problems." Defense counsel testified that he had not heard the juror's remark.

2. *Governing law*

In general, juror misconduct occurs when there is a direct violation of the juror's oaths, duties, and instructions. (*In re Hamilton* (1999) 20 Cal.4th 273, 294; see also § 1122, subd. (b).) Under section 1122, subdivision (b), jurors commit misconduct when they "form or express any opinion about the case before the cause is finally submitted to them."

"A court on notice of the possibility of juror misconduct must undertake an inquiry sufficient ' "to determine if the juror should be discharged and whether the impartiality of other jurors ha[s] been affected." ' " (*People v. Espinoza* (1992) 3 Cal.4th 806, 822.) However, "[n]ot every incident of potential misconduct requires further investigation. [Citation.] '[A] hearing is required only where the court possesses information which, if proven to be true, would constitute "good cause" to doubt a juror's ability to perform his duties and would justify his removal from the case.' " (*People v. Virgil* (2011) 51 Cal.4th 1210, 1284 (*Virgil*).)

3. *Application*

The juror's remark was spontaneous, brief, and merely provided an answer to a rhetorical question posed by the prosecutor. Further, as the trial court noted, the question that the juror answered was "an issue that was not in any way in dispute." The juror's remark did not suggest that the juror had formed an opinion on the case, nor did it in any way suggest that good cause existed to remove the juror from the case. Accordingly, we conclude that the trial court clearly did not abuse its discretion in failing to hold a hearing to investigate the juror's comment. (See *Virgil*, *supra*, 51 Cal.4th at p. 1284.)

D. *The trial court did not abuse its discretion in admitting evidence of Farley's tattoos*

Farley contends that the trial court abused its discretion in admitting evidence of his tattoos. He maintains that the evidence was irrelevant and should have been excluded pursuant to Evidence Code section 352. We review the trial court's evidentiary rulings for abuse of discretion. (See, e.g., *People v. Guerra* (2006) 37 Cal.4th 1067, 1113 [abuse of discretion standard of review applies to any ruling by a trial court on the admissibility of evidence and is particularly appropriate for questions regarding relevance and undue prejudice].)

1. *Factual and procedural background*

Prior to trial, defense counsel orally moved to exclude evidence of Farley's gang-related tattoos. Farley's tattoos include the acronym "M.O.B," which, according to Detective Castillo, is an acronym for "money over bitches," and "dead presidents."

In opposition, the People argued that the tattoos tended to prove Farley's status as a gang member, and were therefore relevant in proving the gang enhancement allegations. Specifically, the prosecutor argued that the tattoos demonstrated Farley's "devotion to acquiring even money over females and . . . his participation in Skyline pimping gang culture." The People also argued that the tattoos were relevant to prove Farley's desire for money and his motive to rob Pleasant.

The court tentatively ruled that the tattoo evidence was relevant to "gang involvement, gang activity," and that the evidence was not unduly prejudicial. However, the court reserved making a final ruling on the admissibility of the tattoos pending the court's viewing of photographs of the tattoos.

At trial, Wishom testified that he thought that one of the men who he saw with Pleasant just before the murder had a tattoo on the top of his arm. When the prosecutor sought to present photographs of Farley's tattoos to Wishom and the jury, defense counsel objected. The trial court overruled the objection and the prosecutor presented the photographs to Wishom and the jury. Wishom could not identify the particular tattoo that he had seen, but stated that one of Farley's tattoos appeared to be in a similar location on Farley's arm as the tattoo that he saw on the man that he saw with Pleasant just before the murder.

Detective Castillo testified that Farley had a tattoo with the initials, "M.O.B.," which Castillo explained was an acronym for "money over bitches." Castillo also stated that the acronym emphasized the importance of money in gang culture. Castillo further testified that Farley had other tattoos related to his desire to obtain money, including a tattoo depicting a gun and the words "dead presidents." Detective Castillo explained that Farley's tattoos did not signify his membership in any particular gang, but that gang members commonly had similar tattoos.

When the prosecutor formally offered photographs of the tattoos in evidence, defense counsel again objected, arguing that the evidence was "largely irrelevant," and that the photographs were inadmissible under Evidence Code section 352. The trial court overruled defense counsel's objections.[10]

2. *Governing law*

a. *Relevant principles of the law of evidence*

" ' " 'Only relevant evidence is admissible [citations], and all relevant evidence is admissible unless excluded under the federal or California Constitution or by statute. [Citations.] Relevant evidence is defined in Evidence Code section 210 as evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." The test of relevance is whether the evidence tends " 'logically, naturally, and by reasonable inference' to establish material facts . . . .' [Citation.]" [Citation.] The trial court has broad discretion in determining the

10 Photographs of the tattoos have been transmitted to this court.

relevance of evidence . . . .' " ' " (*People v. Richardson* (2008) 43 Cal.4th 959, 1000-1001.)

Evidence Code section 352 provides:

> "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

" 'The "prejudice" referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues.' " (*People v. Karis* (1988) 46 Cal.3d 612, 638.)

b. *The admissibility of evidence of a defendant's gang membership*

Evidence tending to demonstrate a defendant's membership in a gang is directly relevant to proving a gang enhancement under section 186.22, subdivision (b). (*People v. Gutierrez* (2009) 45 Cal.4th 789, 820 (*Gutierrez*).) "Evidence of the defendant's gang affiliation . . . can [also] help prove . . . motive, . . . specific intent, . . . or other issues pertinent to guilt of the charged crime." (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049.)

Evidence that a defendant has gang-related tattoos tends to prove a defendant's membership in a gang. (See, e.g., *People v. Albillar* (2010) 51 Cal.4th 47, 62 (*Albillar*); *People v. Valdez* (2012) 55 Cal.4th 82, 131; *People v. Williams* (2009) 170 Cal.App.4th 587, 621.)

3. *Application*

Consistent with Detective Castillo's testimony, the trial court reasonably could have concluded that Farley's tattoos were common among gang members. Evidence that Farley had gang-related tattoos was highly relevant to demonstrate his membership in a gang (see *Albillar*, *supra*, 51 Cal.4th at p. 62), and thus was relevant in proving the gang enhancement. (See *Gutierrez*, *supra*, 45 Cal.4th at p. 820.) We reject Farley's contention that the court should have excluded the tattoo evidence pursuant to Evidence Code section 352 because the jury may have believed that the tattoos suggested that Farley was "greedy," that he valued money over "bitches," and/or that he was willing to obtain money through violence. Even assuming for purposes of this opinion that the tattoos were not admissible with respect to any of these issues, Farley could have requested that the court limit the purposes for which the jury could consider the tattoo evidence. No such request was made, and the trial court was not required to provide such a limiting instruction sua sponte. (See *People v. Smith* (2007) 40 Cal.4th 483, 516 ["Even assuming that defendant is correct in noting that the evidence should only have been admitted for a limited purpose, the trial court had no sua sponte duty to give a limiting instruction"].) Further, in light of the fact that the tattoo evidence was highly probative in proving the gang enhancement allegation, the trial court clearly was not required to exclude the tattoo evidence entirely.

Accordingly, we conclude that the trial court did not err in admitting evidence of Farley's tattoos.[11]

E. *The trial court did not err in excluding Farley's proffered evidence of third-party culpability*

Farley claims that the trial court erred in denying his request to be allowed to present evidence that a third party might have committed the charged offenses. We review a trial court's ruling excluding proffered third-party culpability evidence for an abuse of discretion. (*People v. Prince* (2007) 40 Cal.4th 1179, 1242.)

1. *Governing law*

"[T]he Constitution permits judges 'to exclude evidence that is "repetitive . . . , only marginally relevant," or poses an undue risk of "harassment, prejudice, [or] confusion of the issues." ' " (*Holmes v. South Carolina* (2006) 547 U.S. 319, 320 [stating that evidentiary rules that preclude the admission of third-party culpability evidence that does not sufficiently connect the third person to the crime are "widely accepted"].)

In *People v. Hall* (1986) 41 Cal.3d 826, 834 (*Hall*), the California Supreme Court stated, "[C]ourts should . . . treat third-party culpability evidence like any other evidence:

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11 Farley claims that the trial court's alleged error in admitting the tattoo evidence violated his constitutional right to due process by rendering the trial fundamentally unfair. In light of our conclusion that the trial court did not abuse its discretion in admitting the evidence, it necessarily follows that the court did not violate Farley's constitutional right to due process by admitting the evidence. (See, e.g., *People v. Benavides* (2005) 35 Cal.4th 69, 93 ["Defendant further claims the introduction of this percipient evidence violated his right to due process under the Fourteenth Amendment to the federal Constitution. This claim fails because, as we have concluded, the evidence was properly admitted"].)

if relevant it is admissible ([Evid. Code,] § 350) unless its probative value is substantially outweighed by the risk of undue delay, prejudice, or confusion ([Evid. Code,] § 352)." In describing when such third-party culpability evidence is relevant, the *Hall* court held:

> "To be admissible, the third-party evidence need not show 'substantial proof of a probability' that the third person committed the act; it need only be capable of raising a reasonable doubt of defendant's guilt. At the same time, we do not require that any evidence, however remote, must be admitted to show a third party's possible culpability. . . . [E]vidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant's guilt: there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime." (*Hall, supra,* at p. 833.)

In *People v. DePriest* (2007) 42 Cal.4th 1, 43 (*DePriest*), the Supreme Court elaborated on its holding in *Hall*, stating, "Evidence that another person . . . had some 'remote' connection to the victim or crime scene[] is not sufficient to raise the requisite reasonable doubt. [Citation.] Under *Hall* and its progeny, third-party culpability evidence is relevant and admissible only if it succeeds in 'linking the third person to the actual perpetration of the crime.' " The *DePriest* court concluded that evidence that a third party was with the murder victim in her car, together with the defendant, on the night that she was murdered, was not relevant third-party culpability evidence. (*DePriest, supra,* at p. 44.)

Numerous courts have applied *Hall* in considering the admissibility of evidence of third-party culpability. For example, in *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1134-1138, the Supreme Court considered whether a trial court had erred in excluding

evidence that a third party involved in the trafficking of drugs might have killed the victim. In the trial court, the defendant offered to prove that the victim dealt in marijuana and other narcotics, and owed a large sum of money to a drug dealer. (*Id.* at p. 1135.) The defendant also proffered that the victim had asked him to provide armed protection for her during a drug transaction planned for the night before her murder, and that she had purchased ammunition for this purpose. (*Ibid.*) In addition, the defendant offered to prove that on the night before the murder, he and the victim met a Mexican man named Pablo for the purpose of consummating the drug deal, and that the transaction was postponed when the drugs did not arrive. (*Ibid.*) The Supreme Court concluded that the trial court did not err in excluding this evidence, reasoning that there was no evidence linking Pablo or any other third party to the victim near the time of her death. (*Id.* at p. 1137.)

In *People v. Adams* (2004) 115 Cal.App.4th 243 (*Adams*), the Court of Appeal applied *Hall* in concluding that a trial court had not erred in refusing to allow a defendant to present evidence that a former boyfriend of the murder victim might be responsible for the murder. The evidence included proffered testimony tending to show that the boyfriend had assaulted the victim in the past, as well as explicitly sexual drawings of the boyfriend found in the victim's room.[12] (*Id.* at p. 251.) The court reasoned in part, "[The boyfriend's] history of violence toward [the victim], without direct or circumstantial

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12 The defense contended that the drawings demonstrated a continuing relationship between the victim and the boyfriend. (*Adams, supra,* 115 Cal.App.4th at p. 251.)

evidence linking [the boyfriend] to the actual perpetration of the crime, was inadmissible under Evidence Code section 1101," and the "drawings . . . could not link [the boyfriend] to [the victim] 'in the hours before her death, or indeed on the date of her death.' " (*Adams, supra*, at p. 253.)

2. *Factual and procedural background*

Prior to trial, the court held a hearing for the purpose of determining whether it would permit Farley to introduce evidence suggesting that Pleasant's half brother, David Foster, might have committed the murder.[13] At the hearing, defense counsel stated that Farley sought to present evidence that Foster had been living in Pleasant's apartment until March 2010, when the two got into a physical altercation and Pleasant demanded that Foster move out. Defense counsel stated that Farley also wished to present evidence that police had found Foster's blood in the living room of Pleasant's apartment after the murder.

The prosecutor argued against the admission of the proffered third-party culpability evidence. The prosecutor argued that that the amount of Foster's blood recovered in the apartment amounted to no more than a "speck" in the "doorway" of the apartment, which was insignificant in light of the fact that Foster had resided in the apartment for a period of time and often visited the apartment in order to clean himself up

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13 Although the trial court stated at the hearing that the People had filed a "motion to exclude evidence of third-party culpability," that motion is not in the appellate record.

after skateboarding accidents.[14] The prosecutor also noted that Foster had told police that he and Pleasant had reconciled, and that the two had spent Earth Day, April 20, 2010, together. The prosecutor presented a photograph corroborating Foster's statement to police that he and Pleasant had spent Earth Day together.

The trial court ruled that Farley would not be permitted to present the proposed third-party culpability evidence at trial because the evidence did not tend to "raise a reasonable doubt" as to Farley's guilt. The court noted that the evidence of "one droplet" of Foster's blood was not significant given that Foster had previously resided in Pleasant's apartment and Foster's many injuries. The court also stated that there was no evidence that tended to connect Foster to the scene of the crime near the time of the murder. In addition, the court stated, "[T]here have been certainly a lot of cases that are a lot stronger of connection than you have here [in which third-party culpability evidence] was held to be properly excluded."

3. *Application*

The trial court could have reasonably concluded that evidence of a small amount of Foster's blood in Pleasant's apartment did not demonstrate more than a " 'remote' connection to the . . . crime scene" (*DePriest*, *supra*, 42 Cal.4th at p. 43), given that it was undisputed that Foster had resided in the apartment for a period of time just a few months prior to the murder. (See *Adams*, *supra*, 115 Cal.App.4th at p. 253 [excluding

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14 During the hearing, Foster appeared in court and showed the court many "healing" injuries on his torso.

third-party culpability evidence that "could not link [the third party] to [the victim] in the hours before her death, or indeed on the date of her death"].) In addition, the trial court could have reasonably concluded that evidence that Foster and Pleasant had engaged in a single altercation a few months prior to the murder did not establish anything other than a "mere motive" to commit the murder, which was insufficient to raise a reasonable doubt as to Farley's guilt. (*Hall*, *supra*, 41 Cal.3d at p. 833.) Indeed, the motive evidence pertaining to Foster was considerably weaker than that discussed in *People v. Gutierrez* and *Adams*, in which reviewing courts affirmed the exclusion of third-party culpability evidence. (See *People v. Gutierrez*, *supra*, 28 Cal.4th at pp. 1134-1138; *Adams*, *supra*, 115 Cal.App.4th at p. 253.)

Accordingly, we conclude that the trial court did not abuse its discretion in excluding Farley's proffered third-party culpability evidence.[15]

F. *There is no cumulative error*

Farley contends that the cumulative effect of the errors that he alleges requires reversal. "Under the 'cumulative error' doctrine, errors that are individually harmless may

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15 Farley claims that the trial court's alleged error in excluding the proffered evidence violated his constitutional right to present a defense. In light of our conclusion that the trial court did not abuse its discretion in determining that the proffered evidence was irrelevant, it necessarily follows that the court did not violate Farley's constitutional rights by excluding the evidence. (See *People v. Babbitt* (1988) 45 Cal.3d 660, 685 ["because defendant's evidence failed to meet the threshold requirement of relevance, its exclusion pursuant to [Evidence Code] section 352 did not implicate any due process concerns"]; accord *Adams*, *supra*, 115 Cal.App.4th at p. 254 [rejecting claim that exclusion of "irrelevant" third-party culpability evidence violated defendant's constitutional right to present a defense].)

nevertheless have a cumulative effect that is prejudicial." (*In re Avena* (1996) 12 Cal.4th 694, 772, fn. 32.) We have concluded that none of Farley's asserted claims of error has merit. As a result, there are no errors for which the cumulative effect would require reversal of the judgment against him.

