APPENDIX TO
PETITION FOR WRIT OF CERTIORARI

Appendix A

U.S. Court of Appeals for the Ninth Circuit
Panel decision
(Aug. 13, 2020)

NOT FOR PUBLICATION

FILED

AUG 13 2020

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CARLOS A. ESPINOZA, Petitioner-Appellant, v. W. L. MONTGOMERY, Acting Warden, Respondent-Appellee.	No. 18-16835 D.C. No. 4:17-cv-02159-YGR MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Yvonne Gonzalez Rogers, District Judge, Presiding

Submitted August 11, 2020**
San Francisco, California

Before: HAWKINS and CHRISTEN, Circuit Judges, and BATAILLON,*** District Judge.

Carlos Espinoza appeals the denial of his habeas corpus petition. A motions panel granted a certificate of appealability on the issue of "whether juror misconduct

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

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable Joseph F. Bataillon, United States District Judge for the District of Nebraska, sitting by designation.

violated appellant's rights to due process and a fair and impartial jury."[1] We have jurisdiction under 28 U.S.C. § 2253, and, on de novo review, *Parle v. Runnels*, 505 F.3d 922, 926 (9th Cir. 2007), we affirm.

Espinoza's juror misconduct challenge centers on Juror No. 55's unauthorized visit to the scene, disclosed to other jurors during deliberations. When considering prejudice due to juror misconduct, we must determine "whether the . . . error had substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993) (citation omitted).[2] Based on the circumstances, we find no such prejudicial effect came from the offending juror's misconduct. The trial court held a hearing, found the statements to the other jurors did not impact their deliberations, dismissed the offending juror, admonished the remaining jurors, and called in an alternate.[3] Beyond this, the extraneous

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[1] Espinoza requests we expand the certificate of appealability to include his confrontation clause claim concerning the gang expert's testimony. *See* 28 U.S.C. § 2253(c)(1); 9th Cir. R. 22-1(e). We decline to do so because Espinoza has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

[2] Espinoza urges us to apply the two-step *Mattox/Remmer* framework. Yet, as this Court stated in *Godoy v. Spearman*, 861 F.3d 956, 959 (9th Cir. 2017) (en banc), that inquiry applies "when faced with allegations of improper contact between a juror and an outside party." Here, Juror No. 55's visit to the scene and disclosure to other jurors constitutes a "communication of extrinsic facts," where this Court applies the *Brecht* harmlessness standard. *See Sassounian v. Roe*, 230 F.3d 1097, 1108–11 (9th Cir. 2000) (analyzing prejudicial effect of extrinsic information received by jury).

[3] In employing this procedure rather than declaring a mistrial as Espinoza requested, the trial court stated, "[Juror No. 55] quickly was told by the rest of the jurors that

information Juror No. 55 conveyed was not inconsistent with other evidence at trial. Therefore, we conclude that Juror No. 55's visit and comments did not substantially and injuriously affect or influence the jury's verdict. Furthermore, the state appellate court's prejudice analysis of Espinoza's juror misconduct claim was not unreasonable under 28 U.S.C. § 2254(d)(1).

AFFIRMED.

[his visit to the scene] was not an okay thing to do . . . . It does not appear that there were any discussions other than that was not an okay thing to do were held between the other jurors regarding the comments that Juror [No.] 55 made."

Appendix B

U.S. Court of Appeals for the Ninth Circuit
Order denying rehearing en banc
(Oct. 19, 2020)

FILED

OCT 19 2020

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CARLOS A. ESPINOZA, Petitioner-Appellant, v. W. L. MONTGOMERY, Acting Warden, Respondent-Appellee.	No. 18-16835 D.C. No. 4:17-cv-02159-YGR Northern District of California, Oakland ORDER

Before: HAWKINS and CHRISTEN, Circuit Judges, and BATAILLON,* District Judge.

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

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

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

* The Honorable Joseph F. Bataillon, United States District Judge for the District of Nebraska, sitting by designation.

Appendix C

U.S. Court of Appeals for the Ninth Circuit
Appellee's Brief for W.L. Montgomery, Acting Warden
(Feb. 24, 2020)

18-16835

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CARLOS A. ESPINOZA,

Petitioner-Appellant,

v.

W. L. MONTGOMERY, Acting Warden,

Respondent-Appellee.

On Appeal from the United States District Court
for the Northern District of California

No. 17-cv-02159-YGR
The Honorable Yvonne Gonzalez Rogers, Judge

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INTRODUCTION

At the beginning of jury deliberations, a juror at Espinoza's trial committed misconduct by going to the crime scene and telling the rest of the jury what he observed. Once notified, the trial court held a hearing, questioned the offending juror and the jury foreperson, and made a factual determination that the remaining jurors did not consider the comments. The offending juror was dismissed, the remaining jurors were instructed to disregard the comments, an alternate juror was substituted in, and the jury was instructed to begin deliberations anew.

Espinoza now claims, for the first time on appeal, that the state court's conclusion that the presumption of prejudice was rebutted was contrary to, and an unreasonable application of, this circuit's case law. However, circuit authority does not provide a basis for habeas relief and, in any event, the case law Espinoza relies upon does not provide legal or factual support for his argument.

The trial court did exactly what was required upon learning of juror misconduct: it held a hearing, dismissed the offending juror, and determined that the remaining jurors were unaffected. Accordingly, there is no basis to overturn the reconstituted jury's verdict.

STATEMENT OF JURISDICTION

Petitioner-Appellant Carlos Espinoza is a California state prisoner who appeals the denial of his habeas petition under 28 U.S.C. § 2254. The district court had jurisdiction to decide the petition under 28 U.S.C. § 2254, and entered a final judgment on July 24, 2018. Dkt. 22-23. This Court granted a certificate of appealability (COA) on April 1, 2019. ER 397-398. This Court has jurisdiction under 28 U.S.C. §2253.

STATEMENT OF THE ISSUE

Did juror misconduct violate appellant's rights to due process and a fair and impartial jury? ER 397-398.[1]

STATEMENT OF THE CASE

Espinoza was convicted by a Monterey County jury in April 2012 of first degree murder, attempted murder, and street terrorism. The jury also found that Espinoza committed the murder and attempted murder for the benefit of a criminal street gang and that he personally used and intentionally discharged a firearm proximately causing great bodily injury or

[1] Espinoza also raises an uncertified claim in his opening brief. This Court declined to issue a COA as to this claim: whether the gang expert's testimony violated Espinoza's confrontation rights under *Crawford v. Washington*, 541 U.S. 36 (2004). We therefore decline to address this claim here. *See* Circuit Rule 22-1(f).

death. The trial court sentenced Espinoza, who was 17 years old at the time he committed the crime, to 85 years to life in state prison.

After the California Court of Appeal reversed the judgment and remanded for resentencing, ER 64-99, both parties petitioned the California Supreme Court for review. The Supreme Court transferred the case back to the Court of Appeal for reconsideration in light of its recent decisions in *People v. Sanchez*, 63 Cal.4th 665 (2016) and *People v. Franklin*, 63 Cal.4th 261 (2016).[2] ER 62.

In December 2016, the California Court of Appeal affirmed Espinoza's conviction, finding that *Sanchez* did not require reversal, but that a limited remand was required pursuant to the *Franklin* decision to give Espinoza the "opportunity to make a record of information relevant to his eventual youth offender parole hearing." ER 33-61.

The California Supreme Court subsequently denied review and Espinoza filed a habeas petition in federal district court. ER 32.

The facts underlying the conviction, as set forth by the California Court of Appeal, are as follows:

[2] Pursuant to California Penal Code §§ 3051 and 4801, Espinoza is eligible for a youthful offender parole hearing during the 25th year of his sentence. *See People v. Franklin*, 63 Cal.4th at 261.

On August 6, 2009, Jose Perez was outside of his house on Terrace Street in Salinas. Perez was wearing a white t-shirt, shorts, and sneakers. He was talking to his friend Poncho, who was loaning Perez a bicycle. Perez was planning to ride the bicycle to football practice. According to his brother, Perez was not involved with gangs. Rather, he was "100 percent involved in sports," particularly football.

While Perez and Poncho stood outside, two cars turned onto Terrace Street: a gray primered Mitsubishi Galant, and a grayish-green primered Lexus. The cars stopped in front of the house. Defendant got out of the Galant, cocked a gun, and began shooting. Poncho started running. He looked back and saw Perez on the ground. He ran to a fence, then looked back again. Defendant shot at him, then shot Perez while standing over him.

Perez was later transported to the hospital, where he was declared deceased. Perez had multiple gunshot wounds, including some that had been fired at close range.

B. Prior Incidents Between Poncho and Defendant

Poncho knew defendant as "Flaco." He knew defendant from school. At school, defendant often engaged in "mugging" (staring at) him, and defendant would sometimes bump into him. Defendant had chased Poncho on two prior occasions. First, about three months before the shooting, defendant was in a car that tried to run Poncho over. Then, about one and a half months before the shooting, defendant chased Poncho while driving.

Poncho knew that defendant hung out with Sureños and that defendant considered Poncho to be associated with Norteños. Poncho denied he was in fact a gang member but admitted he had a close family member who was in a Norteño gang. Poncho also admitted he had a tattoo of

the word "Salas" on his back and that he previously had the roman numerals XIV on his hand.

C. Coparticipant Testimony

Julio Montoya Luna (Montoya), Juan Nunez, and Antonio Gayoso were coparticipants in the shooting of Perez. Montoya and Gayoso were members of the Mexican Pride Locos, a Sureño gang. Nunez and defendant were associated with the Vagos, a another Sureño gang.

Montoya and Nunez both entered into agreements with the prosecution, pursuant to which each pleaded guilty to being an accomplice and a gang member in exchange for testifying against defendant.[3]

Montoya and Nunez both testified about defendant's tattoos, which included the number 22 and the phrase "'One Way.'" To get a tattoo of the number 22, which represents "V," the 22nd letter of the alphabet, a Vagos gang member must do a shooting. "'One Way'" refers to a street in the Vagos territory.

Montoya and Nunez also testified about the Perez shooting. Earlier that day, a Sureño gang member named "Shaggy" had been shot. Afterwards, Nunez, defendant and other Sureño gang members had a discussion about how to respond. Nunez said he "could be the one" to do a retaliatory shooting; he wanted to "look good." Six of the Sureño gang members went looking for Norteños. They "didn't find anyone,"

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[3] Gayoso did not testify at defendant's trial. In 2010, he was sentenced to a prison term of 25 years to life after he pleaded guilty to first degree murder (§ 187, subd. (a)) and admitted that the crime was committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)).

although Nunez and two other Sureño gang members shot at a house where Norteños lived.

Nunez and defendant eventually went to the location of Shaggy's shooting. Gayoso approached Nunez, angry about the shooting. Defendant indicated that he had a gun and asked Gayoso "what did he want to do." Defendant borrowed a sweatshirt and gloves, then asked Nunez to "go with him to go riding," meaning to go find "someone to shoot at." Nunez called Montoya over and said, "'The homies are going to go do some riding. Do you want to go?'" Montoya understood this meant that they were going to look for rival Norteños.

Montoya drove one car with Nunez as his passenger. They followed Gayoso, who was driving another car with defendant as his passenger. At Terrace Street, defendant got out and fired his gun at Perez and Poncho. According to Montoya, defendant shot Perez three or four times, then kicked him, then fired the gun three or four more times. Nunez heard about six shots. He saw defendant shoot at Perez when Perez was on the ground.

Both cars drove away from the scene. Defendant and Nunez subsequently switched cars: Nunez got into Gayoso's car, and defendant got into Montoya's car. Defendant left the sweatshirt he had been wearing in Gayoso's car.

When Montoya and defendant were later arrested and transported to jail, defendant told him, "'Don't worry. They have nothing against us.'" Defendant later instructed Montoya to "'just say that it was someone else. That it wasn't me." Defendant told Montoya to invent a nickname and say the person had gone to Mexico.

At the time of the Perez shooting, both defendant and Nunez had no hair. They were about the same size and build.

D. Gang Expert

Salinas Police Officer Robert Zuniga testified as the prosecution's gang expert. He had attended the police academy in 2005 and had been working in the gang unit since March of 2008. At the time of trial, Officer Zuniga was working in the gang unit's street enforcement group, and he had previously worked as a gang intelligence officer. As a gang intelligence officer, he contacted gang members on a daily basis, often in informal settings. He had also obtained information about gangs from confidential reliable informants and other gang experts. In preparation for testifying about the various people involved in this case, he had reviewed documentation such as crime reports and field interview cards.

According to Officer Zuniga, Perez had no documented gang contacts. Officer Zuniga believed that Poncho and his brother were both active Norteño gang members, and that Gayoso, Montoya, Nunez, and defendant were all active Sureño gang members at the time of the Perez shooting.

Officer Zuniga explained why he believed defendant was an active Sureño gang member. First, he referred to defendant's tattoos, which included the number 22 and the phrases "'One Way,'" "'Most Wanted,'" and "'Salinas Finest.'" Second, when defendant was arrested, he was in the company of other Sureño gang members, including two Sureño gang members who were hiding in a restroom, where a loaded firearm was found. Third, defendant had made a statement at juvenile hall to the effect that he was "not ready to leave the gang lifestyle." He had previously stated that he had been associating with Sureño gang members since the

age of 13. Fourth, defendant had been involved in a number of prior incidents (including a prior incident in which shots were fired at an elementary school), during which he was associating with Sureño gang members or engaging in gang-related activities.[4] Fifth, defendant had been housed with Sureño gang members in jail.

Officer Zuniga testified that the primary activities of the Sureño gang are "a variety of crimes," including homicides, shootings, carjackings, robberies, and burglaries.

The prosecution established that Sureño gang members had engaged in a "pattern of criminal gang activity" (see § 186.22, subds. (a), (e), (f)) by introducing court documents showing criminal convictions for enumerated offenses and eliciting Officer Zuniga's testimony about each crime. The documents and testimony established the following.

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[4] Officer Zuniga described the following incidents. On March 27, 2009, defendant left his transitional housing with another Sureño gang member. On July 28, 2008, defendant started an altercation in juvenile hall. On January 26, 2008, defendant was driving a vehicle that was pursued by police and which contained a firearm and ammunition. On January 18, 2008, defendant and another Sureño gang member were at an elementary school, in a vehicle that had been shot at. On September 11, 2007, defendant was involved in a fight with a Norteño gang member in the bathroom of a high school. On April 16, 2006, defendant was standing next to a vehicle that had stolen license plates, along with another Sureño gang member. On March 14, 2005, defendant and three other Sureño gang members were contacted regarding some gang-related graffiti. On January 14, 2005, defendant was contacted while associating with other Sureño gang members.

First, on January 12, 2009, Valentine Rivas and Benjamin Carrillo challenged some Norteño gang members, then "opened fire," killing one of the Norteño gang members. Rivas and Carrillo were both convicted of homicide. Officer Zuniga testified that he was "familiar with" both defendants and with the incident, and he rendered an opinion that both were active participants in the Sureño criminal street gang.

Second, on August 10, 2008, Isaac Arriaga entered a market, where he brandished a BB gun and asked the clerk for "all of the money." Arriaga was convicted of robbery. Officer Zuniga testified that he was "familiar with" the facts of the case, and he rendered an opinion that Arriaga was a Sureño gang member at the time.

Third, on February 25, 2007, Hugo Chavez and Hugo Cervantes fired guns at some Norteño gang members. They were found with a loaded firearm in their vehicle and were convicted of attempted murder and malicious shooting from a vehicle. Officer Zuniga testified that he was "familiar with" the facts of the case, and he rendered an opinion that both Chavez and Cervantes were active Sureño gang members at the time of the offenses.

Fourth, on February 11, 2007, Juan Rivas was in a vehicle with another Sureño gang member; a loaded firearm was found under his seat during a traffic stop conducted by another officer. Rivas was convicted of carrying a loaded firearm in his vehicle. Officer Zuniga testified that he was "familiar with" the facts of the case, and he rendered an opinion that Rivas was a gang member at the time of the offense.

Fifth, on May 15, 2006, Adan Flores got into an argument with some Norteño gang members inside of a 7-Eleven, then shot and killed one of the Norteño gang members. He was convicted of homicide. Officer Zuniga testified that he was "familiar with" the facts of

the case, and he rendered an opinion that Flores was an active Sureño gang member at the time of the offense.

Given a hypothetical situation based on the facts of this case, Officer Zuniga opined that the crime was committed for the benefit of and in association with the Sureño gang, and that it promoted, furthered, and assisted the commission of criminal conduct by the Sureño gang.

E. Defense Case

The defense theory was that Nunez, not defendant, shot Perez. This theory was based primarily on testimony from Guadelupe Gastelum, an independent eyewitness.

Gastelum was visiting friends on Terrace Street at the time of the Perez shooting. He was standing in the street, talking to a friend, when he heard and saw a Mitsubishi Galant turn onto the street. He saw a male exit from the car and shoot at Perez. Gastelum estimated that he was about 300 to 320 feet away from the shooter. His location was about three houses down the street. When the shooter moved closer to Perez, Gastelum's vision was blocked by a fence.

According to Gastelum, the shooter wore a black shirt and blue pants. The shooter was bald and was not wearing a hat. The shooter's sweatshirt might have had a hood, but the hood was not on the shooter's head.[5]

Later that evening, Gastelum was brought to an infield show-up, where he viewed Nunez and Gayoso. He identified Nunez as the shooter, recognizing him

[5] Gastelum's description of the shooter was somewhat inconsistent with Poncho's description. According to Poncho, defendant wore dark pants, a baseball cap, and a hooded sweatshirt.

> because he was bald, wore a black shirt, and had the same build and skin color as the shooter. Gastelum identified Gayoso as the driver. The officer accompanying Gastelum to the show-up opined that Gastelum seemed "very sure" of his identifications.

ER 35-41, renumbered footnotes in original.

SUMMARY OF THE ARGUMENT

After learning that a juror had introduced extrinsic evidence during deliberations, the state trial court conducted a hearing. Based on the offending juror's testimony and the jury foreperson's assurances that the remaining jurors did not consider or discuss those comments, the state court dismissed the offending juror, substituted an alternate juror, and deliberations began anew. On the record before it, the state court's determination that the presumption of prejudice was rebutted was reasonable.

STANDARD OF REVIEW

The Court reviews de novo the district court's denial of the petition. *Lopez v. Thompson*, 202 F.3d 1110, 1116 (9th Cir. 2000) (en banc). The district court's factual findings are reviewed for clear error. *Id*.

The Court reviews the state court's ruling under a "highly deferential" standard imposed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which "demands that state court decisions be given the

benefit of the doubt." *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam). The federal court has no authority to grant habeas relief unless the state court's ruling was "contrary to, or involved an unreasonable application of," Supreme Court law that was "clearly established" at the time the state court adjudicated the claim on the merits. 28 U.S.C. § 2254(d)(1); *Greene v. Fisher*, 565 U.S. 34, 38 (2011); *see Lopez v. Smith*, 135 S.Ct. 1 (2014) (per curiam). "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." *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007). "As a condition for obtaining habeas corpus from a federal court, a state prisoner must 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." *Harrington v. Richter*, 562 U.S. 86, 103 (2011); *see White v. Woodall*, 134 S.Ct. 1697, 1706-1707 (2014) ("The critical point is that relief is available under § 2254(d)(1)'s unreasonable-application clause if, and only if, it is so obvious that a clearly established rule applies to a given set of facts that there could be no 'fairminded disagreement' on the question."); *Bobby v. Dixon*, 565 U.S. 23, 24 (2011) (per curiam) (petitioner must show that state

court "erred so transparently that no fairminded jurist could agree with that court's decision"). This high standard is meant to be "difficult to meet," because "the purpose of AEDPA is to ensure that federal habeas relief functions as a guard against extreme malfunctions in the state criminal justice systems, and not as a means of error correction." *Greene v. Fisher*, 565 U.S. at 38, citations omitted.

ARGUMENT

THE STATE COURT'S DETERMINATION THAT THE JURY MISCONDUCT WAS NOT PREJUDICIAL WAS REASONABLE

Espinoza claims that his Sixth Amendment right to a fair trial was violated by the state court's denial of his juror misconduct claim. AOB 20-51. We disagree and submit that the state court's rejection of this claim was not contrary to, or an unreasonable application of, Supreme Court authority, or an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

A. State Court Determination

The California Court of Appeal set forth the procedural background of this claim as follows:

> During the initial jury deliberations, a juror visited the scene of the Perez shooting and told the other jurors that it would have been difficult to make an identification from Gastelum's location. The trial court held a hearing and determined that the juror had committed

misconduct, but that there was no prejudice. The trial court replaced the juror with an alternate and instructed the jury to begin deliberations anew and disregard anything that the juror had said. The trial court denied defendant's motion for a mistrial and his later motion for a new trial.

Defendant contends that the trial court erred by finding that the jury misconduct was not prejudicial.

1. Proceedings Below

The jury began deliberating on the afternoon of Friday, April 13, 2012. The jurors retired to deliberate at 3:06 p.m. and were excused at 4:45 p.m.

On Monday, April 16, 2012, the jury resumed deliberations at 9:00 a.m. At 9:15 a.m., the jury sent the trial court a note stating, "[Juror No. 55] went to the location of [the] shooting on Thurs. evening before the beginning of deliberations. No one was swayed by his statement."

The trial court indicated it believed that Juror No. 55 had committed misconduct and proposed that Juror No. 55 be removed. Defendant agreed there had been juror misconduct and requested a mistrial. The prosecutor advocated for a hearing to determine whether the misconduct was prejudicial.

