No.

IN THE SUPREME COURT OF THE UNITED STATES

RODTRAVION WOODS,

Petitioner

v.

GREG LEWIS, Warden,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX

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APPENDIX

NOT FOR PUBLICATION

FILED

JUN 16 2023

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RODTRAVION WOODS, Petitioner-Appellant, v. W. L. MONTGOMERY, Acting Warden, Respondent-Appellee.	No. 14-56195 D.C. No. 2:13-cv-05524-JFW-SS MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
John F. Walter, District Judge, Presiding

Argued and Submitted April 12, 2023
San Francisco, California

Before: S.R. THOMAS, PAEZ, and CHRISTEN, Circuit Judges.

Rodtravion Woods, a California state prisoner, appeals the district court's denial of his 28 U.S.C. § 2254 habeas petition (§ 2254 petition) challenging his convictions for attempted first degree murder, shooting from a motor vehicle, and being a felon in possession of a firearm. We granted a certificate of appealability on two issues and have jurisdiction to consider Woods's appeal pursuant to 28

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

U.S.C. §§ 1291 and 2253(a). We affirm the district court's denial of the petition.

We review de novo the district court's denial of a § 2254 petition. *Balbuena v. Sullivan*, 980 F.3d 619, 628 (9th Cir. 2020) (citation omitted). Our review is constrained by the deferential standard of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) as to "any claim that was adjudicated on the merits in State court proceedings." 28 U.S.C. § 2254(d). A federal court may only grant habeas relief if the state court's ruling was: (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "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)(1), (2).

1. In his supplemental brief, Woods argues that we should grant his separate application to file a second or successive petition, stay this appeal, and permit him to file a motion, in the district court, to reopen and amend his original petition. We deny Woods's application to file a second or successive petition in a separate memorandum disposition filed simultaneously with this order because Woods fails to show that "the factual predicate for [his claims] could not have been discovered previously through the exercise of due diligence." 28 U.S.C. § 2244(b)(2)(B)(i).

2. The district court denied Woods's § 2254 petition in which he alleged that his trial counsel rendered ineffective assistance under *Strickland v. Washington*,

466 U.S. 668 (1984) by failing to impeach Delorian Forman, the victim and only testifying eyewitness to the shooting, with his prior conviction for making criminal threats. A petitioner raising an ineffective assistance claim "must show that counsel's performance was deficient" and "that the deficient performance prejudiced the defense." *Id.* at 687. Prejudice exists when there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

Woods did not raise this ineffective assistance claim until he filed a post-conviction petition with the California Supreme Court. That court summarily denied the petition. A summary denial from the California Supreme Court is considered an adjudication on the merits for AEDPA purposes, *Cullen v. Pinholster*, 563 U.S. 170, 187–88 & n.12 (2011), and AEDPA requires that Woods show "there was no reasonable basis for the state court to deny relief," *Demetrulias v. Davis*, 14 F.4th 898, 906 (9th Cir. 2021) (quoting *Harrington v. Richter*, 562 U.S. 86, 98 (2011)).

The California Supreme Court could have reasonably concluded that Woods was not prejudiced by his trial counsel's failure to impeach Forman with his criminal threats conviction. The jury heard from Forman that he was a gang member and that he had to be taken into custody to secure his testimony at trial. Additionally, the California Supreme Court could have relied on Forman's

consistent accounts of the shooting and the cell phone records that undermined Woods's alibi.[1]

3. Woods also argues that trial counsel was ineffective because he failed to impeach Forman with his prior statement to Anthony Jones identifying another person as the shooter. Because Woods raised this claim before the state courts, we "look through" to the last reasoned state court decision addressing its merits—here, the California Court of Appeal's opinion on direct review—and read the California Supreme Court's unexplained order rejecting the claim to rest upon the same ground. *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018).[2]

The California Court of Appeal determined that trial counsel's deficient performance was not prejudicial because: (1) Forman's account of the shooting

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[1] Woods argues that Forman later executed a declaration in which he recanted his identification of the shooter. We are limited to considering the record that was before the state court when it denied Woods's application for post-conviction relief, and Forman's declaration and subsequent testimony were not before the state court at that time. *See Pinholster*, 563 U.S. at 181–82. Further, when the declaration and related evidence was admitted at the state-court exhaustion proceeding, Forman again identified Woods as the shooter, and the court found that his testimony was credible.

[2] We reject the State's suggestion that the look-through presumption is rebutted in this case. *See, e.g.*, *Flemming v. Matteson*, 26 F.4th 1136, 1143–44 (9th Cir. 2022) (rejecting argument that the presumption is rebutted by "internal state procedures for a state supreme court indicating that its summary, unreasoned orders do *not* adopt the lower court's rationale"); *Wilson*, 138 S. Ct. at 1196 (providing examples of circumstances that may be sufficient to rebut the presumption).

was "stable and resolute"; and (2) Woods's alibi defense was fatally undermined by T-Mobile records showing the location of Woods's cellular phone. On this record, we cannot say that the state court erred by concluding that Woods failed to establish a reasonable probability that the proffered impeachment evidence would have affected the verdict.

AFFIRMED.

JS - 6

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

RODTRAVION WOODS,

Petitioner,

v.

GREG LEWIS, Warden,

Respondent.

Case No. CV 13-5524-JFW (OP)

J U D G M E N T

Pursuant to the Order Accepting Findings, Conclusions, and Recommendations of the United States Magistrate Judge,

IT IS ADJUDGED that the Petition is denied and this action is dismissed with prejudice.

DATED: June 25, 2014

HONORABLE JOHN F. WALTER
United States District Judge

Prepared by:

HONORABLE OSWALD PARADA
United States Magistrate Judge

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

RODTRAVION WOODS,

Petitioner,

v.

GREG LEWIS, Warden,

Respondent.

Case No. CV 13-5524-JFW (OP)

ORDER ACCEPTING FINDINGS, CONCLUSIONS, AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition, the other records on file herein, and the Report and Recommendation of the United States Magistrate Judge. Further, the Court has engaged in a de novo review of those portions of the Report and Recommendation to which objections have been made. The Court accepts the findings and recommendations of the Magistrate Judge,

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IT IS ORDERED that Judgment be entered: (1) accepting this Report and Recommendation; and (2) directing that Judgment be entered denying the Petition and dismissing this action with prejudice.

DATED: June 25, 2014

HONORABLE JOHN F. WALTER
United States District Judge

Prepared by:

HONORABLE OSWALD PARADA
United States Magistrate Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

RODTRAVION WOODS, Petitioner, v. GREG LEWIS, Warden, Respondent.	Case No. CV 13-5524-JFW (OP) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable John F. Walter, United States District Judge, pursuant to the provisions of 28 U.S.C. § 636 and General Order 194 of the United States District Court for the Central District of California.

I.

PROCEEDINGS

On July 31, 2013, Rodtravion Woods ("Petitioner"), represented by counsel, filed a Petition for Writ of Habeas Corpus by a Person in State Custody pursuant to 28 U.S.C. § 2254 ("Petition"). (ECF No. 1.) On December 6, 2013, Respondent filed an Answer to the Petition. (ECF No. 11.) On February 7, 2014, Petitioner filed a Traverse to the Answer. (ECF No. 17.) Thus, this matter is ready for decision.

II.

PROCEDURAL HISTORY

On June 2, 2010, Petitioner was convicted after a jury trial in the Los Angeles County Superior Court of attempted first degree murder (Cal. Penal Code §§ 187(a), 664), shooting from a motor vehicle (id. § 12034(c)), and possession of a firearm by a felon (id. § 12021(a)(1)). (Clerk's Transcript ("CT") at 182-84, 212-15.) The jury found true the allegations that Petitioner personally and intentionally discharged a firearm in the commission of the crime (Cal. Penal Code § 12022.53(d), and that he committed the crimes for the benefit of, at the direction of, or in association with the "Inglewood Family Bloods" gang with the specific intent to promote, further, or assist in the criminal conduct of the members of that gang (id. § 186.22(b)(1)(c)). (CT at 182-84, 212-15.) On October 30, 2003, Petitioner was sentenced to a total state prison term of forty-five years to life with the possibility of parole. (Id. at 204-06, 212-15.)

Petitioner appealed the conviction to the California Court of Appeal. (Lodgment 1.) On August 11, 2011, the court of appeal affirmed the judgment. (Lodgment 6.)

Petitioner then filed a habeas corpus petition in the California Court of Appeal. (Lodgment 3.) On August 10, 2011, the court of appeal denied the petition. (Lodgment 5.)

On September 14, 2012, Petitioner filed a habeas corpus petition in the California Supreme Court. (Lodgment 8.) On July 31, 2013, the supreme court summarily denied the petition. (Lodgment 11.)

III.

SUMMARY OF THE EVIDENCE PRESENTED AT TRIAL

Because Petitioner is not challenging the sufficiency of the evidence, the Court adopts the factual discussion of the California Court of Appeal opinion as a

fair and accurate summary of the evidence presented at trial:[1]

A. *Prosecution Evidence*

Inglewood Police Department Officer Kerry Tripp, a gang expert, provided testimony in support of the gang allegations accompanying the charges against appellant. According to Tripp, the Inglewood Family gang claims territory in Inglewood. Members often wear red clothing and caps, and some display tattoos of stars. As a "Blood" gang, the Inglewood Family is hostile to neighboring "Crip" gangs such as the Rollin' 30s. Kerry opined that appellant belonged to the Inglewood Family gang.

The incident underlying the charges against appellant occurred on July 3, 2009. At approximately 7:30 p.m., Los Angeles Police Department (LAPD) officers responded to a call regarding a shooting at 36th Street and 7th Avenue in Los Angeles, in territory claimed by the Rollin' 30s. There they found Delorion[2] Forman lying on the ground with a bullet wound.

Forman testified as follows: He is a member of the Rollin' 30s gang. Approximately two weeks before July 3, 2009, he encountered appellant at a meeting of the Flawless Car Club, to which appellant

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[1] "Factual determinations by state courts are presumed correct absent clear and convincing evidence to the contrary . . . ." Miller-El v. Cockrell, 537 U.S. 322, 340, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003) (citing 28 U.S.C. § 2254(e)(1)). Recent Ninth Circuit cases have accorded the factual summary set forth in an opinion of the California Court of Appeal a presumption of correctness pursuant to 28 U.S.C. § 2254(e)(1). See, e.g., Moses v. Payne, 555 F.3d 742, 746 n.1 (9th Cir. 2009) (citations omitted); Slovik v. Yates, 556 F.3d 747, 749 n.1 (9th Cir. 2009).

[2] According to the Reporter's Transcript ("RT"), the correct spelling of the victim's name is Delorian Forman.

belonged. The meeting occurred near 36th Street and 7th Avenue. At the meeting, Forman told appellant that he was from the Rollin' 30s, and asked "Where are you from?" Appellant initially replied that he did not "gang bang," but later stated that he was from "Family." When the pair exchanged words, other members of the car club intervened, and no physical altercation occurred.

On the evening of July 3, 2009, Forman saw appellant with a young woman at a car wash located at 52d Street and Crenshaw. Approximately 30 minutes later, at 7:30 p.m., Forman was seated in a car parked near 36th Street and 7th Avenue. Appellant drove up in a black car, stopped, and called to Forman. When Forman walked over to appellant's car, appellant said, "I heard you were looking for me." Forman answered, "If I was looking for you, I would have found you." Appellant then fired four or five gunshots, hitting Forman in the stomach. According to Forman, after appellant fired his gun, he said, "I'm B-Mac from Inglewood Family." Forman was hospitalized for three weeks due to his wound.

According to Forman, he told investigating officers that the shooter was "B-Mac," who had stars tattooed on his arms and belonged to the Flawless Car Club.