G. *The parole revocation fine in the abstract of judgment must be stricken*

The abstract of judgment indicates that the trial court imposed a $10,000 parole revocation fine pursuant to section 1202.45. The People acknowledge that the fine must be stricken because the trial court imposed a sentence of life without the possibility of parole. (Citing *People v. Jenkins* (2006) 140 Cal.App.4th 805, 819 ["A parole revocation fine may not be imposed for a term of life in prison without possibility of parole"].) We agree with the People's concession. Accordingly, we order the parole revocation fine stricken, and direct the trial court to prepare a new abstract of judgment.

IV.

DISPOSITION

The judgment is affirmed. The matter is remanded to the trial court. On remand, the trial court is directed to prepare a new abstract of judgment in accordance with part III.G., *ante*, and to forward the new abstract of judgment to the Department of Corrections and Rehabilitation.

AARON, J.

WE CONCUR:

HALLER, Acting P. J.

McDONALD, J.

APPENDIX C

REPORT AND RECOMMENDATION

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CRAIG FARLEY,

Petitioner,

v.

SCOTT KERNAN,

Respondent.

Case No.: 16CV188 LAB (BGS)

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE TO DENY PETITION FOR WRIT OF HABEAS CORPUS

Petitioner Craig Farley ("Petitioner" or "Farley") has filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. Petitioner was convicted of first degree murder, robbery, and burglary.[1] (Lodgment 3, Part 1 at 85, 92, 96.) The jury additionally found Petitioner committed the murder while engaged in a robbery and burglary, that Petitioner committed all three crimes for the benefit of a criminal street gang, and that while acting as a principal another principal used and personally discharged a firearm proximately causing great bodily injury or death. (*Id.* at 88-91.) The jury also found Petitioner committed the burglary and robbery in an inhabited dwelling. (*Id.* at 92, 96.)

[1] Case No. SCD 229026 in the Superior Court of San Diego County

Petitioner was sentenced to life without the possibility of parole plus an additional consecutive sentence of 25 years to life. (Lodgment 1, Part 14 at 3088.)

The Court addresses nine claims[2] for habeas relief: (1) ineffective assistance of trial counsel for failing to introduce evidence of witnesses' failure to identify him in a live police line-up; (2) ineffective assistance of trial counsel for failing to present evidence of innocent explanations for Petitioner's behavior following the murder; (3) ineffective assistance of trial and appellate counsel for failing to raise insufficiency of the evidence for first degree murder; (4) ineffective assistance of trial and appellate counsel for failing to raise a *Batson/Wheeler* challenge; (5) ineffective assistance of trial counsel for failing to raise third-party culpability as to Leroy Thomas; (6) admission of inadmissible gang expert opinion; (7) juror misconduct; (8) admission of evidence of Petitioner's tattoos; and (9) exclusion of evidence of third-party culpability as to David Foster. (Pet. [ECF No. 1][3].) Respondent filed an Answer and Petitioner filed a Traverse. [ECF Nos. 18, 26.]

The Court submits this Report and Recommendation to United States District Judge Larry A. Burns pursuant to 28 U.S.C. § 636(b)(1) and Local Civil Rule HC.2 of the United States District Court for the Southern District of California. After consideration of the Petition, Respondent's Answer, Petitioner's Traverse, as well as lodgments and exhibits submitted by the parties, the Court recommends the Petition be **DENIED**.

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[2] In an effort to address all the issues potentially raised by Petitioner, the Court has organized the issues raised in the Petition into nine claims. In analyzing each, the Court notes where each was identified in the Petition and, if applicable, any corresponding ground identified in the Petition. As the Court explains in more detail below, three of the claims the Court addresses were not identified as "grounds" for relief in the Petition, but rather, were listed as claims that were raised on collateral review before the state courts.

[3] All citations to the Petition are to the ECF chronological page numbers for ease of reference.

I. BACKGROUND

A. Factual Background

This Court gives deference to state court findings of fact and presumes them to be correct; Petitioner may rebut the presumption of correctness, but only by clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1); *see also Parke v. Raley*, 506 U.S. 20, 35-36 (1992) (holding findings of historical fact, including inferences properly drawn from these facts, are entitled to statutory presumption of correctness). Accordingly, the following facts are taken from the California Court of Appeal's November 14, 2014 opinion:

> A. The murder
>
> Victim Jonathan Pleasant sold marijuana from his apartment. He often possessed considerable amounts of marijuana, which he kept in a backpack, as well as large amounts of cash. Pleasant kept a gun by his bed, and sometimes carried the gun on his person.
>
> Pleasant spent the evening of June 28, 2010 at home with his girlfriend, Esther Magnus. During the evening, Pleasant left the apartment with about $2,000 in cash. He returned with several bags of marijuana. At about 10:30 p.m. that evening, Farley came to Pleasant's apartment. While at the apartment, the two men smoked marijuana and discussed a marijuana purchase. Farley said that he did not have money, but that he would return. Ten minutes later, Farley returned and told Pleasant that he would come back the following morning to buy the marijuana. Farley departed the apartment.
>
> The next morning, Pleasant and Magnus discussed their plan to go out together that day. At approximately 11:15 a.m., Magnus left Pleasant's apartment. The two planned for Pleasant to meet Magnus at her residence just after noon. Magnus testified that before she left, Pleasant told her that he was waiting for Farley to come to the apartment. Pleasant also told Magnus that his friend, Corey Wishom, was planning to stop by the apartment, as well.
>
> As Magnus was leaving, Pleasant's neighbor, Mark Dobie, came to the apartment and smoked marijuana with Pleasant. While the two

visited, Pleasant received a phone call. Dobie heard Pleasant tell the caller to "hurry up and come" because Pleasant had to leave soon.

Soon thereafter, Wishom arrived at Pleasant's apartment. Dobie met Wishom and then went back to his own apartment. Pleasant showed his marijuana to Wishom, who purchased some. Following a short visit, Wishom said goodbye to Pleasant and began to leave the apartment.

As Wishom was leaving, two men arrived at Pleasant's door. Pleasant said to one of the men, "Oh, I've been waiting for you." One of the men stepped into the living room and said, "This is my brother and he's cool." Wishom testified that both men were African–American. The man who said, "[t]his is my brother and he's cool" was wearing black Nike shoes, black basketball shorts, white socks pulled up to his knees, a black hoodie, and a backpack strapped to his chest. The man had short clipped hair and a tattoo on the top of one of his arms. Apart from his race, Wishom was unable to provide any further description of the second man. After this short encounter, which occurred at approximately 11:30 a.m., Wishom left the apartment.

Pleasant's neighbor, Lynshel Reid–Jones, testified that at about this time, she heard a melee and a loud "boom" come from Pleasant's apartment. Reid–Jones then heard Pleasant crying for help. Reid–Jones looked outside and saw two young African–American males sprinting from Pleasant's apartment with a backpack that she believed belonged to Pleasant.

At 11:44 a.m., Dobie received a phone call from his sister, Breanna Sandle, saying that she had just seen two men running from the apartment complex and that it appeared that someone had been robbed. Sandle testified that she saw two African–American males, who appeared to be in their 20s, running from the apartment complex. One of the men was wearing a backpack. When shown a photographic lineup by police, Sandle focused on two of the photographs, one of which depicted Farley, before telling the officer that she could not be sure whether he was one of the men she had seen fleeing the apartment complex.

Immediately after the shooting, several neighbors attempted to help Pleasant, who was bleeding profusely. Pleasant cried, " 'They shot

me. They shot me. Oh, God, they shot me.' " Emergency personnel responded to the apartment and pronounced Pleasant dead at the scene.

B. The crime scene

Investigators determined that Pleasant sustained a large gunshot wound to his right buttock. The nature of the wound suggested that Pleasant had been shot from a range of approximately one to three feet away. Pleasant also suffered blunt force trauma to his head, consistent with his having been struck by a gun.

Pleasant's apartment was in disarray, consistent with a struggle or fight having occurred. Police found a slide from a firearm, handcuffs, and a handcuff key in a hallway. Police also found an open, empty safe on the floor of a bedroom and a bag of marijuana on the living room floor. In addition, police found a black Pittsburgh Pirates baseball cap in the living room and a roll of duct tape in the bathroom.

C. DNA and fingerprint evidence

Investigators determined that Farley's DNA was on the duct tape. Police found DNA from a person named Pierre Terry on the baseball cap. Terry's DNA was also found on the gun slide, on blood samples collected from the apartment, and in fingernail scrapings taken from Pleasant. Terry's fingerprints were also found on artwork in the living room.

D. Cell phone records

On the morning of the murder, several short calls were made between Farley's and Pleasant's cell phones, between 10:37 a.m. and 10:39 a.m. At 11:30 on the morning of the murder, the signal from an outgoing phone call made on Farley's phone that lasted 59 seconds terminated at a cell phone tower located on Pleasant's apartment building. A text message was sent from Terry's phone to Farley's phone at 11:33 a.m. From 11:31 a.m. until 11:48 a.m. there was no activity on Farley's cell phone. Beginning at 11:50 a.m., Farley and Terry exchanged numerous text messages. Less than two hours later, a request was made to Farley's cell phone provider for a new phone number. The request was granted. Cell phone records for Farley's new

cell phone number showed him leaving California the following morning and traveling across the United States to Louisiana.

E. Farley's arrest, escape and rearrest

Approximately a month and a half after the murder, authorities in Baton Rouge, Louisiana arrested Farley and took him to a police station. Farley escaped from the station and ran down a nearby street. With the assistance of a police dog, police found Farley hiding in a garbage can.

While being transported back to San Diego, Farley asked one of the officers if he could be charged with a gang crime because the other defendant was a gang member. While the officer had made some statements about the case to Farley, he had not said anything to Farley about the other defendant in the case being a gang member.

Police found several items in a Baton Rouge hotel room where Farley had been staying, including a laptop computer. It was later determined that searches had been performed on the computer related to the murder and the ensuing investigation.

F. Gang Evidence

Detective Joseph Castillo of the San Diego Police Department testified as a gang expert. Detective Castillo stated that the Skyline "Piru" gang is the largest African–American gang in San Diego. Gang members wear the color red and sometimes wear Pittsburgh Pirates baseball caps. Detective Castillo stated that the primary activities of the Skyline Piru gang include murder and robbery.

Castillo testified that Pierre Terry is a documented Skyline gang member and that Farley also appeared to be a Skyline Piru gang member, although he had not previously been documented. In addition, . . . Castillo offered his opinion that a hypothetical crime based on the evidence in this case would benefit, promote, assist and further the criminal conduct of the Skyline Piru gang.

(Lodgment 6. at 3-8.)

Petitioner was found guilty of first degree murder (Cal. Penal Code § 187(a)); robbery (Cal. Penal Code § 211); and burglary (Cal. Penal Code § 459). (Lodgment 3, Part 1 at 85, 92, 96.) The jury additionally found Petitioner committed the murder while engaged in a robbery and burglary, (Cal. Penal Code § 190.2(a)(17)), that Petitioner committed all three crimes for the benefit of a criminal street gang, (Cal. Penal Code § 186.22(b)(1)), and that while acting as a principal another principal used and personally discharged a firearm proximately causing great bodily injury or death, (Cal. Penal Code § 122022.53(b)-(d), (e)(1). (Lodgment 3; Part 1 at 88-91.) The jury also found Petitioner committed the burglary and robbery in an inhabited dwelling, (Cal. Penal Code § 212.5(a)). (Lodgment 3, Part 1 at 92, 96.)

B. Procedural Background

Following multiple days of testimony before the trial court on Petitioner's motion for a new trial approximately a year after Petitioner was convicted, including testimony from his trial counsel, Petitioner's parents, and Petitioner, the trial court found Petitioner was not entitled to a new trial. Petitioner filed an appeal to the Fourth District Court of Appeal in which he argued he received ineffective assistance of counsel based on trial counsel's failure to present evidence he was not identified by two witnesses in live police line-ups and innocent explanations for his departure to Louisiana immediately after the murder, his internet search history, and the changing of his phone number the day of the murder. (Lodgment 4 at 9-21.) He additionally argued the trial court erred in admitting gang expert testimony, failing to question a juror regarding potential misconduct, admitting evidence of Petitioner's tattoos, and failing to allow evidence of third-party culpability as to David Foster, the victim's brother. (*Id.* at 21-43.)

The Court of Appeal found no ineffective assistance of counsel and no error by the trial court.[4] (Lodgment 6.) Petitioner filed a Petition for Review with the California

[4] The Court of Appeal did strike a parole revocation fine because Petitioner was sentenced to life without the possibility of parole.

Supreme Court raising the same claims. (Lodgment 7.) It was summarily denied. (Lodgment 8.)

Petitioner then filed a writ of habeas corpus in San Diego Superior Court.[5] Petitioner raised claims that his trial and appellate counsel were ineffective for failing to raise: (1) third-party culpability as to Leroy Thomas; (2) insufficiency of the evidence for First Degree Murder; and (3) a *Batson/Wheeler* challenge. (Lodgment 9.) The superior court denied the petition, finding as to each claim that Petitioner had failed to set forth an adequate record to allow the court to conduct a rational review. (Lodgment 10.) Petitioner then filed a petition with the Fourth District Court of Appeal raising the same claims (Lodgment 11.) The Court of Appeal denied his petition, finding he failed to provide any record to support his claims. (Lodgment 12.) Petitioner then filed a Petition for Review with the California Supreme Court raising the same claims. (Lodgment 13.) The California Supreme Court summarily denied his Petition for Review. (Lodgment 14.)

II. STANDARD OF REVIEW

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), applicable to this Petition, a habeas petition will not be granted unless that adjudication: (1) resulted in a decision that was contrary to, or involved an unreasonable application of clearly established federal law; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented at the state court proceeding. 28 U.S.C. § 2254(d); *Early v. Packer*, 537 U.S. 3, 8 (2002). "This is a 'difficult to meet' and 'highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt.'" *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (quoting *Harrington v. Richter*, 562 U.S. 86, 102 (2011); *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002)).

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[5] Case No. HC22111.

"The 'contrary to' and 'unreasonable application of' clauses in § 2254(d)(1) are distinct and have separate meanings." *Moses v. Payne*, 555 F.3d 742, 751 (9th Cir. 2008) (citing *Lockyer v. Andrade*, 538 U.S. 63, 73-75 (2003)). "Under the 'contrary to' clause of § 2254(d)(1), a federal court may grant relief only when 'the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or if the state court decides a case differently than the Supreme Court has on a set of materially indistinguishable facts.'" *Loher v. Thomas*, 825 F.3d 1103, 1111 (9th Cir. 2016) (quoting *Williams v. Taylor*, 529 U.S. 362, 413 (2000)).

"Under the 'unreasonable application' clause of § 2254(d)(1), 'a state-court decision involves an unreasonable application of the Supreme Court's precedent if the state court identifies the correct governing legal rule . . . but unreasonably applies it to the facts of the particular state prisoners case.'" *Id.* (quoting *White v. Woodall*, 134 S. Ct. 1697, 1705 (2014). Unreasonable application is "not merely wrong" or "even clear error." *Woods v. Donald*, 135 S. Ct. 1372, 1376 (2015). It must be "objectively unreasonable." *Id.* "To satisfy this high bar, a habeas petitioner is required to 'show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.'" *Id.* at 1377 (quoting *Harrington*, 562 U.S. at 103). "[R]elief is available under § 2254(d)(1)'s unreasonable application clause if, and only if, it is obvious that a clearly established rule applies to a given set of facts that there could be no 'fairminded disagreement' on the question." *Woodall*, 134 S. Ct. at 1706-07 (citing *Harrington*, 562 U.S. at 103); *see also Williams*, 529 U.S. at 411 ("[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.").

Under § 2254(d)(2) "a petitioner may challenge the substance of the state court's finding and attempt to show that those findings were not supported by substantial

evidence" or "challenge the fact-finding process itself on the ground that it was deficient in some material way." *Hibbler v. Benedetti*, 693 F.3d 1140, 1146 (9th Cir. 2012). "Regardless of the type of challenge, 'the question under AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable — a substantially higher threshold." *Id.* "[W]hen the challenge is to the state courts procedure, . . . [the court] must be satisfied that *any* appellate court to whom the defect in the state court's fact-finding process is pointed out would be unreasonable in holding that the state courts fact-finding process was adequate.'" *Id.* at 1146-47; *see also Taylor v. Maddox*, 366 F.3d 992, 1001 (9th Cir. 2004). (the federal court "must be convinced that an appellate panel, applying the normal standards of appellate review, could not reasonably conclude that the finding is supported by the record.").

