
No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ULICES AGUILAR, PETITIONER,
vs.
WARREN MONTGOMERY, RESPONDENT.

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

APPENDIX
[Volume 1 of 2]

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A P P E N D I X 1

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SEP 07 2017

UNITED STATES COURT OF APPEALS

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

FOR THE NINTH CIRCUIT

ULICES AGUILAR,

Petitioner-Appellant,

v.

WARREN MONTGOMERY,

Respondent-Appellee.

No. 15-16944

D.C. No.
1:12-cv-01547-LJO-JLT

MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Lawrence J. O'Neill, Chief District Judge, Presiding

Argued and Submitted August 15, 2017
San Francisco, California

Before: O'SCANNLAIN and RAWLINSON, Circuit Judges, and EZRA,** District Judge.

Ulices Aguilar was convicted by a California jury of second-degree murder.
He now appeals the district court's denial of habeas corpus relief on two claims

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

** The Honorable David A. Ezra, United States District Judge for the District of Hawaii, sitting by designation.

relating to juror bias and misconduct, which were denied as procedurally barred, and alternatively, as meritless. We affirm.

1. The district court correctly found that Aguilar's claim relating to Juror 3 was procedurally barred. *Harris v. Reed*, 489 U.S. 255, 262 (1989). Looking to the last reasoned opinion on the claim, we examine the California Court of Appeal's decision on habeas review. *Cannedy v. Adams*, 706 F.3d 1148, 1156 (9th Cir. 2013). That court properly held the claim was barred by the state's so-called *Dixon* bar, *see In re Dixon*, 264 P.2d 513, 514 (Cal. 1953) (en banc), which requires a defendant to raise a claim on direct appeal to preserve it for habeas. *See, e.g., Johnson v. Lee*, 136 S. Ct. 1802, 1805 (2016) (per curiam) (holding that the *Dixon* bar is an adequate state ground); *In re Robbins*, 959 P.2d 311, 338–39 & n.32 (Cal. 1998) (independent); *cf. In re Seaton*, 95 P.3d 896, 901 n.4 (Cal. 2004) (explaining that a state court may bar habeas claims under either California's rule requiring a timely objection at trial or the *Dixon* bar, if both could apply). Further, we decline to certify Aguilar's derivative claim of ineffective assistance of trial counsel relating to Juror 3, because it does not present "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

2. The district court erred by holding as procedurally barred Aguilar's ineffective assistance of counsel claim relating to Juror 9. No state court has

explicitly addressed this claim except the Court of Appeal on direct review, which reserved it for habeas. As a result, the California Supreme Court rejected the claim on the merits in its summary denial of habeas relief. *Harrington v. Richter*, 562 U.S. 86, 99 (2011).

We grant certification to review the merits of Aguilar's Juror 9 claim. *See* 28 U.S.C. § 2253(c)(2). However, we cannot say that the California Supreme Court's resolution of the claim constituted an unreasonable application of *Strickland v. Washington*, 466 U.S. 668, 687–88, 694 (1984), under any theory. *See Harrington*, 562 U.S. at 102, 105. Aguilar cannot show the required prejudice under that “doubly” deferential standard. *Id.* at 105 (citation omitted). No evidentiary hearing was required. The state trial court did not make an unreasonable determination of the facts. *See Taylor v. Maddox*, 366 F.3d 992, 1000 (9th Cir. 2004). We therefore affirm the district court's rejection of the Juror 9 claim on the alternative ground that the claim is without merit.

AFFIRMED.

A P P E N D I X 2

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

ULICES AGUILAR,	)	Case No.: 1:12-cv-01547-LJO-JLT
	)	
Petitioner,	)	ORDER ADOPTING FINDINGS AND
	)	RECOMMENDATIONS (Doc. 24)
v.	)	
	)	ORDER DENYING PETITION FOR WRIT OF
MATTHEW CATE,	)	HABEAS CORPUS (Doc. 1)
	)	
Respondent.	)	ORDER DIRECTING CLERK OF COURT TO
	)	ENTER JUDGMENT AND CLOSE CASE
	)	
	)	ORDER DECLINING TO ISSUE CERTIFICATE
	)	OF APPEALABILITY
	)	
	)	
	)	

Petitioner is a state prisoner proceeding in propria persona with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. On July 21, 2015, the Magistrate Judge assigned to the case issued Findings and Recommendations to deny the petition on its merits. ([Doc. 24](#)). This Findings and Recommendations was served upon all parties and contained notice that any objections were to be filed within twenty-one days from the date of service of that order. On August 13, 2015, Petitioner filed objections to the Magistrate Judge's Findings and Recommendations. ([Doc. 25](#)).

1 In accordance with the provisions of 28 U.S.C. § 636 (b)(1)(C), this Court has conducted a *de*
2 *novo* review of the case. Having carefully reviewed the entire file, including Petitioner's objections,
3 the Court concludes that the Magistrate Judge's Findings and Recommendations is supported by the
4 record and proper analysis. Petitioner's objections present no grounds for questioning the Magistrate
5 Judge's analysis.

6 Moreover, the Court declines to issue a certificate of appealability. A state prisoner seeking a
7 writ of habeas corpus has no absolute entitlement to appeal a district court's denial of his petition, and
8 an appeal is only allowed in certain circumstances. Miller-El v. Cockrell, 537 U.S. 322, 335-336
9 (2003). The controlling statute in determining whether to issue a certificate of appealability is 28
10 U.S.C. § 2253, which provides as follows:

11
12 (a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge,
13 the final order shall be subject to review, on appeal, by the court of appeals for the circuit
14 in which the proceeding is held.

15 (b) There shall be no right of appeal from a final order in a proceeding to test the validity of a
16 warrant to remove to another district or place for commitment or trial a person charged
17 with a criminal offense against the United States, or to test the validity of such person's
18 detention pending removal proceedings.

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not
be taken to the court of appeals from—

19 (A) the final order in a habeas corpus proceeding in which the detention
20 complained of arises out of process issued by a State court; or

21 (B) the final order in a proceeding under section 2255.

22 (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made
23 a substantial showing of the denial of a constitutional right.

24 (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or
25 issues satisfy the showing required by paragraph (2).
26
27
28

1 If a court denied a petitioner's petition, the court may only issue a certificate of appealability
2 when a petitioner makes a substantial showing of the denial of a constitutional right. 28 U.S.C. §
3 2253(c)(2). To make a substantial showing, the petitioner must establish that "reasonable jurists could
4 debate whether (or, for that matter, agree that) the petition should have been resolved in a different
5 manner or that the issues presented were 'adequate to deserve encouragement to proceed further'."
6 Slack v. McDaniel, 529 U.S. 473, 484 (2000) (*quoting* Barefoot v. Estelle, 463 U.S. 880, 893 (1983)).

7 In the present case, the Court finds that Petitioner has not made the required substantial
8 showing of the denial of a constitutional right to justify the issuance of a certificate of appealability.
9 Reasonable jurists would not find the Court's determination that Petitioner is not entitled to federal
10 habeas corpus relief debatable, wrong, or deserving of encouragement to proceed further. Thus, the
11 Court DECLINES to issue a certificate of appealability.

12 Accordingly, IT IS HEREBY ORDERED that:

- 13 1. The Findings and Recommendations, filed July 21, 2015 (Doc. 24), is ADOPTED IN
14 FULL;
- 15 2. The petition for writ of habeas corpus (Doc. 1), is DENIED with prejudice;
- 16 3. The Clerk of Court is DIRECTED to ENTER JUDGMENT and close the file; and,
- 17 4. The Court DECLINES to issue a certificate of appealability.

18
19 This order terminates the action in its entirety.

20 IT IS SO ORDERED.

21 Dated: August 27, 2015

22 /s/ Lawrence J. O'Neill
23 UNITED STATES DISTRICT JUDGE

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8 **UNITED STATES DISTRICT COURT**
9 **EASTERN DISTRICT OF CALIFORNIA**
10

11 ULICES AGUILAR,) Case No.: 1:12-cv-01547-LJO-JLT
12)
13) Petitioner,) FINDINGS AND RECOMMENDATIONS TO
14) DENY PETITION FOR WRIT OF HABEAS
15) v.) CORPUS (Doc. 1)
16)
17) MATTHEW CATE,)
18) ORDER DIRECTING THAT OBJECTIONS BE
19) FILED WITHIN TWENTY-ONE DAYS
20)
21)
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27)
28)

17 In 2008, Petitioner was convicted of second degree murder and sentenced to an indeterminate
18 term of 40 years-to-life. In addition, the jury found true special allegations related to a gang
19 enhancement and a firearm enhancement.

20 In this action, Petitioner asserts the Double Jeopardy Clause prohibited the jury's determination
21 of the factual grounds for the enhancements and that there was insufficient evidence to support the gang
22 enhancement. He claims also that there were errors by the trial court and his counsel in refusing to
23 excuse certain jury members. The Court finds Petitioner has failed to demonstrate his arguments are
24 well-taken and recommends the petition be **DENIED**.

25 **I. PROCEDURAL HISTORY**

26 After his 2008 his conviction for second degree murder and the jury's determination that the
27 special allegations related to a gang enhancement and a firearm enhancement were true, Petitioner was
28 sentenced to an indeterminate term of 40 years-to-life. Petitioner appealed the conviction to the

California Court of Appeals, Fifth Appellate District (the “5th DCA”), but it was affirmed. (Lodged Document (“LD”) 1). Petitioner’s subsequent petition for review filed in the California Supreme Court, was summarily denied. (LD 2). Petitioner then filed a state habeas petition in the Superior Court which was denied. (LD 4). Likewise, his habeas petitions in the 5th DCA and the California Supreme Court were summarily denied. (LD 6; 8).

II. FACTUAL BACKGROUND

The Court adopts the Statement of Facts in the 5th DCA’s unpublished decision¹:

Appellant was a Surenos gang member.

Prior to 2004, Cisneros, Garcia and Marquez were all Norteno gang members or associates.

On an unspecified date, Cisneros's car was stolen. Cisneros blamed Marquez for the theft.

Cisneros told Garcia that he wanted to shoot Marquez and Garcia agreed to help him. Garcia asked Guillermo Maldonado for a gun. Maldonado initially agreed. But two weeks before the murder, Maldonado told Garcia that he could not get them a gun. Garcia did not take any further action to assist Cisneros.

Cisneros began associating with Surenos gang members and associates, including appellant.

Sometime prior to the murder, appellant and Marquez got into a fight.

On May 1, Cisneros was with some Surenos when a group of Nortenos confronted them. The two groups prepared to fight. Cisneros pulled out a handgun, aimed it at the ground, and fired it repeatedly. The Nortenos left.

During the evening of May 5 and early morning hours of May 6, appellant, Cisneros, Eliseo Sanchez and Lorenzo Perez were socializing at appellant's residence. Appellant had a handgun tucked in his waistband; he said that he was going to “cap it.” Cisneros and appellant got up to leave. Cisneros said, “[W]e'll be back, we're gonna go to [Marquez's] house.” Appellant said, “I got your back.” Appellant and Cisneros left the gathering.

After retrieving a rifle from Cisneros's house, they walked to Marquez's house. Appellant stayed outside while Cisneros entered Marquez's bedroom. Cisneros fired multiple shots from the rifle at Marquez, killing him. Cisneros and appellant ran back to appellant's house.

Shell casings and a detached bolt handle were left at the crime scene.

About a week later, detectives found a rifle in appellant's bedroom. It was subsequently determined to be the murder weapon.

Appellant admitted in a police interview that he and Cisneros went to Marquez's house. Cisneros was carrying a rifle. However, appellant denied knowing that Cisneros was going to shoot Marquez. Appellant said that he walked to the back gate and stayed there. Appellant heard gunshots. They ran back to appellant's house. Appellant took the rifle from Cisneros and

¹ The 5th DCA’s summary of the facts in its unpublished opinion is presumed correct. 28 U.S.C. §§ 2254(d)(2), (e)(1). Thus, the Court adopts the factual recitations set forth by the 5th DCA.

1 put it in his bedroom closet.

2 Deputy Sheriff Joe Aguilar testified as the prosecution's gang expert. City of Madera Police
3 Officer Jason Dilbeck testified as the defense's gang expert.

4 Deputy Aguilar testified that the Nortenos and the Surenos are rival gangs who both claim the
5 town of Pixley as their territory. Nortenos use the color red, the number 14 and the letter N as
6 identifying symbols. Surenos use the color blue, the number 13 and the letter M as identifying
7 symbols. The primary activities of Nortenos and Surenos are burglaries, drug sales, simple
8 assaults and assaults with deadly weapons. The predicate offenses were the conspiracy to
9 commit murder between Garcia and Cisneros and the actual murder which involved Cisneros
10 and appellant.

11 Deputy Aguilar opined that appellant was a Surenos gang member because he admitted
12 membership, wore blue clothing, had gang tattoos and associated with other Surenos.
13 Appellant's house was a gathering place for Surenos.

14 Deputy Aguilar further opined that Marquez and Garcia were affiliated with the Nortenos.

15 Deputy Aguilar stated that Cisneros had been a Nortenos gang member. A few months prior to
16 the homicide, Cisneros changed his gang affiliation and started associating with Surenos gang
17 members and associates. Deputy Aguilar based this determination on Cisneros's contacts with
18 gang members. Cisneros's contacts prior to 2004 were all with Nortenos, but his recent contacts
19 were with Surenos. Deputy Aguilar testified that changing one's gang affiliation is rare but it
20 does occur. In this case, Marquez's theft of Cisneros's car and Cisneros's anger "that he couldn't
21 do nothing about it" was the catalyst for Cisneros's change of gang affiliation from Norteno to
22 Sureno. Deputy Aguilar testified:

23 "By him basically the car theft was a catalyst that-usually when someone switches sides,
24 there has to be some type of disgruntlement. While it is rare, it does occur. And it
25 usually has to do with a wrong that the subject feels that his particular gang has done
26 him and not backed him up, so he feels the need to switch sides to be able to avenge that
27 and also have backup."

28 Deputy Aguilar testified the killing would benefit the Surenos:

29 "Any time that your rival is eliminated, it shows power. Who commits it is really
30 irrelevant as long as one of the southern gang members is with the subject. This
31 enhances the gang's reputation, shows the aggression, and shows what they're willing to
32 do to get rid of their rivals and to claim a turf."

33 Further, the murder would "enhance a subject's individual reputation and also show how willing
34 they were to put in work for the gang."

35 Deputy Aguilar found the prior fight between appellant and Marquez significant in forming the
36 opinion that the homicide benefited the Surenos. He explained:

37 "All I would need to know is that he's Southern and he's a Northerner. Any time there's a
38 confrontation between two rival gangs, one has to do something about it. To not retaliate
39 in some way on would show a weakness on your part.... [¶] ... [¶] ... It would show the
40 subject that he himself was personally weak and that his gang was weak."

41 Deputy Aguilar testified that the lapse of time between the fight and the homicide was not
42 significant, as follows:

43 "A subject would have to feel that he had enough backup in case something else—there
44 were retaliations. If in the beginning they were too weak to actually do anything about it,

they would wait until they had enough members or that subject had gathered enough of a reputation to be able to have some backup.”

Deputy Aguilar also opined that the killing would “promote or further assist criminal activity by other” Surenos. He explained:

“It would also encourage other gang members to commit similar acts. It would also be used as a recruitment tool to show the younger juveniles that they're tough and not to be messed with and if they join they will be protected.”

Officer Dilbeck opined there was insufficient evidence indicating that Cisneros switched gang affiliation. Also, he testified that it appeared “as if the motivation [for Marquez's murder] was personal because of the stolen car and the disrespect that went on with that.”

(LD 1, pp. 4-7).

DISCUSSION

I. Jurisdiction

Relief by way of a petition for writ of habeas corpus extends to a person in custody pursuant to the judgment of a state court if the custody is in violation of the Constitution, laws, or treaties of the United States. 28 U.S.C. § 2254(a); 28 U.S.C. § 2241(c)(3); Williams v. Taylor, 529 U.S. 362, 375 n. 7 (2000). Petitioner asserts that he suffered violations of his rights as guaranteed by the United States Constitution. The challenged conviction arises out of the Tulare County Superior Court, which is located within the jurisdiction of this court. 28 U.S.C. § 2254(a); 28 U.S.C. § 2241(d).

On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), which applies to all petitions for writ of habeas corpus filed after its enactment. Lindh v. Murphy, 521 U.S. 320 (1997) (holding the AEDPA only applicable to cases filed after statute’s enactment). The instant petition was filed after the enactment of the AEDPA and is therefore governed by its provisions.

II. Legal Standard of Review

A petition for writ of habeas corpus under 28 U.S.C. § 2254(d) will not be granted unless the petitioner can show that the state court’s adjudication of his 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); Lockyer v. Andrade, 538 U.S. 63, 70-71 (2003); Williams, 529 U.S.

1 at 412-413.

2 A state court decision is “contrary to” clearly established federal law “if it applies a rule that
3 contradicts the governing law set forth in [the Supreme Court’s] cases, or “if it confronts a set of facts
4 that is materially indistinguishable from a [Supreme Court] decision but reaches a different result.”
5 Brown v. Payton, 544 U.S. 133, 141 (2005), citing Williams, 529 U.S. at 405-406 (2000).

6 In Harrington v. Richter, 562 U.S. ____ , 131 S.Ct. 770 (2011), the U.S. Supreme Court
7 explained that an “unreasonable application” of federal law is an objective test that turns on “whether
8 it is possible that fairminded jurists could disagree” that the state court decision meets the standards set
9 forth in the AEDPA. The Supreme Court has “said time and again that ‘an *unreasonable* application of
10 federal law is different from an *incorrect* application of federal law.’” Cullen v. Pinholster, 131 S.Ct.
11 1388, 1410-1411 (2011). Thus, a state prisoner seeking a writ of habeas corpus from a federal court
12 “must show that the state court’s ruling on the claim being presented in federal court was so lacking in
13 justification that there was an error well understood and comprehended in existing law beyond any
14 possibility of fairminded disagreement.” Harrington, 131 S.Ct. at 787-788.

15 The second prong pertains to state court decisions based on factual findings. Davis v.
16 Woodford, 384 F.3d at 637, citing Miller-El v. Cockrell, 537 U.S. 322 (2003). Under § 2254(d)(2), a
17 federal court may grant habeas relief if a state court’s adjudication of the petitioner’s claims “resulted
18 in a decision that was based on an unreasonable determination of the facts in light of the evidence
19 presented in the State court proceeding.” Wiggins v. Smith, 539 U.S. at 520; Jeffries v. Wood, 114
20 F.3d at 1500. A state court’s factual finding is unreasonable when it is “so clearly incorrect that it
21 would not be debatable among reasonable jurists.” Id.; see Taylor v. Maddox, 366 F.3d 992, 999-1001
22 (9th Cir. 2004), cert.denied, Maddox v. Taylor, 543 U.S. 1038 (2004).

23 To determine whether habeas relief is available under § 2254(d), the federal court looks to the
24 last reasoned state court decision as the basis of the state court’s decision. See Ylst v. Nunnemaker,
25 501 U.S. 979, 803 (1991); Robinson v. Ignacio, 360 F.3d 1044, 1055 (9th Cir. 2004). “[A]lthough we
26 independently review the record, we still defer to the state court’s ultimate decisions.” Pirtle v.
27 Morgan, 313 F.3d 1160, 1167 (9th Cir. 2002).

1 The prejudicial impact of any constitutional error is assessed by asking whether the error had “a
 2 substantial and injurious effect or influence in determining the jury’s verdict.” Brecht v. Abrahamson,
 3 507 U.S. 619, 623 (1993); see also Fry v. Pliler, 551 U.S. 112, 119-120 (2007)(holding that the Brecht
 4 standard applies whether or not the state court recognized the error and reviewed it for harmlessness).
 5 Furthermore, where a habeas petition governed by the AEDPA alleges ineffective assistance of counsel
 6 under Strickland v. Washington, 466 U.S. 668 (1984), the Strickland prejudice standard is applied and
 7 courts do not engage in a separate analysis applying the Brecht standard. Avila v. Galaza, 297 F.3d
 8 911, 918 n. 7 (9th Cir. 2002); Musladin v. Lamarque, 555 F.3d 830, 835 (9th Cir. 2009).

9 **III. Review of Petitioner’s Claims.**

10 Petitioner alleges the following as grounds for relief: (1) Petitioner’s constitutional protection
 11 against Double Jeopardy precluded the prosecution from retrying the firearm and criminal street gang
 12 allegations; (2) the trial court erred in finding that Juror no. 9 did not conceal a bias and was able to be
 13 fair and impartial; (3) sufficiency of the evidence as to the street gang enhancement; (4) failure to
 14 discharge Juror no. 3 as biased; and (5) ineffective assistance of counsel in failing to move to discharge
 15 Jurors nos. 3, 4, and 9 for cause.

16 **A. Double Jeopardy Violation.**

17 Petitioner first contends that the trial court violated the Double Jeopardy Clause by permitting
 18 the retrial of the firearm and street gang enhancements. This contention is without merit.

19 **1. The 5th DCA’s Opinion.**

20 The 5th DCA rejected Petitioner’s claim as follows:

21 **A. Facts**

22 Appellant’s first jury trial occurred in July 2007. The jury charge included CALCRIM Nos.
 23 1401 and 1402, which directed the jurors to consider and decide the special allegations only if
 they found the defendant guilty of first or second degree murder.

24 The jury began deliberating on July 15, 2007.

25 On the next day, the foreperson sent a note to the judge stating they were unable to reach an
 26 agreement. That afternoon, the judge asked the jurors whether further deliberations would be
 27 productive. A juror replied: “We have one issue that we cannot all come to an agreement upon
 28 as far as making a decision on a verdict. And no one is swaying at any point in time on that one
 issue. So, therefore, as far as the people go, no one is wanting to change their opinion on that
 one term. So we can keep going over it and over it, and it’s not making any difference. So it’s
 like a stalemate.” Defense counsel and the prosecutor submitted the matter without comment.
 The judge ruled the jury was deadlocked and declared a mistrial.

1 Then the judge ascertained from the jurors that they unanimously agreed appellant was not
 2 guilty of first degree murder but were split eight to four in favor of a guilty verdict on second
 3 degree murder. A juror explained, “We had a consensus that it wasn’t first degree, but it was an
 issue of second degree as to one term of the stipulations [sic] as to what determined second
 degree. And we couldn’t come to an agreement on that particular term of the second degree.”

4 The judge directed the jury to examine CALCRIM No. 640, which provides instruction on
 5 completion of the verdict forms when a defendant has been charged with first degree murder
 and lesser included homicide offenses. CALCRIM No. 640 does not include instruction on
 6 completion of the verdict forms for any special allegations that might be attached to the murder
 charge. The judge sent the jurors to the jury room “to see if you can straighten it out.”

7 After a recess, the jurors returned to the courtroom. The judge asked, “Have you reached a
 8 verdict on one count?” The foreperson replied affirmatively. The jury returned a not guilty
 verdict on first degree murder as charged in count one and not true findings on the gang special
 9 circumstance, gang allegation and firearm allegation. The judge restated that mistrial had been
 declared as to second degree murder and discharged the jury.

10 Prior to the start of the second trial, appellant filed a written motion to dismiss the firearm and
 gang allegations. The People filed written opposition.

11 The court denied the motion after hearing. Citing People v. Allen (1974) 41 Cal.App.3d 821
 12 (Allen) and our decision in People v. Davis (1988) 202 Cal.App.3d 1009 (Davis), the court
 reasoned that the findings on the special allegations were beyond the scope of the jury’s duties.
 13 The jury was instructed to consider the special allegations only if it found the defendant guilty.
 Since the jury found the defendant not guilty of first degree murder and hung on the question of
 14 second degree murder, it should not have considered any of the special allegations. Under Allen
 and Davis, the jury’s findings in such a situation are considered to be mere surplusage,
 15 equivalent to a lenity recommendation. The court also pointed out that the jury’s not true
 finding on the firearm enhancement was incomprehensible since it was proved “beyond any
 16 shadow of any doubt whatsoever that a principal” (i.e., Cisneros) discharged a firearm, killing
 Marquez. The court thought that, perhaps, “the jury just felt that no blank should be left
 17 unfilled on the verdict and put stuff in.”

18 **B. The double jeopardy bar and the collateral estoppel rule are distinct legal concepts**
 19 **arising from the double jeopardy clauses of the state and federal Constitutions.**

20 “The double jeopardy clauses of the Fifth Amendment to the United States Constitution and
 article I, section 15, of the California Constitution provide that a person may not be twice placed
 21 ‘in jeopardy’ for the ‘same offense.’” The double jeopardy bar protects against a second
 prosecution for the same offense following an acquittal or conviction, and also protects against
 22 multiple punishment for the same offense. [Citations.] [Citation.]” (People v. Anderson (2009)
 47 Cal.4th 92, 103–104.) “Double jeopardy precludes re-prosecution for an offense of which a
 23 defendant has been acquitted or to which jeopardy has otherwise attached.” (People v. Davis
 (1995) 10 Cal.4th 463, 514, fn. 10.)

24 The collateral estoppel rule, which applies to relitigation of factual issues, is derived from the
 double jeopardy clause in the Fifth Amendment. (People v. Cooper (2007) 149 Cal.App.4th
 25 500, 518.) Collateral estoppel is also known as issue preclusion. (People v. Santamaria (1994)
 8 Cal.4th 903, 912, fn. 2.) It is an equitable concept based on fundamental principles of fairness
 26 and is conceptually separate and analytically distinct from double jeopardy, which applies to
 retrial of offenses. (*Id.* at p. 912, fn. 3.) Collateral estoppel may apply in criminal cases
 27 independent of double jeopardy. (See, e.g., Chamblin v. Municipal Court (1982) 130
 Cal.App.3d 115, 119.)

28 The rules governing application of the collateral estoppel rule are settled:

1 “... Collateral estoppel bars relitigation of an issue decided in a previous proceeding in a
 2 different cause of action if ‘(1) the issue necessarily decided at the previous proceeding
 3 is identical to the one which is sought to be relitigated; and (2) the previous proceeding
 4 resulted in a final judgment on the merits; and (3) the party against whom collateral
 5 estoppel is asserted was a party or in privity with a party at the prior
 6 proceeding.’[Citations.]” (People v. Davis, supra, 10 Cal.4th at pp. 514–515, fn. 10.)

7 To determine whether the collateral estoppel rule applies,

8 “[the court is] to ‘examine the record of a prior proceeding, taking into account the
 9 pleadings, evidence, charge, and other relevant matter, and conclude whether a rational
 10 jury could have grounded its verdict upon an issue other than that which the defendant
 11 seeks to foreclose from consideration.’[Fn. omitted.] The inquiry ‘must be set in a
 12 practical frame and viewed with an eye to all the circumstances of the
 13 proceedings.’[Citation.]” (Ashe v. Swenson (1970) 397 U.S. 436, 444.)

14 Where there is no dispute as to the facts, whether a defendant has been formerly in jeopardy for
 15 the same offense is a question of law for the court and not one of fact for the jury. (People v.
 16 Conson (1925) 72 Cal.App. 509, 511.)

17 A double jeopardy or collateral estoppel claim is forfeited on appeal unless it was first presented
 18 in the trial court. (People v. Belcher (1974) 11 Cal.3d 91, 96; People v. Neely (1999) 70
 19 Cal.App.4th 767, 782–783; People v. Morales (2003) 112 Cal.App.4th 1176, 1186; People v.
 20 Gillard (1997) 57 Cal.App.4th 136, 160.) Appellant raised both double jeopardy and collateral
 21 estoppel claims in the points and authorities supporting the dismissal motion. Therefore, the
 22 points were preserved for appellate review.

23 **C. The People were not collaterally estopped from retrying the gang and firearm** 24 **allegations.**

25 Appellant argues Allen and Davis are not controlling and the trial court erred by failing to apply
 26 the collateral estoppel rule to preclude retrial of the enhancements. We are not persuaded.

27 In Allen, supra, 41 Cal.App.3d 821, the victim was shot in the chest with a revolver. Defendant
 28 was charged with murder (count 1) and assault with a deadly weapon (count 2); a firearm
 enhancement was attached to each count. The jury was instructed to determine whether
 defendant used a firearm only if it found him guilty on either or both of the substantive crimes.
 The jury acquitted defendant on count 1 and deadlocked on count 2. The jury filled out the
 verdict form on the firearm enhancement attached to count 1, finding that it was not true.

