UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

AUG 26 2022

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

ALBERT BAUTISTA GUZMAN, Petitioner-Appellant, v. CHRISTIAN PFEIFFER, Warden, Respondent-Appellee.	No. 21-55277 D.C. No. 2:19-cv-02054-SK Central District of California, Los Angeles ORDER

Before: SILVERMAN and M. SMITH, Circuit Judges.

Appellant's motion to reconsider (Docket Entry No. 9), "Rule 33(b)(1) motion" (Docket Entry No. 10), and "Rule 60(b)(6) motion" (Docket Entry No. 11), are denied. *See* 9th Cir. R. 27-10.

No further filings will be entertained in this closed case.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JUN 28 2022

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

ALBERT BAUTISTA GUZMAN,

Petitioner-Appellant,

v.

CHRISTIAN PFEIFFER, Warden,

Respondent-Appellee.

No. 21-55277

D.C. No. 2:19-cv-02054-SK
Central District of California,
Los Angeles

ORDER

Before: BENNETT and FORREST, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 5) is denied because appellant has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

JS-6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ALBERT BAUTISTA GUZMAN, Petitioner, v. CHRISTIAN PFEIFFER, Respondent.	Case No. 2:19-cv-02054-SK **JUDGMENT**

Pursuant to the Order Denying Petition and Denying Certificate of Appealability, **IT IS ADJUDGED** that the petition for writ of habeas corpus is denied and that this action is dismissed with prejudice.[1]

DATED: March 1, 2021

STEVE KIM
U.S. MAGISTRATE JUDGE

[1] Both parties consented to proceed before the undersigned for all proceedings, including entry of judgment (ECF 12, 18, 19). *See* 28 U.S.C. § 636(c)(1).

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ALBERT BAUTISTA GUZMAN, Petitioner, v. CHRISTIAN PFEIFFER, Respondent.	Case No. 2:19-cv-02054-SK **ORDER DENYING PETITION AND DENYING CERTIFICATE OF APPEALABILITY**

I.
BACKGROUND

Petitioner Albert Bautista Guzman is a California state prisoner serving 35 years to life in prison after a jury convicted him of first-degree murder with firearm and gang enhancements. (Lodged Document ("LD") 1)). The California jury found Petitioner, a member of the Pepper Street gang, guilty of shooting and killing a rival gang associate during a late-night drive with four other Pepper Street gang members. (LD 1; 3 Reporter's Transcript ("RT") 263, 417; 2 RT 85, 101). In exchange for immunity, one of those gang members testified at trial against Petitioner and other codefendants. (3 RT 273). This accomplice testimony, combined with other circumstantial evidence and eyewitness accounts, showed that Petitioner and his gang were searching on the night of the victim's shooting for rival gang members to

fight and had, in fact, violently confronted a different suspected gang rival some hours before the victim's death. (4 RT 473, 476-77, 479-81, 490-95). The cooperating accomplice, who was in the car with Petitioner, testified that Petitioner was armed with a gun, loaded it with a bullet, and shot the victim after the Pepper Street members in the car had identified the victim as a gang rival. (3 RT 257-258, 264-68).

A forensic pathologist also testified at trial, confirming through his testimony and the autopsy report that the victim died because of a gunshot wound to his chest. (2 RT 123-26). In addition, a Pasadena, California police detective testified as a gang expert, relying on (among other facts) certified criminal records of, his experience with, and some out-of-court statements about Pepper Street gang members to state that murder, assault, and firearms possession were among the primary criminal activities of the Pepper Street gang. (3 RT 391, 405-12, 423-26). The detective then opined that a murder like the one carried out on the night in question would have benefited, been directed by, or been associated with a criminal street gang. (3 RT 426-32).

For his part, Petitioner testified at trial, admitting that he shot the victim but claiming he did it in self-defense. (4 RT 472, 503, 505, 510-11). Petitioner was represented by appointed counsel both at trial and on appeal. He prevailed partially on direct appeal, securing a remand for resentencing from the California Court of Appeal because of his juvenile status at the time of the crime. (LD 2 at 2, 54; LD 5 at 2). The trial court had originally given Petitioner a longer sentence of 50 years to life. (5 RT 770). But Petitioner was otherwise unsuccessful overturning his conviction, whether in the California Supreme Court on direct review or by later state petitions for post-conviction relief. (LD 4, 7, 8, 9, 11, 13). Petitioner now seeks federal habeas relief from his state murder conviction and sentence under 28 U.S.C. § 2254.

II.