LAPD Officer Paul Fedynich testified that Forman, while hospitalized, provided a detailed account of the shooting and its perpetrator. When Fedynich first talked to Forman in the hospital, he believed that Forman described the shooter as "D-Mac." As a result, Fedynich suspected the shooter was Donte Woods, an Inglewood Family member whose moniker is "D-Mac." On July 7, 2009, he showed Forman a photographic "six-pack" that included Donte Woods, but not appellant. Forman identified no one in the six-pack as the shooter.

Fedynich decided to investigate another aspect of Forman's description of the shooter, namely, that the shooter belonged to the Flawless Car Club and sometimes drove a green Camaro. He found the car club's internet Web site, which displayed a green Camaro registered to appellant. Fedynich concluded that appellant was a potential suspect, and prepared a second six-pack. Forman viewed the six-pack, identified appellant as the shooter, and stated he was "a hundred percent sure" regarding the identification. Investigating officers searched appellant's residence and found several items of red clothing.

On July 21, 2009, appellant was arrested in the presence of his girlfriend, Lanica Flemming. Appellant had tattoos of stars on his arms. Nearby, officers located appellant's green Camaro and a black Chevy Malibu with "Hello Kitty" seat covers. Appellant identified Flemming in a photographic six-pack as the woman accompanying appellant at the car wash. Forman also identified photos of the Chevy Malibu as depicting the shooter's car. Forman told investigating officers he recognized the Chevy Malibu by the "Hello Kitty" inside it.

Melanie Caldwell, a custodian of records for T-Mobile, testified regarding the location of appellant's cell phone on July 3, 2009, based on incoming and outgoing calls through the phone. According to Caldwell, a cell phone's location at the time of a particular call can be determined by the cell phone tower that the call passed through, as cell phones seek the nearest tower, and a tower's range is no more than 15 city blocks. At 6:45 p.m., an outgoing call from appellant's cell phone occurred near 3125 West 54th Street in Los Angeles. Between 9:00 and 9:15 p.m., a series of calls occurred while the phone was on or near the 5, 710, and 10 Freeways. Of these, an outgoing call at 9:13 p.m. occurred while the phone moved from Los Angeles to Alhambra.

Between 9:40 and 9:58 p.m., another series of calls occurred while it was in the Ontario-Fontana area. In addition, at 7:35 p.m., a call was made from the cell phone to appellant's voicemail on the phone, and after 8:48 p.m. several text messages were sent and received on the phone. According to Caldwell, neither cell phone calls to voicemail systems nor cell phone text messages generally create records showing the location of a cell phone.

B. *Defense Evidence*

Appellant testified as follows: He had never been a member of any gang, including the Inglewood Family. The four stars tattooed on his arms represented his four sisters, and the items of red clothing found in his residence belonged to relatives or were gifts from relatives.

In 2009, appellant joined the Flawless Car Club as a hobby. Although Forman did not belong to the club, he hung out in the area and often attended meetings. Appellant first met Forman at a club meeting two or three months before the shooting. Later, appellant talked to Forman amicably on other occasions.

On July 3, 2009, appellant intended to celebrate the July 4th holiday in Las Vegas with relatives. His plans included a party in a restaurant in Ontario on the evening of July 3. At 5:00 p.m., he and his girlfriend, Lanica Flemming, attended the car wash, which the car club had organized to raise funds for the funeral of a club member. As appellant's cell phone needed charging, he used a charger in a car owned by a friend, Derrick Smith. Because appellant was in a rush to begin his trip to Las Vegas, he left his cell phone in Smith's car.

Appellant drove to Ontario in Flemming's car, a black Chevy Malibu with "Hello Kitty" seat covers. Accompanying appellant were his friend, Devin Bush, as well as Flemming and her sister. As they

began their trip, they stopped briefly at Bush's residence in Los Angeles. They left Bush's residence at approximately 6:30 p.m., and arrived at the party in Ontario between 8:10 and 8:15 p.m.

During the trip to Ontario, appellant borrowed a cell phone to call and send text messages to his own phone. In response, appellant received a text message from Smith. Appellant told Smith that he would pay him $50 and "detail" his car if Smith brought appellant's phone to Ontario. Smith agreed to do so. Shortly after 9:00 p.m., appellant briefly left the party, met Smith in Ontario, retrieved his phone, and returned to the party. At approximately 10:30 p.m., he left the party to go to Las Vegas.

During cross-examination, appellant admitted that he placed a call from his cell phone at 9:13 p.m. on July 3. He maintained that he made the call from Ontario, but on further questioning, acknowledged that the T-Mobile records showed the 9:13 p.m. call passed through a cell phone tower in Los Angeles. Appellant also acknowledged that he once told Officer Fedynich that Flemming probably drove her black Chevy Malibu near 36th Street and 7th Avenue on the evening of the shooting, and that Flemming often carried his cell phone with her. Appellant stated that when he spoke to Fedynich, he was confused regarding the date of the shooting.

Terry Easter, Devin Bush's mother, testified that on July 3, 2009, appellant and Bush stopped at her home for approximately 15 minutes, and left before 6:30 p.m. Reginia Mikell and Tiana Shiel, appellant's mother and sister, testified that at approximately 8:30 p.m., appellant arrived at a party in Ontario that they attended. Appellant was accompanied by Bush, Flemming, and Flemming's sister. According to Mikell, appellant borrowed her car, briefly left the party, returned, and

departed for Las Vegas after the party ended around 10:00 p.m.

John Cosgrove, a computer systems engineer, opined that the call to appellant's voicemail at 7:35 p.m. was not placed from appellant's cell phone, as T-Mobile's records associated no cell phone tower with the call. He further noted that the T-Mobile records showed that the cell phone left Los Angeles, moved through Alhambra, and eventually arrived in the Fontana-Ontario area.

On cross-examination, Cosgrove acknowledged that according to the T-Mobile records for July 4 and 5, 2009, when appellant admitted possessing the cell phone, the phone's voicemail was checked many times, yet the T-Mobile records associated no cell towers with some of these calls. Cosgrove also testified that the call from appellant's cell phone at 9:13 p.m. on July 3, 2009, initially relied on a tower in Los Angeles and then a tower in Alhambra. According to Cosgrove, T-Mobile's records showed that the 9:13 p.m. call occurred in or around Alhambra, not Ontario.

(Lodgment 6 at 2-8 (footnotes omitted).)

IV.

PETITIONER'S CLAIMS

Petitioner raises the following claims for habeas corpus relief:

(1) Ineffective assistance of trial counsel for failing to call a defense gang expert ("Ground One") (Pet. at 5, Attach. A at 1-14);

(2) Ineffective assistance of trial counsel for failing to impeach the victim with prior convictions ("Ground Two") (id. at 5, Attach. A at 14-18);

(3) Ineffective assistance of trial counsel for failing to recall the victim as a witness after failing to lay foundation to introduce inconsistent statements ("Ground Three") (id. at 6, Attach. A at 18-31);

(4) Ineffective assistance of trial counsel for failing to object to prosecution gang expert testimony ("Ground Four") (id. at 6, Attach. A at 31-38); and

(5) Ineffective assistance of appellate and habeas counsel for failing to raise claims on review ("Ground Five") (id. at 6, Attach. A at 38-42).

V.

STANDARD OF REVIEW

The standard of review applicable to Petitioner's claims is set forth in 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"):

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). If these standards are difficult to meet, it is because they were meant to be. Harrington v. Richter, 131 S. Ct. 770, 786, 178 L. Ed. 2d 624 (2011). AEDPA "stops short of imposing a complete bar on federal court relitigation of claims already rejected in state proceedings[,]" and a writ may issue only "where there is no possibility fairminded jurists could disagree that the state court's decision conflicts" with United States Supreme Court precedent. Id.

Further, a state court factual determination shall be presumed correct unless rebutted by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

Under the AEDPA, the "clearly established Federal law" that controls federal habeas review of state court decisions consists of holdings (as opposed to dicta) of Supreme Court decisions "as of the time of the relevant state-court decision." Williams v. Taylor, 529 U.S. 362, 412, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). To determine what, if any, "clearly established" United States Supreme Court law exists, the court may examine decisions other than those of the United States Supreme Court. LaJoie v. Thompson, 217 F.3d 663, 669 n.6 (9th Cir. 2000). Ninth Circuit cases "may be persuasive." Duhaime v. Ducharme, 200 F.3d 597, 600 (9th Cir. 1999). On the other hand, a state court's decision cannot be contrary to, or an unreasonable application of, clearly established federal law, if no Supreme Court precedent creates clearly established federal law relating to the legal issue the habeas petitioner raised in state court. Brewer v. Hall, 378 F.3d 952, 955 (9th Cir. 2004); see also Carey v. Musladin, 549 U.S. 70, 77, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006) (in the absence of a Supreme Court holding regarding the prejudicial effect of spectators' courtroom conduct, the state court's decision could not have been contrary to or an unreasonable application of clearly established federal law).

Although a particular state court decision may be both "contrary to" and an "unreasonable application of" controlling Supreme Court law, the two phrases have distinct meanings. Williams, 529 U.S. at 405. A state court decision is "contrary to" clearly established federal law if the decision either applies a rule that contradicts the governing Supreme Court law, or reaches a result that differs from the result the Supreme Court reached on "materially indistinguishable" facts. Early v. Packer, 537 U.S. 3, 8, 123 S. Ct. 362, 154 L. Ed. 2d 263 (2002) (per curiam) (citing Williams, 529 U.S. at 405-06). When a state court decision adjudicating a claim is "contrary to" controlling Supreme Court precedent, the

reviewing federal habeas court is "unconstrained by § 2254(d)(1)." Williams, 529 U.S. at 406. However, the state court need not cite or even be aware of the controlling Supreme Court cases, "so long as neither the reasoning nor the result of the state-court decision contradicts them." Packer, 537 U.S. at 8.

State court decisions that are not "contrary to" Supreme Court law may only be set aside on federal habeas review "if they are not merely erroneous, but 'an unreasonable application' of clearly established federal law, or based on 'an unreasonable determination of the facts.'" Id. at 11 (citing 28 U.S.C. § 2254(d)). Consequently, a state court decision that correctly identified the governing legal rule may be rejected if it unreasonably applied the rule to the facts of a particular case. See Williams, 529 U.S. at 406-10, 413 (e.g., the rejected decision may state Strickland rule correctly but apply it unreasonably); Woodford v. Visciotti, 537 U.S. 19, 24-25, 123 S. Ct. 357, 154 L. Ed. 2d 279 (2002) (per curiam). However, to obtain federal habeas relief for such an "unreasonable application," a petitioner must show that the state court's application of Supreme Court law was "objectively unreasonable." Visciotti, 537 U.S. at 27. An "unreasonable application" is different from an erroneous or incorrect one. Williams, 529 U.S. at 409-10; see also Visciotti, 537 U.S. at 25.

Where, as here with respect to Grounds Three and Four, the California Supreme Court denies a petitioner's claims without comment, the state high court's "silent" denial is considered to be "on the merits" and to rest on the last reasoned decision on these claims, in this case, the grounds articulated by the California Court of Appeal in its decision on direct review. See Ylst v. Nunnemaker, 501 U.S. 797, 803-06, 111 S. Ct. 2590, 115 L. Ed. 2d 706 (1991); Hunter v. Aispuro, 982 F.2d 344, 347-48 (9th Cir. 1992); see also Kennedy v. Lockyer, 379 F.3d 1041, 1052 (9th Cir. 2004); Gill v. Ayers, 342 F.3d 911, 917 n.5 (9th Cir. 2003).

Where, as here with respect to Grounds One, Two, and Five, the state courts supply no reasoned decision, this Court must perform an "'independent review of the record' to ascertain whether the state court decision was objectively unreasonable." Himes v. Thompson, 336 F.3d 848, 853 (9th Cir. 2003) (citing Delgado v. Lewis, 223 F.3d 976, 981-82 (9th Cir. 2000)).

