No.

IN THE SUPREME COURT OF THE UNITED STATES

EKANEM KUFREOBON ESSIEN, *Petitioner,*

v.

SUZANNE M. PEERY, Warden, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Ninth Circuit erred when it denied petitioner Ekanem Kufreobon Essien's 28 U.S.C. § 2254 habeas petition based on its conclusion that his constitutional right to have every element proven beyond a reasonable doubt was not violated by the imposition of the California gang enhancement at sentencing, where the evidence was insufficient to establish: (1) the existence of a criminal street gang within the meaning of the Street Terrorism Enforcement and Prevention Act, Cal. Penal Code § 186.22; and (2) that petitioner acted in association with that same criminal street gang.

RELATED CASES

People v. Ekanem Kufreobon Essien, et al., No. A134046, California Court of Appeal. Judgment entered October 31, 2013.

People v. Ekanem Kufreobon Essien, et al., No. S215094, Supreme Court of California. Judgment entered on February 11, 2014.

Ekanem Kufreobon Essien v. Suzanne M. Peery, Warden, No. 15-CV-02032 JD, Northern District of California. Judgment entered April 20, 2017.

Jacob Christian Mullan v. Eric Arnold, Warden, No. 15-CV-01003 JD, Northern District of California. Judgment entered on April 24, 2017.

Ekanem Kufreobon Essien v. Suzanne M. Peery, Warden, No. 17-16084, Ninth Circuit Court of Appeals. Judgment entered on November 7, 2019.

Jacob Christian Mullan v. Eric Arnold, Warden, No. 17-16052, Ninth Circuit Court of Appeals. Judgment entered on November 7, 2019.

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INTRODUCTION

Ekanem Kufreobon Essien respectfully petitions for a writ of certiorari to the United States Court of Appeals, Ninth Circuit, No. 17-16084.

OPINION BELOW

Mr. Essien sought federal habeas review of his state court conviction. The habeas petition was denied by the district court and this decision was affirmed by the Ninth Circuit Court of Appeals, which issued an unpublished memorandum decision on October 24, 2019. *Ekanem Kufreobon Essien v. Suzanne M. Peery, Warden*, 783 Fed. Appx. 776 (9th Cir. Nov. 7, 2019). The Ninth Circuit's memorandum disposition is contained in Appendix A. The district court's decision denying Mr. Essien's habeas petition is contained in Appendix B. The underlying state court decision is contained in Appendix C.

STATEMENT OF JURISDICTION

On October 24, 2019, the Court of Appeals for the Ninth Circuit issued an unpublished memorandum disposition affirming the judgment of the district court. The Court of Appeals had jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to

be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Title 28 U.S.C. § 2254(d)

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

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

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF FACTS[1]

Jane Doe grew up in the Irvington neighborhood of Fremont, California. ER 241. At around 2:00 AM on January 29, 2011, she went to a party at the Irvington home of her friend Eric Kuehn. ER 244-45, 300. When she arrived, Doe joined a group of people hanging out in the driveway. ER 245-46. An 18-year-old named Braian Calvo began "coming on" to Doe, but she rejected him because he was too young. ER 250-51. In response, Calvo gave her dirty looks, said "nasty things," and licked her face. ER 251-52, 390-91. She wiped her face and walked away. ER 252. There is no evidence that Essien saw or heard about this incident.

[1] Where appropriate, Mr. Essien will cite to the Appellant's Excerpts of Record ("ER"). *See* 9th Cir. Rule 30-1(a)-(b) (directing parties to compile excerpts of record instead of the appendix contemplated by Rule 30 of the Federal Rules of Appellate Procedure).

After most of the other guests had gone home, Doe went with Kuehn to watch TV in his bedroom. ER 254-55. Essien, Calvo, and a man named Jacob Mullan joined them. ER 257. Doe was sitting on the edge of the bed, with Kuehn next to her, when Essien put his hands on her shoulders and pushed her down onto the bed. ER 257-57. Someone pulled down her pants and held her legs while Essien began having sex with her. ER 260. After a few minutes, Essien moved off of her and Mullan began having sex with her. ER 262. Calvo did not touch her, but said something along the lines of "that's what you get, bitch." ER 262. Neither Essien nor Mullan said anything to Doe. ER 247-48. When Doe started yelling, Kuehn – who was still next to Doe on the bed – told Mullan to stop before the noise woke his parents. ER 262-63, 375-76. Doe then got up and left the house. ER 263, 374.