DISCUSSION

Petitioner raises three claims. First, he contends that he received ineffective assistance of trial and appellate counsel because neither attorney ever investigated, questioned, or challenged the pathologist's report, which Petitioner believes had flaws undermining the pathologist's credibility. Second, Petitioner claims that the gang expert's testimony about the Pepper Street gang's criminal activities violated the Confrontation Clause because it relied mostly on inadmissible hearsay. And third, without citing any specific federal right or constitutional guarantee, Petitioner argues that he should receive a new trial because news articles he uncovered years after his conviction disclosed that one officer who had interviewed potential eyewitnesses was investigated for police misconduct, even though that officer was not a trial witness. None of these claims justifies federal habeas relief under de novo review.[1]

A. Petitioner Suffered No Prejudice from Alleged Ineffective Assistance of Trial or Appellate Counsel

To prevail on an ineffective assistance claim, Petitioner must prove both that counsel's performance was deficient and that the deficiency prejudiced his defense. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). To prove prejudice, Petitioner must show a "reasonable probability that, but for counsel's unprofessional errors, the result . . . would have been different." *Id.* at 694. This prejudice standard is even higher—and thus harder for Petitioner to meet—than the general harmless error standard in *Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993), that is otherwise

[1] As a result, there is no need for the Court to address Respondent's contestable procedural defenses like exhaustion (ECF 24 at 2 n.1). *See Berghuis v. Thompkins*, 560 U.S. 370, 390 (2010); *Flournoy v. Small*, 681 F.3d 1000, 1004 n.1 (9th Cir. 2012); *Lambert v. Blodgett*, 393 F.3d 943, 966 (9th Cir. 2004).

applicable to habeas claims lacking a prejudice element. *See Kipp v. Davis*, 971 F.3d 866, 878 (9th Cir. 2020).

On the record here, there is no reasonable probability that the jury would have acquitted Petitioner if trial counsel had only investigated or questioned—or even somehow successfully excluded—the pathologist's autopsy report. The victim's clinical cause of death was not a genuinely disputed issue at trial, for Petitioner admitted shooting the victim (although in claimed self-defense). *See, e.g., Mejia v. Brazelton*, 2013 WL 2155386, at *8 (C.D. Cal. May 16, 2013) (evidentiary error harmless because defendant admitted stabbing victim in self-defense and cause of death was uncontroverted); *McNeiece v. Lattimore*, 2009 WL 1464368, at *8 (C.D. Cal. May 22, 2009) (similar). Contrary to Petitioner's suggestion that the pathologist was unreliable because he mistook a defibrillator pad mark for a second gunshot wound (ECF 6-1 at 54-55; 26 at 4), the record reveals no such mistake. (ECF 6-1 at 53-56, 65-66, 76, 82-84, 89). Nor is it at all evident, at any rate, how that could have undermined confidence in the jury verdict. *See Grisby v. Blodgett*, 130 F.3d 365, 373 (9th Cir. 1997) ("Speculation about what an expert could have said is not enough to establish prejudice."). After all, an eyewitness accomplice incriminated Petitioner as the shooter. So the believability of Petitioner's self-defense argument, not the credibility of the pathologist, was the central—and naturally most important—contested issue at trial.

Likewise, there is no reasonable probability that Petitioner would have secured reversal of his conviction on appeal if appellate counsel had only investigated and attacked the pathologist's report. *See Smith v. Robbins*, 528 U.S. 259, 287-89 (2000); *Hurles v. Ryan*, 752 F.3d 768, 785-88 (9th Cir. 2014). For the same reason that such a strategy would have made little difference at trial, it would have made no difference on appeal either.

Appellate counsel, evidently, even explained this to Petitioner—after which counsel successfully secured him a partial remand for resentencing. (ECF 6-1 at 19, 64). Petitioner also could have suffered no prejudice from his appellate counsel's decision not to press this claim on appeal because, on state collateral review, he ultimately received the only relief he could have gotten even if counsel had followed his instruction. In his state habeas petitions to the California state courts—including to the California Court of Appeal and Supreme Court—Petitioner raised his challenge to the pathologist's report. (LD 9 at 4, 40-43; LD 13 at 5, 54-57). Yet those courts rejected his claim each time. (LD 10, 14). In other words, Petitioner could have suffered no prejudice because there is no likelihood—much less a reasonable probability—that the very California appellate courts that rejected Petitioner's claim on collateral review would have arrived at a different result if only that identical claim had been raised sooner in those same courts on direct appeal. *See Miller v. Zatecky*, 820 F.3d 275, 276-77 (7th Cir. 2016) (denying habeas relief for ineffective appellate counsel claim where state court of appeals decided on collateral review merits of underlying issues that petitioner argued should have been raised by counsel on appeal); *Duckett v. Rackley*, 2017 WL 1129947, at *4 (C.D. Cal. Jan. 4, 2017) (same); *O'Neal v. Sherman*, 2016 WL 1714552, at *23 (C.D. Cal. Feb. 26, 2016) (same).