VI.

DISCUSSION

A. Habeas Relief Is Not Warranted on Petitioner's Claims That Trial Counsel Rendered Ineffective Assistance.

1. Background.

Petitioner contends that trial counsel rendered ineffective assistance. Specifically, he contends trial counsel was ineffective for failing to call a defense gang expert, impeach the victim with his prior convictions, recall the victim as a witness after failing to lay foundation to introduce inconsistent statements, and object to prosecution gang expert testimony. (Pet. at 5-6, Attach. A.)

2. Legal Standard.

For a petitioner to prevail on his ineffective assistance of trial counsel claims, he must satisfy a two-prong test: (1) he must show that counsel's performance was deficient, and (2) he must show that he was prejudiced by the deficient performance. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). A court evaluating an ineffective assistance of counsel claim does not need to address both components of the test if a petitioner cannot sufficiently prove one of them. Id. at 697; see also Thomas v. Borg, 159 F.3d 1147, 1152 (9th Cir. 1998).

To prove deficient performance, a petitioner must show that counsel's representation fell below an objective standard of reasonableness. Strickland. 466 U.S. at 687-88. Because of the difficulty in evaluating counsel's performance, there is a "strong presumption that counsel's conduct falls within the wide range

of reasonable professional assistance." Id. at 689. Only if counsel's acts or omissions, examined in light of all the surrounding circumstances, fell outside this "wide range" of professionally competent assistance will the petitioner prove deficient performance. Id. at 690; United States v. Quintero-Barraza, 78 F.3d 1344, 1348 (9th Cir. 1995).

Establishing counsel's deficient performance does not warrant setting aside the judgment if the error had no effect on the judgment. Strickland, 466 U.S. at 691; see also Seidel v. Merkle, 146 F.3d 750, 757 (9th Cir. 1998). A petitioner must also show prejudice, such that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S. at 694. Thus, a petitioner will only prevail if he can prove that counsel's errors resulted in a "proceeding [that] was fundamentally unfair or unreliable." Lockhart v. Fretwell, 506 U.S. 364, 369, 113 S. Ct. 838, 122 L. Ed.2d 180 (1993).

Moreover, a habeas court's review of a claim under the Strickland standard is "doubly deferential." Knowles v. Mirzayance, 556 U.S. 111, 129 S. Ct. 1411, 1420, 173 L. Ed. 2d 251 (2009). The relevant question "is not whether a federal court believes the state court's determination under the Strickland standard was incorrect but whether that determination was unreasonable – a substantially higher threshold." Id. (citations omitted). "[B]ecause the Strickland standard is a general standard, a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard." Id. (citation omitted).

3. Defense Gang Expert.

In Ground One, Petitioner argues that his trial counsel was ineffective for failing to call a defense gang expert to rebut the testimony of the prosecution's gang expert that Petitioner was an active member of the Inglewood Family Bloods and committed the offense for the benefit of that gang. (Pet. at 5, Attach. A at 1-14.) Petitioner presents the declaration of a gang expert who identifies flaws in

the testimony of the prosecution's evidence and indicates that, if called as a witness, he would testify it was his opinion that Petitioner was not an active member of the Inglewood Family Bloods and that the current crime was not committed for the benefit of that gang. (Pet. Attach. A at 1, Ex. 2.)

Even assuming that Petitioner can show that counsel's failure to call a defense gang expert constitutes deficient performance, he cannot show that counsel's failure resulted in prejudice. The prosecution presented the opinion of Inglewood Police Officer Kerry Tripp from the city's gang intelligence unit. (RT at 145.) Officer Tripp had extensive knowledge of the Inglewood Family Bloods and had personal knowledge of Petitioner and his association with the gang. (Id. at 151-61, 174-76, 195.) Based on the expert's knowledge and training, he believed Petitioner to be an active member of the Inglewood Family Bloods and was of the opinion that a crime such as the one committed here would have been carried out for the benefit of that gang. (Id. at 166-67, 168-71.) Petitioner's proposed defense gang expert, however, was not from Los Angeles County, let alone Inglewood (Pet. Ex. 2 at 5-7), was merely "familiar with" the Inglewood Family Bloods gang (id. at 5), and did not have any firsthand knowledge of Petitioner (see id. at 5, 10 (reviewed materials but did not know Petitioner or interview Petitioner)).

In addition, the prosecution presented evidence that Petitioner had tattoos with potential gang significance, had belongings in his bedroom that could be construed as having gang connotations, and had been seen on multiple occasions in the presence of gang members and in known gang locations. (RT at 160-66, 174-76, 197-200, 265, 272.)

Ultimately, the jury credited the testimony of the prosecution's gang expert and the evidence of Petitioner's gang membership despite testimony from defense witnesses that Petitioner was not a gang member. There can be no doubt that under these circumstances, evidence from a defense expert whose credentials were

not specifically relevant to the issue at hand would not have convinced the jury to return a more favorable verdict.

Based on the foregoing, the Court finds that the California court's rejection of Petitioner's claim was neither contrary to, nor involved an unreasonable application of, clearly established federal law, as determined by the United States Supreme Court. Thus, habeas relief is not warranted on this claim.

4. Witness Impeachment.

In Ground Two, Petitioner faults counsel for failing to impeach victim Delorian Forman with his prior convictions and arrests. (Pet. at 5, Attach. A at 14-17.) Petitioner's claim is based on Forman's prior arrest for robbery pursuant to California Penal Code section 211, conviction for criminal threats pursuant to California Penal Code section 422, and citations for violations of California Vehicle Code sections 14601.1(a) (driving on a suspended license) and 12500(a) (driving without a license). (Pet. Attach. A at 14-17, Ex. 3.)

First, although Forman was charged with robbery, the charges were dismissed prior to his testimony against Petitioner. (Pet. Ex. 6 at 21-22.) Accordingly, the robbery charges could not have been used to impeach Forman's credibility. See People v. Williams, 170 Cal. App. 4th 587, 610 (2009) ("We conclude that evidence of prior arrests that did not result in convictions was inadmissible [against a defendant] either as proof of guilt or for impeachment."); Kennedy v. Super. Ct., 145 Cal. App. 4th 359, 379 (2006) (noting that pending charges might be relevant to show bias of prosecution witness but that charges would lose relevance if no longer pending at time of trial).

In addition, Forman was charged with driving on a suspended license and driving without a license. (Pet. Ex. 6 at 21.) Although the record does not clearly indicate whether Petitioner was convicted of these offenses, even assuming he was he could not have been impeached with these convictions because they are not deemed crimes of moral turpitude under California law. See People v. Flores, No.

E050188, 2011 WL 1782052, at *3 (Cal. App. 2011) (trial court found crime of driving with a suspended license was not a crime of moral turpitude and issue was not one challenged on appeal); People v. Ibarra, No. G040439, 2009 WL 2106100, at *6 (Cal. App. 2009) (upholding trial court's exclusion of evidence of arrest warrant against witness for failure to pay fines related to driving without a license and lacking proof of insurance); compare People v. Smith, No. B208368, 2009 WL 1219939, at *8 (Cal. App. 2009) (finding evidence of suspended license admissible under California Evidence Code § 780 "to prove or disprove the existence or nonexistence of a fact about which a witness has testified or opened the door.").

Because Petitioner cannot show that counsel would have been permitted to impeach Forman with evidence of these prior arrests and/or convictions, Petitioner cannot show that counsel was ineffective in this regard. Rupe v. Wood, 93 F.3d 1434, 1445 (9th Cir. 1996) ("[T]he failure to take a futile action can never be deficient performance.").

The record also indicates that Forman was convicted of making criminal threats pursuant to California Penal Code section 422. (Pet. Ex. 6 at 22.) To the extent it might have been advisable for counsel to impeach Forman with this felony conviction, Petitioner cannot show prejudice. Forman gave an unwavering identification of Petitioner and his vehicle both after the crime and during trial, and his account of the crime remained consistent.[3] (RT at 77-82, 91, 93-94, 98-99, 102, 129-30, 251-52, 256.) In addition, Forman was in custody at the time of his testimony for failing to appear in court pursuant to his subpoena. (Id. at 75-76.)

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[3] Although Petitioner might challenge a finding that Forman's account of the events remained unchanged in light of the assertion that he told Anthony Jones someone else shot him, Jones's testimony was not before the jury. Significantly, as discussed below, the testimony of Jones would not have resulted in a different verdict in light of other evidence admitted at trial.

Yet, the jurors disregarded his custody status and clearly credited his testimony when they convicted Petitioner of the current offense. Given these circumstances, it is not reasonable to conclude that the jury would have decided to reject Forman's testimony had it been presented with evidence that he had previously been convicted of a crime in an entirely unrelated action.

Based on the foregoing, the Court finds that the California court's rejection of Petitioner's claim was neither contrary to, nor involved an unreasonable application of, clearly established federal law, as determined by the United States Supreme Court. Thus, habeas relief is not warranted on this claim.

5. Inconsistent Statements.

a. Background

In Ground Three, Petitioner argues that counsel was ineffective for failing to recall Forman as a witness after failing to lay foundation to introduce evidence of inconsistent statements he made to another individual. (Pet. at 6, Attach. A at 18-31.) Forman identified Petitioner as the shooter from a photographic lineup following the crime and in open court at trial. (RT at 78, 93-94, 102, 251.) To contradict this evidence, Petitioner sought to present the testimony of Forman's friend Anthony Jones. The following exchange took place between the parties and the trial court regarding the admissibility of Jones's testimony:

> [The Prosecutor]: I apologize for the late objection, but this just occurred to me over the lunch hour, your honor. My understanding is Mr. Jones is going to testify.
>
> The Court: I'm sorry, this gentleman's name is?
>
> [The Prosecutor]: Anthony Jones. He is going to testify to statements that the victim, Delorian Forman, made to him. And Mr. Forman, in essence, this is just in summary, this defendant didn't shoot him, but somebody else did.

So what that is, it is an inconsistent statement, impeachment evidence. And I'm just going to quote the Evidence Code. I'm starting with section 1235 which states "that evidence of a statement made by a witness is not inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with section 770.

Section 770 provides that unless the interest of justice otherwise requires extrinsic evidence of a statement made by a witness that is inconsistent with any part of his testimony at the hearing, it shall be excluded unless A, the witness was so examined while testifying as to give him an opportunity to explain or deny the statement, or the witness has not been excused from giving further testimony in the action.

In this case, neither one of those two sections apply. Mr. Forman was never examined or questioned either by myself or by [defense counsel] about any other statements that he may have given to Mr. Jones that were inconsistent with what he testified to in court. And the witness has been excused from further testimony. The court call us to sidebar and warn us that the court would excuse the witness and release him (sic).

I think his testimony is inadmissible. It's hearsay and I would object to it on that base (sic).

The Court: [Defense counsel].

[Defense Counsel]: I would disagree, Judge, because it is in the interest of justice. The victim has categorically named my client as the shooter. He has unequivocally identified him with photographs that were shown to him, and he has categorically claimed that he is the person that was involved in this crime.

And as such, Mr. Anthony Jones, his testimony will refute that because Mr. Forman had told him that he was shot by somebody else. And the code section says, in the interest of justice otherwise. And then it gives two explanations.

I'm submitting to the court that Mr. Jones' testimony is extremely urgent, and I think that it will, it's paramount that his testimony be allowed.

The Court: How long have you known about this gentleman?

[Defense Counsel]: I have known about --

The Court: What I'm saying is, did you know about him before May 25th?

[Defense Counsel]: Oh, yes, of course.

The Court: That's my question.

[Defense Counsel]: As a matter of fact, well if the court wants to know the exact date --

The Court: I don't. I need to know that you knew before May 25th.

[Defense Counsel]: Yes.

The Court: Anything else, Mr. --

The Court: I'm asking you is there anything else that you want to say?