Essien, Mullan, and Calvo followed her outside. Essien hit her, grabbed her purse, and ran away. ER 264, 384. Calvo punched her in the left eye, and snatched her cell phone out of her hand. ER 265-66. Calvo started to run away, but Doe chased him because she wanted her phone back. When she caught up to him, he punched her, kicked her to the ground, and ran away with the phone. ER 267. Once Calvo was gone, Doe got up and began walking. ER 267-68.

A married couple encountered Doe as she was walking and offered her a ride home. ER 174-79. Initially, she had not intended to go to the police, because she "just wanted to forget about it." ER 272. But when the husband asked if she had been raped, she said that she had been. ER 183. The husband pulled over and either he or his wife called 911. ER 184, 213.

Officer John Morillas responded to the 911 call. ER 460-61. Doe told him, falsely, that she had been assaulted by three unknown men outside the home of an old high school friend named Johnny. ER 470-76. She did not say anything to suggest that the men were gang members. ER 479, 486.

Morillas followed Doe to the hospital, where she was examined for evidence of sexual assault. ER 103-08. Afterward, Morillas resumed his efforts to interview Doe. ER 464. She was hostile, and seemed apprehensive about cooperating with the investigation. ER 465-66. At trial, Doe admitted that she had lied to Morillas during this interview, and testified that she had done so because people in her neighborhood frowned on "snitching." ER 272-73, 317-22, 335-36. When the prosecutor asked Doe if her reluctance was the result of something Essien or his codefendants had said to her, she answered, "no." ER 274.

On January 30th, Morillas tried again to interview Doe, but she told him that she did not want to pursue the investigation. ER 467. She explained that "everybody knows everybody" in Irvington, and she did not want her neighbors to think she was a snitch. ER 467. As in her previous interviews with Morillas, she never suggested that the men who had assaulted her were affiliated with a gang, or that her reluctance to cooperate was gang-related. ER 479, 486.

On February 1st, Fremont Detective Ricardo Cortes called Doe to confirm that she did not wish to pursue the case. She said she had changed her mind, and agreed to come in for an interview. ER 278, 414-15. During the interview, Doe said she had been assaulted by three men at Eric Kuehn's house. ER 416-17. She

identified Kuehn from one photospread, ER 411, and selected Essien's picture from another, ER 418. As in her interviews with Morillas, Doe said nothing to suggest that the men involved were gang members, or that her prior reluctance to pursue the case was gang-related. ER 438.

On February 4th, Cortes brought Doe in to look at more photo arrays. ER 419-21. Doe identified Calvo as one of the assailants, and wrote "maybe" next to a photo of Mullan. ER 283-85, 423. Once again, Doe said nothing on about the possibility that the suspects might be gang members. ER 438. Instead, she simply reiterated her concern that people in the neighborhood would think she was a snitch. ER 439.

On February 17th, Cortes brought Doe in again. ER 424. This time she positively identified a photo of Mullan. ER 425-26. As Cortes recounted during the trial, the February 17th interview – Doe's fifth interview with law enforcement – was the first time Doe mentioned the possibility of a gang connection, and she did so only after Cortes raised the subject:

> Q. And during those previous two [interviews], she had never made any mention to you about him possibly being involved in any gang activity?
>
> A. Correct.
>
> Q. As a matter of fact, even on that date, the 17th, she did not make any mention to you have him being involved in gang activity; you had brought that up?
>
> A. Correct.
>
> Q. Up until that point in time, her only express concerns about possible retaliation or something against her for not coming

forth had to do with the fact that she might be considered a snitch?

A. Yes, yes.

ER 438-39.

