IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

ANDRE LUIS ORTEGA,

Petitioner, 2: 08 - cv - 1657 - KJM TJB

vs.

KEN CLARK, Warden,

Respondent. FINDINGS AND RECOMMENDATIONS

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I. INTRODUCTION

Petitioner, Andre Luis Ortega, is a state prisoner proceeding *pro se* with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner is currently serving a sentence of life imprisonment without the possibility of parole after being convicted by a jury of first degree murder. Petitioner raises several claims in this federal habeas petition; specifically: (1) his due process rights were violated when the prosecutor was permitted to proceed on a felony-murder theory based upon a robbery at trial ("Claim I"); (2) there was insufficient evidence to support the gang related findings because it was not established that the Nortenos are a criminal street gang ("Claim II"); (3) prosecutorial misconduct ("Claim III"); (4) his due process and equal protection rights were violated by the admission of uncharged offense evidence ("Claim IV"); (5) his due process and equal protection rights were violated when the prosecutor was allowed to ask the

gang expert at trial whether Petitioner's tattoos showed a propensity for violence ("Claim V"); and (6) his due process and equal protection rights were violated when the prosecutor gave the jury a chart during closing argument that was eventually brought in by the jury during their deliberations ("Claim VI"). For the following reasons, Petitioner's habeas petition should be denied.

II. FACTUAL AND PROCEDURAL BACKGROUND[1]

> Placer County Sheriff's Deputy Paul Long testified he responded to a report of a burglary in Newcastle, California on January 10, 2002. The address to which he reported was the residence and work address of Miller and Aggie Lee, husband and wife. Aggie ran a palm-reading business from that location. The Lees reported that guns, coins, credit cards, and heirloom jewelry had been stolen. Two days after the burglary report Miller Lee told Deputy Long they had received information that the burglar was Steve Adams from Stockton. Deputy Long investigated and discovered that Steve Adams's address in Stockton was a palm reading business, and that Gary, Walter and Lucy Adams were also related to that address.
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> Some of the jewelry the Lees reported as stolen turned up in a pawn shop in Stockton. Miller Lee purchased some of the jewelry that had a sentimental value, but one piece, a diamond bracelet, was not recovered from the pawn shop. The Placer County Sheriff's Department received almost daily calls from Miller Lee asking for the status of the investigation into the burglary. Miller Lee called less frequently after sheriff's deputies informed him there was no evidence linking Steve Adams to the crime. The calls from Miller Lee ended sometime in February 2002.
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> Steve Adams's mother left Steve with Walter and Walter's sister Dolly when Steve was a baby. Steve was referred to as Walter's adopted son. Dolly and her sisters worked at a palm reading business on East Harding Way in Stockton. The Adamses refer to themselves as gypsies or Yugoslavians. Dolly had heard accusations from other gypsies that Steve was robbing gypsies from out of town.
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> Walter had a Ford Explorer he had been trying to sell for a while. On the morning of the murder, October 23, 2002, Dolly received a phone call asking whether they had a car for sale. When Dolly told

[1] The factual background is taken from the California Court of Appeal, Third Appellate District opinion dated December 20, 2006 and filed in this Court by Respondent on July 28, 2009 as Lodged Document 4 (hereinafter referred to as "Slip Op.").

the caller they did, he said he would come take a look at it. Dolly told the caller that the car was not there at the time, and he hung up. The man called again in the afternoon, saying he was coming in from the Fresno area to take a look at the car, and bringing his aunt, who had the money to buy the car.

Two young Hispanic men arrived to look at the car. Walter left in the car with the two young men around 2:30 p.m. Walter was wearing a gold bracelet he had possessed for four or five years. Dolly became concerned after 30 or 40 minutes had passed and Walter had not come back. Dolly had a friend take her to the mall around 6:00 p.m. to see if Walter's car might be in the parking lot. They could not find it, and by the time they got back home Steve had called the police.

The next morning at around 9:00 a.m., Stockton police investigator David Anderson was dispatched to the west frontage road of Highway 99 when a report came in that a Ford Explorer had been found with Walter Adams's body inside. Walter's body was in the passenger seat. There were rope burns from his mouth to his ear lobes, several gunshot wounds to his right shoulder area, and a rope was draped around his chest. Three expended shell casings from a .380 caliber semi-automatic handgun were in the driver's seat area, one was in the center console, one was on the right rear floorboard, and a sixth one was underneath the victim. The victim's wallet containing $11 was in his right rear pants pocket, but he was not wearing a bracelet.

Officer Anderson's observations led him to conclude someone had been sitting in the back seat of the vehicle when the victim was killed. His conclusion was based on the fact that the driver's seat was pushed completely forward as if someone had exited the vehicle on the driver's side from the back seat. [FN 2] The vehicle could not have been driven with the seat in that position. The rope burns on the victim's mouth were unlikely to have been caused by a person in the front seat, because a person could not have exerted enough pressure from that position. Also, the ends of the rope, which was still draped over the victim, were pointed over his shoulders towards the back of the seat. The gunshot wounds came from a position directly above the victim into his right shoulder. There were no bullet holes indicating the victim was shot from the front, because those bullets would have exited the victim's body and gone into the seat. The location of the shell casings was consistent with someone in the back seat having fired the gun, although it was also possible from the casings that the shots could have come from the driver's seat area.

[FN 2] The Explorer was a two-door vehicle.

The Explorer was processed for fingerprints. [Roque] Bejarano's fingerprint was discovered on the exterior of the passenger window, his left palm print was on the interior of the driver's door,

and his right palm print was on the exterior of the passenger door. Defendant's fingerprint was discovered on the exterior of the passenger door window frame.

Dr. Robert Lawrence preformed Walter's autopsy. He determined Walter died as the result of massive hemorrhage and shock from multiple gunshot wounds. The gun muzzle had been either in contact with the victim's skin or within less than an inch. Dr. Lawrence was also of the opinion that the shooter had been in the back seat behind the passenger. He opined the person in the back seat had been holding onto the rope with one hand and reaching around with the gun and firing downward. It was not likely that the shooter was either in the driver's seat or standing outside on the passenger side of the vehicle. Dr. Lawrence did not go to the crime scene, and did not know if there was any blood spatter inside the vehicle.

Noori Zamanian, who lived on Highway 99 frontage road, called the Stockton Police Department the morning of October 25, 2002, after reading a newspaper article about the victim's body and truck having been found. Zamanian reported two Hispanic males had come to his house two days earlier and asked to use the phone. Police officers removed Zamanian's telephones and tested them for latent prints. Defendant's fingerprint was found on one of the telephones.

Defendant was the first of the three suspects to be arrested and interrogated. He told investigators that he, Bejarano, and [Robert] Sisneros had gone to Stockton in Sisneros's vehicle to find someone that had committed a robbery, to scare the person, and to send him a message to stop robbing. They spent and hour or two looking for the person, and when they were unable to find him, decided to find the person's father and send the message to him instead. They knew the father had a vehicle for sale, so they called the number and pretended they wanted to test drive the vehicle in order to make contact with the father.

The three agreed that defendant and Bejarano would go with the victim on the test drive, and Sisneros would follow them in his car. They were on the freeway when the victim said he had an appointment and needed to go back. Bejarano, who had been driving, pulled over to let the victim take the driver's seat. When Bejarano reached for the driver's door, defendant threw a rope over the victim's head. He intended to put the rope around the victim's neck, but it got caught on his mouth. By this time Bejarano was standing outside the passenger door and saw the rope was caught in the victim's mouth. He told defendant, "[y]ou got to do it[,]" so defendant pulled out a gun and fired. He was sitting directly behind the victim when he shot him.

Defendant and Bejarano ran across the freeway to the other side of

the frontage road, where they asked a resident if they could use his phone to call for a ride. Sisneros had not followed them, and they had no idea where he was. Defendant first tried to call his cell phone, then called his home phone in Sacramento. He spoke with Marissa, Bejarano's girlfriend, and told her to contact Sisneros to come pick them up. Shortly after that, Sisneros picked them up and they went back to Sacramento.

Defendant admitted he had joined the Nortenos when he was 10 or 11 years old. Defendant said there was no way to get out of the gang, but he did get away from the crowd and try to stick to himself.

Bejarano testified at trial pursuant to a plea agreement. He stated that on October 22, 2002, defendant asked him if he wanted to go somewhere the next day and make some money. It was Bejarano's understanding they were going to do a "lick," i.e., some criminal activity for the purpose of monetary gain. The next morning Bejarano agreed to do the lick. Sisneros picked up the two of them and they drove from Sacramento to Stockton. Sisneros said they were looking for someone and they began driving around Stockton searching for that person.

Bejarano was aware defendant had a gun because he had seen it. While they were driving around, Sisneros made a lot of phone calls regarding the fact that they could not find the person for whom they were searching. Eventually, Sisneros made a phone call and told the person on the other end they could not find the target, but that they had seen the target's father. When Sisneros hung up, he said they were going to go look for the dad.

They went to a palm reading shop and Bejarano called the number from a "for sale" sign on an Explorer parked in front of the shop. A woman answered and told Bejarano the owner of the vehicle was not in, and that he should call back. Bejarano called back later and said he was coming from Fresno and wanted to test drive the vehicle. They waited another 30 to 40 minutes before going back to the palm reading business. During that time they talked about what was going to happen. While Bejarano drove the Explorer, defendant was going to sit in the back seat and strangle the man with a rope obtained from the back of Sisneros's car. Defendant did not want to shoot the man because he did not want to leave shells behind at the scene. Sisneros told them the man was wearing a diamond bracelet and expensive diamond ring, and to be sure and get the jewelry. Bejarano did not know why the man was being killed, other than Sisneros said it was to send a message to the man's family.