The issue on appeal was whether the jury's finding, in connection with the acquittal on count 1
 that defendant was not using a firearm, barred retrial on count 2. The appellate court concluded
 the jury's not true finding on the firearm allegation was surplusage that did not have any legal
 effect. It analogized the jury's finding to a lenity recommendation. A lenity recommendation “is
 extraneous because punishment is not a jury function and thus beyond the scope of its duties.
 Likewise, when the jury made a special finding after reaching a verdict of not guilty, which it
 should have made only if it found defendant guilty, the finding would be discarded as beyond
 the scope of its duties. [Citation.]” (Davis, supra, 202 Cal.App.3d at p. 1015.) After examining
 the record, the court decided it was probable that the jury simply forgot that under the court's
 instructions it was not to consider the firearm enhancement attached to count 1 unless it found
 defendant guilty of attempted murder and that it could throw away the verdict forms associated
 with this count once it acquitted defendant on that count. “[F]eeling that it had to do something
 more ceremonial with all verdict forms relating to count 1 and unable to say that defendant used
 a gun in committing an offense of which he was to be acquitted, the jury found—quite
 logically—that in not committing the offense he did not use a firearm.” (Allen, supra, 41
 Cal.App.3d at p. 827.)

1 In Davis, supra, 202 Cal.App.3d 1009, this court discussed Allen in concluding that a defendant
 2 who was found guilty of second degree murder but found not guilty of involuntary
 3 manslaughter was not entitled to reversal on the theory that the conviction was inconsistent with
 4 the acquittal on a lesser included offense. We determined that defendant was not entitled to
 5 reversal simply “because of a technical error—the jury filled in the two manslaughter verdicts
 rather than leaving them blank as it was instructed to do once it reached a guilty verdict on one
 of the murder counts. Appellant suffered no injustice because of the errors and we can think of
 no policy which would be served by reversing appellant’s conviction based on this clearly
 procedural error.” (Id. at p. 1017.)

6 Appellant urges this court to reject Allen because it is “rather short and superficial” and did not
 7 explicitly discuss the collateral estoppel rule. As to appellant’s contention that brevity indicates
 8 an absence of intellectual depth, it is sufficient to comment that the Gettysburg Address consists
 9 of 256 words. We are persuaded by respondent’s position that while the Allen court did not
 10 explicitly discuss the collateral estoppel rule, it essentially conducted the type of analysis our
 Supreme Court has determined should be undertaken when considering a collateral estoppel
 issue. As previously explained, the court is to conduct a practical examination of the entire
 record of the prior proceedings, taking account of all of the circumstances, in order to determine
 11 “whether a rational jury could have grounded its verdict upon an issue other than that which the
 defendant seeks to foreclose from consideration.” (Ashe v. Swenson, supra, 397 U.S. at p.
 444.) In Allen, the court conducted this type of examination. Therefore, we find Allen to be
 persuasive authority.

12 Having examined the entire circumstances in this matter we discern no basis to reverse the
 13 lower court’s ruling. It is apparent that the first jury did not follow their instructions to consider
 the special allegations only if they found appellant guilty of murder. It is evident from the jury’s
 14 colloquy with the court that they did not actually consider the merits of the special allegations.
 They decided appellant was not guilty of first degree murder but were irreconcilably divided on
 15 the question whether appellant was guilty of second degree murder. After declaring a mistrial,
 the court sent the jurors back to the jury room with directions to read CALCRIM No. 640 and
 16 complete the verdict form on the murder charge. After only a brief recess, the jurors returned
 with completed verdict forms not just on first degree murder but on all the special allegations
 17 attached to the murder charge. It is apparent that the jurors did not understand how to complete
 the verdict forms. As the trial court pointed out, if the jury had actually determined that it was
 18 not true that a principal used a firearm during the commission of the homicide, then they would
 have found appellant not guilty on all homicide charges since the undisputed evidence at trial
 19 proved Marquez died as a result of multiple gunshot wounds. The People did not present any
 alternative theory for the murder other than Cisneros shot Marquez while appellant acted as the
 20 lookout. Logically, the jury could not have been deadlocked on the question of second degree
 murder if it had unanimously decided that a principal did not fire a weapon during the
 21 commission of the homicide.

22 Since the jury did not have any authority to consider the special allegations in the absence of a
 23 guilty verdict on the murder charge and it is apparent from the record that the jury did not
 necessarily consider and decide the factual questions posed by the special allegations, we hold
 24 that the prosecution was not bound by the unauthorized findings. Appellant had no legitimate
 expectation that the unauthorized not true findings on the special allegations would preclude
 25 retrial of these allegations during the second trial. (Allen, supra, 41 Cal.App.3d at p. 827; Davis,
supra, 202 Cal.App.3d at p. 1017.)

26 Were we to conclude otherwise, the People actually would have been precluded from retrying
 27 appellant for second degree murder because the sole theory of the case was that a principal, i.e.,
 Cisneros, shot and killed Marquez. If the People were collaterally estopped from presenting
 28 evidence about Cisneros’s firearm use because of the unauthorized not true finding on the
 firearm allegation, then the People would not have had any factual theory upon which they
 could have retried appellant.

Accordingly, we conclude the special allegations were not actually and necessarily decided in the first trial. Fundamental principles of fairness do not require us to give any weight to the first jury's unauthorized findings on the special allegations. Therefore, we find the People were not collaterally stopped from retrying the special allegations and uphold the denial of the dismissal motion.

(LD 1, pp. 13-20).

2. Federal Standard.

The Double Jeopardy Clause of the Fifth Amendment, as applied to the states by the Fourteenth Amendment, prohibits re-prosecution following acquittal. Benton v. Maryland, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969). Because the constitution thus provides that a defendant may not be forced to “run the gantlet” a second time, the guarantee against double jeopardy incorporates the principle of collateral estoppel. Ashe v. Swenson, 397 U.S. 436, 445–446 (quoting Green v. United States, 355 U.S. 184, 190 (1957)). The constitutional guarantee against double jeopardy includes the concept of collateral estoppel. See Ashe v. Swenson, 397 U.S. at 445; United States v. James, 109 F.3d 597, 600 (9th Cir.1997); Newton v. Superior Court of California, 803 F.2d 1051, 1057 (9th Cir.1986), cert. denied, 481 U.S. 1070 (1987). Collateral estoppel means that “when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.” Ashe, 397 U.S. at 443. Collateral estoppel analysis involves a three-step analysis:

First, the issues in the two actions are identified so that we may determine whether they are sufficiently similar and material to justify invoking the doctrine. Second, we examine the first record to determine whether the issue was fully litigated. Finally, from our examination of the record, we ascertain whether the issue was necessarily decided. James, 109 F.3d at 600 (quoting United States v. Schwartz, 785 F.2d 673, 681 (9th Cir.1986)). When an element of the crimes charged in successive prosecutions is identical, the “similar and material” prong is satisfied. United States v. Ford, 371 F.3d 550, 556 (9th Cir.2004) (“objective activity” requirements under sections 21 U.S.C. § 856(a)(1) and (a)(2) are identical). The determination of whether the issue was “necessarily decided” turns on whether an issue of fact or law was “actually litigated and determined by a valid and final judgment, and ... is essential to the judgment.” Bobby v. Bies, 129 S.Ct. 2145, 2152-53 (2009) (internal citation omitted).

The earlier determination (whether it be by judge or jury) must be given the most rational interpretation possible. See United States v. Carbullido, 307 F.3d 957, 961-62 (9th Cir.2002) (judge's decision at bench trial finding defendant not guilty by reason of insanity of the one arson charged precluded a second prosecution for another arson in the string of nine arsons listed in the stipulation of facts upon which the judge's decision rested). The petitioner bears the burden of showing that the issue whose

1 relitigation he wishes to foreclose in a second proceeding was actually decided in the first one, and that
 2 no rational jury could have grounded its verdict on an issue other than the one the petitioner seeks to
 3 foreclose. Santamaria v. Horsley, 133 F.3d 1242, 1246 (9th Cir.1998) (en banc), amended, 138 F.3d
 4 1280 (9th Cir.1998); see, e.g., Wilson v. Bellevue, 554 F.3 816, 829-30 (9th Cir.2009) (acquittal on
 5 intentional murder theory did not demonstrate that the jury necessarily decided issues that would bar a
 6 later prosecution on a felony murder theory under Oregon law); Dowling v. United States, 493 U.S.
 7 342, 350-351 (1990).

8 In a federal habeas proceeding involving a claim that retrial of the allegedly precluded issue
 9 would violate double jeopardy protections, the preclusive effect of the first jury verdict is a question of
 10 federal law but the state's highest court's interpretations of state law are binding. Santamaria, 138 F.3d
 11 1245. Finally, if a petitioner has presented his collateral estoppel/double jeopardy claim to the
 12 California Court of Appeal and to the California Supreme Court, this court may address the claim;
 13 petitioner does not have to wait until he is retried to seek federal habeas relief. See id. at 1243; Thomas
 14 v. Municipal Court, 878 F.2d 285, 287 n. 1 (9th Cir.1989).

15 3. Analysis.

16 The Court has been unable to locate, and petitioner has failed to cite, any authority, let alone -
 17 Supreme Court authority, holding that double jeopardy bars the retrial of special allegations when the
 18 jury in the first trial was not able to reach a verdict on the underlying substantive offenses. Moreover,
 19 the Double Jeopardy Clause did not preclude the retrial of the special allegations of which petitioner
 20 was charged. See Monge v. California, 524 U.S. 721, 727, 118 S.Ct. 2246, 141 L.Ed.2d 615 (1998)
 21 (noting that the Supreme Court historically has found double jeopardy protections inapplicable to
 22 sentencing proceedings, including prior conviction allegations, “because the determinations at issue did
 23 not place the defendant in jeopardy for an ‘offense.’”); United States v. Scott, 437 U.S. 82, 97, 98 S.Ct.
 24 2187, 57 L.Ed.2d 65 (1978) (“[A] defendant is acquitted only when ‘the ruling of the judge, whatever
 25 its label, actually represents a resolution [in the defendant’s favor], correct or not, of some or all of the
 26 factual elements of the offense charged[.]’”).

27 Although Petitioner would have the Court ignore the principals enunciated in these authorities,
 28 the simple fact is that, in his first trial, Petitioner was not convicted of any substantive criminal offense.

1 That being the case, the jurors were not permitted to make any determinations on the special
 2 allegations. See People v. Bright, 12 Cal.4th 652, 661 (1996) (“The jury does not decide the truth of
 3 the penalty allegation until it first has reached a verdict on the substantive offense charged.”), *cert.*
 4 *denied*, 518 U.S. 1006 (1996). Hence, the 5th DCA’s observations that, by filling out the special
 5 allegation verdict form, it was obvious “the jurors did not understand how to complete the verdict
 6 forms;” “the jury did not have any authority to consider the special allegations in the absence of a guilty
 7 verdict on the murder charge;” and “it is apparent from the record that the jury did not necessarily
 8 consider and decide the factual questions posed by the special allegations.” Under those circumstances,
 9 it cannot reasonably be said the jury actually “decided” the issue of the special allegation. James, 109
 10 F.3d at 600 (quoting United States v. Schwartz, 785 F.2d 673, 681 (9th Cir.1986). Because the issue
 11 was not actually decided by jurors at the first trial, neither collateral estoppel nor double jeopardy
 12 principles foreclose a retrial of the enhancement issues. James, 109 F.3d at 600; Schwartz, 785 F.2d at
 13 681. Thus, it cannot be said the state court’s adjudication rejecting Petitioner’s claim was objectively
 14 unreasonable.

15 B. Refusal To Discharge Juror No. 9

16 Petitioner next contends the trial court erred in refusing the discharge Juror no. 9, finding that
 17 he/she could be fair and impartial and had not concealed a bias. This contention is also without merit.

18 1. The 5th DCA’s Opinion.

19 The 5th DCA rejected Petitioner’s claim as follows:

20 A. Facts

21 i. Voir Dire

22 During voir dire the judge informed the prospective jurors that there was a gang allegation in
 23 this case. He asked, “Is there anybody here, either yourself or close friends or relatives have
 24 been or are in a street gang?” Juror No. 9 responded, “I have a family member that’s involved
 25 in it, but I don’t—I stay away. It doesn’t bother my mind at all. I’m not involved, and I don’t care
 to be. So I just wanted to let you know that I do have family members.” The judge asked juror
 No. 9 if he/she could decide this case on the evidence presented and he/she answered: “Yes. It
 doesn’t bother me.”

26 Juror No. 9 also disclosed that one of his/her cousins had been accused of murder about a year
 27 ago. This juror answered affirmatively when the court asked if he/she could set this aside and
 decide the case based on the evidence.

28 Defense counsel and the prosecutor both questioned juror No. 9. Neither the prosecutor nor
 defense counsel asked juror No. 9 about the gang connections of his/her family or asked if this

1 juror was personally allied with a gang.

2 Juror No. 9 answered basic biographical questions during which it was ascertained that he/she
3 was employed as a food server. He/she was married and had three children.

4 Neither the prosecutor nor defense counsel exercised a peremptory challenge on juror No. 9 or
5 asked the court to excuse him/her for cause.

6 ii. Proceedings during trial

7 The prosecutor asked witness Eliseo Sanchez (Eliseo) if he knew a person named Alex Sanchez
8 (Alex). Eliseo responded in the negative. After being shown a document, Eliseo testified that
9 Alex was a Norteno.

10 Juror No. 9 passed a note to the judge which stated, "I [know] Alex Sanchez. [Lived] in the
11 same house when he died. Don't know if that is ok!"

12 Outside the presence of the other jurors, the court questioned juror No. 9 about this note. Juror
13 No. 9 stated:

14 "If it's the same Alex Sanchez from Tulare that shot himself, that's the Alex I'm talking
15 about. I don't know if it's Alex from Pixley, but I only know one Alex Sanchez, and I
16 know he passed away around that time. So that's why I thought I should let you know
17 that. I lived with him at the time. I was dating his [sibling]. He was like my little
18 brother."

19 It was ascertained that juror No. 9 and the prosecutor were both referring to the same Alex
20 Sanchez.

21 The court said that a poster on which "In Memory of Alex," was written was going to be used as
22 part of the basis for the gang expert's testimony.

23 Defense counsel asked the court, "Can I ask [him/her]?"

24 Instead of replying to defense counsel, the judge asked juror No. 9, "Is that going to affect your
25 ability to sit fairly in this case in any way?" He/she replied, "If it doesn't have nothing to do
26 with him, no." The court said, "It doesn't." He/she responded, "If it doesn't, then no."

27 Defense counsel asked the court if he could ask juror No. 9 some questions. The court directed
28 counsel to approach the bench; an off-the-record discussion occurred.

Then the judge asked juror No. 9, "The fact that he was Norteno-associated and defendant here
may be Sureno-associated, is that going to affect your ability to be fair in this?"

Juror No. 9 replied, "Maybe a little bit." Then he/she continued, "I'm not saying that—I still
have to see everything, so I can't say—" The judge said, "That's what we're asking." He/she
said, "No."

The court asked, "You could see the evidence and decide this based on the evidence?"

Juror No. 9 replied: "Like, okay, put it this way. Right now I can't say he's guilty or not guilty.
Just because he's a Sureno, that doesn't have nothing to do with me. I don't claim. My family
does, but that has nothing to do with me."

The court asked juror No. 9 if he/she would be influenced because the defendant is a Sureno.

1 Juror No. 9 replied, "I don't claim, so I don't care about that."

2 The court thanked juror No. 9 and concluded the discussion.

3 Neither defense counsel nor the prosecutor asked the court to excuse juror No. 9.

4 On the next court day, a discussion was conducted in chambers. In relevant part, defense
5 counsel said:

6 "I'm not complaining about anybody. Luis Aguilar, who is [appellant's] brother, advised
7 me that the ... juror who knew the Norteno in the Memorial thing has like a gang tattoo
and was in the hallway playing ... phone rap music that was Norteno rap music, making
derogatory terms to Surenos calling them Surrattas or whatever."

8 The judge asked, "The rap music was or [he/she] was?"

9 Defense counsel replied:

10 "The music [he/she] was listening to. And I heard [him/her] playing music, but I wasn't
11 paying attention to it. And I myself did see that [he/she] has a big red star tattooed on
[his/her] neck. And I just wanted to bring it to [the] Court's attention so that the Court
could deal with it how he sees proper."

12 The judge asked, "Well, what do you suggest? We've already talked to [him/her]."

13 Defense counsel said,

14 "Yeah. And I remember what [he/she] said. I just—I wanted to just maybe follow-up. I
15 don't know if it's too late in the game to just ask [him/her] if, you know, if [he/she] sides
one side or anything like that. [He/she] had mentioned that [he/she] has family that were
16 gangs, and that [he/she] knew that person. But it was never really brought up that if
[him/her] family's, you know—if [he/she] would tend to side with a gang or be biased
17 against my client because he's in a rival gang."

18 The judge said, "I think I asked [him/her] that directly." Defense counsel said, "Okay." The
19 court stated that it would ask the court report to verify its recollection. Defense counsel said,
"However you see proper. I'm not trying to--" The judge said, "No. That's appropriate."

20 Then the judge asked, "What's a red star? That's a new one on me."

21 Defense counsel replied, "It's a North Star. It's called like the North Star, and it's in red."

22 The prosecutor said, "Dilbeck talked about it at the last trial when he was looking at some of
23 those things about the stars. It's in the transcript of the last trial. That north, North Star, I don't
know ... [¶] ... [¶] ... [t]he constellation they're referring to."

24 Defense counsel said, "Something like that. But basically North Star, and it's in red. Apparently
25 his witness Ramon Pulido had seen that underneath it. It had some writing with a big N on it,
something like that."

26 The prosecutor asked, "On [him/her]?" Defense counsel replied, "Yeah."

27 The judge asked, "When are these guys seeing this stuff?"

28 Defense counsel said, "Apparently in the hallway. Because I saw [him/her] when I was—I
distanced myself."

1 The judge asked, "I got one question. What are they doing close enough to the jurors to be able to see that?"

2 Defense counsel replied, "I think if they were—I don't know—I didn't talk to Mr. Pulido who
3 noticed that. I saw the star on the neck. But earlier I distanced myself way on the far end, and
4 [he/she] was blasting the music on [his/her] phone, rap music. And I wasn't paying attention. I was reading."

5 The judge directed defense counsel, as follows: "Well, maybe you can check after we adjourn. It shouldn't be that hard to find.... I think I asked [him/her] a direct question about would one—
6 north versus south cause you to—" Defense counsel interrupted, saying, "Okay." The judge continued, "I think we got a direct answer to the question. So let's check that out and then we'll
7 take it up after that." Defense counsel said, "Okay. Thank you."

8 Later that day, outside the presence of the jury, the judge stated that the reporter's transcript reflected that juror No. 9 "was directly asked, 'Just because he was Sureno that doesn't have
9 nothing to do with me. I don't claim.'" Defense counsel replied, "Okay." The judge continued:

10 "“The family does.’ And I asked specifically, ‘The fact that he's a Norteno, is that going to affect your ability?’ At first [he/she] said, ‘Maybe a little bit.’ Then [he/she] backs off
11 and says, ‘I'm not saying that. I still have to see everything.’ ‘That's what we're asking. You could see the evidence, decide it based on the evidence?’ ‘I don't claim.’ Then
12 [he/she] says later, ‘Because he's a Sureno, therefore’—‘I don't claim so I don't care about that.’”

13 Defense counsel said, "Okay." The judge said, "So I think that's covered."

14 Defense counsel did not ask the court to dismiss juror No. 9 at any point during the trial or
15 assert that he/she had concealed material information during voir dire.

16 iii. Posttrial proceedings—new trial motion

17 Appellant filed a written motion for new trial. In relevant part, he argued juror No. 9 committed misconduct by concealing his/her bias against appellant because of his Sureno gang affiliation.

18 Defense counsel filed a supporting declaration in which he alleged juror No. 9 "played Norteno rap in front of fellow jurors and the defendant's family in the courthouse hallway." Also, juror
19 No. 9 "had a red star tattoo and wore stars throughout trial indicative of Norteno gang affiliation." Further, juror No. 9 "lived [in the same house] with a deceased Norteno gang
20 member Alex Sanchez."

21 Appellant filed a declaration in which appellant alleged that a fellow prisoner, Abel Vasquez, told appellant that he knew juror No. 9 and he/she voted in favor of guilt because he/she was
22 scared of appellant.

23 The motion was denied after hearing. In relevant part, the court reasoned:

24 "[¶] And here there were three allegations of misconduct. The first was as to juror
25 number nine, allegations relating to playing Norteno rap music in the hallway. And as to that, there really was no admissible evidence that, in fact, it was Norteno rap music.
26 There's no foundation to prove that it was.

27 "But even if it were, it didn't establish misconduct, because juror number nine was the one who very frankly revealed [his/her] family gang connections. [He/she] disclosed a
28 connection with a person in a photo. [He/she] was questioned about that and stated that [he/she] felt [he/she] could be fair."

1 The court also stated:

2 “[¶] ... [T]he cases, in fact, require as part of a declaration and as part of the defendant's
3 showing evidence that neither the defendant nor the defendant's counsel were aware of
4 the misconduct.

5 “And this would apply certainly to the hallway rap music allegation where I'm
6 denying.... And as I did state before, a person can't use as the basis for a motion for new
7 trial conduct which might have been cured if timely reported.

8 “You're not allowed to gamble on the outcome while secretly preserving the error in the
9 event of an unfavorable verdict.”

10 **B. Appellant did not prove that juror No. 9 concealed a Norteno affiliation, a bias against
11 Surenos or otherwise committed misconduct.**

12 A juror's concealment of bias constitutes misconduct and is ground for a new trial. (People v.
13 Nesler (1997) 16 Cal.4th 561, 581–582 (Nesler).) “A juror who conceals relevant facts or
14 gives false answers during the voir dire examination thus undermines the jury selection process
15 and commits misconduct. [Citations.]” (In re Hitchings (1993) 6 Cal.4th 97, 111.)

16 Where a party seeks a new trial based upon jury misconduct, the court must undertake a three-
17 step inquiry. First, it must determine whether the evidence presented for its consideration is
18 admissible. If it finds the evidence is admissible, it must then consider whether the facts
19 constitute misconduct. If misconduct is found to have occurred, the court must determine
20 whether the misconduct was prejudicial. Reversal is required unless the reviewing court finds
21 there is no substantial likelihood that a juror was improperly influenced against the defendant. A
22 reviewing court will uphold the trial court's ruling on a new trial motion unless it clearly appears
23 that a manifest and unmistakable abuse of discretion occurred. (People v. Duran (1996) 50
24 Cal.App.4th 103, 112–113.)

25 We agree with respondent that appellant did not present admissible evidence proving juror
26 misconduct. Appellant mistakenly treats the hearsay assertions in defense counsel's declarations
27 as established facts. During trial, defense counsel told the court that he was not paying attention
28 to the music he heard juror No. 9 playing. Defense counsel did not have any personal
knowledge whether the music was Norteno rap. Also, defense counsel did not report to the court
that he saw the letter N inside the star that was tattooed on juror No. 9's neck. Ramon Pulido,
who allegedly saw the letter N inside the tattooed star, did not testify to this fact at trial or
submit a declaration supporting the new trial motion.

In the absence of evidence proving that juror No. 9 was listening to Norteno rap or that the
tattoo on his/her neck definitely signified a personal Norteno affiliation, there was no admissible
evidence supporting appellant's assertion that juror No. 9 concealed facts indicating a bias
against Surenos.

Juror No. 9 disclosed during voir dire that some of his/her family members were affiliated with
the Nortenos and during trial disclosed that he/she lived with the family of a Norteno member.
Acquaintance alone does not imply bias. (See, e.g., People v. Cochran (1998) 62 Cal.App.4th
826, 831.) When questioned by the court during trial after he/she disclosed that he/she had
resided with Alex Sanchez and his family, he/she affirmed that he/she could be fair and was not
biased against defendant because of his Surenos affiliation.

Therefore, we conclude the record does not contain admissible evidence supporting appellant's
claim that juror No. 9 concealed a bias against Surenos or that he/she failed to disclose material
information during voir dire. Therefore, we uphold the denial of the new trial motion on this
basis.

(LD 1, pp. 20-27).

2. Federal Standard.

Though Petitioner contends the trial judge erred when refusing to dismiss juror no. 9, such a contention is not cognizable in federal habeas proceedings. Generally, issues of state law are not cognizable on federal habeas. Estelle v. McGuire, 502 U.S. 62, 67, 112 S.Ct. 475 (1991) ("We have stated many times that 'federal habeas corpus relief does not lie for errors of state law.'"), *quoting* Lewis v. Jeffers, 497 U.S. 764, 780 (1990); Gilmore v. Taylor, 508 U.S. 333, 348-49 (1993) (O'Connor, J., concurring) ("mere error of state law, one that does not rise to the level of a constitutional violation, may not be corrected on federal habeas"). Indeed, federal courts are bound by state court rulings on questions of state law. Oxborrow v. Eikenberry, 877 F.2d 1395, 1399 (9th Cir.) (1989). Further, "the availability of a claim under state law does not of itself establish that a claim was available under the United States Constitution." Sawyer v. Smith, 497 U.S. 227, 239, 110 S.Ct. 2822 (1990), *quoting*, Dugger v. Adams, 489 U.S. 401, 409 (1989). Thus, insofar as Petitioner's claim is premised upon the state court's misapplication of California law, it is not cognizable in these proceedings.

In any event, Petitioner's claim is without merit. "In all criminal prosecutions," state and federal, "the accused shall enjoy the right to . . . trial . . . by an impartial jury." U.S. Const., Amends. 6 and 14; *see* Duncan v. Louisiana, 391 U.S. 145 (1968); Irvin v. Dowd, 366 U.S. 717, 722 (1961). When a petitioner challenges a California trial court's failure to remove a juror, the reviewing court need only decide whether the application of California's procedure violated the petitioner's Sixth Amendment rights. Perez, 119 F.3d at 1426. To make this decision, the reviewing court must determine whether good cause existed to support the court's decision not to remove the juror. *Id.* In making this determination, the reviewing court must be mindful that a trial court's findings regarding juror fitness are entitled to special deference. *Id.* (citing Patton v. Yount, 467 U.S. 1025, 1036-38 & n. 12 (1984)). A trial judge's exercise of the responsibility to be "ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen," Smith, 455 U.S. at 217 n. 7, inherently involves the court's "appraisal of witness credibility and demeanor." Thompson v. Keohane, 516 U.S. 99, 111 (1995). Because trial judge is best positioned to make decisions regarding credibility and

demeanor, the “judgment of the jurist-observer” has been given “presumptive weight” in these matters. Id. Thus, juror impartiality is a factual issue within the statutory presumption of correctness. Id.; Wainwright v. Witt, 469 U.S. 412, 429 (1985); Tinsley, 895 F.2d at 525 (“findings of state trial and appellate courts on juror impartiality deserve ‘a high measure of deference.’”); Skilling v. United States, ___ U.S. ___, 130 S.Ct. 2896, 2918 (2010)(“reviewing courts are properly resistant to second-guessing the trial judge’s estimation of a juror’s impartiality....”).

3. Analysis.

Here, as mentioned, in rejecting Petitioner’s claim as to juror no. 9, the state court pointed out that the trial judge spoke directly with juror no. 9 before initially declining to dismiss him/her, and then, after further consideration, deciding that dismissal was not required. The 5th DCA also noted that Petitioner failed to present admissible evidence proving juror misconduct, that hearsay statements in defense counsel’s declarations were not “established facts,” that counsel was not paying attention when he heard the rap music supposedly showing juror no. 9’s support for Norteno gangs, that counsel had no personal knowledge even whether the music was “Norteno” rap, that counsel did not personally see the red letter “N” on juror no. 9, and that the one witness who claimed to have seen the red letter did not testify to that fact or submit a declaration.

In the absence of competent admissible evidence establishing that juror No. 9 was listening to Norteno rap or that the tattoo on his/her neck definitely signified a personal Norteno affiliation, there was no admissible evidence supporting appellant's assertion that juror No. 9 concealed facts indicating a bias for Nortenos or a prejudice against Surenos. As the state court explained:

Juror No. 9 disclosed during voir dire that some of his/her family members were affiliated with the Nortenos and during trial disclosed that he/she lived with the family of a Norteno member. Acquaintance alone does not imply bias. (See, e.g., People v. Cochran (1998) 62 Cal.App.4th 826, 831.) When questioned by the court during trial after he/she disclosed that he/she had resided with Alex Sanchez and his family, he/she affirmed that he/she could be fair and was not biased against defendant because of his Surenos affiliation.

Therefore, we conclude the record does not contain admissible evidence supporting appellant's claim that juror No. 9 concealed a bias against Surenos or that he/she failed to disclose material information during voir dire. Therefore, we uphold the denial of the new trial motion on this basis.

(LD 1, p. 27).

Under these circumstances, and giving the trial court the requisite “special deference” on the

1 factual determination as to juror no. 9's fitness to deliberate, the state court's reasons for upholding the
 2 trial court's refusal to dismiss juror no. 9 were more than sufficient to satisfy federal constitutional
 3 concerns. In sum, juror no. 9 brought the matter to the court's attention, the judge carefully and
 4 thoroughly inquired into the matter and the juror assured the court that he/she could be fair and
 5 impartial. Absent admissible evidence that juror no. 9 actually concealed vital information or deceived
 6 the court with his/her answers, there is simply no basis to depart from the conclusion reached by the
 7 state court.