After Doe positively identified Essien, Calvo, and Mullan, all three men were charged with forcible rape in concert, with an allegation that the offense was committed for the benefit of a criminal street gang. *See* Cal. Penal Code §§ 364.1(a), 186.22(b)(1). Essien was also charged with second degree robbery, with a gang enhancement. *See* Cal. Penal Code §§ 211, 186.22(b)(1).[2]

At trial, Doe admitted she did not know if any of the defendants were gang members. ER 288. There is no evidence that they identified themselves as gang members or made any gang-related statements in her presence, and no indication that she saw any gang-related tattoos. Nonetheless, Doe thought it was possible that they might be Norteños, based on "[t]he way they talked, the way they walked, the way they interacted with the other guys." ER 288. When asked at trial if she knew what a Norteño was, she answered, "Somewhat." ER 286. When asked to explain her "understanding of a Norteño," she answered, "Someone that claims the color red." *Id.* She did not testify that she thought the men could be members of any other gang, subset or clique.

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[2] In addition, the prosecution alleged that Essien had committed a prior serious felony offense, *see* Cal. Penal Code § 667(a)(1); that he had served a prior prison term, *see* Cal. Penal Code § 667.5(b); and that he had suffered a prior "strike" conviction, *see* Cal. Penal Code §§ 667(c) and (e), 1170.12(a).

To support its allegations that the crimes were gang-related within the meaning of California Penal Code § 186.22, the prosecution relied on the opinion of Detective Eric Tang, who testified as an expert witness. *See* ER 495-535, 580-635.

Tang testified about an informal "umbrella organization" called Fremont Mexican Territory (FMT). According to Tang, FMT started with a few members in the late 1970s or early 1980s. ER 514. Eventually, FMT grew too large, and its members split off into separate subsets. ER 514. These smaller groups included Irvington; the Niles Boys, also called The Tracks; the Cabrillo Boys; Via Norte Fremont, also called North Side Fremont; South Side Fremont; and the Dale Block Gangsters. ER 514-15. Tang testified that these smaller groups "claim certain districts," while FMT claims "the entire city of Fremont."[3] ER 517.

Tang described FMT not as an organized gang, but as an informal "umbrella" group. ER 515-16. Tang testified that FMT included hundreds of members, but admitted that these individuals identify themselves as belonging to a particular subset, rather than FMT. ER 515. Tang stated that, at some point within the past ten years, the various cliques had "realized if we combine back under the umbrella FMT we'll be much stronger." ER 514-15. He did not offer any basis for that opinion, however, or any examples of how the various smaller groups actually became "stronger" or benefitted from an association with FMT.

Tang testified that FMT's symbols are the letters FMT and a hand sign representing the letter F. ER 514, 516. He acknowledged, however, that many

[3] Fremont is also claimed by various rival gangs, such as the Insane Viet Thugs and City Vietnamese. ER 520.

younger Fremont-area gang members think that the letters FMT stand for the city of Fremont, and have no idea that FMT is supposed to stand for Fremont Mexican Territory. ER 516. Tang testified that FMT is "aligned with the Norteño street movement," and that it claims the color red and the number 14. ER 514-16, 519. But he acknowledged that the color red and the number 14 are claimed by all Norteños, not just FMT members. ER 519.

Tang testified that, in his opinion, Essien was a member of FMT. Tang did not link Essien to any specific subset, however. ER 529. Most of Tang's testimony regarding Essien's purported gang membership related to Essien's tattoos, but there was no indication that those tattoos were in any way unique to FMT members. *See* ER 529-30. For example, Tang testified that Essien's tattoo of the numbers "510" represented "the Bay Area, Northern California, the Nuestra Familia and the territory that Norteños proclaim," not that "510" represented FMT. ER 529-30. He testified that a tattoo of the letters "IRV" was important because those letters are "the abbreviation for Irvington" (the Fremont neighborhood where Doe, Kuehn, and the defendants lived); that a tattoo of the word "Fremont" was significant because "gang members from the city of Fremont will occasionally use that as a symbol or tattoo for the gang"; and that a tattoo reading, "fuck my enemies" depicted "the attitude and demeanor towards the lifestyle, the gang lifestyle, towards law enforcement, towards gang members." ER 530.