As Bejarano was driving the Explorer, he noticed Sisneros following them at first, but then noticed he was not there. He drove the car onto Highway 99. After he went past a couple of

exits, the victim said he needed to get back for an appointment. Bejarano pulled over and told the victim he did not know the area and did not know which road to take. The victim said he would drive. Bejarano was out of the car, and the victim had opened the passenger door when defendant put a rope over the victim's head. Bejarano ran around to the passenger side and told defendant the rope was in the man's mouth. Bejarano shut the door because he figured defendant was going to shoot the victim. Bejarano heard defendant shoot the victim five or six times. Bejarano and defendant ran away from the vehicle. They ran over to an overpass, went to a house and knocked on the door. No one answered at the first house, but when they went to a second house a man came out from the side of the house. They told him their car had broken down on the freeway and they needed to use the phone. Defendant made the phone call. They waited outside, and Sisneros soon came and drove them back to Sacramento.

During the drive, Bejarano saw defendant holding the diamond bracelet the victim had been wearing. At one point during the drive Sisneros talked to someone on the phone to let them know the deed was done and to set up a meeting. They met that evening in a parking lot in the Sunrise area of Sacramento. Sisneros met the person in a parking lot. As they were driving away from the meeting Sisneros said he got $2,000 for the job. He gave defendant some of the money, and defendant gave Bejarano $200. Sisneros said he had shown the guy the bracelet to let him know the job was done.

Bejarano had performed a lick previously with defendant when defendant asked him to go to Willits, California and steal some marijuana plants. They did that lick with Raymond Royal and Raymond Rios. Bejarano thought Royal might have been associated with the Oak Park Bloods. When they took the marijuana plants, Bejarano and Royal went to the backyard while defendant held the people in the house at gunpoint. At one point someone tried to grab some of the plants from Royal, and Royal shot him. Both defendant and Royal had guns for the Willits robbery. Defendant's gun was a .380 caliber automatic handgun, the same handgun he used to kill Walter Adams. When police were dispatched to the Willits robbery, they found a man with two gunshot wounds to his chest, a woman with a gunshot wound to her knee, and a man with blunt force trauma to the head. Bejarano testified that defendant sported gang tattoos, and that he was once a member of the Norteno gang. Bejarano was not sure whether defendant considered himself a gang member at the time of the Adams murder. When police interviewed Bejarano in January 2003, he told them both defendant and Sisneros were members of the Norteno gang. He stated he "associated" with Nortenos. Bejarano admitted he had entered into a plea agreement by which he would receive 18 years in prison in exchange for his truthful testimony.

Sisneros also admitted he entered into a plea agreement after being charged with the murder of Walter Adams. In exchange for his truthful testimony, he agreed to a 20 year prison sentence. Sisneros testified he was related to gypsies Johnny Mitchell and Miller Lee. Sometime in 2002, Miller Lee approached him and defendant about some property that had been stolen from Lee, and asked if Sisneros would be interest in trying to recover it. Lee said he wanted Sisneros to recover the property and scare the man who had stolen it. Sisneros said the gypsies treated him with respect because he had been incarcerated, and they assumed he was someone to fear.

Lee and Mitchell drove Sisneros to Stockton and took him by several houses where they believed Steve Adams might be living. One was a palm reading shop. Sisneros said they were just supposed to scare Adams, and Sisneros expected no compensation for it.

Sometime in October Sisneros called a couple of people to help him with the job. One of those people was defendant. Defendant and Sisneros were Nortenos, were known to have guns, and defendant was not afraid to use a gun. Bejarano also went with them to do the job. Bejarano was also a Norteno.

On the day of the murder Sisneros kept in telephone contact with Lee and Mitchell. They discussed where Sisneros might be able to find Steve Adams. The plan was to scare Steve by beating him up. Sisneros, Bejarano and defendant went several places, but could not find Steve's car. Sisneros told Lee there was a red Ford Explorer in front of one house, and Lee told him he thought the Explorer belonged to Steve's father. Lee said that since the father was not taking responsibility for his son, they should send a message to the father. Lee told Sisneros the victim wore expensive jewelry, and that some of it might belong to Lee. He wanted Sisneros to retrieve the jewelry. Sisneros told defendant and Bejarano this.

There was a "for sale" sign in the back of the Explorer. Miller told Sisneros to call the number. Bejarano agreed to make the phone call. Bejarano and defendant went to test drive the vehicle, and Sisneros planned to follow them in his car and pick them up afterward. However, Sisneros got stopped by a train and lost contact with the Explorer. When Sisneros could not find them, he headed back to Sacramento. Within about 20 minutes, he got a call from one of the men's girlfriends telling him defendant and Bejarano were stranded. Sisneros went to pick them up. He exited the freeway when he saw the Explorer on the side road, and soon saw Bejarano and defendant walking. After they got in the car, Bejarano showed Sisneros the bracelet he got from the victim. They discussed whether they could get any money for it. Defendant told Sisneros he emptied the gun into the victim, and

Bejarano took off running.

Sisneros got a phone call from Lee, and he told Lee they had the victim's bracelet. Lee said he wanted it. Lee told Sisneros to meet him in Sacramento. The three of them met Lee and Mitchell in a parking lot. Lee said he would get money to buy the bracelet. When Sisneros told Lee and Mitchell that Walter was dead, Mitchell said he got what he deserved.

After meeting with Lee and Mitchell, Sisneros dropped off defendant and Bejarano at a chicken place. He gave them $200 so they would have some money.

About a week later Sisneros met Lee again. He had given Lee the bracelet, and Lee paid him $3,500. He gave $100 to Bejarano.

Defendant testified at trial, and recounted a series of events that differed in several material respects from the statement he gave police shortly after the murder. He testified that Sisneros never told him why he wanted defendant to go out of town with him. He said he rode with Sisneros and Bejarano to Stockton, where they drove around to a couple of different locations, including a palm reading shop. Later, they were shopping when Sisneros and Bejarano told him Sisneros had contacted his cousin and the cousin told him where they could locate someone. Defendant did not know why they were trying to locate the person, and he was not curious about it. They went to a palm reading shop and Sisneros told him Bejarano was interested in buying a car. They got the number off of a "for sale" sign in the back window of a red Explorer. Defendant did not decide to go on the test drive with Bejarano until the last minute.

When Bejarano pulled the car over so that the victim could drive back to his house, Bejarano pulled a gun on him. The victim asked what was going on, and Bejarano told him his son had robbed Lee. Bejarano tossed a rope to defendant. The victim reached for Bejarano's gun and started fighting with Bejarano. Defendant panicked and threw the rope over the victim to get him to let go of the gun. Bejarano was standing outside the driver side door when he shot the victim six times. The victim was leaning over the center console with his head over the driver's seat.

Later, Sisneros told him that if anyone questioned him he should take the blame for the killing because he was the youngest one and would be out in a couple of years. He said if defendant did not keep quiet he would suffer the consequences later. Defendant testified that even though he had a gang tattoo on his back, he was never a gang member. He did, however, hang out with a lot of gang members.

Defendant's version of events was supported by the testimony of

> Duane Lovaas, a Department of Justice criminalist. He theorized that the shooter was the driver or was in the driver's position. His opinion was based on the location of the cartridge casings and the blood splatter evidence.
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> Deputy Ronald Aurich testified as an expert in criminal street gangs. He explained that Norteno is a criminal street gang made up of 20 to 25 different subsets in the Sacramento area. The subsets also have neighborhood affiliations. Aurich opined that defendant was a Norteno, and specifically a Barrio North Side Norteno. Aurich's opinion was based on defendant's gang logo tattoos, involvement in gang-related crimes, and the fact that he kept company with validated gang members. Aurich testified he had reviewed documentation indicating defendant admitted his gang membership to the juvenile county probation officer.
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> Aurich opined that Sisneros was also a gang member. His opinion was based upon the Norteno prison gang symbols tattooed on Sisneros's chest, his involvement in gang related crimes, the fact he had been in prison, and that he kept company with other gang members. Aurich also opined Sisneros was a gang member with a certain status above a common gangster from the neighborhood.
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> Aurich opined that Bejarano was a Norteno gang member, based upon his association with other gang members, the crimes in which he was involved, the neighborhood in which he lived, and the people with whom he associated.
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> In Aurich's opinion Walter Adams's' murder was gang related.

(Slip Op. at p. 3-17 (footnote omitted).)

Petitioner was convicted by a jury and sentenced to life imprisonment without the possibility of parole. On direct appeal to the California Court of Appeal, Third Appellate District, Petitioner raised the issues that he raises in this federal habeas petition (amongst others). On December 20, 2005, the California Court of Appeal affirmed the judgment. Petitioner then filed a petition for review in the California Supreme Court. In April 2007, the California Supreme Court summarily denied the petition for review.

In July 2008, Petitioner filed the instant federal habeas petition. Respondent answered the Petitioner on July 27, 2009.

III. APPLICABLE LAW FOR FEDERAL HABEAS CORPUS

An application for writ of habeas corpus by a person in custody under judgment of a state

court can only be granted for violations of the Constitution or laws of the United States. See 28 U.S.C. § 2254(a); see also Peltier v. Wright, 15 F.3d 860, 861 (9th Cir. 1993); Middleton v. Cupp, 768 F.2d 1083, 1085 (9th Cir. 1985) (citing Engle v. Isaac, 456 U.S. 107, 119 (1982)). Petitioner filed this petition for writ of habeas corpus after April 24, 1996, thus the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") applies. See Lindh v. Murphy, 521 U.S. 320, 326 (1997). Under AEDPA, federal habeas corpus relief is not available for any claim decided on the merits in the state court proceedings unless the state court's adjudication of the claim: (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in state court. See 28 U.S.C. 2254(d).