[Defense Counsel]: No.

The Court: Then the court has listened to both arguments, and with respect to the testimony, proposed testimony of Mr. Jones, to the extent that he will give testimony that will purport to impeach or contradict what was said by Delorian Forman on May 25, that motion, as far as the People are concerned, in other words; he will not be allowed to give impeachment that regard (sic). The court finds there is

> no compliance with 1235 and 770 of the Evidence Code. That will be the court's ruling.

(RT at 279-82.)

The trial court informed Petitioner's counsel that Jones would be allowed to testify to other matters, but could not testify to statements Forman allegedly made about being shot by another individual. (Id. at 282.) After speaking with Jones, Petitioner's counsel elected not to call Jones as a witness. (Id. at 282-84.) Petitioner's counsel did not attempt to recall Forman as a defense witness to lay the foundation for presenting Jones's testimony.

In support of his claim, Petitioner has presented a report from a defense investigator memorializing an interview with Anthony Jones before trial. (Pet. Ex. 3.) At that time, Jones explained to the investigator that he was a member of Forman's gang, knew Forman well, and had also know Petitioner for eighteen months. (Id. at 14.) Jones stated that Petitioner was not a gang member. (Id.) Jones also indicated that Forman was jealous of Petitioner because of his "tricked out" car and the attention he received from women. (Id.) According to Jones, Forman and other gang members were at Jones' house shortly after Forman was shot. Forman showed off his wounds and stated that he was shot by some Rollin' 20s/Black Pea Stones gang members. (Id. at 15.)

Petitioner also presents the declaration of his appellate counsel, who states that he spoke with Petitioner's trial counsel after trial. According to appellate counsel, Petitioner's trial counsel admitted that he "screwed up" by failing to lay the foundation to present the defense's "best witness." (Pet. Ex. 4.)

b. California Court Opinion.

The California Court of Appeal denied Petitioner's claim, as follows:

> . . . Mizrahi's conduct was not prejudicial, as there is no reasonable probability that Jones's testimony would have eroded Forman's credibility or otherwise affected the trial's outcome. Although

Forman was the prosecution's sole eye witness to the shooting, the other evidence at trial showed that Forman's account of the shooting and identification of appellant as the shooter had remained stable and resolute since the shooting. According to the offer of proof in appellant's new trial motion, Jones would have testified that after Forman was released from the hospital, he boasted to fellow gang members that he suffered his wound in a shootout with a gang to which appellant does not belong. However, Forman's trial testimony was materially identical to the account of the shooting that he first gave to investigating officers while hospitalized, and he repeatedly identified appellant as the shooter from the time he was hospitalized immediately following the shooting.

At trial, Officer Fedynich testified that Forman provided a detailed account of the shooting when Fedynich first interviewed him in the hospital shortly after the incident. According to Fedynich, Forman told him that he first saw the shooter at a car wash. The shooter and a girl were in a black Malibu. Later, while Forman was seated in a car near 36th Street and 7th Avenue, the shooter drove up in a black car, called Forman over, and fired at him. Forman said that the shooter was a gang member with a moniker that Fedynich heard as "D-Mac."

Fedynich further testified that Forman made no identification upon viewing a six-pack that included a gang member whom Fedynich knew as "D-Mac[.]" However, when Fedynich later showed him a second six pack in the hospital, Forman stated that he was "a hundred percent sure" that appellant's photo depicted the shooter. While still hospitalized, Forman also identified Flemming in a six-pack as the woman accompanying appellant at the car wash, and identified photos of her Chevy Malibu as depicting the shooter's car.

> The record thus discloses that while hospitalized, Forman not only identified appellant as the shooter, but provided a full and detailed account of the shooting matching his trial testimony. Moreover, Forman reaffirmed his identification of appellant as the shooter at the preliminary hearing and trial. In view of the stability and firmness of Forman's account of the crime and identification of appellant as the perpetrator, it is not reasonably likely that Jones's testimony would have altered the trial's outcome.
>
> Nor does the other trial evidence establish the reasonable likelihood of a different outcome had Jones testified. As explained above . . . appellant's alibi defense was fatally undermined by a critical defect unrelated to Jones's proffered testimony: the T-Mobile records showing that the 9:13 p.m. call originated in the Los Angeles-Alhambra area discredited the testimony from appellant and his alibi witnesses that he was in Ontario at the time of the call.
>
> Furthermore, as appellant testified that his relationship with Forman had been amicable prior to the shooting, nothing in the record suggests why Forman, while hospitalized, might have invented an account of the crime that falsely identified appellant as the perpetrator.
>
> In sum, appellant has failed to demonstrate that Mizrahi rendered ineffective assistance of counsel in connection with Jones's testimony.

(Lodgment 6 at 20-23.)

c. Analysis.

Even assuming, as the state court did, that Petitioner's counsel was remiss in failing to lay the foundation for Jones's testimony during the initial questioning of Forman or failing to recall Forman as a defense witness later in trial, Petitioner cannot establish prejudice.

From the very beginning of the investigation Forman identified Petitioner as the shooter. While still in the hospital, Forman told police that the shooter was a member of Flawless car club and described the vehicle Petitioner was driving. (RT at 249.) Forman then identified Petitioner and his girlfriend from photographic lineups.[4] (Id. at 97-99, 251-52, 257-58.) Forman also identified the vehicle Petitioner was driving the day of the shooting through photographs. (Id. at 256.) At trial, Forman identified Petitioner as the shooter and testified that he did not have any doubt as to his identification. (Id. at 78, 102.)

In addition, the evidence suggested that Petitioner and Forman exchanged words over whether Petitioner was a gang member. Petitioner testified that he told Forman he was not a gang member. (Id. at314.) Forman testified that Petitioner initially denied gang membership, but subsequently admitted being a member of the Inglewood Family Bloods. (Id. at 85-86, 88, 108.) Thus, the evidence supported an inference that there might have been some animosity between Petitioner and Forman.

Significantly, the prosecution presented evidence that refuted Petitioner's alibi defense. Petitioner, his mother, and his sister testified that he was at a restaurant in Ontario by about 8:30 p.m. on the evening of the shooting and, except for a 20 minute absence, did not leave until close to 10:00 p.m. (Id. at 389, 398, 408-11.) If this were true, it is unlikely he would have been able to commit the crime in Los Angeles at 7:30 p.m. (id. at 76, 81), and drive to Ontario by 8:30 p.m. in holiday weekend traffic (id. at 323-24). However, Petitioner admitted that he placed a call from his cell phone to his father at about 9:14 p.m. that evening. (Id. at 429.) Experts testified that, when this call was placed, Petitioner's phone was located in the area of Alhambra. (Id. at 215-16, 486, 502, 505, 512.)

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[4] Petitioner's girlfriend was not identified as being with Petitioner at the time of the shooting, but was with Petitioner earlier that day. (RT at 97.)

Accordingly, the evidence does not support Petitioner's claim that he was in Ontario from 8:30 p.m. to about 10:00 p.m.

Given the strength of Forman's identification, the evidence of a possible rift between Petitioner and Forman, and the flaws in Petitioner's defense, it is not reasonable to conclude that evidence suggesting that Forman might have given differing information in an attempt to "brag" in front of fellow gang members would have resulted in a different result at trial.

Based on the foregoing, the Court finds that the California court's rejection of Petitioner's claim was neither contrary to, nor involved an unreasonable application of, clearly established federal law, as determined by the United States Supreme Court. Thus, habeas relief is not warranted on this claim.

6. Prosecution Gang Expert.

a. Background.

Petitioner contends in Ground Four that counsel was ineffective for failing to object to a portion of the prosecution's questioning of gang expert, Kerry Tripp. Specifically, Petitioner argues that counsel should have objected when the prosecutor asked the expert a hypothetical question regarding the circumstances of the crime because the prosecutor asked whether the expert had an opinion as to whether the crime was committed "with the specific intent to promote [gang] activities." (Pet. at 6, Attach. A at 31-38.) Petitioner's claim is premised on the following portion of the gang expert's testimony:

> Q Let me provide you the following hypothetical.
>
> You have a Rollin' 30s gang member who sees what he perceives to be a rival gang member in his neighborhood near 36th Avenue, I'm sorry, 36th Street and 7th Avenue. And he, as you would say, hits him up, says, "Where you from?" The perceived rival at first says, "I don't gang bang," but then claims Family Bloods.

The altercation doesn't go any further. It's quashed, as far as the Rollin' 30s gang member is concerned.

About two weeks later, in the same area near 36th Street and 7th Avenue, the Rollin' 30s gang member is sitting in a car when the member who claims Family Bloods, pulls up in a car, motions him over, the gang member from the Rollin' 30s gets out of his car, out of the passenger side, walks up to the driver's side of the individual that claims the Family Bloods.

And the individual says to the Rollin' 30s gang member, "I heard you been looking for me." And the Rollin' 30s gang member says to him, "If I was looking for you, I would have saw you by now or "I would have found you," something to that effect, at which point, the member who claims Family Bloods, shoots, fires several shots, one of which hits the Rollin' 30s gang member in the stomach, and then drives off, yelling out something to the effect of "B-Mac" or "D-Mac," "Family Bloods."

Do you have an opinion as to whether that crime of shooting the individual, which also includes shooting from the car, which also includes possession of a firearm, whether those three crimes where committed for the benefit of, at the direction of, Family Bloods and *with the specific intent to promote its activities*?

. . . .

The Witness: Yes, I have an opinion.

Q Okay. And what's your opinion?

A My opinion is that the crimes that you mentioned would have been committed for the benefit of Inglewood Family Gangster Bloods. And I believe this crime further promotes its gang because gang members are like anybody else. They go back and talk to the friends and

when you commit a violent crime or any crime, especially a violent crime, you gain respect in that gang, and you get recognition.

Other gang members see this and it makes them want to go out and do the same thing, get the same kind of respect and recognition this person just got if you shoot and kill or wound a rival gang member, you obviously benefit yourself and that gang because that is one less person that can commit a crime against you.

Crimes like this are committed by firearms. And he is in a rival gang territory. This definitely benefits Inglewood Family Gangster Bloods and him personally.

(RT at 168-70 (emphasis added).)

b. California Court Opinion.

The California Court of Appeal denied Petitioner's claim, as follows:

The limits on expert opinion regarding a gang member's state of mind in conducting crimes for the gang's benefit were examined in *People v. Killebrew* (2002) . . . (*Killebrew*) and *People v. Gonzalez* (2006) . . . (*Gonzalez*). In *Killebrew*, police officers searched three cars close to the site of a gang shooting, and discovered a gun in one car and a second gun near the other two cars. All the cars had been occupied by members of a particular gang. The defendant, a member of the gang, was found standing near one of the cars, and was charged with conspiracy to possess a firearm. At trial, a gang expert testified that the defendant, as a gang member, was aware of the guns and had the specific intent to possess them. The appellate court concluded that this was improper expert opinion on ultimate facts.

After *Killebrew*, our Supreme Court repudiated any suggestion in that case that gang experts may not offer opinions in response to hypothetical questions framed in terms of facts established by the

prosecution. In *Gonzalez*, the defendant, a gang member, entered territory claimed by a rival gang and shot two men working on a driveway. Several individuals told the police the defendant was the shooter, but disclaimed their statements at trial. During the trial, the prosecutor asked the gang expert hypothetical questions regarding whether gang members would intimidate witnesses under the circumstances established by the evidence. The expert opined that they would do so.

Relying on *Killebrew*, the defendant argued that the expert's opinions were inadmissible. Our Supreme Court rejected this contention, stating: "[The gang expert] merely answered hypothetical questions based on other evidence the prosecution presented, which is a proper way of presenting expert testimony." Following *Gonzalez*, several courts have concluded that an expert may properly opine on whether a crime was committed for a gang's benefit.