Tang's opinion was also based on secondhand reports that Essien had been seen at an FMT member's funeral,[4] ER 530; that he appeared in a You Tube video that included "Norteño street terms," and "areas that were kind of FMT territorial landmarks," ER 530-31; and that he had previously "admitted he was a Norteño," ER 530. There is no evidence that Essien ever admitted to being a member of FMT or any local subset.

Tang testified that, in his opinion, Mullan and Calvo also were members of FMT. ER 524-28; 532-33. As with Essien's purported membership in FMT, the evidence upon which Tang relied was not FMT-specific. Instead, Tang relied only on evidence that tied Mullan and Calvo to Norteños generally. *See id.*

On October 5, 2011, the jury convicted Essien of both the rape count and the robbery count, and found the gang allegation to be true as to both counts. ER 51.

Essien appealed. On October 31, 2013, the California Court of Appeal affirmed his conviction, including the gang enhancements. ER 18. The court concluded that there was sufficient evidence to support a finding that Essien had committed both the rape and the robbery "in association with fellow gang members," and that he had committed both crimes to "promote, further, or assist" in criminal conduct by gang members. ER 33-34. The California Supreme Court summarily denied review on February 11, 2014. ER 47.

Essien timely sought habeas relief in federal court. CR 1. His petition was denied on April 20, 2017. ER 1.

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[4] In fact, Essien could not have been present because he was in prison on the day of the funeral. *See* ER 949.

Essien timely filed a notice of appeal.

The United States Court of Appeals for the Ninth Circuit affirmed the district court in an unpublished memorandum disposition, *Ekanem Kufreobon Essien v. Suzanne M. Peery, Warden*, 783 Fed. Appx. 776 (9th Cir. Nov. 7, 2019). The Ninth Circuit held:

> After an independent but deferential review of the record, we conclude there was sufficient evidence for a rational juror to find all elements, beyond a reasonable doubt, to support imposition of the California Penal Code § 186.22(b)(1) gang enhancement on both Essien's rape and robbery convictions. "Because a rational trier of fact could have been persuaded beyond a reasonable doubt that" the requisite elements of California's gang enhancements were met, "habeas relief is unwarranted." *Bruce v. Terhune*, 376 F.3d 950, 958 (9th Cir. 2004). Accordingly, the California Court of Appeal's decision cannot be characterized as objectively unreasonable, and the district court properly denied relief on Essien's sufficiency of the evidence claim.

Ekanem Kufreobon Essien v. Suzanne M. Peery, Warden, 783 Fed. Appx. 776 (9th Cir. Nov. 7, 2019.

REASONS FOR GRANTING THE WRIT

"[T]he Due Process Clause of the Fourteenth Amendment protects a defendant in a criminal case against conviction 'except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.'" *Jackson v. Virginia*, 443 U.S. 307, 315 (1979) (quoting *In re Winship*, 397 U.S. 358, 364 (1970)). Crucially, *Jackson* requires that the sufficiency of the evidence be assessed with "explicit reference to the substantive elements of the criminal offense as defined by *state law*." *Id.* at 324 n.16 (emphasis added). In this case, the question before the Ninth Circuit was whether, applying the highly deferential AEDPA

standard of review, the California Court of Appeal's determination – that a rational jury could have found that there was sufficient evidence to support imposition of the California gang enhancement – was objectively unreasonable. Because the answer to that question required "explicit reference" to California's definition of the substantive elements, the Ninth Circuit should have assessed the state court's determination in light of the California Supreme Court's interpretation of the substantive elements of the gang enhancement, as set forth in *People v. Prunty*, 62 Cal. 4th 59 (2015). The Ninth Circuit's failure to even acknowledge the California Supreme Court's leading case construing the gang enhancement statute, much less apply that case in its assessment of the sufficiency of the evidence, is an extreme departure from *Jackson v. Virginia* that requires intervention by this Court.

When Mr. Essien was sentenced, the trial court imposed a sentencing enhancement pursuant to California's Street Terrorism Enforcement and Prevention Act (the "STEP Act"), Cal. Penal Code § 186.22. The effect of this enhancement was substantial. Mr. Essien was convicted of two serious substantive crimes – rape and robbery – yet he is serving more time in prison for the gang enhancement than for the rape and robbery combined. The imposition of that enhancement violated Mr. Essien's right to due process because the prosecution failed to produce sufficient evidence to establish: (1) the existence of a criminal street gang, within the meaning of Cal. Penal Code § 186.22(f); or (2) that Mr. Essien committed the crimes of conviction "in association with" that same criminal street gang.