Section 2254(e) (1) provides: "a determination of a factual issue made by a State court shall be presumed to be correct." 28 U.S.C. § 2254(e)(1). The petitioner has "the burden of rebutting the presumption of correctness by clear and convincing evidence." *Id.*

Where, as here, there is no reasoned decision from the state's highest court, the Court "looks through" to the last reasoned decision and presumes it provides the basis for the higher court's denial of a claim or claims. *See Ylst v. Nunnemaker*, 501 U.S. 797, 805-06 (1991);[6] *see also Johnson v. Williams*, 133 S. Ct. 1088, 1094 n.1 (2013). Here, the California Court of Appeal's November 14, 2014 decision is the last reasoned decision on most of Petitioner's claims.[7]

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[6] The Court notes that the United States Supreme Court granted certiorari in *Wilson v. Sellers*, 2017 WL 737820, on February 27, 2017 to address whether the Supreme Court's decision in *Harrington*, 562 U.S. 86 silently abrogated *Ylst*'s direction to look through a summary ruling to the last reasoned decision.

[7] The Court of Appeal's October 14, 2015 decision, that takes notice of the November 14, 2015 decision on direct appeal, is the last reasoned decision on the three claims raised only on collateral review: (1) ineffective assistance of counsel for failing to raise third-party culpability as to Leroy Thomas; (2) ineffective assistance of counsel for failing to

III. DISCUSSION

A. Ineffective Assistance of Counsel Claims

Petitioner raises numerous claims regarding ineffective assistance of counsel. He argues his trial counsel should have presented evidence that Breanna Sandle and Corey Wishom failed to identify Petitioner in live police line-ups. (Pet. at 2, 5; Lodgment 7 at 5-9.[8]) Petitioner argues his trial counsel should have presented evidence of innocent explanations for his trip to Louisiana, his internet search history while there, and his change in phone number following the murder. (Pet. at 4; Lodgment 7 at 9-14.) Finally, Petitioner argues his trial and appellate counsel were ineffective for failing to raise sufficiency of the evidence for first degree murder, third-party culpability as to Leroy Thomas, and a *Batson/Wheeler* challenge. (Pet. at 12; Lodgment 13 at 8-25.) Each claim is addressed below.

When evaluating claims for ineffective assistance of counsel under ADEPA, the Court's review is "'doubly deferential' in order to afford 'both the state court and the defense attorney the benefit of the doubt." *Woods*, 135 S. Ct. at 1376 (quoting *Burt v Titlow*, 134 S. Ct. 10, 13 (2013)). As explained more fully below, review under *Strickland*, the standard for evaluating an ineffective assistance of counsel claim, is deferential to counsel's decisions, and review under AEDPA is deferential to the state court's decision finding no violation of *Strickland*. *See Harrington*, 562 U.S. at 105 ("The standards created by *Strickland* and § 2254(d) are both highly deferential and when the two apply in tandem, review is doubly so.")

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raise insufficiency of the evidence; and (3) ineffective assistance of counsel for failing to raise a *Batson/Wheeler* challenge. (Lodgment No. 12.)

[8] In addition to the arguments Petitioner makes in the Petition itself, he refers to Exhibit A attached to his Petition, his December 23, 2014 Petition on direct appeal to the California Supreme Court, for more elaboration on numerous claims. The Court's analysis takes into consideration the arguments advanced in that filing, including the final page, not included as part of Exhibit A, but provided by Respondent in Lodgment 7. All further references are to Lodgment 7.

Under *Strickland*, a defendant must "show that counsel's performance was deficient." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). This "first prong sets a high bar." *Buck v. Davis*, 2017 WL 685534, at *13 (2017). "A defense lawyer navigating a criminal proceeding faces any number of choices about how best to make a client's case." *Id.* Counsel's constitutional obligation under *Strickland* is satisfied "so long as his decisions fall within the 'wide range' of professionally competent assistance." *Id.* (quoting *Strickland*, 466 U.S. at 690); *see also Harrington*, 562 U.S. at 104 (A reviewing court must indulge "a strong presumption that counsel's representation was within the 'wide range' of reasonable professional assistance."). "The question is whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom." *Harrington*, 562 U.S. at 105 (quoting *Strickland*, 466 U.S. at 690.) "It is only when the lawyer's errors were 'so serious that counsel was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment' that *Strickland*'s first prong is satisfied." *Buck*, 2017 WL 685534, at *13 (quoting *Strickland*, 466 U.S. at 687).

The Court need not address both the deficiency prong and the prejudice prong if the defendant fails to make a sufficient showing of either one. *Strickland*, 466 U.S. at 697. However, assuming a defendant can establish deficient performance under this highly deferential standard, prejudice must also be shown. *Harrington*, 562 U.S. at 104. "It is not enough 'to show that the errors had some conceivable effect on the outcome of the proceeding.'" *Id.* (quoting *Strickland*, 466 U.S. at 693). A defendant "must demonstrate '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.'" *Id.* (quoting *Strickland*, 466 U.S. at 694); *see also Buck*, 2017 WL 685534, at *14. "This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687.

When evaluating claims of ineffective assistance of counsel under § 2254(d), as the Court is here, the court is not considering "whether defense counsel's performance fell below *Strickland*'s standard." *Harrington*, 562 U.S. at 101. "The pivotal question is whether the state court's application of the *Strickland* standard was unreasonable." *Id.* "A state court must be granted a deference and latitude that are not in operation when the case involves review under the *Strickland* standard itself." *Id.* "When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Id.* at 105.

1. Failing to Introduce Evidence of Live Police Line-Ups[9]

Trial counsel did not introduce evidence that Sandle and Wishom failed to identify Petitioner in live line-ups. Petitioner argues this would have provided further evidence that he was not one of the individuals observed at Pleasant's apartment before the murder or fleeing the apartment following the murder. (Pet. at 5; Lodgment 7 at 5-9) Petitioner argues this evidence was significant because the live line-ups occurred on September 17, 2010 in closer proximity to the murder and when the prosecutor had obtained a "no haircut" order to allow witnesses to see him with a hairstyle similar to that he would have had at the time of the murder. (Lodgment 7 at 5.) The witnesses in-court non-identification of Petitioner did not occur until his trial in October 2011. Petitioner additionally argues this testimony was significant because both Sandle and Wishom testified they tentatively selected Petitioner in photographic line-ups before indicating they did not know if he was one of the individuals they saw. (*Id.* at 7.) Petitioner also argues that this evidence could have been presented through the officer that conducted

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[9] Petitioner raises this issue in Ground One of his Petition with a reference to his December 23, 2014 Petition on direct appeal to the California Supreme Court, for more elaboration. As noted above, the Court has considered these arguments and all references are to Lodgment No. 7.

the live line-up to avoid having Sandle or Wishom change their mind and identify Petitioner. (*Id.* at 8.) Petitioner also argues trial counsel's concern that the live line-up evidence would emphasize police suspicion was unreasonable because police suspicion would be obvious from Petitioner being charged with murder. (*Id.* at 8.)

Respondent argues that, given neither witness had identified Petitioner at trial and both confirmed on cross examination that they did not identify Petitioner in six-pack photographic line-ups conducted shortly after the murder, his trial counsel made a reasonable tactical decision not to introduce additional evidence of non-identification in the live police line-ups. Respondent emphasizes trial counsel's testimony during the hearing on Petitioner's motion for a new trial that he did not want to give the witnesses a chance to change their testimony by raising the live police line-ups or emphasize the police interest in Petitioner.

The Court of Appeal concluded that counsel's decision did not fall below "prevailing professional norms." (Lodgment 6 at 13.) The Court considered Petitioner's argument that the live line-up evidence could have been presented through the testimony of the officers conducting it, avoiding the risk that the witnesses would reconsider their non-identification of Petitioner on cross examination and identify him. (*Id.* at 12.) The court also considered defense counsel's testimony that he decided not to offer the live line-up evidence because neither witness had identified Petitioner at trial and he wanted to avoid emphasizing to the jury that Petitioner was a suspect immediately after the murder. (*Id.* at 12.) The Court of Appeal found trial counsel could reasonably have determined that additional evidence of a non-identification was of "marginal benefit." (*Id.* at 13.)

The Court of Appeal's decision was not unreasonable. At the hearing on Petitioner's motion for a new trial, Petitioner's trial counsel testified that he decided not to introduce evidence that Wishom and Sandle had not identified Petitioner at live line-ups because neither had identified Petitioner at trial. (Lodgment 1, Part 11 at 2567-68.) He explained that "nobody in the courtroom was pointing the finger at him as an offender

in the case, I didn't want to go back and rehash the police's suspicion that he'd been one of the offenders and had been in a line-up. I made a conscious decision not to present that evidence." (*Id.* at 2568.) He indicated he had a lack of in-court identification in front of the jury and he did not want to risk giving them an opportunity on cross examination to say something different. (*Id.* at 2604-05.) And, he stated more generally, "it is my view that when – when there is a lack of an in-court identification of the defendant, of my client, as an offender, that I don't want to go back and give them another chance to make their statement of identification better." (*Id.* at 2603.)

There is certainly at least a reasonable argument that counsel satisfied *Strickland*'s deferential standard. *Harrington*, 562 U.S. at 105 ("the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard.") No witness had identified Petitioner at the location of the murder at the time of the murder and the two witnesses that did see the individuals believe to be responsible for the murder coming and going from the apartment did not identify Petitioner in court. There may have been some benefit in emphasizing that Petitioner was also not identified at the live line-ups, closer to the time to when the witnesses would have seen him. But, when weighed against trial counsel's concerns about the witnesses reconsidering their testimony or emphasizing further that Petitioner was a suspect shortly after the murder, there is at least a reasonable argument that counsel's decision fell "within the 'wide range' of reasonable professional assistance." *Id.* at 104. The Court recommends Petitioner's claim for ineffective assistance of counsel for failing to introduce evidence of the live police line-ups be **DENIED**.

2. Failing to Introduce Evidence of Innocent Explanations[10]

At trial, the prosecutor argued Petitioner's flight from San Diego to Louisiana, his searching for information on who was in jail and for warrants issued for himself and others, and his phone number change right after the murder reflected consciousness of guilt. Petitioner argues his trial counsel should have presented evidence of innocent explanations for his trip to Louisiana, his internet search history, and his change in phone number the day of murder. (Pet. at 4; Lodgment 7 at 9-14.) The Court considers each.

a) Trip to Louisiana

Petitioner asserts trial counsel was ineffective in failing to introduce evidence of Petitioner's calls to and from his wife in Louisiana in the months preceding the murder to provide an innocent explanation why Petitioner went to Louisiana — it was a preplanned trip to visit his wife rather than flight following a murder. (Pet. at 5; Lodgment 7 at 9-10.) Respondent argues the innocent explanation for the trip to Louisiana that Petitioner wanted his trial counsel to put before the jury was extremely problematic and declining to do it was a tactical decision.

The Court of Appeal found trial counsel's decision not to present evidence of Petitioner's communications with his wife in the months leading up to the murder was a reasonable tactical decision. (Lodgment 6 at 16.) The court noted trial counsel had explained he found Petitioner's story regarding the trip preposterous and did not think it would be well received by the jury. (*Id.*) Petitioner claimed that he preplanned the trip to visit his wife, from whom he was separated, for his wedding anniversary, and brought his girlfriend, a prostitute, on the trip for "female companionship." (*Id.* at 14.) The court also explained that trial counsel thought Petitioner's wife and girlfriend, each of which might have had to testify to the trip, particularly given Petitioner elected not to testify a

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[10] As with the prior claim, Petitioner raises this claim in Ground One of his Petition and refers to his Petition to the California Supreme Court on direct appeal for more elaboration.

week before trial, would not have been seen as credible. (*Id.* at 15.) The court also found that while evidence of Petitioner's communications with his wife in Louisiana might have explained his going to that location, as opposed to another, it did not explain the timing of the trip, the day after the murder. (*Id.* at 15-16.)

As to Petitioner's wife, trial counsel testified that she "presented big problems, potential problems . . . . She'd been interviewed by the police in the case, she was made aware that Mr. Farley had come together with his other girlfriend, who was a prostitute, and she was decidedly unhappy about that." (*Id.* at 2631.) Trial counsel also explained that Petitioner's girlfriend would not have been a good witness. (*Id.* at 2594.) He indicated he could not determine whether she was lying when they spoke and that because she was a prostitute, she brought with her significant baggage, including that the jury might think that Petitioner was her pimp, particularly given that she had apparently prostituted herself on their trip. (*Id.* at 2566, 2590, 2594.) He acknowledges that having an innocent explanation for the trip would have been helpful, but the options to present it once Petitioner decided not to testify were not good. (*Id.* at 2594.) Although the Court of Appeal did not specifically rely on it, trial counsel also explained that he relied on Petitioner's cell phone records, admitted by the prosecutor, showing calls between Petitioner and a phone number with a Louisiana area code prior to the murder and argued that this connection to someone in Louisiana prior to the murder showed an alternate reason for his trip to Louisiana other than fleeing. (*Id.* at 2607-08, 2630-31.)

Trial counsel chose to avoid an undesirable and potentially unbelievable explanation for the trip and having that less-than-appealing story presented by bad witnesses to a jury. "[I]t is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Strickland*, 466 U.S. at 689. But, the reviewing court must make every effort "to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* Counsel identified significant problems with Petitioner's explanation for

the trip in both the trip itself and the witnesses that would have to testify to it. He decided not to attempt to get that explanation in front of the jury, and instead emphasized evidence that Petitioner knew someone in Louisiana that he was communicating with prior to the murder to suggest he was not fleeing. If trial counsel had sought to admit evidence of Petitioner's calls to his wife in advance of the murder to show the trip was preplanned, the trip itself, with all its baggage, might have been presented to the jury. If that had happened, Petitioner would surely be arguing now that counsel was ineffective for putting that unfavorable and less-than-credible story in front of the jury instead of just relying on phone records showing his calls to a Louisiana number prior to the murder for an innocent explanation. It is exactly the type of decision that should not be second-guessed, particularly under AEDPA's doubly deferential review. *See Woods*, 135 S. Ct. at 1376 (explaining doubly deferential review based on deference to both the state court and the defense attorney's decisions). The Court of Appeal's conclusion that counsel did not provide ineffective assistance in failing to present evidence of Petitioner's calls to his wife prior to the murder was not unreasonable. The Court recommends Petitioner's claim for ineffective assistance of counsel for failing to introduce evidence of Petitioner's communications with his wife prior to the murder be **DENIED**.

b) Evidence of Petitioner's Communications with His Parents

Petitioner asserts trial counsel failed to introduce evidence Petitioner's parents told him about the murder and the execution of a search warrant at their home related to the murder while he was in Louisiana and evidence his mother changed his phone number.[11]

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[11] As to the issue of counsel failing to present testimony from Petitioner's mother that she changed his phone number, the claim is not clearly raised. The only reference in the Petition or Traverse to it is under a section where he lists the claims he raised on direct appellate review. (Pet. at 4.) In listing the claim raised on direct appeal for ineffective assistance of counsel for failing to provide innocent explanations for the trip to Louisiana and his internet searches, he also includes "the change in phone number." (*Id.*). Unlike the remainder of that claim, that he raises in Ground One in his Petition, he does not otherwise raise this issue in his Petition or Traverse. Additionally, there is nothing else in

(Pet. at 5; Lodgment 7 at 11-14.) He asserts that this information would have provided an innocent explanation for his internet searches for warrants and on the "Who's in Jail" website for himself and his co-defendant Terry as well as his question to a police officer that escorted him from Louisiana to San Diego concerning whether he could be charged with a gang crime because the other defendant was a gang member. (Pet. at 5; Lodgment 7 at 11-12.)

Respondent argues trial counsel's decision not to introduce evidence Petitioner's mother told him about Pleasant's killing and that Petitioner was a suspect was a tactical decision. Specifically, Respondent argues that trial counsel assessed she would have been a horrible witness because of her hostile and uncooperative demeanor. Additionally, Respondent argues that this story was inconsistent with the story Petitioner told counsel a week before trial — that he arranged for others to rob Pleasant.