The trial court called in Juror No. 55, who admitted he had gone to the scene of the shooting, out of "curiosity." He told the other jurors that he "went over there," and he said "that it was difficult to see what was happening when you're too far from there, from the street." Juror No. 55 had gone to the scene the prior Thursday, and he told the other jurors about his visit the next day. None of the other jurors said anything in response to his comment: "They just listened."

The trial court then called in the jury foreperson. The trial court asked if the other jurors had discussed Juror No. 55's comment. The foreperson indicated that some of the jurors had expressed "shock that he had done it" because of the trial court's admonition not to go to the scene.[6] The foreperson continued, "But nobody—basically the point he brought up everybody had already decided on that point. Do I say what that point is or—" The trial court responded, "I don't think you need to."

The trial court asked, "Did the comment made by Juror Number 55 result in a conversation that would—that [was] a part of your deliberations?" The foreperson responded, "No. Not really, no." The foreperson said that the jury had only discussed whether or not to report the incident to the court.

The trial court asked the foreperson to describe Juror No. 55's comment. The foreperson stated, "That he went to the location. Took a look from the point of view of Mr. G and said he didn't think that Mr. G could see that far to be able to identify a face." Juror No. 55 continued, "But everybody else had already made that decision, that we agreed that we did not believe that—" The trial court interrupted, saying, "I don't want to invade the province of the jury at this point."[7]

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[6] At both the beginning and end of trial, the trial court had instructed the jury not to "visit the scene of any event involved in this case." (See CALCRIM Nos. 101, 201.)

[7] Evidence Code section 1150, subdivision (a) provides: "Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the

Defendant reiterated his request for a mistrial. The trial court denied the request and decided, instead, to dismiss Juror No. 55, admonish the remaining jurors, and bring in an alternate juror. The trial court explained the basis for its ruling: "The jurors did deliberate for over an hour on Friday.... And it appears to the Court that Juror Number 55 on Friday revealed that he had been to the scene of the event. And he quickly was told by the rest of the jurors that that was not an okay thing to do.... It does not appear that there were any discussions other than that was not an okay thing to do that were held between the other jurors regarding the comments that Juror [No.] 55 made."

After dismissing Juror No. 55, the trial court admonished the remaining jurors as follows: "It is the Court's understanding that the—there may have been a comment by a juror on information that he received from outside of the trial. So as trial jurors, the important thing for you to do is only deliberate and only consider the evidence that was received at trial. Anything that is received outside of the courtroom or seen or viewed or told to you outside of the courtroom is not to be considered at trial. And I will tell you specifically if you heard any comments made by Juror [No.] 55 regarding anything that he said or any information that he received either by viewing himself or heard from someone else outside of the trial is not to be considered by you." The trial court told the jurors that anything they heard from Juror No. 55 should be treated as "evidence that's stricken during the trial" and "should not be considered by you for any purpose."

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verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined."

> The trial court suspended deliberations until the alternate juror could be brought in. When the alternate joined the jury, the trial court instructed the jurors that "the jury deliberation process begins anew." The jury reached its verdicts later that day.
>
> Defendant subsequently brought a motion for a new trial based on the jury misconduct. The trial court denied the motion on June 21, 2012, finding that there was no prejudice.

ER 49-52, renumbered footnotes in original.

The state court then considered and rejected Espinoza's claim that he was prejudiced by the juror's conduct as follows:

> **2. Analysis**
>
> Due process requires a jury be "'capable and willing to decide the case solely on the evidence before it....' [Citations.]" (*People v. Nesler* (1997) 16 Cal.4th 561, 578 (*Nesler*), italics omitted.) Thus, "[j]uror misconduct, such as the receipt of information about a party or the case that was not part of the evidence received at trial, leads to a presumption that the defendant was prejudiced thereby and may establish juror bias." (*Ibid.*; see also *In re Hitchings* (1993) 6 Cal.4th 97, 119 (*Hitchings*).)
>
> "When juror misconduct involves the receipt of information about a party or the case from extraneous sources, the verdict will be set aside only if there appears a substantial likelihood of juror bias. [Citation.] Such bias may appear in either of two ways: (1) if the extraneous material, judged objectively, is so prejudicial in and of itself that it is inherently and substantially likely to have influenced a juror; or (2) even if the information is not 'inherently' prejudicial, if, from the nature of the misconduct and the surrounding

circumstances, the court determines that it is substantially likely a juror was 'actually biased' against the defendant." (*Nesler, supra,* 16 Cal.4th at pp. 578-579.)

The presumption of prejudice arising from juror misconduct "'may be rebutted by proof that no prejudice actually resulted.' [Citations.]" (*Hitchings, supra,* 6 Cal.4th at p. 118.) More specifically, the presumption of prejudice "'"may be rebutted by an affirmative evidentiary showing that prejudice does not exist or by a reviewing court's examination of the entire record to determine whether there is a reasonable probability of actual harm to the complaining party [resulting from the misconduct]...."' [Citations.]" (*Id.* at p. 119.) On appeal, whether prejudice arose from juror misconduct "is a mixed question of law and fact subject to an appellate court's independent determination. [Citations]." (*Nesler, supra,* 16 Cal.4th at p. 582.)

In this case, defendant contends the jury misconduct was "so prejudicial in and of itself that it is inherently and substantially likely to have influenced a juror." (*Nesler, supra,* 16 Cal.4th at pp. 578-579.) The test for inherent bias "is analogous to the general standard for harmless error analysis under California law. Under this standard, a finding of 'inherently' likely bias is required when, but only when, the extraneous information was so prejudicial in context that its erroneous introduction in the trial itself would have warranted reversal of the judgment. Application of this 'inherent prejudice' test obviously depends upon a review of the trial record to determine the prejudicial effect of the extraneous information." (*In re Carpenter* (1995) 9 Cal.4th 634, 653 (*Carpenter*).)

We disagree that the information conveyed by Juror No. 55 was "so prejudicial in and of itself that it is inherently and substantially likely to have influenced a juror." (*Nesler, supra,* 16 Cal.4th at pp. 578-579.)

Although the accuracy of Gastelum's identification was an important issue at trial, Juror No. 55's misconduct did not "completely undermine[ ]" the defense case, as defendant claims. The evidence had already established that Gastelum had viewed the scene from a distance of at least 300 feet and that his view was obscured when defendant shot at Perez from close range.[8] The evidence had also established that someone could have confused defendant and Nunez from such a distance, due to their similarities in size, build, and hairstyle. Additionally, pictures of the scene and Gastelum's location were introduced into evidence, so the jurors were able to assess the distance for themselves. (See *People v. Sutter* (1982) 134 Cal.App.3d 806, 821 [juror's description of her visit to the scene could not "possibly have added anything to what the jurors already knew" because of pictures introduced into evidence].) Thus, although Juror No. 55 committed misconduct, he did not introduce any evidence into the jurors' deliberations that was "so prejudicial in context that its erroneous introduction in the trial itself would have warranted reversal of the judgment." (*Carpenter, supra*, 9 Cal.4th at p. 653.)

Next, we consider whether it is "substantially likely a juror was 'actually biased' against the defendant." (*Nesler, supra,* 16 Cal.4th at pp. 578-579; see also *Carpenter, supra,* 9 Cal.4th at p. 654.) Under this test, "'[t]he presumption of prejudice may be rebutted, inter alia, by a reviewing court's determination, upon examining the entire record, that there is no substantial likelihood that the complaining party suffered actual

[8] During argument to the jury, the prosecutor discredited Gastelum's identification of Nunez. He argued that Gastelum was too far from the shooting to make an accurate identification: "You can't see from that far away anybody's face."

harm.' [Citation.]" (*Carpenter*, *supra*, 9 Cal.4th at p. 654.) "In an extraneous-information case, the 'entire record' logically bearing on a circumstantial finding of likely bias includes the nature of the juror's conduct, the circumstances under which the information was obtained, the instructions the jury received, the nature of the evidence and issues at trial, and the strength of the evidence against the defendant." (*Ibid*.)

Courts have often found that the presumption of prejudice arising from juror misconduct was rebutted because the trial court was apprised of the misconduct during deliberations and was able to implement "curative measures such as the replacement of the tainted juror with an alternate or a limiting instruction or admonition." (*People v. Holloway* (1990) 50 Cal.3d 1098, 1111, disapproved on other grounds by *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1; see also *People v. Dorsey* (1995) 34 Cal.App.4th 694, 704 [presumption of prejudice rebutted where trial court replaced the offending juror and instructed the jury to begin deliberations anew].) For instance, in *People v. Knights* (1985) 166 Cal.App.3d 46 (*Knights*), during deliberations, a juror learned that the defendant had previously killed a four-year-old child, and she told the rest of the jury what she had heard. The presumption of prejudice was rebutted, however, because "the misconduct occurred early in the deliberations" and was quickly brought to the court's attention by the foreperson. (*Id*. at p. 51.) "The potentially biased juror was excused and replaced with an alternate juror," and the remaining jurors "were instructed to begin deliberations again as if no deliberations had ever occurred." (*Ibid*.)

On this record, we find that the presumption of prejudice arising from Juror No. 55's misconduct was rebutted. Considering the nature of the jury misconduct and the fact that the extraneous material was not

> inconsistent with other evidence at trial, there was "'no substantial likelihood' " that defendant "'suffered actual harm'" from the jury misconduct. (*Carpenter*, *supra*, 9 Cal.4th at p. 654.) Further, in this case, similar to *Knights*, "the misconduct occurred early in the deliberations" and was quickly brought to the court's attention by the foreperson. (*Knights*, *supra*, 166 Cal.App.3d at p. 51.) "The potentially biased juror was excused and replaced with an alternate juror." (*Ibid*.) The remaining jurors were instructed not to consider anything Juror No. 55 said, and they "were instructed to begin deliberations again as if no deliberations had ever occurred." (*Ibid*.) Under the circumstances, it is not "substantially likely a juror was 'actually biased' against the defendant." (*Nesler*, *supra*, 16 Cal.4th at p. 579.

ER 52-55, renumbered footnote in original.

B. The District Court Determination

After setting forth the applicable law, the district court explained that the state trial court conducted a hearing on Juror 55's misconduct, including the testimony of Juror 55 and the jury foreperson, and subsequently found the misconduct not prejudicial. ER 26-7, citing 15 RT 1845-59. The district court noted that the state trial court acted immediately and informed the parties of the reports of misconduct and determined after questioning that the other jurors had not discussed or considered the comments of Juror 55. *Id*. 26-7, citing 15 RT 1840-41, 1854-55. The district court next noted that based on these assurances, the trial court dismissed Juror 55, admonished the

jury to disregard extrinsic evidence, and brought in an alternate juror. ER 27, citing 15 RT 1860-62. Noting that the state court's factual finding that the jury had not discussed the comments raised by Juror 55 is presumptively correct, the district court concluded that Espinoza had a "full, fair and complete opportunity to present his claim to the state courts." *Id*., citing 28 U.S.C. § 2254(e)(1) and *Hibbler v. Benedetti*, 693 F.3d 1140, 1146 (9th Cir. 2012).

The district court continued by citing the five factors set forth in *Mancuso v. Olivarez*, 292 F.3d 939, 951-52 (9th Cir. 2002) to consider whether the extrinsic evidence was prejudicial. The court found that the *Mancuso* factors demonstrated that Espinoza was not prejudiced, explaining:

> Beginning with the first three *Mancuso* factors, the record shows that only Juror Number 55 went to the site of the shooting, but his comment that, "to [him] it was very difficult to see something from where [he] was standing" was made to the other members of the jury. 15 RT 1850. The comment was made on Friday, April 13, 2012, and the foreperson reported the misconduct on Monday, April 16, 2012, adding that "[n]o one was swayed by [Juror Number 55's] statement." 15 RT 1840. The foreperson reported that Juror Number 55's introduction of extrinsic material did not impact or change the jury's mindset because the jury "had already decided on that point." 15 RT 1853. Moreover, the comment in the present case did not introduce new evidence because photos of the scene and the witness's location were already given to the jury as evidence during trial. 12 RT 1509-1523.

> As to the fourth *Mancuso* factor, the extrinsic material was introduced before the verdict was reached, at the beginning of deliberation. 15 RT 1853. However, the trial court noted that the foreperson stated that by that point "everybody had already decided on that point." *Id*.; *see Bayramoglu* [*v. Estelle*], 806 F.2d [880], at 888 [(9th Cir. 1986)] (observing that, though not determinative, a juror's assurance that he could disregard the extraneous information was "certainly significant"). Finally, as to the fifth *Mancuso* factor, considering the witness statements and details of the scene submitted to the jury in addition to the foreperson's assurances, Juror Number 55's comment could not have been an influential factor in the jury's decision to find Petitioner guilty.
>
> In sum, the record shows that, although Juror Number 55 inappropriately introduced extrinsic material during deliberations, the trial court found that such extrinsic material did not have a prejudicial effect on the verdict. The state court's decision was not "objectively unreasonable in light" of the evidence presented, ... Furthermore, the jury could have arrived at the same conclusion given the evidence presented at trial. [Citation]. Thus, under these circumstances, the state court reasonably found that the trial court's determination was supported by the record. [Citation].

ER 28-30.

C. The State Court Reasonably Rejected Espinoza's Claim that the Juror Misconduct was Prejudicial

The Sixth Amendment right to trial by jury "necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of

counsel." *Turner v. Louisiana*, 379 U.S. 466, 472-473 (1965); *accord*, *Parker v. Gladden*, 385 U.S. 363, 364-365 (1966). This encompasses the right to have the jury decide the case based on evidence subject to confrontation, cross examination, and the assistance of counsel. *Eslaminia v. White*, 136 F.3d 1234, 1237 (9th Cir. 1998). However, "[d]ue process does not require a new trial every time a juror has been placed in a potentially compromising situation . . . [because] it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote." *Smith v. Phillips*, 455 U.S. 209, 217 (1982).

Constitutionally impermissible prejudice is strongly presumed whenever members of the jury receive extrinsic information about the case in which they must return a verdict. *Xiong v. Felker*, 681 F.3d 1067, 1076 (9th Cir. 2012) (citing *Remmer v. United States*, 347 U.S. 227, 228 (1954)). Juror bias can be inferred where a juror is "apprised of such prejudicial information about the defendant that the court deems it highly unlikely that he can exercise independent judgment even if the juror states he will." *Estrada v. Scribner*, 512 F.3d 1227, 1240 (9th Cir. 2008) (citing *Coughlin v. Tailhook Ass'n*, 112 F.3d 1052, 1062 (9th Cir. 1997)). However, as noted, a new trial is not automatic. *Smith v. Phillips*, 455 U.S. at 217. Instead, the presumption of prejudice is rebuttable, and the burden rests upon the

government to show that the information received by the jurors was harmless. *Xiong*, 681 F.3d at 1076. "When the presumption arises but the prejudicial effect of the contact is unclear, the trial court must hold a 'hearing' to 'determine the circumstances [of the contact], the impact thereof upon the juror, and whether or not it was prejudicial.'" *Godoy v. Spearman*, 861 F.3d 956, 959 (9th Cir. 2017) (en banc) (citing *Remmer*, 347 U.S. at 229-230).

This Court also often applies a harmless error analysis for claims of juror misconduct based on extraneous information. *See e.g.*, *Smith v. Swarthout*, 742 F.3d 885, 892 n.2 (9th Cir. 2014). Under the *Brecht* harmless error standard, federal habeas petitioners "are not entitled to habeas relief based on trial error unless they can establish that it resulted in 'actual prejudice.'" *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (citation omitted). The test is "whether the error had 'substantial and injurious' effect or influence in determining the jury's verdict." *Smith*, 742 F.3d at 894 (internal citation omitted).[9]

[9] It is unclear how the *Remmer* presumption and the *Brecht* standard fit together and this Court has not consistently applied either or both of the standards in juror misconduct cases. *See Godoy*, 861 F.3d at 969 (applying *Remmer* presumption and stating that if the state fails to demonstrate the contact was harmless, the defendant's conviction is unconstitutional); *Smith*,

Here, the state court applied a presumption of prejudice and assumed that Juror 55 committed misconduct when he went to the scene of the shooting and then reported back to the other jurors that Gastelum's location would make an identification difficult. The trial court held a hearing and questioned Juror 55, who admitted he had gone to the scene and then reported back to the other jurors during Friday afternoon deliberations, which lasted from 3:06 p.m. to 4:45 p.m. Juror 55 reported that none of the other jurors said anything in response to his comment, they just listened. ER 125-131. The trial court then examined the jury foreperson who explained that when Juror 55 revealed that he had visited the crime scene, the reaction of the other jurors was shock because they had specifically been instructed not to go to that location and if they happened to be in the area, to drive through without stopping. ER 133. The foreperson also stated that the point that Juror 55 brought up had already been decided by everybody. *Id*. When asked if Juror 55's comment had resulted in a conversation among the other jurors or had been part of the deliberations, the foreperson said "No. Not

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742 F.3d at 894 (applying *Brecht* harmless error analysis for claim that a juror examined medicine at home and conducted an internet search); *August v. Montgomery*, 2017 WL 4280944, *28-29 (C.D. Cal. 2017) (discussing approaches); *Khek v. Foulk*, 2016 WL 270948, *19 n.11 (N.D. Cal. 2016) (same).

really, no." ER 133-134. The foreperson further explained that he did not think much about Juror 55's comment initially, "because it didn't change anything," but the more he thought about it, he decided it was something the court needed to know about. ER 134. The foreperson described Juror 55's comment for the court and reiterated that the "everybody else had already made that decision" about what Juror 55 reported. ER 135.

After finding that there were no discussions among the jurors about Juror 55's comments "other than it was not an okay thing to do," the trial court denied Espinoza's request for a mistrial, dismissed Juror 55 and substituted an alternate juror. Before the alternate juror was seated, the trial court strongly admonished the remaining jurors to disregard the comments of Juror 55 as follows:

> It is the Court's understanding that the—there may have been a comment by a juror on information that he received from outside of the trial. So as trial jurors, the important thing for you to do is only deliberate and only consider the evidence that was received at trial. Anything that is received outside of the courtroom or seen or viewed or told to you outside of the courtroom is not to be considered at trial. And I will tell you specifically if you heard any comments made by Juror 55 regarding anything that he said or any information that he received either by viewing himself or heard from someone else outside of the trial is not to be considered by you.

> I talked to you during the trial about evidence that's stricken during the trial cannot be considered by the jurors for any purpose. I'll give you the same admonition if you heard anything from Juror 55. Anything that he brought into this that was not received in the courtroom should not be considered by you for any purpose. As I may have told you already, we do have one of the alternates who will be coming in, and it is Juror Number 76. I've asked them to be here at 1:00 o'clock. So we will suspend deliberations until that time. At that time I'm going to ask you all to come back. You can take your seats. We'll have the alternate juror take the seat that is now vacant, and I will provide you with an additional jury instruction about how you are to proceed from here, because you will have to go back and start deliberations over again.

ER 141-42. When the substitute juror was seated, the trial court instructed the jury to begin deliberations again as if no deliberations had ever occurred.

Although the comments by Juror 55 were actually received by the jury, according to the jury foreperson, the jurors did not discuss or consider the information and, in fact, they had already decided the point that Juror 55 made. The trial court's finding that the other jurors had not discussed or considered the comments made by Juror 55 is presumed correct unless rebutted by Espinoza. 28 U.S.C. § 2254(e)(1); *see Patton v. Yount*, 467 U.S. 1025, 1038 (1984) (trial court's conclusion that a juror was not biased is a finding of fact entitled to "special deference"); *Hedlund v. Ryan*, 815 F.3d 1233, 1248 (9th Cir. 2016).

As the state court of appeal explained, the evidence at trial established that Gastelum had viewed the scene from a distance of a least 300 feet (the length of a football field) and that his view was obscured when Espinoza shot Perez from close range. ER 53-54. The evidence also established that someone could have confused Espinoza and Nunez from such a distance, due to their similarities in size, build, and hairstyle. ER 37 (noting that Nunez and Espinoza were both bald and were the same size and build). Moreover, photos of the crime scene and Gastelum's location were also introduced at trial, so the jurors were able to assess the distance for themselves, and the prosecutor discredited Gastelum's identification of Nunez during argument. ER 54 (explaining that pictures of the scene and Gastelum's location were introduced into evidence); 54 n.9 (noting that the prosecutor argued that Gastelum was too far from the shooting to make an accurate identification). On this record showing Gastelum's location and inability to clearly view the victim when he was shot, Juror 55's comments were cumulative. *See Tong Xiong v. Felker*, 681 F.3d at 1078 (upholding as reasonable the state court's factual determination that the petitioner was not prejudiced by the jury's consideration of extrinsic evidence because a witness's credibility was so impeached at trial that extrinsic evidence further impeaching his credibility was merely cumulative).

This Court has found prejudicial juror misconduct involving circumstances with "*extended* external influences on jurors or confirmed juror bias." *Henry v. Ryan*, 720 F.3d 1073, 1086 (9th Cir. 2013) (emphasis in original) (juror experiment about whether a person lying in the camper of a truck could hear an argument occurring in the cab did not amount to prejudicial misconduct). Here, Juror 55's comments were not inherently inflammatory, nor had the evidence been excluded from trial as unduly prejudicial. *Cf. Mancuso v. Olivarez*, 292 F.3d at 953 ("Juror misconduct cases in which habeas relief has been granted often involve the jury's receipt of information excluded from trial as unduly prejudicial such as evidence of the facts surrounding a defendant's prior conviction, bad reputation, or propensity to violate the law"); *Sassounian v. Roe*, 230 F.3d 1097, 1104, 1112 (9th Cir. 2000) (reversing a special circumstance jury verdict where it was reached after the jury improperly considered evidence that had not been presented at trial because it had been ruled inadmissible); *Eslaminia v. White*, 136 F.3d 1234, 1237 (9th Cir. 1998) (finding prejudicial jury misconduct when tape recording of interview of petitioner's brother, who did not testify at trial, and whose statements contained strong support for prosecution case and undermined defense case, was mistakenly given to jury during deliberations); *Rodriguez v. Marshall*, 125 F.3d 739, 744 (9th Cir.