As a threshold matter, this Court must "first decide what constitutes 'clearly established Federal law, as determined by the Supreme Court of the United States.'" Lockyer v. Andrande, 538 U.S. 63, 71 (2003) (quoting 28 U.S.C. § 2254(d)(1)). "'[C]learly established federal law' under § 2254(d)(1) is the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision.'" Id. (citations omitted). Under the unreasonable application clause, a federal habeas court making the unreasonable application inquiry should ask whether the state court's application of clearly established federal law was "objectively unreasonable." See Williams v. Taylor, 529 U.S. 362, 409 (2000). Thus, "a federal court may not issue the writ simply because the court concludes in its independent judgment that the relevant state court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." Id. at 411. Although only Supreme Court law is binding on the states, Ninth Circuit precedent remains relevant persuasive authority in determining whether a state court decision is an objectively unreasonable application of clearly established federal law. See Clark v. Murphy, 331 F.3d 1062, 1070 (9th Cir. 2003) ("While only the Supreme Court's precedents are binding . . . and only those precedents need be reasonably

applied, we may look for guidance to circuit precedents.").

The first step in applying AEDPA's standards is to "identify the state court decision that is appropriate for our review." See Barker v. Fleming, 423 F.3d 1085, 1091 (9th Cir. 2005). When more than one court adjudicated Petitioner's claims, a federal habeas court analyzes the last reasoned decision. Id. (citing Ylst v. Nunnemaker, 501 U.S. 797, 803 (1991)). The last reasoned decision in this case came from the California Court of Appeal on direct appeal.

IV. ANALYSIS OF PETITIONER'S CLAIMS

A. Claim I

In Claim I, Petitioner argues that the trial court erred in instructing the jury on a theory of felony-murder based upon a robbery despite the fact that the magistrate judge had found as a factual matter at the preliminary hearing that the evidence of the robbery was insufficient. Petitioner basis this argument on the theory of collateral estoppel. Petitioner also alludes to the fact that he had no notice of this charge such that his due process rights were violated as well. The California Court of Appeal analyzed this claim in its decision and stated the following:

> The amended complaint contained a robbery count and a special circumstance allegation that defendant committed the murder while engaged in the commission of a robbery pursuant to Penal Code section 190.2, subdivision (a)(17)(A). At the preliminary hearing, the court found insufficient evidence to hold defendant over on these charges. The court found there was "insufficient evidence to establish that the murder was carried out to advance the commission of a robbery, rather the evidence suggest[ed] that the robbery was incidental to the murder." The information filed thereafter did not include either the robbery special circumstance allegation or a robbery count.
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> Defendant filed a motion in limine arguing the prosecution was precluded from advancing a felony murder theory based on robbery or presenting any evidence that the homicide was committed during the course of a robbery. The court denied the motion, finding, "a particular theory of murder doesn't necessarily have to be proved at the preliminary hearing, as long as the defendant's on notice that the theory might be advanced at trial."
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> Thereafter, the trial court instructed the jury that the prosecution contended defendant was guilty of first degree murder on three theories: deliberation and premeditation, lying in wait, and felony

> murder. The felony murder theory was based on an unlawful killing occurred during the commission or attempted commission of the crime of robbery. The court instructed that the jurors were not required to unanimously agree on the particular theory of first degree murder as long as they unanimously agreed he was guilty of first degree murder under any of the theories.
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> Defendant argues the doctrine of collateral estoppel precluded the prosecution from trying the case on any theory of robbery. Collateral estoppel bars the relitigation of an issue decided in a previous proceeding if: (1) the issue was actually and necessarily decided in the prior proceeding; (2) the prior proceeding resulted in a final adjudication on the merits; and (3) the party against whom collateral estoppel is asserted was a party or in privity with a party in the prior proceeding. (People v. Davis (1995) 10 Cal.4th 463, 514, fn. 10.)
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> However, the doctrine of collateral estoppel does not apply to orders dismissing criminal proceedings following a preliminary hearing. (People v. Wallace (2004) 33 Cal.4th 738, 749.) It is also questionable whether collateral estoppel even applies to further proceedings in the same litigation. (People v. Memro (1995) 11 Cal.4th 786, 821.)
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> In any event, the advancement of a felony murder theory was harmless beyond a reasonable doubt. The jury was instructed on three theories by which it could find defendant guilty of murder in the first degree: (1) premeditated murder, (2) felony murder (robbery), and (3) lying in wait murder. While the jury may have based its finding that defendant was guilty of first degree murder on one or all three theories advanced by the prosecutor, it necessarily found that defendant was guilty of lying in wait murder. This is so because the jury found true the special circumstance allegation that the murder was committed by means of lying in wait. The requirements for the lying in wait special circumstance are more stringent than those for lying in wait murder, and if the evidence supports the special circumstance, it necessarily supports the theory of first degree murder. (People v. Moon (2005) 37 Cal.4th 1, 22.)
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> Defendant also claims he was denied due process because he was forced to defend against a charge of which he had no notice. This is simply incorrect. Defendant obviously had notice the prosecution intended to argue a felony murder theory, since he brought a motion in limine to prevent it.

(Slip Op. at p. 17-20.)

The United States Supreme Court has incorporated the principles of collateral estoppel into the protections of the Double Jeopardy Clause. See Ashe v. Swenson, 397 U.S. 436, 443-45

(1970); United States v. James, 109 F.3d 597, 599 (9th Cir. 1997). 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. The government can however litigate a case under alternative theories of a crime. See Williams v. Warden, 422 F.3d 1006, 1011 (9th Cir. 2005). Collateral estoppel 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 (internal quotation marks and citation omitted). The determination of whether an issue was "necessarily decided" turns on whether the issue of fact or law was actually litigated and determined by a valid and final judgment and is essential to that judgment. See, e.g., Bobby v. Bies, 129 S.Ct. 2145, 2152 (2009).

In this case, the magistrate judge found as a factual matter that the evidence of robbery was insufficient at the preliminary hearing. However, the subsequent argument and felony-murder instruction by the court at trial did not run afoul of the collateral estoppel principles to warrant granting Petitioner federal habeas relief on this Claim. As the Ninth Circuit has noted, a "dismissal at a preliminary hearing has no preclusive effect under California law," and "an initial dismissal for lack of probable cause is never a binding determination on the lack of probable cause," and a dismissed action can be re-filed. See De Anda v. City of Long Beach, 7 F.3d 1418, 1422 & n.6 (9th Cir. 1993). As the California Supreme Court has explained:

> It has long been the rule in [California] that a magistrate's dismissal of criminal charges following a preliminary examination does not bar the People from either refiling the same charges before another magistrate or seeking an indictment based upon those charges . . . . [T]he magistrate lacks the power to make a finding regarding the guilt or innocence of the accused, for the magistrate's authority is limited to determining whether sufficient

> or probable cause exists to hold the defendant for trial. Accordingly, as the magistrate has no power to make a determination on the merits of the case before him, there is no room for the application of the doctrines of res judicata or collateral estoppel.

People v. Uhlemann, 9 Cal.3d 662, 664, 108 Cal. Rptr. 657, 511 P.2d 609 (1973); see also People v. Wallace, 33 Cal. 4th 738, 749, 16 Cal. Rptr. 3d 96, 103, 93 P.3d 1037 (2004) ("[w]hen a magistrate declines to hold a defendant to answer on the ground that the evidence at the preliminary hearing did not establish probable cause to believe the defendant committed the charged offense, the ruling does not bar future prosecution"). Here, the mere fact that the magistrate judge found insufficient evidence at the preliminary hearing on the felony-murder (robbery) charge does not implicate collateral estoppel since it was not "fully litigated" by the magistrate judge's finding at the preliminary hearing.

Additionally, as noted by the California Court of Appeal, the advancement of the felony-murder theory was harmless. Petitioner would not be entitled to federal habeas relief on this claim unless the constitutional violation had a substantial and injurious effect or influence in determining the jury's verdict. See Brecht v. Ahrahamson, 507 U.S. 619, 637 (1993); see also Hedgpeth v. Pulido, 555 U.S. 57, 129 S.Ct. 530, 532 (2008) (per curiam) ("harmless error analysis applies to instructional errors so long as the error at issue does not categorically vitiat[e] all the jury's findings . . . An instructional error arising in the context of multiple theories of guilt no more vitiates all the jury's findings than does omission or misstatement of an element of the offense when only one theory is submitted") (internal quotation marks and citations omitted). Here, the first-degree murder charge proceeded on three theories: (1) premeditated murder, (2) felony-murder (robbery) and (3) lying in wait murder. The jury made a specific finding that the murder of Walter Adams was committed by means of lying in wait within the meaning of California Penal Code § 190.2(a)(15) which provides that the penalty for a defendant found guilty of first-degree murder by lying in wait is death or life imprisonment without the possibility of parole. See also Cal. Penal Code § 189 (stating that murder perpetrated by lying in wait is

murder in the first degree). Therefore, even though the jury was instructed on felony-murder, any purported error would have been harmless as the jury specifically found that Petitioner was guilty of first-degree murder for lying in wait.

Finally, Petitioner argues that his due process rights were violated when he was not provided with the requisite notice that the prosecutor was going to raise the felony-murder (robbery) first-degree murder theory at trial. Respondent admits in his answer that the "primary charging documents did not specifically charge Petitioner with felony murder." (Resp't's Answer at p. 22.) For the following reasons, federal habeas relief should not be granted on this lack of notice argument.