In *People v. Prunty*, the California Supreme Court held that the STEP Act's gang enhancement requires, *inter alia*, proof beyond a reasonable doubt of the following two elements:[5]

First, the evidence must establish the existence of a "criminal street gang." Cal. Penal Code § 186.22(f); *Prunty*, 62 Cal. 4th at 71. This requires proof of an "ongoing organization, association, or group" of "three or more persons" using a "common name or common identifying sign or symbol." Cal. Penal Code § 186.22(f). Critically, "where a gang contains various subsets, the gang cannot be used as the relevant group – and evidence of various subsets' activities cannot be used to prove the gang's existence – absent proof of 'some sort of collaborative activities or collective organizational structure.'" *Prunty*, 62 Cal. 4th at 70 (citation omitted).

And second, the prosecution must prove that the defendant committed the charged offense "'for the benefit of, at the direction of, or in association with *any criminal street gang*.'" *Id.* at 66 (quoting Cal. Penal Code § 186.22(b)(1)) (emphasis in *Prunty*). The evidence must show that the group the defendant in association with or for the benefit of, "is the same 'group' that meets the definition of section 186.22(f)." *Prunty*, 62 Cal. 4th at 72.

Here, the California Court of Appeal concluded that there was sufficient evidence that Essien committed the rape "in association with" a criminal street gang because, in its view, a rational juror could have found: (1) "all three defendants were Norteño/FMT gang members"; (2) "Essien and Mullan acted in concert when

[5] The prosecution also must prove that the defendant acted "with the specific intent to promote, further, or assist in any criminal conduct by gang members." Cal. Penal Code § 186.22(b)(1). That requirement is not at issue here.

they raped Doe in the home of Kuehn, another FMT gang member"; (3) the rape was committed "in Calvo's presence and with his explicit approval, in apparent retaliation for Doe's earlier rejection" of him; and (4) "the presence of four gang members in the bedroom was significant, as the perpetrators knew 'no matter what you're going to have my back, no matter what I'm going to rely on you and we're not going to ... snitch on each other.'" ER 33 (ellipses in original). The state court concluded that the robbery likewise was committed "in association with" a criminal street gang, because "the jury could conclude from Tang's testimony that the robbery and assault were designed to isolate and intimidate Doe," and were intended "to discourage a report of the gang-related rape." ER 34.

Both of these determinations were based on an unreasonable application of *Jackson*.

Under California law, "it is not sufficient to simply commit any act in concert with" another gang member; "it is acting in concert with individuals of 'common gang membership' that satisfies the 'in association with' element of the gang enhancement." *Johnson v. Montgomery*, 899 F.3d 1052, 1057 (9th Cir. 2018) (quoting *People v. Albillar*, 51 Cal. 4th 47, 62 (2010)). As the California Supreme Court explained in *Albillar*, there must be "substantial evidence that defendants came together *as gang members*" to commit the crime. *Albillar*, 51 Cal. 4th at 62 (emphasis in original). And, as *Prunty* makes clear, "common gang membership" must be membership in the *same* gang that has been established as a criminal street gang under § 186.22(f). *See Prunty*, 62 Cal. 4th at 81.

Accordingly, Essien acted "in association with" the gang only if there was sufficient evidence to prove not only that he and his codefendants worked together as members of a common gang, but also that this particular gang was a "criminal street gang" within the meaning of § 186.22(f). Here, the prosecution failed to prove that FMT was a criminal street gang within the meaning of 186.22(f); that Essien and his codefendants were members of FMT; or that they "came together" as FMT gang members to commit the crimes.

Tang's testimony touched on various groups – Nuestra Familia, the Norteños, FMT, Irvington, and LMG, among others. But of all these groups, FMT was the only group that the prosecution attempted to prove was a "criminal street gang." FMT is the only group whose primary activities were introduced, and the only group the prosecution sought to prove had "engaged in a pattern of criminal activity" by committing predicate offenses. *See* ER 521-23. As Tang's testimony made clear, however, FMT is nothing more than a loose, informal "umbrella organization" of people who are "aligned with the Norteño street movement." ER 515-16. This is not enough.