1997) ("We have granted a new trial where the jury receives extraneous information that is ordinarily excluded from trial as inflammatory or unduly prejudicial"), *overruled on other grounds by Payton v. Woodford*, 299 F.3d 815, 828-829 & n. 11 (9th Cir. 2002) (en banc).

After hearing Juror 55's explanation as well as the jury foreperson's assurances that the remaining jurors did not consider or discuss those comments, the state court reasonably concluded that the presumption of prejudice that arose from the introduction of the extrinsic evidence was rebutted. *Remmer v. United States*, 347 U.S. at 228-229. Accordingly, the state court's decision rejecting Espinoza's claim was not objectively unreasonable. *Harrington v. Richter*, 562 U.S. at 103.

Even if the decision not to declare a mistrial and to allow deliberations to continue was constitutional error, the introduction of Juror 55's comments did not have a "substantial and injurious effect on the verdict." *Brecht*, 507 U.S. at 637. The evidence of Espinoza's guilt was substantial. Poncho, who stood six feet away as Espinoza shot Jose Perez and shot at Poncho, recognized Espinoza from prior confrontations and clearly identified him to police and during his testimony. Nunez and Montoya, who were Espinoza's fellow gang members and were at the scene, also identified Espinoza as the shooter. Nunez and Montoya were active Sureno gang members at the time

of the shooting and expert testimony established that they hunted down and shot Perez and Poncho as retaliation for an earlier shooting of a fellow Sureno gang member. On this record, the jury had more than enough properly admitted evidence with which to find Espinoza guilty.

To recap, the trial court interviewed Juror 55 about his comments and the reaction of the other jurors as well as the jury foreperson, who stated that the jurors did not discuss or consider Juror 55's comments. The trial court dismissed Juror 55, admonished the jury to consider only evidence presented in court and brought in the alternate juror to begin deliberations anew. On this record, Espinoza cannot show that Juror 55's comments had a substantial and injurious effect upon the verdict. *Brecht*, 507 U.S. at 637.

For the first time on appeal, Espinoza claims that the state court decision is not entitled to AEDPA deference because it was "contrary to" and an unreasonable application of Supreme Court law. AOB 29-41. On this basis, he claims he is entitled to habeas relief. Espinoza's arguments are unpersuasive.

Initially, Espinoza theorizes that the standard relied upon by the California Court of Appeal for determining prejudice–that there was "no substantial likelihood" that Espinoza "suffered actual harm" from the jury's misconduct–is contrary to federal law. In his view, it is "impossible to

reconcile the state court's use of the "no substantial likelihood" standard with the language in *Remmer* and *Mattox* that the "burden rests heavily on the Government to establish" that the misconduct "was harmless to the defendant." AOB 32, citing *Mattox*, 146 U.S. at 150 ("'possibly prejudicial' extraneous contacts or information invalidate the verdict" until determined to be harmless); *Remmer I*, 347 U.S. at 229 ("the burden rests heavily upon the Government to establish that the conduct was harmless to the defendant").

Relying on language in *Godoy v. Spearman*, 861 F.3d at 956 and *Caliendo v. Warden of Cal. Men's Colony*, 365 F.3d 691 (9th Cir. 2004), Espinoza claims that the *Mattox/Remmer* presumption *requires* a new trial whenever there is a "reasonable possibility" of influence on the verdict. AOB 33, citing *Caliendo*, 365 F.3d at 697 (new trial motion must be granted "unless the prosecution shows that there is no reasonable possibility that the communication will influence the verdict") and *Godoy*, 861 F.3d at 968 (harmlessness means "that there is no reasonable possibility that the communication … influence[d] the verdict").

Espinoza's argument fails because, under AEDPA, the federal court has no authority to grant habeas relief unless the state court's ruling was contrary to or involved an unreasonable application of "clearly established

Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1); *see Richter*, 562 U.S. at 101 ("[I]t is not an unreasonable application of clearly established Federal law for a state court to decline to apply a specific legal rule that has not been squarely established by this Court"); *Mann v. Ryan*, 828 F.3d 1143, 1157-1158 (9th Cir. 2016) (en banc) (acknowledging that if it is "possible to read the state court's decision in a way that comports with clearly established federal law. . . we must do so") .

Contrary to his argument, Espinoza cites no Supreme Court authority that clearly establishes the standard he articulates. *Kernan v. Cuero*, 138 S.Ct. 4, 9 (2017) (en banc) (Ninth Circuit precedent does not constitute "clearly established Federal law, as determined by the Supreme Court as required by 28 U.S.C. § 2254(d)(1)").

Indeed, numerous state supreme court cases have consistently adhered to the substantial likelihood standard for determining prejudice from juror misconduct, often stating it in conjunction with *Remmer*. *See e.g.*, *People v. Foster*, 50 Cal.4th 1301, 1342 (2010); *People v. Lewis*, 46 Cal.4th 1255, 1309 (2009). Moreover, the California Supreme Court has rejected the argument that the substantial likelihood standard is inconsistent with federal law. *People v. Loker*, 44 Cal.4th 691, 747-48 (2008) (rejecting the defense

argument that the "substantial likelihood" standard is inconsistent with federal law and noting that the defense provided neither controlling authority nor persuasive argument that the court should alter its settled approach). Notably, the state court opinion in *Godoy* articulated the substantial likelihood standard and, yet, this Court's *Godoy* opinion did not find that that standard conflicted with Supreme Court authority. *Godoy*, 861 F.3d at 961. Espinoza's argument that California's approach to juror misconduct claims is contrary to Supreme Court law was implicitly rejected by that en banc opinion, which did not invalidate California's longstanding precedents.

In any event, neither *Godoy* nor *Caliendo* articulated the "reasonable possibility" standard as controlling authority and, importantly, the facts of those cases are entirely distinguishable from the instant case. In *Godoy*, this Court determined that the state court erred in failing to place the burden of rebutting the presumption of prejudice on the prosecution, relying instead on the same declaration submitted by a juror to both establish *and* rebut the presumption of prejudice, and denying the defendant an evidentiary hearing on the alleged juror misconduct. 861 F.3d at 964-68. Here, in contrast, the state court held a hearing, examined Juror 55 and the foreperson, subsequently dismissed Juror 55 and substituted an alternate juror to begin deliberations anew.

In *Caliendo*, the state court erred in failing to presume prejudice when a critical prosecution witness had an unauthorized conversation with multiple jurors for twenty minutes. 365 F.3d at 697-98. In contrast here, the trial court presumed prejudice and held a hearing after Juror 55's misconduct was brought to its attention. Neither case articulates the "reasonable possibility" standard as clearly established Supreme Court authority or even as the Circuit's controlling law. Moreover, both cases are factually distinguishable from the instant case because no hearing was held to determine whether the presumption of prejudice was rebutted.

Espinoza's analogy to *Johnson v. California*, 545 U.S. 162 (2004), is equally unpersuasive. *Johnson*, a direct appeal case about the prima facie showing required at the first step of a discriminatory juror challenge, held that California's "more likely than not" test conflicted with the "inference of discriminatory purpose" test set forth clearly in *Batson v. Kentucky*, 476 U.S. 79, 168-169 (1986). *Johnson* at 168-72 (holding that California's "more likely than not" standard is an inappropriate yardstick by which to measure the sufficiency of a prima facie case). In contrast to the instant habeas case, the Supreme Court had clearly articulated the prima facie standard for the first stage of a *Batson* challenge and the question of which standard was correct was squarely before the Court. "[I]f a habeas court must extend a

rationale before it can apply to the facts at hand the rationale cannot be clearly established at the time of the state-court decision….Section 2254(d)(1) would be undermined if habeas courts introduced rules not clearly established under the guise of extensions to existing law." *Yarborough v. Alvarado*, 541 U.S. 652, 666 (2004); *White v. Woodall*, 134 S.Ct. 1697, 1706 (2014) (Section 2254(d)(1) "does not require state courts to extend [Supreme Court] precedent or license federal courts to treat the failure to do so error"); *Alvarado v. Hill*, 252 F.3d 1066, 1068-69 (9th Cir. 2001) (question "is not whether [the challenged ruling] violates due process as that concept might be extrapolated from the decisions of the Supreme Court. Rather, it is whether [the ruling] violates due process under 'clearly established' federal law, as already determined by the Court").

Espinoza also argues, again for the first time on appeal, that the state court's decision is an unreasonable application of clearly established federal law because it failed to consider the fact that, after Juror 55 was dismissed and the jury was reconstituted, the jury returned a verdict in approximately one hour. AOB 37-41. According to Espinoza, the timing of the verdict is a "crucial consideration in assessment of the effect of juror misconduct." *Id*. at 39. To support his argument, he cites *Sassounian v. Roe*, 230 F.3d at 1110 and *State v. Lehman*, 321 N.W.2d 212, 223-24 (Wis. 1982). Neither

case constitutes clearly established Supreme Court authority or even states that the length of the jury deliberations is a crucial consideration in juror misconduct cases. *See Sassounian*, 230 F.3d at 1110 (explaining that the timing of the jury's discussion about the improper evidence was critical); *Lehman*, 321 N.W.2d at 223-24 (Wisconsin supreme court concluded that a state statute did not allow substitution of a juror during deliberations and found reversible error absent consent by the defendant to the substitution). Indeed, because the Supreme Court has not articulated specific factors to consider, the test for prejudice is necessarily general and case-specific, which allows state courts broad leeway in its application. *See Renico v. Lett*, 559 U.S. 766, 778-779 (2010) (state court was not obligated to employ circuit's three-part test, because Supreme Court had not clearly established that assessment of those factors was constitutionally required); *Yarborough v. Alvarado*, 541 U.S. at 664. As this Court has acknowledged, even when considering the circuit's factors, "none of these factors should be considered dispositive." *Jeffries v. Blodgett*, 5 F.3d 1180, 1190 (9th Cir. 1992).

Moreover, the state court was clearly aware of the amount of time the reconstituted jury took to reach a verdict, as it acknowledged in its opinion that the jury "reached its verdicts later that day." ER 52. Even if it did not expressly discuss that factor in its analysis, "state courts are not required to

address every jot and tittle of proof suggested to them, nor need they 'make detailed findings addressing all the evidence before [them].'" *Taylor v. Maddox*, 366 F.3d 992, 1001 (9th Cir.2004) (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 347 (2003)); *Gray v. Zook*, 806 F.3d 783, 791 (4th Cir. 2015) ("a state court need not refer specifically to each piece of a petitioner's evidence to avoid the accusation that it unreasonably ignored the evidence"). Nor did Espinoza rely on that factor in his state briefing. SER 1-65. A state court cannot be faulted for "ignoring" evidence when the petitioner himself failed to bring it to the court's attention for the particular inference he seeks. *Pizzuto v. Yordy*, 947 F.3d 510, 531-32 (9th Cir. 2019).

Accordingly, the state court's failure to explicitly discuss the time it took the reconstituted jury to reach a verdict did not amount to an unreasonable application of the law on the presumption of prejudice as set forth by the Supreme Court law. Espinoza points to no authority that requires a different result. Indeed, the district court considered the same factors set out by Espinoza to conclude that the extrinsic evidence did *not* prejudice Espinoza. *See* AOB 37-8; *compare* ER 28-30 (Juror 55's comment was made early in the deliberations; the trial court found that no one was swayed by the comment; Juror 55's observation did not introduce new evidence because photos of the scene and the witness's location were

already before the jury; the foreperson assured the court that the jurors would disregard the comments; and, considering all the evidence presented to the jury, Juror 55's comments could not have been "an influential factor in the jury's decision to find [Espinoza] guilty"). Espinoza contends that "[o]rdinarily one would expect a jury to deliberate at least two or three days in a murder case of this length and complexity," AOB 39, but every case is different and there is no prescribed length for a "reasonable" amount of deliberation. For example, the O.J. Simpson murder trial took eight months, and the jury deliberated for less than four hours before returning a verdict. Here, the defense presented required the jury to decide whether Espinoza or Nunez was the shooter. The evidence of guilt was substantial, establishing that Espinoza was a Sureno gang member and, shortly before the shooting, was involved in discussions to respond to a shooting of a fellow gang member. Three witnesses identified Espinoza as the shooter, including the surviving victim who observed Espinoza at close range and clearly identified Espinoza to the police and during his trial testimony. On this record, the jury had more than enough properly admitted evidence with which to find Espinoza guilty.

Because the state court's decision was not contrary to, or an unreasonable application of, clearly established federal law, habeas relief is unavailable.

CONCLUSION

For the reasons stated, we respectfully ask this Court to affirm the judgment of the district court denying the petition for writ of habeas corpus.

Dated: February 24, 2020

Respectfully submitted,

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18-16835

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CARLOS A. ESPINOZA,

Petitioner-Appellant,

v.

W. L. MONTGOMERY, Acting Warden,

Respondent-Appellee.

STATEMENT OF RELATED CASES

To the best of our knowledge, there are no related cases.

Dated: February 24, 2020

Respectfully Submitted,

XAVIER BECERRA
Attorney General of California
JEFFREY M. LAURENCE
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s/ Pamela K. Critchfield
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Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28-1.1(f), 29-2(c)(2) and (3), 32-1, 32-2 or 32-4 for Case Number 18-16835

Note: This form must be signed by the attorney or unrepresented litigant *and attached to the end of the brief.*

I certify that (*check appropriate option*):

☒ This brief complies with the length limits permitted by Ninth Circuit Rule 28-1.1.
The brief is 9508 words or _____ pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

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The brief is 9508 words or _____ pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

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The brief is _____ words or _____ pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable, and is filed by (1) ☐ separately represented parties; (2) ☐ a party or parties filing a single brief in response to multiple briefs; or (3) ☐ a party or parties filing a single brief in response to a longer joint brief filed under Rule 32-2(b). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☐ This brief complies with the longer length limit authorized by court order dated _____
The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6). The brief is _____ words or _____ pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable.

☐ This brief is accompanied by a motion for leave to file a longer brief pursuant to Ninth Circuit Rule 32-2 (a) and is _____ words or _____ pages, excluding the portions exempted by Fed. R. App. P. 32 (f), if applicable. The brief's type size and type face comply with Fed. R .App. P. 32(a)(5) and (6).

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Signature of Attorney or Unrepresented Litigant: s/ Pamela K. Critchfield

Date: Feb. 24, 2020

("s/" plus typed name is acceptable for electronically-filed documents)

CERTIFICATE OF SERVICE

Case Name: ***Carlos A. Espinoza v. W. L. Montgomery, Acting Warden*** No. **18-16835**

I hereby certify that on February 24, 2020, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

APPELLEE'S BRIEF

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 State of California the foregoing is true and correct and that this declaration was executed on February 24, 2020, at San Francisco, California.

M. T. Otanes	***s/ M. T. Otanes***
Declarant	Signature

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Appendix D

U.S. District Court, Northern Dist., California District Court decision (July 24, 2018)

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

CARLOS A. ESPINOZA,

Petitioner,

v.

W. L. MONTGOMERY, Warden,

Respondent.

Case No. 17-cv-02159-YGR (PR)

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS; AND DENYING CERTIFICATE OF APPEALABILITY

Petitioner Carlos A. Espinoza, a state prisoner, brings the instant *pro se* habeas action under 28 U.S.C. § 2254 to challenge his 2012 conviction and sentence. A Monterey County jury convicted Petitioner, who was 17 years old at the time he committed the offenses, of first degree murder, attempted premeditated and deliberate murder, and active participation in a criminal street gang. The jury also found that Petitioner committed the murder and attempted murder for the benefit of a criminal street gang, and that in committing the murder and attempted murder, he personally used and intentionally discharged a firearm and proximately caused great bodily injury or death. The petition raises the following three claims: (1) the gang crime and gang enhancements must be reversed because the gang expert's opinion testimony was based in part on testimonial hearsay, in violation of Petitioner's Sixth Amendment right to confrontation; (2) an ineffective assistance of counsel ("IAC") claim based on his trial counsel's failure to object to the gang expert's opinion testimony on confrontation grounds; and (3) the judgment must be reversed due to jury misconduct because one juror visited the scene and told the other jurors what he observed. Dkt. 1 at 7-27.[1]

Having read and considered the papers filed in connection with this matter and being fully informed, the Court hereby DENIES the petition for the reasons set forth below.

[1] Page number citations refer to those assigned by the Court's electronic case management filing system and not those assigned by the parties.

I. BACKGROUND

A. Factual Background

The California Court of Appeal summarized the facts of Petitioner's offense as follows. This summary is presumed correct. *See Hernandez v. Small*, 282 F.3d 1132, 1135 n.1 (9th Cir. 2002); 28 U.S.C. § 2254(e)(1).

> ***A. The Shooting***
>
> On August 6, 2009, Jose Perez was outside of his house on Terrace Street in Salinas. Perez was wearing a white t-shirt, shorts, and sneakers. He was talking to his friend Poncho, who was loaning Perez a bicycle. Perez was planning to ride the bicycle to football practice. According to his brother, Perez was not involved with gangs. Rather, he was "100 percent involved in sports," particularly football.
>
> While Perez and Poncho stood outside, two cars turned onto Terrace Street: a gray primered Mitsubishi Galant, and a grayish-green primered Lexus. The cars stopped in front of the house. Defendant got out of the Galant, cocked a gun, and began shooting. Poncho started running. He looked back and saw Perez on the ground. He ran to a fence, then looked back again. Defendant shot at him, then shot Perez while standing over him.
>
> Perez was later transported to the hospital, where he was declared deceased. Perez had multiple gunshot wounds, including some that had been fired at close range.
>
> ***B. Prior Incidents Between Poncho and Defendant***
>
> Poncho knew defendant as "Flaco." He knew defendant from school. At school, defendant often engaged in "mugging" (staring at) him, and defendant would sometimes bump into him. Defendant had chased Poncho on two prior occasions. First, about three months before the shooting, defendant was in a car that tried to run Poncho over. Then, about one and a half months before the shooting, defendant chased Poncho while driving.
>
> Poncho knew that defendant hung out with Sureños and that defendant considered Poncho to be associated with Norteños. Poncho denied he was in fact a gang member but admitted he had a close family member who was in a Norteño gang. Poncho also admitted he had a tattoo of the word "Salas" on his back and that he previously had the roman numerals XIV on his hand.
>
> ***C. Coparticipant Testimony***
>
> Julio Montoya Luna (Montoya), Juan Nunez, and Antonio Gayoso were coparticipants in the shooting of Perez. Montoya and Gayoso were members of the Mexican Pride Locos, a Sureño gang. Nunez and defendant were associated with the Vagos, a [sic] another Sureño gang.

62-A

Montoya and Nunez both entered into agreements with the prosecution, pursuant to which each pleaded guilty to being an accomplice and a gang member in exchange for testifying against defendant.

Montoya and Nunez both testified about defendant's tattoos, which included the number 22 and the phrase "'One Way.'" To get a tattoo of the number 22, which represents "V," the 22nd letter of the alphabet, a Vagos gang member must do a shooting. "'One Way'" refers to a street in the Vagos territory.

Montoya and Nunez also testified about the Perez shooting. Earlier that day, a Sureño gang member named "Shaggy" had been shot. Afterwards, Nunez, defendant and other Sureño gang members had a discussion about how to respond. Nunez said he "could be the one" to do a retaliatory shooting; he wanted to "look good." Six of the Sureño gang members went looking for Norteños. They "didn't find anyone," although Nunez and two other Sureño gang members shot at a house where Norteños lived.

Nunez and defendant eventually went to the location of Shaggy's shooting. Gayoso approached Nunez, angry about the shooting. Defendant indicated that he had a gun and asked Gayoso "what did he want to do." Defendant borrowed a sweatshirt and gloves, then asked Nunez to "go with him to go riding," meaning to go find "someone to shoot at." Nunez called Montoya over and said, "'The homies are going to go do some riding. Do you want to go?'" Montoya understood this meant that they were going to look for rival Norteños.

Montoya drove one car with Nunez as his passenger. They followed Gayoso, who was driving another car with defendant as his passenger. At Terrace Street, defendant got out and fired his gun at Perez and Poncho. According to Montoya, defendant shot Perez three or four times, then kicked him, then fired the gun three or four more times. Nunez heard about six shots. He saw defendant shoot at Perez when Perez was on the ground.

Both cars drove away from the scene. Defendant and Nunez subsequently switched cars: Nunez got into Gayoso's car, and defendant got into Montoya's car. Defendant left the sweatshirt he had been wearing in Gayoso's car.

When Montoya and defendant were later arrested and transported to jail, defendant told him, "'Don't worry. They have nothing against us.'" Defendant later instructed Montoya to "'just say that it was someone else. That it wasn't me.'" Defendant told Montoya to invent a nickname and say the person had gone to Mexico.

At the time of the Perez shooting, both defendant and Nunez had no hair. They were about the same size and build.

D. Gang Expert

Salinas Police Officer Robert Zuniga testified as the prosecution's

gang expert. He had attended the police academy in 2005 and had been working in the gang unit since March of 2008. At the time of trial, Officer Zuniga was working in the gang unit's street enforcement group, and he had previously worked as a gang intelligence officer. As a gang intelligence officer, he contacted gang members on a daily basis, often in informal settings. He had also obtained information about gangs from confidential reliable informants and other gang experts. In preparation for testifying about the various people involved in this case, he had reviewed documentation such as crime reports and field interview cards.