Here, the prosecutor posed a hypothetical question to Tripp framed in terms of the evidence regarding the facts of the shooting, including the gang challenges that preceded it. After reciting these facts, the prosecutor asked, "Do you have an opinion as to whether that crime of shooting the individual, which also includes shooting from the car . . . [and] possession of a firearm, whether those three crimes were committed for the benefit of, at the direction of, [the] Family . . . and with the specific intent to promote its activities." Tripp answered, "My opinion is that the crimes . . . would have been committed for the benefit of the Inglewood Family."

Appellant contends that the question was subject to a meritorious objection under *Killebrew*, as it effectively sought Tripp's opinion regarding appellant's specific intent. However, it is unnecessary for us

> to address this contention, as Tripp's answer addressed only whether the listed crimes were committed for the benefit of the gang, an admittedly properly subject of expert testimony. Accordingly, even if Mizrahi had objected to the question and the trial court had asked the prosecutor to restate it without using the term "specific intent," the jury would have heard the same opinion. As the opinion itself was proper, appellant has failed to demonstrate ineffective assistance of counsel.

(Lodgment 6 at 17-18 (citations omitted.)

c. Analysis.

Petitioner's argument is premised on the opinion of the California Court of Appeal that a gang expert cannot testify to the issue of a defendant's intent, as expressed in Killebrew, 103 Cal. App. 4th 644, 647 (2002) and recognized in Briceno v. Scribner, 555 F.3d 1069, 1079 n.2 (9th Cir. 2008). However, this is not the current state of California law. As detailed by the court of appeal on direct review of Petitioner's conviction, the California Supreme Court has found it permissible for experts to testify to issues such as intent based on purely hypothetical questions. People v. Xue Vang, 52 Cal. 4th 1038, 1047-49 (2011); People v. Gonzalez, 38 Cal. 4th 932, 946-47 (2006). Because the prosecutor's hypothetical question was proper under state law, counsel could not have been ineffective for failing to object. Rupe, 93 F.3d at 1445.

In addition, even if the Court could find that counsel should have objected to the question, Petitioner cannot show prejudice. Nothing in the expert's answer to the question spoke to the issue of intent. Rather, the expert merely offered his opinion as to whether the hypothetical crime would have been committed for the benefit of the Inglewood Family Bloods. (RT at 170.) Accordingly, even if counsel had lodged a successful objection to the intent portion of the question, he would not have elicited a different response from the expert.

Based on the foregoing, the Court finds that the California court's rejection of Petitioner's claim was neither contrary to, nor involved an unreasonable application of, clearly established federal law, as determined by the United States Supreme Court. Thus, habeas relief is not warranted on this claim.

B. Habeas Relief Is Not Warranted on Petitioner's Claims That Appellate and Habeas Counsel Rendered Ineffective Assistance.

Finally, in Ground Five, Petitioner argues that his appellate and habeas counsel rendered ineffective assistance of counsel by failing to adequately present the issues raised in Grounds Three and Four on direct and habeas review in the state courts. (Pet. at 6, Attach. A at 38-42.)

To the extent Petitioner claims ineffective assistance of habeas counsel, his claim fails. The United States Supreme Court has not clearly established a constitutional right to the effective assistance of counsel on collateral review in state courts. See Coleman v. Thompson, 501 U.S. 722, 752, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991) ("There is no constitutional right to an attorney in state post-conviction proceedings. . . . Consequently, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings."); Martinez v. Ryan, --- U.S. ---, 132 S. Ct. 1309, 1315, 182 L. Ed. 2d 272 (2012) (Coleman left open "a question of constitutional law: whether a prisoner has a right to effective counsel in collateral proceedings which provide the first occasion to raise a claim of ineffective assistance at trial."). Absent such "clearly established Federal law," the Court cannot conclude that the state court's denial of this claim was an "unreasonable application" of Supreme Court precedent. Wright v. Van Patten, 552 U.S. 120, 126, 128 S. Ct. 743, 169 L. Ed. 2d 583 (2008) (where Supreme Court's cases give no clear answer to the question presented, state court's rejection of petitioner's claim did not constitute an unreasonable application of clearly established Federal law); Musladin, 549 U.S. at 77 ("Given

lack of holdings from this Court regarding [a specific issue], it cannot be said that the state court 'unreasonabl[y] appli[ed] clearly established Federal law.'").

To the extent Petitioner claims ineffective assistance of appellate counsel, the Strickland standard applies. A habeas petitioner must show that, but for appellate counsel's failure to raise the omitted claim(s), there is a reasonable probability that the petitioner would have prevailed on appeal. In the absence of such a showing, neither Strickland prong is satisfied. See Pollard v. White, 119 F.3d 1430, 1435-37 (9th Cir. 1997); Miller v. Keeney, 882 F.2d 1428, 1434-35 (9th Cir. 1989). Appellate counsel does not have a constitutional duty to raise every non-frivolous issue requested by a defendant. Jones v. Barnes, 463 U.S. 745, 751, 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983). Counsel "must be allowed to decide what issues are to be pressed." Id. Otherwise, the ability of counsel to present the client's case in accord with counsel's professional evaluation would be "seriously undermined." Id.; see also Smith v. Stewart, 140 F.3d 1263, 1274 n.4 (9th Cir. 1998) (counsel not required to file "kitchen-sink briefs" because it "is not necessary, and is not even particularly good appellate advocacy."). There is, of course, no obligation to raise meritless arguments on a client's behalf. See Strickland, 466 U.S. at 687-88 (requiring a showing of deficient performance as well as prejudice). The weeding out of weaker issues is widely recognized as one of the hallmarks of effective appellate advocacy, and counsel is not deficient for failing to raise a weak issue. Miller, 882 F.2d at 1434. In order to demonstrate prejudice in this context, Petitioner must demonstrate that he probably would have prevailed on appeal, but for appellate counsel's errors. Id. at 1434 n.9. A court evaluating an ineffective assistance of appellate counsel claim does not need to address both components of the test if the petitioner cannot sufficiently prove one of them. See Strickland, 466 U.S. at 697; see also Thomas v. Borg, 159 F.3d 1147, 1151-52 (9th Cir. 1998).

Here, the Court has found no merit to Petitioner's claims and thus Petitioner would have met with no success even if the claims had been presented to the state courts as they have been presented here. Accordingly, the Court cannot find that counsel was ineffective for failing to properly present these claims on direct review in state court. Miller, 882 F.2d at 1434 n.9 (to demonstrate prejudice a petitioner must demonstrate that he probably would have prevailed on appeal).

Based on the foregoing, the Court finds that the California court's rejection of Petitioner's claim was neither contrary to, nor involved an unreasonable application of, clearly established federal law, as determined by the United States Supreme Court. Thus, habeas relief is not warranted on this claim.

VII.

RECOMMENDATION

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

DATED: April 18, 2014

HONORABLE OSWALD PARADA
United States Magistrate Judge

S205390

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re RODTRAVION WOODS on Habeas Corpus.

The petition for writ of habeas corpus is denied.

Werdegar, J., was absent and did not participate.

SUPREME COURT
FILED

JUL 31 2013

Frank A. McGuire Clerk

Deputy

CANTIL-SAKAUYE

Chief Justice

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re

RODTRAVION WOODS

on

Habeas Corpus.

No. B232981

(Super. Ct. No. BA359103)
(Bob S. Bowers, Judge)

ORDER

THE COURT:*

The petition for writ of habeas corpus has been read and considered concurrently with the appeal in *People v. Woods,* B226542. For the reasons explained in our decision regarding the appeal, the petition is denied for failure to demonstrate entitlement to relief.

*EPSTEIN, P.J., MANELLA, J. SUZUKAWA, J.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. RODTRAVION WOODS, Defendant and Appellant.	B226542 (Los Angeles County Super. Ct. No. BA359103)

APPEAL from a judgment of the Superior Court of Los Angeles County, Bob S. Bowers, Jr., Judge. Affirmed.

The Fox Firm and Christopher A. Darden, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Linda C. Johnson and Lance E. Winters, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Rodtravion Woods was convicted of attempted murder, shooting from a motor vehicle, and possession of a firearm as a felon. He contends that the trial court improperly excluded defense witnesses, that his trial counsel rendered ineffective assistance, and that the trial court improperly denied his request for new appointed counsel. We find no reversible error and affirm.

RELEVANT PROCEDURAL BACKGROUND

On September 11, 2009, an information was filed, charging appellant with the attempted murder of Delorian Forman (Pen. Code, §§ 187, subd. (a), 664), discharging a firearm from a motor vehicle (Pen. Code, § 12034, subd. (c)), and possession of a firearm as a felon (Pen. Code, § 12021, subd. (a)(1)).[1] Accompanying the charges were gang allegations (§ 186.22, subd. (b)(1)(C)) and firearm use allegations (12022.53, subds. (b) - (e)). Appellant pleaded not guilty and denied the special allegations.

On June 2, 2010, the jury found appellant guilty as charged, and found the special allegations to be true. On July 27, 2010, the trial court sentenced appellant to a term of imprisonment of 5 years plus 40 years to life.

FACTS

A. *Prosecution Evidence*

Inglewood Police Department Officer Kerry Tripp, a gang expert, provided testimony in support of the gang allegations accompanying the charges against appellant. According to Tripp, the Inglewood Family gang claims territory in Inglewood. Members often wear red clothing and caps, and some display tattoos of stars. As a "Blood" gang, the Inglewood Family is hostile to neighboring

"Crip" gangs such as the Rollin' 30s. Kerry opined that appellant belonged to the Inglewood Family gang.

The incident underlying the charges against appellant occurred on July 3, 2009. At approximately 7:30 p.m., Los Angeles Police Department (LAPD) officers responded to a call regarding a shooting at 36th Street and 7th Avenue in Los Angeles, in territory claimed by the Rollin' 30s. There they found Delorion Forman lying on the ground with a bullet wound.

Forman testified as follows: He is a member of the Rollin' 30s gang. Approximately two weeks before July 3, 2009, he encountered appellant at a meeting of the Flawless Car Club, to which appellant belonged. The meeting occurred near 36th Street and 7th Avenue. At the meeting, Forman told appellant that he was from the Rollin' 30s, and asked "Where are you from?" Appellant initially replied that he did not "gang bang," but later stated that he was from "Family." When the pair exchanged words, other members of the car club intervened, and no physical altercation occurred.

On the evening of July 3, 2009, Forman saw appellant with a young woman at a car wash located at 52d Street and Crenshaw. Approximately 30 minutes later, at 7:30 p.m., Forman was seated in a car parked near 36th Street and 7th Avenue.[2] Appellant drove up in a black car, stopped, and called to Forman. When Forman walked over to appellant's car, appellant said, "I heard you were looking for me." Forman answered, "If I was looking for you, I would have found you." Appellant then fired four or five gunshots, hitting Forman in the stomach. According to Forman, after appellant fired his gun, he said, "I'm B-Mac from Inglewood

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1 All further statutory citations are to the Penal Code, unless otherwise indicated.

2 On cross-examination, Forman admitted that he was smoking a marijuana cigarette while seated in the parked car.

Family." Forman was hospitalized for three weeks due to his wound. According to Forman, he told investigating officers that the shooter was "B-Mac," who had stars tattooed on his arms and belonged to the Flawless Car Club.[3]

LAPD Officer Paul Fedynich testified that Forman, while hospitalized, provided a detailed account of the shooting and its perpetrator. When Fedynich first talked to Forman in the hospital, he believed that Forman described the shooter as "D-Mac." As a result, Fedynich suspected the shooter was Donte Woods, an Inglewood Family member whose moniker is "D-Mac." On July 7, 2009, he showed Forman a photographic "six-pack" that included Donte Woods, but not appellant. Forman identified no one in the six-pack as the shooter.