The Court of Appeal found that trial counsel's decision not to introduce evidence that Petitioner's mother had informed him that the police were investigating him was a reasonable tactical choice. (Lodgment 6 at 19.) In summarizing trial counsel's testimony, the Court of Appeal explained that he had spoken with Petitioner's parents numerous times and found Petitioner's mother to be hostile and assessed her as "likely to be a 'terrible witness.'" (*Id.* at 18.) The court also noted that evidence his mother informed him about the police investigation was not necessarily inconsistent with his guilt. (*Id.* at 19) As to Petitioner's father, the Court of Appeal found Petitioner had not claimed that trial counsel could have presented an explanation for the computer searches

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the exhibits attached to his Petition, exhibits referenced in the Petition, or subsequent filings with the Court suggesting he is raising a claim on this basis in his Petition. Although Respondent does not address it and the Court could find it was not raised, the Court gives the Petition the benefit of a very liberal construction and addresses the issue. *Porter v. Ollison*, 620 F.3d 952, 958 (9th Cir. 2010) (citing *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) and finding "[p]risoner pro se pleadings are given the benefit of liberal construction.").

solely through Petitioner's father, rather it was his mother's testimony that was important. (*Id.* at 18.) The court does, however, note that trial counsel indicated that Petitioner's father had little to say and he did not recall having any discussions with him about communications with Petitioner while Petitioner was in Louisiana. (*Id.* at 18.) Finally, the Court of Appeal notes that Petitioner did not argue on appeal that trial counsel failed to properly investigate his parents as potential witnesses. (*Id.* at 19 n.6.)

The Court of Appeal did not specifically address the potential testimony from Petitioner's mother that she had Petitioner's phone number changed. Nor does Respondent specifically address this argument. This is likely because the issue was noted only in a single paragraph amidst Petitioner's briefing to the Court of Appeal on trial counsel's decision not to present the testimony about Petitioner's parents' communications with him. (Lodgment 4 at 15-16.) The Court of Appeal's conclusion that trial counsel did not err in not having Petitioner's mother testify because she would be a bad witness would similarly apply to her testifying as to the phone number change. Additionally, Petitioner has not shown that his counsel's failure to present this evidence "fell below an objective standard of reasonableness." *Harrington*, 562 U.S at 104. This Court notes that the record also reflects that had this testimony been presented, it might have been harmful. Petitioner's mother testified during the hearing on his motion for a new trial that she was frustrated in speaking with Petitioner on the day of the murder because he was getting so many calls. (Lodgment 1, Part 11 at 2451-52.) The many calls were causing the phone to keep cutting off what Petitioner was saying, what she described as the interference from the continual beeping as calls kept coming in. (*Id.*) And when she asked him if he was going to answer the calls, he replied "No. I'm not trying to hear crazy stuff." (*Id.* at 2452.) Even if Petitioner's statements to his mother were not admitted, that he was receiving such an unusually high volume of calls that day that his mother changed his phone number to stop it, could suggest he was receiving calls related to the murder. A jury might have also thought she was just a mother making up a story to protect her son. If the explanation — changing a phone number because of call

volume in one conversation — seemed odd, the jury might have even found it suggested she was covering up something for him. Although it might have been helpful to have an explanation for Petitioner's phone number changing the day of the murder, the explanation itself from his mother might have been more harmful to Petitioner's case, particularly given counsel's assessment of her as a witness. Under these circumstances, trial counsel's representation did not "amount[] to incompetence under 'prevailing professional norms.'" *Harrington*, 562 U.S. at 105 (quoting *Strickland*, 466 U.S. at 688.)

The Court of Appeal's conclusion that trial counsel was not ineffective for failing to introduce testimony from Petitioner's parents that they informed him about the murder was not unreasonable. *Id.* at 105 ("the question is not whether counsel's action were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard."). Given trial counsel's assessment of Petitioner's parents, electing not to have them testify, assuming it was error at all, was not the type of "error[] so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687. Trial counsel, having assessed Petitioner's mother on many occasions, considered her a terrible witness and it does not appear that he was aware Petitioner's father had communicated with Petitioner about the murder investigation while he was in Louisiana. Although not specifically noted by the Court of Appeal, the proceedings on Petitioner's motion for a new trial also support counsel's assessment. During questioning that does not appear to be going smoothly, the prosecutor requests Petitioner's mother be directed to answer his questions and notes "this goes back to the same dynamic we had for three and a half weeks in trial. This witness sat in the back gallery, as well as in the hallway, frequently interrupted proceedings, even up to closing argument." (Lodgment 1, Part 11 at 2423.) The trial judge noted he had already made that direction, before giving it again. (*Id.*) The Court recommends Petitioner's claim for ineffective assistance of counsel for failing to introduce evidence of innocent explanations for Petitioner's conduct be **DENIED**.

3. Ineffective Assistance of Counsel Claims Raised on Collateral Review in State Court

a) Whether These Claims Were Raised in the Federal Petition

Petitioner does not clearly assert these claims in his Petition. The claims — ineffective assistance of trial and appellate counsel for failing to raise: sufficiency of the evidence for First Degree Murder; third-party culpability as to Leroy Thomas; and a *Batson/Wheeler* challenge — are referenced in his federal Petition in two places, but they are under listings for grounds raised on collateral review in state court. (Pet. at 3, 12.) He references Exhibit B to his Petition "for more established," but as with the listing above, it is under a heading for collateral review in state court. (*Id.* at 12.) Exhibit B is his habeas Petition to the California Supreme Court, which raise these claims. (Lodgment 13.) Another exhibit attached to his Petition, a request for stay and abeyance, suggests he is raising these claims in his federal Petition because he is seeking to exhaust these claims. (ECF No. 1 at 15-19.) Petitioner's filings after Respondent Answered also suggest he is raising these claims. Petitioner references and seeks relief on the claims, including noting that Respondent failed to respond to them in his Answer. (ECF Nos. 28, 38-39.) Respondent's Answer indicates that he did not address these claims because Petitioner only raised them in the request for stay and abeyance attached as an exhibit to his Petition, rather than in his Petition. (Answering Brief at 1, n.1 and 7 n. 5.)

Although the claims were arguably only identified in the actual Petition as part of the procedural history of the proceedings in state court, when viewed in the context of the exhibits attached to the Petition and Petitioner's later filings it appears he is likely attempting to raise these claims. And, because "[p]risoner pro se pleadings are given the benefit of liberal construction" the Court addresses these claims.[12] *Porter*, 620 F.3d at 958 (citing *Erickson*, 551 U.S. at 94).

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[12] The Court does not address whether these claims are procedurally defaulted. "Procedural default is an affirmative defense" that the state must generally assert. *Vang*

b) Failing to Raise Third-Party Culpability as to Leroy Thomas

Petitioner argues[13] that based on the evidence found in a search of Leroy Thomas' residence and the close relationship between Thomas and Terry, Petitioner's co-defendant, his trial counsel should have presented a third-party culpability defense as to Leroy Thomas and his appellate counsel should have raised his trial counsel's failure to do so on appeal. (Lodgment 13, ECF No. 19-29 at 14.[14])

Petitioner explains that Thomas gave a statement to police indicating that Terry was with Petitioner the day of the murder, things went bad, and Petitioner fired a shot. (*Id.* at 11.) Petitioner points to testimony from Wishom indicating that one of the two men that came to Pleasant's apartment as Wishom was leaving just before the murder stated "This is my brother, he's cool." (*Id.*) Petitioner argues the brothers referenced in this statement were Terry and Thomas because Thomas indicated in a statement to police

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v. Nevada, 329 F.3d 1069, 1073 (9th Cir. 2003). Respondent has not asserted it here. However, the Court does have the "discretion to consider the issue *sua sponte* if the circumstances warrant. *Id.* (citing *Boyd v. Thompson*, 47 F.3d 1124, 1128 (9th Cir. 1998)). In *Boyd*, the procedural default was obvious from the face of the petition and the state had not waived the defense because the court raised it before the state responded. *Id.* (citing *Boyd*, 147 F.3d at 1127-28). And in *Vang*, the court reversed the district court for raising it *sua sponte* when the state did not raise the defense despite full briefing on the claims. *Id.* Here, procedural default as to these claims is not obvious from the Petition and the state has already responded to the Petition. While the Court would not necessarily find the defense waived as in *Vang* — given how questionable it is Petitioner even properly raised these claims in his federal Petition — the state has fully briefed the Petition and did not assert the procedural default defense. Additionally, even if it were proper to raise the defense *sua sponte*, courts may address the merits, as the Court does here, instead of a potential procedural bar. *See Lambrix v. Singletary*, 520 U.S 518, 525 (1997).

[13] This argument is drawn from the filing attached as Exhibit B and referenced for support in the Petition, Petitioner's Petition for Review filed with the California Supreme Court. The same filing is before the Court as Lodgment 13. Further references are to Lodgment 13.

[14] All references to Lodgment 13 are to the ECF page numbering.

that he spoke with Terry regularly and lived next door to him. (*Id.*) Petitioner additionally argues that Terry utilized the assistance of another inmate, Miguel Gonzaba, to get a letter out of the prison to have Thomas killed for snitching on Terry. (*Id.* at 12-14.)

The Court of Appeal's October 14, 2015 decision rejected Petitioner's claim of ineffective assistance of counsel for failing to raise third-party culpability as to Leroy Thomas because Petitioner failed to provide any records or documents to support the claim. (Lodgment 12 at 1-2.) The Court notes that it appears the only document submitted in support of the state petition was a picture of Leroy Thomas. (Lodgment 12 at 15-16.) The Court cannot find the "state court's determination was . . . unreasonable." *Hibbler*, 693 F.3d at 1146.

The Court also finds the claim has no merit. Although this claim was not raised on direct appeal, Petitioner's appointed counsel for purposes of his motion for a new trial did question Petitioner's trial counsel concerning third-party culpability as to Thomas during the hearing on Petitioner's motion for a new trial. Petitioner's counsel testified that he considered and chose not to introduce evidence of third-party culpability as to Leroy Thomas for numerous reasons. (Lodgment 1, Part 11 at 2560-61.) As explained in more detail below, trial counsel knew that Thomas could connect Petitioner to Terry and he was trying to distance Petitioner from Terry. (*Id.* at 2561-62.) Additionally, trial counsel found Petitioner's own account of events, different a week before trial than it had been prior, further supported trial counsel's decision not to raise third-party culpability as to Thomas at trial. (*Id.* at 2569.)

Trial counsel explained that he knew that Thomas had made statements to the police. (*Id.* at 2561.) Thomas had indicated that Petitioner and his co-defendant Terry were together on the day of the murder. (*Id.*) Additionally, Thomas had claimed to police that Terry told him that Terry and Petitioner had been at Pleasant's to rob him and that Petitioner came out of the bathroom with a shotgun and shot Pleasant. (*Id.* at 2561, 2610-11.) Trial counsel was concerned that if he raised third-party culpability as to Thomas,

Thomas might testify and the connection between Petitioner and Terry might have been presented to the jury. (*Id.* at 2574.)

Thomas' potential to create a connection between Petitioner and Terry was very problematic for trial counsel. Counsel wanted to distance Petitioner from Terry for numerous reasons. The scientific evidence against Terry was stronger. (*Id.* at 2562.) Trial counsel needed to avoid any connection between the two to persuade the prosecutor to sever Petitioner and Terry for trial, which he did. (*Id.* at 2573.)

Trial counsel was also aware there might be additional charges against Terry based on allegations Terry had sent messages out of the jail asking that Thomas be dissuaded from testifying, including, that he be hurt, and that Thomas was in fact hurt. (*Id.* at 2573.) Although not entirely clear, it appears this is the letter Petitioner describes Gonzaba helping Terry get out of the prison. Trial counsel explained that a letter he was aware of before trial indicated Terry thought Thomas had inculpated he and Petitioner. (*Id.* at 2614.) He explains that the letter from Terry complained about "motor mouth," that he interpreted to be Thomas, "blound me and, even worse, the other boy," and later says he "let it all out on me and the other boy too." (*Id.* at 2613-14.) It also references Terry being charged as a gang member. (*Id.* at 2613.) Trial counsel was concerned that if he raised third-party culpability as to Thomas, there might be evidence introduced connecting Petitioner with Terry's attempts to intimidate Thomas. (*Id.* at 2574.)

Counsel also explained that third-party culpability as to Thomas was itself weak. The only evidence connecting Thomas to the murder was what counsel considered weak DNA evidence linking Thomas to a piece of physical evidence in the apartment. (*Id.* at 2562.)

Counsel also indicated in his testimony that his decision not to raise third-party culpability as to Thomas was bolstered when Petitioner told him, one week before trial, that he had arranged for Thomas to buy marijuana from Pleasant the day before the murder. (*Id.* at 2569.) Petitioner had previously claimed that he did not know Thomas. (*Id.* at 2535.) A week before trial, Petitioner told trial counsel he did know Thomas —

met Thomas outside a barber shop and they had become acquaintances — and that Thomas had asked Petitioner to arrange for him to purchase marijuana from Pleasant. (*Id.* at 2538-39.) Petitioner additionally explained to his counsel that he made arrangements with Pleasant the night before Pleasant was murdered for Thomas to make a purchase from Pleasant. (*Id.* at 2539.) Petitioner also told his trial counsel that when he tried to call Thomas the morning of the murder he got someone else — he thought it might have been Terry, but did not know — and that person gave Petitioner a different number for Thomas. (*Id.* at 2546.) Counsel was concerned this new version of events involving Thomas might open Petitioner up to being an aider and abettor of the shooting if Petitioner had made the arrangements for a drug buy that resulted in someone being shot and killed. (*Id.* at 2569.)

Trial counsel made a strategic decision to, at a minimum, avoid connecting Petitioner to his co-defendant against which the evidence was stronger. As with Petitioner's other claims, there might have been some benefit in attempting to introduce evidence suggesting someone else was responsible, but counsel would have been calling a witness that put Petitioner with the individual against whom the evidence was stronger and who had stated Terry and Petitioner had robbed and shot Pleasant. Additionally, as discussed more fully below, trial counsel unsuccessfully tried to admit third-party culpability evidence as to Pleasant's brother, David Foster. Attempting to raise third-party culpability as to numerous individuals might have presented additional risks. Trial counsel reasonably elected not to take these significant risks with little likely benefit.

As to appellate counsel, the claim fails for the same reasons noted above. Because trial counsel was not ineffective in failing to raise the issue, appellate counsel reasonably elected not to argue he was. Additionally, appellate counsel "need not (and should not) raise every nonfrivolous claim, but rather may select from among them in order to maximize the likelihood of success on appeal." *Smith v. Robbins*, 528 U.S. 259, 288 (2000). "Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome." *Id.* at 288. Given

the many significant reasons trial counsel provided for not asserting third-party culpability as to Leroy Thomas, particularly the possibility that he might inculpate Petitioner, appellate counsel's election to pursue stronger claims was not unreasonable. The Court recommends Petitioner's claim that trial and appellate counsel were ineffective for failing to raise third-party culpability as to Leroy Thomas be **DENIED**.

4. Failing to Raise Insufficiency of the Evidence to Support First Degree Murder

Petitioner argues his trial and appellate counsel were ineffective because each failed to challenge the sufficiency of the evidence that he was in the apartment at the time of the shooting. (Lodgment 13 at 17.) Petitioner concedes the prosecution presented evidence of Petitioner's cell phone activity around the time of murder, evidence Petitioner was at Pleasant's apartment the night before the murder, evidence Pleasant was expecting him to return the next morning, evidence Petitioner's DNA was on a roll of duct tape in the bathroom of the apartment that Pleasant's girlfriend did not recall seeing before the murder, and Petitioner escaped from custody in Louisiana. (*Id.*)

Petitioner's argument relies largely on listing the items in the apartment that were tested for DNA and he was excluded as a source of the DNA. (*Id.* at 18-20.) He also dismisses the significance of his DNA being on the duct tape because duct tape is used to package marijuana and he had previously been in the apartment. (*Id.* at 17) He disputes the significance of the evidence that his cell phone was "pinging" off a cell tower near the apartment as not being specific enough given the evidence that a phone could ping off a tower from as far away as two miles. (*Id.* at 21-23.) Petitioner additionally notes the prosecutor's argument concerning Petitioner's phone activity ceasing for approximately eleven minutes that coincide with when the robbery and murder were taking place, but seems to only challenge that evidence as it relates to his being in the location. (*Id.* at 22-23.) He also argues there was no evidence of blood on his clothes at the time of his arrest or in his car. (*Id.* at 20.) Petitioner also argues Pleasant's statement, "they got me, oh God they shot me" immediately after the shooting, before he died, establishes Petitioner

did not shoot him because Pleasant, having seen Petitioner the night before, would have identified him by name. (*Id.* at 24.)