8 In his Traverse, Petitioner contends that the trial judge's failure to remove juror no. 9 was not
 9 "reasoned" because the juror "was biased and concealed that bias both before and during the trial."
 10 (Doc. 21, p. 13). However, such assertions are mere speculation unsupported by any probative facts.
 11 Again, as the 5th DCA pointed out, it was juror no. 9 who brought his/her attenuated connection to the
 12 Norteno gang to the judge's attention. It was juror no. 9 who disavowed being part of any street gang.
 13 And it was juror no. 9 who strongly indicated that he/she would base any verdict on the facts and
 14 evidence, not on any pre-conceived bias or prejudice toward street gangs and their members. Petitioner
 15 is not entitled to a re-trial simply because he repeatedly asserts, without proof, that the juror was biased
 16 or prejudiced. There is no authority that would support a presumption of bias or prejudice: it must be
 17 proven. In Petitioner's case, it was not.

18 C. Sufficiency Of The Evidence Regarding The Street Gang Enhancement.

19 Petitioner contends there was insufficient evidence to support the street gang enhancement. The
 20 court disagrees.

21 1. The 5th DCA's Opinion.

22 The 5th DCA rejected Petitioner's claim as follows:

23 A. The substantial evidence standard of review applies.

24 When reviewing a challenge to the sufficiency of the evidence, we assess the entire record in the
 25 light most favorable to the judgment below to determine whether it contains substantial
 26 evidence from which a reasonable trier of fact could find the defendant guilty beyond a
 27 reasonable doubt. (People v. Johnson (1980) 26 Cal.3d 557, 578.) "This standard applies to a
 28 claim of insufficiency of the evidence to support a gang enhancement." (People v. Vy (2004)
 122 Cal.App.4th 1209, 1224.) "The standard is the same, regardless of whether the prosecution
 relies mainly on direct or circumstantial evidence. [Citation.]" (People v. Vazquez (2009) 178
 Cal.App.4th 347, 352 (Vasquez).)

In applying the substantial evidence standard of review, the appellate court adopts all reasonable

1 inferences and presumes in support of the judgment the existence of every fact that a jury
 2 reasonably could have deduced from the evidence. The trier of fact makes credibility
 3 determinations and resolves factual disputes. An appellate court will not substitute its evaluation
 4 of a witness's credibility for that of the fact finder. "It is the jury, not this court, that must be
 5 convinced beyond a reasonable doubt that the gang enhancement allegation is true. [Citation.]"
 6 (Vasquez, supra, 178 Cal.App.4th at p. 352.)

7 B. Section 186.22, subdivision (b)(1) did not require the People to prove appellant committed
 8 the substantive offense with the specific intent to facilitate additional and separate criminal
 9 conduct by gang members.

10 In relevant part, section 186.22, subdivision (b)(1), provides for a sentence enhancement when a
 11 defendant commits a felony "for the benefit of, at the direction of, or in association with any
 12 criminal street gang, with the specific intent to promote, further, or assist in any criminal
 13 conduct by gang members...."

14 In Garcia v. Carey (9th Cir.2005) 395 F.3d 1099 (Garcia) and Briseno v. Scribner (9th
 15 Cir.2009) 555 F.3d 1069 (Briseno), the Ninth Circuit held that the specific intent requirement of
 16 section 186.22, subdivision (b) requires some evidence supporting an inference that the
 17 defendant committed the crime with the specific intent to facilitate separate additional criminal
 18 conduct by gang members. The People are required to produce evidence describing "what
 19 criminal activity of the gang was ... intended to be furthered" by the charged crime. (Garcia,
 20 supra, 395 F.3d at p. 1103; see also Briseno, supra, 555 F.3d at p. 1079.)

21 Relying on these Ninth Circuit cases, appellant argues the true finding on the gang enhancement
 22 must be reversed because the record lacks proof that he committed the substantive offense with
 23 the specific intent to facilitate separate and additional criminal conduct by gang members. We
 24 are not convinced. As will be explained, the Ninth Circuit has misinterpreted section 186.22,
 25 subdivision (b)(1).

26 As lower federal court decisions, Garcia and Briseno are not binding on this court. (People v.
 27 Hoag (2000) 83 Cal.App.4th 1198, 1205.) No California Court of Appeal has accepted the
 28 Ninth Circuit's interpretation of section 186.22, subdivision (b)(1). The California appellate
 courts that have considered this issue unanimously agree there is no statutory requirement that
 the "criminal conduct by gang members" referenced in section 186.22, subdivision (b)(1) must
 "be distinct from the charged offense, or that the evidence establish specific crimes the
 defendant intended to assist his fellow gang members in committing." (Vasquez, supra, 178
 Cal.App.4th at p. 354; see also People v. Romero (2006) 140 Cal.App.4th 15, 19 (Romero);
People v. Hill (2006) 142 Cal.App.4th 770, 774 (Hill).) Vasquez cogently explains:

21 "[¶] While our Supreme Court has not yet reached this issue, numerous California
 22 Courts of Appeal have rejected the Ninth Circuit's reasoning. As our colleagues noted in
 23 [Romero, supra, 140 Cal.App.4th at p. 19]: 'By its plain language, the statute requires a
 24 showing of specific intent to promote, further, or assist in "any criminal conduct by gang
 25 members," rather than other criminal conduct. (§ 186.22, subd. (b)(1), italics added.)'
 26 Thus, if substantial evidence establishes that the defendant is a gang member who
 27 intended to commit the charged felony in association with other gang members, the jury
 28 may fairly infer that the defendant also intended for his crime to promote, further or
 assist criminal conduct by those gang members. [Citation.]

"Like the Romero court, we reject the Ninth Circuit's attempt to write additional
 requirements into the statute. It provides an enhanced penalty where the defendant
 specifically intends to 'promote, further, or assist in any criminal conduct by gang
 members.' (§ 186.22, subd. (b)(1).) There is no statutory requirement that this 'criminal
 conduct by gang members' be distinct from the charged offense, or that the evidence
 establish specific crimes the defendant intended to assist his fellow gang members in

committing.” (Vasquez, *supra*, 178 Cal.App.4th at pp. 353–354.)

For the reasons expressed in Vasquez, Romero and Hill, we reject the Ninth Circuit's interpretation of section 186.22, subdivision (b)(1), and decline to follow Briseno and Garcia.

C. Deputy Aguilar's opinion has sufficient foundation and there is substantial evidence proving the murder benefited the Surenos.

We now consider the sufficiency of the evidence proving that the murder was committed “for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members” (§ 186.22, subd. (b)(1).) Appellant argues that Deputy Aguilar's testimony was speculative. We are not persuaded. As will be explained, there was adequate evidentiary foundation for Deputy Aguilar's opinions. The People met their burden of proving the benefit element of the gang enhancement.

Evidence that a crime would enhance a gang's status or reputation or that it would intimidate rival gangs or potential witnesses within the gang's territory, is sufficient to support a finding that the crime was “for the benefit of” the gang. (See People v. Garcia (2007) 153 Cal.App.4th 1499, 1504–1506, 1511–1512 & People v. Morales, *supra*, 112 Cal.App.4th at p. 119.) Generally, the testimony of a single witness is sufficient to prove a disputed fact. (People v. Young (2005) 34 Cal.4th 1149, 1181.) This topic is a proper subject for expert testimony. (People v. Zepeda (2001) 87 Cal.App.4th 1183, 1207–1209.) An expert may rely on hearsay in forming his or her opinion. (People v. Catlin (2001) 26 Cal.4th 81, 137.) Yet, “[l]ike a house built on sand, the expert's opinion is no better than the facts on which it is based.” [Citation.]” (People v. Gardeley (1996) 14 Cal.4th 605, 618.)

“[¶] A gang expert's testimony alone is insufficient to find an offense gang related. [Citation.] ‘[T]he record must provide some evidentiary support, other than merely the defendant's record of prior offenses and past gang activities or personal affiliations, for a finding that the crime was committed for the benefit of, at the direction of, or in association with a criminal street gang.’ [Citation.]” (People v. Ochoa (2009) 179 Cal.App.4th 650, 657 .)

It is undisputed that the Surenos is a criminal street gang and that appellant is a member of this gang. Both the People's gang expert and the defense's gang expert testified that appellant was a Sureno. Deputy Aguilar testified that assault with a deadly weapon was one of the Surenos's primary criminal activities. In challenging the foundation for Deputy Aguilar's opinion that the murder benefited the Surenos, appellant fails to recognize the significance of the fact that he, a Sureno, assisted in the murder of Marquez, a Norteno. Nortenos and Surenos are enemy gangs. Appellant previously had been involved with a fight with Marquez. Thus, irrespective of Cisneros's desire to retaliate against Marquez because of the car theft, there was a gang-related reason for appellant to participate in Marquez's murder. Deputy Aguilar explained,

“Any time there's a confrontation between two rival gangs, one has to do something about it. To not retaliate in some way on would show a weakness on your part.... [¶] ... [¶] ... It would show the subject that he himself was personally weak and that his gang was weak.”

Appellant's affiliation with the Surenos and his prior fight with Marquez are foundational facts providing evidentiary support for Deputy Aguilar's opinion that murder benefited the Surenos, because failing to retaliate against Marquez after the fight would cause other gang members and associates to view appellant and the Surenos as weak. By participating in the murder, appellant eliminated a rival gang member who had disrespected him, thereby increasing his stature and the stature of the Surenos.

Also, there was evidence that Cisneros began associating with Sureños during the months before he killed Marquez. In fact, five days before the murder Cisneros was with a group of Sureños when they were confronted by a group of Nortenos. Cisneros fired a handgun onto the ground and the Nortenos left. Appellant fails to recognize the significance of this act—Cisneros overtly sided against his former gang associates in a dispute between the two rival gangs.

Furthermore, in the hours before the homicide Cisneros and appellant were socializing with a group of people that included Sureños. They made verbal statements indicating that they were going to kill Marquez. Then they left the gathering. This shows that they wanted others to know that they were going to kill Marquez, who was known to be a Norteno. And they were not just going to kill any Norteno—they targeted a Norteno who previously fought with appellant, a Sureños member, and was believed to have stolen a car belonging to Cisneros, a new Sureños associate. By killing Marquez, Cisneros demonstrated his commitment to the Sureños. Appellant proved his strength and the strength of the Sureños.

Considered in their totality, these facts adequately support Deputy Aguilar's testimony that the murder benefited the Sureños. Accordingly, we reject appellant's contention that Deputy Aguilar's testimony was speculative.

Having carefully examined the record, we conclude that it contains substantial evidence from which a reasonable jury could determine beyond a reasonable doubt that the murder was committed for the benefit of, at the direction of, or in association with the Sureños, with the specific intent to promote, further, or assist in any criminal conduct by gang members. Therefore, the challenge to the sufficiency of the evidence fails.

(LD 1, pp. 23-26).

2. Federal Standard.

The law on sufficiency of the evidence is clearly established by Supreme Court of the United States. Pursuant to the Supreme Court's holding in Jackson v. Virginia, 443 U.S. 307, the test on habeas review to determine whether a factual finding is fairly supported by the record is “[W]hether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” Jackson, 443 U.S. at 319; see also Lewis v. Jeffers, 497 U.S. 764, 781 (1990). Thus, only if “no rational trier of fact” could have found proof of guilt beyond a reasonable doubt will a petitioner be entitled to habeas relief. Jackson, 443 U.S. at 324. Sufficiency claims are judged by the elements defined by state law. Id. at 324, n. 16.

A federal court reviewing collaterally a state court conviction does not determine whether it is satisfied that the evidence established guilt beyond a reasonable doubt. Payne v. Borg, 982 F.2d 335, 338 (9th Cir. 1992). The federal court “determines only whether, ‘after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crimes beyond a reasonable doubt.’” See id., quoting Jackson, 443 U.S. at 319. Only where no rational trier of fact could have found proof of guilt beyond a reasonable doubt may the writ

1 be granted. See Jackson, 443 U.S. at 324; Payne, 982 F.2d at 338.

2 If confronted by a record that supports conflicting inferences, a federal habeas court “must
3 presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such
4 conflicts in favor of the prosecution, and must defer to that resolution.” Jackson, 443 U.S. at 326. A
5 jury’s credibility determinations are therefore entitled to near-total deference. Bruce v. Terhune, 376
6 F.3d 950, 957 (9th Cir. 2004). Except in the most exceptional of circumstances, Jackson does not
7 permit a federal court to revisit credibility determinations. See id. at 957-958.

8 Circumstantial evidence and inferences drawn from that evidence may be sufficient to sustain a
9 conviction. Walters v. Maass, 45 F.3d 1355, 1358 (9th Cir. 1995). (only speculation supported
10 conviction for first degree murder under theory of aiding and abetting). After the enactment of the
11 AEDPA, a federal habeas court must apply the standards of Jackson with an additional layer of
12 deference. Juan H. v. Allen, 408 F.3d 1262, 1274 Cir. 2005). Generally, a federal habeas court must
13 ask whether the operative state court decision reflected an unreasonable application of Jackson and
14 Winship to the facts of the case. Id. at 1275.²

15 In applying the AEDPA’s deferential standard of review, this Court must also presume the
16 correctness of the state court’s factual findings. 28 U.S.C. § 2254(e)(1); Kuhlmann v. Wilson, 477 U.S.
17 436, 459 (1986). This presumption of correctness applies to state appellate determinations of fact as
18 well as those of the state trial courts. Tinsley v. Borg, 895 F.2d 520, 525 (9th Cir.1990). Although the
19 presumption of correctness does not apply to state court determinations of legal questions or mixed
20 questions of law and fact, the facts as found by the state court underlying those determinations are
21 entitled to the presumption. Sumner v. Mata, 455 U.S. 539, 597, 102 S.Ct. 1198 (1981).

22 In Cavazos, v. Smith, __ U.S. __, 132 S.Ct. 2 (2011), the Supreme Court further explained the
23 highly deferential standard of review in habeas proceedings, by noting that Jackson

24 makes clear that it is the responsibility of the jury—not the court—to decide what conclusions
25 should be drawn from evidence admitted at trial. A reviewing court may set aside the jury’s
26 verdict on the ground of insufficient evidence only if no rational trier of fact could have agreed
with the jury. What is more, a federal court may not overturn a state court decision rejecting a
sufficiency of the evidence challenge simply because the federal court disagrees with the state

27
28 ² Prior to Juan H., the Ninth Circuit expressly left open the question of whether 28 U.S.C. § 2254(d) requires an additional degree of deference to a state court’s resolution of sufficiency of the evidence claims. See Chein v. Shumsky, 373 F.3d 978, 983 (9th Cir. 2004); Garcia v. Carey, 395 F.3d 1099, 1102 (9th Cir. 2005).

1 court. The federal court instead may do so only if the state court decision was “objectively
2 unreasonable.” Renico v. Lett, 559 U.S. —, —, 130 S.Ct. 1855, 1862, 176 L.Ed.2d 678
(2010) (internal quotation marks omitted).

3 Because rational people can sometimes disagree, the inevitable consequence of this settled law
4 is that judges will sometimes encounter convictions that they believe to be mistaken, but that
they must nonetheless uphold.

5 Cavazos, 132 S.Ct. at 3.

6 “Jackson says that evidence is sufficient to support a conviction so long as ‘after viewing the
7 evidence in the light most favorable to the prosecution, any rational trier of fact could have
8 found the essential elements of the crime beyond a reasonable doubt.’ 443 U.S., at 319, 99
9 S.Ct. 2781. It also unambiguously instructs that a reviewing court “faced with a record of
historical facts that supports conflicting inferences must presume—even if it does not
affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of
the prosecution, and must defer to that resolution.” Id., at 326, 99 S.Ct. 2781.

10 Cavazos, 132 S.Ct. at 6.³

11 3. Analysis.

12 Petitioner relies upon the Ninth Circuit’s holdings in Garcia v. Carey, 395 F.3d 1099 (9th Cir.
13 2005), and Briceno v. Scribner, 55 F.3d 1069 (9th Cir. 2009), which, Petitioner contends, “held that
14 criminal street gang enhancement under section 186.22(b) requires a specific intent to facilitate other
15 criminal activities by gang members.” (Doc. 1, p. 21). However, as Respondent correctly points out,
16 Briceno and Garcia were overruled by the California Supreme Court in People v. Albillar, 51 Cal.4th
17 47, 66 (2010), which held the intent requirement of section 186.22(b)(1) “is unambiguous and applies
18 to *any* criminal conduct, without a further requirement that the conduct be ‘apart from’ the criminal
19 conduct underlying the offense of conviction sought to be enhanced.” Id. (emphasis in original). The
20 Ninth Circuit has recognized that Albillar overruled Briceno and Garcia and that the California
21 Supreme Court’s decision on this matter is “authoritative.” (Emery v. Clark, 643 F.3d 1210, 1215 (9th
22 Cir. 2011). Indeed, this Court is bound by a state high court’s interpretation of its own laws. Hicks v.
23 Feiock, 485 U.S. 624, 629 (1988) (a determination of state law by a state appellate court is binding in a
24 federal habeas action); Lewis v. Jeffers, 497 U.S. 764, 780, 110 S.Ct. 3092, 111 L.Ed.2d 606 (1990)
25 (federal habeas court must respect a state court’s application of its own law and must not engage in de

26
27 ³ To the extent that the 5th DCA’s opinion does not expressly cite the Jackson v. Virginia standard in analyzing the
28 sufficiency claims herein, it must be noted that, long ago, the California Supreme Court expressly adopted the federal
Jackson standard for sufficiency claims in state criminal proceedings. People v. Johnson, 26 Cal.3d 557, 576 (1980).
Accordingly, the state court applied the correct legal standard, and this Court’s only task is to determine whether the state
court adjudication was contrary to or an unreasonable application of that standard.

1 novo review); Clemons v. Mississippi, 494 U.S. 738, 739–740 (1990)(federal court has no basis for
 2 disputing a state's interpretation of its own law).

3 Applying the above scienter requirement to the facts presented at trial, it is clear that sufficient
 4 evidence was presented to support the enhancement. Petitioner was a member of a criminal street gang,
 5 the victim was a member of a rival criminal street gang, Petitioner had previously been involved in a
 6 fight with the victim, and Petitioner assisted the gang member who killed the victim. Under the
 7 Jackson standard, this is sufficient to meet the scienter requirement as explained in Albillar.

8 D. Failure To Discharge Juror No. 3 and Juror No. 9 For Bias

9 Petitioner also contends that the trial court violated his right to a fair trial by failing to discharge
 10 Juror nos. 3 and 9 for bias. This contention is without merit.

11 1. The State Court Decisions.

12 As mentioned, during the direct appeal, the 5th DCA rejected Petitioner's claim as to juror no. 9,
 13 discussed previously. In habeas corpus proceedings, Petitioner raised the issue of juror bias as to juror
 14 no. 3. The Superior Court rejected the claim as being procedurally barred and rejected the claim as to
 15 juror no. 9 on the same grounds. The Superior Court never considered the claims on their merits.
 16 Subsequently, the state appellate courts summarily rejected the claims. Thus, the last reasoned state
 17 court decision denied the claims based on a procedural bar.

18 2. Federal Standard.⁴

19 The state court rejected the claim against juror no. 9 on the grounds that it had already been
 20 litigated in the state court proceedings, citing In re Waltreus, 62 Cal.2d 218 (1965) and In re Harris, 5
 21 Cal.4th 813 (1993). The court rejected the claim against juror no. 3 on the grounds that Petitioner
 22 should have raised it in his direct appeal but did not, citing In re Walker, 10 Cal.3d 764, 773-775
 23 (1974).

24 Federal courts “will not review a question of federal law decided by a state court if the decision
 25 of that court rests on a state law ground that is independent of the federal question and adequate to
 26 support the judgment.” Coleman v. Thompson, 501 U.S. 722, 729 (1991); LaCrosse v. Kernan, 244

27
 28 ⁴ In a previous section, the Court identified the federal standard for reviewing a claim of juror bias on the merits. Hence, that standard will not be repeated here.

1 F.3d 702, 704 (9th Cir. 2001); see Ylst v. Nunnemaker, 501 U.S. 797, 801 (1991); Park v. California,
 2 202 F.3d 1146, 1150 (2000) (“A district court properly refuses to reach the merits of a habeas petition if
 3 the petitioner has defaulted on the particular state’s procedural requirements”); see also Fox Film
 4 Corp. v. Muller, 296 U.S. 207, 210 (1935). This concept has been commonly referred to as the
 5 procedural default doctrine. This doctrine of procedural default is based on concerns of comity and
 6 federalism. Coleman, 501 U.S. at 730-32. If the court finds an independent and adequate state
 7 procedural ground, “federal habeas review is barred unless the prisoner can demonstrate cause for the
 8 procedural default and actual prejudice, or demonstrate that the failure to consider the claims will result
 9 in a fundamental miscarriage of justice.” Noltie v. Peterson, 9 F.3d 802, 804-805 (9th Cir. 1993);
 10 Coleman, 501 U.S. at 750; Park v. California, 202 F.3d 1146, 1150 (9th Cir. 2000).

11 The mere occurrence, however, of a procedural default will not necessarily bar a federal court
 12 from reviewing claims in a petition for writ of habeas corpus. In order for the procedural default
 13 doctrine to apply and thereby bar federal review, the state court determination of default must be
 14 grounded in state law that is both *adequate* to support the judgment and *independent* of federal law.
 15 Ylst, 501 U.S. at 801; Coleman, 501 U.S. at 729-30; see also Fox Film Corp., 296 U.S. at 210. Put
 16 another way, the procedural default doctrine will apply only if the application of the state procedural
 17 rule provides “an adequate and independent state law basis” on which the state court can deny relief.
 18 Park, 202 F.3d at 1151, *quoting*, Coleman, 501 U.S. at 729-30.

19 “For a state procedural rule to be ‘independent,’ the state law basis for the decision must
 20 not be interwoven with federal law.” LaCrosse v. Kernan, 244 F.3d 702, 704 (9th Cir. 2001) (*citing*
 21 Michigan v. Long, 463 U.S. 1032, 1040-41, 103 S.Ct. 3469 (1983)); Morales v. Calderon, 85 F.3d
 22 1387, 1393 (9th Cir. 1996) (“Federal habeas review is not barred if the state decision ‘fairly appears to
 23 rest primarily on federal law, or to be interwoven with federal law.’” (*quoting* Coleman, 501 U.S. at
 24 735). “A state law is so interwoven if ‘the state has made application of the procedural bar depend on
 25 an antecedent ruling on federal law [such as] the determination of whether federal constitutional error
 26 has been committed.’” Park, 202 F.3d at 1152 (*quoting* Ake v. Oklahoma, 470 U.S. 68, 75 (1985)).

27 To be deemed adequate, the state law ground for decision must be well-established and
 28 consistently applied. Poland v. Stewart, 169 F.3d 573, 577 (9th Cir. 1999) (“A state procedural rule

1 constitutes an adequate bar to federal court review if it was ‘firmly established and regularly followed’
 2 at the time it was applied by the state court.”)(*quoting Ford v. Georgia*, 498 U.S. 411, 424, 111 S.Ct.
 3 850 (1991)). Although a state court’s exercise of judicial discretion will not necessarily render a rule
 4 inadequate, the discretion must entail “the exercise of judgment according to standards that, at least
 5 over time, can become known and understood within reasonable operating limits.” *Id.* at 377 (*quoting*
 6 *Morales*, 85 F.3d at 1392).

7 As to juror no. 9, *Waltreus* provides that “any issue that was actually raised and rejected on
 8 appeal cannot be renewed in a petition for a writ of habeas corpus,” *Forrest v. Vasquez*, 75 F.3d 562,
 9 563 (9th Cir.1996) (internal quotation marks and citation omitted), results in a procedural default thus
 10 barring this Court from reaching the merits of this claim. *Whitley*, 505 U.S. at 338. However, the Ninth
 11 Circuit has stated that a denial under *Waltreus* “is neither a ruling of procedural default nor a ruling on
 12 the merits,” but rather “merely bars relitigation in state habeas proceedings of claims already litigated
 13 on direct appeal.” *Carter v. Giurbino*, 385 F.3d 1194, 1198 (9th Cir.2004).

14 Indeed, “a citation to *Waltreus* by a state court, standing alone, is neither a ruling on the merits,
 15 nor a denial on procedural grounds, and, as such, has no bearing on a California Prisoner’s ability to
 16 raise a constitutional claim on Federal habeas review.” *Medina v. Sandor*, 2012 WL 3689906, at * 4–6
 17 (C.D.Cal. June 14, 2012) (citing *Ylst v. Nunnemaker*, 501 U.S. 797, 805, 111 S.Ct. 2590, 115 L.Ed.2d
 18 706 (1991)). In a situation such as this one, where Respondent asserts that a petition brought by a
 19 California state prisoner is procedurally barred by a citation to *Waltreus*, a court must ‘look through’
 20 that citation to the last reasoned state court decision in order to determinate whether the citation to
 21 *Waltreus* was based on an earlier procedural bar.” *Id.* (citing *Ylst*, 501 U.S. at 805–806).

22 A state procedural bar that is both adequate and independent will be enforced by the federal
 23 court on habeas review unless Petitioner shows cause and prejudice or a fundamental miscarriage of
 24 justice. *Harris*, 489 U.S. at 262; *Coleman*, 501 U.S. at 750. In his Traverse, Petitioner has not
 25 addressed either contention. Accordingly, the claim as to juror no. 9 is barred in these proceedings.

26 As to juror no. 3, the state court denied the claim, stating that “petitioner has failed to show that
 27 these issues are not barred because they were not raised in his appeal.” (LD 6). In so ruling, the Court
 28 cited *Walker*, which, in turn, relies upon *In re Dixon*, 41 Cal.2d 756, 759 (1953) for the proposition

1 that, in a habeas corpus proceeding, establish a procedural rule in California that a California court will
 2 not review the merits of a claim if that claim *could have been raised* in a timely appeal but was not.
 3 Walker, 10 Cal.3d at 773. Thus, under Dixon and its progeny (including Walker), the writ will not lie
 4 where the claimed errors could have been, but were not, raised upon a timely appeal from a judgment
 5 of conviction”). See In re Harris, 5 Cal.4th 813, 823 (1993) (explaining In re Dixon rule). Despite the
 6 petitioner’s failure to bring a claim on direct appeal from a conviction, a California court will hear the
 7 merits of case if the court finds one of four exceptions. The four exceptions to the Dixon bar are: 1)
 8 fundamental constitutional error; 2) a lack of fundamental jurisdiction by the trial court over the
 9 petitioner; 3) the trial court’s acting in excess of jurisdiction; and 4) an intervening change in the law.
 10 Fields v. Calderon, 125 F.3d 757, 763 (9th Cir. 1997), *quoting* In re Harris, 5 Cal.4th at 828-842.

11 Since the California Supreme Court’s 1998 decision in In re Robbins, 18 Cal.4th 770, 811-812
 12 & n. 32 (1998), the Dixon rule has been independent of federal law. Park v. California, 202 F.3d 1146,
 13 1152 (2000). Since the California Supreme Court’s 1993 decisions in In re Harris, 5 Cal.4th 813, 823
 14 (1993) and In re Clark, 5 Cal.4th 750 (1993), the Dixon rule has been consistently applied, i.e.,
 15 “adequate.” Park, 202 F.3d at 1152. Hence, any state court ruling procedurally barring a habeas claim
 16 because the petition failed to raise that claim in his direct appeal, i.e., the Dixon rule, will be barred on
 17 federal habeas review unless the petitioner can demonstrate (1) cause for the default and actual
 18 prejudice resulting from the alleged violation of federal law, or (2) a fundamental miscarriage of
 19 justice. Harris v. Reed, 489 U.S. 255, 262-263 (1989); Coleman v. Thompson, 501 U.S. 722, 750, 111
 20 S.Ct. 2546 (1989).

21 Here, Petitioner has not alleged, let alone established, entitlement to any exception to the Dixon
 22 rule. Accordingly, the claim is barred on federal review.

23 3. Analysis.

24 However, even were the foregoing not the case, the claims would fail on their merits. The
 25 Court has already addressed the merits of Petitioner’s claim as to juror no. 9 and will not repeat that
 26 analysis here. As to juror no. 3, the Court finds Petitioner’s arguments unpersuasive.

27 a. Procedural History.

28 During four days of Petitioner’s trial, Petitioner was housed in a cell next to inmate Isaac

1 Vasquez, who, it so happened, had fathered a child by juror no. 3. During the trial, juror no. 3 talked by
2 telephone with Vasquez, expressing to Vasquez, according to Petitioner, who allegedly overheard
3 Vasquez's side of the conversations, her concerns about sitting as a juror in Petitioner's case and
4 deciding Petitioner's fate. After trial, Petitioner filed a motion for new trial based upon alleged juror
5 misconduct.