The Sixth Amendment guarantees a criminal defendant the fundamental right to be clearly informed of the nature and cause of the charges against him in order to permit adequate preparation of a defense. See Cole v. Arkansas, 333 U.S. 196, 201 (1948) ("It is as much a violation of due process to send an accused to prison following conviction on a charge on which he was never tried as it would be to convict him upon a charge that was never made."); see also Gautt v. Lewis, 489 F.3d 993, 1002 (9th Cir. 2007). The Sixth Amendment notice guarantee applies to the States under the Due Process Clause of the Fourteenth Amendment. See Cole, 333 U.S. at 201; Gautt, 489 F.3d at 1003.

In some instances, a source other than a charging document can give defendant adequate notice of the charges against him. See Murtishaw v. Woodford, 255 F.3d 926, 953-54 (9th Cir. 2001) (holding that the prosecutor's opening statement, evidence presented at trial, and a jury instruction conference gave the defendant notice of the prosecution's theory); Calderon v. Prunty, 59 F.3d 1005, 1009-10 (9th Cir. 1995) (holding that the prosecutor's opening statement and a hearing held after the prosecution's case in chief gave the defendant adequate notice of the prosecution theory); Sheppard v. Rees, 909 F.2d 1234, 1236 n. 2 (9th Cir. 1989) (suggesting that "[a]n accused could be adequately notified of the nature and cause of the accusation by other means - for example, a complaint, an arrest warrant, or a bill of particulars" or "during the course

of a preliminary hearing"); see also Gautt 489 F.3d at 1009-10 (noting the possibility that a source other than the charging document can give notice to a defendant of the charges against him).

This is not a case where Petitioner was not given notice that the prosecutor intended to advance a felony-murder (robbery) theory to support a first-degree murder conviction. As noted by the California Court of Appeal, Petitioner filed a motion in limine before trial seeking to prevent the prosecutor from advancing a felony-murder (robbery) theory at trial. Thus, he was clearly on notice that the prosecutor was intending to advance such a theory. Petitioner is not entitled to federal habeas relief on his lack of notice argument. Thus, Claim I does not warrant federal habeas relief.

B. Claim II

In Claim II, Petitioner asserts that there was insufficient evidence to support a finding that Norteno is a criminal street gang. The California Court of Appeal analyzed this Claim on direct appeal and stated the following:

> The jury found true the special circumstance allegation that while defendant was an active participant in a criminal street gang, he intentionally killed the victim to further the activities of the criminal street gang. (§ 190.2, subd. (a)(22).) It found true the allegation that defendant committed the offense for the benefit of a criminal street gang. (§ 186.22, subd. (b)(1).) The jury also found defendant guilty of violating section 186.22, subdivision (a), actively participating in a criminal street gang. The existence of a criminal street gang is an element of all three allegations.
>
> A criminal street gang is defined as, "an ongoing association of three or more persons with a common name or common identifying sign or symbol [that] has as one of its primary activities the commission of one or more of the criminal acts enumerated in the statute[,] and . . . includes members who either individually or collectively have engaged in a 'pattern of criminal gang activity' by committing, attempting to commit, or soliciting *two or more* of the enumerated offenses (the so-called 'predicate offenses') during the statutorily defined period. [Citation.]" (People v. Gardely (1996) 14 Cal.4th 605, 617; In re Jose P. (2003) 106 Cal.App.4th 458, 466-467.)
> Defendant contends there was insufficient evidence to sustain a finding of the existence of a criminal street gang because the gang

to which the prosecution's expert testified was the Norteno gang, and the term "Norteno" is merely the geographical identity of a number of local gangs with similar characteristics, but is not itself an entity. Defendant's contention is not supported by the evidence.

Defendant relies on People v. Valdez (1997) 58 Cal.App.4th 494 (Valdez), noting that in Valdez the Sixth District Court of Appeal stated, "Norteno and Sureno are not the names of gangs." (Id. at p. 508.) However, in Valdez, the issue was whether the trial court had abused its discretion in allowing the prosecution's gang expert to testify that the defendant had acted for the benefit of a gang, the defendant arguing the issue was one of fact for the jury. (Id. at p. 507.) The pertinent facts were that "a group of individuals from a number of different Norteno cliques or gangs in San Jose came together one day and formed a caravan to attack Surenos." (In re Jose P., supra, 106 Cal.App.4th at p. 467.) The court stated that if the evidence had been that most or all of the participants in the caravan were from the same Norteno gang, then the jury might have been able to determine the "'for the benefit etc.'" element as easily as an expert. (Valdez, supra, at p. 508.) "However," the court stated, "the facts of the case were not so simple. The participants in the caravan were a diverse group, with affiliations to different gangs. They united for one day to attack Surenos. At the time it assembled, the caravan was not a 'criminal street gang' within the meaning of the enhancement allegation. Moreover, their common identification as Nortenos did not establish them as a street gang, for, as Officer Piscitello testified, Norteno and Sureno are not the names of gangs." (Ibid.) The court concluded the particular facts of the case were such that the jury could not determine whether a crime had occurred without the assistance of an expert. (Ibid.) Even assuming Valdez was correctly decided, a subsequent decision by the Sixth District reiterated that, "Valdez does not hold that there is no criminal street gang called Norteno." (In re Jose P., supra, 106 Cal.App.4th at p. 467.)

Detective Aurich, the prosecution's gang expert, testified there were thousands of documented Norteno gang members in Sacramento. He testified some of their commonly used symbols are the letter "N," the Roman numeral "IV," "catorce" (Spanish for 14), and the color red. He testified some of their primary activities are the commission of murder, assault, witness intimidation, car-jacking, robbery, extortion, and dope dealing. Detective Aurich also testified regarding the facts of two crime reports of offenses committed by Nortenos. One involved a shooting into a crowd of rival gangsters. The other involved a Norteno gang member shooting someone at a gas station who was wearing Sureno colors.

Evidence was thus presented, through the prosecution's gang expert, to establish every element of the existence of the Nortenos as a criminal street gang. Unlike Valdez, there was no expert testimony in this case that Norteno is not the name of a gang, and,

> as the Sixth District Court of Appeal recognized in a later case, "the expert testimony in Valdez was evidence in that case, not this one." (In re Jose P., supra, 106 Cal.App.4th at p. 467.)
>
> Detective Aurich testified there were thousands of Norteno gang members in the Sacramento area, and 20 to 25 subsets of Nortenos. We reject defendant's assertion that the prosecution had to prove precisely which subset was involved in the present case. No evidence indicated the goals and activities of a particular subset were not shared by others. There was sufficient evidence that Norteno was a criminal street gang, that the murder was related to the activity of that gang, and defendant actively participated in that gang. There is no further requirement that the prosecution prove which particular subset was involved here. As stated in Valdez, supra, 58 Cal.App.4th at pages 506-507, "gangs are not public and open organizations or associations like the YMCA or State Bar Association, which have a clearly defined and ascertainable membership. Rather, gangs are more secretive, loosely defined associations of people, whose involvement runs the gamut from 'wannabes' to leaders. Moreover, determining whether someone is involved and the level of involvement is not a simple matter and requires the accumulation of a wide variety of evidence over time and its evaluation by those familiar with gang arcana in light of pertinent criteria." (Fn. omitted.) In this case there was testimony that it was not uncommon for members of different gangs to work in concert to commit a crime. In light of the nature of gang structure and the apparent willingness of members to work with other gangs to commit crimes, requiring the prosecution to prove the specific subset of a larger gang in which a defendant operated would be an impossible, and ultimately meaningless task.

(Slip Op. at p. 26-31.)

The Due Process Clause of the Fourteenth Amendment "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 297 U.S. 358, 364 (1970). There is sufficient evidence to support a conviction, if, "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 v. Virginia, 443 U.S. 307, 319 (1979). "[T]he dispositive question under Jackson is 'whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt.'" Chein v. Shumsky, 373 F.3d 978, 982 (9th Cir. 2004) (quoting Jackson, 443 U.S. at 318). A petitioner for a federal writ of habeas corpus "faces a heavy burden when

challenging the sufficiency of the evidence used to obtain a state conviction on federal due process grounds." Juan H. V. Allen, 408 F.3d 1262, 1274 (9th Cir. 2005). In order to grant the writ, the habeas court must find that the decision of the state court reflected an unreasonable application of Jackson and Winship to the facts of the case. See id.

A federal habeas court determines sufficiency of the evidence in reference to the substantive elements of the criminal offense as defined by state law. See Jackson, 443 U.S. at 324 n. 16; Chein, 373 F.3d at 983. As noted by the California Court of Appeal, the jury specifically found that Petitioner "intentionally killed Walter Adams, or a principal intentionally killed Walter Adams and the defendant aided and abet the killing while being an active participant in a criminal street gang, within the meaning of Penal Code Section 190.2(a)(22)." (Clerk's Tr. at p. 1051.) The jury also specifically found that the "offense was committed by defendant for the benefit of, at the direction of, or in association with a criminal street gang within the meaning of Penal Code section 186.22(b)(1)." (Id. at p. 1053.) Finally, the jury also specifically found Petitioner guilty of violated Section 186.22(a) of the California Penal Code by being an active participant in a criminal street gang. (See id. at p. 1054.)