As recited above in the Court of Appeal's summary of the evidence presented at trial, there was evidence from which a jury could find Petitioner was at the apartment at the time of the murder. Petitioner was at the apartment the night before and Pleasant was expecting him to return the next morning. Pleasant's girlfriend indicated that when she left the apartment at approximately 11:15 a.m. she and Pleasant planned to meet at noon, but Pleasant had indicated he was waiting for Petitioner to come to the apartment. A visiting neighbor heard Pleasant tell a caller to hurry up and come because he was leaving soon. When another visitor, Wishom, was leaving, two other men arrived, to which Pleasant responded "Oh, I've been waiting for you." Wishom left as the men entered the apartment and at approximately the same time, a neighbor heard a melee and a loud boom from Pleasant's apartment, heard Pleasant crying for help, and looked outside to see two African American males running from the apartment with a backpack. Pleasant sustained a large gunshot wound to the buttocks and blunt force trauma to the head consistent with being struck with a gun. He died at the scene. A jury could infer from this evidence that Petitioner was one of the individuals that arrived at the apartment right before the murder and was seen fleeing immediately after. Petitioner is dismissive of the cell phone records presented, but as the Court of Appeal explained, they showed several short calls between Petitioner and Pleasant that morning between 10:37 and 10:39 a.m. This further supports the expectation that Petitioner was expected at Pleasant's apartment that morning and was the person Pleasant stated "Oh, I've been waiting for you" to.

The apartment was in disarray, including an open empty safe in the bedroom and a bag of marijuana on the living room floor. Police also found a slide from a firearm, handcuffs, and a handcuff key in the hallway. As Petitioner acknowledges above, Petitioner's DNA was found on duct tape in the bathroom that Pleasant's girlfriend did not recall seeing in the apartment before. This is further evidence from which the jury could infer Petitioner was in the apartment. Although a jury might conclude his DNA

was on duct tape in the apartment from a prior visit as Petitioner now argues, that does not mean a jury could not reach a different conclusion about the duct tape and the reason it might have been in the apartment, particularly given the presence of handcuffs and a robbery.

As previously noted, there was stronger DNA evidence as to Terry — his DNA was found on a baseball cap, gun slide, blood samples from the apartment, and fingernail scraping taken from Pleasant, in addition to his fingerprints being on artwork in the living room. This is of consequence as to Petitioner because cell phone records show an 11:30 a.m. call placed from Petitioner's phone that lasted 59 seconds and terminated at the cell tower at Pleasant's apartment. Terry's phone also sent a text to Petitioner's phone at 11:33 a.m. There was no activity on Petitioner's phone from 11:31 to 11:48 a.m. followed by Petitioner and Terry's phones exchanging numerous text messages. Two hours later Petitioner's phone number is changed. The next morning, cell records on the new phone show Petitioner leaving California and traveling to Louisiana.

Petitioner was arrested a month and a half later in Louisiana. This lengthy gap makes Petitioner's emphasis on the absence of blood on his clothes and in his car less compelling. Additionally, as discussed above, there was evidence Petitioner asked an officer about whether he could be charged with a gang crime if the other person involved was in a gang and internet search history reflects Petitioner was searching for information about the murder and investigation.

Petitioner identifies ways in which the evidence presented could be interpreted in his favor, but that does not make an interpretation unfavorable to him wrong. For example, he argues that because the maximum distance his cell phone could have been from the tower was two miles this evidence was insufficient to show that he was in the apartment. In isolation, he might be right, but in the context of all the other evidence, a jury could interpret his phone pinging off a tower at the apartment as supporting or confirming he was in that location that morning.

As with the prior claim, the Court of Appeal's October 14, 2015 decision rejected Petitioner's claim of ineffective assistance of trial and appellate counsel for failing to raise insufficiency of the evidence for First Degree Murder because Petitioner failed to submit any records or documents to support the claim. (Lodgment 12 at 1-2.) And, as with his prior claim, the Court cannot find this was unreasonable.

The Court also cannot find trial or appellate counsel were ineffective for failing to raise insufficiency of the evidence. Although the evidence against him was circumstantial, there was certainly sufficient evidence from which a jury could find Petitioner was in the apartment and to support his murder conviction. "[E]vidence is sufficient to support a conviction so long as "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." *Cavazos v. Smith*, 565 U.S. 1, 7 (2011). (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). Not raising sufficiency of the evidence, given the evidence against Petitioner, "falls within the 'wide range' of professionally competent assistance." *Buck*, 2017 WL 685534, at *13.

Similarly, because the evidence was sufficient, insufficiency of the evidence would not have been stronger than the claims appellate counsel raised on direct appeal. *Robbins*, 528 U.S. at 288 ("Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.") The Court recommends Petitioner's claim of ineffective assistance of trial and appellate counsel for failing to raise insufficiency of the evidence be **DENIED**.

5. Failing to Raise *Batson/Wheeler* Challenge

Petitioner argues his trial and appellate counsel were ineffective for failing to raise a *Batson/Wheeler* challenge.[15] (Lodgment 13 at 25.) More specifically, Petitioner argues

[15] *Batson v. Kentucky*, 476 U.S. 79 (1986); *People v. Wheeler*, 22 Cal. 3d 258 (1978).

his counsel was ineffective for failing to challenge the absence of African Americans on the jury.[16] (*Id.*)

The issue here is not whether there was a *Batson* violation, but whether trial and appellate counsel were ineffective in failing to raise a challenge on this basis. The standards articulated above, particularly the "'strong presumption' that counsel's representation was within the 'wide range' range of reasonable professional assistance" apply. *Harrington*, 562 U.S. at 104. However, the Court concludes that trial and appellate counsel were not ineffective for failing to raise a *Batson* challenge because what Petitioner alleges does not constitute the kind of purposeful discrimination in the selection of a jury that warrants relief under *Batson*.

A *Batson* violation occurs when there is purposeful discrimination in the selection of the jury. *Batson*, 476 U.S. at 86. "[A] defendant has no right to a 'petit jury composed in whole or in part of persons of his own race," but rather the right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria." *Id.* at 85-86. It is a challenge to the use of preemptory strikes to exclude jurors based on their race. *Id.* at 89. There are three steps that guide the review of the preemptory strikes: (1) a prima facie "showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose;" (2) if defendant makes that showing, the state must offer "permissible race-neutral justifications for the strikes;" and then (3) the court must decide whether defendant "has proved purposeful racial discrimination." *Johnson v. California*, 545 U.S. 162, 168 (2005).

To establish a prima facie case of purposeful discrimination, the accusing party must show: (1) the prospective juror is a member of a cognizable group, (2) the prosecutor used a peremptory strike to remove the juror, and (3) the totality of the circumstances raises an inference that the strike was motivated by race. *Boyd v. Newland*,

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[16] For purposes of this analysis, the Court assumes that there were no African Americans on the jury. As noted above, Respondent did not address this issue.

476 F.3d 1139, 1143 (9th Cir. 2006). Here, Petitioner has made no showing that would give rise to a discriminatory purpose in the use of preemptory strikes. There are no facts or allegations that a prospective juror that was a member of a cognizable group was struck by the prosecutor. And certainly no circumstances raising an inference a strike was motivated by race. The first step, the prima facie showing has not been made.

Given the absence of any basis for a claim, trial and appellate counsel's failure to raise it cannot constitute ineffective assistance of counsel. The Court recommends Petitioner's claim of ineffective assistance of trial and appellate counsel for failing to raise a *Batson/Wheeler* challenge be **DENIED**.

B. Admission of Gang Expert Testimony[17]

Petitioner argues the trial court erred in admitting gang expert testimony addressing whether the charged offenses were committed for the benefit of a gang. (Pet. at 6.) Petitioner argues the witness essentially testified, based on his review of all the reports and evidence in the case, that Petitioner and Terry committed the robbery for the benefit of a gang because the individual referenced in the hypothetical scenario presented to the witness was obviously Petitioner. (Lodgment 7 at 19.) Petitioner argues this could give the jury the impression the charges were supported by evidence known to the witness, but not before the jury. (*Id.* at 21.)

Respondent argues that this is a state evidentiary rule that does not present a federal question and there was no violation of Petitioner's due process rights recognized by the Supreme Court in the admission of the evidence. Additionally, Respondent argues the evidence was properly allowed under California law.

In evaluating this claim, the Court of Appeal included a portion of the testimony Petitioner relied on in arguing the trial court erred in allowing the testimony. The prosecutor asks a series of questions that involve a hypothetical in which two individuals,

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[17] Petitioner raised this claim under Ground Two in his Petition.

one a documented gang member, and the other not documented as a gang member, commit armed robbery of a drug dealer. Applying California law, *People v. Vang*, 52 Cal. 4th 1038 (2011), the Court of Appeal found no error in the testimony because the expert was allowed to testify that the conduct described was committed for the benefit of a gang "based on assumed hypothetical facts rooted in the evidence." (Lodgment 6 at 24.) The court also rejected Petitioner's claim that the testimony was improperly based on evidence in the case, rather than being limited to hypothetical questions based on evidence as required under *Vang*. (*Id.*) The court found the testimony "was offered in response to 'the prosecutor's hypothetical questions . . . based on what the evidence showed these defendants did, not what someone else might have done.'" (*Id.* (quoting *Vang*, 52 Cal. 4th at 1046.).)

The admission of evidence is an issue of state law. *Holley v. Yarborough*, 568 F.3d 1091, 1101 (9th Cir. 2009). Even if the Court assumes there was any error in the admission of this evidence, "[s]imple errors of state law do not warrant federal habeas relief." *Id.* (citing *Estelle v. McGuire*, 502 US. 62, 67 (1991)). "The admission of evidence does not provide a basis for habeas relief unless it rendered the trial fundamentally unfair in violation of due process." *Id.* (quoting *Johnson v. Sublett*, 63 F.3d 926, 930 (9th Cir. 1995)). And, "[u]nder AEDPA, even clearly erroneous admissions of evidence that render a trial fundamentally unfair may not permit the grant of federal habeas corpus relief if not forbidden by 'clearly established Federal law,' as laid out by the Supreme Court. *Id.* (quoting § 2254(d)).

The gang expert's testimony did not render Petitioner's trial fundamentally unfair. The testimony was phrased in terms of a hypothetical throughout.[18] The opinion that an armed robbery of a drug dealer committed by one documented and one undocumented gang member was committed for the benefit of a gang only mattered if the jury found

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[18] In the one instance when the witness identified Petitioner by name, Petitioner's counsel objected and the objection was sustained. (Lodgment 1, Part 8 at 1981.)

Petitioner committed the armed robbery of the drug dealer with a documented gang member. This was not fundamentally unfair because the prosecutor still had to prove Petitioner's conduct matched the hypothetical. Additionally, no Supreme Court authority forbids the admission of testimony from a gang expert to assist a jury in determining whether a crime was committed for the benefit of a gang.

The Court recommends Petitioner's claim that the admission of the gang expert's testimony violated Due Process be **DENIED**.

C. Juror Misconduct[19]

Petitioner argues the trial court erred in failing to question a juror regarding potential bias or misconduct.[20] (Pet. at 4; Lodgment 7 at 21-22.) He argues an exchange between the prosecutor and a juror showed that a juror was biased in favor of the prosecution. (Lodgment 7 at 21-22.) During the prosecutor's closing he is recounting the evidence that Petitioner was conducting internet searches for warrants and on the Who's in Jail website. The following exchange occurred:

> Prosecutor: But the important question you can't get around, and there's no reasonable alternate explanation for it, it why, why is he going to these databases? Because at the end of the day he's not just putting in Pierre Terry's name, is he? What other name did he put in when it came time to look for warrants? Who was he worried about for getting warrants.
>
> Unidentified juror: Himself.

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[19] Petitioner raised this claim under Ground Three in his Petition.

[20] To the extent Petitioner argues his trial counsel was ineffective for failing to object to the alleged juror misconduct, the record reflects that his trial counsel did not hear the juror respond to the rhetorical question. Additionally, as the trial court noted, he might have elected not to object to avoid drawing more attention to it even if he had heard it. As the Court of Appeal and the trial court explained, it was not a disputed issue and objecting might have just led the entire jury to believe it was more significant. To the extent there was any error in missing it or not objecting, it was not the kind of error "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Buck*, 2017 WL 685534, at *13.

> Prosecutor: That's right, himself. Why am I looking up warrants for myself when I didn't do anything?

(Lodgment 1, Part 9 at 2223-24.)[21]

The Court of Appeal found the remark did not suggest that the juror had formed an opinion on the case or that good cause existed to remove the juror. The court explained that the remark was brief and just provided an answer to a rhetorical question. The court also agreed with the trial court that the answer to the question was not in dispute.

Clearly established federal law, as determined by the Supreme Court, does not require state or federal courts to hold a hearing every time a claim of juror bias is raised by the parties. *Tracey v. Palmateer*, 341 F.3d 1037, 1044 (9th Cir. 2003) (citing *Remmer v. United States*, 347 U.S. 227 (1954) and *Smith v. Phillips*, 455 U.S. 209, 217–18 and finding no error where trial court, during questioning of one juror about potential misconduct, declined to inquire about other jurors who were potentially subject to misconduct); *Sims v. Rowland*, 414 F.3d 1148, 1153 (9th Cir. 2005) (trial court need not order a hearing *sua sponte* whenever presented with evidence of juror bias). When considering a claim of juror bias, federal district courts "should 'consider the content of the allegations, the seriousness of the alleged misconduct or bias, and the credibility of the source' when determining whether a hearing is required." *Sims*, 414 F.3d at 1148 (quoting *Tracey*, 341 F.3d at 1044). Certainly no more is required of a state court to comply with Due Process. *Id.* ("It would be anomalous to require more of a state trial judge in order to comply with the Fourteenth Amendment's Due Process Clause.")

Here, the juror misconduct issue was raised as part of Petitioner's motion for a new trial. The trial court considered it. (Lodgment 1, Part 11 at 2389-2395.) Because the

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[21] Petitioner's counsel did not hear the response from the juror and although the trial judge did, he elected not to raise it out of concern that he would draw more attention to the issue. (Lodgment 1, Part 11 at 2393.) The issue was not raised until Petitioner's motion for a new trial approximately a year later.

exchange was undisputed and in the transcript, the content of the allegation and the credibility of the source of the alleged misconduct were not at issue. The only real issue was how serious the alleged misconduct or bias was. In short, the juror answered a rhetorical question that substantively concerned whether Petitioner was searching online to find out if there was a warrant out for his arrest. Petitioner's counsel for the motion for a new trial argued it showed the juror had already made up his or her mind about Petitioner's guilt. (*Id.* at 2392.) The trial court was not even convinced it was misconduct. (*Id.* at 2395.) The trial court considered whether the juror speaking up indicated the juror had drawn a conclusion about Petitioner's guilt and explained that at most, it showed that this juror may have made up their mind that Petitioner was searching online to see if there were warrants out for his arrest. (*Id.*) In the alternative he suggested the juror may have just been caught up in the closing argument. (*Id.* at 2394.) The trial court noted that this, Petitioner searching for warrants for himself online, was not in dispute. (*Id.* at 2394.) He contrasted the question here with something that was disputed, "who fired the gun," and suggested a response to a question like that would be significant. (*Id.*)

The Court of Appeals reasonably concluded that the brief, spontaneous remark on an undisputed issue "did not suggest that the juror had formed an opinion on the case." (Lodgment 6 at 27.) The Court recommends Petitioner's claim of juror misconduct or bias be **DENIED**.

D. Admission of Evidence of Petitioner's Tattoos[22]

Petitioner argues the trial court violated his Fifth and Fourteenth Amendment rights in admitting evidence of Petitioner's tattoos. (Pet. at 8; Lodgment 7 at 22-24.) Petitioner argues the admission of the tattoos portrayed Petitioner as greedy and disrespectful of women. (Lodgment 7 at 24.)

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[22] Petitioner raised this claim under Ground Four in his Petition.