6 At the new trial hearing, Vasquez, responding to questions from defense counsel, testified that
7 juror no. 3 was his "baby's mother," and that she talked to him at the jail between April 2 and April 6
8 during Petitioner's trial. (LD 28, p. 1898; 1901). Vasquez testified that juror no. 3 told him she was
9 scared, that she did not know what she was doing, and wanted Vasquez's opinion as to what she should
10 do. (LD 28, p. 1908). Vasquez testified that he had once been a Norteno at one time, but now was no
11 longer affiliated with any street gang. (Id., p. 1910). He told juror no. 3 to just "go with the flow," and
12 to "do whatever." (Id.). He stated that if it were up to him, he would have found Petitioner guilty
13 because he was a member of a rival gang. (Id.).

14 The trial court initially found that juror no. 3 had engaged in misconduct on two occasions: first
15 by withholding information during voir dire that she was affiliated with Vasquez, who had gang ties,
16 and second when she failed to disclose talking to Vasquez about the case. (Id., p. 1928). However, the
17 court concluded that Petitioner violated his obligation to notify counsel and the court of the purported
18 misconduct until after the jury had announced its verdict:

19 What affect [the misconduct] had on the jury, we don't know. Even if there's a presumption
20 that it did, that's trumped by the fact that he didn't disclose it at a time when something could
have been done about it.

21 (Id., p. 1928).

22 When defense counsel insisted that the verdict was announced before Petitioner could notify his
23 lawyer, the trial judge pointed out that the jury indicated they had reached a verdict on Monday, April
24 7, 2008, at 11:20 a.m., and that the verdict was announced in open court at 12:21 p.m.. (Id., p. 1929).
25 The judge indicated that Vasquez must have had his conversation with juror no. 3 between the close of
26 the court session on Thursday, April 3, at 3:28 p.m., and Monday morning. The judge ruled that
27 Petitioner had "plenty of time" to notify his counsel or the court about the purported misconduct, and
28 that Petitioner is not permitted to "in essence sandbag and wait and see what the result is, and then after

1 he doesn't like the result then bring it up, and that's what has happened." (*Id.*, p. 1927). The court held
 2 that such delay "trumped" juror no. 3's misconduct. (*Id.*, p. 1928).

3 At a subsequent hearing, the judge attempted to clarify his earlier ruling in several significant
 4 respects. First, he indicated that he did not find that juror no. 3 engaged in two separate acts of
 5 misconduct. The judge explained that the failure to disclose a relationship with Vasquez during voir
 6 dire could not be deemed misconduct because Vasquez indicated that, presently, he was not affiliated
 7 with a gang and that, although old photographs of Vasquez wearing gang-related clothing were
 8 introduced at the motion for new trial, because no evidence was presented as to when the photographs
 9 were taken, no evidence showed that Vasquez was still a gang member. Hence, juror no. 3's failure to
 10 disclose a relationship with a gang member, i.e., Vasquez, during voir dire could was not proven. (LD
 11 29, p. 2001).

12 Next, the judge found the single act of misconduct in contacting Vasquez during deliberations
 13 not to be prejudicial. (*Id.*). The judge noted that if juror no. 3 had actually been biased, she would not
 14 have contacted Vasquez to share her doubts and concerns in the first place, i.e., she would have simply
 15 voted to convict Petitioner. (*Id.*). Also, Vasquez did not tell her how to vote and only expressed his
 16 own feeling, based on the fact that Petitioner was a member of a rival gang of his former gang. (*Id.*).
 17 The judge further opined that this was not a case where a juror had received extra-judicial facts about
 18 the case from a non-juror, since Vasquez testified that he did not know anything about Petitioner's case.
 19 (*Id.*, p. 2003). Finally, the judge pointed out that no evidence was presented that any jurors were
 20 affected by juror no. 3's misconduct and there was no evidence that the contact with Vasquez had any
 21 impact on juror no. 3's own deliberations. (*Id.*). The court concluded by again pointing to Petitioner's
 22 failure to disclose the issue until after the verdict was announced, stating:

23 [T]he cases, in fact, require as part of a declaration and as part of the defendant's showing
 24 evidence that neither the defendant nor the defendant's counsel were aware of the misconduct.

25 ...
 You're not allowed to gamble on the outcome while secretly preserving the error in the event of
 an unfavorable verdict.

26 (*Id.*, pp. 2004-2005).

27 b. Discussion.

28 Respondent first contends that the issue is procedurally barred by the trial court who considered

the claim waived by Petitioner's failure to raise it in a timely manner; the Court agrees. California law requires that, with certain exceptions, appellate courts will not consider claims of error that could have been, but were not, raised in the trial court. People v. Vera, 15 Cal.4th 269, 275 (1997). That rule has been deemed both independent of federal law, People v. Williams, 16 Cal.4th 153, 208 (1997), and consistently applied. Melendez v. Pliler, 288 F.3d 1120, 1125 (9th Cir. 2002). Here, the trial judge's finding is that Petitioner waited until after the verdict to notify his attorney, thus precluding the tender a timely objection. As mentioned previously, factual determinations by state courts are presumed correct absent clear and convincing evidence to the contrary and a decision adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state court proceedings. Miller-El v. Cockrell, 537 U.S. at 340; § 2254(d)(2) and (e)(1). Hence, the state court's determination that the claim has been procedurally defaulted bars federal review in this case.⁵

Although Respondent and the trial court list numerous reasons for finding no prejudice resulted from juror no. 3's misconduct, this Court is persuaded by three factors which would, if present, bear directly on the issue of prejudice: (1) Vasquez did not tell juror no. 3 how to vote or attempt to influence or coerce her into voting a particular way; (2) Vasquez did not communicate any extra-judicial facts that might have influenced juror no. 3; and (3) there is no evidence that either juror no. 3 was influenced in any way by Vasquez's comments or that she communicated these comments to any other members of the jury. As mentioned previously, where misconduct occurs, the Court presumes prejudice and the government must show the contrary. Here, the issue a close one, if the Court were deciding the issue de novo. However, under the AEDPA, the Court must give deference to the state court's factual findings and its legal conclusions, unless those conclusions are objectively unreasonable. For the reasons set forth above, and giving the state court all of the deference required by federal law, the Court cannot say that reasonable judicial minds could not disagree about whether juror no. 3's misconduct was prejudicial. Accordingly, the Court must reject Petitioner's claim.

///

⁵ In this regard, Respondent contends that no "clearly established federal law" exists as to whether a criminal defendant may or may not waive his right to an impartial jury. (Doc. 17, p. 40). Cases from various jurisdictions appear split on the issue; however, the Court has found no case directly on point that would constitute binding authority either way.

1 E. Ineffective Assistance Of Trial Counsel.

2 Finally, Petitioner contends that the he was denied his Sixth Amendment right to the effective
3 assistance of counsel in failing to move to discharge Jurors nos. 3, 4, and 9 for cause. This contention
4 too is without merit.

5 1. The State Court Adjudication.

6 As Respondent correctly points out, Petitioner pursued his claims of ineffective assistance of
7 counsel as to these three jurors in state habeas proceedings. (LD 3; 5; 7). The state court denied
8 Petitioner's ineffectiveness claims as to jurors nos. 3 and 9, the 5th DCA rejected those claims as
9 procedurally barred, citing Walker, because Petitioner could have raised, but did not, those claims in
10 his direct appeal. (LD 6). The Court has previously discussed this state procedural bar and found it
11 both independent and adequate. Accordingly, Petitioner is barred from federal habeas review on those
12 two issues.

13 Petitioner sought habeas corpus relief as to juror no. 4 in a petition in the California Supreme
14 Court that was summarily denied, which is considered a decision on the merits. (LD 8). However,
15 where the state court reaches a decision on the merits but, as here, provides no reasoning to support its
16 conclusion, a federal habeas court independently reviews the record to determine whether habeas
17 corpus relief is available under § 2254(d). Stanley v. Cullen, 633 F.3d 852, 860 (9th Cir. 2011); Himes
18 v. Thompson, 336 F.3d 848, 853 (9th Cir.2003); Greene v. Lambert, 288 F.3d 1081, 1089 (9th Cir.
19 2002) (when there is an adjudication on the merits but no reason for the decision, the court must review
20 the complete record to determine whether resolution of the case constitutes an unreasonable application
21 of clearly established federal law); Delgado v. Lewis, 223 F.3d 976, 982 (9th Cir. 2000) ("Federal
22 habeas review is not de novo when the state court does not supply reasoning for its decision, but an
23 independent review of the record is required to determine whether the state court clearly erred in its
24 application of controlling federal law."). "[A]lthough we independently review the record, we still
25 defer to the state court's ultimate decisions." Pirtle v. Morgan, 313 F.3d 1160, 1167 (9th Cir. 2002).
26 "Independent review of the record is not de novo review of the constitutional issue, but rather, the only
27 method by which we can determine whether a silent state court decision is objectively unreasonable."
28 Himes, 336 F.3d at 853. Where no reasoned decision is available, a petitioner still has the burden of

1 “showing there was no reasonable basis for the state court to deny relief.” Harrington, 131 S.Ct. at 784.
 2 Accordingly, the Court will conduct an independent review of Petitioner’s claim as to juror no. 4.

3 2. Federal Standard.

4 Effective assistance of counsel is guaranteed by the Due Process Clause of the Fourteenth
 5 Amendment. Evitts v. Lucey, 469 U.S. 387, 391-405 (1985). Claims of ineffective assistance of
 6 counsel are reviewed according to Strickland’s two-pronged test. Miller v. Keeney, 882 F.2d 1428,
 7 1433 (9th Cir.1989); United States v. Birtle, 792 F.2d 846, 847 (9th Cir.1986); see also Penson v. Ohio,
 8 488 U.S. 75(1988) (holding that where a defendant has been actually or constructively denied the
 9 assistance of counsel altogether, the Strickland standard does not apply and prejudice is presumed; the
 10 implication is that Strickland does apply where counsel is present but ineffective).

11 To prevail, Petitioner must show two things. First, he must establish that counsel’s deficient
 12 performance fell below an objective standard of reasonableness under prevailing professional norms.
 13 Strickland v. Washington, 466 U.S. 668, 687-88, 104 S.Ct. 2052 (1984). Second, Petitioner must
 14 establish that he suffered prejudice in that there was a reasonable probability that, but for counsel’s
 15 unprofessional errors, he would have prevailed on appeal. Id. at 694. A “reasonable probability” is a
 16 probability sufficient to undermine confidence in the outcome of the trial. Id. The relevant inquiry is
 17 not what counsel could have done; rather, it is whether the choices made by counsel were reasonable.
 18 Babbitt v. Calderon, 151 F.3d 1170, 1173 (9th Cir.1998).

19 With the passage of the AEDPA, habeas relief may only be granted if the state-court decision
 20 unreasonably applied this general Strickland standard for ineffective assistance. Knowles v.
 21 Mirzayance, 556 U.S. ___, 129 S.Ct. 1411, 1419 (2009). Accordingly, the question “is not whether a
 22 federal court believes the state court’s determination under the Strickland standard “was incorrect but
 23 whether that determination was unreasonable—a substantially higher threshold.” Schriro v. Landrigan,
 24 550 U.S. 465, 473 (2007); Knowles v. Mirzayance, 556 U.S. ___, 129 S.Ct. at 1420. In effect, the
 25 AEDPA standard is “doubly deferential” because it requires that it be shown not only that the state
 26 court determination was erroneous, but also that it was objectively unreasonable. Yarborough v.
 27 Gentry, 540 U.S. 1, 5 (2003). Moreover, because the Strickland standard is a general standard, a state
 28 court has even more latitude to reasonably determine that a defendant has not satisfied that standard.

1 See Yarborough v. Alvarado, 541 U.S. 652, 664 (2004)("[E]valuating whether a rule application was
 2 unreasonable requires considering the rule's specificity. The more general the rule, the more leeway
 3 courts have in reaching outcomes in case-by-case determinations").

4 3. Analysis.

5 The Court has previously discussed in depth the lack of merit as to Petitioner's claims regarding
 6 jurors no. 3 and 9. Considering the Strickland standard's double deference, it seems readily apparent
 7 that if Petitioner's claims as to these two jurors lack legal merit, then defense counsel cannot possibly
 8 be ineffective for failing to raise meritless arguments in the state court. Similarly, since the arguments
 9 lack legal merit, it is difficult to see how Petitioner could possibly have been prejudiced by counsel's
 10 failure to request that those two jurors be discharged from the venire.

11 As to juror no. 4, the record shows he was a correctional officer. (LD 30, p. 113). However,
 12 that alone is insufficient to establish juror bias. As the Supreme Court noted in Smith v. Phillips, 455
 13 U.S. 209 (1982):

14 [D]ue process does not require a new trial every time a juror has been placed in a potentially
 15 compromising situation. Were that the rule, few trials would be constitutionally acceptable. The
 16 safeguards of juror impartiality, such as voir dire and protective instructions from the trial judge,
 17 are not infallible; it is virtually impossible to shield jurors from every contact or influence that
 might theoretically affect their vote. Due process means a jury capable and willing to decide the
 case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial
 occurrences and to determine the effect of such occurrences when they happen.

18 Smith, 455 U.S. at 217. The Supreme Court has repeatedly rejected claims of implied bias based on
 19 employment, noting that the accused was "free to show the existence of actual bias." Dennis v. United
 20 States, 339 U.S., 162, 167 (1950)(claim that jurors employed by the federal government were inherently
 21 biased because such employees were subject to executive order providing for discharge of federal
 22 employees upon reasonable belief in employee's disloyalty to government); Smith, 455 U.S. at 216-218
 23 (rejecting claim of juror bias where juror, during course of trial, applied for employment as investigatory
 24 with prosecutor's office). The Court thus concluded: "A holding of implied bias to disqualify jurors
 25 because of their relationship with the Government is no longer permissible.... Preservation of the
 26 opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury." Dennis, 339
 27 U.S. at 171-172. See also Frazier v. United States, 335 U.S. 497 (1948); United States v. Wood, 299
 28 U.S. 123 (1936).

Accordingly, the mere fact that juror no. 4 was a correctional officer is insufficient to establish the actual bias necessary to support a challenge for cause. Moreover, as Respondent correctly notes, juror no. 4 stated under oath that he could decide the case on the evidence, that he could be fair and impartial, and that he understood that law enforcement officers and detectives could make mistakes and wrong decisions. (LD 30, pp. 116-117). Under such circumstances, there was no legal basis to challenge juror no. 4 for cause. Necessarily, then, defense counsel was not ineffective for failing to make such a challenge, and his failure to do so could not have been prejudicial to Petitioner's case. Thus, on independent review, Petitioner has failed in meeting his burden to show "there was no reasonable basis for the state court to deny relief." Harrington, 131 S.Ct. at 784. Accordingly, the claim should be denied.

RECOMMENDATION

Accordingly, the Court RECOMMENDS that Petitioner's Petition for Writ of Habeas Corpus (Doc. 1), be DENIED with prejudice.

This Findings and Recommendation is submitted to the United States District Court Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636 (b)(1)(B) and Rule 304 of the Local Rules of Practice for the United States District Court, Eastern District of California. **Within 21 days** after being served with a copy of this Findings and Recommendation, any party may file written objections with the Court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendation." Replies to the Objections shall be served and filed **within 10 days** (plus three days if served by mail) after service of the Objections. The Court will then review the Magistrate Judge's ruling pursuant to 28 U.S.C. § 636 (b)(1)(C). The parties are advised that failure to file objections within the specified time may waive the right to appeal the Order of the District Court. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

IT IS SO ORDERED.

Dated: July 21, 2015

/s/ Jennifer L. Thurston
UNITED STATES MAGISTRATE JUDGE

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9 FOR THE EASTERN DISTRICT OF CALIFORNIA
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12 **ULICES AGUILAR,**

1:12-cv-01547-LJO-JLT

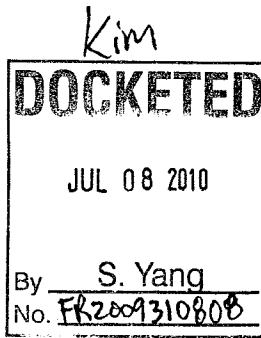
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14 Petitioner,

15 v.

16 **MATTHEW CATE, Secretary, CDCR,**

17 Respondent.
18

19 1. Unpublished Opinion, filed July 8, 2010, in the Fifth Appellate District Court of
20 Appeal, Case Number F057268.
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COURT OF APPEAL
FIFTH APPELLATE DISTRICT
FILED

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By _____ Deputy

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ULISCES AGUILAR,

Defendant and Appellant.

F057268

(Super. Ct. No. VCF127019E)

OPINION

APPEAL from a judgment of the Superior Court of Tulare County. Lloyd L. Hicks, Judge.

Kim Malcheski, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Senior Assistant Attorney General, Kathleen A. McKenna and William K. Kim, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION AND FACUAL OVERVIEW

During the early morning hours of May 6, 2004, appellant Ulises Aguilar acted as the lookout while Miguel Ontiveros Cisneros fatally shot to death Everado Marquez while Marquez was sleeping. The murder weapon was found in appellant's home.

At the time of the murder, appellant was a member of the Surenos, a criminal street gang. Marquez was a member of the Surenos's rival gang, the Nortenos. Cisneros had been a Norteno. But Cisneros thought Marquez stole his car and he wanted to kill Marquez. Fellow Nortenos did not help him retaliate against Marquez. So Cisneros began associating with Surenos.

The prosecution's gang expert opined that the murder satisfied Cisneros's desire for vengeance against Marquez and it also benefited the Surenos. The defense's gang expert opined that the motivation for the killing was entirely personal and the murder was not gang related.

Appellant and Cisneros were jointly charged with murder; a street gang special circumstance allegation, a street gang enhancement and an allegation that a principal personally and intentionally discharged a firearm, causing great bodily injury and death, were attached to the murder count. (Pen. Code, §§ 187; 190, subd. (a)(22); 186.22, subd. (b)(1); 12022.53, subds. (d) & (e).)¹ Both defendants were charged with shooting at an inhabited dwelling, but this count was later dismissed. (§ 246.) Cisneros was charged with the additional offenses of conspiracy to commit murder and concealing a firearm in a vehicle. (§§ 182, subd. (a)(1); 12025, subd. (a)(1).)

Trials of the codefendants were severed.

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

Cisneros was tried first. He was convicted after jury trial on all counts and all of the special allegations were found to be true. He was sentenced to life with parole, plus a consecutive term of 25 years to life. The judgment was affirmed on appeal.²

Appellant's jury trial began in July 2007. It ended in a mistrial after the jury hung on second degree murder. The jury returned a verdict of not guilty of first degree murder. It found all of the special allegations to be not true.

Appellant filed a motion to dismiss the enhancement allegations because retrial was barred by the federal and state constitutional prohibitions against double jeopardy and collateral estoppel. (U.S. Const., 5th Amend.; Cal. Const., art. I, § 15.) The motion was denied.³

Appellant's second jury trial was held in 2008. He was found guilty of second degree murder. The gang and firearm enhancement allegations were found to be true.

Appellant motioned for a new trial. In relevant part, he argued juror No. 9 committed misconduct by concealing her connections with the Nortenos. The motion was denied.

Appellant was sentenced to 15 years to life, plus a consecutive term of 25 years to life.

Appellant challenges the sufficiency of the evidence supporting the gang enhancement. Also, he argues the trial court committed federal constitutional error by refusing to dismiss the enhancement allegations and by denying the new trial motion. Finally, he contends defense counsel was ineffective because he failed to move to dismiss

² On this court's own motion, we hereby take judicial notice of the opinion in *People v. Cisneros*, F051367, opinion filed Oct. 17, 2007 [2007 WL 3025074]. (Evid. Code, § 452.)

³ The parties agreed that the special circumstance allegation no longer applied because appellant was found not guilty of first degree murder at the first trial.

juror No. 9 during trial and incompetently litigated the issue in the new trial motion. None of these contentions is persuasive. We will affirm.

FACTS

Appellant was a Surenos gang member.

Prior to 2004, Cisneros, Garcia and Marquez were all Norteno gang members or associates.⁴

On an unspecified date, Cisneros's car was stolen. Cisneros blamed Marquez for the theft.

Cisneros told Garcia that he wanted to shoot Marquez and Garcia agreed to help him. Garcia asked Guillermo Maldonado for a gun. Maldonado initially agreed. But two weeks before the murder, Maldonado told Garcia that he could not get them a gun. Garcia did not take any further action to assist Cisneros.

Cisneros began associating with Surenos gang members and associates, including appellant.

Sometime prior to the murder, appellant and Marquez got into a fight.

On May 1, Cisneros was with some Surenos when a group of Nortenos confronted them. The two groups prepared to fight. Cisneros pulled out a handgun, aimed it at the ground, and fired it repeatedly. The Nortenos left.

During the evening of May 5 and early morning hours of May 6, appellant, Cisneros, Eliseo Sanchez and Lorenzo Perez were socializing at appellant's residence. Appellant had a handgun tucked in his waistband; he said that he was going to "cap it." Cisneros and appellant got up to leave. Cisneros said, "[W]e'll be back, we're gonna go

⁴ Henceforth, unless otherwise specified all dates refer to 2004.

to [Marquez's] house." Appellant said, "I got your back." Appellant and Cisneros left the gathering.⁵

After retrieving a rifle from Cisneros's house, they walked to Marquez's house. Appellant stayed outside while Cisneros entered Marquez's bedroom. Cisneros fired multiple shots from the rifle at Marquez, killing him. Cisneros and appellant ran back to appellant's house.

Shell casings and a detached bolt handle were left at the crime scene.

About a week later, detectives found a rifle in appellant's bedroom. It was subsequently determined to be the murder weapon.

Appellant admitted in a police interview that he and Cisneros went to Marquez's house. Cisneros was carrying a rifle. However, appellant denied knowing that Cisneros was going to shoot Marquez. Appellant said that he walked to the back gate and stayed there. Appellant heard gunshots. They ran back to appellant's house. Appellant took the rifle from Cisneros and put it in his bedroom closet.

Deputy Sheriff Joe Aguilar testified as the prosecution's gang expert. City of Madera Police Officer Jason Dilbeck testified as the defense's gang expert.

Deputy Aguilar testified that the Nortenos and the Surenos are rival gangs who both claim the town of Pixley as their territory. Nortenos use the color red, the number 14 and the letter N as identifying symbols. Surenos use the color blue, the number 13 and the letter M as identifying symbols. The primary activities of Nortenos and Surenos are burglaries, drug sales, simple assaults and assaults with deadly weapons. The

⁵ Appellant has not challenged the sufficiency of the evidence supporting the murder conviction. Some of the evidence proving appellant's involvement in the murder was obtained during police interviews with him, and with his friends and relatives. At trial, some of these people recanted or failed to recollect statements they made to the police.

predicate offenses were the conspiracy to commit murder between Garcia and Cisneros and the actual murder which involved Cisneros and appellant.

Deputy Aguilar opined that appellant was a Surenos gang member because he admitted membership, wore blue clothing, had gang tattoos and associated with other Surenos. Appellant's house was a gathering place for Surenos.

Deputy Aguilar further opined that Marquez and Garcia were affiliated with the Nortenos.

Deputy Aguilar stated that Cisneros had been a Nortenos gang member. A few months prior to the homicide, Cisneros changed his gang affiliation and started associating with Surenos gang members and associates. Deputy Aguilar based this determination on Cisneros's contacts with gang members. Cisneros's contacts prior to 2004 were all with Nortenos, but his recent contacts were with Surenos. Deputy Aguilar testified that changing one's gang affiliation is rare but it does occur. In this case, Marquez's theft of Cisneros's car and Cisneros's anger "that he couldn't do nothing about it" was the catalyst for Cisneros's change of gang affiliation from Norteno to Sureno. Deputy Aguilar testified:

"By him basically the car theft was a catalyst that -- usually when someone switches sides, there has to be some type of disgruntlement. While it is rare, it does occur. And it usually has to do with a wrong that the subject feels that his particular gang has done him and not backed him up, so he feels the need to switch sides to be able to avenge that and also have backup."

Deputy Aguilar testified the killing would benefit the Surenos:

"Any time that your rival is eliminated, it shows power. Who commits it is really irrelevant as long as one of the southern gang members is with the subject. This enhances the gang's reputation, shows the aggression, and shows what they're willing to do to get rid of their rivals and to claim a turf."

Further, the murder would “enhance a subject’s individual reputation and also show how willing they were to put in work for the gang.”

Deputy Aguilar found the prior fight between appellant and Marquez significant in forming the opinion that the homicide benefited the Sureños. He explained:

“All I would need to know is that he’s Southern and he’s a Northerner. Any time there’s a confrontation between two rival gangs, one has to do something about it. To not retaliate in some way on would show a weakness on your part.... [¶] ... [¶] ... It would show the subject that he himself was personally weak and that his gang was weak.”

Deputy Aguilar testified that the lapse of time between the fight and the homicide was not significant, as follows:

“A subject would have to feel that he had enough backup in case something else -- there were retaliations. If in the beginning they were too weak to actually do anything about it, they would wait until they had enough members or that subject had gathered enough of a reputation to be able to have some backup.”

Deputy Aguilar also opined that the killing would “promote or further assist criminal activity by other” Sureños. He explained:

“It would also encourage other gang members to commit similar acts. It would also be used as a recruitment tool to show the younger juveniles that they’re tough and not to be messed with and if they join they will be protected.”

Officer Dilbeck opined there was insufficient evidence indicating that Cisneros switched gang affiliation. Also, he testified that it appeared “as if the motivation [for Marquez’s murder] was personal because of the stolen car and the disrespect that went on with that.”

DISCUSSION

I. The gang enhancement has adequate evidentiary support.

A. The substantial evidence standard of review applies.

When reviewing a challenge to the sufficiency of the evidence, we assess the entire record in the light most favorable to the judgment below to determine whether it contains substantial evidence from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) “This standard applies to a claim of insufficiency of the evidence to support a gang enhancement.” (*People v. Vy* (2004) 122 Cal.App.4th 1209, 1224.) “The standard is the same, regardless of whether the prosecution relies mainly on direct or circumstantial evidence. [Citation.]” (*People v. Vazquez* (2009) 178 Cal.App.4th 347, 352 (*Vasquez*).)

In applying the substantial evidence standard of review, the appellate court adopts all reasonable inferences and presumes in support of the judgment the existence of every fact that a jury reasonably could have deduced from the evidence. The trier of fact makes credibility determinations and resolves factual disputes. An appellate court will not substitute its evaluation of a witness’s credibility for that of the fact finder. “It is the jury, not this court, that must be convinced beyond a reasonable doubt that the gang enhancement allegation is true. [Citation.]” (*Vasquez, supra*, 178 Cal.App.4th at p. 352.)

B. Section 186.22, subdivision (b)(1) did not require the People to prove appellant committed the substantive offense with the specific intent to facilitate additional and separate criminal conduct by gang members.

In relevant part, section 186.22, subdivision (b)(1), provides for a sentence enhancement when a defendant commits a felony “for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members”

In *Garcia v. Carey* (9th Cir. 2005) 395 F.3d 1099 (*Garcia*) and *Briseno v. Scribner* (9th Cir. 2009) 555 F.3d 1069 (*Briseno*), the Ninth Circuit held that the specific intent requirement of section 186.22, subdivision (b) requires some evidence supporting an inference that the defendant committed the crime with the specific intent to facilitate separate additional criminal conduct by gang members. The People are required to produce evidence describing “what criminal activity of the gang was ... intended to be furthered” by the charged crime. (*Garcia, supra*, 395 F.3d at p. 1103; see also *Briseno, supra*, 555 F.3d at p. 1079.)

Relying on these Ninth Circuit cases, appellant argues the true finding on the gang enhancement must be reversed because the record lacks proof that he committed the substantive offense with the specific intent to facilitate separate and additional criminal conduct by gang members. We are not convinced. As will be explained, the Ninth Circuit has misinterpreted section 186.22, subdivision (b)(1).

As lower federal court decisions, *Garcia* and *Briseno* are not binding on this court. (*People v. Hoag* (2000) 83 Cal.App.4th 1198, 1205.) No California Court of Appeal has accepted the Ninth Circuit’s interpretation of section 186.22, subdivision (b)(1). The California appellate courts that have considered this issue unanimously agree there is no statutory requirement that the “criminal conduct by gang members” referenced in section 186.22, subdivision (b)(1) must “be distinct from the charged offense, or that the evidence establish specific crimes the defendant intended to assist his fellow gang members in committing.” (*Vazquez, supra*, 178 Cal.App.4th at p. 354; see also *People v. Romero* (2006) 140 Cal.App.4th 15, 19 (*Romero*); *People v. Hill* (2006) 142 Cal.App.4th 770, 774 (*Hill*).) *Vasquez* cogently explains:

“[¶] While our Supreme Court has not yet reached this issue, numerous California Courts of Appeal have rejected the Ninth Circuit’s reasoning. As our colleagues noted in [*Romero, supra*, 140 Cal.App.4th at p. 19]: ‘By its plain language, the statute requires a showing of specific intent to

promote, further, or assist in “*any* criminal conduct by gang members,” rather than *other* criminal conduct. (§ 186.22, subd. (b)(1), italics added.)’ Thus, if substantial evidence establishes that the defendant is a gang member who intended to commit the charged felony in association with other gang members, the jury may fairly infer that the defendant also intended for his crime to promote, further or assist criminal conduct by those gang members. [Citation.]