Petitioner argues there was insufficient evidence to support these findings/convictions because Norteno is not a criminal street gang. California Penal Code § 186.22(f) defines a "criminal street gang" as "any ongoing organization, association, or group of three or more persons, whether formal or informal, having one of its primary activities the commission of one or more of the criminal acts enumerated [in subdivision (e) of the statute, the 'predicate offenses'] . . . and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity." See also People v. Gardeley, 14 Cal.4th 605, 617, 59 Cal. Rptr. 2d 356, 927 P.2d 713 (1996) ("[T]he prosecution must prove that the gang (1) is an ongoing association of three or more persons with a common name or common identifying symbol; (2) has as one of its primary activities the commission of one ore more of the criminal acts enumerated in the statute; and (3) includes members who either individually or collectively

have engaged in a 'pattern of criminal gang activity' by committing, attempting to commit, or soliciting *two or more* of the enumerated offenses (the so-called 'predicate offenses') during the statutorily defined period."). Petitioner argues that the term "Norteno" is a highly amorphous concept that does not constitute a criminal street gang. (See Pet'r's Pet. at p. 8.) For the following reasons, the California Court of Appeal's decision was not an objectively unreasonable application of Jackson or Winship such that Petitioner is not entitled to federal habeas relief on this Claim.

In this case, the prosecutor called Detective Aurich as a gang expert witness. As noted by the California Supreme Court, "[t]he subject matter of the culture and habits of criminal street gangs" is permissible subject matter for expert opinion. See Gardeley, 14 Cal. 4th at 617, 619-20, 59 Cal. Rptr. 2d 356, 927 P.2d 713. Detective Aurich testified that the Nortenos were an ongoing association of three or more persons who share a common name, common identifying sign or a common similar goal. (See Reporter's Tr. at p. 1084.) He further testified that one of the primary activities of the Nortenos is murder, assault, witness intimidation, car-jacking, robbery, extortion and dope dealing. (See id. at p. 1086.) Detective Aurich also testified about two predicate offenses that were committed by the Norteno gang. One involved a Norteno gang member shooting into a crowd of rival gang members. (See id. at p. 1088-89.) A second involved a documented Norteno gang member shooting a person believing he was a rival gang member. (See id.) Detective Aurich testified that Sisneros, Bejarano and the Petitioner were all members and active participants of Nortenos as well. (See id. at p. 1104, 1106, 1116-17.) Construing the evidence at trial in the light most favorable to the prosecution, there was sufficient evidence at trial to support a finding that the Nortenos is a criminal street gang. Therefore, Petitioner's claim of a lack of sufficient evidence to support this finding does not merit granting federal habeas relief. Claim II should therefore be denied.

C. Claim III

In Claim III, Petitioner makes several arguments that the prosecutor committed

misconduct during the trial. Petitioner's prosecutorial misconduct arguments fall into three separate categories; specifically: (1) the prosecutor committed misconduct by asking Petitioner questions about his post-arraignment silence; (2) the prosecutor committed misconduct by referring to polygraphs when referencing Bejarano and Sisneros' plea agreements; and (3) the prosecutor committed misconduct by mischaracterizing evidence during his closing argument. Each of these arguments will be considered in turn.

i. Questions on Defendant's Postarrest silence

The California Court of Appeal analyzed this issue on direct appeal and stated the following:

> Defendant argues the prosecutor's repeated questioning about what defendant told others regarding the incident was misconduct. We shall determine any harm was cured by the court's instruction.
>
> After defendant testified on direct examination that Bejarano had been the shooter and that defendant had been unaware of the true purpose of the test drive, the prosecutor asked defendant on cross-examination if it was fair to say he had never told such a story in the past. The prosecutor then established that the police had advised defendant of his Miranda rights before questioning him, that defendant knew the interview was being videotaped, and that defendant understood he could stop the interview at any time. The prosecutor then asked defendant without objection whether he had told the police about the robbery in Willits when he was questioned about Walter Adams's murder.
>
> The prosecutor asked if defendant's testimony in front of the jury was the first time he had ever told anyone that the plan was to meet Johnny Boy (Johnny Mitchell). Defendant objected, and an unreported bench conference was held. During the bench conference, defense counsel argued the prosecutor's line of questioning violated the attorney-client privilege. The trial court ordered the prosecutor to preface his questions to exclude the communications between defendant and his counsel.
>
> When questioning resumed, the prosecutor asked defendant if he understood that he did not have to discuss anything he told his attorney or investigator because it was privileged. The trial court sustained an objection from defense counsel and another unreported bench conference was held. Next, the prosecutor instructed defendant to disregard anything he may have told his attorney or investigator, and asked whether, prior to his testimony, he had told anyone else of his involvement in the Willits robbery.

The prosecutor continued to ask about what defendant might have previously told others about the details of the Willits robbery.

The prosecutor then began asking questions about defendant's direct testimony, and whether he had previously revealed certain details. When two of the prosecutor's questions were not prefaced by an exclusion of defendant's attorney or investigator, defendant replied that he had told certain details to his attorney. The court asked the attorneys to approach, and the discussion was not reported. At the unreported bench conference, the court ordered the prosecutor not to ask any questions about what defendant said or did not say to anyone after his initial arraignment.

After the unreported bench conference, the prosecutor prefaced the next question, and several thereafter, with some variant of, "[b]efore you were appointed an attorney, have you ever told anybody . . . ."

Shortly thereafter, the prosecutor started the question, "Prior to your testimony here today in front of this jury . . ." when he was interrupted by the trial court, and a reported conference ensued. The trial court stated that defense counsel had originally asserted that the questions about what defendant may or may not have said at a certain point in time implicated the attorney-client privilege. The court said it agreed with the concern, but had others as well. The court noted it had originally agreed to let the prosecutor ask the defendant what he had told others up to the time he was appointed an attorney. The court indicated it no longer thought those questions were appropriate, and would give a limiting instruction. Defendant's counsel then asked for a mistrial on three grounds. He claimed the questions violated defendant's privilege against self incrimination, that the questions implied defendant and his attorney collaborated to fabricate defendant's testimony on the witness stand, and that the questions implicated attorney-client privilege.

At the request of the defense, and with the prosecutor's stipulation, the court gave a limiting instruction. The court denied the motion for mistrial, and instructed the jury as follows:

> "Questions have been asked concerning what Mr. Ortega told anyone prior to his testimony today. Do not infer from these questions and answers that his attorney has told him what to say in his testimony. [¶] Also, do not consider as evidence defendant's silence concerning any events underlying the charges, that silence having taken place after his first arraignment or first appearance in court, which was his arraignment on November 5th, 2002. [¶] When the defendant was arraigned at his first appearance in court, he was informed by the

> Court that he had a constitutional right not to say anything about the events underlying the charges. And his silence was an invocation of those rights. [¶] Also, at his first appearance in court, the defendant was advised by counsel not to say anything to anyone concerning the events underlying the charges. Therefore, you must not draw any inference from his silence after his arraignment. [¶] Further, you must not discuss it, nor permit it to enter into your deliberations in any way."

After the verdict, defendant moved for a new trial on the basis of prosecutorial misconduct. The trial court denied the motion, stating the curative instruction given remedied any violation.

Defendant argues the prosecutor committed Doyle [v. Ohio, 426 U.S. 610 (1976)] error in cross-examining him about his postarrest silence. The defendants in Doyle made no postarrest statement after being given their Miranda warnings. At trial, they contended for the first time that they had been framed by a government informant. (Doyle, supra, 426 U.S. at pp. 612-613 [49 L.Ed.2d at p. 95].) The prosecutor attempted to impeach their testimony by asking why they had not told their story of a frame-up before trial. (Id. at pp. 613-614 [at pp. 95-96].) The United States Supreme Court reversed the convictions, holding that Miranda prohibited such questions as a means of impeachment. (Id. at p. 617 [at p. 97].)

Subsequently, the United States Supreme Court clarified that, "Doyle does not apply to cross-examination that merely inquires into prior inconsistent statements. Such questioning makes no unfair use of silence because a defendant who voluntarily speaks after receiving Miranda warnings has not been induced to remain silent." (Anderson v. Charles (1980) 447 U.S. 404, 408 [65 L.Ed.2d 222, 226].)

In People v. Belmontes (1988) 45 Cal.3d 744, the California Supreme Court indicated that while it is permissible to question a defendant about inconsistencies between extrajudicial statements and trial testimony, questions that elicit a defendant's testimony that he made no statements about the crime after being appointed an attorney, but before trial, run afoul of Doyle. (Id. at pp. 785-86.) Belmontes held that the questions in that case had the potential to ripen into Doyle error because, although they may have been meant to point out the differences between the defendant's extrajudicial statements and his trial testimony, they could have been interpreted to highlight the defendant's silence between his last jailhouse statement (after which he was appointed an attorney) and trial. (Id. at p. 786.) The Belmontes court held the questions in the case before it did not ripen into Doyle error because of the trial court's

admonishment. (Id. at pp. 786-787.)

In this case, most of the prosecutor's questions regarding what defendant did or did not say were also an attempt to highlight the difference between defendant's statement to police and his trial testimony. The prosecutor asked numerous questions about defendant's trial version of certain details of the crime, and whether defendant had previously told anyone the trial version. After asking numerous questions in this vain, the prosecutor emphasized by his questions that defendant had spent three hours talking to the police about "each and every one of these things," and yet he chose to tell a story he claimed at trial was a lie. As in Belmontes, the prosecutor's questions here could have been interpreted to highlight defendant's silence after he was appointed an attorney, instead of the differences between defendant's two versions of the crime. For this reason, the prosecutor's emphasis on whether defendant had ever made certain statements before trial, rather than on the discrepancies between defendant's pretrial and trial statements was ill-advised. However, also as in Belmontes, the questions did not ripen into Doyle error because the trial court admonished the jury not to draw any inference from defendant's silence after he was appointed an attorney.