Respondent argues the tattoos were probative of Petitioner's membership in a gang for purposes of proving the gang enhancement under California Penal Code § 186.22(b) because evidence of gang-related tattoos tends to prove gang membership. Respondent emphasizes the prosecution had to prove Petitioner committed his crimes for the benefit of the Skyline Piru gang and Petitioner disputed he was a gang member or had done anything to benefit a gang. The gang expert testified that Petitioner's tattoos — MOB for "money over bitches" and a gun with the words "dead presidents"— were common among gang members, but not a specific gang.

The California Court of Appeal found the tattoo evidence was highly probative to prove the gang enhancement. (Lodgment 6 at 32.) The court noted the gang expert's testimony that these and similar tattoos were common among gang members. (*Id.*) The court also explained that having gang-related tattoos was highly relevant to demonstrate membership in a gang for purposes of proving the gang enhancement. (*Id.*) The court rejected Petitioner's argument that the tattoos should have been excluded because the jury might have thought he was greedy, violent, or valued money over women. (*Id.*) The court concluded the trial court did not err in admitting the evidence.

As previously noted, the admission of evidence is an issue of state law. *Holley*, 568 F.3d at 1101. Even if the Court assumes there was any error in the admission of this evidence, "[s]imple errors of state law do not warrant federal habeas relief." *Id.* (citing *Estelle*, 502 U.S. at 67). "The admission of evidence does not provide a basis for habeas relief unless it rendered the trial fundamentally unfair in violation of due process." *Id.* (quoting *Johnson*, 63 F.3d at 930). The Court cannot find the admission of this evidence rendered Petitioner's trial fundamentally unfair. His gang membership was disputed. The gang expert testified that Petitioner was not a documented gang member, the police had no gang-related contacts on file for him, and the gang expert assigned to the gang Petitioner was alleged to be associated with had no knowledge of Petitioner prior to this case. (Lodgment 1, Part 8 at 2005-07.) It was not fundamentally unfair to admit evidence that was probative of proving the gang enhancement.

Additionally, "[u]nder AEDPA, even clearly erroneous admissions of evidence that render a trial fundamentally unfair may not permit the grant of federal habeas corpus relief if not forbidden by 'clearly established Federal law,' as laid out by the Supreme Court. *Holley*, 568 F.3d at 1101 (quoting § 2254(d)). Absent clearly established Federal law forbidding the admission of evidence under these circumstances, Petitioner is not entitled to habeas relief. The Court recommends Petitioner's claim that the admission of his tattoos violated Due Process be **DENIED**.

E. Exclusion of Evidence of Third Party Culpability[23]

Petitioner argues the trial court violated his Fifth and Fourteenth Amendment rights by excluding evidence of third party culpability as to David Foster. (Pet. at 9; Lodgment 7 at 24-27.) Petitioner's trial counsel sought to admit evidence that Pleasant got into a physical altercation with his half-brother, Foster, who at the time was living in the apartment. (Pet. at 9; Lodgment 7.) The altercation was apparently about Foster not having a job. (Pet. at 9.) At Pleasant's demand, Foster moved out following the altercation and Pleasant's girlfriend believed they never reconciled. (*Id.*) Additionally, DNA from blood stains in the apartment matched DNA from Foster. (*Id.)*

The California Court of Appeal noted the above background proffered by Petitioner's counsel. (Lodgment 6 at 36.) The court also noted that the blood recovered was no more than a speck, Foster often visited the apartment to clean up after skateboarding accidents, that Foster had indicated to police that he and Pleasant had reconciled after the altercation and spent Earth Day together. (Id. at 36-37.) The prosecutor produced a date-stamped picture corroborating they spent Earth Day together. (*Id.* at 37.)

The Court of Appeal found the trial court could reasonably find the speck of blood from Foster in the apartment doorway was no more than a remote connection to the crime

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[23] Petitioner raised this claim under Ground Five in his Petition.

scene, particularly given he lived in and visited the apartment and in the absence of any evidence connecting him to the scene near the time of the murder. (Lodgment 6 at 37.) The court also found the trial court could reasonably conclude that the single altercation months prior was nothing more than mere motive and insufficient to raise reasonable doubt as to Petitioner. *(Id.* at 38.)

As previously noted, "a federal habeas court cannot review questions of state evidence law and it is well settled that a state court's evidentiary rule, even if erroneous, is grounds for federal habeas relief only if it renders the state proceedings so fundamentally unfair as to violate due process." *Spivey v. Rocha*, 194 F.3d 371, 977-78 (9th Cir. 1999). "[T]he Constitution permits judges 'to exclude evidence that is repetitive . . . only marginally relevant, or poses an undue risk of harassment, prejudice, or confusion of the issues.'" *Holmes v. South Carolina*, 547 U.S. 319, 326-27 (2006). Third party culpability evidence "may be excluded where it does not sufficiently connect the other person to the crime, as, for example, where the evidence is speculative or remote, or does not tend to prove or disprove a material fact at issue at the defendant's trial." *Id.* at 327 (quoting 40A Am. Jur. 2d, Homicide § 286, pp 136-38 (1999) as "widely accepted" rules).

The Court of Appeal reasonably concluded that the evidence as to Foster was too remote and speculative. Foster's only recent connection to the crime scene was a speck of blood in an apartment he had previously lived in and his previous adversarial connection to Pleasant was apparently resolved. The Court cannot find the exclusion of this evidence rendered the state proceedings so fundamentally unfair as to violate due process. Nor can the Court find the Court of Appeal's decision was unreasonable.

Additionally, it is not clear Petitioner still intends to pursue this claim. As noted above, in listing the claims he raised on collateral review, Petitioner references Exhibit B, attached to his Petition. Exhibit B is his Petition for Review to the California Supreme Court raising the claims discussed above on collateral review, also Lodgment 13. In that filing Petitioner indicates "trial counsel should have moved to present evidence of third-

party culpability, *the third party being not David Foster*, but Leroy Thomas." (Lodgment 13 at 11.)

The Court recommends Petitioner's claim that the exclusion of third-party culpability evidence violated Due Process be **DENIED**.

F. Stay and Abeyance

In addition to numerous other documents attached to the Petition, Petitioner included a document requesting stay and abeyance to exhaust the three new claims he raised on collateral review in state court. (Pet. at 15-19.) Respondent filed an Opposition to the request. (ECF 14.) Respondent cited the Lodgments filed in support of Respondent's Answer to the Petition that showed the Superior Court, Court of Appeal, and California Supreme Court had all denied the claims for failing to provide any evidentiary support for the claims. (*Id.*). Petitioner then filed an Opposition for Stay in which indicates he has exhausted the three claims raised on collateral review and notes that Respondent failed to address those claims. (ECF 28.)

To the extent there is a stay and abeyance motion properly before the Court, it is moot. Petitioner and Respondent agree there is no need for a stay because the claims were exhausted. To the extent they do not, the Court has considered the merits of these claims and recommends they be denied. The Court recommends that any request before the Court for stay and abeyance be **DENIED**.

IV. Evidentiary Hearing

Petitioner does not request an evidentiary hearing in his Petition. In his Traverse under the section addressing third party culpability as to Foster, Petitioner notes the need for an evidentiary hearing to address whether Foster and Pleasant had reconciled.

AEDPA prescribes the manner in which federal habeas courts must approach the factual record and "substantially restricts the district court's discretion to grant an evidentiary hearing." *Baja v. Ducharme*, 187 F.3d 1075, 1077 (9th Cir.1999). "[A] determination of a factual issue made by a State court shall be presumed to be correct," with the petitioner having "the burden of rebutting the presumption of correctness by

clear and convincing evidence." 28 U.S.C. § 2254(e)(1). Section 2254(e)(2) limits "the discretion of federal habeas courts to take new evidence in an evidentiary hearing." *Cullen*, 563 U.S. at 185.

"If a claim has been adjudicated on the merits by a state court, a federal habeas petitioner must overcome the limitation of § 2254(d)(1) on the record that was before that state court." *Cullen*, 563 U.S. at 185("[E]vidence introduced in federal court has no bearing on § 2254(d)(1) review"). If a claim subject to 28 U.S.C. § 2254(d)(1) does not satisfy that statutory requirement, it is "unnecessary to reach the question whether § 2254(e)(2) would permit a [federal] hearing on th[at] claim." *Id.* at 184 (citation omitted). "In practical effect, . . . this means that when the state-court record 'precludes habeas relief' under the limitations of § 2254(d), a district court is 'not required to hold an evidentiary hearing.'" *Cullen*, 563 U.S. at 183. (citation omitted). Since *Cullen*, the Ninth Circuit has held that a federal habeas court may consider new evidence only on de novo review, subject to the limitations of § 2254(e)(2). *See Stokley v. Ryan*, 659 F.3d 802, 808 (9th Cir.2011).

As explained above, Petitioner is not entitled to relief under § 2254(d) and has not met any of the exacting requirements for an evidentiary hearing on federal habeas review. Accordingly, the Court recommends Petitioner's request for an evidentiary hearing be **DENIED**.

V. CONCLUSION & RECOMMENDATION

For all the foregoing reasons, **IT IS HEREBY RECOMMENDED** the Court issue an Order: (1) approving and adopting this Report and Recommendation; and (2) denying the Petition.

IT IS ORDERED that no later than **March 24, 2017,** any party to this action may file written objections with the Court and serve a copy on all parties. The document should be captioned "Objections to Report and Recommendation."

IT IS FURTHER ORDERED that any reply to the objections shall be filed with the Court and served on all parties no later than **April 7, 2017.**

The parties are advised that failure to file objections within the specified time may waive the right to raise those objections on appeal of the Court's order. *Turner v. Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153, 1156 (9th Cir. 1991).

Dated: March 3, 2017

Hon. Bernard G. Skomal
United States Magistrate Judge

APPENDIX D

ORDER DISMISSING HABEAS AND DENYING CERTIFICATE OF APPEALABILITY

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CRAIG FARLEY,

Petitioner,

v.

SCOTT KERNAN, Secretary of the California Department of Corrections and Rehabilitation,

Respondent.

Case No.: 16cv188-LAB (BGS)

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

Petitioner Craig Farley, a prisoner in state custody, filed a petition for writ of habeas corpus under 28 U.S.C. § 2254. The matter was referred to Magistrate Judge Bernard Skomal for a report and recommendation. After Judge Skomal issued his substantial report and recommendation (the "R&R"), Farley filed objections ("Objections" or "Obj.").

Farley was convicted in California state court of first degree murder, robbery, and burglary. The jury made additional findings that he committed the murder while engaged in a robbery and burglary, that he committed all three crimes for the benefit of a criminal street gang, that a firearm was used during the crime, and that the crime was committed in an inhabited dwelling. He was sentenced to life without

the possibility of parole plus an additional consecutive sentence of 25 years to life. In his petition, he raised nine claims for relief.

Legal Standards

A district court has jurisdiction to review a Magistrate Judge's report and recommendation on dispositive matters. Fed. R. Civ. P. 72(b). "The district judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to." *Id.* "A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1). The Court reviews de novo those portions of the R&R to which specific written objection is made. *United States v. Reyna–Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc).

Federal habeas review of state court judgments is highly deferential. *Harrington v. Richter*, 562 U.S. 86, 105 (2011); *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011). As to claims adjudicated on the merits in state court, the Court can grant relief only if those proceedings resulted in a decision that was contrary to or involved an unreasonable application of clearly established federal law, as determined by the U.S. Supreme Court; or resulted in a decision based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. § 2254(d). The state courts' factual determinations are presumed correct, and this presumption can only be rebutted by clear and convincing evidence. § 2254(e)(1). The Court's review is limited to the record before the state court. *Pinholster*, 563 U.S. 170, 181—82 (2011).

Where, as here, the state supreme court summarily denies relief, the Court "looks through" to the last reasoned decision — in this case, the California Court of Appeals' decision — to determine the basis for the state supreme court's judgment. *See Reis-Campos v. Biter*, 832 F.3d 968, 973–74 (9th Cir. 2016). But if there is no reasoned decision on a particular claim, the petitioner must show that

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there was no reasonable basis for the denial of relief. *Id.* at 974 (citing *Richter*, 562 U.S. at 92).

Federal habeas relief is available only when a prisoner is in custody in violation of federal law; errors of state law are not a basis for issuance of the writ. *Swarthout v. Cooke*, 562 U.S. 216, 219 (2011).

Request for Stay and Abeyance

The petition included a request for stay and abeyance as to three ineffective assistance of counsel claims that Farley said he intended to bring in state court. The R&R recommended denying it as moot, because the claims in fact had been exhausted because Farley raised them in a habeas petition in the California Supreme Court. Neither party objected to this, and the Court **ADOPTS** the R&R's recommendation. The request for stay and abeyance is **DENIED**.

Farley's Objections as to Legal Standards

Farley's objections, while lengthy, are premised on the erroneous idea that federal habeas review is *de novo*. He contends that under AEDPA no deference is due to state courts' decisions. For example, he argues that "no AEDPA deference should have been accorded" to the state courts' decision (Obj. at 1) and faults Judge Skomal for this. (*Id.* at 2 ("The Magistrate Judge['s] basis for the decision is deference to the state court decision . . . .").) He argues that Judge Skomal should have found some independent reasons for his recommendations instead of relying on the state courts' factual findings or deferring to state courts' determinations. (*Id.* at 2 ("Moreover, the Magistrate Judge establishes no independent legal or reasonable basis for his decision . . . ."); 14.) He appears to argue that the Court's review is not limited to the state court record, and that the Court should consider arguments based on factual bases that were never developed in state court. And he also argues that the Court should weigh the evidence itself. (*Id.* at 13.)

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Farley's concept of the standard of review is completely incorrect, and the standards set forth in the R&R are correct. Farley's petition is subject to AEDPA, and the Court's review of state court judgments a deferential one. The R&R correctly states the legal standards, which the Court **ADOPTS**.

A good part of Farley's objections is devoted to arguing legal positions that the R&R either explicitly or implicitly agrees with, such as his right to a fair trial, his right to competent counsel, his right to an impartial jury, and the "beyond a reasonable doubt" standard applicable to criminal cases. The points where he agrees with the R&R are not, however, objections and do not trigger a *de novo* review.

Farley also makes a number of generalized and conclusory objections, which do not require review, and which in any event either lack merit or do not affect the outcome.

Discussion of Farley's Claims

The facts of Farley's case, as well as the procedural history, are set forth in the R&R. Because the parties are aware of them, the Court does not repeat them here, except as necessary for discussion. Most of Farley's objections focus on his claims of ineffective assistance of counsel, and he mentions other claims only very briefly and conclusorily.

Claims 1 Through 5: Ineffective Assistance of Counsel

Farley claims his trial counsel was ineffective in several respects: failure to introduce evidence of witnesses' inability to identify him in a live police line-up; failing to present evidence of innocent explanations for his behavior following the murder; failing to raise insufficiency of the evidence for first degree murder; failing to raise a *Batson/Wheeler* challenge; and failing to raise third-party culpability as to Leroy Thomas, an associate of one of Farley's co-defendants. Farley argues his trial counsel was ineffective in all these respects, and his appellate counsel was ineffective for failing to raise claims 3 through 5 on direct appeal.

Ineffective assistance of counsel is reviewed under the standard set forth in *Strickland v. Washington*, 466 U.S. 688 (1984). This is a highly deferential standard, and surmounting it is "never an easy task." *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010). "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland* at 689.

The R&R provides a thorough and correct discussion of that standard. A state court's determination that relief is not warranted under *Strickland* is reviewed under a doubly deferential standard, because *Strickland* and § 2254 deference are operating in tandem. *Richter*, 562 U.S. at 105. The question the Court must answer is not whether in the Court's own opinion trial and appellate counsel's performance was adequate, but "whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Id.*

Appellate Counsel

Farley objects that appellate counsel are required to raise every potentially meritorious issue. Specifically, he argues:

> Appellate counsel [have] a duty to zealously represent their clients. Appellate counsel failed to argue zealously all meritorious issues for his client and assist the court in understanding the facts and legal issues involved in petitioner[']s case. The focus of the court is [whether] appellate counsel met their duty to present arguable issues.