According to Officer Zuniga, Perez had no documented gang contacts. Officer Zuniga believed that Poncho and his brother were both active Norteño gang members, and that Gayoso, Montoya, Nunez, and defendant were all active Sureño gang members at the time of the Perez shooting.

Officer Zuniga explained why he believed defendant was an active Sureño gang member. First, he referred to defendant's tattoos, which included the number 22 and the phrases "'One Way,'" "'Most Wanted,'" and "'Salinas Finest.'" Second, when defendant was arrested, he was in the company of other Sureño gang members, including two Sureño gang members who were hiding in a restroom, where a loaded firearm was found. Third, defendant had made a statement at juvenile hall to the effect that he was "not ready to leave the gang lifestyle." He had previously stated that he had been associating with Sureño gang members since the age of 13. Fourth, defendant had been involved in a number of prior incidents (including a prior incident in which shots were fired at an elementary school), during which he was associating with Sureño gang members or engaging in gang-related activities. Fifth, defendant had been housed with Sureño gang members in jail.

Officer Zuniga testified that the primary activities of the Sureño gang are "a variety of crimes," including homicides, shootings, carjackings, robberies, and burglaries.

The prosecution established that Sureño gang members had engaged in a "pattern of criminal gang activity" (see § 186.22, subds. (a), (e), (f)) by introducing court documents showing criminal convictions for enumerated offenses and eliciting Officer Zuniga's testimony about each crime. The documents and testimony established the following.

First, on January 12, 2009, Valentine Rivas and Benjamin Carrillo challenged some Norteño gang members, then "opened fire[d]," killing one of the Norteño gang members. Rivas and Carrillo were both convicted of homicide. Officer Zuniga testified that he was "familiar with" both defendants and with the incident, and he rendered an opinion that both were active participants in the Sureño criminal street gang.

Second, on August 10, 2008, Isaac Arriaga entered a market, where he brandished a BB gun and asked the clerk for "all of the money." Arriaga was convicted of robbery. Officer Zuniga testified that he was "familiar with" the facts of the case, and he rendered an opinion

that Arriaga was a Sureño gang member at the time.

Third, on February 25, 2007, Hugo Chavez and Hugo Cervantes fired guns at some Norteño gang members. They were found with a loaded firearm in their vehicle and were convicted of attempted murder and malicious shooting from a vehicle. Officer Zuniga testified that he was "familiar with" the facts of the case, and he rendered an opinion that both Chavez and Cervantes were active Sureño gang members at the time of the offenses.

Fourth, on February 11, 2007, Juan Rivas was in a vehicle with another Sureño gang member; a loaded firearm was found under his seat during a traffic stop conducted by another officer. Rivas was convicted of carrying a loaded firearm in his vehicle. Officer Zuniga testified that he was "familiar with" the facts of the case, and he rendered an opinion that Rivas was a gang member at the time of the offense.

Fifth, on May 15, 2006, Adan Flores got into an argument with some Norteño gang members inside of a 7-Eleven, then shot and killed one of the Norteño gang members. He was convicted of homicide. Officer Zuniga testified that he was "familiar with" the facts of the case, and he rendered an opinion that Flores was an active Sureño gang member at the time of the offense.

Given a hypothetical situation based on the facts of this case, Officer Zuniga opined that the crime was committed for the benefit of and in association with the Sureño gang, and that it promoted, furthered, and assisted the commission of criminal conduct by the Sureño gang.

E. Defense Case

The defense theory was that Nunez, not defendant, shot Perez. This theory was based primarily on testimony from Guadelupe Gastelum, an independent eyewitness.

Gastelum was visiting friends on Terrace Street at the time of the Perez shooting. He was standing in the street, talking to a friend, when he heard and saw a Mitsubishi Galant turn onto the street. He saw a male exit from the car and shoot at Perez. Gastelum estimated that he was about 300 to 320 feet away from the shooter. His location was about three houses down the street. When the shooter moved closer to Perez, Gastelum's vision was blocked by a fence.

According to Gastelum, the shooter wore a black shirt and blue pants. The shooter was bald and was not wearing a hat. The shooter's sweatshirt might have had a hood, but the hood was not on the shooter's head.

Later that evening, Gastelum was brought to an infield show-up, where he viewed Nunez and Gayoso. He identified Nunez as the shooter, recognizing him because he was bald, wore a black shirt, and had the same build and skin color as the shooter. Gastelum identified Gayoso as the driver. The officer accompanying Gastelum to the show-up opined that Gastelum seemed "very sure"

> of his identifications.
>
> ***F. Charges, Trial, and Sentencing***
>
> Defendant was charged with first degree murder (§ 187, subd. (a); count 1), attempted premeditated and deliberate murder (§§ 664/187, subd. (a); count 2) and active participation in a criminal street gang (§ 186.22, subd. (a); count 3). The District Attorney alleged that defendant committed the murder and attempted murder for the benefit of a criminal street gang (§ 186.22, subd. (b)(5)), and that he personally used and intentionally discharged a firearm and proximately caused great bodily injury or death (§ 12022.53, subds. (b), (c), (d)).

People v. Espinoza, No. H038508, 2016 WL 7105924, *1-5 (Cal. Ct. App. Dec. 6, 2016) (brackets added).

B. Procedural History

1. Conviction and Sentencing

As mentioned above, in April 2012, a Monterey County jury convicted Petitioner of all three charged offenses. 2 CT 572-78; *Espinoza*, 2016 WL 7105924, *5. The jury also found true all of the special allegations. *Id.* The trial court sentenced Petitioner to an aggregate prison term of 85 years to life. 3 CT 708-709; *Espinoza*, 2016 WL 7105924, *5.

2. Post-Conviction Appeals and Collateral Attacks

The present case came before the California Court of Appeal on two separate instances. In the first instance, Petitioner originally appealed on three claims, including the confrontation clause and juror misconduct claims as well as a sentencing claim, in which he claimed "that remand for resentencing [was] required because the sentence of 85 years to life constitute[d] cruel and unusual punishment in light of the fact he was a juvenile at the time he committed the offense." *Espinoza*, 2016 WL 7105924, *1. The parties petitioned the California Supreme Court for review after the state appellate court arrived at an opinion (issued on January 31, 2014[2]) that would have reversed judgment on Petitioner's sentencing claim and remanded for resentencing.[3] *Id.* The California

[2] *See People v. Espinoza*, No. H038508, 2014 WL 347025, *12-16 (Cal. Ct. App. Jan. 31, 2014).

[3] While the first appeal was pending, Petitioner filed a petition for a writ of habeas corpus, which the state appellate court ordered to be considered with the appeal. *Espinoza*, 2016 WL 7105924, *14, note 2. In that petition, he raised his IAC claim based on trial counsel's failure to object to the gang expert's opinion testimony. *Id.* The court summarily denied the state habeas

Supreme Court granted review, but deferred briefing to transfer the case back to the California Court of Appeal in view of recent opinions in *People v. Sanchez*, 63 Cal. 4th 665 (2016) and *People v. Franklin*, 63 Cal. 4th 261 (2016) in relation to his sentencing claim. *Id.*

In the interim, on December 8, 2014, Petitioner filed his first federal habeas petition. *See* Case No. C 14-5376 YGR (PR). The Court dismissed his first petition without prejudice on abstention grounds pursuant to *Younger v. Harris*, 401 U.S. 37 (1971). *See* Dkt. 8 in Case No. 14-5376 YGR (PR).

Thereafter, the present case came before the state appellate court for the second time. On December 6, 2016, after obtaining supplemental briefing from the parties, the state appellate court reviewed the present case. *Espinoza*, 2016 WL 7105924, *1. The court subsequently vacated its prior opinion as to the sentencing claim, and affirmed Petitioner's conviction in an unpublished opinion, "finding that *Sanchez* did not require reversal, but that a limited remand was required pursuant to the *Franklin* decision to give Petitioner the 'opportunity to make a record of information relevant to his eventual youth offender parole hearing.'" *Espinoza*, 2016 WL 7105924, *1, *12-14.

The California Supreme Court denied Petitioner's subsequent petition for review on March 1, 2017. Resp't Exs. 14, 15.

3. Federal Court Proceedings

On April 18, 2017, Petitioner filed the instant federal petition, in which he raises the three aforementioned claims. Dkt. 1. On August 1, 2017, the Court issued an Order to Show Cause. Dkt. 7. Respondent has filed an Answer. Dkt. 16. Petitioner has filed a Traverse. Dkt. 20.

II. LEGAL STANDARD

A federal court may entertain a habeas petition from a state prisoner "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Under the Antiterrorism and Effective Death Penalty Act ("AEDPA") of 1996,

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petition by separate order filed on January 31, 2014. *See In re Espinoza*, H040305; *see* Cal. Rules of Court, rule 8.387(b)(2)(B). The California Supreme Court denied Petitioner's petition for review of that order on May 14, 2014. *See In re Espinoza*, S217072.

a district court may not grant a petition challenging a state conviction or sentence on the basis of a claim that was reviewed on the merits in state court unless the state court's adjudication of the claim: "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). The first prong applies both to questions of law and to mixed questions of law and fact, *see Williams (Terry) v. Taylor*, 529 U.S. 362, 407-09 (2000), while the second prong applies to decisions based on factual determinations, s*ee Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003).

A. 28 U.S.C. § 2254(d)(1)

To determine whether a state court ruling was "contrary to" or involved an "unreasonable application" of federal law under subsection (d)(1), the Court must first identify the "clearly established Federal law," if any, that governs the sufficiency of the claims on habeas review. "Clearly established" federal law consists of the holdings of the United States Supreme Court which existed at the time the petitioner's state court conviction became final. *Williams v. Taylor*, 529 U.S. 362, 412 (2000). A state court decision is "contrary to" clearly established Supreme Court precedent if it "applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases," or if it "confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [its] precedent." *Williams*, 529 U.S. at 405-406. "Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id*. at 413. "[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." *Id*. at 411.

Under 28 U.S.C. § 2254(d)(2), a state court decision "based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence

presented in the state-court proceeding." *See Miller-El*, 537 U.S. at 340; *see also Torres v. Prunty*, 223 F.3d 1103, 1107 (9th Cir. 2000). Moreover, "a determination of a factual issue made by a State court shall be presumed to be correct," and the petitioner "shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

On federal habeas review, AEDPA "imposes a highly deferential standard for evaluating state-court rulings" and "demands that state-court decisions be given the benefit of the doubt." *Renico v. Lett*, 559 U.S. 766, 773 (2010) (internal quotation marks omitted). In applying the above standards on habeas review, the Court reviews the "last reasoned decision" by the state court. *See Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018); *Cannedy v. Adams*, 706 F.3d 1148, 1156 (9th Cir.), *amended*, 733 F.3d 794 (9th Cir. 2013).

As explained below, Petitioner did not contemporaneously object to the gang expert's opinion testimony on Sixth Amendment grounds. *Espinoza*, 2016 WL 7105924, *6. However, in its unpublished disposition issued on December 6, 2016, the state appellate court "assume[d] that the confrontation clause argument was not forfeited and address[ed] the merits . . . ." *Id.*; *see also id.*, *6-8. The court also addressed the merits of the juror misconduct claim in the same opinion. *Id.*, *9-12. Therefore, the last reasoned decision as to Petitioner's confrontation clause and juror misconduct claims is the California Court of Appeal's unpublished disposition issued on December 6, 2016. *See Espinoza*, 2016 WL 7105924, *5-12

Meanwhile, no reasoned decision exists on Petitioner's IAC claim, which was summarily denied by the state appellate court on January 31, 2014. *Id.*, *14 at note 2. The California Supreme Court denied the petition for review of that summary denial on May 14, 2014. *Id.* A summary denial is presumed to be a denial on the merits of the petitioner's claims. *Stancle v. Clay*, 692 F.3d 948, 957 & n.3 (9th Cir. 2012). Where the state court reaches a decision on the merits but provides no reasoning to support its conclusion, a federal habeas court independently reviews the record to determine whether habeas corpus relief is available under section 2254(d). *Stanley v. Cullen*, 633 F.3d 852, 860 (9th Cir. 2011).

"Independent review of the record is not de novo review of the constitutional issue, but

rather, the only method by which [a court] can determine whether a silent state court decision is objectively unreasonable." *Himes v. Thompson*, 336 F.3d 848, 853 (9th Cir. 2003). Even where no reasoned decision is available, the habeas petitioner still bears the burden of "showing there was no reasonable basis for the state court to deny relief." *Harrington v. Richter*, 562 U.S. 86, 98 (2011). The federal court is obligated to review the state court record to determine whether there was any "reasonable basis for the state court to deny relief." *Id.* This Court "must determine what arguments or theories . . . could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the Supreme] Court." *Id.* at 102.

B. 28 U.S.C. § 2254(d)(2) and (e)(1)

A federal habeas court may grant a writ if it concludes a state court's adjudication of a claim "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). An unreasonable determination of the facts occurs where a state court fails to consider and weigh highly probative, relevant evidence, central to a petitioner's claim, that was properly presented and made part of the state court record. *Taylor v. Maddox*, 366 F.3d 992, 1005 (9th Cir. 2004), *abrogated on other grounds*, *Murray v. Schriro*, 745 F.3d 984, 1000 (9th Cir. 2014). A district court must presume correct any determination of a factual issue made by a state court unless a petitioner rebuts the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). The presumption of correctness applies to express and implied findings of fact by both trial and appellate courts. *Sumner v. Mata*, 449 U.S. 539, 546-47 (1981); *see Williams v. Rhoades*, 354 F.3d 1101, 1108 (9th Cir. 2004) ("On habeas review, state appellate court findings—including those that interpret unclear or ambiguous trial court ruling—are entitled to the same presumption of correctness that we afford trial court findings.").

Section 2254(d)(2) applies to an intrinsic review of a state court's fact-finding process, or situations in which the petitioner challenges a state court's fact-findings based entirely on the state court record, whereas § 2254(e)(1) applies to challenges based on extrinsic evidence, or evidence presented for the first time in federal court. *See Taylor*, 366 F.3d at 999-1000. In *Taylor*, the

Ninth Circuit established a two-part analysis under §§ 2254(d)(2) and 2254(e)(1). *Id.* First, federal courts must undertake an "intrinsic review" of a state court's fact-finding process under the "unreasonable determination" clause of § 2254(d)(2). *Id.* at 1000. The intrinsic review requires federal courts to examine the state court's fact-finding process, not its findings. *Id.* Once a state court's fact-finding process survives this intrinsic review, the second part of the analysis begins by addressing the state court finding of a presumption of correctness under § 2254(e)(1). *Id.* According to the AEDPA, this presumption means that the state court's fact-finding may be overturned based on new evidence presented by a petitioner for the first time in federal court only if such new evidence amounts to clear and convincing proof a state court finding is in error. *See* 28 U.S.C. § 2254(e)(1). "Significantly, the presumption of correctness and the clear-and-convincing standard of proof only come into play once the state court's fact-findings survive any intrinsic challenge; they do not apply to a challenge that is governed by the deference implicit in the 'unreasonable determination' standard of section 2254(d)(2)." *Taylor*, 366 F.3d at 1000.

If constitutional error is found, habeas relief is warranted only if the error had a "substantial and injurious effect or influence in determining the jury's verdict." *Penry v. Johnson*, 532 U.S. 782, 795-96 (2001) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993)).

III. DISCUSSION

A. Claims Related to Admission of Gang Expert's Testimony

Petitioner alleges his federal constitutional right to confrontation, pursuant to *Crawford v. Washington*, 541 U.S. 36 (2004), was violated by the trial court's admission of testimony of the gang expert, Officer Zuniga. Dkt. 1 at 7-13. Specifically, Petitioner alleges that the admission of Officer Zuniga's opinion testimony violated his Sixth Amendment right to confrontation because it was based on testimonial hearsay. *Id.* at 8-13. Petitioner refers to the following three areas of Officer Zuniga's expert opinion testimony about: (1) establishing a pattern of criminal gang activity by Sureño gang members; (2) the primary activities of Sureño gang members; and (3) Petitioner's statements and membership in the Sureño gang. *Id.* at 9-13. According to Petitioner, Officer Zuniga's testimony about these topics was based on "police investigations and interviews conducted by others who did not testify." *Id.* at 8. Petitioner further contends that the

admission of the testimony was prejudicial as to count 3 (active participation in a criminal street gang) and the gang enhancements found true as to counts 1 and 2. *Id.* at 7.

Related to the aforementioned claim is Petitioner's IAC claim, in which he alleges that his trial counsel was ineffective for failing to object to Officer Zuniga's testimony. *Id.* at 23-27.

1. Confrontation Clause Claim

a. State Court Opinion

As mentioned above, the state appellate court assumed that the confrontation clause argument was not forfeited and addressed the claim on the merits. *Espinoza*, 2016 WL 7105924, *5. The court outlined the applicable federal law, including the relevant United States Supreme Court cases, *Crawford v. Washington*, 541 U.S. 36 (2004) and *Davis v. Washington*, 547 U.S. 813 (2006), (which this Court will elaborate upon below), and applicable state law, as follows:

> At the time this court filed the original opinion in this case, the California Supreme Court had not yet considered whether the confrontation clause prohibits a gang expert from relying on hearsay to establish whether a particular gang meets the definition of a criminal street gang and to provide evidence that a particular crime was committed for the benefit of a gang. However, in *People v. Gardeley* (1996) 14 Cal. 4th 605, 618-619 (*Gardeley*), the court had reasoned that, "[c]onsistent with [the] well-settled principles" concerning expert witness testimony, a detective "could testify as an expert witness and could reveal the information on which he had relied in forming his expert opinion, including hearsay." (*Id.* at p. 619.) *Gardeley* reasoned that gang experts can rely on inadmissible hearsay because such evidence is not offered as "'independent proof' of any fact." (*Ibid.*) In the original opinion in this case, this court found it was required to follow *Gardeley*'s holding that the "basis evidence" was not offered as "'independent proof' of any fact." (*Ibid.*) This court also found that most, if not all, of the "basis evidence" was "nontestimonial" under any of the definitions in the recent confrontation clause cases. (See *Crawford*, *supra*, 541 U.S. at p. 59 [declining to give a comprehensive definition of "testimonial" but stating that at a minimum, it includes prior testimony and police interrogations]; *Davis*, *supra*, 547 U.S. at p. 822 [statements are testimonial when "the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution"]; *Dungo*, *supra*, 55 Cal. 4th at p. 619 [in addition to the "primary purpose" requirement, to be testimonial, a statement "must be made with some degree of formality or solemnity"].)
>
> In *Sanchez*, the California Supreme Court held that "case-specific statements" related by a gang expert constituted inadmissible hearsay and that some of the statements constituted "testimonial" hearsay under the Sixth Amendment. (*Sanchez*, *supra*, 63 Cal. 4th at pp. 670-671.) The California Supreme Court disapproved its prior opinion in

> *Gardeley*, supra, 14 Cal. 4th 605, "to the extent it suggested an expert may properly testify regarding case-specific out-of-court statements without satisfying hearsay rules." (*Sanchez*, *supra*, at p. 686, fn. 13.)

Id. at *6-7. The state appellate court then rejected the claim on the merits as follows:

> In the supplemental briefing submitted after *Sanchez*, defendant contends Officer Zuniga related both "ordinary and testimonial hearsay" regarding defendant's gang membership, defendant's intent to benefit the gang, and the offenses introduced to show a "pattern of criminal gang activity" (§ 186.22, subds. (a), (e).).
>
> In addressing defendant's claims, we first note that Officer Zuniga was never asked to specify the basis of his knowledge for any specific facts. We are hesitant to presume, as defendant does, that Officer Zuniga's testimony related case-specific hearsay or testimonial hearsay. In the absence of a timely and specific objection to a particular statement on hearsay or confrontation grounds, which places the burden on the government to establish the admissibility of the statement (see *Idaho v. Wright* (1990) 497 U.S. 805, 816), reviewing courts should not presume that the witness is relating hearsay or that an out-of-court statement given to a law enforcement officer under unclear circumstances, possibly without testimonial purpose, is testimonial. (See *Denham v. Superior Court* (1970) 2 Cal. 3d 557, 564 [error must be affirmatively shown].)
>
> We further note that according to Officer Zuniga, much of the information he based his opinions on came from his work as a gang intelligence officer. His testimony was largely based on contacts with gang members, confidential reliable informants, and other gang experts. Nothing in the record suggests, let alone establishes, that this information was "gathered during an official investigation of a completed crime" (*Sanchez*, *supra*, 63 Cal. 4th at p. 694), that the information was given in a way that bore any degree of solemnity or formality (see *Williams*, supra, 567 U.S. at p. ___ [132 S. Ct. at p. 2260] (conc. opn. of Thomas, J.); *Dungo*, *supra*, 55 Cal. 4th at p. 619) or that the information was provided through any kind of formal interrogation. (See *Davis*, *supra*, 547 U.S. at p. 822.) Additionally, nothing in the record indicates that the primary purpose of Officer Zuniga's information-gathering was to target defendant or any other individuals, to investigate a particular crime, or to establish past facts for a later specific criminal prosecution. (*See ibid*.)
>
> We turn to the specifics of Officer Zuniga's testimony, beginning with the testimony used to establish a pattern of criminal gang activity by Sureño gang members. In the original opinion, this court noted that to the extent Officer Zuniga relied on the court records showing other Sureño gang members' criminal convictions, those court records did not constitute testimonial evidence as described in Crawford. (*See Crawford*, *supra*, 541 U.S. 36, at pp. 51-52, 68.) They were admissible as official records (see Evid. Code, § 1280) and hence reliance on them did not give rise to a confrontation clause violation. (*See id*. at p. 56; *People v. Taulton* (2005) 129 Cal. App. 4th 1218, 1225 [records that are "prepared to document acts and events relating to convictions and imprisonments" are beyond the scope of *Crawford*].) Defendant does not argue otherwise in the

supplemental briefing filed after *Sanchez*.