“Like the *Romero* court, we reject the Ninth Circuit’s attempt to write additional requirements into the statute. It provides an enhanced penalty where the defendant specifically intends to ‘promote, further, or assist in any criminal conduct by gang members.’ (§ 186.22, subd. (b)(1).) There is no statutory requirement that this ‘criminal conduct by gang members’ be distinct from the charged offense, or that the evidence establish specific crimes the defendant intended to assist his fellow gang members in committing.” (*Vasquez, supra*, 178 Cal.App.4th at pp. 353-354.)

For the reasons expressed in *Vasquez, Romero* and *Hill*, we reject the Ninth Circuit’s interpretation of section 186.22, subdivision (b)(1), and decline to follow *Briseno* and *Garcia*.

C. Deputy Aguilar’s opinion has sufficient foundation and there is substantial evidence proving the murder benefited the Surenos.

We now consider the sufficiency of the evidence proving that the murder was committed “for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members” (§ 186.22, subd. (b)(1).) Appellant argues that Deputy Aguilar’s testimony was speculative. We are not persuaded. As will be explained, there was adequate evidentiary foundation for Deputy Aguilar’s opinions. The People met their burden of proving the benefit element of the gang enhancement.

Evidence that a crime would enhance a gang’s status or reputation or that it would intimidate rival gangs or potential witnesses within the gang’s territory, is sufficient to support a finding that the crime was “for the benefit of” the gang. (See *People v. Garcia*

(2007) 153 Cal.App.4th 1499, 1504-1506, 1511-1512 & *People v. Morales*, *supra*, 112 Cal.App.4th at p. 119.) Generally, the testimony of a single witness is sufficient to prove a disputed fact. (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) This topic is a proper subject for expert testimony. (*People v. Zepeda* (2001) 87 Cal.App.4th 1183, 1207-1209.) An expert may rely on hearsay in forming his or her opinion. (*People v. Catlin* (2001) 26 Cal.4th 81, 137.) Yet, “[l]ike a house built on sand, the expert’s opinion is no better than the facts on which it is based.” [Citation.]” (*People v. Gardeley* (1996) 14 Cal.4th 605, 618.)

“[¶] A gang expert’s testimony alone is insufficient to find an offense gang related. [Citation.] ‘[T]he record must provide some evidentiary support, other than merely the defendant’s record of prior offenses and past gang activities or personal affiliations, for a finding that the *crime* was committed for the benefit of, at the direction of, or in association with a criminal street gang.’ [Citation.]” (*People v. Ochoa* (2009) 179 Cal.App.4th 650, 657.)

It is undisputed that the Surenos is a criminal street gang and that appellant is a member of this gang. Both the People’s gang expert and the defense’s gang expert testified that appellant was a Sureno. Deputy Aguilar testified that assault with a deadly weapon was one of the Surenos’s primary criminal activities. In challenging the foundation for Deputy Aguilar’s opinion that the murder benefited the Surenos, appellant fails to recognize the significance of the fact that he, a Sureno, assisted in the murder of Marquez, a Norteno. Nortenos and Surenos are enemy gangs. Appellant previously had been involved with a fight with Marquez. Thus, irrespective of Cisneros’s desire to retaliate against Marquez because of the car theft, there was a gang-related reason for appellant to participate in Marquez’s murder. Deputy Aguilar explained, “Any time there’s a confrontation between two rival gangs, one has to do something about it. To not retaliate in some way on would show a weakness on your part.... [¶] ... [¶] ... It would show the subject that he himself was personally weak and that his gang was weak.”

Appellant's affiliation with the Sureños and his prior fight with Marquez are foundational facts providing evidentiary support for Deputy Aguilar's opinion that murder benefited the Sureños, because failing to retaliate against Marquez after the fight would cause other gang members and associates to view appellant and the Sureños as weak. By participating in the murder, appellant eliminated a rival gang member who had disrespected him, thereby increasing his stature and the stature of the Sureños.

Also, there was evidence that Cisneros began associating with Sureños during the months before he killed Marquez. In fact, five days before the murder Cisneros was with a group of Sureños when they were confronted by a group of Nortenos. Cisneros fired a handgun onto the ground and the Nortenos left. Appellant fails to recognize the significance of this act -- Cisneros overtly sided against his former gang associates in a dispute between the two rival gangs.

Furthermore, in the hours before the homicide Cisneros and appellant were socializing with a group of people that included Sureños. They made verbal statements indicating that they were going to kill Marquez. Then they left the gathering. This shows that they wanted others to know that they were going to kill Marquez, who was known to be a Norteno. And they were not just going to kill any Norteno -- they targeted a Norteno who previously fought with appellant, a Sureños member, and was believed to have stolen a car belonging to Cisneros, a new Sureños associate. By killing Marquez, Cisneros demonstrated his commitment to the Sureños. Appellant proved his strength and the strength of the Sureños.

Considered in their totality, these facts adequately support Deputy Aguilar's testimony that the murder benefited the Sureños. Accordingly, we reject appellant's contention that Deputy Aguilar's testimony was speculative.

Having carefully examined the record, we conclude that it contains substantial evidence from which a reasonable jury could determine beyond a reasonable doubt that

the murder was committed for the benefit of, at the direction of, or in association with the Surenos, with the specific intent to promote, further, or assist in any criminal conduct by gang members. Therefore, the challenge to the sufficiency of the evidence fails.⁶

II. The dismissal motion was properly denied.

A. Facts

Appellant's first jury trial occurred in July 2007. The jury charge included CALCRIM Nos. 1401 and 1402, which directed the jurors to consider and decide the special allegations only if they found the defendant guilty of first or second degree murder.

The jury began deliberating on July 15, 2007.

On the next day, the foreperson sent a note to the judge stating they were unable to reach an agreement. That afternoon, the judge asked the jurors whether further deliberations would be productive. A juror replied: "We have one issue that we cannot all come to an agreement upon as far as making a decision on a verdict. And no one is swaying at any point in time on that one issue. So, therefore, as far as the people go, no one is wanting to change their opinion on that one term. So we can keep going over it and over it, and it's not making any difference. So it's like a stalemate." Defense counsel and the prosecutor submitted the matter without comment. The judge ruled the jury was deadlocked and declared a mistrial.

Then the judge ascertained from the jurors that they unanimously agreed appellant was not guilty of first degree murder but were split eight to four in favor of a guilty verdict on second degree murder. A juror explained, "We had a consensus that it wasn't

⁶ We note that appellant's reliance on cases such as *People v. Killebrew* (2002) 103 Cal.App.4th 644, *People v. Ramon* (2009) 175 Cal.App.4th 843 and *In re Frank S.* (2006) 11 Cal.App.4th 1192 is misplaced; none of the authorities cited by appellant is factually analogous to this matter.

first degree, but it was an issue of second degree as to one term of the stipulations [*sic*] as to what determined second degree. And we couldn't come to an agreement on that particular term of the second degree."

The judge directed the jury to examine CALCRIM No. 640, which provides instruction on completion of the verdict forms when a defendant has been charged with first degree murder and lesser included homicide offenses. CALCRIM No. 640 does not include instruction on completion of the verdict forms for any special allegations that might be attached to the murder charge. The judge sent the jurors to the jury room "to see if you can straighten it out."

After a recess, the jurors returned to the courtroom. The judge asked, "Have you reached a verdict on one count?" The foreperson replied affirmatively. The jury returned a not guilty verdict on first degree murder as charged in count one and not true findings on the gang special circumstance, gang allegation and firearm allegation. The judge restated that mistrial had been declared as to second degree murder and discharged the jury.

Prior to the start of the second trial, appellant filed a written motion to dismiss the firearm and gang allegations. The People filed written opposition.

The court denied the motion after hearing. Citing *People v. Allen* (1974) 41 Cal.App.3d 821 (*Allen*) and our decision in *People v. Davis* (1988) 202 Cal.App.3d 1009 (*Davis*), the court reasoned that the findings on the special allegations were beyond the scope of the jury's duties. The jury was instructed to consider the special allegations only if it found the defendant guilty. Since the jury found the defendant not guilty of first degree murder and hung on the question of second degree murder, it should not have considered any of the special allegations. Under *Allen* and *Davis*, the jury's findings in such a situation are considered to be mere surplusage, equivalent to a lenity recommendation. The court also pointed out that the jury's not true finding on the

firearm enhancement was incomprehensible since it was proved “beyond any shadow of any doubt whatsoever that a principal” (i.e., Cisneros) discharged a firearm, killing Marquez. The court thought that, perhaps, “the jury just felt that no blank should be left unfilled on the verdict and put stuff in.”

B. The double jeopardy bar and the collateral estoppel rule are distinct legal concepts arising from the double jeopardy clauses of the state and federal Constitutions.

“The double jeopardy clauses of the Fifth Amendment to the United States Constitution and article I, section 15, of the California Constitution provide that a person may not be twice placed ‘in jeopardy’ for the ‘same offense.’ ‘The double jeopardy bar protects against a second prosecution for the same offense following an acquittal or conviction, and also protects against multiple punishment for the same offense. [Citations.]’ [Citation.]” (*People v. Anderson* (2009) 47 Cal.4th 92, 103-104.) “Double jeopardy precludes reprosecution for an offense of which a defendant has been acquitted or to which jeopardy has otherwise attached.” (*People v. Davis* (1995) 10 Cal.4th 463, 514, fn. 10.)

The collateral estoppel rule, which applies to relitigation of factual issues, is derived from the double jeopardy clause in the Fifth Amendment. (*People v. Cooper* (2007) 149 Cal.App.4th 500, 518.) Collateral estoppel is also known as issue preclusion.⁷ (*People v. Santamaria* (1994) 8 Cal.4th 903, 912, fn. 2.) It is an equitable concept based on fundamental principles of fairness and is conceptually separate and analytically distinct from double jeopardy, which applies to retrial of offenses. (*Id.* at

⁷ Appellant uses the term direct estoppel in his briefing as though it is somehow different from collateral estoppel. We agree with respondent that there is no difference between collateral estoppel and direct estoppel. (See, e.g., *Commonwealth v. Rodriguez* (2005) 443 Mass. 707, 709-710.)

p. 912, fn. 3.) Collateral estoppel may apply in criminal cases independent of double jeopardy. (See, e.g., *Chamblin v. Municipal Court* (1982) 130 Cal.App.3d 115, 119.)

The rules governing application of the collateral estoppel rule are settled:

“... Collateral estoppel bars relitigation of an issue decided in a previous proceeding in a different cause of action if ‘(1) the issue necessarily decided at the previous proceeding is identical to the one which is sought to be relitigated; and (2) the previous proceeding resulted in a final judgment on the merits; and (3) the party against whom collateral estoppel is asserted was a party or in privity with a party at the prior proceeding.’ [Citations.]” (*People v. Davis, supra*, 10 Cal.4th at pp. 514-515, fn. 10.)

To determine whether the collateral estoppel rule applies,

“[the court is] to ‘examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.’ [Fn. omitted.] The inquiry ‘must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings.’ [Citation.]” (*Ashe v. Swenson* (1970) 397 U.S. 436, 444.)

Where there is no dispute as to the facts, whether a defendant has been formerly in jeopardy for the same offense is a question of law for the court and not one of fact for the jury. (*People v. Conson* (1925) 72 Cal.App. 509, 511.)

A double jeopardy or collateral estoppel claim is forfeited on appeal unless it was first presented in the trial court. (*People v. Belcher* (1974) 11 Cal.3d 91, 96; *People v. Neely* (1999) 70 Cal.App.4th 767, 782-783; *People v. Morales* (2003) 112 Cal.App.4th 1176, 1186; *People v. Gillard* (1997) 57 Cal.App.4th 136, 160.) Appellant raised both double jeopardy and collateral estoppel claims in the points and authorities supporting the dismissal motion. Therefore, the points were preserved for appellate review.

C. The People were not collaterally estopped from retrying the gang and firearm allegations.

Appellant argues *Allen* and *Davis* are not controlling and the trial court erred by failing to apply the collateral estoppel rule to preclude retrial of the enhancements. We are not persuaded.

In *Allen, supra*, 41 Cal.App.3d 821, the victim was shot in the chest with a revolver. Defendant was charged with murder (count 1) and assault with a deadly weapon (count 2); a firearm enhancement was attached to each count. The jury was instructed to determine whether defendant used a firearm only if it found him guilty on either or both of the substantive crimes. The jury acquitted defendant on count 1 and deadlocked on count 2. The jury filled out the verdict form on the firearm enhancement attached to count 1, finding that it was not true.

The issue on appeal was whether the jury's finding, in connection with the acquittal on count 1 that defendant was not using a firearm, barred retrial on count 2. The appellate court concluded the jury's not true finding on the firearm allegation was surplusage that did not have any legal effect. It analogized the jury's finding to a lenity recommendation. A lenity recommendation "is extraneous because punishment is not a jury function and thus beyond the scope of its duties. Likewise, when the jury made a special finding after reaching a verdict of not guilty, which it should have made only if it found defendant guilty, the finding would be discarded as beyond the scope of its duties. [Citation.]" (*Davis, supra*, 202 Cal.App.3d at p. 1015.) After examining the record, the court decided it was probable that the jury simply forgot that under the court's instructions it was not to consider the firearm enhancement attached to count 1 unless it found defendant guilty of attempted murder and that it could throw away the verdict forms associated with this count once it acquitted defendant on that count. "[F]eeling that it had to do something more ceremonial with all verdict forms relating to count 1 and unable to say that defendant used a gun in committing an offense of which he was to be

acquitted, the jury found -- quite logically -- that in not committing the offense he did not use a firearm.” (*Allen, supra*, 41 Cal.App.3d at p. 827.)

In *Davis, supra*, 202 Cal.App.3d 1009, this court discussed *Allen* in concluding that a defendant who was found guilty of second degree murder but found not guilty of involuntary manslaughter was not entitled to reversal on the theory that the conviction was inconsistent with the acquittal on a lesser included offense. We determined that defendant was not entitled to reversal simply “because of a technical error -- the jury filled in the two manslaughter verdicts rather than leaving them blank as it was instructed to do once it reached a guilty verdict on one of the murder counts. Appellant suffered no injustice because of the errors and we can think of no policy which would be served by reversing appellant’s conviction based on this clearly procedural error.” (*Id.* at p. 1017.)

Appellant urges this court to reject *Allen* because it is “rather short and superficial” and did not explicitly discuss the collateral estoppel rule. As to appellant’s contention that brevity indicates an absence of intellectual depth, it is sufficient to comment that the Gettysburg Address consists of 256 words. We are persuaded by respondent’s position that while the *Allen* court did not explicitly discuss the collateral estoppel rule, it essentially conducted the type of analysis our Supreme Court has determined should be undertaken when considering a collateral estoppel issue. As previously explained, the court is to conduct a practical examination of the entire record of the prior proceedings, taking account of all of the circumstances, in order to determine “whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.” (*Ashe v. Swenson, supra*, 397 U.S. at p. 444.) In *Allen*, the court conducted this type of examination. Therefore, we find *Allen* to be persuasive authority.

Having examined the entire circumstances in this matter we discern no basis to reverse the lower court’s ruling. It is apparent that the first jury did not follow their

instructions to consider the special allegations only if they found appellant guilty of murder. It is evident from the jury's colloquy with the court that they did not actually consider the merits of the special allegations. They decided appellant was not guilty of first degree murder but were irreconcilably divided on the question whether appellant was guilty of second degree murder. After declaring a mistrial, the court sent the jurors back to the jury room with directions to read CALCRIM No. 640 and complete the verdict form on the murder charge. After only a brief recess, the jurors returned with completed verdict forms not just on first degree murder but on all the special allegations attached to the murder charge. It is apparent that the jurors did not understand how to complete the verdict forms. As the trial court pointed out, if the jury had actually determined that it was not true that a principal used a firearm during the commission of the homicide, then they would have found appellant not guilty on all homicide charges since the undisputed evidence at trial proved Marquez died as a result of multiple gunshot wounds. The People did not present any alternative theory for the murder other than Cisneros shot Marquez while appellant acted as the lookout. Logically, the jury could not have been deadlocked on the question of second degree murder if it had unanimously decided that a principal did not fire a weapon during the commission of the homicide.

Since the jury did not have any authority to consider the special allegations in the absence of a guilty verdict on the murder charge and it is apparent from the record that the jury did not necessarily consider and decide the factual questions posed by the special allegations, we hold that the prosecution was not bound by the unauthorized findings. Appellant had no legitimate expectation that the unauthorized not true findings on the special allegations would preclude retrial of these allegations during the second trial. (*Allen, supra*, 41 Cal.App.3d at p. 827; *Davis, supra*, 202 Cal.App.3d at p. 1017.)

Were we to conclude otherwise, the People actually would have been precluded from retrying appellant for second degree murder because the sole theory of the case was

that a principal, i.e., Cisneros, shot and killed Marquez. If the People were collaterally estopped from presenting evidence about Cisneros's firearm use because of the unauthorized not true finding on the firearm allegation, then the People would not have had any factual theory upon which they could have retried appellant.

Accordingly, we conclude the special allegations were not actually and necessarily decided in the first trial. Fundamental principles of fairness do not require us to give any weight to the first jury's unauthorized findings on the special allegations. Therefore, we find the People were not collaterally stopped from retrying the special allegations and uphold the denial of the dismissal motion.

III. The new trial motion was properly denied.

A. Facts

i. Voir Dire

During voir dire the judge informed the prospective jurors that there was a gang allegation in this case. He asked, "Is there anybody here, either yourself or close friends or relatives have been or are in a street gang?" Juror No. 9 responded, "I have a family member that's involved in it, but I don't -- I stay away. It doesn't bother my mind at all. I'm not involved, and I don't care to be. So I just wanted to let you know that I do have family members." The judge asked juror No. 9 if he/she could decide this case on the evidence presented and he/she answered: "Yes. It doesn't bother me."

Juror No. 9 also disclosed that one of his/her cousins had been accused of murder about a year ago. This juror answered affirmatively when the court asked if he/she could set this aside and decide the case based on the evidence.

Defense counsel and the prosecutor both questioned juror No. 9. Neither the prosecutor nor defense counsel asked juror No. 9 about the gang connections of his/her family or asked if this juror was personally allied with a gang.

Juror No. 9 answered basic biographical questions during which it was ascertained that he/she was employed as a food server. He/she was married and had three children.

Neither the prosecutor nor defense counsel exercised a peremptory challenge on juror No. 9 or asked the court to excuse him/her for cause.

ii. Proceedings during trial

The prosecutor asked witness Eliseo Sanchez (Eliseo) if he knew a person named Alex Sanchez (Alex). Eliseo responded in the negative. After being shown a document, Eliseo testified that Alex was a Norteno.

Juror No. 9 passed a note to the judge which stated, "I [know] Alex Sanchez. [Lived] in the same house when he died. Don't know if that is ok!"

Outside the presence of the other jurors, the court questioned juror No. 9 about this note. Juror No. 9 stated:

"If it's the same Alex Sanchez from Tulare that shot himself, that's the Alex I'm talking about. I don't know if it's Alex from Pixley, but I only know one Alex Sanchez, and I know he passed away around that time. So that's why I thought I should let you know that. I lived with him at the time. I was dating his [sibling]. He was like my little brother."

It was ascertained that juror No. 9 and the prosecutor were both referring to the same Alex Sanchez.

The court said that a poster on which "In Memory of Alex," was written was going to be used in as part of the basis for the gang expert's testimony.

Defense counsel asked the court, "Can I ask [him/her]?"

Instead of replying to defense counsel, the judge asked juror No. 9, "Is that going to affect your ability to sit fairly in this case in any way?" He/she replied, "If it doesn't have nothing to do with him, no." The court said, "It doesn't." He/she responded, "If it doesn't, then no."

Defense counsel asked the court if he could ask juror No. 9 some questions. The court directed counsel to approach the bench; an off-the-record discussion occurred.

Then the judge asked juror No. 9, "The fact that he was Norteno-associated and defendant here may be Sureno-associated, is that going to affect your ability to be fair in this?"

Juror No. 9 replied, "Maybe a little bit." Then he/she continued, "I'm not saying that -- I still have to see everything, so I can't say --" The judge said, "That's what we're asking." He/she said, "No."

The court asked, "You could see the evidence and decide this based on the evidence?"

Juror No. 9 replied: "Like, okay, put it this way. Right now I can't say he's guilty or not guilty. Just because he's a Sureno, that doesn't have nothing to do with me. I don't claim. My family does, but that has nothing to do with me."

The court asked juror No. 9 if he/she would be influenced because the defendant is a Sureno.

Juror No. 9 replied, "I don't claim, so I don't care about that."

The court thanked juror No. 9 and concluded the discussion.

Neither defense counsel nor the prosecutor asked the court to excuse juror No. 9.

On the next court day, a discussion was conducted in chambers. In relevant part, defense counsel said:

"I'm not complaining about anybody. Luis Aguilar, who is [appellant's] brother, advised me that the ... juror who knew the Norteno in the Memorial thing has like a gang tattoo and was in the hallway playing ... phone rap music that was Norteno rap music, making derogatory terms to Surenos calling them Sur rattas or whatever."

The judge asked, "The rap music was or [he/she] was?"

Defense counsel replied:

"The music [he/she] was listening to. And I heard [him/her] playing music, but I wasn't paying attention to it. And I myself did see that [he/she] has a big red star tattooed on [his/her] neck. And I just wanted to bring it to [the] Court's attention so that the Court could deal with it how he sees proper."

The judge asked, "Well, what do you suggest? We've already talked to [him/her]."

Defense counsel said,

"Yeah. And I remember what [he/she] said. I just -- I wanted to just maybe follow-up. I don't know if it's too late in the game to just ask [him/her] if, you know, if [he/she] sides one side or anything like that. [He/she] had mentioned that [he/she] has family that were gangs, and that [he/she] knew that person. But it was never really brought up that if [him/her] family's, you know -- if [he/she] would tend to side with a gang or be biased against my client because he's in a rival gang."

The judge said, "I think I asked [him/her] that directly." Defense counsel said, "Okay." The court stated that it would ask the court report to verify its recollection. Defense counsel said, "However you see proper. I'm not trying to --" The judge said, "No. That's appropriate."

Then the judge asked, "What's a red star? That's a new one on me."

Defense counsel replied, "It's a North Star. It's called like the North Star, and it's in red."

The prosecutor said, "Dilbeck talked about it at the last trial when he was looking at some of those things about the stars. It's in the transcript of the last trial. That north, North Star, I don't know ... [¶] ... [¶] ... [t]he constellation they're referring to."⁸

⁸ When Officer Dilbeck was called as a defense expert witness later in the trial he testified, in relevant part: "... Nortenos identify with being Northerners. The star being the North Star." One of the words Surenos call Nortenos is estrellas, which is the Spanish word for stars. After defense counsel elicited this testimony from Officer Dilbeck, he did not ask the court to dismiss juror No. 9.

Defense counsel said, "Something like that. But basically North Star, and it's in red. Apparently his witness Ramon Pulido had seen that underneath it. It had some writing with a big N on it, something like that."

The prosecutor asked, "On [him/her]?" Defense counsel replied, "Yeah."

The judge asked, "When are these guys seeing this stuff?"

Defense counsel said, "Apparently in the hallway. Because I saw [him/her] when I was -- I distanced myself."

The judge asked, "I got one question. What are they doing close enough to the jurors to be able to see that?"

Defense counsel replied, "I think if they were -- I don't know -- I didn't talk to Mr. Pulido who noticed that. I saw the star on the neck. But earlier I distanced myself way on the far end, and [he/she] was blasting the music on [his/her] phone, rap music. And I wasn't paying attention. I was reading."

The judge directed defense counsel, as follows: "Well, maybe you can check after we adjourn. It shouldn't be that hard to find.... I think I asked [him/her] a direct question about would one -- north versus south cause you to --" Defense counsel interrupted, saying, "Okay." The judge continued, "I think we got a direct answer to the question. So let's check that out and then we'll take it up after that." Defense counsel said, "Okay. Thank you."

Later that day, outside the presence of the jury, the judge stated that the reporter's transcript reflected that juror No. 9 "was directly asked, 'Just because he was Sureno that doesn't have nothing to do with me. I don't claim.'" Defense counsel replied, "Okay." The judge continued:

"'The family does.' And I asked specifically, 'The fact that he's a Norteno, is that going to affect your ability?' At first [he/she] said, 'Maybe a little bit.' Then [he/she] backs off and says, 'I'm not saying that. I still have to see everything.' 'That's what we're asking. You could see the evidence,

decide it based on the evidence?' 'I don't claim.' Then [he/she] says later, 'Because he's a Sureno, therefore' -- 'I don't claim so I don't care about that.'"

Defense counsel said, "Okay." The judge said, "So I think that's covered."

Defense counsel did not ask the court to dismiss juror No. 9 at any point during the trial or assert that he/she had concealed material information during voir dire.

iii. Posttrial proceedings -- new trial motion

Appellant filed a written motion for new trial. In relevant part, he argued juror No. 9 committed misconduct by concealing his/her bias against appellant because of his Sureno gang affiliation.

Defense counsel filed a supporting declaration in which he alleged juror No. 9 "played Norteno rap in front of fellow jurors and the defendant's family in the courthouse hallway." Also, juror No. 9 "had a red star tattoo and wore stars throughout trial indicative of Norteno gang affiliation." Further, juror No. 9 "lived [in the same house] with a deceased Norteno gang member Alex Sanchez."

Appellant filed a declaration in which appellant alleged that a fellow prisoner, Abel Vasquez, told appellant that he knew juror No. 9 and he/she voted in favor of guilt because he/she was scared of appellant.

The motion was denied after hearing. In relevant part, the court reasoned:

"[¶] And here there were three allegations of misconduct. The first was as to juror number nine, allegations relating to playing Norteno rap music in the hallway. And as to that, there really was no admissible evidence that, in fact, it was Norteno rap music. There's no foundation to prove that it was.

"But even if it were, it didn't establish misconduct, because juror number nine was the one who very frankly revealed [his/her] family gang connections. [He/she] disclosed a connection with a person in a photo. [He/she] was questioned about that and stated that [he/she] felt [he/she] could be fair."

The court also stated:

“[¶] ... [T]he cases, in fact, require as part of a declaration and as part of the defendant’s showing evidence that neither the defendant nor the defendant’s counsel were aware of the misconduct.

“And this would apply certainly to the hallway rap music allegation where I’m denying And as I did state before, a person can’t use as the basis for a motion for new trial conduct which might have been cured if timely reported.

“You’re not allowed to gamble on the outcome while secretly preserving the error in the event of an unfavorable verdict.”

B. Appellant did not prove that juror No. 9 concealed a Norteno affiliation, a bias against Surenos or otherwise committed misconduct.

A juror’s concealment of bias constitutes misconduct and is ground for a new trial. (*People v. Nesler* (1997) 16 Cal.4th 561, 581-582 (Nesler).) “A juror who conceals relevant facts or gives false answers during the voir dire examination thus undermines the jury selection process and commits misconduct. [Citations.]” (*In re Hitchings* (1993) 6 Cal.4th 97, 111.)

Where a party seeks a new trial based upon jury misconduct, the court must undertake a three-step inquiry. First, it must determine whether the evidence presented for its consideration is admissible. If it finds the evidence is admissible, it must then consider whether the facts constitute misconduct. If misconduct is found to have occurred, the court must determine whether the misconduct was prejudicial. Reversal is required unless the reviewing court finds there is no substantial likelihood that a juror was improperly influenced against the defendant. A reviewing court will uphold the trial court’s ruling on a new trial motion unless it clearly appears that a manifest and unmistakable abuse of discretion occurred. (*People v. Duran* (1996) 50 Cal.App.4th 103, 112-113.)

We agree with respondent that appellant did not present admissible evidence proving juror misconduct. Appellant mistakenly treats the hearsay assertions in defense

counsel's declarations as established facts. During trial, defense counsel told the court that he was not paying attention to the music he heard juror No. 9 playing. Defense counsel did not have any personal knowledge whether the music was Norteno rap. Also, defense counsel did not report to the court that he saw the letter N inside the star that was tattooed on juror No. 9's neck. Ramon Pulido, who allegedly saw the letter N inside the tattooed star, did not testify to this fact at trial or submit a declaration supporting the new trial motion.