There was no Doyle error with regard to the questions the prosecutor asked about the Willits robbery. The reasoning of Doyle is that a person arrested for a crime has the right to remain silent, and that after being informed of that right, he should not be penalized for exercising it. (Doyle, supra, 426 U.S. at p. 619 [49 L.Ed.2d at p. 98].) Defendant was not arrested for the Willits robbery, nor was he charged with the Willits robbery. By emphasizing his silence on the Willits robbery, the prosecutor was not punishing defendant for exercising his Miranda rights in this case.

We also find no prejudicial violation of defendant's attorney-client privilege. After defense counsel objected to the prosecutor's questions on this ground, the prosecutor told defendant anything he may have told his attorney or investigator was privileged and that he did not have to discuss it. Even though every question may not have been prefaced with that disclaimer, it was clear from the context that the prosecutor was not attempting to elicit attorney-client confidences.

In any event, we conclude any error as a result of the prosecutor's questions was not prejudicial. Error in this circumstance is prejudicial if the evidence against defendant is less than overwhelming and if the improper questioning touched a live nerve in the defense. (People v. Lindsey (1988) 205 Cal.App.3d 112, 117.) However, the prejudicial impact may be ameliorated by a strong curative instruction. (People v. Galloway (1979) 100 Cal.App.3d 551, 560.)

> This case differs from People v. Galloway, supra, because here there was a strong curative instruction, the evidence of guilt was overwhelming, and the prosecutor did not emphasize defendant's silence in closing argument so as to touch a "live nerve." The evidence was overwhelming because no less than three people gave statements naming defendant as the shooter: Bejarano, Sisneros, and defendant himself. These stories were completely consistent with the physical evidence. Defendant's testimony that he did not shoot the victim was not his sole defense, and the prosecutor did not bring up defendant's silence in his closing argument. The prosecutor could legitimately emphasize defendant's prior statement, the inconsistencies, and the likelihood that the trial testimony was the false testimony. Finally, the trial court gave a strong curative instruction, and we must presume the jury understood and followed this instruction. (People v. Cline (1998) 60 Cal.App.4th 1327, 1336.) We conclude that had the prosecutor phrased his questions so as to emphasize defendant's changed story rather than defendant's silence, it would have had no effect on the verdict. Any error was therefore harmless.

(Slip Op. at p. 33-41.)

A criminal defendant's due process rights are violated if prosecutorial misconduct renders a trial "fundamentally unfair." Drayden v. White, 232 F.3d 704, 713 (9th Cir. 2000) (citing Darden v. Wainright, 477 U.S. 168, 183 (1986)). A habeas petition will be granted for prosecutorial misconduct only when the misconduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Darden, 477 U.S. at 181 (internal quotation marks and citation omitted). A determination that the prosecutor's questioning was improper is insufficient in and of itself to warrant reversal. See Ortiz v. Stewart, 149 F.3d 923, 934 (9th Cir. 1998). Further, isolated comments by a prosecutor may be cured by jury instructions. See Sassounian v. Roe, 230 F.3d 1097, 1106-07 (9th Cir. 2000); see also Hall v. Whitley, 935 F.2d 164, 165-66 (9th Cir. 1991) ("Put in proper context, the comments were isolated moments in a three day trial.") A claim of prosecutorial misconduct is analyzed under the prejudice standard set forth in Brecht, 507 U.S. at 638 n. 9. See Karis v. Calderon, 283 F.3d 1117, 1128 (stating that a claim of prosecutorial misconduct is analyzed under the standard set forth in Brecht). Specifically, the inquiry is whether the prosecutorial misconduct had a substantial and injurious effect on the jury's verdict. See Johnson v. Sublett, 63 F.3d 926, 930

(9th Cir. 1995) (finding no prejudice from prosecutorial misconduct because it could not have had a substantial impact on the verdict under Brecht).

A prosecutor may not impeach a defendant's testimony with his silence after he has been advised of and invoked his right to remain silent under Miranda v. Arizona, 384 U.S. 436, 444 (1966). See Doyle, 426 U.S. at 611. The Doyle rule is based on the assurance provided in the Miranda warnings that the exercise of a right of silence will not be penalized. See Wainwright v. Greenfield, 474 U.S. 284, 295 (1986). However, "Doyle does not apply to cross-examination that merely inquires into prior inconsistent statements. Such questioning makes no unfair use of silence because a defendant who voluntarily speaks after receiving Miranda warnings has not been induced to remain silent." Anderson v. Charles, 447 U.S. 404, 408 (1980). Additionally, there is not a Doyle violation if the trial court promptly sustains a timely objection to the question concerning post-arrest silence, instructs the jury to disregard the question, and provides a curative jury instruction. See Greer v. Miller, 483 U.S. 756, 765-67 (1987).

A challenged or offering statement must also be evaluated in the context of the entire trial, as well as the context in which it was made. See Boyde v. California, 494 U.S. 370, 384-85 (1990). Some factors to consider in determining the prejudicial effect of a prosecutor's misconduct include: (1) whether a curative instruction was issued, see Greer v. Miller, 483 U.S. 756, 766 n.8 (1987); (2) the weight of evidence of guilt, compare United States v. Young, 470 U.S. 1, 19 (1985) (finding "overwhelming evidence" of guilt), with United States v. Schuler, 813 F.2d 978, 982 (9th Cir. 1987) (requiring new trial after prosecutor referred to defendant's courtroom demeanor, in light of prior hung jury and lack of curative instruction); (3) whether the misconduct was isolated or part of an ongoing pattern, see Lincoln v. Sunn, 807 F.2d 805, 809 (9th Cir. 1987); (4) whether the misconduct relates to a critical part of the case, see Giglio v. United States, 405 U.S. 150, 154 (1972); and (5) whether the prosecutor's comment misstates or manipulates the evidence. See Darden, 477 U.S. at 181-82.

In this case, Petitioner argues that the prosecutor's inquiry into his silence violated Doyle

as well as infringed on his attorney-client communications. For the following reasons, this argument does not merit federal habeas relief. First, as stated in Greer an important factor to examine is whether the trial judge instructed the jury to disregard the prosecutor's questioning with regard to a defendant's silence as well as whether the trial judge issued a curative instruction. See 483 U.S. at 765-67. That was done in this case. As outlined by the California Court of Appeal in its decision, the trial judge instructed the jury that they should not infer that his attorney told him what to say in his testimony and that they must not draw any inference from Petitioner's silence. (See Reporter's Tr. at p. 1539-40.) The jury is presumed to have followed these instructions. See Weeks v. Angelone, 528 U.S. 225, 234 (2000).

Additionally, it is important to reiterate the evidence against Petitioner. For example, the evidence against the Petitioner in this case included the testimony of Bejarano who testified that Petitioner shot Adams in the car. (See Reporter's Tr. at p. 924.) Sisneros also testified at trial Bejarano, Petitioner and himself discussed that the purpose of the test-drive of the Explorer was to scare Adams by threatening him and restraining him with a rope. (See id. at p. 1688.) Sisneros also testified that after the shooting, the men discussed the shooting whereby Petitioner was indicated as the shooter. (See id. at p. 1708.). It is also worth noting that Petitioner initially took responsibility for the shooting to police before changing his theory of what transpired during his trial testimony. (See id. at p. 1471.) This could have affected how credible the jury viewed Petitioner's testimony. As stated by the California Court of Appeal, three witnesses (including the Petitioner himself at one time), stated that Petitioner was the shooter. Thus, for the foregoing reasons, Petitioner is not entitled to relief on this argument as the prosecutor's statement did not make Petitioner's trial fundamentally unfair under this argument.

ii. Reference to Polygraphs of Bejarano and Sisneros During Prosecutor's Rebuttal Closing Argument

The California Court of Appeal also analyzed this issue on direct appeal and stated the following:

The plea agreements for Bejarano and Sisneros were admitted into evidence without objection, and defense counsel cross-examined Bejarano and Sisneros extensively regarding the agreements. In closing argument, defense counsel argued Bejarano and Sisneros knew what information the prosecutor wanted and acted in their own self interest by giving the prosecution the information it wanted. Defense counsel told the jury to be skeptical of the contracts and to "scrutinize" them.

In rebuttal, the prosecutor argued the plea deals were not actually that good for Bejarano and Sisneros, and that the plea agreements meant that both of them would be serving more time than if they had been convicted of second degree murder, and almost as much time as if they had been convicted of first degree murder. The prosecutor went on to explain that by entering into the plea agreements they did not have the benefit of a determination, "based upon judges, courtrooms, anything else like this. The second page of both of these contracts explains that they have to have a polygraph, a polygraph examination, that would be submitted at any time. So we don't have to come in here. We don't have to have a jury determine this. We don't have to hear closing arguments. If they fail a polygraph, all bets are off. They return to their original positions, face the rest of their lives in prison."

At the next court recess, defense counsel informed the court: "I know there's language about polygraphs in the contracts. I certainly don't have any objection to it being referenced, however, the insinuation to the jury that polygraphs were done in this case, obviously that would create the inference that if the polygraphs passed [*sic*] would certainly be absolutely false." The prosecutor and the court assured defense counsel that no such insinuation had been made, and defense counsel raised no objection.

Defendant claims the prosecutor's reference to polygraph tests violated Evidence Code section 351.1 and constituted misconduct. We disagree.

Evidence Code section 351.1 subdivision (a) states:

> "Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence in any criminal proceeding, including pretrial and post conviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court, unless all parties stipulate to the admission of such results."