In his original briefing, defendant's primary argument was that in testifying about the crimes establishing the requisite "pattern of criminal gang activity" (§ 186.22, subds. (a), (e), (f)), Officer Zuniga improperly relied on statements in police reports, which were presumably taken during police investigations for the primary purpose of establishing or proving "past events potentially relevant to later criminal prosecution." (*Davis*, *supra*, 547 U.S. at p. 822.) Defendant reiterates this argument in the supplemental briefing filed after *Sanchez*. However, details about the crimes that were committed by other Sureño gang members were unnecessary to prove the gang crime or the gang enhancement. For purposes of section 186.22, the predicate offenses required to establish a "'pattern of criminal gang activity'" need not be "'gang related.'" (*Gardeley*, *supra*, 14 Cal. 4th at p. 621.) Rather, the "'pattern'" is established by evidence that members of the gang "individually or collectively have actually engaged in 'two or more' acts of specified criminal conduct committed either on separate occasions or by two or more persons." (*Id*. at p. 623.) The criminal conduct was proved by the court records from the cases of the individuals convicted of homicide, robbery, attempted murder and malicious shooting, and carrying a loaded firearm in a vehicle. The record does not show that Officer Zuniga related any hearsay or testimonial hearsay to the jury when rendering his opinions that the individuals involved in those crimes were Sureño gang members. Officer Zuniga was not asked about the specific facts on which he based those opinions, and he was entitled to rely on hearsay in rendering an opinion that a particular individual belonged to a gang. (See *Sanchez*, *supra*, 63 Cal. 4th at p. 677.) Although Officer Zuniga noted that he had reviewed crime reports and field interview cards in preparation for testifying about the various people involved in this case, he also specified that as a gang intelligence officer, he had daily informal contact with gang members, through which he learned about their gang affiilations [sic]. Moreover, the jury was entitled to consider the coparticipants' convictions stemming from the present offenses (i.e., the convictions of Montoya, Nunez, and Gayoso) when determining whether members of the Sureño gang had committed two or more predicate offenses. (See *People v. Loeun* (1997) 17 Cal. 4th 1, 5 ["the requisite 'pattern' can also be established by evidence of the offense with which the defendant is charged and proof of another offense committed on the same occasion by a fellow gang member"].) Thus, any error in admitting Officer Zuniga's testimony about the details of the predicate offenses was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*).)

We next address Officer Zuniga's testimony that the primary activities of the Sureño gang are "a variety of crimes," including homicides, shootings, carjackings, robberies, and burglaries. This testimony was clearly based on Officer Zuniga's gang training and experience, and did not relate any "case-specific hearsay content" to the jury. (*Sanchez*, *supra*, 63 Cal. 4th at p. 670.) Again, defendant does not argue otherwise in the supplemental briefing filed after *Sanchez*.

Finally, we address whether Officer Zuniga's testimony about

> defendant's prior police contacts and statements regarding his membership in the Sureño gang improperly related testimonial hearsay. In the supplemental briefing filed after *Sanchez*, defendant contends that "[m]ost of the evidence that [he] belonged to a gang" was based on testimonial hearsay. Defendant specifically identifies evidence of defendant's prior police contacts as the testimony that was improperly admitted. At trial, prior to testifying about those incidents, Officer Zuniga stated he had "reviewed" defendant's prior police contacts, indicating that his testimony "relate[d] hearsay information gathered during an official investigation of a completed crime." (*Sanchez*, *supra*, 63 Cal. 4th at p. 694.) This challenged testimony was introduced to show that defendant was actively participating in a criminal street gang (§ 186.22, subd. (a)) and that he committed the murder and attempted murder "for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members" (*id*., subd. (b)(1)).
>
> Assuming that under *Sanchez*, it was improper to admit Officer Zuniga's testimony about defendant's prior police contacts and statements regarding his membership in the Sureño gang, the error was harmless beyond a reasonable doubt. (*Chapman*, *supra*, 386 U.S. at p. 24.) Officer Zuniga's challenged testimony was insignificant in comparison to the testimony of defendant's coparticipants, which established that defendant was an associate of the Vagos, a Sureño gang; that defendant had a tattoo of the number 22, meaning he had done a shooting; that defendant had a tattoo referring to a street in Vagos territory; that defendant had been involved in a gang discussion about how to respond to the shooting of a Sureño gang member; that defendant said he wanted to go find someone to shoot at; and that defendant committed the shootings along with his fellow Sureño gang members. (See *Yates v. Evatt* (1991) 500 U.S. 391, 403 [under *Chapman*, "an error did not contribute to the verdict" if that error was "unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record"], disapproved on another point in *Estelle v. McGuire* (1991) 502 U.S. 62, 72, fn. 4.) Poncho, the surviving victim, also provided evidence of defendant's association with Sureño gang members. In light of the evidence presented through defendant's coparticipants and Poncho, no reasonable jury would have failed to convict defendant of the substantive gang offense or found the gang allegations untrue if Officer Zuniga's challenged testimony had been excluded. The testimony of the coparticipants and Poncho constituted significant additional evidence that distinguishes this case from *Sanchez*, in which the admission of testimonial hearsay was prejudicial error because "[t]he main evidence of [the] defendant's intent to benefit [his gang] was [the expert's] recitation of testimonial hearsay." (*Sanchez*, supra, 63 Cal. 4th at p. 699.)

Espinoza, 2016 WL 7105924, *7-8 (footnote omitted).

b. Applicable Federal Law

The Confrontation Clause of the Sixth Amendment provides that in criminal cases the accused has the right to "be confronted with the witnesses against him." U.S. Const. amend. VI.

The federal confrontation right applies to the states through the Fourteenth Amendment. *Pointer v. Texas*, 380 U.S. 400, 403 (1965).

The Confrontation Clause applies to all out-of-court testimonial statements offered for the truth of the matter asserted, i.e., "testimonial hearsay." *See Crawford v. Washington*, 541 U.S. 36, 51 (2004). "Testimony . . . is typically a solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Id*. (internal quotation and citation omitted); *see id.* ("An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not."). The Confrontation Clause applies not only to in-court testimony but also to out-of-court statements introduced at trial, regardless of the admissibility of the statements under state laws of evidence. *Id.* at 50-51.

Out-of-court statements by witnesses that are testimonial hearsay are barred under the Confrontation Clause unless (1) the witnesses are unavailable, and (2) the defendants had a prior opportunity to cross-examine the witnesses. *Id.* at 59. The reliability of such statements, for Confrontation Clause purposes, depends solely upon these two factors. *Id.* at 68. Thus, the Court's prior holding in *Ohio v. Roberts*, 448 U.S. 56 (1980), that such statements may be admitted so long as the witness is unavailable and the statements have adequate "indicia of reliability," i.e., fall within a "firmly rooted hearsay exception" or bear "particularized guarantees of trustworthiness," is overruled by *Crawford*. *See id.* Hearsay that is not testimonial, "while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause." *Davis v. Washington*, 547 U.S. 813, 821 (2006).

The ultimate goal of the Confrontation Clause is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. *Crawford*, 541 U.S. at 61. An expert may render an opinion and explain the facts on which that opinion is based without violating the Confrontation Clause. *Williams v. Illinois*, 567 U.S. 50, 58 (2012) ("When an expert testifies for the prosecution in a criminal case, the defendant has the opportunity to cross-examine the expert about any statements that are offered for their truth. Out-of-court statements that are related by the expert solely for the purpose of explaining the assumptions on which that opinion rests are not offered for their truth and thus fall outside the scope of the Confrontation Clause."); *Hill v. Virga*,

588 Fed. App'x 723, 724 (9th Cir. 2014) (Supreme Court has not clearly established that admission of hearsay statements relied on by expert violates Confrontation Clause). Moreover, when expert testimony relies on out-of-court statements by others that *Crawford* would bar if offered directly, "'[t]he question is whether the expert is, in essence, giving an independent judgment or merely acting as a transmitter for testimonial hearsay. As long as he is applying his training and experience to the sources before him and reaching an independent judgment, there will typically be no *Crawford* problem.'" *United States v. Gomez*, 725 F.3d 1121, 1129-30 (9th Cir. 2013) (quoting *United States v. Johnson*, 587 F.3d 625, 635 (4th Cir. 2009)).

Claims relating to the Confrontation Clause are subject to harmless error analysis. *United States v. Nielsen*, 371 F.3d 574, 581 (9th Cir. 2004) (post-*Crawford* case); *see also United States v. Allen*, 425 F.3d 1231, 1235 (9th Cir. 2005). For purposes of federal habeas corpus review, the standard applicable to violations of the Confrontation Clause is whether the inadmissible evidence had an actual and prejudicial effect upon the jury. *See Hernandez v. Small*, 282 F.3d 1132, 1144 (9th Cir. 2002) (citing *Brecht*).

c. Analysis

As further explained below, the Court finds that Petitioner has failed to show that the state appellate court's rejection of Petitioner's confrontation clause claim was an unreasonable application of Supreme Court authority.

As mentioned above, Petitioner claims that Officer Zuniga relied upon "testimonial hearsay" to establish: (1) the gang's pattern of criminal activity/predicate offenses; (2) the gang's primary activities; and (3) Petitioner's gang membership. Dkt. 1 at 10-11. Specifically, Petitioner's contends that Officer Zuniga's testimony (relating to the aforementioned three areas) was inadmissible because he based it on police records and "field interviews with suspected gang members," some of which he did not personally conduct. *Id.* at 10-13. The state appellate court noted Officer Zuniga did not specify the basis of his expert testimony. *Espinoza*, 2016 WL 7105924, *7. However, the state appellate court also noted that Officer Zuniga stated that his opinions relied upon his work experience and informal connections. *Id.* at *7. *See also, e.g.*, 12 RT 1410-1411. Moreover, the state appellate court did not presume Officer Zuniga's testimony

related case-specific facts or testimonial hearsay, reasoning that "reviewing courts should not presume the witness is relating hearsay." *Id.* at *8 (citing *Denham v. Superior Court*, 2 Cal. 3d 557, 564 (1970)). However, even if Officer Zuniga *did* rely on hearsay testimony, no clearly established Supreme Court authority exists to show that the admission of hearsay statements relied on by an expert violates the Confrontation Clause. *See Williams*, 567 U.S. at 57-58; *Hill*, 588 Fed. App'x at 724. Moreover, as stated above, the Supreme Court held in *Williams* that an expert may render an opinion and explain the facts on which that opinion is based without violating the Confrontation Clause. *Williams*, 567 U.S. at 58. The state appellate court was also reasonable in determining that even if Office Zuniga's testimony was inadmissible, the error was harmless as to each of the three areas outlined above, as follows. *See Espinoza*, 2016 WL 7105924, *8.

i. Gang's Pattern of Criminal Activity

First, the state appellate court determined that the official court records were sufficient to establish a "pattern of gang activity" because a "pattern" is shown when members of a gang independently or collectively commit at least two specific crimes either on separate occasions or with two or more persons. *Id.* (citing *People v. Gardeley*, 14 Cal. 4th 605, 623 (1996)). Moreover, the state appellate court correctly determined that the court records "were admissible as official records . . . and hence reliance on them did not give rise to a confrontation clause violation." *Id.* at *7 (citing *Crawford*, 541 U.S. at 51-52, 68). Petitioner does not contest that these court records were testimonial in nature. *See* Dkt. 20-1 at 3-5. Rather, as mentioned, Petitioner contends that Officer Zuniga impermissibly relied on "testimonial hearsay" in the form of police records. *Id.* The state appellate court reasonably determined that Officer Zuniga did not relate testimonial hearsay, because he was allowed to consider hearsay in providing an opinion as an expert witness. *Espinoza*, 2016 WL 7105924, *8. The record shows that Officer Zuniga appropriately related to the police record because he testified on cases that predated Petitioner's case and did not involve Petitioner nor the coparticipants to the present matter. 11 RT 1305-1311. Moreover, the state appellate court reasonably found that even if Officer Zuniga's reliance on the police record was in error, the error was harmless given that the jury could consider the coparticipants' convictions, Officer Zuniga's experience with gangs, and the record to arrive at the

same conclusion. *Espinoza*, 2016 WL 7105924, *8.

ii. Gang's Primary Activities

Second, the state appellate court reasonably determined that Officer Zuniga's testimony on the Sureño's "primary activities" was admissible because it was "clearly based on [his] gang training and experience." *See id.* Petitioner solely contends that Officer Zuniga's statement could only be based on the police record. Dkt. 20-1 at 5. However, as the state appellate court also reasonably determined, Officer Zuniga's "gang training and experience" have established a general knowledge and expertise of the Sureño and Norteño gangs, which cannot be barred on hearsay grounds. *Espinoza*, 2016 WL 7105924, *8 (citing *Sanchez*, 63 Cal. 4th at 670); *see also id.* at 675 ("[E]xperts may relate information acquired through their training and experience, even though that information may have been derived from conversations with others, lectures, study of learned treatises, etc."). Petitioner does not contend nor provide evidence contesting Officer Zuniga's expertise. *See* Dkt. 20-1 at 4-5. The state appellate court determined that even if Officer Zuniga's testimony was improperly admitted, Petitioner's claim would still fail on the merits because Officer Zuniga's testimony on the gang's primary activities based on police records did not have an actual, prejudicial effect upon the jury. *See Hernandez*, 282 F.3d at 1144 (citing *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993)). As the state appellate court reasonably concluded, the testimonies of Sureño gang members were sufficient such that inclusion of Officer Zuniga's testimony would not have impacted the jury's verdict. *Espinoza*, 2016 WL 7105924, *8. Moreover, the state appellate court determined that the present case could be distinguished from *Sanchez*. *Id.* As the state appellate court noted, Officer Zuniga's testimony supplemented the coparticipants' testimonies in the present matter, whereas in *Sanchez*, the expert witness's testimonial hearsay was the primary evidence of the defendant's gang involvement. *Id.* (citing *Sanchez*, 63 Cal. 4th at 699). Co-participant Julio Montoya testified that as a member of the gang, he has assisted Sureño members in shootings, resulting in attempts to commit homicide or assault with a deadly weapon, thereby establishing a "pattern of criminal gang activity." 9 RT 917-918; *see* Cal. Penal Code Ann. § 186.22 ("'pattern of criminal gang activity' means the commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for,

or conviction of two or more of the following offenses"). Coparticipant Juan Nunez testified that crimes such as retaliatory shootings and homicides were expected of Sureño gang members, establishing "primary activities" of the Sureño gang. 11 RT 1070-1072, 1080. Finally, coparticipant Montoya testified that Petitioner had stated he was "involved" and "doing a lot of things" for the Sureño gang, that Petitioner was a member of Vagos, a Sureño gang. 9 RT 892; 11 RT 1054.

iii. Petitioner's Gang Membership

Third, Petitioner claims that Officer Zuniga's testimony about Petitioner's police contacts and statements about his membership in the Sureño gang improperly related testimonial hearsay. Dkt. 1 at 12-13. The state appellate court noted that this challenged testimony was introduced to show that Petitioner was actively participating in a criminal street gang and that he committed the murder and attempted murder "for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members." *Espinoza*, 2016 WL 7105924, *8. The state appellate court assumed that even if it was improper to admit such testimony about Petitioner's prior police contacts and statements regarding his membership in the Sureño gang, the error was harmless beyond a reasonable doubt. *Id.* (citing *Chapman*, 386 U.S. at 24). The court determined that the challenged testimony

> was insignificant in comparison to the testimony of [Petitioner]'s coparticipants, which established that [Petitioner] was an associate of the Vagos, a Sureño gang; that [Petitioner] had a tattoo of the number 22, meaning he had done a shooting; that [Petitioner] had a tattoo referring to a street in Vagos territory; that [Petitioner] had been involved in a gang discussion about how to respond to the shooting of a Sureño gang member; that [Petitioner] said he wanted to go find someone to shoot at; and that [Petitioner] committed the shootings along with his fellow Sureño gang members.

Id.; *see, e.g.*, 9 RT 892; 9 RT 897-897; 9 RT 930; 11 RT 1081-1082. Moreover, Poncho, the surviving victim, also provided evidence of Petitioner's association with Sureño gang members. *Espinoza*, 2016 WL 7105924, *8. The state appellate court was reasonable to conclude that, in light of the evidence presented through Petitioner's coparticipants and Poncho, no reasonable jury would have failed to convict Petitioner of the substantive gang offense or found the gang

allegations untrue if Officer Zuniga's challenged testimony had been excluded. *See id.*

iv. Summary

Based on the above, the Court finds that the state appellate court's rejection of Petitioner's confrontation clause claim stemming from the improper admission of "testimonial hearsay" was based on a reasonable application of clearly-established federal law under section 2254(d)(1). Accordingly, this claim is DENIED.

2. IAC Claim

Because Petitioner's confrontation clause claim relating to the aforementioned inadmissible testimonial hearsay fails, the state court's summary denial of any related IAC claim based on trial counsel's failure to object to such testimony was therefore neither contrary to nor an unreasonable application of federal law. Furthermore, Petitioner has made no showing that the state appellate court's summary denial of his IAC claim was either contrary to or an unreasonable application of *Strickland v. Washington*, 466 U.S. 668 (1984). *See id.* at 687 (under *Strickland*, a defendant must show that (1) performance was deficient and that (2) the "deficient performance prejudiced the defense."). Accordingly, Petitioner's IAC claim is DENIED.

B. Juror Misconduct

Petitioner alleges that the state court erred in finding no prejudice from juror misconduct, thereby violating his federal constitutional rights. Dkt. 1 at 14-22.

1. State Court Opinion

The state appellate court described the factual background on this claim and rejected it as follows:

> During the initial jury deliberations, a juror visited the scene of the Perez shooting and told the other jurors that it would have been difficult to make an identification from Gastelum's location. The trial court held a hearing and determined that the juror had committed misconduct, but that there was no prejudice. The trial court replaced the juror with an alternate and instructed the jury to begin deliberations anew and disregard anything that the juror had said. The trial court denied defendant's motion for a mistrial and his later motion for a new trial.
>
> Defendant contends that the trial court erred by finding that the jury misconduct was not prejudicial.

1. Proceedings Below

The jury began deliberating on the afternoon of Friday, April 13, 2012. The jurors retired to deliberate at 3:06 p.m. and were excused at 4:45 p.m.

On Monday, April 16, 2012, the jury resumed deliberations at 9:00 a.m. At 9:15 a.m., the jury sent the trial court a note stating, "[Juror No. 55] went to the location of [the] shooting on Thurs. evening before the beginning of deliberations. No one was swayed by his statement."

The trial court indicated it believed that Juror No. 55 had committed misconduct and proposed that Juror No. 55 be removed. Defendant agreed there had been juror misconduct and requested a mistrial. The prosecutor advocated for a hearing to determine whether the misconduct was prejudicial.

The trial court called in Juror No. 55, who admitted he had gone to the scene of the shooting, out of "curiosity." He told the other jurors that he "went over there," and he said "that it was difficult to see what was happening when you're too far from there, from the street." Juror No. 55 had gone to the scene the prior Thursday, and he told the other jurors about his visit the next day. None of the other jurors said anything in response to his comment: "They just listened."

The trial court then called in the jury foreperson. The trial court asked if the other jurors had discussed Juror No. 55's comment. The foreperson indicated that some of the jurors had expressed "shock that he had done it" because of the trial court's admonition not to go to the scene. The foreperson continued, "But nobody—basically the point he brought up everybody had already decided on that point. Do I say what that point is or—" The trial court responded, "I don't think you need to."

The trial court asked, "Did the comment made by Juror Number 55 result in a conversation that would—that [was] a part of your deliberations?" The foreperson responded, "No. Not really, no." The foreperson said that the jury had only discussed whether or not to report the incident to the court.

The trial court asked the foreperson to describe Juror No. 55's comment. The foreperson stated, "That he went to the location. Took a look from the point of view of Mr. G and said he didn't think that Mr. G could see that far to be able to identify a face." Juror No. 55 continued, "But everybody else had already made that decision, that we agreed that we did not believe that—" The trial court interrupted, saying, "I don't want to invade the province of the jury at this point."

Defendant reiterated his request for a mistrial. The trial court denied the request and decided, instead, to dismiss Juror No. 55, admonish the remaining jurors, and bring in an alternate juror. The trial court explained the basis for its ruling: "The jurors did deliberate for over an hour on Friday . . . . And it appears to the Court that Juror Number 55 on Friday revealed that he had been to the scene of the event. And he quickly was told by the rest of the jurors that that was not an okay

thing to do . . . . It does not appear that there were any discussions other than that was not an okay thing to do that were held between the other jurors regarding the comments that Juror [No.] 55 made."

After dismissing Juror No. 55, the trial court admonished the remaining jurors as follows: "It is the Court's understanding that the—there may have been a comment by a juror on information that he received from outside of the trial. So as trial jurors, the important thing for you to do is only deliberate and only consider the evidence that was received at trial. Anything that is received outside of the courtroom or seen or viewed or told to you outside of the courtroom is not to be considered at trial. And I will tell you specifically if you heard any comments made by Juror [No.] 55 regarding anything that he said or any information that he received either by viewing himself or heard from someone else outside of the trial is not to be considered by you." The trial court told the jurors that anything they heard from Juror No. 55 should be treated as "evidence that's stricken during the trial" and "should not be considered by you for any purpose."

The trial court suspended deliberations until the alternate juror could be brought in. When the alternate joined the jury, the trial court instructed the jurors that "the jury deliberation process begins anew." The jury reached its verdicts later that day.