In the absence of evidence proving that juror No. 9 was listening to Norteno rap or that the tattoo on his/her neck definitely signified a personal Norteno affiliation, there was no admissible evidence supporting appellant's assertion that juror No. 9 concealed facts indicating a bias against Surenos.

Juror No. 9 disclosed during voir dire that some of his/her family members were affiliated with the Nortenos and during trial disclosed that he/she lived with the family of a Norteno member. Acquaintance alone does not imply bias. (See, e.g., *People v. Cochran* (1998) 62 Cal.App.4th 826, 831.) When questioned by the court during trial after he/she disclosed that he/she had resided with Alex Sanchez and his family, he/she affirmed that he/she could be fair and was not biased against defendant because of his Surenos affiliation.

Therefore, we conclude the record does not contain admissible evidence supporting appellant's claim that juror No. 9 concealed a bias against Surenos or that he/she failed to disclose material information during voir dire. Therefore, we uphold the denial of the new trial motion on this basis.

C. The related ineffective assistance claim must be presented in a petition for habeas corpus.

Appellant also argues defense counsel was ineffective because he failed to move to discharge juror No. 9 during trial and did not obtain declarations supporting his

allegations in the new trial motion that juror No. 9 was listening to Norteno rap music during trial and that the tattoo on this juror's neck had the letter N inside it. As will be explained, we agree with respondent that this ineffective assistance claim is properly presented in a petition for habeas corpus.

The applicable legal principles are well-established:

“To prevail [on an ineffective assistance claim], defendant must first show that “counsel’s representation fell below an objective standard of reasonableness ... under prevailing professional norms.” [Citations.] Second, defendant must show that the inadequacy was prejudicial, that is, “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.]

“If ‘counsel’s omissions resulted from an informed tactical choice within the range of reasonable competence, the conviction must be affirmed.’ [Citation.] When, however, the record sheds no light on why counsel acted or failed to act in the manner challenged, the reviewing court should not speculate as to counsel’s reasons. To engage in such speculations would involve the reviewing court “in the perilous process of second-guessing.” [Citation.] Because the appellate record ordinarily does not show the reasons for defense counsel’s actions or omissions, a claim of ineffective assistance of counsel should generally be made in a petition for writ of habeas corpus, rather than on appeal. [Citation.]” (*People v. Diaz* (1992) 3 Cal.4th 495, 557-558.)

In this case, there is no indication in the record why defense counsel did not move to dismiss juror No. 9 during trial. Also, there is no indication in the record why he did not present declarations to support the factual assertions contained in his new trial motion. However, we can posit several reasonable tactical reasons for both of these decisions.

Defense counsel may have wanted to retain juror No. 9 as a juror, while still making a record for a new trial motion or appeal if his client was found guilty. Thus, he raised the point to the judge during trial but did not move to dismiss the juror or ask to

have Pulido or appellant's brother testify about the type of music juror No. 9 was listening to or whether there was an "N" inside the star tattoo.

Defense counsel reasonably could have made a tactical decision that juror No. 9 might have been sympathetic toward his client. He could have thought that this juror's familial gang connections might have made him/her sympathetic toward all gang members, regardless of their particular gang affiliation. Also, defense counsel reasonably could have thought that this juror might have an unfavorable view toward law enforcement. This could benefit his client because some of the incriminating evidence was elicited during interviews with police officers. Further, defense counsel reasonably could have decided that he wanted to retain juror No. 9 because he/she might be receptive to his theory that appellant did not change gang affiliations and the murder occurred for purely personal reasons. He might have thought that this juror would be responsive to his argument that gang members commit crimes that are not gang related and the murder was such a crime. Finally, defense counsel might not have exercised a peremptory challenge or asked for juror No. 9 to be removed because he believed this juror's assurances that he/she could decide the case fairly.

With respect to the new trial motion, it is entirely possible that defense counsel failed to obtain declarations from Pulido and appellant's brother because they were not available or they did not recollect the relevant facts. There is nothing in the appellate record indicating that these individuals were available and remembered the key facts. Defense counsel may have submitted the personal declaration containing hearsay because he could not obtain declarations from appellant's brother or Pulido.

Since the appellate record does not shed any light on the reasons why counsel acted or failed to act in the manner challenged on appeal, and it does not necessarily appear that defense counsel's course of conduct could not have been the result of reasonable tactical decisions, this claim is properly decided in a habeas proceeding rather

ATTORNEY GENERAL'S OFFICE
DOCKETING OFFICE

than on direct appeal. (*People v. Diaz*, supra, 139 Cal.4th at pp. 557-558.) Accordingly,
we reject the ineffective assistance claim on this basis.

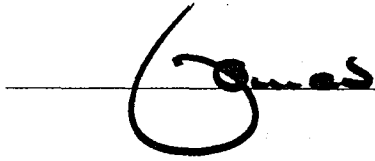
DISPOSITION

The judgment is affirmed.



Levy, Acting P.J.

WE CONCUR:



Gomes, J.



Dawson, J.

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10
11

12 **ULICES AGUILAR,**

1:12-cv-01547-LJO-JLT

13
14 Petitioner,

15 v.

16 **MATTHEW CATE, Secretary, CDCR,**

17 Respondent.
18

19 2. Order, Petition for Review Denied, filed October 27, 2010, in the Supreme Court of
20 the State of California, Case Number S185614.
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Court of Appeal, Fifth Appellate District - No. F057268

S185614

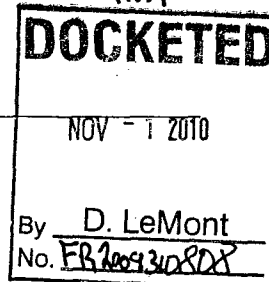
IN THE SUPREME COURT OF CALIFORNIA *Kim*

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

ULISCES AGUILAR, Defendant and Appellant.



The petition for review is denied.

SUPREME COURT
FILED

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

OCT 27 2010

Frederick K. Ohlrich Clerk

Deputy

GEORGE
Chief Justice

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12 **ULICES AGUILAR,**

1:12-cv-01547-LJO-JLT

13
14 Petitioner,

15 v.

16 **MATTHEW CATE, Secretary, CDCR,**

17 Respondent.
18

19 4. Ruling Re: Petition for Writ of Habeas Corpus, filed October 27, 2011, in the
20 Superior Court of the State of California, County of Tulare, Case Number VHC259287.
21
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OCT 27 2011

LARAYNE CLEEK, CLERK
BY: [Signature]

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF TULARE

In Re

ULICES AGUILAR

For Writ of Habeas Corpus

Case No 259287

**RULING RE: PETITION
FOR WRIT OF HABEAS
CORPUS**

Petitioner has failed to state proper and adequate notice to the necessary parties.

Even had petitioner given proper and adequate notice his writ would fail for failing to provide sufficient evidence to establish a prima facie basis for relief.

Petitioner claims insufficiency of the evidence and double jeopardy as it relates to the gang enhancements contested during a second trial.

The issues raised by the petitioner were raised in an appeal with the Fifth District Court of Appeal filed on March 16, 2009.

The statement of facts set forth in that appeal is incorporated herein.

The Fifth District Court of Appeals denied the petitioner's claims and affirmed the judgment of the trial court in a ruling dated July 8, 2010.

The petitioner cannot re-litigate an issue already raised in an appeal by filing a writ of habeas corpus.

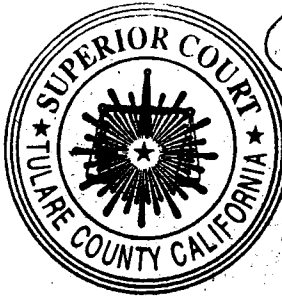
Once the appellate court has ruled on that issue it cannot be re-litigated by means of writ. *In Re Waltreus*(1965) 62 Cal.2d 218, *In Re Harris* (1993) 5 Cal.4th 813.

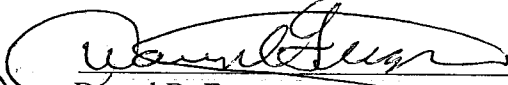
1 Accordingly petitioner's petition for Writ of Habeas Corpus is denied.

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3 Date received by judge: 10-26-11

4 Dated: 10-27-11




Darryl B. Ferguson
Judge of the Superior Court

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SUPERIOR COURT OF CALIFORNIA
COUNTY OF TULARE
Visalia Division
County Civic Center, Room 303
Visalia, CA 93291-8940

In Re

Aguilar, Ulices

For Writ of Habeas Corpus

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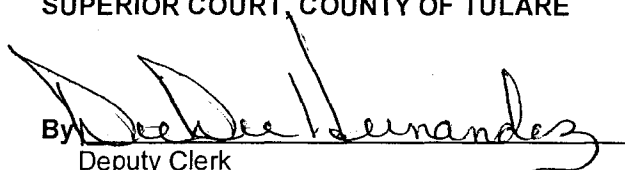
CLERK'S CERTIFICATE OF MAILING (CCP 1013a(4))

I certify that I am not a party to this action.

The Ruling re: Petition for Writ of Habeas Corpus was mailed first class, in a sealed envelope, postage prepaid, to the parties at the addresses shown. The mailing and this certification occurred at the place and on the date shown.

Dated: October 27, 2011 at Visalia, California.

LARAYNE CLEEK, CLERK OF THE
SUPERIOR COURT, COUNTY OF TULARE

By 
Deputy Clerk

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9 FOR THE EASTERN DISTRICT OF CALIFORNIA
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11

12 **ULICES AGUILAR,**

1:12-cv-01547-LJO-JLT

13
14 Petitioner,

15 v.

16 **MATTHEW CATE, Secretary, CDCR,**

17 Respondent.
18

19 6. Order Denying Petition for Writ of Habeas Corpus, filed March 19, 2012, in the Fifth
20 District Court of Appeal, Case Number F063652.
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COURT OF APPEAL
FIFTH APPELLATE DISTRICT
FILED

MAR 19 2012

IN THE
COURT OF APPEAL OF THE STATE OF CALIFORNIA
IN AND FOR THE
FIFTH APPELLATE DISTRICT

by

Deputy

In re ULICES AGUILAR,
On Habeas Corpus.

F063652

(Tulare Sup. Ct. No. 259287)

ORDER

BY THE COURT:*

The "Petition for Writ of Habeas Corpus," filed November 14, 2011, is denied without prejudice. Insofar as petitioner claims that the trial court erroneously denied his motion for new trial based on prosecutorial misconduct and the misconduct of juror #3, petitioner has failed to show that these issues are not barred because they were not raised in his appeal. (*In re Walker* (1974) 10 Cal.3d 764, 773-775.)

 Acting P. J.

* Gomes, A.P.J., Dawson, J., and Franson, J.

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12 **ULICES AGUILAR,**

1:12-cv-01547-LJO-JLT

13
14 Petitioner,

15 v.

16 **MATTHEW CATE, Secretary, CDCR,**

17 Respondent.
18

19 8. Order Denying Petition for Writ of Habeas Corpus, filed August 29, 2012, in the
20 Supreme Court of the State of California, Case Number S202649.
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Appellate Courts Case Information

CALIFORNIA COURTS
THE JUDICIAL BRANCH OF CALIFORNIA

Supreme Court

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Court data last updated: 10/23/2012 10:05 AM

Docket (Register of Actions)

AGUILAR (ULICES) ON H.C.
Case Number S202649

Date	Description	Notes
05/18/2012	Petition for writ of habeas corpus filed	Petitioner: Aguilar, Ulices Pro Per Exhibits attached with petition.
08/29/2012	Petition for writ of habeas corpus denied	Werdegar, J., was absent and did not participate.

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A P P E N D I X 4

FILED

UNITED STATES COURT OF APPEALS

OCT 31 2017

FOR THE NINTH CIRCUIT

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

ULICES AGUILAR,

Petitioner-Appellant,

v.

WARREN MONTGOMERY,

Respondent-Appellee.

No. 15-16944

D.C. No.

1:12-cv-01547-LJO-JLT

Eastern District of California,
Fresno

ORDER

Before: O'SCANNLAIN and RAWLINSON, Circuit Judges, and EZRA,^{*} District Judge.

The panel voted to deny the Petition for Rehearing. Judge Rawlinson voted, and Judges O'Scannlain and Ezra recommended, to reject the Suggestion for Rehearing En Banc.

The full court has been advised of the Suggestion for Rehearing En Banc, and no judge of the court has requested a vote.

Petitioner-Appellant's Petition for Rehearing, filed on September 21, 2017, is DENIED, and the Suggestion for Rehearing En Banc is REJECTED.

^{*} The Honorable David A. Ezra, United States District Judge for the District of Hawaii, sitting by designation.

A P P E N D I X 5

CA No. 15-16944

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ULICES AGUILAR,	)	D.C. No. 1:12-cv-1547-LJO
	)	
Petitioner-Appellant,	)	
	)	
v.	)	
	)	
WARREN MONTGOMERY,	)	
	)	
Respondent-Appellee.	)	

**PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC**

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

HONORABLE LAWRENCE J. O'NEILL
United States District Judge

CARLTON F. GUNN
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Pasadena, California 91101
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Attorney for Petitioner-Appellant

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2. <u>Juror 3</u>	6
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CA No. 15-16944

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ULICES AGUILAR,	)	D.C. No. 1:12-cv-1547-LJO
	)	
Petitioner-Appellant,	)	
	)	
v.	)	
	)	
WARREN MONTGOMERY,	)	
	)	
Respondent-Appellee.	)	

**PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC**

Petitioner-appellant, Ulices Aguilar, hereby petitions for rehearing en banc, pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure. The panel opinion requires a showing of prejudice even though the harm created by ineffective assistance of counsel is structural error not amenable to harmless error review. This warrants en banc review because it is both inconsistent with precedent of this Court and is a question of exceptional importance for ineffective assistance of counsel challenges.

Respectfully submitted,

DATED: September 21, 2017

By s/ Carlton F. Gunn
CARLTON F. GUNN
Attorney at Law

I.

INTRODUCTION

In a trial for an allegedly gang-motivated murder, Mr. Aguilar was denied one of the most fundamental rights a defendant has – the right to an impartial jury untainted by outside influences. First, one of the jurors directly consulted a former member of a rival gang – her boyfriend – about how she should vote. Second, there was evidence a second juror affirmatively concealed her association with the rival gang and trial counsel failed to present admissible evidence of that misconduct.

The panel opinion rejected both claims for erroneous reasons. It rejected the first claim based on an erroneous application of what is known as the “*Dixon* bar,” from the California case of *In re Dixon*, 264 P.2d 513 (Cal. 1953). It rejected the second claim based on a failure to show prejudice. This latter error in particular warrants en banc review because it conflicts with precedent of this Court holding a biased juror is structural error not amenable to review for harmless error or prejudice. This error is also of exceptional importance because it makes it impossible to remedy ineffective assistance of counsel which leads to structural error.

* * *

II.

STATEMENT OF FACTS

A. THE TRIALS.

On May 6, 2004, a “Northerner,” or “Norteno,” gang member named Everado Marquez was shot at his home in Pixley, California. Everado’s brother, Juan, saw two men – one running away from the house and another waiting on the neighbors’ driveway. RT 1004-07.¹ When the first man reached the second man, they both ran. RT 1035. Juan identified the first man as a man named Miguel Cisneros, and eventually identified the second man as Mr. Aguilar. *See* RT 1006-07, 1017-18. Mr. Cisneros had had an argument with Everado three weeks earlier because Mr. Cisneros believed Everado had stolen his car. RT 1018, 1039. Mr. Cisneros was also allegedly trying to switch from the “Northerner” gang to the rival “Southerner,” or “Sureno,” gang Mr. Aguilar allegedly belonged to. *See* Appellant’s Opening Brief, at 10-12.

Mr. Cisneros and Mr. Aguilar were both charged with first degree murder, a firearm enhancement, and a gang enhancement. CT 376. Mr. Aguilar was tried separately. The jury in a first trial acquitted him of first degree murder and could not reach a verdict on second degree murder. *See* RT 940-43; CT 636, 640.

Mr. Aguilar was then retried on the second degree murder charge and the

¹ “RT” refers to the state court reporter’s transcript lodged with this Court. “CT” refers to the state court “Clerk’s Transcript” lodged with the Court. “CR” refers to the federal district court pleading docketed at the number indicated.

firearm and gang enhancements.² The second jury found Mr. Aguilar guilty and also found the firearm and gang enhancements to be true. RT 1857-58; CT 737.

B. JUROR MISCONDUCT AND BIAS.

Evidence of juror misconduct and/or bias came up first during trial and then during deliberations. Defense counsel sought relief only after trial, however.

1. Juror 9.

Juror 9 sent the court a note during trial indicating she thought she might know a gang member who was referenced in a document found in Mr. Cisneros's house. *See* ER 327; RT 1363. The court asked the juror if it was going to affect her ability to sit fairly in the case, and she replied, "If it doesn't have nothing to do with him, no." ER 322.

Defense counsel then asked if he could ask some questions, and the court inquired further:

THE COURT: The fact that he was Norteno-associated and defendant here may be Sureno-associated, is that going to affect your ability to be fair in this?

JUROR NO. 9: Maybe a little bit.

² The evidence presented at the two trials is described in more detail in Appellant's Opening Brief, but is not re-summarized here because it is not relevant to the arguments made in this petition. Mr. Aguilar did not dispute his presence at the scene of the crime, but did dispute whether he had known Mr. Cisneros was going to shoot Everado Marquez, whether he had aided and abetted the shooting, and whether the shooting was gang-related.

THE COURT: Well –
JUROR NO. 9: I'm not saying that – I still have to see everything, so I can't say –
THE COURT: That's what we're asking.
JUROR NO. 9: No.
THE COURT: You could see the evidence and decide this based on the evidence?
JUROR NO. 9: Like, okay, put it this way. Right now I can't say he's guilty or not guilty. Just because he's a Sureno, that doesn't have nothing to do with me. I don't claim. My family does, but that has nothing to do with me.
THE COURT: What you disclosed before.
JUROR NO. 9: Right.
THE COURT: That's all we want to know. You're not going to say –
JUROR NO. 9: Because he –
THE COURT: Because he's a Sureno, therefore, I'm not going –
JUROR NO. 9: I don't claim, so I don't care about that.
THE COURT: All right. Thank you very much.

ER 323-24.

Additional information provided the next day contradicted some of this, however. One of Mr. Aguilar's brothers told defense counsel the juror had a gang tattoo and was playing Norteno rap music "making derogatory terms to Surenos calling them Sur rattas or whatever" on her phone in the hallway. ER 313. In addition, a defense witness had seen a red "North Star" tattoo on the juror's neck, along with "some writing with a big N on it," ER 314-15, which stood for Norteno, *see* RT 1268, 1311, 1633, 1703. Defense counsel had not been paying attention to the music, but had seen "a big red star tattooed on her neck," ER 313, which the prosecutor agreed was a Northerner gang symbol, ER 314. This was not only inconsistent with what the juror had said the previous day, but also inconsistent with the juror's following statement during voir dire:

I have a family member that's involved in it, but I don't – I stay away. It doesn't bother my mind at all. I'm not involved, and I don't care to be. So I just wanted to let you know that I do

have family members.

ER 333.

After describing what had been seen in the hallway, defense counsel expressed concern that “it was never really brought up that if her family’s, you know – if she would tend to side with the gang or be biased against my client because he’s in a rival gang.” ER 314. After the lunch break, the court read back the original exchange with the juror the day before, ER 314, 317-18, and the defense attorney simply said, “Okay.” ER 318. He raised concerns again only in the motion for new trial discussed further below. ER 301. The court rejected the claim, asserting there was no admissible evidence of the juror playing the Northerner rap music, the juror had frankly revealed her gang connections, and defense counsel had not been denied an opportunity to question her. ER 246-47, 288.

2. Juror 3.

Another juror, Juror 3, also had gang connections. After the jury retired to deliberate, Mr. Aguilar heard another jail inmate saying his girlfriend was on Mr. Aguilar’s jury and had asked his opinion about what position she should take regarding the verdict. ER 307. Defense counsel did not make any objection about this before the verdict, but did make a motion for new trial after the verdict, *see* ER 297-307.

The inmate with whom Juror 3 had spoken, Isaac Vasquez, testified at a hearing on the motion. ER 259-76. He testified Juror 3 was the mother of his

child, just born on November 12, ER 260, so she likely had been pregnant with the child during the trial. Mr. Vasquez also testified he had been a member of the Northerner gang, though he wasn't any more, and identified two photographs in which he was wearing red bandannas indicating he was a Northerner. ER 265-66. His girlfriend, the juror, was in the photos with him, ER 265-66, which suggested she had concealed material information during voir dire. One of the questions the jurors had been asked was whether "either yourself or close friends or relatives have been or are in a street gang," ER 331, and Juror 3 had said nothing when she was seated and asked, "Any of the questions we've asked so far that you'd like to respond to?," ER 334.

Mr. Vasquez also confirmed Juror 3 had spoken with him during the jury deliberations. ER 269. He testified she told him she was scared, told him she didn't know what she was doing, and asked his opinion about what she should do. ER 270. He told her to "just go with the flow." ER 272, 273-74. He admitted that while he was no longer "affiliated" with the rival gang, "still there's like a little resentment there sometimes." ER 272. In part because of this, he told Juror 3 "that if it was up to me, he'd be guilty. That if it was up to me, regardless if he's guilty or not, he's guilty to me." ER 273.

After hearing this testimony, the trial court agreed there had been misconduct, ER 248, 290, but denied the motion nonetheless. First, it ruled the claim was waived because the misconduct should have been brought to the court's attention before the verdict was returned, so the court could have considered substituting an alternate juror. ER 250-51, 290. Second, it ruled there was no showing of what effect there had been on the juror or jury. ER 290.

C. APPEAL AND HABEAS PROCEEDINGS.

Mr. Aguilar was sentenced to a prison term of 15 years to life for the second degree murder conviction and a consecutive term of 25 years to life for the gang and firearm enhancements. RT 2006. He thereafter appealed. He included arguments that the trial court should have discharged Juror 9 and defense counsel had been ineffective by failing to move to discharge Juror 9 during trial and not obtaining declarations supporting the allegations in the new trial motion, but did not include any arguments about Juror 3's misconduct. *See* ER 46-76. The state court of appeals rejected these and Mr. Aguilar's other arguments. ER 46-76. Mr. Aguilar then filed a petition for review with the state supreme court which was denied. ER 44.

Mr. Aguilar thereafter filed state habeas petitions – first in the superior court and then in the state court of appeals and state supreme court. Additional issues raised in those petitions included Juror 3's misconduct and ineffective assistance of counsel in defense counsel's failure to timely move to discharge Juror 3. *See* CR 18, ## 3, 5, 7. The superior court denied the petition because a petitioner "cannot re-litigate an issue already raised in an appeal by filing a writ of habeas corpus," CR 18, #4, without recognizing there were added issues which had not been raised in the direct appeal. The state court of appeals denied the petition in a two-sentence order which read as follows:

The "Petition for Writ of Habeas Corpus," filed November 14, 2011, is denied without prejudice. Insofar as petitioner claims that the trial court erroneously denied his motion for new trial based on prosecutorial misconduct and the misconduct of juror #3, petitioner has failed to show that these issues are not barred because they were not raised in his appeal.

(*In re Walker* (1974) 10 Cal. 3d 764, 773-775.)

ER 42. The state supreme court denied the petition without comment. ER 40.

Mr. Aguilar then filed his federal habeas petition. It included the claims that the refusal to discharge Jurors 3 and 9 violated his right to a fair trial and impartial jury and that his trial counsel had provided ineffective assistance by, inter alia, failing to move to discharge Juror 9. ER 144-50, 152-54. A magistrate judge issued a report and recommendation that the petition be denied, which the district court adopted. ER 1-38. It found the claim regarding Juror 3's misconduct both failed on the merits and was procedurally barred, first, under what is called the "*Dixon* bar," after the case of *In re Dixon*, 264 P.2d 513 (Cal. 1953), because it had not been raised on direct appeal,³ and, second, because there had not been a timely objection in the trial court. See ER 29-30, 34. It also rejected the Juror 9 ineffective assistance of counsel claim based on the *Dixon* bar and the merits. See ER 35.

Mr. Aguilar thereafter appealed to this Court. The Court granted a certificate of appealability on (1) whether the district court erred by denying the Juror 9 ineffective assistance of counsel claim as procedurally defaulted and (2) whether Juror 3's communication with her boyfriend violated Mr. Aguilar's right to a fair and impartial jury and whether the district court's alternative procedural default determination as to that claim was erroneous. Docket #3. But the panel

³ The case cited in the state court of appeals habeas denial – *Walker* – is a later case following *Dixon*.

ultimately assigned to decide the merits rejected the arguments. *See Appendix*.⁴ The panel held the Juror 3 claim was procedurally barred by the same *Dixon* bar upon which district court had relied. *See Appendix*, at 2. On the Juror 9 claim, it ruled an evidentiary hearing on the adequacy of the trial attorney's representation was unnecessary and the claim failed because Mr. Aguilar could not show prejudice. *See Appendix*, at 3.⁵

III. ARGUMENT

A. REHEARING EN BANC IS APPROPRIATE BECAUSE THE REJECTION OF MR. AGUILAR'S JUROR 9 INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM IS INCONSISTENT WITH THIS COURT'S RECOGNITION THAT SEATING OF A DISHONEST JUROR IS NOT SUSCEPTIBLE TO REVIEW FOR HARMLESS ERROR OR PREJUDICE.

Strickland v. Washington, 466 U.S. 668 (1984), generally requires a defendant claiming ineffective assistance of counsel to show both deficient representation and prejudice. *See id.* at 687-88, 694. *Strickland*'s prejudice requirement is based on an important premise, however. That is that it is possible

⁴ Pursuant to Circuit Rule 40-1(c), the panel opinion is attached as an appendix.

⁵ The state conceded the district court erred in ruling this claim procedurally barred. *See Appellee's Answering Brief*, at 12-14.

to determine the prejudicial effect of the trial attorney's errors. As explained in *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006): "[I]f and when counsel's ineffectiveness 'pervades' a trial, it does so (to the extent we can detect it) through identifiable mistakes. We can assess how those mistakes affected the outcome." *Id.* at 150-51.

This is not possible when the harm caused is the seating of a juror who has been dishonest during voir dire. This Court has recognized in multiple cases that the seating of such a juror is a structural error. *See Smith v. Swarthout*, 742 F.3d 885, 892 n.2 (9th Cir. 2014); *United States v. Hayat*, 710 F.3d 875, 885 (9th Cir. 2013); *United States v. Long*, 301 F.3d 1095, 1101 (9th Cir. 2002); *United States v. Gonzalez*, 214 F.3d 1109, 1111 (9th Cir. 2000); *Dyer v. Calderon*, 151 F.3d 970, 973 n.2 (9th Cir. 1998) (en banc). *See also Arizona v. Fulminante*, 499 U.S. 279, 309 (1991) (citing biased judge as example of structural error). And structural errors "defy analysis by 'harmless-error' standards," *United States v. Cazares*, 788 F.3d 956, 970 (9th Cir. 2015) (quoting *Fulminante*, 499 U.S. at 309), *cert. denied*, 136 S. Ct. 2484 (2016), meaning a court cannot determine the prejudice. As explained in this Court's en banc opinion in *Dyer* for the specific structural error of seating a dishonest juror:

A juror . . . who lies materially and repeatedly in response to legitimate inquiries about her background introduces destructive uncertainties into the process. There is, of course, the possibility that she did so because of some personal bias against the defendant which she managed to hide from the court. But a perjured juror is unfit to serve even in the absence of such vindictive bias. If a juror treats with contempt the court's admonition to answer voir dire questions truthfully, she can be expected to treat her responsibilities as a juror – to listen to the evidence, not to consider extrinsic facts, to follow the judge's instructions – with equal scorn. Moreover, a juror who tells major lies creates a serious conundrum for the fact-

finding process. How can someone who herself does not comply with the duty to tell the truth stand in judgment of other people's veracity? Having committed perjury, she may believe that the witnesses also feel no obligation to tell the truth and decide the case based on her prejudices rather than the testimony.

Id., 151 F.3d at 983.

While the foregoing cases considered the traditional harmless error inquiry, their reasoning applies equally to inquiries into prejudice in other contexts. This Court has expressly recognized that in the plain error context, by holding a structural error necessarily establishes an effect on substantial rights. *See United States v. Yameshiro*, 788 F.3d 1231, 1236 (9th Cir. 2015); *United States v. Recio*, 371 F.3d 1093, 1101 (9th Cir. 2004). It follows that structural error should also necessarily establish the prejudice required by *Strickland* for an ineffective assistance of counsel claim. To hold otherwise would mean an ineffective assistance of counsel claim could never be based on structural error, because it is impossible to show prejudice when the error “def[ies] analysis by ‘harmless-error’ standards.”