In *Prunty*, for example, the prosecution sought to prove that the Sacramento-area Norteños were a criminal street gang within the meaning of § 186.22(f). *See Prunty*, 62 Cal. 4th at 66. Although the prosecution's expert testified about "the Sacramento-area Norteño gang's general existence and origins, its use of shared symbols, colors, and names, its primary activities, and the predicate activities of two local neighborhood subsets," the expert did not provide "any specific testimony contending that these subsets' activities connected them to one another or to the

Sacramento Norteño gang in general." *Id.* The California Supreme Court concluded that this evidence failed to establish that the Sacramento Norteños were a criminal street gang, because "the prosecution did not introduce sufficient evidence showing a connection among the subsets it alleged comprised a criminal street gang." *Id.* at 68. The same is true here.

The only evidence connecting the local subsets to FMT was Tang's assertion that, at some point in the last ten years, the subsets "realized if we combine back under the umbrella FMT we'll be much stronger." ER 515. In *Prunty*, the California Supreme Court held that the evidence was insufficient to establish a connection between subsets and the Sacramento-area Norteños where "[b]esides [the expert's] testimony that these gang subsets referred to themselves as Norteños, the prosecution did not introduce specific evidence showing these subsets identified with a larger Norteño group." *Prunty*, 62 Cal. 4th at 69. Here, Tang did not even testify that gang members "referred to themselves as" FMT; on the contrary, he testified that they identified themselves as members of a particular subset ("They say I'm from Irvington, but overall they're from FMT."). ER 515.

There are several ways for a prosecutor to prove that local subsets are part of a larger criminal street gang. A prosecutor can present evidence that all of the subsets are connected through "shared bylaws or organizational arrangements," or evidence that each subset "contains a 'shot caller' who answers to a higher authority in the [larger organization's] change of command." *Prunty*, 62 Cal. 4th at 77 (citations omitted). Alternatively, the prosecutor can present evidence that the various subsets have "worked in concert" and "exchanged strategic information," *id.*

at 78; or that each subset's "independent activities benefit the same (presumably higher ranking) individual or group" by, for example, giving the higher ranking group a cut of each subset's drug sale proceeds, *id.* at 77. Even evidence that various subsets "routinely act to protect the same territory or 'turf' could suggest that they are part of a larger association," *id.* at 77, although "the prosecution must do more than simply present evidence that various alleged gang subsets are found within the same broad geographic area," *id.* at 79 (testimony that various subsets "were located 'all over Sacramento' does not show that the subsets constituted a single criminal street gang").

No such evidence was presented here. There is no evidence that the subsets had bylaws at all, much less bylaws that they shared with FMT. There is no evidence that the different subsets exchanged "strategic information," no evidence that they were required to "answer to a higher authority," and no evidence that they shared profits with FMT.[6] And while Tang did testify that FMT and the subsets are all located in Fremont, he also testified that the different subsets claimed different districts, *see* ER 517, and there is no evidence that they joined forces to protect the same territory. Where, as here, "a gang contains various subsets, the gang cannot be used as the relevant group" under § 186.22(f), "absent proof of some sort of collaborative activities or collective organizational structure." *Prunty*, 62 Cal. 4th at 70 (citation omitted). Because "the prosecution did not introduce sufficient evidence showing a connection among the subsets it alleged comprised a criminal street gang,

[6] On the contrary, Tang testified that FMT was *not* the kind of group where there were "lieutenants or captains," and "[n]othing happens without approval from somebody up above." ER 515-16

[Essien] was not eligible for a sentence under the STEP Act." *Id.* at 68.

Nor was there sufficient evidence to support the California Court of Appeal's conflation of FMT with Norteños. The only connections Tang drew between FMT and the Norteños were that FMT is "aligned with the Norteño street movement," and that both Norteños and FMT claim the color red and the number 14. ER 51416, 519. But, as the California Supreme Court has made clear, a criminal street gang's members "must be united by their activities, not simply by their viewpoints," and the prosecution must offer proof "transcending the mere existence of a common name (or other identifying symbols) used by various individuals, or a common ideology that appears to be present among otherwise disconnected people." *Prunty*, 62 Cal. 4th at 75-76.