Fedynich decided to investigate another aspect of Forman's description of the shooter, namely, that the shooter belonged to the Flawless Car Club and sometimes drove a green Camaro. He found the car club's internet Web site, which displayed a green Camaro registered to appellant. Fedynich concluded that appellant was a potential suspect, and prepared a second six-pack. Forman viewed the six-pack, identified appellant as the shooter, and stated he was "a hundred percent sure" regarding the identification. Investigating officers searched appellant's residence and found several items of red clothing.

On July 21, 2009, appellant was arrested in the presence of his girlfriend, Lanica Flemming. Appellant had tattoos of stars on his arms. Nearby, officers located appellant's green Camaro and a black Chevy Malibu with "Hello Kitty" seat covers. Appellant identified Flemming in a photographic six-pack as the

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3 At trial, Forman acknowledged that he had been placed in custody to secure his testimony, and that he had failed to comply with a subpoena for his attendance. He asserted that he did not answer the detectives who attempted to serve the subpoena because he "woke up late." On cross-examination, Forman stated that he told the detectives, "Fuck you and fuck the judge. I'm not going to court."

woman accompanying appellant at the car wash. Forman also identified photos of the Chevy Malibu as depicting the shooter's car. Forman told investigating officers he recognized the Chevy Malibu by the "Hello Kitty" inside it.

Melanie Caldwell, a custodian of records for T-Mobile, testified regarding the location of appellant's cell phone on July 3, 2009, based on incoming and outgoing calls through the phone. According to Caldwell, a cell phone's location at the time of a particular call can be determined by the cell phone tower that the call passed through, as cell phones seek the nearest tower, and a tower's range is no more than 15 city blocks. At 6:45 p.m., an outgoing call from appellant's cell phone occurred near 3125 West 54th Street in Los Angeles. Between 9:00 and 9:15 p.m., a series of calls occurred while the phone was on or near the 5, 710, and 10 Freeways. Of these, an outgoing call at 9:13 p.m. occurred while the phone moved from Los Angeles to Alhambra. Between 9:40 and 9:58 p.m., another series of calls occurred while it was in the Ontario-Fontana area. In addition, at 7:35 p.m., a call was made from the cell phone to appellant's voicemail on the phone, and after 8:48 p.m. several text messages were sent and received on the phone. According to Caldwell, neither cell phone calls to voicemail systems nor cell phone text messages generally create records showing the location of a cell phone.

B. *Defense Evidence*

Appellant testified as follows: He had never been a member of any gang, including the Inglewood Family. The four stars tattooed on his arms represented

his four sisters, and the items of red clothing found in his residence belonged to relatives or were gifts from relatives.[4]

In 2009, appellant joined the Flawless Car Club as a hobby. Although Forman did not belong to the club, he hung out in the area and often attended meetings. Appellant first met Forman at a club meeting two or three months before the shooting. Later, appellant talked to Forman amicably on other occasions.

On July 3, 2009, appellant intended to celebrate the July 4th holiday in Las Vegas with relatives. His plans included a party in a restaurant in Ontario on the evening of July 3. At 5:00 p.m., he and his girlfriend, Lanica Flemming, attended the car wash, which the car club had organized to raise funds for the funeral of a club member. As appellant's cell phone needed charging, he used a charger in a car owned by a friend, Derrick Smith. Because appellant was in a rush to begin his trip to Las Vegas, he left his cell phone in Smith's car.

Appellant drove to Ontario in Flemming's car, a black Chevy Malibu with "Hello Kitty" seat covers. Accompanying appellant were his friend, Devin Bush, as well as Flemming and her sister. As they began their trip, they stopped briefly at Bush's residence in Los Angeles. They left Bush's residence at approximately 6:30 p.m., and arrived at the party in Ontario between 8:10 and 8:15 p.m.

During the trip to Ontario, appellant borrowed a cell phone to call and send text messages to his own phone. In response, appellant received a text message from Smith. Appellant told Smith that he would pay him $50 and "detail" his car if Smith brought appellant's phone to Ontario. Smith agreed to do so. Shortly after 9:00 p.m., appellant briefly left the party, met Smith in Ontario, retrieved his

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[4] Appellant acknowledged that he had been convicted of two prior felonies, namely, willful discharge of a firearm or BB gun (§ 246) and forgery (§ 470, subd. (d)).

phone, and returned to the party. At approximately 10:30 p.m., he left the party to go to Las Vegas.

During cross-examination, appellant admitted that he placed a call from his cell phone at 9:13 p.m. on July 3. He maintained that he made the call from Ontario, but on further questioning, acknowledged that the T-Mobile records showed the 9:13 p.m. call passed through a cell phone tower in Los Angeles. Appellant also acknowledged that he once told Officer Fedynich that Flemming probably drove her black Chevy Malibu near 36th Street and 7th Avenue on the evening of the shooting, and that Flemming often carried his cell phone with her. Appellant stated that when he spoke to Fedynich, he was confused regarding the date of the shooting.

Terry Easter, Devin Bush's mother, testified that on July 3, 2009, appellant and Bush stopped at her home for approximately 15 minutes, and left before 6:30 p.m. Reginia Mikell and Tiana Shiel, appellant's mother and sister, testified that at approximately 8:30 p.m., appellant arrived at a party in Ontario that they attended. Appellant was accompanied by Bush, Flemming, and Flemming's sister. According to Mikell, appellant borrowed her car, briefly left the party, returned, and departed for Las Vegas after the party ended around 10:00 p.m.

John Cosgrove, a computer systems engineer, opined that the call to appellant's voicemail at 7:35 p.m. was not placed from appellant's cell phone, as T-Mobile's records associated no cell phone tower with the call. He further noted that the T-Mobile records showed that the cell phone left Los Angeles, moved through Alhambra, and eventually arrived in the Fontana-Ontario area.

On cross-examination, Cosgrove acknowledged that according to the T-Mobile records for July 4 and 5, 2009, when appellant admitted possessing the cell phone, the phone's voicemail was checked many times, yet the T-Mobile records associated no cell towers with some of these calls. Cosgrove also testified that the

call from appellant's cell phone at 9:13 p.m. on July 3, 2009, initially relied on a tower in Los Angeles and then a tower in Alhambra. According to Cosgrove, T-Mobile's records showed that the 9:13 p.m. call occurred in or around Alhambra, not Ontario.[5]

DISCUSSION

Appellant contends (1) that the trial court erroneously excluded testimony from two defense witnesses, (2) that his trial counsel rendered ineffective assistance of counsel, and (3) that the trial court improperly denied his request for new appointed counsel under *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*). For the reasons explained below, we find no reversible error.

A. *Underlying Proceedings*

As appellant's contentions rely on an intertwined set of facts, we begin by summarizing the key proceedings related to the contentions. On May 21, 2010, prior to the selection of the jury, the prosecutor told the trial court that the parties intended to complete the presentation of evidence by Friday, May 28. Appellant's counsel, Edward Mizrahi, did not dispute this estimate.

Shortly before noon on Thursday, May 27, the prosecution completed its case-in-chief. When the trial court asked Mizrahi to begin the defense case in the afternoon, Mizrahi said that his expert was unavailable until Friday and that some "lay" witnesses could not testify before Tuesday of the following week. Noting that Mizrahi had previously stated he was ready for trial and that the jury had been

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5 On re-direct examination, Cosgrove suggested that the T-Mobile records might contain some errors or "anomalies," but he identified none related to the 9:13 p.m. call.

told the presentation of evidence would conclude on Friday, the court directed Mizrahi to present his available witnesses after the lunch break.

At the beginning of the afternoon session on Thursday, May 27, the prosecutor objected to testimony that Mizrahi planned to elicit from Anthony Jones in order to impeach Forman. According to the prosecutor, "in summary," Jones was to testify that Forman told Jones that appellant "didn't shoot him, but somebody else did." The prosecutor argued that Jones's proposed testimony was inadmissible hearsay under Evidence Code sections 770 and 1235, which ordinarily bar extrinsic evidence of statements inconsistent with a witness's testimony unless the witness was questioned regarding the statements or the witness has not been excused when the extrinsic evidence is admitted. As the prosecutor noted, no one examined Forman regarding the purported statements to Jones before Forman had been excused as a witness. After determining that Mizrahi was aware of Jones when Forman testified, the trial court excluded the proposed testimony. Jones never appeared as a witness.

On the afternoon of Friday, May 28, shortly before Mizrahi presented testimony from Cosgrove, his final witness, Mizrahi informed the court that appellant felt strongly that Lavina Gonzalez should be permitted to testify, even though she could not appear until the following week. The trial court declined to "wait" for Gonzalez, stating that her testimony was offered solely to corroborate Mikell's and Shiel's testimony that appellant attended a party in Ontario on the evening of the shooting. The court explained: "I don't believe that [the absence of Gonzalez's testimony] would in any way put the defense in detriment . . . because two other witnesses testified [regarding] that same issue."

After the jury returned its verdict, Mizrahi filed a motion for a new trial, contending that the trial court erred in excluding the proffered impeachment testimony from Jones, whom the motion characterized as Forman's "fellow gang

member[]." According to the motion, Jones would have testified as follows: "[F]ollowing Forman's hospital discharge[,] he boasted to his group of gang members . . . that he got into it with some 'Rollin 20's Black Pea Stones' gang members and got shot. Allegedly[,] Jones was with Forman at the Crenshaw mall a month prior to the shooting; . . . they met some Black Pea Stone gang member[s] and Forman got into a yelling challenge with one of them. One opposing gang member said he would get Forman later; . . . the logo for [the] Black Pea Stones [is] the star tattoo on their arms."

On June 29, 2010, at the beginning of the hearing on the new trial motion, appellant requested new appointed counsel under *Marsden*. During the hearing on this request, appellant contended that Mizrahi had rendered ineffective assistance by failing to present several witnesses. Appellant asserted: "I have at least five witnesses . . . that I subpoenaed that I was not able to use." One of these witnesses appears to be Jones, as appellant argued that Mizrahi improperly failed to obtain impeachment testimony from Jones.

The remaining witnesses were alibi witnesses whose presence Mizrahi purportedly failed to secure. Of these witnesses, the sole person appellant specifically named was Gonzalez, whom he characterized as the guest of honor at the party in Ontario. Appellant argued that the jury was likely to find Gonzalez credible because she was not related to him. According to appellant, the alibi witnesses did not appear at trial because Mizrahi told them that they were not needed until Wednesday, June 2, even though the presentation of his defense had to conclude on Friday, May 28. Appellant attributed this scheduling error to Mizrahi's mistaken understanding of the court orders regarding the deadline for completing the presentation of evidence.

Regarding Gonzalez's absence, Mizrahi responded that after the presentation of evidence concluded on Friday, May 28, Mizrahi told Gonzalez not to attend the

trial because "all witnesses had appeared that were being permitted to appear." Mizrahi also suggested that Gonzalez's testimony would have added little to the other defense witnesses' testimony. Regarding the excluded testimony from Jones, Mizrahi noted only that the new trial motion was pending before the court.

In denying the *Marsden* request, the trial court concluded that appellant had not presented specific grounds establishing "a substantial impairment of his right to counsel." The court determined that the absence of Gonzalez's testimony was "insignificant," in view of the other defense evidence, and it rejected appellant's remaining contentions as general disagreements over "case management or trial tactics." The court subsequently denied the new trial motion, reasoning that its ruling at trial was correct.

B. *Exclusion of Testimony*

Appellant maintains that the trial court improperly prevented him from presenting the proferred testimony from Jones and Gonzalez. As explained below, we see no error in the trial court's rulings.