The panel's resolution of Mr. Aguilar's ineffective assistance of counsel claims under the prejudice prong of *Strickland* was thus inconsistent with the structural error cases. The only way to resolve the claim would be under the deficient representation prong of *Strickland*. And that requires an evidentiary hearing. First, a hearing is necessary to resolve whether Juror 9 was in fact dishonest on voir dire. Second, a hearing is necessary to resolve whether there was admissible evidence the defense attorney could have presented to establish the

dishonesty. *See* Appellant’s Opening Brief, at 43-44 & n.14.⁶

B. THE PANEL ALSO ERRED IN APPLYING THE “DIXON BAR” TO THE JUROR 3 CLAIM.

The panel also erred in applying the “*Dixon* bar” to the claim based on Juror 3’s even more shocking conduct of consulting with an outside person about her verdict, *see generally* *Godoy v. Spearman*, 861 F.3d 956 (9th Cir. 2017) (en banc) (discussing Supreme Court and Ninth Circuit case law regarding ex parte contact between jurors and outside persons).⁷ The *Dixon* bar prevents a defendant from

⁶ Since the state courts did not provide a hearing in the state habeas proceedings, it will have to be provided in the federal court. Any implicit findings of fact without providing the opportunity for a hearing would be deficient as “an unreasonable determination of the facts” under 28 U.S.C. § 2254(d)(2). *See Hurler v. Ryan*, 752 F.3d 768, 790-91 (9th Cir. 2014), and cases cited therein. *See also Brumfield v. Cain*, 135 S. Ct. 2269, 2276, 2281 (2015) (finding “unreasonable determination of the facts” where existing record raised reasonable doubt about defendant’s intellectual disability and defendant “had not yet had the opportunity to develop the record”). In addition, Mr. Aguilar cannot be procedurally barred for failure to present facts in state habeas proceedings without counsel. *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), holds there is cause for *complete failure* to raise an ineffective assistance claim when (1) the claim is a “substantial” claim; (2) there was either no counsel or only ineffective counsel in the state habeas proceedings; and (3) state law either requires or “in effect . . . direct[s]” defendants to raise claims of ineffective assistance of trial counsel in collateral proceedings rather than on direct appeal. *Id.* at 1918, 1919.

⁷ The panel properly declined to adopt the district court’s additional reliance rely on the absence of a timely objection during the trial. This is because the “last reasoned decision” in the state courts – the state court of appeals habeas denial – relied only on the *Dixon* bar. *See Curiel v. Miller*, 830 F.3d 864, 870 (9th Cir. 2016) (en banc) (holding “the federal court should review the last decision in

raising a claim from in habeas when “the claimed errors could have been, but were not, raised upon a timely appeal from a judgment of conviction.” *In re Dixon*, 264 P.2d 513, 514 (Cal. 1953).

This bar does not apply to the Juror 3 misconduct claim because Mr. Aguilar’s attorney failed to timely raise the Juror 3 claim and that prevented Mr. Aguilar from raising the claim in his direct appeal. California law incorporates the traditional contemporaneous objection rule, which applies just as readily to juror misconduct claims as it does to other claims, *see, e.g., People v. Burton*, 359 P.2d 433, 446 (Cal. 1961), and which the trial court expressly relied upon in denying Mr. Aguilar’s post-trial motion for a new trial, *see* ER 251 (finding that “defendant waived the misconduct” by not objecting before verdict returned). As expressed in case law, “[n]o procedural principle is more familiar . . . than that a constitutional right, or a right of any other sort, may be forfeited in criminal as well as civil cases by the failure to make a timely assertion of the right,” *People v. Saunders*, 853 P.2d 1093, 1097 (Cal. 1993), and a claim “will not be reviewed on appeal in the absence of a specific and timely objection,” *People v. Rogers*, 579 P.2d 1048, 1051-52 (Cal. 1978). Where a timely objection is not made, it “is understandable” that a defendant does not raise an issue on appeal, because “he [i]s precluded from doing so by his failure to preserve the point by appropriate objection in the trial court.” *Rogers*, 579 P.2d at 1051.

The state did assert – in both its brief and oral argument – that another California Supreme Court case – *In re Seaton*, 95 P.3d 896 (Cal. 2004) – requires defendants to raise such claims on direct appeal despite the contemporaneous

isolation” (quoting *Barker v. Fleming*, 423 F.3d 1085, 1093 (9th Cir. 2005))).

objection bar and despite *Rogers*'s assurance it is "understandable" not to. But that is not the best reading of *Seaton*. *Seaton* found the claims there barred not by the *Dixon* bar but by the contemporaneous objection bar, which it labeled the "forfeiture rule." *Seaton*, 95 P.3d at 900. The court also explained how this bar differs from the *Dixon* bar.

Our *Dixon* bar (citation omitted) states that certain types of claims may not be raised on habeas corpus if they should have been, but were not, raised on appeal. When we determine that a claim in a habeas corpus petition is barred by *Dixon*, we do not, as a general rule, go on to decide whether the claim is also barred because the defendant did not object at trial. What we mean when we invoke the *Dixon* bar is that the claim is *based on the appellate record*, and thus was fully cognizable on appeal insofar as it was preserved at trial. Hence, we need not engage in the sometimes complex and time-consuming task of determining separately whether a claim was forfeited at trial by failure to object before concluding, under *Dixon*, that the proper means, if any, of obtaining review of the claim was by direct appeal.

Seaton, 95 P.3d at 901 n.4 (emphasis in original). In other words, when a claim "was fully cognizable on appeal *insofar as it was preserved at trial*" (emphasis added), the court may simply rely on the *Dixon* bar. But the court may not rely on the *Dixon* bar when a claim was not preserved at trial and so is not cognizable on appeal.

To the extent *Seaton* might be ambiguous, it is another reason for en banc review. Given the ubiquity of the *Dixon* bar, *see Johnson v. Lee*, 136 S. Ct. 1802 (2016) (per curiam), it is important that its reach be clear. *Cf. Melendez v. Pliler*, 288 F.3d 1120, 1124 (9th Cir. 2002) (noting federal court should not enforce procedural bar "grounded on a rule which is unclear or uncertain").

IV.

CONCLUSION

En banc review of the Juror 9 ineffective assistance of counsel claim is warranted because requiring a showing of prejudice is inconsistent with case law recognizing structural error is not susceptible to harmless error review. Review of the Juror 3 claim is warranted because the *Dixon* bar applies only to claims which can be raised on direct appeal; Mr. Aguilar's attorney's failure to make a timely objection in the trial court prevented Mr. Aguilar from raising the Juror 3 claim on direct appeal; and the ubiquity of the *Dixon* bar makes it important to clarify the bar's reach.

Respectfully submitted,

DATED: September 21, 2017

By s/ Carlton F. Gunn
CARLTON F. GUNN
Attorney at Law

CERTIFICATE OF COMPLIANCE

I certify, pursuant to Rule 32 of the Federal Rules of Appellate Procedure, Circuit Rule 32-1, and Circuit Rule 40-1, that this petition contains 4,193 words and is prepared in a format, type face, and type style that complies with Rule 32(a) of the Federal Rules of Appellate Procedure.

DATED: September 21, 2017

s/ Carlton F. Gunn

CARLTON F. GUNN
Attorney at Law

Certificate of Service

I hereby certify that on September 21, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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

By: s/ Carlton F. Gunn
CARLTON F. GUNN

A P P E N D I X 6

CA No. 15-16944

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ULICES AGUILAR,	)	D.C. No. 12-cv-1547-LJO
	)	
Petitioner-Appellant,	)	
	)	
v.	)	
	)	
MATTHEW CATE,	)	
	)	
Respondent-Appellee.	)	

APPELLANT'S OPENING BRIEF

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

HONORABLE LAWRENCE J. O'NEILL
United States District Judge

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IN THE UNITED STATES COURT OF APPEALS
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	)	
Petitioner-Appellant,	)	
	)	
v.	)	
	)	
MATTHEW CATE,	)	
	)	
Respondent-Appellee.	)	

I.

STATEMENT OF JURISDICTION

This appeal is from the denial of a habeas corpus petition. The district court had jurisdiction under 28 U.S.C. § 2254. Judgment was entered on August 28, 2015, ER 1-3, and a timely notice of appeal was placed in the prison mail on September 23, 2015, ER 77-78. This Court has jurisdiction under 28 U.S.C. § 2253. On May 19, 2016, this Court granted a certificate of appealability on (1) “whether the district court erred by denying as procedurally defaulted appellant’s claim that trial counsel furnished ineffective assistance by failing to move to dismiss Juror No. 9” and (2) “whether [appellant’s] due process right to a fair and impartial jury was violated as a result of Juror No. 3’s communication with

appellant's fellow inmate Isaac Vasquez, including whether the district court's alternative procedural-default determination as to this claim is erroneous." Docket #3.

II.

STATEMENT OF ISSUES PRESENTED

A. DID A JUROR'S DISCUSSION OF THE CASE DURING DELIBERATIONS WITH A BOYFRIEND WHO WAS THE FATHER OF HER CHILD AND HIS ADVICE TO "GO WITH THE FLOW" AND THAT HE'D VOTE GUILTY VIOLATE MR. AGUILAR'S CONSTITUTIONAL RIGHT TO AN IMPARTIAL JURY?

1. Did the Ex Parte Discussion Deprive Mr. Aguilar of His Constitutional Right to an Impartial Jury?

a. Does the state court of appeals' reliance on a procedural bar mean a trial court ruling on the merits is not entitled to deference because the trial court ruling is not the "last reasoned decision?"

b. Should the petition be granted even if the trial court's ruling is entitled to deference, as both contrary to clearly established federal law as determined by the Supreme Court and an unreasonable application of clearly established law as determined by the Supreme Court?

2. Is the Procedural Bar Relied Upon by the State Court of Appeals – the "Dixon Bar" – that Precludes Raising an Issue in Habeas When the Issue

Could Have Been Raised on Direct Appeal Inapplicable Because Mr. Aguilar's Trial Attorney's Failure to Make a Timely Objection Precluded Mr. Aguilar from Raising the Issue on Direct Appeal?

3. Does an Alternative Trial Court Procedural Bar Ruling – that There Was No Timely Objection – Not Foreclose Review Because, First, the Trial Court Ruling Is Not the “Last Reasoned Decision,” and, Second, the Failure to Make a Timely Objection Was Ineffective Assistance of Counsel?

4. Is the Juror Misconduct Claim Subject to Review and Should a Hearing Be Held on the Basis of Ineffective Assistance of Counsel Even If One of the Foregoing Procedural Bars Applies to the Direct Juror Misconduct Claim?

B. DID THE DISTRICT COURT ERR IN REJECTING MR. AGUILAR'S CLAIM THAT TRIAL COUNSEL FURNISHED INEFFECTIVE ASSISTANCE BY FAILING TO MOVE TO DISMISS JUROR 9?

1. Did the District Court Err in Concluding This Claim Was Procedurally Barred by the “Dixon Bar” Because the State Courts Did Not Rule the Claim Should Have Been Raised on Direct Appeal, It in Fact Was Raised on Direct Appeal, and the State Court of Appeals Instructed Mr. Aguilar to Instead Raise It in a Habeas Petition?

2. Did the District Court Err in Rejecting the Claim on the Merits Because It and the State Courts Relied on an Absence of Admissible Evidence that Juror 9 Had Lied, Failure to Present that Evidence Was Part of the Ineffective Assistance of Counsel, and Evidence Juror 9 Had Lied Would Have Required Her Dismissal and/or a New Trial?

III.

STATEMENT OF THE CASE

A. THE MURDER, INVESTIGATION, AND ARREST OF MR. AGUILAR.

On the morning of May 6, 2004, a man named Everado Marquez was shot at his home in Pixley, California. Everado's brother, Juan, heard the shots, went to a window, and saw two men – one running away from the house and another waiting on the neighbors' driveway. RT 1004-07.¹ When the first man reached the second man, they both ran. RT 1035. Juan told police detectives the first man was a man named Miguel Cisneros and the second man was a man named William Sanchez. RT 1017-18. There had been an argument between these two men and Everado three weeks earlier because Mr. Cisneros believed Everado had stolen his car. RT 1018, 1039.

Investigating officers found bullet fragments, 9 mm shell casings, and a rifle bolt at the house. RT 1076, 1079, 1087-89, 1137-38. They also found shoeprints. RT 1074, 1085-86. Some of the shoeprints were from K Swiss shoes. RT 1116. The pattern of some of the prints heading away from the house suggested the person had been running. RT 1122-24.

¹ "RT" refers to the state court reporter's transcript lodged with this Court. "CT" refers to the state court "Clerk's Transcript" lodged with the Court. "RT(supp)" refers to the supplemental state court reporter's transcript lodged with the Court, and "CT(supp)" refers to the supplemental state court "Clerk's Transcript" lodged with the Court. "CR" refers to the federal district court pleading docketed at the number indicated.

Mr. Cisneros was arrested later that morning. RT 1131-32. Officers executed a search warrant at his home, RT 1130, and found evidence including an empty 9 mm ammunition box, RT 1137, a set of rifle sights for a Hi Point rifle carbine, RT 1135, and a notebook with “Hi-Point 995 carbine something, nine-millimeter times 18” written in it, RT 1611. The officers also found possible drug paraphernalia and various items suggesting gang affiliation. RT 1132-36, 1138-42, 1610.

Further investigation led officers to suspect Mr. Aguilar was the second man Juan Marquez had seen.² Officers arrested Mr. Aguilar a week after the shooting and also executed a search warrant at his home. RT 1169, 1566. They seized a pair of K Swiss shoes, RT 1133, and a Hi Point model 995 9 mm carbine with a clip containing four rounds of ammunition, RT 1163, 1609-10. The rifle was in a black trash bag on the shelf of the closet, and the officers found no additional ammunition for the rifle. RT 1164, 1609-10, 1614-15. The rifle bolt found outside the Marquez home fit into this rifle. RT 1079-80.

B. THE FIRST TRIAL.³

Mr. Cisneros and Mr. Aguilar were both charged with first degree murder,

² At some point, Juan changed his identification of the second man from William Sanchez to Mr. Aguilar, and he so testified at a preliminary hearing. RT 1006-07, 1018.

³ The evidence presented in the first trial was largely the same as the evidence presented in the second trial, which is discussed below.

an enhancement for personal discharge of a firearm by a principal in violation of California Penal Code § 12022.53(d), and a criminal street gang enhancement under California Penal Code § 186.22(b)(1). CT 376. Mr. Aguilar was tried separately, with trial commencing on July 2, 2007. RT 1. On July 16, 2007, the jury informed the court it could not reach a verdict and its “ratio” was “8-4.” CT 636.

When inquiry revealed the 8-4 vote was on the lesser included offense of second degree murder and there was a consensus on first degree murder, the court told the jury to resume deliberations and referred it to the instruction about what to do in the event they reached a decision on the greater charge. RT 940-42. The jury subsequently returned with a completed verdict form in which it had entered a “not guilty” verdict for first degree murder and “not true” findings for the firearm and gang enhancements. RT 942-43; CT 640.⁴

C. THE SECOND TRIAL.

1. The Evidence of the Murder and Crime Scene Investigation.

The initial prosecution witnesses established that Everado Marquez had been shot and killed and identified the evidence found at the scene as described *supra* p. 4. This included the body; the bullet fragments, shell casings, and rifle

⁴ Mr. Aguilar’s attorney subsequently moved to bar retrial of the special allegations under double jeopardy and collateral estoppel principles, CT(supp) 13-21, but the court denied the motion, RT(supp) 12-13.

bolt; and the shoeprints. *See supra* p. 4. Coroner's and ballistics reports established the cause of death, *see* RT 1803, and tied the shell casings to the Hi Point carbine rifle which was found in Mr. Aguilar's bedroom closet, *see* RT 1812. The prosecution also introduced preliminary hearing testimony by Juan Marquez identifying Mr. Cisneros as the man running away after the shooting, RT 1000-51.

2. The Evidence of Mr. Aguilar's Involvement.

Juan Marquez's preliminary hearing testimony also included his change in the identification of the second man he saw waiting by the driveway – from William Sanchez to Mr. Aguilar. *See supra* p. 5 n.2. Corroborating this was testimony that the K Swiss shoes found in Mr. Aguilar's home matched the K Swiss shoeprints found at the scene. RT 1192-93. There was also testimony about the rifle found in the closet in Mr. Aguilar's bedroom, albeit without any extra ammunition and wrapped in a trash bag. *See supra* p. 5. As a result of this evidence, Mr. Aguilar's presence at the scene and possession of the rifle after the crime were undisputed. *See* RT 1821-44 (defense attorney closing argument).

What was disputed was whether Mr. Aguilar had known Mr. Cisneros was going to shoot Everado Marquez and whether Mr. Aguilar had aided and abetted the shooting. In trying to prove this, the prosecution presented (1) evidence from two friends of Mr. Aguilar who had been drinking with Mr. Aguilar and Mr. Cisneros in a trailer at Mr. Aguilar's house shortly before the shooting took place; (2) evidence from Mr. Aguilar's younger brother; and (3) evidence of a post-arrest

statement by Mr. Aguilar.

In the post-arrest statement, Mr. Aguilar initially resisted even admitting he had been present, but eventually did admit he had been at the house and possibly gotten as close as the gate. CT 879-84, 893, 896-97. Mr. Aguilar consistently denied knowing why Mr. Cisneros had taken him to Everado Marquez's house, however, or knowing what Mr. Cisneros was going to do. CT 892, 900-01, 904, 932-33, 939-40. He said the rifle was wrapped in a black trash bag and he did not know there was going to be a shooting until he heard shots and Mr. Cisneros came running back, saying, "Let's jam." CT 904. He said Mr. Cisneros subsequently gave him the rifle and asked him to keep it at his house. CT 910. That the rifle belonged to Mr. Cisneros and not Mr. Aguilar was corroborated by a statement one of the friends, Eliseo Sanchez, made to one of the detectives – that he had seen Mr. Cisneros with the rifle a year before, RT 1578. There was also testimony about a handgun being found in a car Mr. Cisneros was in when he was arrested, RT 1160; Mr. Cisneros having fired a handgun in a previous incident several weeks earlier, RT 1049-50, 1335-36, 1459, 1464-65; and photographs of Mr. Cisneros with firearms, RT 1156-57. Witnesses testified they had never seen Mr. Aguilar with any gun, in contrast. RT 1229, 1236, 1248, 1369, 1445.

The evidence from the friends who had been drinking with Mr. Cisneros and Mr. Aguilar in the trailer before the shooting – Eliseo Sanchez and Lorenzo Perez – was ambiguous. In their trial testimony, they admitted drinking with Mr. Aguilar and Mr. Cisneros and that Mr. Aguilar and Mr. Cisneros left, saying they would be back, but denied hearing Mr. Aguilar or Mr. Cisneros say anything about going to Everado Marquez's house. RT 1325-29, 1420-24. What Mr. Perez

recalled was Mr. Aguilar wanting to “score some weed.” RT 1422. Mr. Perez did remember Mr. Cisneros wanted to fight Everado Marquez because Everado Marquez had stolen Mr. Cisneros’s car, but did not recall Mr. Cisneros saying he wanted to shoot Everado and “probably wouldn’t have took it like he would have done it” if Mr. Cisneros had made such a statement. RT 1434. Both Mr. Perez and Mr. Sanchez also testified they never saw a rifle, RT 1336, 1425-28, though Mr. Sanchez saw the outline of a handgun in Mr. Cisneros’s waistband, RT 1329-33.

Mr. Sanchez and/or Mr. Perez had said a little more in prior police interviews, though that was in response to threats that they could be charged as accessories to murder if they “covered up,” *see* CT 851-53. Mr. Perez had said Mr. Cisneros tried to get him to hold a handgun Mr. Cisneros had, but still denied seeing a rifle. RT 1578. Mr. Sanchez had said Mr. Aguilar “had Mr. Cisneros’s back” in his prior statement, CT 864, 865-66, but testified he had just assumed that, not that Mr. Aguilar had said it, RT 1357-58, 1393. Mr. Sanchez also indicated Mr. Cisneros thought Everado Marquez had stolen his car and “was telling everybody, you know, he’s all like I’m going to cap him and this and that,” but that he did not know anything was going to happen that night. CT 859-60. Mr. Sanchez also indicated in the prior statement that he didn’t understand why Mr. Aguilar was guilty of anything, asking the detective, “So how come you guys keep Ulie?” CT 860. Mr. Sanchez also reiterated that he, Mr. Sanchez, didn’t “know nothing about it” and opined that “Ulie didn’t either.” CT 865.

Mr. Aguilar’s younger brother, in his actual testimony, remembered basically nothing about that night, and certainly nothing incriminating. *See* RT

1198-1242. He also had made a prior statement to the police, however, albeit as a 13-year-old without his parents present, which defense counsel suggested was a rather intimidating situation, *see* RT 1608-09, 1771, 1775, 1833-34. In this prior statement, Mr. Aguilar's brother had allegedly said he had heard about Everado Marquez, or "Baloney,"⁵ being shot, he had asked Mr. Aguilar what happened, and Mr. Aguilar had said Mr. Cisneros, or "Mikey," had shot Baloney and Mr. Aguilar had gone with Mikey because Mikey wanted to kill Baloney. RT 1582. Mr. Aguilar's brother also allegedly added that he told Mr. Aguilar Baloney had a daughter and Mr. Aguilar replied that Baloney shouldn't have "messed around." RT 1584.

3. The Evidence About the Special Gang Allegation.

There was testimony from both lay witnesses and gang experts about gangs in Pixley. There were two rival gangs described as Northerners and Southerners, or Nortenos and Surenos. *E.g.*, RT 1012-13, 1263-64, 1410, 1414, 1630-32, 1697-98. Northerners wear red, and Southerners wear blue. *E.g.*, RT 1264-66, 1264-67, 1414, 1632, 1634, 1697-98. Gangs in small towns like Pixley do not claim specific territories like gangs in big cities, however, and gang members have ordinary everyday contact which does not necessarily lead to confrontation. RT 1634-35, 1667, 1677, 1698-1700.

There was also testimony about the alleged gang affiliations of the key

⁵ "Baloney" was Mr. Marquez's nickname. *See* RT 1204, 1261, 1290, 1404, 1485.

figures in this case. Multiple red items suggesting Northerner affiliation were found in the homes of Mr. Cisneros and Everado Marquez, RT 1132-38, 1546, 1639-41, though Juan Marquez testified Everado had “dropped out,” RT 1047. At Mr. Aguilar’s house, there was a large “sur,” purportedly standing for Sureno, on the back fence. RT 1173, 1244-45, 1682. A prosecution gang expert testified about “validat[ing]” Mr. Aguilar as a gang member in a contact a month prior to the murder, based on “self-admission,” gang tattoos, blue clothing, and “association.” RT 1648-49. There was also evidence Mr. Aguilar had been in a fistfight with Everado Marquez, but that fight had taken place long before and there was no evidence it was gang-related. *See* RT 1252-53, 1359-60.

The prosecution theory was that Mr. Cisneros wanted to switch sides – from Northerner to Southerner, or “red” to “blue” – shortly before the shooting because Everado Marquez, another Northerner, had stolen his car and Mr. Cisneros wasn’t getting support from his own gang. As articulated by the prosecution gang expert:

From what I’ve read and what I base my opinion on is this occurred basically for a southern gang member, and you had a northern gang member who wanted to participate in that gang. He would have felt that he had been wronged. And the only backup he could think of was to join the opposite side.

The Southerner in this particular case went along with him to verify that he, in fact, was actually going to join. And so that’s the reason he went to observe the subject commit the crime.

RT 1654. Yet the prosecution expert admitted such switching of sides was “rare” and he had seen it happen “only once before.” RT 1663. The prosecution’s theory was further undercut by the fact that just a week earlier Mr. Cisneros had approached another man, Ernesto Garcia, about getting a gun, *see* RT 1280-85, and Mr. Garcia was a Northerner, RT 1650.

A defense gang expert – who, like the prosecution expert, was a law enforcement officer in Central California, *see* RT 1694 – disagreed with the prosecution expert. He did agree it was extremely rare for a gang member to switch sides; indeed, he had seen just four gang members out of 2000 do this. RT 1700-01. He further noted it would be both unusual and unwise for a gang member who switched sides to keep his original gang materials, as Mr. Cisneros apparently had, *see* RT 1704-05, 1711-13, and the switching sides was also inconsistent with Mr. Cisneros having approached a fellow Northerner about a gun just five days earlier, RT 1723, 1766. The defense expert’s conclusion was that “the motivation [for the crime] was personal because of the stolen car and the disrespect that went on with that.” RT 1723.

4. The Verdict.

The case was submitted to the second jury on April 3, 2008. RT 1854. That jury returned a verdict on April 7, 2008. RT 1857; CT 737. It found Mr. Aguilar guilty of second degree murder and also found the firearm and gang enhancements to be true. RT 1857-58; CT 737.

D. PROCEEDINGS CONSIDERING JUROR MISCONDUCT AND JUROR BIAS.

Juror misconduct and/or evidence of juror bias – as to two jurors – came to the attention of defense counsel during trial and then during deliberations.

Defense counsel sought relief only after trial, however.

1. Juror 9.

Juror 9 sent the court a note during trial indicating she thought she might know a gang member who had committed suicide and whose memorial had been referenced in a document found in Mr. Cisneros's house. *See* ER 327; RT 1363. The court held a hearing and discovered the juror did know the gang member, and she had dated his brother and even lived in the same house with him. ER 321. The court asked the juror if it was going to affect her ability to sit fairly in the case, and she replied, "If it doesn't have nothing to do with him, no." ER 322.

Defense counsel then asked if he could ask the juror some additional questions, and there was an off-the-record discussion, after which the court asked some additional questions:

THE COURT: The fact that he was Norteno-associated and defendant here may be Sureno-associated, is that going to affect your ability to be fair in this?

JUROR NO. 9: Maybe a little bit.

THE COURT: Well –

JUROR NO. 9: I'm not saying that – I still have to see everything, so I can't say –

THE COURT: That's what we're asking.

JUROR NO. 9: No.

THE COURT: You could see the evidence and decide this based on the evidence?

JUROR NO. 9: Like, okay, put it this way. Right now I can't say he's guilty or not guilty. Just because he's a Sureno, that doesn't have nothing to do with me. I don't claim. My family does, but that has nothing to do with me.

THE COURT: What you disclosed before.

JUROR NO. 9: Right.

THE COURT: That's all we want to know. You're not going to say –

JUROR NO. 9: Because he –

THE COURT: Because he's a Sureno, therefore, I'm not going –
JUROR NO. 9: I don't claim, so I don't care about that.
THE COURT: All right. Thank you very much.

ER 323-24.

Additional information provided the next day contradicted some of what the juror had said, however. One of Mr. Aguilar's brothers told defense counsel the juror had a gang tattoo and was playing Norteno rap music "making derogatory terms to Surenos calling them Sur rattas or whatever" on her phone in the hallway.

ER 313. In addition to this, a defense witness had seen a red "North Star" tattoo on the juror's neck, along with "some writing with a big N on it," ER 314-15, which witnesses testified stood for Norteno, *see, e.g.*, RT 1268, 1311, 1633, 1703. Defense counsel had not been paying attention to the music, but had seen "a big red star tattooed on her neck," ER 313, which the prosecutor agreed was a northerner gang symbol, ER 314. This was not only inconsistent with what the juror had said the previous day, but also inconsistent with what the juror had said during voir dire, which was:

I have a family member that's involved in it, but I don't – I stay away. It doesn't bother my mind at all. I'm not involved, and I don't care to be. So I just wanted to let you know that I do have family members.

ER 333.

After describing what had been seen in the hallway, defense counsel expressed concern that "it was never really brought up that if her family's, you know – if she would tend to side with the gang or be biased against my client because he's in a rival gang." ER 314. The court had the court reporter check transcript notes at the lunch hour, and after the lunch break, the court read back the

original exchange with the juror the day before. ER 314, 317-18. The defense attorney responded by simply saying, “Okay.” ER 318. He raised his concerns again only in the motion for new trial discussed below in connection with Juror 3’s misconduct, complaining again that Juror 9 had hidden her gang affiliation and claiming he had been denied an opportunity to question her about her possible bias. ER 301. The court rejected the claim, asserting there was no admissible evidence of the juror playing the Northerner rap music, the juror had frankly revealed her gang connections, and defense counsel had not been denied an opportunity to question her. ER 246-47, 288.

2. Juror 3.

Another juror, Juror 3, also had gang connections, which came up during deliberations. After the jury retired to deliberate, Mr. Aguilar heard an inmate in the cell next to him at the jail talking about the case. ER 307. Mr. Aguilar heard the other inmate saying his girlfriend was on Mr. Aguilar’s jury and had asked his opinion about what position she should take regarding the verdict. ER 307.