Defendant subsequently brought a motion for a new trial based on the jury misconduct. The trial court denied the motion on June 21, 2012, finding that there was no prejudice.

2. Analysis

Due process requires a jury be "'capable and willing to decide the case solely on the evidence before it . . . .' [Citations.]" (*People v. Nesler* (1997) 16 Cal. 4th 561, 578 (*Nesler*), italics omitted.) Thus, "[j]uror misconduct, such as the receipt of information about a party or the case that was not part of the evidence received at trial, leads to a presumption that the defendant was prejudiced thereby and may establish juror bias." (*Ibid.;* see also *In re Hitchings* (1993) 6 Cal. 4th 97, 119 (*Hitchings*).)

"When juror misconduct involves the receipt of information about a party or the case from extraneous sources, the verdict will be set aside only if there appears a substantial likelihood of juror bias. [Citation.] Such bias may appear in either of two ways: (1) if the extraneous material, judged objectively, is so prejudicial in and of itself that it is inherently and substantially likely to have influenced a juror; or (2) even if the information is not 'inherently' prejudicial, if, from the nature of the misconduct and the surrounding circumstances, the court determines that it is substantially likely a juror was 'actually biased' against the defendant." (*Nesler, supra,* 16 Cal. 4th at pp. 578-579.)

The presumption of prejudice arising from juror misconduct "'may be rebutted by proof that no prejudice actually resulted.' [Citations.]" (*Hitchings, supra,* 6 Cal. 4th at p. 118.) More specifically, the presumption of prejudice "'may be rebutted by an affirmative evidentiary showing that prejudice does not exist or by a reviewing court's examination of the entire record to determine whether there is

a reasonable probability of actual harm to the complaining party [resulting from the misconduct] . . . .' [Citations.]" (*Id.* at p. 119.) On appeal, whether prejudice arose from juror misconduct "is a mixed question of law and fact subject to an appellate court's independent determination. [Citations]." (*Nesler, supra,* 16 Cal. 4th at p. 582.)

In this case, defendant contends the jury misconduct was "so prejudicial in and of itself that it is inherently and substantially likely to have influenced a juror." (*Nesler, supra,* 16 Cal. 4th at pp. 578-579.) The test for inherent bias "is analogous to the general standard for harmless error analysis under California law. Under this standard, a finding of 'inherently' likely bias is required when, but only when, the extraneous information was so prejudicial in context that its erroneous introduction in the trial itself would have warranted reversal of the judgment. Application of this 'inherent prejudice' test obviously depends upon a review of the trial record to determine the prejudicial effect of the extraneous information." (*In re Carpenter* (1995) 9 Cal. 4th 634, 653(*Carpenter*).)

We disagree that the information conveyed by Juror No. 55 was "so prejudicial in and of itself that it is inherently and substantially likely to have influenced a juror." (*Nesler, supra,* 16 Cal. 4th at pp. 578-579.) Although the accuracy of Gastelum's identification was an important issue at trial, Juror No. 55's misconduct did not "completely undermine[ ]" the defense case, as defendant claims. The evidence had already established that Gastelum had viewed the scene from a distance of at least 300 feet and that his view was obscured when defendant shot at Perez from close range. The evidence had also established that someone could have confused defendant and Nunez from such a distance, due to their similarities in size, build, and hairstyle. Additionally, pictures of the scene and Gastelum's location were introduced into evidence, so the jurors were able to assess the distance for themselves. (See *People v. Sutter* (1982) 134 Cal. App. 3d 806, 821[juror's description of her visit to the scene could not "possibly have added anything to what the jurors already knew" because of pictures introduced into evidence].) Thus, although Juror No. 55 committed misconduct, he did not introduce any evidence into the jurors' deliberations that was "so prejudicial in context that its erroneous introduction in the trial itself would have warranted reversal of the judgment." (*Carpenter, supra,* 9 Cal. 4th at p. 653.)

Next, we consider whether it is "substantially likely a juror was 'actually biased' against the defendant." (*Nesler, supra,* 16 Cal. 4th at pp. 578-579; see also *Carpenter, supra,* 9 Cal. 4th at p. 654.) Under this test, "'[t]he presumption of prejudice may be rebutted, inter alia, by a reviewing court's determination, *upon examining the entire record,* that there is no substantial likelihood that the complaining party suffered actual harm.' [Citation.]" (*Carpenter, supra,* 9 Cal. 4th at p. 654.) "In an extraneous-information case, the 'entire record' logically bearing on a circumstantial finding of likely bias includes the nature of the juror's conduct, the circumstances under which the information was obtained, the instructions the jury received, the nature of the evidence and issues at trial, and the strength of the evidence against the defendant." (*Ibid.*)

Courts have often found that the presumption of prejudice arising

> from juror misconduct was rebutted because the trial court was apprised of the misconduct during deliberations and was able to implement "curative measures such as the replacement of the tainted juror with an alternate or a limiting instruction or admonition." (*People v. Holloway* (1990) 50 Cal. 3d 1098, 1111, disapproved on other grounds by *People v. Stansbury* (1995) 9 Cal. 4th 824, 830, fn. 1; see also *People v. Dorsey* (1995) 34 Cal. App. 4th 694, 704 [presumption of prejudice rebutted where trial court replaced the offending juror and instructed the jury to begin deliberations anew].) For instance, in *People v. Knights* (1985) 166 Cal. App. 3d 46 (*Knights*), during deliberations, a juror learned that the defendant had previously killed a four-year-old child, and she told the rest of the jury what she had heard. The presumption of prejudice was rebutted, however, because "the misconduct occurred early in the deliberations" and was quickly brought to the court's attention by the foreperson. (*Id.* at p. 51.) "The potentially biased juror was excused and replaced with an alternate juror," and the remaining jurors "were instructed to begin deliberations again as if no deliberations had ever occurred." (*Ibid.*)
>
> On this record, we find that the presumption of prejudice arising from Juror No. 55's misconduct was rebutted. Considering the nature of the jury misconduct and the fact that the extraneous material was not inconsistent with other evidence at trial, there was "'no substantial likelihood'" that defendant "'suffered actual harm'" from the jury misconduct. (*Carpenter, supra,* 9 Cal. 4th at p. 654.) Further, in this case, similar to *Knights*, "the misconduct occurred early in the deliberations" and was quickly brought to the court's attention by the foreperson. (*Knights, supra,* 166 Cal. App. 3d at p. 51.) "The potentially biased juror was excused and replaced with an alternate juror." (*Ibid.*) The remaining jurors were instructed not to consider anything Juror No. 55 said, and they "were instructed to begin deliberations again as if no deliberations had ever occurred." (*Ibid.*) Under the circumstances, it is not "substantially likely a juror was 'actually biased' against the defendant." (*Nesler, supra,* 16 Cal. 4th at p. 579.)

Espinoza, 2016 WL 7105924, *9-12 (footnotes omitted).

2. Applicable Federal Law

The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to a trial by a fair and impartial jury. *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). The right to a jury trial is extended to state criminal trials through the Due Process Clause of the Fourteenth Amendment. *Duncan v. Louisiana*, 391 U.S. 145, 148–149 (1968) (holding that "the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which—were they to be tried in a federal court—would come within the Sixth Amendment's guarantee.").

The Constitution "does not require a new trial every time a juror has been placed in a potentially compromising situation." *Smith v. Phillips*, 455 U.S. 209, 217 (1982). Due process

requires a jury capable and willing to deliberate solely based upon the evidence presented, and a trial judge watchful to prevent prejudicial occurrences and to assess their effects if they happen. *Id.* A decision on whether an allegedly compromising situation requires further investigation is a matter of court and trial management usually left to the sound discretion of the trial court under state law. *People v. Williams*, 58 Cal. 4th 197, 290 (2013).

3. Analysis

As noted above, where the state court's factual findings are at issue in a habeas proceeding, the district court must first conduct an "intrinsic review" of its fact-finding process. *See Taylor*, 366 F.3d at 999-1000. "[A] decision adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding." *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003); *see also Cavazos v. Smith*, 565 U.S. 1, 2 (2011) (per curiam) (it is not the province of the district court on federal habeas review to reassess issues of credibility or to reweigh the evidence).

Here, the trial court conducted a hearing on Juror Number 55's alleged misconduct, which included the presentation of testimony by Juror Number 55 and the jury foreperson. 15 RT 1845-1856. The trial court found that the misconduct was not prejudicial. 15 RT 1858-1859. The state appellate court affirmed the trial court's ruling in a reasoned decision. *Espinoza*, 2016 WL 71905924, *11. In evaluating Petitioner's juror misconduct claim, the state appellate court determined that Juror Number 55's information was not so prejudicial that erroneous introduction would warrant reversal of judgment. *Id.* Here, the trial court acted immediately and informed the parties of the reports of juror misconduct, stating:

> "[The jurors] did gather at 9 o'clock, and the Court received a comment at 9:15 indicating that one of the jurors went to the location of shooting on Thursday evening before the beginning of deliberations. And no one was swayed by his statement. The Court has inquired and has found out that it's . . . juror number 55. I've provided information to both counsel just currently on the record about which juror it was but previously provided to counsel access to the written statement of the jurors . . . [I]t does appear to the Court [what has happened] to be misconduct and that [juror number 55] would be removed."

15 RT 1840-1841. The trial court added that it intended to bring Juror Number 55 in to determine what information he had provided to the jurors and to question the other jurors as well. 15 RT 1841. Petitioner's counsel requested a mistrial, which the trial court denied pending Juror Number 55 and the foreperson's responses and its intention to seat an alternate juror. 15 RT 1841. After questioning the foreperson, the trial court found that the other jurors had not discussed or considered the comments made by Juror Number 55. 15 RT 1854-1855. Based on this assurance, the trial court dismissed Juror Number 55, admonished the jury to disregard the extrinsic evidence, and brought in an alternate juror. 15 RT 1860-1862. The trial court's factual finding that the jury had not discussed the comments raised by Juror Number 55 is presumed to be correct unless rebutted by Petitioner. 28 U.S.C. § 2254(e)(1). As stated, the remaining jurors were admonished not to consider Juror Number 55's comments and to start jury deliberations anew. 15 RT 1861-1862.

Thus, the record demonstrates that Petitioner had a full, fair and complete opportunity to present evidence in support of his claim to the state courts. Therefore, the Court finds that the state court's fact-finding process that the jury had not discussed the comments raised by Juror Number 55 survives intrinsic review. *See Hibbler v. Benedetti*, 693 F.3d 1140, 1146 (9th Cir. 2012) (noting that "a federal court may not second-guess a state court's fact-finding process unless, after review of the state-court record, it determines that the state court was not merely wrong, but actually unreasonable") (quoting *Taylor*, 366 F.3d at 999).

"Once the state court's fact-finding process survives this intrinsic review . . . the state court's findings are dressed in a presumption of correctness. . . ." *Taylor*, 366 F.3d at 1000. "AEDPA spells out what this presumption means: State-court fact-finding may be overturned based on new evidence presented for the first time in federal court only if such new evidence amounts to clear and convincing proof that the state-court finding is in error." *Id.* (citing 28 U.S.C. § 2254(e)(1)). In the instant matter, the state appellate court ruled that the denial prejudice in Juror Number 55's misconduct was based on the trial court's reasonable factual finding and legal conclusion that the Juror Number 55's misconduct occurred after the jury had already decided on that issue, and the misconduct would not have created the likelihood of a different

result on retrial. On federal habeas review, that finding is entitled to deference under section 2254(d)(2). Petitioner fails to present clear and convincing evidence sufficient to overcome the presumption of correctness of the state court's factual findings.

However, the salient question under section 2254(d)(2) is whether the state appellate court, applying the normal standards of appellate review, could reasonably conclude that the trial court's findings are supported by the record. *See Lambert v. Blodgett*, 393 F.3d 943, 978 (9th Cir. 2004).

Here, as explained above, Petitioner claims the trial court erred in determining that Juror Number 55's misconduct did not cause prejudice, and that the state appellate court erred in affirming the trial court's findings. Dkt. 1 at 14. The trial court determined Juror Number 55's visitation of the shooting location and his comments on the location's visibility was not prejudicial. 15 RT 1859. The state appellate court then reasonably determined that there was no substantial likelihood that Petitioner suffered actual harm from the jury misconduct because the "extraneous material" was not inconsistent with other evidence at trial. *Espinoza*, 2016 WL 71905924, *11-12. The Ninth Circuit has set forth five factors for considering if extrinsic evidence is prejudicial:

> (1) whether the extrinsic material was actually received, and if so, how; (2) the length of time it was available to the jury; (3) the extent to which the jury discussed and considered it; (4) whether the extrinsic material was introduced before a verdict was reached, and if so, at what point in the deliberations it was introduced; and (5) any other matters which may bear on the issue of . . . whether the introduction of extrinsic material affected the verdict.

Mancuso v. Olivarez, 292 F.3d 939, 951-52 (9th Cir. 2002) (quoting *Bayramoglu v. Estelle*, 806 F.2d 880, 887 (9th Cir. 1986)), *overruled on other grounds by Slack v. McDaniel*, 529 U.S. 473 (2000). In *Mancuso*, the Ninth Circuit explained that there is no "bright line test" to determine prejudice from juror exposure to extraneous information, and a court "place[s] great weight on the nature of the extraneous information that has been introduced into deliberations." *See Mancuso*, 292 F.3d at 950. But a court should not consider the number of jurors affected by extrinsic evidence because even a single juror's improperly influenced vote deprives the defendant of an unprejudiced, unanimous verdict. *Lawson v. Borg*, 60 F.3d 608, 613 (9th Cir. 1995).

Beginning with the first three *Mancuso* factors, the record shows that only Juror Number

55 went to the site of the shooting, but his comment that, "to [him] it was very difficult to see something from where [he] was standing" was made to the other members of the jury. 15 RT 1850. The comment was made on Friday, April 13, 2012, and the foreperson reported the misconduct on Monday, April 16, 2012, adding that "[n]o one was swayed by [Juror Number 55's] statement." 15 RT 1840. The foreperson reported that Juror Number 55's introduction of extrinsic material did not impact or change the jury's mindset because the jury "had already decided on that point." 15 RT 1853. Moreover, the comment in the present case did not introduce new evidence because photos of the scene and the witness's location were already given to the jury as evidence during trial. 12 RT 1509-1523.

As to the fourth *Mancuso* factor, the extrinsic material was introduced before the verdict was reached, at the beginning of deliberation. 15 RT 1853. However, the trial court noted that the foreperson stated that by that point "everybody had already decided on that point." *Id.*; s*ee Bayramoglu*, 806 F.2d at 888 (observing that, though not determinative, a juror's assurance that he could disregard the extraneous information was "certainly significant"). Finally, as to the fifth *Mancuso* factor, considering the witness statements and details of the scene submitted to the jury in addition to the foreperson's assurances, Juror Number 55's comment could not have been an influential factor in the jury's decision to find Petitioner guilty.

In sum, the record shows that, although Juror Number 55 inappropriately introduced extrinsic material during deliberations, the trial court found that such extrinsic material did not have a prejudicial effect on the verdict. The state court's decision was not "objectively unreasonable in light" of the evidence presented, and Petitioner has failed to rebut this presumption of the state court's correctness by "clear and convincing evidence." 28 U.S.C. § 2254(e)(1). Furthermore, as the state appellate court concluded, the jury could have arrived at the same conclusion given the evidence presented at trial. *Espinoza*, 2016 WL 7105924, *11. Thus, under these circumstances, the state appellate court reasonably found that the trial court's determination was supported by the record. *See id.*

Accordingly, the state courts' decisions denying Petitioner's challenge to the alleged juror misconduct were not contrary to, or an unreasonable application of, clearly established Supreme

Court precedent, nor were they based on an unreasonable determination of the facts in light of the evidence presented. *See* 28 U.S.C. § 2254(d)(1), (2). Therefore, Petitioner is not entitled to relief on his juror misconduct claim, and it is DENIED.

IV. REQUEST FOR EVIDENTIARY HEARING

Petitioner has requested an evidentiary hearing on his claims. Dkt. 1 at 27. The Court concludes that no additional factual supplementation is necessary, and that an evidentiary hearing is unwarranted with respect to the claims raised in the instant petition.

For the reasons described above, the facts alleged in support of these claims, even if established at an evidentiary hearing, would not entitle Petitioner to federal habeas relief. Further, Petitioner has not identified any concrete and material factual conflict that would require the Court to hold an evidentiary hearing in order to resolve. *See Cullen v. Pinholster*, 563 U.S. 170 (2011). Therefore, Petitioner's request for an evidentiary hearing is DENIED.

V. CERTIFICATE OF APPEALABILITY

No certificate of appealability is warranted in this case. For the reasons set out above, jurists of reason would not find this Court's denial of Petitioner's claims debatable or wrong. *See Slack*, 529 U.S. at 484. Petitioner may not appeal the denial of a certificate of appealability in this Court but may seek a certificate from the Ninth Circuit under Rule 22 of the Federal Rules of Appellate Procedure. *See* Rule 11(a) of the Rules Governing Section 2254 Cases.

VI. CONCLUSION

For the reasons outlined above, the Court orders as follows:

1. The petition is DENIED, and a certificate of appealability will not issue. Petitioner's request for an evidentiary hearing is DENIED. Petitioner may seek a certificate of appealability from the Ninth Circuit Court of Appeals.

2. The Clerk of the Court shall terminate any pending motions and close the file.

IT IS SO ORDERED.

Dated: July 24, 2018

YVONNE GONZALEZ ROGERS
United States District Judge

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

CARLOS A. ESPINOZA,

Petitioner,

v.

W. L. MONTGOMERY, Wardne

Respondent.

Case No.17-cv-02159-YGR

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on 7/24/2018, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Carlos A. Espinoza ID: AL9944
C-5 #250
Calipatria State Prison
P.O. Box 5002
Calipatria, CA 92233

Dated: 7/24/2018

Susan Y. Soong
Clerk, United States District Court

By: Frances Stone
Frances Stone, Deputy Clerk to the
Honorable YVONNE GONZALEZ ROGERS

91-A

Appendix E

California Supreme Court
Order denying review
(Mar. 1, 2017)

Court of Appeal, Sixth Appellate District - No. H038508

S239400

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

CARLOS ESPINOZA, Defendant and Appellant.

The petition for review is denied.

CANTIL-SAKAUYE
Chief Justice

B

Appendix F

California Court of Appeal
Opinion on direct appeal
(Dec. 6, 2016)

Filed 12/6/16 P. v. Espinoza CA6
Opinion on remand from Supreme Court

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. CARLOS ESPINOZA, Defendant and Appellant.	H038508 (Monterey County Super. Ct. No. SS091887)

This case is before this court for a second time, after the California Supreme Court granted review, deferred briefing, and then transferred it back to this court for reconsideration in light of the recent opinions in *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*) and *People v. Franklin* (2016) 63 Cal.4th 261 (*Franklin*).

Defendant Carlos Espinoza appeals after a jury convicted him of first degree murder (Pen. Code, § 187, subd. (a)[1]), attempted premeditated and deliberate murder (§§ 664/187, subd. (a)) and active participation in a criminal street gang (§ 186.22, subd. (a)). The jury found that defendant committed the murder and attempted murder for the benefit of a criminal street gang (§ 186.22, subd. (b)(5)), and that in committing the murder and attempted murder, he personally used and intentionally discharged a firearm and proximately caused great bodily injury or death (§ 12022.53, subds. (b), (c),

[1] All further statutory references are to the Penal Code unless otherwise indicated.

(d)). The trial court sentenced defendant, who was 17 years old at the time he committed the offenses, to an aggregate prison term of 85 years to life.

On appeal, defendant originally contended: (1) the gang crime and gang enhancements must be reversed because the gang expert's opinion was based in part on testimonial hearsay, in violation of defendant's Sixth Amendment right to confrontation; (2) the judgment must be reversed due to jury misconduct because one juror visited the scene and told the other jurors what he observed; and (3) remand for resentencing is required because the sentence of 85 years to life constitutes cruel and unusual punishment in light of the fact he was a juvenile at the time he committed the offense. Two justices on the original panel agreed with defendant's third claim, and the original opinion in this case would have reversed the judgment and remanded for resentencing.[2] Both parties petitioned for review in the California Supreme Court, which granted review but deferred briefing pending its consideration of related issues in other cases. Pursuant to the California Supreme Court's order transferring the case back to this court for reconsideration in light of *Sanchez* and *Franklin*, and after receiving supplemental briefing from the parties, we now vacate the prior opinion. We find that *Sanchez* does not require reversal of defendant's convictions but that—as the parties agree—a limited remand is required pursuant to *Franklin*.

[2] While the original appeal was pending, defendant's appellate counsel filed a petition for writ of habeas corpus, which this court ordered considered with the appeal. In his writ petition, defendant argued that he was deprived of the effective assistance of counsel because his attorney failed to object to the gang expert's opinion testimony. We disposed of the habeas petition by separate order filed on the same day the original opinion was filed. (*In re Espinoza*, summarily denied, January 31, 2014, H040305; see Cal. Rules of Court, rule 8.387(b)(2)(B).) The California Supreme Court denied defendant's petition for review of that order on May 14, 2014. (*In re Espinoza*, S217072.)

BACKGROUND

A. The Shooting

On August 6, 2009, Jose Perez was outside of his house on Terrace Street in Salinas. Perez was wearing a white t-shirt, shorts, and sneakers. He was talking to his friend Poncho, who was loaning Perez a bicycle. Perez was planning to ride the bicycle to football practice. According to his brother, Perez was not involved with gangs. Rather, he was "100 percent involved in sports," particularly football.