(Obj. at 12.) The Supreme Court has previously rejected this standard. *Jones v. Barnes*, 463 U.S. 745, 752–53 (1983) (holding that appellate counsel is not required to present every arguable issue, explaining that doing so "runs the risk of burying good arguments . . . .") And it has recently strengthened its position: "Effective appellate counsel should not raise every nonfrivolous argument on appeal, but rather only those arguments most likely to succeed." *Davila v. Davis*, 137 S. Ct. 2058, 2067 (2017). Failing to raise an issue on appeal is only deficient

performance if the issue was "plainly stronger" than the issues counsel did raise. *Id.* at 2067.

The claims Farley points to were not plainly stronger than the issues that were raised. And more to the point, the state courts' rejection of this claim was not unreasonable.[1]

Trial Counsel

Farley's counsel was not ineffective within the meaning of *Strickland* for any of the reasons Farley advances. The tactics Farley suggests were either risky or unlikely to succeed, or both, and his trial counsel was reasonable in deciding to try other approaches. His Objections consist mainly of confident but unsupported assertions that if his counsel had done something differently, he surely have been acquitted.

The police line-up evidence was cumulative, which limited its value, because the same two witnesses also failed to identify Farley in court and testified that they did not identify him in a photographic lineup. Furthermore, as the state court pointed out, trial counsel identified real risks associated with introducing it. For example, mentioning that Farley was present in the line-ups created a risk of emphasizing to the jury that Farley had been a suspect immediately after the murder. Trial counsel also mentioned that he didn't want to give the witnesses an opportunity to correct or explain their non-identification. (Lodgment 1, part 11, at 2604:7–2606:8.)

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[1] Because the California Court of Appeals' decision was the last reasoned decision, the Court looks to that decision to determine the California Supreme Court's reasoning. But it is the reasonableness of the California Supreme Court's decision that is at issue here.

The record shows trial counsel considered and thought through his decision, and was able to give reasons for it. The state court's decision that this tactical decision did not amount to ineffective assistance under *Strickland* was reasonable.

Farley suggests that his counsel should have introduced an innocent explanation for his trip to Louisiana right after the murder, and for his communications with his parents. According to Farley, he went to Louisiana, not to flee after the murder, but for a pre-planned visit to his wife, from whom he was separated, to celebrate their wedding anniversary. He brought his girlfriend, a prostitute, on the trip so that he could have sexual relations with her. (Lodgment 1, part 11, at 2566:1–9, 2590:2–7, 2594:12–22.)[2] She was apparently plying her trade during the trip, and Farley's trial counsel was concerned the jury might think he was her pimp. (*Id.*) Because Farley was not going to testify (*id.* at 2564:20–27), Farley's wife's and girlfriend's testimony may have been required. His counsel found the girlfriend not credible, and decided that offering her testimony was potentially more harmful than beneficial. (*Id.* at 2594:12–27.) His counsel also believed that Farley's wife, who was decidedly unhappy after learning about Farley's girlfriend, might prove to be a dangerous witness. (*Id.* at 2631:8–13; *see also id.* at 2631:14–2634:23 (testimony about other problems with this witness).) His counsel also expressed concern that the jury would not believe the explanation, which he himself found "preposterous." (*Id.*)

Putting on this evidence would have carried significant risk with little assurance that it would help Farley's case. Counsel are not ineffective for failing to pursue options that might be harmful to the defense, *see Richter*, 562 U.S. at

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[2] The references cited here and in the R&R, are to Farley's trial counsel's testimony in state court. These citations are provided, not because the Court is making a credibility determination or weighing the facts, but to illustrate the fact that the state courts' decisions were well-supported by the record.

108, or "could only have alienated [the defendant] in the eyes of the jury." *See Bell v. Cone*, 535 U.S. 685, 700 (2002). *See also Denham v.* Deeds, 954 F.2d 1501 1505 (9th Cir. 1992) (holding that attorney's decision not to call alibi witness whose proposed testimony included glaring inconsistencies reflected sound professional judgment). As the R&R correctly points out, if trial counsel had tried to use it, Farley might well now be arguing that his counsel was ineffective for doing so. The state court reasonably determined that Farley's counsel's performance was not ineffective within the meaning of *Strickland*.

Part of the evidence against Farley was his own internet searches for warrants on himself and his co-defendant Terry, and his question to a police officer about whether he could be charged with a gang crime in light of his co-defendant's gang membership. Farley explains that he knew he was a suspect because his mother told him. He also explains a change in his phone number while he was in Louisiana by saying his mother did it.[3]

Because Farley's counsel found his mother to be hostile and likely a "terrible witness," he did not call her. (Lodgment 1, part 11 at 2566:4–14; Lodgment 6 at 18.) Farley's father could not remember any communications with Farley while the latter was in Louisiana, and could not explain the internet searches. Therefore trial counsel determined they could only be established through Farley's mother's testimony. The state court also reasonably determined that failure to present this evidence did not amount to ineffective assistance of counsel.

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[3] Farley did not develop this argument in state court, but merely mentioned it in passing. The Court of Appeal did not specifically mention this argument. But assuming it was adequately raised and the state court merely neglected to explain its reasoning, Farley was obligated to show that there was no reasonable basis for the denial of relief. *See Richter*, 562 U.S. 562 U.S. at 92. He has not done this. And in any event, this part of his claim fails for the same reasons the rest of this claim fails.

Farley did not adequately raise on appeal the claim that his trial counsel was ineffective for failing to argue insufficiency of the evidence. Farley seeks to excuse this by arguing that his appellate counsel was also ineffective. In his view, the Court should weigh the evidence, taking note of contradictions and inconsistencies, and determine whether it was sufficient to convict him. (Obj. at 13.)

The correct standard, however, is given in *Cavazos v. Smith*, 565 U.S. 1, 7 (2011) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). Under that standard, the reviewing court, after viewing the evidence in the light most favorable to the jury only needs to determine whether any rational jury could have found the elements of the crime proved beyond a reasonable doubt. If any rational jury could have convicted him, the reviewing court need not grant relief. Here, for reasons set forth in the R&R's discussion of the California Court of Appeals' summary, the evidence, though circumstantial, was easily sufficient to support a conviction. Farley's suggestions about how a jury might have interpreted the evidence do not show the *Jackson* standard was met. His trial counsel was not ineffective for failing to make the futile gesture of raising sufficiency of the evidence, and his appellate counsel was also not ineffective for failing to raise it on appeal. *See Juan H. v. Allen*, 408 F.3d 1262, 1273–74 (9th Cir. 2005) (holding that trial counsel's failure to engage in a futile action cannot serve as the basis for an ineffective assistance claim).

Farley's objections barely mention the *Batson/Wheeler* challenge, except to cite *Foster v. Chatman*, 136 S. Ct. 1737 (2016). Farley, however, incorrectly believes that the mere absence of African-Americans on the jury would have supported such a challenge. But a *Batson/Wheeler* challenge requires a showing of purposeful discrimination in using peremptory strikes. The mere fact that a jury is not composed in whole or part by jurors of a particular race does not give rise to a claim for relief. *Batson v. Kentucky*, 476 U.S. 79, 85–86 (1986). Farley has

never shown that the prosecution improperly used peremptory strikes, nor has he alleged any facts that would give rise to a meritorious *Batson/Wheeler* challenge. His trial counsel was therefore not ineffective for failing to make such a claim.

The state court rejected Farley's claim that his counsel was ineffective for failing to pursue a third-party liability theory focusing on Leroy Thomas. The R&R concluded this was reasonable, because Farley did not back up his claim with any evidence other than a photograph of Thomas and therefore did not meet his burden.[4] Although Farley's petition in this Court includes a multitude of allegations about facts he believes back up his claim, the Court's review is limited to the record before the state court. *Pinholster*, 563 U.S. at 181–82. The Court cannot grant relief on a claim based on evidence he did not bother to present to the state court.[5]

The R&R also addressed the merits, outlining Farley's trial counsel's detailed reasoning in deciding not to pursue this defense, which entailed among other things the considerable risk of implicating Farley even more deeply than he already was, and the relatively weak evidence tying Thomas to the murder. Farley's objections do not dispute any of this reasoning.

Farley has offered reasons why, in retrospect, his counsel might have done things differently. But it is not the Court's function to second-guess trial counsel's tactical decisions after conviction. *Strickland*, 466 U.S. at 689. The question that the state courts on review were answering was not whether Farley's counsel's approach was optimal, but whether it was competent. The question this Court must

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[4] Although the R&R focused on Farley's petition in the California Court of Appeals, his petition to the California Supreme Court (Lodgment 13) likewise included no evidence other than Thomas' photograph.

[5] Farley's claim is not based on any new evidence or any evidence that he could not, with reasonable diligence, have presented to the state court. Rather, as the state court determined, he made "numerous factual allegations" but did not provide include copies of reasonably available documentary evidence to support them. (Lodgment 12 at 1–2.)

answer is not whether it agrees with either Farley's counsel's decisions or with the state courts' assessment of them. Rather, the issue before this Court is "whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Richter*, 562 U.S. at 105. Considered either individually or cumulatively, Farley's trial counsel's decisions or tactics do not amount to ineffective assistance under *Strickland*. The state courts' rejection of these claims was not unreasonable.

Claims 6, 8, and 9: Evidentiary Rulings

These three claims concern admission of gang expert opinion and evidence of Farley's tattoos, and exclusion of third-party culpability of David Foster. Farley raises almost no objections to the R&R's determination that these claims do not warrant relief, other than to deny that he was a gang member and claim that admission of gang evidence was highly prejudicial.

The admission or exclusion of evidence is an issue of state law; even if erroneous, it ordinarily does not warrant federal habeas relief. *Holley v. Yarborough*, 568 F.3d 1091, 1101 (9th Cir. 2009). Evidentiary errors could serve as a basis for federal habeas relief, however, if they render the trial fundamentally unfair, and if they violate clearly established federal law as determined by the U.S. Supreme Court. *Id.* (citing *Johnson v. Sublett*, 63 F.3d 926, 930 (9th Cir. 1995)); § 2254(d)).

Even assuming the trial court erred in its evidentiary rulings and the state court on review erred in determining that the trial court's rulings were correct, none of these "errors" rendered Farley's trial fundamentally unfair. Nor is there any Supreme Court authority that forbids the state court's decisions regarding the admissibility or exclusion of this evidence. The state courts' rejection of these claims was reasonable.

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Claim 7: Juror Bias or Misconduct

During the prosecutor's closing argument, as he was discussing the evidence that Farley had been conducting internet searches for warrants, he asked a rhetorical question that a juror unexpectedly answered aloud. The exchange was:

> Prosecutor: But the important question you can't get around, and there's no reasonable alternate explanation for it, it why, why is he going to these databases? Because at the end of the day he's not just putting in Pierre Terry's name, is he? What other name did he put in when it came time to look for warrants? Who was he worried about for getting warrants.
>
> Unidentified juror: Himself.
>
> Prosecutor: That's right, himself. Why am I looking up warrants for myself when I didn't do anything?

Farley's counsel did not hear the juror's comment, and made no objection. The R&R discussed this interchange, the state courts' reasoning in rejecting it, and federal standards thoroughly and correctly. The state courts made factual determinations that are fully supported by the record, and their rejection of this claim was both reasonable and grounded in the facts. Farley has not objected to the R&R's recommendation on this claim, other than to conclude that the event had a substantial and injurious effect on the trial.

Adding to the R&R's discussion, it is worth noting that this occurred during closing argument, and was therefore based on the evidence presented at trial. Moreover, the answer to this rhetorical question was not in dispute. At most, this remark might show that after hearing the evidence, the juror might have made up his or her mind about an undisputed issue, *i.e.*, that Farley was searching online to see if there were warrants out for his arrest.

Jurors are not required to remain agnostic about basic facts of the case or to refrain from preliminarily considering and forming opinions about the evidence. All

that is required is that jurors keep an open mind about the defendant's guilt until the case has been submitted to them. *Davis v. Woodford*, 384 F.3d 628, 652–53 (9th Cir. 2004) (quoting *United States v. Klee*, 494 F.2d 394, 396 (9th Cir. 1974)). In fact, if it were true that a juror's premature expression of credence on some issue in the case necessarily rendered the conviction constitutionally infirm, *Klee* (which remains good law) presented a far stronger argument for it than this case does. In *Klee*, nine jurors during recesses prematurely expressed opinions on the defendant's guilt. Nevertheless, in light of evidence the jurors kept an open mind about the defendant's guilt, the improprieties were held to be harmless.

At least one other federal court has considered whether a juror's audible comment during closing argument warranted relief. In *Hill v. Warden*, 2013 WL 3035280 (W.D. Va., June 17, 2013), the court considered and rejected a habeas petitioner's claim based on a comment with a much greater potential for prejudice than was present in this case. During closing argument, a juror audibly answered the prosecutor's rhetorical question by opining that Hill locked the victim in the trunk of a car in order to kill her. *Id.* at *6. The defendant/petitioner argued that his counsel should have moved for a mistrial.[6] The state court's rejection of this claim implied that there was no apparent basis for Hill's counsel to object, and no reason to believe an objection would have been sustained. The district court concluded that the state court's rejection of Hill's claim was not contrary to or an unreasonable application of federal law, and not based on an unreasonable determination of the facts. *Id.*

Furthermore, in *Hill* as in this case, neither defense attorney heard the jurors' comments, and only learned about them when reviewing the transcripts afterwards. Because counsel were not aware of the remarks, they were not

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[6] The *Hill* court was considering an ineffective assistance of counsel claim.

ineffective in failing to make contemporaneous objections. *Id.*at *6 n.7. *See Strickland*, 466 U.S. 689 (emphasizing that a court conducting habeas review should view the situation from "counsel's perspective at the time").

The situation in this case is far more benign than that presented in *Klee*. The trial court itself was not sure that the juror's answering of a rhetorical question and the prosecutor's follow-up were improper. But even assuming they were, the state courts found this did not deny Farley a fair trial, and rejected his claim. This determination was reasonable, and not counter to or an unreasonable application of any holding of the U.S. Supreme Court.

The Court agrees with the R&R's discussion, and **ADOPTS** it with the additional reasoning mentioned here.

Conclusion and Order

Having conducted a *de novo* review of those portions of the R&R Farley has objected to, the Court **OVERRULES** Farley's objections and concludes that Farley is entitled to no habeas relief. The Court **ADOPTS** the R&R, with additional analysis noted above. The petition is **DENIED**.

IT IS SO ORDERED.

Dated: February 26, 2018

Hon. Larry Alan Burns
United States District Judge

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CRAIG FARLEY,

Petitioner,

v.

SCOTT KERNAN, Secretary of the California Department of Corrections and Rehabilitation,

Respondent.

Case No.: 16cv188-LAB (BGS)

ORDER DENYING CERTIFICATE OF APPEALABILITY

Having denied the petition for writ of habeas corpus, the Court also finds the conditions for issuance of a certificate of appealability are not met. *See Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). A certificate of appealability is therefore **DENIED**.

IT IS SO ORDERED.

Dated: March 1, 2018

Hon. Larry Alan Burns
United States District Judge

APPENDIX E

PETITIONER'S MOTION FOR CERTIFICATE OF APPEALABILITY

No. 18-55352

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CRAIG FARLEY
Petitioner-Appellant,
v.
SCOTT KERNAN
Respondent-Appellant

On Appeal from the United States District Court
For the Southern District of California
No. 3:16-cv-00188-LAB-BGS
Hon. Larry Alan Burns

MOTION FOR CERTIFICATE OF APPEALABILITY

(FRAP, Rule 22, subd (b))

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INTRODUCTION

MATTHEW J. SPEREDELOZZI, hereby submits this MOTION FOR ISSUANCE OF A CERTIFICATE OF APPEALABILITY pursuant to 28 U.S.C. § 2253(c). Petitioner seeks to appeal from a Judgement of U.S. District Court (Hon. Larry Burns) dated and entered March 1, 2018, which adopts Magistrate Bernard Skomal's Report and Recommendation (ECF 50) and denies PETITIONER'S petition for habeas corpus.

PROCEDURAL BACKGROUND

In 2011, Petitioner was convicted of a gang related murder in state court with special allegations increasing his sentence and other related felony offenses. Nearly a year after trial Petitioner, represented by new counsel, moved for a new trial on the grounds that denied effective assistance of counsel as guaranteed by the United States Constitution. The trial court denied Petitioner's motion and sentenced him to life without the possibility of parole plus an additional consecutive sentence of 25 years to life.