> This section prohibits references to polygraphs from being admitted into evidence. Of course, the arguments of counsel are not evidence, so any mention of a polygraph in the prosecutor's closing argument did not violate Evidence Code section 351.1. Although defendant does not raise the argument, the admission of the plea agreements also did not violate the section. The plea agreements did not contain the results of a polygraph examination, the opinion of a polygraph examiner, or any offer to take or refusal to take a polygraph. The agreements merely stated that a polygraph could be required at any time.

(Slip Op. at p. 41-43.)

References to the results of a polygraph examination, an offer to take a polygraph examination, or a refusal to take such a test are disfavored an constitute inadmissible evidence in a criminal proceeding, absent a stipulation by counsel. See Cal. Evid. Code § 351.1. At the outset, it is worth noting that defense counsel did not object to the admission of Bejarano and Sisneros' plea agreements into evidence. Petitioner argues that the prosecutor's reference in closing argument to Bejarano and Sisneros's plea agreement and the provision that required them to have a polygraph examination constituted prosecutorial misconduct.

"A writ of habeas corpus is available under 28 U.S.C. § 2254(a) only on the basis of some transgression of federal law binding on the state courts. It is unavailable to alleged error in the interpretation or application of state law. See Middleton v. Cupp, 768 F.2d 1083, 1085 (9th Cir. 1985). Generally speaking, the admission of polygraph evidence does not violate the Constitution. See id. at 1085-86; Carrillo v. Kramer, Civ. No. 07-1324, 2010 WL 129675, at *8 (C.D. Cal. Jan. 8, 2010); Walker v. Marshall, Civ. No. 95-20390, 1996 WL 130821, at *2 (N.D. Cal. Mar. 11, 1996), aff'd by, No. 97-17300, 1999 WL 50852 (9th Cir. Feb. 3, 1999). Thus, it is solely an issue of state law. See, e.g., Cacoperdo v. Demosthenes, 37 F.3d 504, 510 (9th Cir. 1994). A court does not review issues of state law in federal habeas proceedings. See Estelle, 502 U.S. at 68.

Additionally, as previously noted, the prosecutor's arguments are not evidence and the jury was specifically admonished by the trial judge in his instructions that the attorney's

statements during trial were not evidence to be considered by them. First, the jury is presumed to have followed this instruction. See Weeks, 528 U.S. at 234. Second, as noted by the California Court of Appeal, the prosecutor did not state any details about the polygraph tests or give any results. See Cacoperdo, 37 F.3d at 510 ("After reviewing the record, we are satisfied that the reference to the polygraph examinations did not violate Cacoperdo's due process rights. The record shows that the witness did not discuss the results of or give any details about the examinations he only mentioned inadvertently that they had been given. In addition, each child testified at trial and was subjected to cross-examination, allowing the jurors to make their own credibility determinations."); Cardillo, 2010 WL 129675, at *8 (stating that even if the issue of polygraph testimony was properly before the court, Petitioner failed to show that it made his trial fundamentally unfair where the witness did not testify about the details of the polygraph examination or the results). Petitioner has not shown that his trial was fundamentally unfair by the prosecutor's statement in closing argument which referenced the polygraph test provision of the plea agreement.

iii. Prosecutor's Purported Mischaracterization of Evidence During Closing Argument

Finally, Petitioner asserts that the prosecutor mischaracterized facts during his closing argument that went to critical determinations in the case; specifically Petitioner argues that: "[t]he prosecutor mischaracterized the evidence when he stated that petitioner personally discharged the gun because he knew the number of shots which were fired and with the echo in the car it was impossible for anyone to hear the number, whether it was three or ten or whatever. There was no evidence to support that statement." (Pet'r's Pet. at p. 9.) The California Court of Appeal analyzed this issue on direct appeal and stated the following:

> During closing argument the prosecutor, referring to defendant's statement to the police, made the following argument to the jury:
>
> > "You saw just on Friday the manner in which the police officers asked him [the caliber o the weapon used]. There was no suggestion [in the question

> that would have prompted the correct answer]. He knew the caliber, not because he read the little shell casings that were there in the car. He knew the caliber that was used because he is the one that had the gun. He also knew the number of shots fired because he's the one that fired the gun. When you have that loud number of shots like Duane Lovaas [defendant's expert witness] is describing in a small vehicle, when you have this type of echo that is going off, it's impossible for anyone to tell the number of shots between three and ten or whatever, especially going off in . . . [an objection was interposed] when it's going off in rapid succession over a brief amount of time. He knows how many shots are in there because – he knows how many shots were in the gun because he loaded the gun, because he was the person who, in fact, pulled the trigger."
>
> Defendant argues that since Lovaas did not testify it was impossible to tell the number of gunshots going off, it was misconduct for the prosecutor to argue such a fact.
>
> While a prosecutor may not mischaracterize the evidence in his or her closing argument, fair comment on the evidence is allowed. (People v. Harrison (2005) 35 Cal.4th 208, 244.) Fair comment includes reasonable deductions or inferences drawn from the evidence. (Ibid.) In this case, Lovaas testified the victim was shot six times from the same gun, that the noise would have been very loud, especially since it was in a closed vehicle, that the bullet wounds were consistent with the victim being in the same position for all six shots, and that the type of gun used would have made it possible to fire all six shots in a matter of seconds. The prosecution's expert also testified the victim's wounds were consistent with the shots having occurred very close in time. It was reasonable to infer from this evidence, that a person hearing the shots would not necessarily know exactly how many times the victim was shot, and that the only reason defendant knew how many times the victim was shot was because he was the shooter. The argument was fair comment on the evidence, not a mischaracterization of the evidence.

(Slip Op. at p. 43-45.)

With respect to improper prosecutorial comments during a closing argument, the law is settled that under this due process standard, "[c]ounsel are given latitude in the presentation of their closing arguments, and the courts must allow the prosecution to strike hard blows based on the evidence presented and all reasonable inferences therefrom." Ceja v. Stewart, 97 F.3d 1246,

1253-54 (9th Cir. 1996) (internal quotation marks omitted). A reviewing court should consider a prosecutor's allegedly improper statements in light of the realistic nature of trial closing arguments. "Because 'improvisation frequently results in syntax left imperfect and meaning less than crystal clear,' 'a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations.'" Williams v. Borg, 139 F.3d 737, 744 (9th Cir. 1998) (quoting Donnelly v. DeChristoforo, 416 U.S. 637, 647 (1974)). A challenged or offering statement must also be evaluated in the context of the entire trial, as well as the context in which it was made. See Boyde v. California, 494 U.S. 370, 384-85 (1990). For the reasons expressed by the California Court of Appeal in its decision, the prosecutor's statement did not constitute a due process violation because it was a permitted inference from the evidence. Additionally, the jury was specifically admonished that any statements made from the attorneys during trial was not evidence. (See Reporter's Tr. at p. 1959.) The jury is presumed to have followed this instruction. Any alleged impropriety by the prosecutor during his closing argument did not rise to the level of a due process violation for prosecutorial misconduct on this argument.

For the foregoing reasons, Petitioner is not entitled to any of his prosecutorial misconduct arguments as stated within Claim III.

D. Claim IV

In Claim IV, Petitioner argues that the trial court erred in failing to exclude evidence of other uncharged crimes. Specifically, Petitioner argues that the trial court's introduction of the Willits robbery and a drive-by shooting in Stockton violated Petitioner's due process and equal protection rights. He argues that "neither uncharged crime had any factual resemblance that would negate mistake here as to the killing." (Pet'r's Pet. at p. 10.) The California Court of Appeal analyzed this issue on direct appeal and stated the following:

Defendant argues the trial court erred in denying his motion to

exclude evidence of other crimes. Specifically, he objects to the introduction of the Willits robbery and of a drive-by shooting in Stockton. [FN 9] Defendant made a pretrial motion pursuant to Evidence Code section 1101, subdivision (a) to exclude this evidence, arguing it had no relevance and was prejudicial. [FN 9] Bejarano testified that when they were in Stockton on the day of the murder and about an hour before the murder, defendant and Sisneros were talking about another shooting they did in Stockton. They said defendant, who was inside Sisneros's vehicle at the time, shot a man who was sitting in his car.

In denying the motion to exclude evidence of the two incidents, the trial court held they were relevant to a "pattern of criminal gang activity" which the prosecution was required to prove to obtain a conviction for violation of section 182.2, subdivision (a), participation in a criminal street gang. The trial court also found the evidence was admissible under Evidence Code section 1101, subdivision (b) because it was relevant to show motive, lack of accident, and aiding and abetting. Evidence Code section 1101 states in relevant part that evidence of a person's character, including specific instances of conduct, is inadmissible to prove that person's conduct on a specified occasion, unless the evidence is relevant to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Two of the disputed issues at trial were whether the incident was gang-related and whether defendant was the shooter. Defendant claimed at trial he thought the test drive of the victim's vehicle was legitimate, and he had no idea there was a plan to harm the victim. He also claimed he hung out with gang members, but he had never done any crimes for the gang. Both of the prior incidents at issue were relevant to show motive, knowledge, and absence of mistake or accident. They showed defendant had committed prior gang-related crimes with the two other gang members involved in the instant case, and that defendant had been armed in each instance. Together with the testimony of the gang expert that gang crimes are often committed to harm rivals and to make money, the prior incidents tended to show defendant had those motives in the past gang crimes, and likely had those motives in this crime. The prior incidents also tended to show defendant was an active participant in gang crimes, making it unlikely his involvement in Walter Adams's murder was accidental.