After the verdict was returned, defense counsel sought to investigate this misconduct. He began by filing a petition for access to Juror 3’s identifying information so he could contact her directly. CT 763-68. The court held a hearing and agreed to contact Juror 3 to ascertain if she was willing to discuss her jury service. RT 1880-81. When Juror 3 indicated she did not want to be contacted, the court denied the motion. RT 1889-90.

The court did tell defense counsel he was still free to file a motion for new

trial, RT 1891, and defense counsel did that, *see* ER 297-307. The inmate with whom Juror 3 had spoken, Isaac Vasquez, testified at a hearing on the motion. ER 259-76. He testified Juror 3 was the mother of his child, just born on November 12, ER 260, so she likely had been pregnant with the child during the trial. Mr. Vasquez also testified he had been a member of the Northerner gang, though he wasn't "affiliated" any more, and identified two photographs in which he was wearing red bandannas indicating he was a Northerner. ER 265-66. His girlfriend, the juror, was in the photos with him, ER 265-66, which suggested she had concealed material information during voir dire. One of the questions the jurors had been asked was whether "either yourself or close friends or relatives have been or are in a street gang," ER 331, and Juror 3 had told the court nothing about this when she was seated and asked, "Any of the questions we've asked so far that you'd like to respond to?," ER 334.

Mr. Vasquez also confirmed Juror 3 had spoken with him during the jury deliberations. ER 269. He testified she had told him she was scared, told him she didn't know what she was doing, and asked his opinion about what she should do. ER 270. Regarding what all of the other jurors were doing, he told her to "just go with the flow." ER 272, 273-74. He also testified that while he was no longer "affiliated" with the rival gang, "still there's like a little resentment there sometimes." ER 272. In part because of this, he told Juror 3 "that if it was up to me, he'd be guilty. That if it was up to me, regardless if he's guilty or not, he's guilty to me." ER 273.

After hearing this testimony, the trial court agreed there had been

misconduct in at least one form, ER 248, 290,⁶ but denied the motion nonetheless. The court gave two reasons. First, it ruled the claim was waived because the misconduct should have been brought to the court's attention before the verdict was returned, so the court could have considered substituting an alternate juror. ER 250-51, 290. Second, it ruled there was no showing of what effect there had been on the juror or jury. ER 290. As further articulated at the sentencing hearing a week later:

[T]hat misconduct does raise a rebuttable presumption of prejudice.

But the Court finds that that presumption is overcome by a consideration of the entire record, such that there is no reasonable probability of actual harm from the misconduct.

The question really is as a result of the conversation with Mr. Vasquez, was there a substantial likelihood that juror number three was impermissibly influenced to the defendant's detriment. And the answer is no.

In the usual case a juror receives information regarding the case about a party or a party from a third person. We don't have that here. Mr. Vasquez didn't know anything about the case. He didn't purport to state anything about the defendant or facts of the case to juror number three. So we don't have any evidence about the case or information about the case for defendant imparted to a juror outside the court from the conversation.

We don't have any indication of what effect this discussion had on juror number three. Mr. Vasquez didn't tell her how to vote other than to go with the flow, which could have been either way. At most said how he would vote.

There's also no indication of any effect on any other

⁶ The trial court opined the failure to disclose the boyfriend's prior gang affiliation was not misconduct because "there's no basis for a finding that at the time the jury was selected he was gang-affiliated, and, therefore, no basis for finding an intentional concealment of such a relationship." ER 247. This overlooked the breadth of the question during voir dire, however, which was whether the juror, close friends, or relatives are or "have been" in a street gang, ER 331.

jurors. . . .

Obviously, this would be a different story if Mr. Vasquez gave the juror any information relating to the defendant that was not in evidence. But it appears that this was just a general discussion of her internal deliberations without regard to any particular evidence. So on the record as a whole the presumption of prejudice is rebutted.

ER 248-50.

E. SENTENCING, APPEAL, AND HABEAS PROCEEDINGS.

Mr. Aguilar was sentenced, as required by California law, to a prison term of 15 years to life for the second degree murder conviction and a consecutive term of 25 years to life for the gang and firearm enhancements. RT 2006. He thereafter appealed, arguing that (1) there was insufficient evidence to support the gang enhancement; (2) the first jury's "not true" findings regarding the gang enhancement precluded retrial of that allegation in the second trial; (3) the trial court should have discharged Juror 9; and (4) defense counsel had been ineffective because he failed to move to discharge Juror 9 during trial and did not obtain declarations supporting the allegations in the new trial motion. *See* ER 46-76. The state court of appeals rejected the first three arguments on the merits and rejected the ineffective assistance claim on the ground that it should be presented in a petition for writ of habeas corpus. ER 46-76. Mr. Aguilar then filed a petition for review with the state supreme court which was denied. ER 44.

Mr. Aguilar thereafter filed state habeas petitions, first in the superior court and then in the state court of appeals and state supreme court. Additional issues raised in those petitions included a claim of prosecutorial misconduct in closing

argument, Juror 3's misconduct, and ineffective assistance of counsel in defense counsel's failure to timely move to discharge Juror 3. *See* CR 18, ## 3, 5, 7. The superior court denied the petition filed before it because a petitioner "cannot re-litigate an issue already raised in an appeal by filing a writ of habeas corpus," CR 18, #4, without recognizing there were added issues which had not been raised in the direct appeal. The state court of appeals denied the petition filed before it in a two-sentence order which read as follows:

The "Petition for Writ of Habeas Corpus," filed November 14, 2011, is denied without prejudice. Insofar as petitioner claims that the trial court erroneously denied his motion for new trial based on prosecutorial misconduct and the misconduct of juror #3, petitioner has failed to show that these issues are not barred because they were not raised in his appeal. (*In re Walker* (1974) 10 Cal. 3d 764, 773-775.)

ER 42. The state supreme court denied the petition filed before it without comment. ER 40.

Mr. Aguilar then filed his federal habeas petition, raising the claims that (1) retrial of the gang enhancement violated the Double Jeopardy Clause; (2) the refusal to discharge Juror 9 violated his right to a fair trial and impartial jury; (3) the evidence was insufficient to support the gang enhancement; (4) the failure to discharge Juror 3 violated his right to a fair trial and impartial jury; and (5) his trial counsel had provided ineffective assistance by failing to move to discharge Juror 3, Juror 9, and another juror, Juror 4. ER 125-89. A magistrate judge issued a report and recommendation that the petition be denied, which the district court adopted. ER 1-38. It rejected the claims of double jeopardy, Juror 9 bias, and insufficiency of evidence to support the gang enhancement on the merits. ER 9-28. It found the claim regarding Juror 3's misconduct procedurally barred both

because it had not been raised on direct appeal and because there had not been a timely objection in the trial court. ER 29-30, 34. It also found the claim failed on the merits, largely because it believed it owed deference to the trial court's reasoning. ER 34.⁷

Finally, the report and recommendation rejected the ineffective assistance of counsel claim. It began by asserting federal habeas review was barred because "the [state court of appeals] rejected those claims as procedurally barred, citing Walker, because Petitioner could have raised, but did not, those claims in his direct appeal." ER 35. It also summarily concluded its preceding rejection of the underlying substantive claims meant there could be no prejudice even if federal habeas review were not barred. ER 38.

IV.

SUMMARY OF ARGUMENT

Juror 3's ex parte discussion of the case with her boyfriend and the father of her child deprived Mr. Aguilar of one of his most fundamental constitutional rights – the right to an impartial jury. Supreme Court case law dating back to the 19th century establishes that extrinsic communications between a juror and a non-juror are presumptively prejudicial and there is a heavy burden on the government to show no possibility of an effect on the verdict.

The trial court's ruling to the contrary cannot stand. To begin, the trial

⁷ The court opined the issue would be "a close one" if it were engaging in de novo review. ER 34.

court's ruling is entitled to no deference because it is not the "last reasoned decision," and the state court of appeals habeas denial which is the "last reasoned decision" relied solely upon a procedural bar. Further, the trial court's ruling could not stand even if it were given deference. First, the trial court's ruling was contrary to the well-established Supreme Court case law noted in the preceding paragraph. The test the trial court used was whether there *was a reasonable probability* of actual harm, which is almost the converse of placing a heavy burden on the government to show *no possibility* of harm. Second, the trial court's ruling would have been an unreasonable application of the Supreme Court case law even if it had applied the correct standard. This was a close case in which there previously had been an acquittal of first degree murder, a hung jury on second degree murder, and "not true" findings on the enhancements. The ex parte communication between the juror and the non-juror was about the most fundamental decision the juror had to make, namely, what verdict to return. The person from whom she sought advice was her boyfriend, the father of her child, and a former member of the same rival gang which was the alleged target of Mr. Aguilar's alleged crime.

There is the procedural bar relied upon by the state court of appeals – known as the "*Dixon* bar" – to consider. That procedural bar precludes a defendant from raising a claim in habeas proceedings when he could have raised the claim on direct appeal. Mr. Aguilar could not have raised the claim about Juror 3's misconduct on direct appeal, however. Both California statutory law and California case law preclude a defendant from raising a claim on direct appeal when there has been not been a timely objection in the trial court. For an

objection to be timely here, it had to be made before the verdict was returned, as the trial court pointed out. The absence of such an objection precluded Mr. Aguilar from raising the claim on direct appeal, and that made the “*Dixon* bar” inapplicable.

The failure to make a timely objection can also be a procedural bar, but it is not a bar here for at least two reasons. First, the state court of appeals did not rely on that procedural bar, and it is the state court of appeals ruling, not the trial court’s ruling, which is the “last reasoned decision.” Second, Mr. Aguilar can show cause and prejudice for this procedural default, because it was ineffective assistance for his trial attorney not to make the objection before the verdict was returned. It is hornbook law that such ineffective assistance establishes cause for a procedural default, and prejudice is established by the seriousness of the juror misconduct and the closeness of the case.

Finally, this Court can consider Mr. Aguilar’s claim through an ineffective assistance of counsel claim even if finds there is a procedural bar to raising the misconduct claim directly. The timely objection procedural bar does not apply to an ineffective assistance claim because the failure to make a timely objection *is* the ineffective assistance. The “*Dixon* bar” does not apply because ineffective assistance of counsel claims are expressly exempted from the “*Dixon* bar.”

The district court also erred in rejecting Mr. Aguilar’s claim that his trial attorney furnished ineffective assistance by failing to move to dismiss Juror 9. The district court’s initial conclusion that the state court of appeals invoked the “*Dixon* bar” on this claim misreads the record. The “*Dixon* bar” was applied to only the Juror 3 misconduct claim and a prosecutorial misconduct claim, not the

ineffective assistance of counsel claims. Mr. Aguilar actually raised this ineffective assistance of counsel claim on direct appeal, was instructed he must instead raise it in a habeas petition, and then raised it in his habeas petitions.

The district court did address the merits of this ineffective assistance claim as well, concluding a challenge to Juror 9 would have failed because there were only hearsay allegations and no admissible evidence Juror 9 concealed her bias. This ignores the fact that the failure to present admissible evidence *was* the ineffective assistance. An effective attorney would have presented the admissible evidence that was missing. Direct evidence from the witnesses the defense attorney described would have established Juror 9 lied multiple times when she said things about gang membership such as “I stay away,” “I’m not involved,” and “I don’t claim.”

This in turn would have required Juror 9’s dismissal – under two lines of case law. First, it would have required dismissal under *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548 (1984), which requires dismissal of a juror when (1) the juror gives a dishonest answer on voir dire and (2) an honest response would have supported a challenge for cause. Second, it would have required dismissal under California case law which holds that (1) a juror who intentionally conceals material information during voir dire has engaged in misconduct, (2) such intentional concealment raises a presumption of prejudice, and (3) that presumption may be rebutted only by an affirmative showing that prejudice does not exist or an examination of the record establishing there is no reasonable probability of harm.

V.

ARGUMENT

A. STANDARD OF REVIEW.

When a state court has adjudicated a claim on the merits, a federal court grants habeas relief if the state court decision either (1) was “contrary to, or involved an unreasonable application of, clearly established Federal law, as established by the Supreme Court of the United States” or (2) was “based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” *James v. Ryan*, 733 F.3d 911, 914 (9th Cir. 2013) (quoting 28 U.S.C. § 2254(d)). Where the state court provides no reasoning to support a decision on the merits, the federal court conducts an independent review of the record to determine whether the state court decision is unreasonable. *Reynoso v. Giurbino*, 462 F.3d 1099, 1109 (9th Cir. 2006). Review is de novo if the state court did not reach the merits but instead relied on a procedural bar which is later held inadequate. *James*, 733 F.3d at 914. Whether a claim is procedurally barred is also reviewed de novo. *Cooper v. Neven*, 641 F.3d 322, 326 (9th Cir. 2011).

* * *

C. THE DISTRICT COURT ERRED IN REJECTING MR. AGUILAR'S CLAIM THAT TRIAL COUNSEL FURNISHED INEFFECTIVE ASSISTANCE BY FAILING TO MOVE TO DISMISS JUROR 9.

1. The District Court Erred in Concluding This Claim Was Procedurally Barred by the “Dixon Bar” Because the State Courts Did Not Rule the Claim Should Have Been Raised on Direct Appeal, the Claim in Fact Was Raised on Direct Appeal, and the State Court of Appeals Instructed Mr. Aguilar to Instead Raise the Claim in a Habeas Petition.

The report and recommendation in the district court misread the record when it asserted that “the [state court of appeals] rejected [the ineffective assistance of counsel] claims as procedurally barred, citing Walker, because Petitioner could have raised, but did not, those claims in his direct appeal.” ER 35. The state court of appeals order denying Mr. Aguilar's state court of appeals habeas petition said nothing at all about his ineffective assistance of counsel claims. The order did cite *In re Walker*, 518 P.2d 1129 (Cal. 1974), and so invoke, albeit wrongly, the “Dixon bar” discussed *supra* pp. 36-37. But it did not invoke that bar as to the ineffective assistance of counsel claims. What the order stated was that “[i]nsofar as petitioner claims that the trial court erroneously denied his motion for new trial *based on prosecutorial misconduct and the misconduct of juror #3*, petitioner has failed to show that *these issues* are not barred because they were not raised in his appeal.” ER 42 (emphasis added). The order said nothing about a procedural bar of the claim that Mr. Aguilar's attorney had provided

ineffective assistance of counsel in failing to move to dismiss Juror 9.

Indeed, the claim that Mr. Aguilar's attorney had provided ineffective assistance of counsel in failing to move to dismiss Juror 9 *was* raised in the direct appeal. *See* ER 72-76. And it was rejected not on the merits but because it should have been raised in a habeas corpus petition instead. The state court of appeals expressly instructed: "The related ineffective assistance claim must be presented in a petition for habeas corpus." ER 72. Mr. Aguilar then followed this instruction by presenting it in his habeas petitions.

In sum, Mr. Aguilar did raise the ineffective assistance of counsel claim on direct appeal, he was told he instead had to raise it in a habeas petition, he did raise it in his habeas petitions, and the state court of appeals never held it was procedurally barred in the habeas proceedings. The report and recommendation was mistaken in asserting the contrary.

2. The District Court Erred in Rejecting the Ineffective Assistance of Counsel Claim on the Merits Because It and the State Courts Relied on an Absence of Admissible Evidence that Juror 9 Had Lied, Failure to Present that Evidence Was Part of the Ineffective Assistance of Counsel, and Evidence Juror 9 Had Lied Would Have Required Her Dismissal and/or a New Trial.

The report and recommendation did also briefly address the merits of the ineffective assistance of counsel claim – in a three-sentence paragraph.¹³ It first

¹³ Counsel assumes that certification of the procedural bar issue is also an implicit certification of the underlying merits issue, since consideration of the

noted summarily that it “ha[d] previously discussed in depth the lack of merit as to Petitioner’s claims regarding jurors no. 3 and 9.” ER 37. It then reasoned that “if Petitioner’s claims as to these two jurors lack legal merit, then defense counsel cannot possibly be ineffective for failing to raise meritless arguments in the state court.” ER 37.

This reasoning ignores the fact that part of the ineffective assistance of counsel was failing to make the necessary record to support dismissal of Juror 9. Both the federal court and the state courts rejected the substantive claim that Juror 9 was biased largely because there were only hearsay allegations and no admissible evidence that Juror 9 had concealed the gang affiliation evidenced by her Northerner gang tattoo and the Northerner rap music she was playing, *see supra* p. 14. *See* ER 21 (noting “there was no admissible evidence supporting appellant’s assertion that juror No. 9 concealed facts”); ER 71-72 (agreeing with state that “appellant did not present admissible evidence proving juror misconduct,” stating that “[a]ppellant mistakenly treats the hearsay assertions in defense counsel’s declarations as established facts,” and explaining that defense counsel did not have personal knowledge and other witnesses did not testify). *See also* ER 246 (trial court noting “there really was no admissible evidence” juror was playing Northerner rap music).

This absence of admissible evidence is the whole point – or at least a major part – of the ineffective assistance of counsel claim. A competent attorney would have provided admissible evidence, in the form of either declarations or testimony from the witnesses who identified the music as Northerner rap music and saw the

procedural bar would be meaningless if the merits cannot also be considered.

full gang tattoo, including both the red “North Star” and the red letter, “N,” *see supra* p. 14. That would have provided the admissible evidence the federal court and state courts complained was missing. This evidence in turn would have showed Juror 9 had not been honest and forthright during voir dire as the courts concluded without this evidence.¹⁴ Rather, she flat out lied. While she admitted her *family’s* connections during voir dire, she flatly denied her own. During voir dire at the beginning of trial, she stated: “I have a family member that’s involved in it, but *I don’t – I stay away*. It doesn’t bother my mind at all. *I’m not involved, and I don’t care to be.*” ER 333 (emphasis added). And what she stated in the hearing during trial – twice – was: “I don’t claim.” ER 323, 324.

Such evidence of lying would have required the trial court to apply a very

¹⁴ A court of course will have to determine if the evidence the defense attorney could have presented establishes the facts alleged. Since the state courts did not provide that hearing in the state habeas proceedings, it will have to be provided in the federal court. Any implicit findings of fact without providing the opportunity for a hearing would be deficient as “an unreasonable determination of the facts” under 28 U.S.C. § 2254(d)(2). *See Hurles v. Ryan*, 752 F.3d 768, 790-91 (9th Cir. 2014), and cases cited therein. *See also Brumfield v. Cain*, 135 S. Ct. 2269, 2276, 2281 (2015) (finding “unreasonable determination of the facts” where existing record raised reasonable doubt about defendant’s intellectual disability and defendant “had not yet had the opportunity to develop the record”). In addition, Mr. Aguilar cannot be procedurally barred for failure to present facts in state habeas proceedings without counsel. *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), and *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), hold there is cause for *complete failure* to raise an ineffective assistance claim when (1) the claim is a “substantial” claim; (2) there was either no counsel or only ineffective counsel in the state habeas proceedings; and (3) state law either requires or “in effect . . . direct[s]” defendants to raise claims of ineffective assistance of trial counsel in collateral proceedings rather than on direct appeal. *Trevino*, 133 S. Ct. at 1918, 1919.

different standard in considering whether to dismiss Juror 9. Dismissal would have been required – and certainly would have been advisable – under at least two lines of case law.

The first line of cases recognizes what this Court has labeled “*McDonough*-style [juror] bias,” *United States v. Olsen*, 704 F.3d 1172, 1189 (9th Cir. 2013); *Fields v. Brown*, 503 F.3d 755, 766 (9th Cir. 2007) (en banc), after the case of *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548 (1984). *McDonough* held a juror is presumed to be biased and the constitutional right to an impartial jury violated by the juror’s service if “first[,] . . . [the] juror failed to answer honestly a material question on *voir dire*, and [second,] a correct response would have provided a valid basis for a challenge for cause.” *Id.* at 556. As this Court explained in *Dyer v. Calderon*, 151 F.3d 970 (9th Cir. 1998) (en banc):

A juror . . . who lies materially and repeatedly in response to legitimate inquiries about her background introduces destructive uncertainties into the process. There is, of course, the possibility that she did so because of some personal bias against the defendant which she managed to hide from the court. But a perjured juror is unfit to serve even in the absence of such vindictive bias. If a juror treats with contempt the court’s admonition to answer *voir dire* questions truthfully, she can be expected to treat her responsibilities as a juror – to listen to the evidence, not to consider extrinsic facts, to follow the judge’s instructions – with equal scorn. Moreover, a juror who tells major lies creates a serious conundrum for the fact-finding process. How can someone who herself does not comply with the duty to tell the truth stand in judgment of other people’s veracity? Having committed perjury, she may believe that the witnesses also feel no obligation to tell the truth and decide the case based on her prejudices rather than the testimony.

Id. at 983.

McDonough error is structural, moreover; the rule admits of no discretion in its application and such error cannot be found to be harmless. *Dyer*, 151 F.3d at

973 n.2. *See also Smith v. Swarthout*, 742 F.3d 885, 892 n.2 (9th Cir.) (reaffirming *Dyer*), *cert. denied*, 135 S. Ct. 175 (2014); *United States v. Hayat*, 710 F.3d 875, 885 (9th Cir. 2013) (same); *United States v. Long*, 301 F.3d 1095, 1101 (9th Cir. 2002) (same); *United States v. Gonzalez*, 214 F.3d 1109, 1111 (9th Cir. 2000) (same). The trial court thus would have been *required* to dismiss Juror 9 and/or grant a new trial if the *McDonough* requirements were shown to be satisfied.

The trial court likely would have found those requirements satisfied if Mr. Aguilar had received effective assistance of counsel. The first requirement of a dishonest answer would have been established by contrasting the juror's direct statement that she didn't "claim," "stay[ed] away," and was "not involved," *supra* p. 44, with admissible evidence offered by an effective attorney that showed she had a gang tattoo and played Northerner rap music. The second requirement that the concealed information provide a basis to challenge the juror for cause would have been satisfied because the Northerner and Southerner gangs are direct rivals, as testified to almost ad nauseam in the case, and the offense here was alleged to be the shooting of a Northerner gang member in support of the Southerner gang. The gang rivalry would have justified a challenge for cause in this case just as discharge for cause was required in the Fifth Circuit case of *United States v. Nell*, 526 F.2d 1223 (5th Cir. 1976). In that case, the court concluded a juror who was a union member could not be impartial and should have been excluded for cause in the trial of a defendant who was a member of a rival union and was accused of embezzling union funds. *See id.* at 1230. *See also United States v. Gonzalez*, 214 F.3d at 1113 n.4 (citing *Nell* as case where implied bias was found because "juror

belonged to a labor union that had fought with the union victimized by the defendant”); *United States v. Clabaugh*, 589 F.2d 1019, 1023 (9th Cir. 1979) (citing *Nell* as case where court found substantial possibility of bias because juror “had quarreled with the union involved in the trial”). If rivalry between two lawful groups like labor unions is sufficient to disqualify members from serving as jurors in each others’ trials, rivalry between two criminal gangs certainly ought to create such disqualification.

If the Court were for some reason to find this is not the case, there is a line of California cases which the trial court would have been required to apply here and which would have required dismissal of Juror 9. That line of cases establishes three principles. First, a juror who intentionally conceals material information during voir dire has engaged in misconduct. *People v. Blackwell*, 236 Cal. Rptr. 803, 806 (Cal. App. 1987), *cited with approval in In re Hitchings*, 860 P.2d 466, 478 (Cal. 1993). *See also People v. Morris*, 807 P.2d 949, 965 (Cal. 1991) (“Concealment by a potential juror constitutes implied bias justifying disqualification.”). Second, such intentional concealment raises a presumption of prejudice. *Hitchings*, 860 P.2d at 478; *Blackwell*, 236 Cal. Rptr. at 805; *People v. Diaz*, 200 Cal. Rptr. 77, 82 (Cal. App. 1984). Third, the presumption of prejudice is rebutted only “by an affirmative evidentiary showing that prejudice does not exist or by a reviewing court’s examination of the entire record to determine whether there is a reasonable probability of actual harm to the complaining party.” *Hitchings*, 860 P.2d at 478 (internal quotations omitted). *See also Blackwell*, 236 Cal. Rptr. at 805-06; *Diaz*, 200 Cal. Rptr. at 82. Unlike the *McDonough* line of cases, there does not need to be a showing that the concealed information rises to

the level of supporting a challenge for cause. *See Blackwell*, 236 Cal. Rptr. at 806 (noting that concealed information “might have led to a challenge for cause,” but not requiring such).

There was no “affirmative evidentiary showing” in the present case that overcame the presumption of prejudice, and neither does the “entire record” overcome the presumption. Juror 9’s initial response to the question of whether she would not be affected by Mr. Aguilar’s gang membership was that in fact she might be affected, at least “a little bit.” ER 323. She did subsequently give reassurances that she would not be, but those reassurances were tied to the concealment of her own gang affiliation. What she said was: “Just because he’s a Sureno, that doesn’t have nothing to do with me. *I don’t claim*. My family does, *but that has nothing to do with me.*” ER 323 (emphasis added). Finally, this was just one of *two* jurors who concealed a gang association; as discussed *supra* pp. 16, 33, 35, Juror 3 concealed the prior gang membership of her boyfriend and the father of her child.

This was not a case where gang membership was just a tangential fact, moreover. It was one of the express charges in the information, in a special allegation that the offense “was committed for the benefit of, at the direction of, and in associatiodn [sic] with a criminal street gang with a specific intent to promote, further and assist in criminal conduct by gang members.” CT 376. And the evidence supporting this allegation was extremely weak, as discussed *supra* p. 32.

The centrality of the gang issue, the weak evidence supporting the special gang allegation, the juror’s initial hesitation about whether Mr. Aguilar’s gang

membership might affect her, and the juror's tying of her subsequent reassurances to the concealment of the very information which suggested her bias make it impossible to say the presumption of prejudice was overcome. The trial court could and might have dismissed the juror without resolving the question, moreover. A judge who is faced with this situation in the middle of a trial before a verdict is returned and has alternate jurors whom he can substitute has the option of playing it safe. As the court explained in *Rufo v. Simpson*, 103 Cal. Rptr. 2d 492 (Cal. App. 2001):

When juror misconduct is discovered before a verdict is reached, the trial court has a choice among several remedies, one of which is to discharge the offending juror and replace the juror with an alternate. Ordinarily the less drastic remedy is preferable to requiring a whole new trial; the remedy of mistrial is for those rare cases where the trial court in its discretion concludes the misconduct of the juror has already caused such irreparable harm that only a new trial can secure for the complaining party a fair trial.

Id. at 520 (citations omitted). Had Mr. Aguilar's trial attorney presented actual admissible evidence of Juror 9's gang affiliation during the trial, the trial court might have chosen to play it safe and turn to this "less drastic remedy" without resolving whether the presumption of prejudice was overcome.

In sum, there are two lines of case law that should have led to the dismissal of Juror 9 during trial and/or a new trial if the defense attorney had presented the admissible evidence he should have presented. First, *McDonough* required that result because there would have been a showing of a dishonest answer about a fact that would have supported a challenge for cause. Second, California case law holds it is misconduct for a juror to intentionally conceal material information even when the information falls short of supporting a cause challenge, such

concealment creates a presumption of prejudice, there must be evidence affirmatively presented or already in the record that overcomes that presumption, and there was not such evidence here.

VI.

CONCLUSION

The Court should grant a conditional writ of habeas corpus setting an appropriate deadline by which the state should either release Mr. Aguilar or give him a new trial. At the very least, there should be a remand for a hearing on Mr. Aguilar's ineffective assistance of counsel claims.

Respectfully submitted,

DATED: November 15, 2016

s/ Carlton F. Gunn
CARLTON F. GUNN
Attorney at Law

CERTIFICATE OF RELATED CASES

Counsel for appellant certifies that he is unaware of any pending case presenting an issue related to those raised in this brief.

DATED: November 15, 2016

s/ Carlton F. Gunn

CARLTON F. GUNN
Attorney at Law

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. 32(a)(7)(c) and Circuit Rule 32-1, I certify that this brief is proportionally spaced, has a typeface of 14 points or more, and contains 13,979 words.

DATED: November 15, 2016

s/ Carlton F. Gunn
CARLTON F. GUNN
Attorney at Law

Certificate of Service

I hereby certify that on November 15, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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

By: s/ Carlton F. Gunn
CARLTON F. GUNN

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ULICES AGUILAR, PETITIONER,
vs.
WARREN MONTGOMERY, RESPONDENT.

CERTIFICATE OF SERVICE

I, Carlton F. Gunn, hereby certify that on this 12th day of December, 2017, a copy of the Petitioner's Joint Appendix, Volume 1 of 2, was mailed postage prepaid, to counsel for the Respondent, Deputy Attorney General Justain Riley, at 1300 I Street, Suite 215, P.O. Box 944255, Sacramento, CA 94244-2550.

Respectfully submitted,

December 12, 2017

s/ Carlton F. Gunn
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