Petitioner timely appealed in state court. The Fourth District Court of Appeal affirmed the conviction. On January 25, 2016, Petitioner filed, in pro per, a petition for writ of habeas corpus in the United States District Court for the

Southern District of California asserting several grounds for relief. (ECF 1.) On March 3, 2017, magistrate Bernard Skomal issued a report and recommendation that the petition be denied. (ECF 50.) On February 27, 2018 district court judge Larry Burns issued an Order adopting the report and recommendation and denying Petitioner's petition for writ of habeas corpus. This motion is filed requesting a Certificate of Appealability on that order.

EXHIBITS

1. Notice of Motion and Memorandum of Points and Authorities in Support of Motion for a New Trial by Elizabeth Missakian.

FACTS OF THE CRIME

A summary of the underlying facts are stated in the the appellate court opinion (Lodgment 6) and restated in the magistrate Bernard Skomal's report and recommendation. (ECF 50, 3-6.)

Additionally, the case against PETITIONER at trial was entirely circumstantial. This point is made by Judge Burns in his order denying the petition. (See ECF 56, 9.)

ADDITIONAL FACTS

At the motion for new trial, it was established that trial counsel for Petitioner failed to introduce identification evidence related to witnesses Corey Wishom and Breanna Sandle. At trial, neither witness was able to identify Petitioner as one of the two men they saw in connection with the murder. Nonetheless, the prosecution introduced evidence that both witnesses keyed in on Petitioner when police presented them with a photo lineup during the course of the investigation.

With regard to Wishom, it was established at trial that he saw the two black men come into the victim's apartment just before the murder took place. When shown a photo lineup containing Petitioner, he picked him out and said that he looked like someone he had seen on TV.

With regard to Sandle, it was established at trial that she saw two black men run from the victim's apartment just after the murder. When shown a photo lineup containing Petitioner, she focused on two of the photographs, one of which was Petitioner. She then told the police that she could not be sure.

At the motion for new trial, it was gleaned that both witnesses also participated in a live lineup procedure with Petitioner after the prosecution obtained a "no haircut" order so that Petitioner would look similar to how he

looked on the day of the murder. During the live lineup, neither witness was able to pick Petitioner.

With regard to Wishom, he failed to identify Petitioner at the live lineup as the person he saw come into the victim's apartment the day of the murder. He did identify a participant in the lineup who was not Petitioner and said he was 80% sure it was him.

With regard to Sandle, she did not identify anyone in the live lineup as one of the men she saw running. Sandle stated that one of the men looked familiar, but didn't believe it was one of the men running from the apartment the day of the murder. Petitioner was not the man she stated looked familiar.

Petitioner's trial counsel never presented the live lineup evidence to the jury. This failure was one of the grounds Petitioner raised on a motion for new trial and the trial court found that trial counsel "had not made a reasonable tactical decision in failing to do so." (Lodgment 6 at 12.)

At the motion for new trial Petitioner also asserted that trial counsel was ineffective because he failed to introduce evidence to rebut certain prosecution evidence. The prosecution introduced evidence to attempt to show consciousness of guilt. They introduced phone records that showed Petitioner changed his phone number the same day as the murder and then, the very next day, left San Diego for

Louisiana. When arrested in Louisiana law enforcement seized Petitioner's laptop computer. The prosecution introduced evidence that Petitioner conducted internet research related to the murder, i.e., conducting general searches about the case, checking if Pierre Terry (also a suspect) was in jail, and checking to see if Petitioner had an outstanding warrant. The prosecution argued that these actions were all consistent with a guilty state of mind.

The evidence that trial counsel failed to present, it was argued, would have provided innocent explanations for the prosecution's evidence. The defense had call logs showing an extensive call history between Petitioner and his wife who lived in Louisiana which the defense could have used to show an alternative theory as to why he left San Diego, i.e., to see her. He could have also presented the testimony of Petitioner's wife and/or girlfriend (he and his wife were separated) both of whom would have corroborated that Petitioner's reasons for going to Louisiana were consistent with innocence and not necessarily with fleeing from police.

Also, Petitioner's mother, Carla Farley, could have testified that she was the one who changed Petitioner's phone number, refuting the prosecution's claim that Petitioner did it to avoid detection.

Even further, Carla Farley could have explained that the police conducted a search of her home looking for evidence and identified themselves as the homicide team. She later called Petitioner and told him that the police suspected him of being involved in the murder. She later told Petitioner that police had apprehended Pierre Terry in connection with the murder. This evidence would have explained that the prosecution evidence was consistent with innocence. None of this evidence was presented by the trial counsel.[1]

ISSUES FOR APPEAL

1. Whether the district court erred in ruling that the state appellate court reasonably determined that trial counsel was not ineffective for failure to present evidence of key witnesses' (Corey Wishom and Breanna Sandle's) failure to identify Petitioner in a live lineup.
2. Whether the district court erred in ruling that the state appellate court reasonably determined that trial counsel was not ineffective for failing introduce evidence of innocent explanations for Petitioner's flight Louisiana,

[1] Included in this motion is Petitioner's motion for a new trial filed in the state court trial proceedings which contains a very reasoned analysis regarding trial counsel's errors and omissions. The arguments therein are incorporated by reference to this motion for Certificate of Appealability.

changing his phone number, and conducting internet searches on his laptop related to the murder and investigation.

LEGAL STANDARD FOR CERTIFICATE OF APPEALABILITY

In order to appeal a final judgment on a writ of habeas corpus, a Certificate of Appealability must be obtained from a circuit justice or from the district court judge. (28 U.S.C. 2253(c)(1).) A certificate of appealability on a habeas claim may issue if "the applicant has made a substantial showing of the denial of a constitutional right." (28 U.S.C. 2253(c)(2).)

Under the Antiterrorism and Effective Death Penalty Act of 1996 (hereinafter AEDPA), a habeas petition will not be granted unless that adjudication: (1) resulted in a decision that was contrary to, or involved in an unreasonable application of clearly established federal law; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented at the state court proceeding. (28 U.S.C. § 2254(d); Early v. Packer (2002) 537 U.S. 3, 8.)

However, while this high standard is relevant to the analysis, the standard for a reviewing court to grant a Certificate of Appealability is lower. The petitioner need not show that he should prevail on the merits. (Lambright v.

Stewart, 220 F.3d 1022, 1025 (9th Cir. 2000, en banc).) Rather, the petitioner is merely required to make the "modest" showing (Lambright, supra, at 1025) that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." (Slack v. McDaniel, 529 U.S. 473, 484 (2000).) As explained by the Ninth Circuit in Jennings v. Wood-ford, 290 F.3d 1006 (9th Cir. 2002), the substantial showing standard required for a COA is "relatively low." (Id., at 1011, citing Slack, supra.)

Hence, a COA must issue if any of the following apply: (1) the issues are debatable among reasonable jurists; (2) another court could resolve the issues differently; or (3) the questions raised are adequate enough to encourage the petitioner to proceed further. Finally, "The court must resolve doubts about the propriety of a COA in the petitioner's favor." (Jennings, supra, citing Lambright, supra, at 1025.)

ARGUMENT

I. AEDPA and IAC

In order to prevail on a claim of IAC, a defendant must "show that counsel's performance was deficient." (Strickland v. Washington (1984) 466 U.S. 668, 687.) The question is whether counsel's performance fell within the "wide range" of

reasonable professional norms and professionally competent assistance. (See Buck v. Davis (2017) 137 S. Ct. 759, 772.)

As the Magistrates report and recommendation correctly points out, claims for IAC under AEDPA are doubly deferential. (See Woods v. Donald (2015) 135 S Ct. 1372, 1376.) "The pivotal question is whether the state court's application of the Strickland standard was unreasonable." (Harrington v. Richter (2011) 562 U.S. 86, 101.) "When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied Srickland's deferential standard." (Id. at 105.)

II. The district court's ruling, that the state appellate court's finding that trial counsel satisfied the Strickland standard was reasonable, is debatable among reasonable jurists.

The state appellate court's reasoning that trial counsel was not IAC seems grounded in the fact that the lack of identifications was of marginal benefit. The court of appeal found that "[g]iven that neither witness had identified Farley during direct examination at trial, Farley's trial counsel could have reasonably determined that additional evidence of the witnesses' failure to identify Farley was likely to be of marginal benefit to the defense." (Lodgment 6, 11-12.) However this view was not shared by the trial court that found that counsel did not make a reasonable tactical decision in failing to present the live lineup evidence. (See Id.) This

discrepancy between the state trial court and the state court of appeal illustrates that the issue of whether trial counsel's performance was constitutionally "effective" is debatable among jurists.

Further, the explanations given by trial counsel on why he failed to present the identification evidence are illogical and suspicious. At the hearing for a new trial, trial counsel stated, "[b]ecause none of the witnesses identified him at trial. None of them made an in-court identification of Mr. Farley as the offender at trial. And given that nobody in the courtroom was pointing the finger at him as an offender in the case, I didn't want to go back and rehash the police's suspicion that he'd been one of the offenders and had been at a lineup. I made a conscious decision not to present that evidence." (Lodgement 6, 11-12.)

Counsel's reasoning is flawed and cannot be seen as reasonably tactical. First, failure to call relevant evidence because it might highlight that the police were pointing the finger at Petitioner is not sound strategic reasoning. Of course the police are suspicious of Petitioner, that is why he is standing trial in the first place. It was not a factual dispute that the police believed he was guilty. Everyone knew that fact. Presenting evidence that that the police were investigating him, when that part of their investigation revealed exculpatory evidence, would

highlight that the police may have been wrong to suspect him. No reasonably competent attorney would use this reasoning to fail to present helpful evidence.

Even more profound is trial counsel's reasoning that neither of the witnesses made an in-court identification, so the lack of a live lineup would have been of marginal value. This reasoning does not reflect a reasonable tactical choice. Both of the witnesses pointed to Petitioner in photo lineups. So the jury could believe there was some recognition. The live lineup lack of identification evidence could have damaged, neutralized, or diminished the photo lineup identification evidence presented by the prosecution.

The jury was free to believe that the witnesses' failure to identify Petitioner at trial may have been related to fear of retaliation rather than a true inability to identify him as one of the perpetrators. The court noted this point when it stated that Wishom's demeanor at trial was evasive and the court suspected Wishom "did not want to identify someone." (13 RT 3035.) This suspicion would have been dispelled if the jury learned that Wishom was willing to identify someone and did identify someone other than Petitioner (to an 80% degree of certainty) at the live lineup. If the jury believed that Wishom (and Sandle) were merely hesitant about identifying Petitioner, the live lineup evidence would have put that notion to rest.

Trial counsel's reasoning was also based on the fact that he did not want to give the witnesses an opportunity to "clean up" their prior identifications. (11 RT 2568.) This reasoning is nonsensical considering that trial counsel could have simply presented the testimony of the police officer conducting the live lineup and that would have prevented the witnesses from cleaning up anything.

There was simply no downside to presenting the live lineup evidence and there was a substantial upside. As such there is no reasonable argument that counsel's conduct satisfied Strickland. Since the district court's ruling was based on defense counsel's reasoning as discussed herein, such ruling is, at the very least, debatable among jurists. A Certificate of Appealability should issue.

III. The district court's ruling, that the state court of appeal's finding that counsel was reasonable in not presenting evidence refuting prosecution evidence related to Petitioner's travel, phone number change and internet searches, is debatable among reasonable jurists.

The prosecution introduced evidence at trial that purportedly showed consciousness of guilt. All of this evidence could have been rebutted by trial counsel, but was not. Since there was no reasonable tactical reason to fail to present the rebuttal evidence, the district court's order is debatable among jurists.

First, the prosecution presented evidence that showed Petitioner left for Louisiana the day after the murder. The jury was left to have no explanation as to

why Petitioner would just up and leave San Diego and the defense gave no explanation. The prosecution argued (9 RT 2267-2268) and the jury was instructed (1 CT 47) that they could use the flight evidence to prove Petitioner's guilt. However, Petitioner's phone records established a long history of communication between Petitioner and his wife, Tamara Brumfeld, who resided in Louisiana in the months preceding the trip. (1 CT 192-199.) Trial counsel admitted that the Louisiana trip was an important part of the case. (11 RT 2593.) Trial counsel attempted to admit Petitioner's phone records, but could not lay a proper foundation. (8 RT 1887.) Trial counsel did not subpoena Petitioner's wife's phone records, nor did he call a custodian of records from the phone company to admit the records.

Failure to admit the evidence of Petitioner's communications with his wife prior to the Louisiana trip was not a reasonable tactical decision. There was no downside. He could have called the wife to establish that they communicated and admitted the phone records to corroborate it. There would have been no risk and only an upside as to present a reasonable explanation, consistent with innocence, for the trip to Louisiana.

Trial counsel noted that Brumfeld's negative feelings about Petitioner would have made her a risky witness. However, without her the jury was left in the dark

about why Petitioner left San Diego. Had trial counsel presented this evidence, he could have argued that Petitioner went to Louisiana to see his wife, not to flee from police.

Another significant aspect of the prosecution's case was evidence showing Petitioner's knowledge and concern about the murder and resulting investigation while he was residing in Louisiana. The prosecution introduced evidence showing that Petitioner conducted web searches related to the investigation. Petitioner checked online at the sheriff's website to see if Pierre Terry was in jail and whether Petitioner had a warrant out for his arrest. The prosecution used the records of Petitioner's online inquiries as evidence to argue his consciousness of guilt.

However, there was ample evidence to rebut this argument, and trial counsel never presented it. Petitioner's mother called Petitioner after police executed a search warrant on her home and told him about the homicide investigation. She later told Petitioner that Pierre Terry had been arrested for the murder. Petitioner's father consulted with an attorney who advised that they could check the sheriff's website to see if Petitioner had a warrant. Petitioner's mother told Petitioner this information over the phone. This evidence would have provided an innocent explanation for the internet research conducted by Petitioner, i.e., that he conducted

the internet searches after learning from his parents that he was a suspect in a murder investigation and that Pierre Terry had been arrested for that murder.

Failure of defense counsel to present such evidence was not a reasonable tactical choice. Defense counsel stated that Petitioner's mother was "hostile" and would have been a terrible witness. However, no specifics were given as to why he felt this way. Nonetheless, she was the only witness who could have explained otherwise damaging evidence. No matter how "hostile" she appeared to defense counsel, he should have called her. She could have also rebutted the claim that Petitioner changed his phone number the day of the arrest. Petitioner's mother would have testified that she changed his number.

Also, there is no reasons given as to why trial counsel did not present the testimony of Petitioner's father to explain his part of the story. Without any reasons stated, trial counsel's decision to not call Petitioner's father is also not tactical.

It was also discovered during the motion for new trial that trial counsel failed to formally interview the parents about this information. "Whether to call certain witnesses is . . . a matter of trial tactics, unless the decision results from unreasonable failure to investigate." (People v. Bolin (1998) 18 Cal.4th 297, 334.)

Given the issues outlined herein, it is debatable among jurists whether there is any reasonable argument that trial counsel satisfied even deferential Strickland standards. For this reason, a Certificate of Appealability should be granted on the issues outlined herein.

CONCLUSION

Petitioner respectfully requests this court issue a Certificate of Appealability on the issues outlined in this motion.

Respectfully submitted,

July 6, 2018

/s/ *Matthew J. Speredelozzi*

_____
MATTHEW J. SPEREDELOZZI
Attorney for
CRAIG FARLEY

CERTIFICATE OF SERVICE

CASE NAME:	**No**.
CRAIG FARLEY v. SCOTT KERNAN, Secretary of DOCR	18-55352

I hereby certify that on June 6, 2018, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

Motion for Certificate of Appealability

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the United States the foregoing is true and correct and that this declaration was executed on June 6, 2018 at San Diego, California.

/s *Matthew J. Speredelozzi*

Matthew J. Speredelozzi
Attorney for
Craig Farley

APPENDIX F

ORDER DENYING MOTION FOR CERTIFICATE OF APPEALABILITY

FILED

AUG 29 2018

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CRAIG FARLEY, Petitioner-Appellant, v. SCOTT KERNAN, Secretary of the California Department of Corrections and Rehabilitation, Respondent-Appellee.	No. 18-55352 D.C. No. 3:16-cv-00188-LAB-BGS Southern District of California, San Diego ORDER

Before: FARRIS and LEAVY, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 9) is denied. Appellant has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.