1. *Jones's Proposed Testimony*

The propriety of the ruling regarding Jones's testimony hinges on the application of Evidence Code sections 1235 and 770.[6] Section 1235 provides: "Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with Section 770." Section 770 states: "Unless the interests of justice otherwise require, extrinsic evidence of a statement made by a witness

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6 All further statutory citations in this section (pt. B.1.) are to the Evidence Code.

that is inconsistent with any part of his testimony at the hearing shall be excluded unless: [¶] (a) The witness was so examined while testifying as to give him an opportunity to explain or to deny the statement; or [¶] (b) The witness has not been excused from giving further testimony in the action." The admissibility of statements under sections 1235 and 770 is consigned to the trial court's discretion. (*People v. Avila* (2006) 38 Cal.4th 491, 579.)

Under these provisions, inconsistent statements by a witness may be admitted and relied upon as substantive evidence when the foundational requirements stated in section 770 are satisfied. (*People v. Brown* (1995) 35 Cal.App.4th 1585, 1596-1597.) However, if the requirements are not satisfied, such statements are properly excluded unless there are exceptional circumstances, that is, unless "the interests of justice otherwise require" their admission. (§ 770; see *People v. Alexander* (2010) 49 Cal.4th 846, 909.) Regarding these exceptional circumstances, the Law Revision Commission has stated: "Where the interests of justice require it, the court may permit extrinsic evidence of an inconsistent statement to be admitted even though the witness has been excused and has had no opportunity to explain or deny the statement. An absolute rule forbidding introduction of such evidence where the specified conditions are not met may cause hardship in some cases. For example, the party seeking to introduce the statement may not have learned of its existence until after the witness has left the court and is no longer available to testify." (Cal. Law Revision Com. com, 29B Pt. 2 West's Ann. Evid. Code (1995 ed.) foll. § 770, p. 423.) In *People v. Collup* (1946) 27 Cal.2d 829, 836, our Supreme Court explained that satisfying the foundational requirements is not necessary when doing so "is impossible . . . due to no fault of the party urging the impeachment."

Here, we see no abuse of discretion in the trial court's ruling. When Mizrahi sought to introduce Jones's testimony, the trial court had already excused Forman,

who had not been examined regarding the purported statements to Jones. Furthermore, as Mizrahi was aware of Jones's potential testimony before Forman testified, no special circumstances triggered the exception to the foundational requirements stated in section 770. Accordingly, the trial court properly barred the proposed testimony from Jones. (*People v. Alexander*, *supra*, 49 Cal.4th at p. 909 [inconsistent statements of witness were inadmissible under sections 1235 and 770 when no party examined witness regarding them before witness was excused].)

Appellant contends that Jones's testimony falls within the "interests of justice" exception to the foundational requirements, arguing that appellant was denied the benefit of Jones's testimony because Mizrahi failed to satisfy the requirements. We decline to construe the "interests of justice" exception broadly to encompass such circumstances, as doing so would effectively eviscerate the foundational requirements in section 770. Rather, as noted above, the exception is applicable only in limited situations, for example, when the party seeking to admit the impeachment testimony could not satisfy the requirements. That is not the case here.

Pointing to *People v. Maki* (1985) 39 Cal.3d 707 (*Maki*), appellant also contends that Jones's testimony was admissible, even though it fell within no recognized exception to the hearsay rule. The crux of his contention is that Jones's testimony "had sufficient indicia of trustworthiness" to secure its admission.

Appellant has forfeited this contention, as he never raised it before the trial court. (*People v. Ervine* (2009) 47 Cal.4th 745, 783.) However, we would reject it were we to consider it on the merits. In *Maki*, our Supreme Court held that hearsay falling outside the recognized exceptions to the hearsay rule may be admitted in probation revocation hearings when it displays sufficient indicia of reliability. (*Maki*, *supra*, 39 Cal.3d at pp. 714-717.) Here, the underlying proceeding was a

criminal trial, not a probation revocation hearing. Moreover, as explained below, Jones's proposed testimony lacked the requisite indicia of reliability.

Our inquiry into the proposed testimony's reliability is controlled by the offers of proof regarding the testimony (§ 354). As the court explained in *People v. Schmies* (1996) 44 Cal.App.4th 38, 53, "[a]n offer of proof should give the trial court an opportunity to change or clarify its ruling and in the event of appeal would provide the reviewing court with the means of determining error and assessing prejudice. [Citation.] To accomplish these purposes an offer of proof must be *specific*. It must set forth the actual evidence to be produced and *not* merely the facts or issues to be addressed and argued." (Italics added.) We therefore limit our analysis to the specific evidence identified in the offers of proof. (*Id.* at p. 54.)

When the trial court first ruled on the prosecutor's objection to Jones's proposed testimony, the sole characterization of the testimony came from the prosecutor, who stated only that Jones would testify that Forman told him that someone other than appellant was the shooter. Nothing in this skeletal description supports the reliability of the testimony. Later, Mizrahi provided a detailed description of Jones's proposed testimony in the new trial motion, which effectively asked the trial court to reconsider its prior ruling. According to Mizrahi, Jones would have testified that after leaving the hospital, Forman "boasted" to Jones and other members of Forman's gang that he was wounded during a shootout with another gang. As boasting is ordinarily not regarded as facially trustworthy, Mizrahi's offer of proof did not establish the requisite indicia of reliability. In sum, the trial court did not err in excluding Jones's proposed testimony.

2. *Gonzalez's Proposed Testimony*

Although appellant does not identify the precise ruling that purportedly denied him an opportunity to present Gonzalez as a witness, he appears to contend that the trial court, in declining to "wait" for Gonzalez on Friday, May 28, 2010, improperly denied a continuance to facilitate the presentation of her testimony the following week. We disagree.

Generally, continuances may be granted "only upon a showing of good cause." (§ 1050, subd. (e).) To obtain a continuance of a criminal trial for the purpose of securing a witness's testimony, the moving party must show that he exercised due diligence to secure the witness's presence, the expected testimony was material and not cumulative, the testimony could be obtained within a reasonable time, and the facts to which the witness would testify could not otherwise be proven. (*People v. Roybal* (1998) 19 Cal.4th 481, 500-501, 504.) The trial court's ruling on a motion for a continuance is reviewed for abuse of discretion. (*Id.* at p. 505.)

Here, as the trial court noted, Gonzalez's testimony was cumulative and not essential to appellant's defense, as the offer of proof -- insofar as it is reflected in the record -- showed only that she would testify that appellant attended a party in Ontario on the night of the shooting. In declining to "wait" for Gonzalez, the trial court concluded that the absence of her testimony was not detrimental to appellant's defense because it was offered only to corroborate the testimony of appellants' other alibi witnesses. We see no error in this determination.[7] In sum,

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[7] Appellant's opening brief asserts that Gonzalez would have testified that she saw appellant in Ontario "minutes after the shooting." Nothing in the record supports this statement. The description of Gonzalez's proposed testimony in the record does not establish the time at which she purportedly saw appellant at the party in Ontario.

the trial court did not improperly deny appellant an opportunity to present Gonzalez as a witness.[8]

C. *Ineffective Assistance of Counsel*

Appellant contends that Mizrahi rendered ineffective assistance of counsel in failing to secure the admission of Gonzalez's and Jones's proposed testimony, and in failing to object to certain testimony from Officer Tripp, the prosecution's gang expert. For the reasons explained below, we conclude appellant has failed to demonstrate constitutionally ineffective assistance of counsel.

"In order to demonstrate ineffective assistance of counsel, a defendant must first show counsel's performance was 'deficient' because his 'representation fell below an objective standard of reasonableness . . . under prevailing professional norms.' [Citations.] Second, he must also show prejudice flowing from counsel's performance or lack thereof. [Citations.] Prejudice is shown when there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citations.]" (*People v. Jennings* (1991) 53 Cal.3d 334, 357.)

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[8] For the same reasons, we reject appellant's contention that the denial of a continuance contravened his right to confront witnesses under the Sixth Amendment of the United States Constitution. As our Supreme Court has explained, when a trial court properly exercises its discretion under state law in denying a continuance, there is ordinarily no violation of a defendant's federal constitutional rights. (*People v. Samayoa* (1997) 15 Cal.4th 795, 840-841.)

1. *Officer Tripp's Testimony*

We begin with appellant's contention regarding Officer Tripp's testimony. Appellant maintains that Mizrahi rendered ineffective assistance by failing to object to Officer Tripp's expert opinion regarding appellant's "specific intent" in shooting Forman. We reject this contention.

The limits on expert opinion regarding a gang member's state of mind in conducting crimes for the gang's benefit were examined in *People v. Killebrew* (2002) 103 Cal.App.4th 644 (*Killebrew*) and *People v. Gonzalez* (2006) 38 Cal.4th 932 (*Gonzalez*). In *Killebrew*, police officers searched three cars close to the site of a gang shooting, and discovered a gun in one car and a second gun near the other two cars. (*Killebrew*, *supra*, 103 Cal.App.4th at p. 648.) All the cars had been occupied by members of a particular gang. (*Ibid.*) The defendant, a member of the gang, was found standing near one of the cars, and was charged with conspiracy to possess a firearm. (*Id.* at pp. 647-648, 650.) At trial, a gang expert testified that the defendant, as a gang member, was aware of the guns and had the specific intent to possess them. (*Id.* at p. 658.) The appellate court concluded that this was improper expert opinion on ultimate facts. (*Ibid.*)

After *Killebrew*, our Supreme Court repudiated any suggestion in that case that gang experts may not offer opinions in response to hypothetical questions framed in terms of facts established by the prosecution. In *Gonzalez*, the defendant, a gang member, entered territory claimed by a rival gang and shot two men working on a driveway. (*Gonzalez*, *supra*, 38 Cal.4th at p. 938.) Several individuals told the police the defendant was the shooter, but disclaimed their statements at trial. (*Id.* at pp. 939-940.) During the trial, the prosecutor asked the gang expert hypothetical questions regarding whether gang members would intimidate witnesses under the circumstances established by the evidence. (*Id.* at pp. 944-945.) The expert opined that they would do so. (*Id.* at p. 945.)

Relying on *Killebrew*, the defendant argued that the expert's opinions were inadmissible. (*Gonzalez*, *supra*, 38 Cal.4th at p. 946.) Our Supreme Court rejected this contention, stating: "[The gang expert] merely answered hypothetical questions based on other evidence the prosecution presented, which is a proper way of presenting expert testimony." (*Ibid.*) Following *Gonzalez*, several courts have concluded that an expert may properly opine on whether a crime was committed for a gang's benefit. (*People v. Williams* (2009) 170 Cal.App.4th 587, 621; *People v. Martinez* (2008) 158 Cal.App.4th 1324, 1332-1333; *People v. Garcia* (2007) 153 Cal.App.4th 1499, 1512-1514.)

Here, the prosecutor posed a hypothetical question to Tripp framed in terms of the evidence regarding the facts of the shooting, including the gang challenges that preceded it. After reciting these facts, the prosecutor asked, "Do you have an opinion as to whether that crime of shooting the individual, which also includes shooting from the car . . . [and] possession of a firearm, whether those three crimes were committed for the benefit of, at the direction of, [the] Family . . . and with the specific intent to promote its activities." Tripp answered, "My opinion is that the crimes . . . would have been committed for the benefit of the Inglewood Family."

Appellant contends that the question was subject to a meritorious objection under *Killebrew*, as it effectively sought Tripp's opinion regarding appellant's specific intent. However, it is unnecessary for us to address this contention, as Tripp's answer addressed only whether the listed crimes were committed for the benefit of the gang, an admittedly properly subject of expert testimony. Accordingly, even if Mizrahi had objected to the question and the trial court had asked the prosecutor to restate it without using the term "specific intent," the jury would have heard the same opinion. As the opinion itself was proper, appellant has failed to demonstrate ineffective assistance of counsel.