While Perez and Poncho stood outside, two cars turned onto Terrace Street: a gray primered Mitsubishi Galant, and a grayish-green primered Lexus. The cars stopped in front of the house. Defendant got out of the Galant, cocked a gun, and began shooting. Poncho started running. He looked back and saw Perez on the ground. He ran to a fence, then looked back again. Defendant shot at him, then shot Perez while standing over him.

Perez was later transported to the hospital, where he was declared deceased. Perez had multiple gunshot wounds, including some that had been fired at close range.

B. Prior Incidents Between Poncho and Defendant

Poncho knew defendant as "Flaco." He knew defendant from school. At school, defendant often engaged in "mugging" (staring at) him, and defendant would sometimes bump into him. Defendant had chased Poncho on two prior occasions. First, about three months before the shooting, defendant was in a car that tried to run Poncho over. Then, about one and a half months before the shooting, defendant chased Poncho while driving.

Poncho knew that defendant hung out with Sureños and that defendant considered Poncho to be associated with Norteños. Poncho denied he was in fact a gang member but admitted he had a close family member who was in a Norteño gang. Poncho also admitted he had a tattoo of the word "Salas" on his back and that he previously had the roman numerals XIV on his hand.

C. Coparticipant Testimony

Julio Montoya Luna (Montoya), Juan Nunez, and Antonio Gayoso were coparticipants in the shooting of Perez. Montoya and Gayoso were members of the Mexican Pride Locos, a Sureño gang. Nunez and defendant were associated with the Vagos, a another Sureño gang.

Montoya and Nunez both entered into agreements with the prosecution, pursuant to which each pleaded guilty to being an accomplice and a gang member in exchange for testifying against defendant.[3]

Montoya and Nunez both testified about defendant's tattoos, which included the number 22 and the phrase " 'One Way.' " To get a tattoo of the number 22, which represents "V," the 22nd letter of the alphabet, a Vagos gang member must do a shooting. " 'One Way' " refers to a street in the Vagos territory.

Montoya and Nunez also testified about the Perez shooting. Earlier that day, a Sureño gang member named "Shaggy" had been shot. Afterwards, Nunez, defendant and other Sureño gang members had a discussion about how to respond. Nunez said he "could be the one" to do a retaliatory shooting; he wanted to "look good." Six of the Sureño gang members went looking for Norteños. They "didn't find anyone," although Nunez and two other Sureño gang members shot at a house where Norteños lived.

Nunez and defendant eventually went to the location of Shaggy's shooting. Gayoso approached Nunez, angry about the shooting. Defendant indicated that he had a gun and asked Gayoso "what did he want to do." Defendant borrowed a sweatshirt and gloves, then asked Nunez to "go with him to go riding," meaning to go find "someone to shoot at." Nunez called Montoya over and said, " 'The homies are going to go do some

[3] Gayoso did not testify at defendant's trial. In 2010, he was sentenced to a prison term of 25 years to life after he pleaded guilty to first degree murder (§187, subd. (a)) and admitted that the crime was committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)).

riding. Do you want to go?' " Montoya understood this meant that they were going to look for rival Norteños.

Montoya drove one car with Nunez as his passenger. They followed Gayoso, who was driving another car with defendant as his passenger. At Terrace Street, defendant got out and fired his gun at Perez and Poncho. According to Montoya, defendant shot Perez three or four times, then kicked him, then fired the gun three or four more times. Nunez heard about six shots. He saw defendant shoot at Perez when Perez was on the ground.

Both cars drove away from the scene. Defendant and Nunez subsequently switched cars: Nunez got into Gayoso's car, and defendant got into Montoya's car. Defendant left the sweatshirt he had been wearing in Gayoso's car.

When Montoya and defendant were later arrested and transported to jail, defendant told him, " 'Don't worry. They have nothing against us.' " Defendant later instructed Montoya to " 'just say that it was someone else. That it wasn't me.' " Defendant told Montoya to invent a nickname and say the person had gone to Mexico.

At the time of the Perez shooting, both defendant and Nunez had no hair. They were about the same size and build.

D. Gang Expert

Salinas Police Officer Robert Zuniga testified as the prosecution's gang expert. He had attended the police academy in 2005 and had been working in the gang unit since March of 2008. At the time of trial, Officer Zuniga was working in the gang unit's street enforcement group, and he had previously worked as a gang intelligence officer. As a gang intelligence officer, he contacted gang members on a daily basis, often in informal settings. He had also obtained information about gangs from confidential reliable informants and other gang experts. In preparation for testifying about the various people involved in this case, he had reviewed documentation such as crime reports and field interview cards.

According to Officer Zuniga, Perez had no documented gang contacts. Officer Zuniga believed that Poncho and his brother were both active Norteño gang members, and that Gayoso, Montoya, Nunez, and defendant were all active Sureño gang members at the time of the Perez shooting.

Officer Zuniga explained why he believed defendant was an active Sureño gang member. First, he referred to defendant's tattoos, which included the number 22 and the phrases " 'One Way,' " " 'Most Wanted,' " and " 'Salinas Finest.' " Second, when defendant was arrested, he was in the company of other Sureño gang members, including two Sureño gang members who were hiding in a restroom, where a loaded firearm was found. Third, defendant had made a statement at juvenile hall to the effect that he was "not ready to leave the gang lifestyle." He had previously stated that he had been associating with Sureño gang members since the age of 13. Fourth, defendant had been involved in a number of prior incidents (including a prior incident in which shots were fired at an elementary school), during which he was associating with Sureño gang members or engaging in gang-related activities.[4] Fifth, defendant had been housed with Sureño gang members in jail.

Officer Zuniga testified that the primary activities of the Sureño gang are "a variety of crimes," including homicides, shootings, carjackings, robberies, and burglaries.

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[4] Officer Zuniga described the following incidents. On March 27, 2009, defendant left his transitional housing with another Sureño gang member. On July 28, 2008, defendant started an altercation in juvenile hall. On January 26, 2008, defendant was driving a vehicle that was pursued by police and which contained a firearm and ammunition. On January 18, 2008, defendant and another Sureño gang member were at an elementary school, in a vehicle that had been shot at. On September 11, 2007, defendant was involved in a fight with a Norteño gang member in the bathroom of a high school. On April 16, 2006, defendant was standing next to a vehicle that had stolen license plates, along with another Sureño gang member. On March 14, 2005, defendant and three other Sureño gang members were contacted regarding some gang-related graffiti. On January 14, 2005, defendant was contacted while associating with other Sureño gang members.

The prosecution established that Sureño gang members had engaged in a "pattern of criminal gang activity" (see § 186.22, subds. (a), (e), (f)) by introducing court documents showing criminal convictions for enumerated offenses and eliciting Officer Zuniga's testimony about each crime. The documents and testimony established the following.

First, on January 12, 2009, Valentine Rivas and Benjamin Carrillo challenged some Norteño gang members, then "opened fire," killing one of the Norteño gang members. Rivas and Carrillo were both convicted of homicide. Officer Zuniga testified that he was "familiar with" both defendants and with the incident, and he rendered an opinion that both were active participants in the Sureño criminal street gang.

Second, on August 10, 2008, Isaac Arriaga entered a market, where he brandished a BB gun and asked the clerk for "all of the money." Arriaga was convicted of robbery. Officer Zuniga testified that he was "familiar with" the facts of the case, and he rendered an opinion that Arriaga was a Sureño gang member at the time.

Third, on February 25, 2007, Hugo Chavez and Hugo Cervantes fired guns at some Norteño gang members. They were found with a loaded firearm in their vehicle and were convicted of attempted murder and malicious shooting from a vehicle. Officer Zuniga testified that he was "familiar with" the facts of the case, and he rendered an opinion that both Chavez and Cervantes were active Sureño gang members at the time of the offenses.

Fourth, on February 11, 2007, Juan Rivas was in a vehicle with another Sureño gang member; a loaded firearm was found under his seat during a traffic stop conducted by another officer. Rivas was convicted of carrying a loaded firearm in his vehicle. Officer Zuniga testified that he was "familiar with" the facts of the case, and he rendered an opinion that Rivas was a gang member at the time of the offense.

Fifth, on May 15, 2006, Adan Flores got into an argument with some Norteño gang members inside of a 7-Eleven, then shot and killed one of the Norteño gang

members. He was convicted of homicide. Officer Zuniga testified that he was "familiar with" the facts of the case, and he rendered an opinion that Flores was an active Sureño gang member at the time of the offense.

Given a hypothetical situation based on the facts of this case, Officer Zuniga opined that the crime was committed for the benefit of and in association with the Sureño gang, and that it promoted, furthered, and assisted the commission of criminal conduct by the Sureño gang.

E. Defense Case

The defense theory was that Nunez, not defendant, shot Perez. This theory was based primarily on testimony from Guadelupe Gastelum, an independent eyewitness.

Gastelum was visiting friends on Terrace Street at the time of the Perez shooting. He was standing in the street, talking to a friend, when he heard and saw a Mitsubishi Galant turn onto the street. He saw a male exit from the car and shoot at Perez. Gastelum estimated that he was about 300 to 320 feet away from the shooter. His location was about three houses down the street. When the shooter moved closer to Perez, Gastelum's vision was blocked by a fence.

According to Gastelum, the shooter wore a black shirt and blue pants. The shooter was bald and was not wearing a hat. The shooter's sweatshirt might have had a hood, but the hood was not on the shooter's head.[5]

Later that evening, Gastelum was brought to an infield show-up, where he viewed Nunez and Gayoso. He identified Nunez as the shooter, recognizing him because he was bald, wore a black shirt, and had the same build and skin color as the shooter. Gastelum identified Gayoso as the driver. The officer accompanying Gastelum to the show-up opined that Gastelum seemed "very sure" of his identifications.

[5] Gastelum's description of the shooter was somewhat inconsistent with Poncho's description. According to Poncho, defendant wore dark pants, a baseball cap, and a hooded sweatshirt.

F. Charges, Trial, and Sentencing

Defendant was charged with first degree murder (§ 187, subd. (a); count 1), attempted premeditated and deliberate murder (§§ 664/187, subd. (a); count 2) and active participation in a criminal street gang (§ 186.22, subd. (a); count 3). The District Attorney alleged that defendant committed the murder and attempted murder for the benefit of a criminal street gang (§ 186.22, subd. (b)(5)), and that he personally used and intentionally discharged a firearm and proximately caused great bodily injury or death (§ 12022.53, subds. (b), (c), (d)). The jury convicted defendant of all three charged offenses and found true all of the special allegations.

For count 1 (murder), the trial court imposed a term of 25 years to life, with a consecutive term of 25 years to life for personally and intentionally discharging a firearm and proximately causing death or great bodily injury (§ 12022.53, subd. (d)). For count 2 (attempted murder), the trial court imposed a consecutive term of 15 years to life, with a consecutive 20-year term for personally and intentionally discharging a firearm (§ 12022.53, subd. (c)), but it stayed a 10-year term for personally using a firearm (§ 12022.53, subd. (b)). The trial court stayed count 3 (active participation in a criminal street gang) pursuant to section 654. Defendant's aggregate sentence was 85 years to life.

DISCUSSION

A. Gang Expert Testimony

In his original briefing on appeal, defendant contended that certain opinion testimony by Officer Zuniga was based on testimonial hearsay and that its admission violated his Sixth Amendment right to confront witnesses. (See *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*).) Defendant contended that the admission of the testimony was prejudicial as to count 3 (active participation in a criminal street gang) and the gang enhancements found true as to counts 1 and 2.

Specifically, defendant referred to three areas of Officer Zuniga's expert opinion testimony: (1) the testimony establishing a pattern of criminal gang activity by Sureño gang members; (2) the testimony about the primary activities of Sureño gang members; and (3) the testimony about defendant's statements and membership in the Sureño gang. According to defendant, Officer Zuniga's testimony about these topics was based on "police investigations and interviews conducted by others who did not testify." Defendant contended that this testimony was offered for its truth, was testimonial, and should have been excluded. However, defendant did not present such arguments below.

1. Forfeiture

In general, a defendant forfeits a confrontation claim by failing to object below. (See *People v. Redd* (2010) 48 Cal.4th 691, 730.) Defendant acknowledges that he "did not object to [Officer] Zuninga's [sic] testimony on Sixth Amendment or state hearsay grounds," but he contends the issue was not forfeited because an objection would have been futile in light of the case law at the time of trial. (See *People v. Sandoval* (2007) 41 Cal.4th 825, 837, fn. 4 [objection not required "if it would have been futile" in light of binding authority at the time].) Defendant notes that at the time of trial, California courts had uniformly rejected confrontation clause challenges to "basis evidence" from a gang expert. (E.g., *People v. Hill* (2011) 191 Cal.App.4th 1104, 1131; *People v. Sisneros* (2009) 174 Cal.App.4th 142, 153; *People v. Ramirez* (2007) 153 Cal.App.4th 1422, 1427; *People v. Thomas* (2005) 130 Cal.App.4th 1202, 1209.)

The Attorney General contends that an objection would not necessarily have been overruled. Officer Zuniga testified on April 10 and 11, 2012. The Attorney General points out that two weeks earlier, the California Supreme Court had granted review in a case presenting this issue. (See *People v. Archuleta* (2011) 202 Cal.App.4th 493, review granted March 28, 2012, S199979, review dismissed May 22, 2013.) The Attorney General further points out that similar confrontation clause issues were pending in the California Supreme Court and United States Supreme Court. (See, e.g., *People v. Dungo*

(2012) 55 Cal.4th 608 (*Dungo*) [statements in autopsy report describing condition of murder victim's body]; *Williams v. Illinois* (2012) 567 U.S. __ [132 S.Ct. 2221, 183 L.Ed.2d 89] (*Williams*) [expert's reliance on DNA laboratory report].)

Defendant contends that if an objection was required to preserve this issue for appeal, trial counsel was ineffective for failing to object below.

We will assume that the confrontation clause argument was not forfeited and address the merits, as we would likely need to do if we considered the issue under the prism of defendant's ineffective assistance claim. (See *People v. Osband* (1996) 13 Cal.4th 622, 693.)

2. Confrontation Clause and "Basis Evidence"

"The Sixth Amendment to the United States Constitution guarantees the accused in criminal prosecutions the right 'to be confronted with the witnesses against him.' In *Crawford v. Washington* (2004) 541 U.S. 36 [(*Crawford*)] . . . , the high court held that this provision prohibits the admission of out-of-court *testimonial* statements offered for their truth, unless the declarant testified at trial or was unavailable at trial and the defendant had had a prior opportunity for cross-examination. [Citations.]" (*People v. Livingston* (2012) 53 Cal.4th 1145, 1158 (*Livingston*).)

"In *Davis v. Washington*[(2006)] 547 U.S. 813 [(*Davis*)], the court explained the difference between testimonial and nontestimonial statements made to the police. 'Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.' [Citations.]" (*Livingston*, *supra*, 53 Cal.4th at pp. 1158-1159.)

At the time this court filed the original opinion in this case, the California Supreme Court had not yet considered whether the confrontation clause prohibits a gang expert from relying on hearsay to establish whether a particular gang meets the definition of a criminal street gang and to provide evidence that a particular crime was committed for the benefit of a gang. However, in *People v. Gardeley* (1996) 14 Cal.4th 605, 618-619 (*Gardeley*), the court had reasoned that, "[c]onsistent with [the] well-settled principles" concerning expert witness testimony, a detective "could testify as an expert witness and could reveal the information on which he had relied in forming his expert opinion, including hearsay." (*Id.* at p. 619.) *Gardeley* reasoned that gang experts can rely on inadmissible hearsay because such evidence is not offered as " 'independent proof' of any fact." (*Ibid*.) In the original opinion in this case, this court found it was required to follow *Gardeley*'s holding that the "basis evidence" was not offered as " 'independent proof' of any fact." (*Ibid*.) This court also found that most, if not all, of the "basis evidence" was "nontestimonial" under any of the definitions in the recent confrontation clause cases. (See *Crawford, supra,* 541 U.S. at p. 59 [declining to give a comprehensive definition of "testimonial" but stating that at a minimum, it includes prior testimony and police interrogations]; *Davis, supra,* 547 U.S. at p. 822 [statements are testimonial when "the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution"]; *Dungo, supra,* 55 Cal.4th at p. 619 [in addition to the "primary purpose" requirement, to be testimonial, a statement "must be made with some degree of formality or solemnity"].)

In *Sanchez,* the California Supreme Court held that "case-specific statements" related by a gang expert constituted inadmissible hearsay and that some of the statements constituted "testimonial" hearsay under the Sixth Amendment. (*Sanchez, supra,* 63 Cal.4th at pp. 670-671.) The California Supreme Court disapproved its prior opinion in *Gardeley, supra,* 14 Cal.4th 605, "to the extent it suggested an expert may properly

testify regarding case-specific out-of-court statements without satisfying hearsay rules." (*Sanchez, supra,* at p. 686, fn. 13.)

3. Analysis

In the supplemental briefing submitted after *Sanchez*, defendant contends Officer Zuniga related both "ordinary and testimonial hearsay" regarding defendant's gang membership, defendant's intent to benefit the gang, and the offenses introduced to show a "pattern of criminal gang activity" (§ 186.22, subds. (a), (e).).

In addressing defendant's claims, we first note that Officer Zuniga was never asked to specify the basis of his knowledge for any specific facts. We are hesitant to presume, as defendant does, that Officer Zuniga's testimony related case-specific hearsay or testimonial hearsay. In the absence of a timely and specific objection to a particular statement on hearsay or confrontation grounds, which places the burden on the government to establish the admissibility of the statement (see *Idaho v. Wright* (1990) 497 U.S. 805, 816), reviewing courts should not presume that the witness is relating hearsay or that an out-of-court statement given to a law enforcement officer under unclear circumstances, possibly without testimonial purpose, is testimonial. (See *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564 [error must be affirmatively shown].)

We further note that according to Officer Zuniga, much of the information he based his opinions on came from his work as a gang intelligence officer. His testimony was largely based on contacts with gang members, confidential reliable informants, and other gang experts. Nothing in the record suggests, let alone establishes, that this information was "gathered during an official investigation of a completed crime" (*Sanchez, supra,* 63 Cal.4th at p. 694), that the information was given in a way that bore any degree of solemnity or formality (see *Williams, supra,* 567 U.S. at p. ___ [132 S.Ct. at p. 2260] (conc. opn. of Thomas, J.); *Dungo, supra,* 55 Cal.4th at p. 619) or that the information was provided through any kind of formal interrogation. (See *Davis, supra,*

547 U.S. at p. 822.) Additionally, nothing in the record indicates that the primary purpose of Officer Zuniga's information-gathering was to target defendant or any other individuals, to investigate a particular crime, or to establish past facts for a later specific criminal prosecution. (See *ibid*.)

We turn to the specifics of Officer Zuniga's testimony, beginning with the testimony used to establish a pattern of criminal gang activity by Sureño gang members. In the original opinion, this court noted that to the extent Officer Zuniga relied on the court records showing other Sureño gang members' criminal convictions, those court records did not constitute testimonial evidence as described in *Crawford*. (See *Crawford, supra,* 541 U.S. 36, at pp. 51-52, 68.) They were admissible as official records (see Evid. Code, § 1280) and hence reliance on them did not give rise to a confrontation clause violation. (See *id.* at p. 56; *People v. Taulton* (2005) 129 Cal.App.4th 1218, 1225 [records that are "prepared to document acts and events relating to convictions and imprisonments" are beyond the scope of *Crawford*].) Defendant does not argue otherwise in the supplemental briefing filed after *Sanchez*.

In his original briefing, defendant's primary argument was that in testifying about the crimes establishing the requisite "pattern of criminal gang activity" (§ 186.22, subds. (a), (e), (f)), Officer Zuniga improperly relied on statements in police reports, which were presumably taken during police investigations for the primary purpose of establishing or proving "past events potentially relevant to later criminal prosecution." (*Davis, supra,* 547 U.S. at p. 822.) Defendant reiterates this argument in the supplemental briefing filed after *Sanchez.* However, details about the crimes that were committed by other Sureño gang members were unnecessary to prove the gang crime or the gang enhancement. For purposes of section 186.22, the predicate offenses required to establish a " 'pattern of criminal gang activity' " need not be " 'gang related.' " (*Gardeley, supra,* 14 Cal.4th at p. 621.) Rather, the " 'pattern' " is established by evidence that members of the gang "individually or collectively have actually engaged

in 'two or more' acts of specified criminal conduct committed either on separate occasions or by two or more persons." (*Id.* at p. 623.) The criminal conduct was proved by the court records from the cases of the individuals convicted of homicide, robbery, attempted murder and malicious shooting, and carrying a loaded firearm in a vehicle. The record does not show that Officer Zuniga related any hearsay or testimonial hearsay to the jury when rendering his opinions that the individuals involved in those crimes were Sureño gang members. Officer Zuniga was not asked about the specific facts on which he based those opinions, and he was entitled to rely on hearsay in rendering an opinion that a particular individual belonged to a gang. (See *Sanchez, supra,* 63 Cal.4th at p. 677.[6]) Although Officer Zuniga noted that he had reviewed crime reports and field interview cards in preparation for testifying about the various people involved in this case, he also specified that as a gang intelligence officer, he had daily informal contact with gang members, through which he learned about their gang affiilations. Moreover, the jury was entitled to consider the coparticipants' convictions stemming from the present offenses (i.e., the convictions of Montoya, Nunez, and Gayoso) when determining whether members of the Sureño gang had committed two or more predicate offenses. (See *People v. Loeun* (1997) 17 Cal.4th 1, 5 ["the requisite 'pattern' can also be established by evidence of the offense with which the defendant is charged and proof of another offense committed on the same occasion by a fellow gang member"].) Thus, any error in admitting Officer Zuniga's testimony about the details of the predicate offenses

[6] In *Sanchez*, the court gave the following example: "That an associate of the defendant had a diamond tattooed on his arm would be a case-specific fact that could be established by a witness who saw the tattoo, or by an authenticated photograph. That the diamond is a symbol adopted by a given street gang would be background information about which a gang expert could testify. The expert could also be allowed to give an opinion that the presence of a diamond tattoo shows the person belongs to the gang." (*Sanchez, supra,* 63 Cal.4th at p. 677.)

was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*).)