B. The Gang Expert's Testimony Did Not Violate the Confrontation Clause

To prove the gang sentencing enhancement under California Penal Code § 186.22, the prosecution in Petitioner's trial had to prove (among other elements) that he "committed a felony for the benefit of, at the direction of, or in association with any criminal street gang[.]" *People v. Mejia*, 211 Cal. App. 4th 586, 613 (2012). A "criminal street gang" under

this statute is one that has as one of its "primary activities" the commission of one or more predicate offenses enumerated in the statute and includes members who engage, or have engaged, in two or more predicate crimes and thus a "pattern of criminal gang activity." *People v. Gardeley*, 14 Cal. 4th 605, 617 (1996). The charged crime itself, however, may serve as one of the qualifying predicate offenses. *See People v. Tran*, 51 Cal. 4th 1040, 1046 (2011).

Petitioner claims that the prosecution erroneously admitted hearsay through the gang expert's testimony in violation of the Sixth Amendment's Confrontation Clause to prove that the Pepper Street gang was a "criminal street gang" under California law. (ECF 6-1 at 19, 40, 42, 46-47). But the Confrontation Clause applies only to "testimonial" statements, meaning those "procured with a primary purpose of creating an out-of-court substitute for trial testimony." *Michigan v. Bryant*, 562 U.S. 344, 358 (2011). "Certified computer records of the criminal convictions of other gang members" in this case did not count as testimonial since they were created, not to serve as evidence against Petitioner, but to "memorialize the events that occurred in other, unrelated, court proceedings." *Hines v. Harrington*, 2010 WL 4025608, at *10 (C.D. Cal. Sept. 2, 2010); *see Bryant*, 562 U.S. at 359 (admissibility of non-testimonial hearsay "is the concern of state and federal rules of evidence, not the Confrontation Clause").

Moreover, an expert witness may rely on "inadmissible testimonial hearsay . . . to explain the basis for his expert opinion." *United States v. Vera*, 770 F.3d 1232, 1237-39 (9th Cir. 2014). The gang expert here did just that, resting his opinions not only on certified conviction records but also on his gang training, familiarity with and observations of the Pepper Street area, formal and informal contacts with Pepper Street members, and conversations with them about their activities. (3 RT 391-93, 399-401, 404-

12). He did not, in other words, "merely act[] as a transmitter for testimonial hearsay" but applied "his training and experience to the sources before him" to "reach[] an independent judgment." *United States v. Gomez*, 725 F.3d 1121, 1129 (9th Cir. 2013) (cleaned up). That does not violate the Confrontation Clause. *See 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" and "[o]ut-of-court statements that are related by [an] expert solely for the purpose of explaining the assumptions on which [his expert] opinion rests are not offered for their truth and thus fall outside the scope of the Confrontation Clause.").

C. Petitioner's Free-Floating Claim of "Detective Misconduct" Warrants No Federal Habeas Remedy

Finally, with no link to a cognizable federal right, Petitioner contends that he deserves habeas relief because "Detective Kevin Okamoto of the Pasadena Police Department was found guilty of misconduct." (ECF 6-1 at 19, 97-101). Petitioner evidently learned—years after his trial and mostly from newspaper articles—that Detective Okamoto, who was among those who investigated the shooting here and interviewed witnesses at the scene, was accused of misconduct in other criminal investigations. (ECF 6-1 at 100-01, 104; ECF 6-2 at 15-19; ECF 29 at 4-7; ECF 26 at 15-20). But this detective never testified at Petitioner's trial. Nor does Petitioner draw any connection between evidence presented at trial and this detective's alleged misconduct. He merely alludes to the theoretical possibility that this detective "jeopardized" the murder investigation. (ECF 6-1 at 99-101). Even if that is possible, such a free-floating allegation unmoored from any federal right or constitutional guarantee does not—and cannot—prove there was a "substantial and injurious effect or influence in determining the jury's

verdict." *Brecht*, 507 U.S. at 623. "Misconduct by the police, however reprehensible, is not a ground for federal habeas corpus if it does not contribute to a conviction." *Miller v. Eklund*, 364 F.2d 976, 978 (9th Cir. 1966). That is doubly true when the accused officer is not even a prosecution witness at the trial.

III.

CONCLUSION

For all these reasons, the petition for writ of habeas corpus under 28 U.S.C. § 2254 is DENIED. Judgment will be entered dismissing this action with prejudice.[2] A certificate of appealability is also DENIED because Petitioner has made no substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2); Fed. R. App. P. 22(b); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

IT IS SO ORDERED.

DATED: March 1, 2021

STEVE KIM
U.S. MAGISTRATE JUDGE

[2] Both parties consented to proceed before the undersigned for all proceedings, including the entry of judgment (ECF 12, 18, 19). *See* 28 U.S.C. § 636(c)(1).