2. *Gonzalez's Testimony*

We turn to appellant's contention that Mizrahi rendered ineffective assistance in failing to present Gonzalez as a witness. Generally, defense counsel is accorded considerable latitude in the selection of a defense strategy (*People v. Cunningham* (2001) 25 Cal.4th 926, 1004-1007), provided that it is informed by adequate investigation and preparation (*In re Marquez* (1992) 1 Cal.4th 584, 602). To show deficient performance, appellant must "demonstrate[] that the record affirmatively discloses that counsel's acts or omissions cannot be explained on the basis of any knowledgeable choice of tactics. [Citation.]" (*People v. Shoals* (1992) 8 Cal.App.4th 475, 501.) Because the decision to call a witness is a matter of trial tactics, a reviewing court generally will not "second guess" this decision. (*People v. Mitcham* (1992) 1 Cal.4th 1027, 1058-1059.)

Here, the record does not establish that Mizrahi's conduct regarding Gonzalez fell below professional norms. During trial, Mizrahi stated that Gonzalez was unable to appear until the following week; later, during the *Marsden* hearing, he stated that after the close of the presentation of evidence, on Friday, May 28, he told Gonzalez not to attend the trial because she would not be permitted to testify. As the record does not "affirmatively disclose[]" that Mizrahi could have secured Gonzalez's appearance by Friday, appellant has failed to demonstrate ineffective assistance of counsel. (*People v. Shoals*, *supra*, 8 Cal.App.4th at p. 501.)

More importantly, appellant has not demonstrated that the absence of Gonzalez's testimony was prejudicial. The failure to present potentially exculpatory evidence does not constitute ineffective assistance of counsel unless it is reasonably likely that the trial's result would have been different had the evidence been admitted. (*People v. Vines* (2011) 51 Cal.4th 830, 881.) Applying this standard, we conclude that it is unlikely the admission of Gonzalez's testimony would have altered the outcome of the trial. Her testimony was cumulative, as it

was offered to corroborate Mikell and Shiel, appellant's alibi witnesses (see pt. B.2., *ante*). Moreover, appellant's alibi defense was fatally undermined by evidence Gonzalez's testimony could not refute.

To establish his alibi defense, appellant provided a detailed account of his activities on the evening of the shooting, which occurred at approximately 7:30 p.m. According to appellant, he left his friend's Los Angeles residence at about 6:30 p.m., arrived at the party in Ontario between 8:10 and 8:15 p.m., retrieved his cell phone in Ontario shortly after 9:00 p.m., made a call from his cell phone at 9:13 p.m., and left the party for Las Vegas at approximately 10:30 p.m. However, T-Mobile's cell phone records showed that the 9:13 p.m. call occurred while appellant's cell phone was moving from Los Angeles into Alhambra. Appellant's own expert testified that the call took place in the Alhambra area, not Ontario. This unchallenged fact discredited appellant's alibi testimony, as well as Mikell's and Shiel's testimony that appellant arrived at the party in Ontario at approximately 8:30 p.m. Nothing in Gonzalez's testimony could have remedied this defect in appellant's alibi defense. Accordingly, we reject appellant's claim of ineffective assistance of counsel in connection with Gonzalez's testimony.

3. *Jones's Testimony*

Appellant further contends that Mizrahi rendered ineffective assistance in failing to secure the admission of Jones's impeachment testimony. He maintains that because the prosecution case relied primarily on Forman's testimony, the absence of Jones's testimony materially impaired his defense. We disagree. Although Mizrahi's conduct appears to have fallen below professional norms, we find no reasonable likelihood that it affected the trial's outcome.

Generally, to support a claim of ineffective assistance of counsel, a defendant must show that trial counsel had no "reasonable tactical basis for his

action or inaction." (*People v. Jones* (2003) 30 Cal.4th 1084, 1122.) Here, the record affirmatively establishes that Mizrahi lacked such a basis for his failure to satisfy the foundational requirements for the admission of Jones' testimony. Mizrahi was aware of Jones's proposed testimony before Forman testified, and he intended to call Jones as a witness at trial; only Mizrahi's failure to examine Forman regarding the purported statements he made to Jones prevented Mizrahi from presenting Jones's testimony. The record appears to foreclose the existence of a reasonable tactical basis for Mizrahi's failure to conduct the requisite examination. (See *People v. Guizar* (1986) 180 Cal.App.3d 487, 492, fn. 3.)

Nonetheless, Mizrahi's conduct was not prejudicial, as there is no reasonable probability that Jones's testimony would have eroded Forman's credibility or otherwise affected the trial's outcome. Although Forman was the prosecution's sole eye witness to the shooting, the other evidence at trial showed that Forman's account of the shooting and identification of appellant as the shooter had remained stable and resolute since the shooting. According to the offer of proof in appellant's new trial motion, Jones would have testified that after Forman was released from the hospital, he boasted to fellow gang members that he suffered his wound in a shootout with a gang to which appellant does not belong. However, Forman's trial testimony was materially identical to the account of the shooting that he first gave to investigating officers while hospitalized, and he repeatedly identified appellant as the shooter from the time he was hospitalized immediately following the shooting.

At trial, Officer Fedynich testified that Forman provided a detailed account of the shooting when Fedynich first interviewed him in the hospital shortly after the incident. According to Fedynich, Forman told him that he first saw the shooter at a car wash. The shooter and a girl were in a black Malibu. Later, while Forman was seated in a car near 36th Street and 7th Avenue, the shooter drove up in a

black car, called Forman over, and fired at him. Forman said that the shooter was a gang member with a moniker that Fedynich heard as "D-Mac."

Fedynich further testified that Forman made no identification upon viewing a six-pack that included a gang member whom Fedynich knew as "D-Mac," However, when Fedynich later showed him a second six pack in the hospital, Forman stated that he was "a hundred percent sure" that appellant's photo depicted the shooter. While still hospitalized, Forman also identified Flemming in a six-pack as the woman accompanying appellant at the car wash, and identified photos of her Chevy Malibu as depicting the shooter's car.

The record thus discloses that while hospitalized, Forman not only identified appellant as the shooter, but provided a full and detailed account of the shooting matching his trial testimony. Moreover, Forman reaffirmed his identification of appellant as the shooter at the preliminary hearing and trial. In view of the stability and firmness of Forman's account of the crime and identification of appellant as the perpetrator, it is not reasonably likely that Jones's testimony would have altered the trial's outcome.

Nor does the other trial evidence establish the reasonable likelihood of a different outcome had Jones testified. As explained above (see pt. C.2., *ante*), appellant's alibi defense was fatally undermined by a critical defect unrelated to Jones's proffered testimony: the T-Mobile records showing that the 9:13 p.m. call originated in the Los Angeles-Alhambra area discredited the testimony from appellant and his alibi witnesses that he was in Ontario at the time of the call. Furthermore, as appellant testified that his relationship with Forman had been amicable prior to the shooting, nothing in the record suggests why Forman, while hospitalized, might have invented an account of the crime that falsely identified appellant as the perpetrator. In sum, appellant has failed to demonstrate that Mizrahi rendered ineffective assistance of counsel in connection with Jones's

testimony.

D. *Marsden Request*

Appellant contends that the trial court erred in denying his request for new appointed counsel, which occurred after the jury returned its verdicts, but before appellant was sentenced. We disagree.

Because defendants are entitled to competent representation at all times, they may seek new appointed counsel at any stage of the proceedings under the standard established in *Marsden* and its progeny. (*People v. Memro* (1995) 11 Cal.4th 786, 859, overruled on another ground in *People v. Gaines* (2009) 46 Cal.4th 172, 181, fn. 2; 5 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Trial, § 223, pp. 349-350.) The *Marsden* standard requires the defendant to show that "a failure to replace the appointed attorney would substantially impair the right to assistance of counsel [citation]," that is, "that the first appointed attorney is not providing adequate representation or that the defendant and the attorney have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result [citation]." (*People v. Smith* (1993) 6 Cal.4th 684, 696.) To carry this burden, the defendant must identify specific instances of inadequate performance. (*People v. Welch* (1999) 20 Cal.4th 701, 772.) Furthermore, tactical disagreement, by itself, "is insufficient to compel discharge of appointed counsel." (*People v. Cole* (2004) 33 Cal.4th 1158, 1192.)

Generally, a *Marsden* motion, though based on past events, is "forward-looking[,] in the sense that counsel would be substituted in order to provide effective assistance in the future." (*People v. Smith*, *supra*, 6 Cal.4th at p. 695, italics deleted.) Accordingly, when the defendant requests new counsel after the verdict has been rendered but before sentencing, the trial court may properly grant the request upon "a proper showing . . . that counsel can no longer provide

effective representation, either for the purpose of sentencing or of making a motion for new trial based on incompetency of counsel." (*People v. Dennis* (1986) 177 Cal.App.3d 863, 871.) The decision to appoint new counsel is consigned to the trial court's discretion. (*People v. Smith*, *supra*, 6 Cal.4th at p. 696; *People v. Dennis*, *supra*, 177 Cal.App.3d at p. 869.)

Because appellant was obliged to identify specific instances of inadequate performance in seeking new appointed counsel, we limit our analysis to Mizrahi's conduct regarding Gonzalez and Jones, as they were the only witnesses appellant named and discussed at the *Marsden* hearing.[9] We see no error in the trial court's determination that appellant failed to demonstrate "a substantial impairment of his right to counsel."

During the trial and at the *Marsden* hearing, Mizrahi stated that he was unable to secure Gonzalez's attendance at trial before the close of the presentation of evidence on Friday, May 28; in addition, he suggested that Gonzalez's testimony was cumulative. The trial court properly credited Mizrahi's remarks as showing that appellant's contention concerned only "case management or trial tactics," notwithstanding appellant's assertions that Gonzalez's testimony was critical and that her failure to appear was due to Mizrahi's misunderstanding of the court orders regarding the trial schedule. (*People v. Jones* (2003) 29 Cal.4th 1229, 1245 [to the extent there is a credibility question between defendant and defense counsel at a *Marsden* hearing, the trial court may accept defense counsel's explanation].) As noted above, tactical decisions regarding the presentation of witnesses do not support the substitution of newly appointed counsel.

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9 Although appellant also contended that Mizrahi performed inadequately in connection with other matters, he has not raised these contentions on appeal, and thus has forfeited them.

Although Mizrahi offered no explanation for his failure to secure the admission of Jones's testimony, the trial court did not abuse its discretion in concluding that Mizrahi's conduct did not require the substitution of new appointed counsel. As explained above (see pt. C.3, *ante*), although Mizrahi may have erred in connection with Jones's testimony, there is no reasonable likelihood that this mistake affected the trial's outcome. Because the mistake occurred in the courtroom during the trial, the trial court was well positioned to determine that it implied no inadequacy in Mizrahi's future representation. (See *People v. Smith*, *supra*, 6 Cal.4th at pp. 692-693.)

Furthermore, even if the trial court incorrectly declined to appoint new counsel, appellant has shown no prejudice from the ruling. The improper denial of a *Marsden* request is not reversible error when it is "harmless beyond a reasonable doubt." (*People v. Henning* (2009) 178 Cal.App.4th 388, 405.) Here, the denial of new counsel implicated only (1) a potential new trial motion based on ineffectiveness of counsel and (2) appellant's sentencing. For the reasons described above (see pt. C., *ante*), a new trial motion based on ineffective assistance would have lacked merit. Furthermore, appellant has not shown that Mizrahi's continued representation adversely affected his sentencing in any manner. In sum, appellant's *Marsden* request was properly denied.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MANELLA, J.

We concur:

EPSTEIN, P. J.

SUZUKAWA, J.

SUPREME COURT OF THE UNITED STATES

RODTRAVION WOODS Petitioner, v. GREG LEWIS, Warden Respondent.	)))))))))	NO._____ CERTIFICATE OF SERVICE

I hereby certify that I was appointed to represent the petitioner under the Criminal Justice Act, 18 U.S.C. 3006A and that I have on this date served copies of the petitioner's Petition for Writ of Certiorari by depositing them in the U.S. Mail, first class postage prepaid, at Oakland, California and addressed to:

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