Even if the prosecution had succeeded in proving that FMT was a criminal street gang, the evidence was insufficient to prove that Essien and his codefendants "came together," not just as generic gang members, but as members of FMT specifically.

There is no evidence that Essien had ever heard of FMT, much less any evidence that he identified himself as an FMT member. He had no FMT-specific tattoos, *see* ER 529-30, and there is no evidence that he knew what FMT's symbols were or that he had ever used them. Nor did Jane Doe testify that she believed Essien belonged to FMT. On the contrary, she testified that she did not know if Essien belonged to a gang at all; if he did, the only possibility she could think of was that he might be a Norteño. ER 288.

Tang did testify that, in his opinion, Essien was a member of FMT, but "the testimony of a gang expert, without more, 'is insufficient.'" *Johnson*, 399 F.3d at 1057 (quoting *People v. Ochoa*, 179 Cal. App. 4th 650, 657 (2009)). That is particularly true where, as here, the expert's opinion lacks evidentiary support. *See Chein v. Shumsky*, 373 F.3d 978, 989 (9th Cir. 2004) (expert's "bare, unsubstantiated assertion" is insufficient).

Tang testified at length about Essien's tattoos, but none of those tattoos pointed to FMT specifically. Tang testified that Essien's "510" tattoo represented "the Bay Area, Northern California, the Nuestra Familia and the territory that Norteños proclaim," *not* FMT. ER 529-30. The "IRV" tattoo was an "abbreviation for Irvington," the neighborhood where Essien lived.[7] ER 530. There is no evidence that Essien's "Fremont" tattoo represented FMT, as opposed to the city of Fremont. *See* ER 530. And Tang testified that the "fuck my enemies" tattoo depicted "the gang lifestyle" generally – there is no indication that "fuck my enemies" is a philosophy unique to FMT. ER 530.

Although there was evidence that Essien had previously admitted to being a Norteño, ER 530, there was no evidence that Essien had admitted to being in FMT. Tang noted that Essien had supposedly been seen at an FMT member's funeral, but even if this were true, Essien's mere presence at the funeral would not make him an FMT member, any more than Jane Doe's presence at Eric Kuehn's party made her a Norteño. Tang's final reason for opining that Essien belonged to FMT was his

[7] Tang did not testify that "IRV" stood for the Irvington subset, as opposed to the neighborhood.

appearance in a You Tube video that promoted Norteños (*not* FMT) and had been filmed in "areas that were kind of FMT territorial landmarks."[8] ER 530-31. Given the dearth of evidence to support it, Tang's conclusory opinion that Essien belonged to FMT is insufficient.

Nor was there sufficient evidence to conclude that Mullan, Calvo, or Kuehn belonged to FMT. There was no evidence that any of them had ever made statements aligning themselves with FMT, none of them had FMT-specific tattoos, and none had employed FMT hand signs. Jane Doe did not identify any of them as FMT members, even Kuehn, a friend she had known for years.

When this case reached the Ninth Circuit, the court concluded, after "an independent but deferential review of the record," that a rational trier of fact could have concluded that the elements of the STEP Act had been met. While the Ninth Circuit appears to have been appropriately deferential to the state appellate court, it failed to pay the necessary deference to California's Supreme Court. The Ninth Circuit disposition makes no mention of *Prunty*, nor can it be squared with *Prunty*'s construction of § 186.22. The Ninth Circuit's failure to assess the sufficiency of the evidence in light of the California Supreme Court's interpretation of state substantive law was contrary to *Jackson v. Virginia* and requires intervention by this Court.

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[8] None of these landmarks were identified, and there is no evidence that they were associated only with FMT.

CONCLUSION

For the foregoing reasons, petitioner Ekanem Kufreobon Essien respectfully asksthe Court to grant his petition for a writ of certiorari.

Dated: January 29, 2020

Respectfully submitted,

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