We next address Officer Zuniga's testimony that the primary activities of the Sureño gang are "a variety of crimes," including homicides, shootings, carjackings, robberies, and burglaries. This testimony was clearly based on Officer Zuniga's gang training and experience, and did not relate any "case-specific hearsay content" to the jury. (*Sanchez, supra,* 63 Cal.4th at p. 670.) Again, defendant does not argue otherwise in the supplemental briefing filed after *Sanchez*.

Finally, we address whether Officer Zuniga's testimony about defendant's prior police contacts and statements regarding his membership in the Sureño gang improperly related testimonial hearsay. In the supplemental briefing filed after *Sanchez,* defendant contends that "[m]ost of the evidence that [he] belonged to a gang" was based on testimonial hearsay. Defendant specifically identifies evidence of defendant's prior police contacts as the testimony that was improperly admitted. At trial, prior to testifying about those incidents, Officer Zuniga stated he had "reviewed" defendant's prior police contacts, indicating that his testimony "relate[d] hearsay information gathered during an official investigation of a completed crime." (*Sanchez, supra,* 63 Cal.4th at p. 694.) This challenged testimony was introduced to show that defendant was actively participating in a criminal street gang (§ 186.22, subd. (a)) and that he committed the murder and attempted murder "for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members" (*id.*, subd. (b)(1)).

Assuming that under *Sanchez*, it was improper to admit Officer Zuniga's testimony about defendant's prior police contacts and statements regarding his membership in the Sureño gang, the error was harmless beyond a reasonable doubt. (*Chapman, supra,* 386 U.S. at p. 24.) Officer Zuniga's challenged testimony was insignificant in comparison to the testimony of defendant's coparticipants, which

established that defendant was an associate of the Vagos, a Sureño gang; that defendant had a tattoo of the number 22, meaning he had done a shooting; that defendant had a tattoo referring to a street in Vagos territory; that defendant had been involved in a gang discussion about how to respond to the shooting of a Sureño gang member; that defendant said he wanted to go find someone to shoot at; and that defendant committed the shootings along with his fellow Sureño gang members. (See *Yates v. Evatt* (1991) 500 U.S. 391, 403 [under *Chapman*, "an error did not contribute to the verdict" if that error was "unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record"], disapproved on another point in *Estelle v. McGuire* (1991) 502 U.S. 62, 72, fn. 4.) Poncho, the surviving victim, also provided evidence of defendant's association with Sureño gang members. In light of the evidence presented through defendant's coparticipants and Poncho, no reasonable jury would have failed to convict defendant of the substantive gang offense or found the gang allegations untrue if Officer Zuniga's challenged testimony had been excluded. The testimony of the coparticipants and Poncho constituted significant additional evidence that distinguishes this case from *Sanchez,* in which the admission of testimonial hearsay was prejudicial error because "[t]he main evidence of [the] defendant's intent to benefit [his gang] was [the expert's] recitation of testimonial hearsay." (*Sanchez, supra*, 63 Cal.4th at p. 699.)

B. Jury Misconduct

During the initial jury deliberations, a juror visited the scene of the Perez shooting and told the other jurors that it would have been difficult to make an identification from Gastelum's location. The trial court held a hearing and determined that the juror had committed misconduct, but that there was no prejudice. The trial court replaced the juror with an alternate and instructed the jury to begin deliberations anew and disregard anything that the juror had said. The trial court denied defendant's motion for a mistrial and his later motion for a new trial.

Defendant contends that the trial court erred by finding that the jury misconduct was not prejudicial.

1. Proceedings Below

The jury began deliberating on the afternoon of Friday, April 13, 2012. The jurors retired to deliberate at 3:06 p.m. and were excused at 4:45 p.m.

On Monday, April 16, 2012, the jury resumed deliberations at 9:00 a.m. At 9:15 a.m., the jury sent the trial court a note stating, "[Juror No. 55] went to the location of [the] shooting on Thurs. evening before the beginning of deliberations. No one was swayed by his statement."

The trial court indicated it believed that Juror No. 55 had committed misconduct and proposed that Juror No. 55 be removed. Defendant agreed there had been juror misconduct and requested a mistrial. The prosecutor advocated for a hearing to determine whether the misconduct was prejudicial.

The trial court called in Juror No. 55, who admitted he had gone to the scene of the shooting, out of "curiosity." He told the other jurors that he "went over there," and he said "that it was difficult to see what was happening when you're too far from there, from the street." Juror No. 55 had gone to the scene the prior Thursday, and he told the other jurors about his visit the next day. None of the other jurors said anything in response to his comment: "They just listened."

The trial court then called in the jury foreperson. The trial court asked if the other jurors had discussed Juror No. 55's comment. The foreperson indicated that some of the jurors had expressed "shock that he had done it" because of the trial court's admonition not to go to the scene.[7] The foreperson continued, "But nobody -- basically the point he

[7] At both the beginning and end of trial, the trial court had instructed the jury not to "visit the scene of any event involved in this case." (See CALCRIM Nos. 101, 201.)

brought up everybody had already decided on that point. Do I say what that point is or --" The trial court responded, "I don't think you need to."

The trial court asked, "Did the comment made by Juror Number 55 result in a conversation that would -- that [was] a part of your deliberations?" The foreperson responded, "No. Not really, no." The foreperson said that the jury had only discussed whether or not to report the incident to the court.

The trial court asked the foreperson to describe Juror No. 55's comment. The foreperson stated, "That he went to the location. Took a look from the point of view of Mr. G and said he didn't think that Mr. G could see that far to be able to identify a face." Juror No. 55 continued, "But everybody else had already made that decision, that we agreed that we did not believe that --" The trial court interrupted, saying, "I don't want to invade the province of the jury at this point."[8]

Defendant reiterated his request for a mistrial. The trial court denied the request and decided, instead, to dismiss Juror No. 55, admonish the remaining jurors, and bring in an alternate juror. The trial court explained the basis for its ruling: "The jurors did deliberate for over an hour on Friday. . . . And it appears to the Court that Juror Number 55 on Friday revealed that he had been to the scene of the event. And he quickly was told by the rest of the jurors that that was not an okay thing to do. . . . It does not appear that there were any discussions other than that was not an okay thing to do that were held between the other jurors regarding the comments that Juror [No.] 55 made."

[8] Evidence Code section 1150, subdivision (a) provides: "Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined."

After dismissing Juror No. 55, the trial court admonished the remaining jurors as follows: "It is the Court's understanding that the -- there may have been a comment by a juror on information that he received from outside of the trial. So as trial jurors, the important thing for you to do is only deliberate and only consider the evidence that was received at trial. Anything that is received outside of the courtroom or seen or viewed or told to you outside of the courtroom is not to be considered at trial. And I will tell you specifically if you heard any comments made by Juror [No.] 55 regarding anything that he said or any information that he received either by viewing himself or heard from someone else outside of the trial is not to be considered by you." The trial court told the jurors that anything they heard from Juror No. 55 should be treated as "evidence that's stricken during the trial" and "should not be considered by you for any purpose."

The trial court suspended deliberations until the alternate juror could be brought in. When the alternate joined the jury, the trial court instructed the jurors that "the jury deliberation process begins anew." The jury reached its verdicts later that day.

Defendant subsequently brought a motion for a new trial based on the jury misconduct. The trial court denied the motion on June 21, 2012, finding that there was no prejudice.

2. Analysis

Due process requires a jury be " 'capable and willing to decide the case solely on the evidence before it . . . .' [Citations.]" (*People v. Nesler* (1997) 16 Cal.4th 561, 578 (*Nesler*), italics omitted.) Thus, "[j]uror misconduct, such as the receipt of information about a party or the case that was not part of the evidence received at trial, leads to a presumption that the defendant was prejudiced thereby and may establish juror bias." (*Ibid.;* see also *In re Hitchings* (1993) 6 Cal.4th 97, 119 (*Hitchings*).)

"When juror misconduct involves the receipt of information about a party or the case from extraneous sources, the verdict will be set aside only if there appears a substantial likelihood of juror bias. [Citation.] Such bias may appear in either of two

ways: (1) if the extraneous material, judged objectively, is so prejudicial in and of itself that it is inherently and substantially likely to have influenced a juror; or (2) even if the information is not 'inherently' prejudicial, if, from the nature of the misconduct and the surrounding circumstances, the court determines that it is substantially likely a juror was 'actually biased' against the defendant." (*Nesler, supra,* 16 Cal.4th at pp. 578-579.)

The presumption of prejudice arising from juror misconduct " 'may be rebutted by proof that no prejudice actually resulted.' [Citations.]" (*Hitchings, supra,* 6 Cal.4th at p. 118.) More specifically, the presumption of prejudice " ' "may be rebutted by an affirmative evidentiary showing that prejudice does not exist or by a reviewing court's examination of the entire record to determine whether there is a reasonable probability of actual harm to the complaining party [resulting from the misconduct]. . . ." ' [Citations.]" (*Id.* at p. 119.) On appeal, whether prejudice arose from juror misconduct "is a mixed question of law and fact subject to an appellate court's independent determination. [Citations]." (*Nesler, supra,* 16 Cal.4th at p. 582.)

In this case, defendant contends the jury misconduct was "so prejudicial in and of itself that it is inherently and substantially likely to have influenced a juror." (*Nesler, supra,* 16 Cal.4th at pp. 578-579.) The test for inherent bias "is analogous to the general standard for harmless error analysis under California law. Under this standard, a finding of 'inherently' likely bias is required when, but only when, the extraneous information was so prejudicial in context that its erroneous introduction in the trial itself would have warranted reversal of the judgment. Application of this 'inherent prejudice' test obviously depends upon a review of the trial record to determine the prejudicial effect of the extraneous information." (*In re Carpenter* (1995) 9 Cal.4th 634, 653 (*Carpenter*).)

We disagree that the information conveyed by Juror No. 55 was "so prejudicial in and of itself that it is inherently and substantially likely to have influenced a juror." (*Nesler, supra,* 16 Cal.4th at pp. 578-579.) Although the accuracy of Gastelum's identification was an important issue at trial, Juror No. 55's misconduct did not

"completely undermine[]" the defense case, as defendant claims. The evidence had already established that Gastelum had viewed the scene from a distance of at least 300 feet and that his view was obscured when defendant shot at Perez from close range.[9] The evidence had also established that someone could have confused defendant and Nunez from such a distance, due to their similarities in size, build, and hairstyle. Additionally, pictures of the scene and Gastelum's location were introduced into evidence, so the jurors were able to assess the distance for themselves. (See *People v. Sutter* (1982) 134 Cal.App.3d 806, 821 [juror's description of her visit to the scene could not "possibly have added anything to what the jurors already knew" because of pictures introduced into evidence].) Thus, although Juror No. 55 committed misconduct, he did not introduce any evidence into the jurors' deliberations that was "so prejudicial in context that its erroneous introduction in the trial itself would have warranted reversal of the judgment." (*Carpenter, supra,* 9 Cal.4th at p. 653.)

Next, we consider whether it is "substantially likely a juror was 'actually biased' against the defendant." (*Nesler, supra,* 16 Cal.4th at pp. 578-579; see also *Carpenter, supra,* 9 Cal.4th at p. 654.) Under this test, " '[t]he presumption of prejudice may be rebutted, inter alia, by a reviewing court's determination, *upon examining the entire record,* that there is no substantial likelihood that the complaining party suffered actual harm.' [Citation.]" (*Carpenter, supra,* 9 Cal.4th at p. 654.) "In an extraneous-information case, the 'entire record' logically bearing on a circumstantial finding of likely bias includes the nature of the juror's conduct, the circumstances under which the information was obtained, the instructions the jury received, the nature of the evidence and issues at trial, and the strength of the evidence against the defendant." (*Ibid.*)

[9] During argument to the jury, the prosecutor discredited Gastelum's identification of Nunez. He argued that Gastelum was too far from the shooting to make an accurate identification: "You can't see from that far away anybody's face."

Courts have often found that the presumption of prejudice arising from juror misconduct was rebutted because the trial court was apprised of the misconduct during deliberations and was able to implement "curative measures such as the replacement of the tainted juror with an alternate or a limiting instruction or admonition." (*People v. Holloway* (1990) 50 Cal.3d 1098, 1111, disapproved on other grounds by *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1; see also *People v. Dorsey* (1995) 34 Cal.App.4th 694, 704 [presumption of prejudice rebutted where trial court replaced the offending juror and instructed the jury to begin deliberations anew].) For instance, in *People v. Knights* (1985) 166 Cal.App.3d 46 (*Knights*), during deliberations, a juror learned that the defendant had previously killed a four-year-old child, and she told the rest of the jury what she had heard. The presumption of prejudice was rebutted, however, because "the misconduct occurred early in the deliberations" and was quickly brought to the court's attention by the foreperson. (*Id.* at p. 51.) "The potentially biased juror was excused and replaced with an alternate juror," and the remaining jurors "were instructed to begin deliberations again as if no deliberations had ever occurred." (*Ibid.*)

On this record, we find that the presumption of prejudice arising from Juror No. 55's misconduct was rebutted. Considering the nature of the jury misconduct and the fact that the extraneous material was not inconsistent with other evidence at trial, there was " 'no substantial likelihood' " that defendant " 'suffered actual harm' " from the jury misconduct. (*Carpenter, supra*, 9 Cal.4th at p. 654.) Further, in this case, similar to *Knights*, "the misconduct occurred early in the deliberations" and was quickly brought to the court's attention by the foreperson. (*Knights, supra*, 166 Cal.App.3d at p. 51.) "The potentially biased juror was excused and replaced with an alternate juror." (*Ibid.*) The remaining jurors were instructed not to consider anything Juror No. 55 said, and they "were instructed to begin deliberations again as if no deliberations had ever occurred." (*Ibid.*) Under the circumstances, it is not "substantially likely a juror was 'actually biased' against the defendant." (*Nesler, supra*, 16 Cal.4th at p. 579.)

C. Sentencing

In his original briefing, defendant contended that his sentence of 85 years to life was "the equivalent of life without parole," which constituted cruel and unusual punishment because he was a juvenile (age 17) at the time he committed the offense.

Defendant primarily relied on two recent decisions. First, he relied on *Miller v. Alabama* (2012) 567 U.S. ___ [132 S.Ct. 2455] (*Miller*), where the United States Supreme Court held that the Eighth Amendment bars imposition of a mandatory sentence of life without the possibility of parole (LWOP) for a juvenile homicide defendant. Second, he relied on *People v. Caballero* (2012) 55 Cal.4th 262 (*Caballero*), where the California Supreme Court held—in the context of a juvenile nonhomicide offense—that a sentence of "a term of years with a parole eligibility date that falls outside the juvenile offender's natural life expectancy" is the functional equivalent of a LWOP sentence. (*Id.* at p. 268.)

The Attorney General argued, inter alia, that defendant's challenge to his sentence was moot due to the enactment of section 3051 (Sen. Bill No. 260 (2013-2014 Reg. Sess.)) after defendant's sentencing hearing.[10] Section 3051, inter alia, requires the Board of Parole Hearings (Board) to conduct youth offender parole hearings and makes youth offenders eligible for release on parole by at least the 25th year of incarceration. (§ 3051, subd. (b).) In *Franklin*, the court agreed with this argument, finding that section

[10] The Attorney General also originally argued that defendant forfeited his cruel and unusual punishment claim by failing to object below on that ground. In response, defendant pointed out that he was sentenced on June 21, 2012—prior to both the *Miller* and *Caballero* decisions. This court found that because there was no California or United States Supreme Court case on point at the time of sentencing, this issue was not forfeited by defendant's failure to raise it below. (See *People v. Black* (2007) 41 Cal.4th 799, 810 [forfeiture rule does not apply when " 'the pertinent law' " changes unforeseeably].) Citing *Caballero*, the Attorney General also originally argued that defendant's claim could only be brought in a petition for writ of habeas corpus filed in the trial court. This court disagreed, noting that because defendant's case was still pending on direct appeal, the judgment was not yet final.

3051 effectively superseded sentences like the one imposed in this case. (*Franklin, supra,* 63 Cal.4th at p. 277.) As noted by the *Franklin* court, in determining whether to grant parole at a youthful offender parole hearing, the Board is required to "give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law." (§ 4801, subd. (c); see *Franklin, supra,* at p. 277.) Under the new statutes, youthful offenders such as defendant "will have a meaningful opportunity for release no more than 25 years into their incarceration." (*Franklin, supra,* at p. 277.)

In light of the California Supreme Court's decision in *Franklin,* defendant now acknowledges that his claim is effectively moot. Defendant contends, and the Attorney General concedes, that this case must be remanded for a limited hearing pursuant to *Franklin*. As explained below, we agree.

1. Proceedings Below

The probation report reflected that defendant not only maintained his innocence, but he claimed to know " 'nothing' " about the offense. It further reflected that defendant's family (his mother, father, and two younger siblings) lived in Mexico, that defendant had completed the 11th grade, that he had used alcohol once, and that he denied using drugs.

The probation report also reflected that defendant's juvenile criminal history began in May of 2005, when he committed an attempted burglary, vandalism, theft, and resisting arrest. He violated probation twice in 2005, once in 2006, twice in 2007, three times in 2008, and twice in 2009. Some of the probation violations involved the commission of new offenses. In 2009, defendant absconded from a placement. Additionally, defendant had been subject to four disciplinary reports while in jail for the present offense.

At the sentencing hearing, defendant requested the trial court impose concurrent terms for the murder and attempted murder, arguing that they constituted "one incident." He also claimed he was innocent.

The trial court responded, "[Y]ou murdered a young 15-year old in cold blood." For count 1 (murder), the trial court imposed a term of 25 years to life, with a consecutive term of 25 years to life for personally and intentionally discharging a firearm and proximately causing great bodily injury or death, pursuant to section 12022.53, subdivision (d). For count 2 (attempted murder), the trial court imposed a consecutive term of 15 years to life, with a consecutive 20-year term for personally and intentionally discharging a firearm, pursuant to section 12022.53, subdivision (c).

The trial court noted that it had found a number of factors in aggravation, which applied to defendant's conviction of actively participating in a criminal street gang (count 3). Although it stayed the term for that conviction pursuant to section 654, the trial court noted its findings: (1) the crime involved great violence, great bodily injury, and a high degree of cruelty, viciousness, and callousness; (2) the victims were particularly vulnerable; (3) the crime involved planning; (4) defendant had a continuing relationship with a criminal street gang; (5) defendant's violent conduct indicated he was a serious danger to society; (6) defendant was the subject of prior sustained juvenile petitions, indicating an escalation in his criminal conduct; (7) defendant had a significant juvenile criminal history; (8) prior efforts at rehabilitation had been unsuccessful; and (9) defendant's prior performance on probation had been unsuccessful. In deciding to impose consecutive sentences for the murder and attempted murder, the trial court made findings that (1) the victims were particularly vulnerable and (2) the incidents were separate, since defendant had fired numerous shots.

2. Analysis

In *Franklin*, the court explained that the new statutory scheme "contemplate[s] that information regarding the juvenile offender's characteristics and circumstances at the

time of the offense will be available at a youth offender parole hearing to facilitate the Board's consideration." (*Franklin, supra,* 63 Cal.4th at p. 283.) The court noted that section 3051, subdivision (f)(2) provides that " '[f]amily members, friends, school personnel, faith leaders, and representatives from community-based organizations with knowledge about the individual before the crime . . . may submit statements for review by the board' " and that "[a]ssembling such statements . . . is typically a task more easily done at or near the time of the juvenile's offense rather than decades later when memories have faded, records may have been lost or destroyed, or family or community members may have relocated or passed away." (*Franklin, supra,* at pp. 283-284.) The court found it was "not clear whether Franklin had sufficient opportunity to put on the record the kinds of information that sections 3051 and 4801 deem relevant at a youth offender parole hearing." (*Id.* at p. 284.) Thus, the court remanded the matter to the trial court "for a determination of whether Franklin was afforded sufficient opportunity to make a record of information relevant to his eventual youth offender parole hearing." (*Ibid.*) The *Franklin* court specified that if the trial court later determined "that Franklin did not have sufficient opportunity, then the court may receive submissions and, if appropriate, testimony pursuant to procedures set forth in section 1204 and rule 4.437 of the California Rules of Court, and subject to the rules of evidence." (*Ibid.*)

At the sentencing hearing in this case, the trial court did not have the guidance of the *Miller* or *Caballero* decisions, and the sentencing hearing predated the enactment of section 3051. Both parties acknowledge that in imposing sentence, the trial court did not consider or make a record of the *Miller* factors, including defendant's "chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences," his "family and home environment," and "the way familial and peer pressures may have affected him." (*Miller, supra,* 132 S.Ct. at p. 2468.) Thus, as the parties agree, a limited remand is required so that the trial court can make such a record in accordance with *Franklin*.

DISPOSITION

The judgment is reversed and the matter is remanded for the limited purpose of giving defendant an "opportunity to make a record of information relevant to his eventual youth offender parole hearing." (*People v. Franklin* (2016) 63 Cal.4th 261, 284.)

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BAMATTRE-MANOUKIAN, ACTING P.J.

WE CONCUR:

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MIHARA, J.

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GROVER, J.