The evidence was properly admitted pursuant to Evidence Code section 1101, subdivision (b). Nevertheless, defendant contends the trial court abused its discretion in allowing the evidence because it was unduly prejudicial, uncorroborated, cumulative, devoid of detail, and dissimilar to the crime at issue. We will reverse the trial court's exercise of discretion only if the ruling was "'arbitrary, whimsical, or capricious as a matter of law. [Citation.]'" (People v. Branch (2001) 91 Cal.App.4th 274,

282.)

> Evidence Code section 352 provides that the trial court may, in its discretion, exclude relevant evidence if its probative value is substantially outweighed by the likelihood that it will necessitate undue consumption of time or create a substantial danger of undue prejudice, confuse the issues, or mislead the jury. The factors to be considered in determining whether to exclude uncharged offenses sought to be admitted under Evidence Code 1101, subdivision (b) are: "(1) the inflammatory nature of the uncharged conduct; (2) the possibility of confusion of issues; (3) remoteness in time of the uncharged offenses; and (4) the amount of time involved in introducing and refuting the evidence of uncharged offenses." (People v. Branch, supra, 91 Cal.App.4th at p. 282.)
>
> In this case neither of the prior incidents was as inflammatory as the charged offense of murder, both prior incidents appeared to have been fairly recent, [FN 10] there was no possibility of confusion of the issues, and the amount of time spent on the prior incidents was minor in comparison to the voluminous testimony presented in this trial.
> [FN 10] The Willits incident occurred in October 2002. Bejarano testified he thought the prior Stockton shooting had occurred within the year.
>
> Defendant argues the trial court erred in admitting Bejarano's testimony regarding the prior drive-by shooting in Stockton because it was based on the uncorroborated evidence of an accomplice. Although Penal Code section 1111 requires that accomplice testimony be corroborated to support a conviction, the statute relates to the sufficiency, not the admissibility of the evidence. (People v. Riel (2000) 22 Cal.4th 1153, 1190.)
>
> To the extent defendant argues the trial court erred in admitting Bejarano's testimony regarding the prior Stockton shooting because there was no proof of the corpus delicti of the shooting, any such claim is forfeited for failure to object on that ground at trial. (People v. Martinez (1996) 51 Cal.App.4th 537, 544.) Moreover, the corpus delicti rule has never been applied to other crimes evidence. (Id. at p. 545.)
>
> Defendant also argues it violated his right to due process to admit evidence that was offered only to prove his propensity to commit crimes. We have determined the evidence was properly admitted for reasons other than to establish a propensity to commit crimes, thus there was no due process violation.

(Slip Op. at p. 46-49.)

A state court's evidentiary ruling is not subject to federal habeas review unless the ruling

violates federal law, either by infringing a specific constitutional provision or by depriving the defendant of the fundamentally fair trial guaranteed by due process. See Pulley v. Harris, 465 U.S. 37, 41 (1984). The due process inquiry in federal habeas review is whether the admission of evidence was arbitrary or so prejudicial that it rendered the trial fundamentally unfair. See Romano v. Oklahoma, 512 U.S. 1, 12-13 (1994). "A habeas petitioner bears a heavy burden in showing a due process violation based on an evidentiary decision." Boyde v. Brown, 404 F.3d 1159, 1172 (9th Cir. 2005). The United States Supreme Court has "defined the category of infractions that violate 'fundamental fairness' very narrowly." Dowling v. United States, 493 U.S. 342, 352 (1990). Only if there are no permissible inferences that the jury may draw from the evidence can its admission violate due process. See Jammal v. Van de Kamp, 926 F.2d 918, 920 (9th Cir. 1991).

As noted by the California Court of Appeal, disputed issues at trial included whether the incident was gang-related and whether the defendant was the shooter. Thus, the prior uncharged crimes testimony contained permissible inferences that the jury could draw. For example, as stated by the state court, the prior incidents showed that Petitioner had committed prior gang-related crimes with the other two gang members involved in this case and that Petitioner had been armed on those occasions. For these reasons, the trial court's decision to allow this evidence did not violate Petitioner's due process rights as it was not arbitrary or so prejudicial that it rendered the trial fundamentally unfair.

Assuming *arguendo* that the trial court erred in permitting this testimony of Petitioner's prior uncharged crimes, Petitioner would also not be entitled to federal habeas relief on this Claim because the admission of this evidence did not have a "substantial and injurious effect on the jury's verdict." Plascencia v. Alameida, 467 F.3d 1190, 1203 (9th Cir. 2006) (applying Brecht harmless error analysis to claim that the admission of evidence was improper). Without this evidence, the jury had sufficient evidence to convict the Petitioner of the charged offense. For example, as stated in supra Part IV.C.i., evidence was presented at trial that Petitioner was

the shooter through Bejarano and Sisneros' testimony. Additionally, the gang expert testified regarding prior crimes committed by the Nortenos to satisfy that element of the criminal street gang definition.

Petitioner also alludes to the fact that his equal protection rights were violated by the introduction of this evidence at trial.[2] The Fourteenth Amendment's Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike." Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985). Petitioner can establish an equal protection claim by showing that he was intentionally discriminated against based on his membership in a protected class, see Lee v. City of Los Angeles, 250 F.3d 668, 686 (9th Cir. 2001), or that similarly situated individuals were treated differently without a rational basis for the difference in treatment. See Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000) (per curiam). To state an equal protection claim under this second theory, Petitioner must allege that: (1) he was intentionally treated differently from other similarly situated; and (2) there is no rational basis for the difference in treatment. See Engquist v. Oregon Dep't of Agric., 553 U.S. 591, 601 (2008). In this case, Petitioner fails to show that he was intentionally treated differently than others similarly situated and he does not show that he was intentionally discriminated based on his membership in a protected class. Thus, Claim IV does not merit federal habeas relief on equal protection grounds as well.

The denial of this Claim by the California Court of Appeal was not an unreasonable application of clearly established federal law. Accordingly, the Claim should be denied.

E. Claim V

In Claim V, Petitioner argues that he was denied his due process and equal protection rights when the trial court permitted questioning of whether one of Petitioner's tattoos showed a

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[2] While it appears that Petitioner may not have exhausted this equal protection argument, a federal habeas court can deny an unexhausted claim so long as it is deemed not "colorable." See Cassett v. Stewart, 406 F.3d 614, 624 (9th Cir. 2005).

propensity for violence. In his answer, Respondent argues that this claim is procedurally defaulted. Alternatively, Respondent asserts that this Claim can also be denied on the merits. The California Court of Appeal discussed this claim in its opinion on direct appeal and stated the following:

> Defendant argues the trial court erred in not sustaining an objection to a prosecution question asking whether one of defendant's tattoos showed a propensity for violence. We shall conclude that the issue was not preserved for appeal because defense counsel was not specific as to the ground for the objection, and that any error in failing to sustain the objection was harmless because no improper propensity evidence was presented.
>
> Evidence Code section 353 precludes reversal of a judgment because of the erroneous admission of evidence unless there was a timely objection making clear the specific ground for the objection. Defendant's trial counsel did not specify any ground for objecting, thus the issue was not preserved for appeal. (People v. Partida (2005) 37 Cal.4th 428, 431.)
>
> In any case, no objectionable propensity evidence was presented. The objection occurred when the prosecutor was questioning Aurich, the gang expert, about defendant's tattoos. The prosecutor asked whether a certain tattoo indicated gang involvement. The expert responded the tattoo was more an indication of gang mentality or characteristic. The prosecutor then asked: "Now when you have this tattoo . . . this creature with a hat, maybe it's a clown with a hat, and the two firearms, both double barreled or two firearms, is that bragging about your propensity for violence?" The trial court overruled defense counsel's objection, and the witness replied, "I think it promotes what the mentality of that person in that the lifestyle he chooses by showing that his use of guns – are in favor of guns is not – is well within his realm. Again, these tattoos are a way of sort gangsters because they are more visible. Intimidating people and intimidating or projecting the sense of status by tattooing."
>
> Aurich then testified that the five-pointed star in the tattoo was a symbol for the Norteno gang. Based on defendant's tattoos, as well as other factors, Aurich opined that defendant was an active participant in the gang. Evidence of the significance of defendant's tattoos was relevant to show his active participation. Aurich did not testify that the tattoo showed a propensity to violence but that it was a visible signal of gang membership designed to intimidate and project a sense of status in the gang. Such evidence of gang culture was admissible. (People v. Ferraez (2003) 112 Cal.App.4th 925, 930.)

(Slip Op. at p. 50-51.)

i. Procedural Default

A state court's refusal to hear the merits of a claim because of the petitioner's failure to follow a state procedural rule is considered a denial of relief on an independent and adequate state ground. See Harris v. Reed, 489 U.S. 255, 260-61 (1989). The state rule for these purposes is only "adequate" if it is "firmly established and regularly followed." Id. (citing Ford v. Georgia, 498 U.S. 411, 424 (1991); see also Bennett v. Mueller, 322 F.3d 573, 583 (9th Cir. 2003) ("[t]o be deemed adequate, the state law ground for decision must be well-established and consistently applied."). The state rule must also be "independent" in that it is not "interwoven with the federal law." Park v. California, 202 F.3d 1146, 1152 (9th Cir. 2000) (citing Michigan v. Long, 463 U.S. 1032, 1040-41 (1983)). Furthermore, procedural default can only block a claim in federal court if the state court, "clearly and expressly states that its judgment rests on a state procedural bar." Harris, 489 U.S. at 263. This means that the state court must have specifically stated that it was denying relief on a procedural ground. See Ylst v. Nunnemaker, 501 U.S. 797, 803 (1991); Acosta-Huerta v. Estelle, 7 F.3d 139, 142 (9th Cir. 1993).

Pursuant to Section 353 of California's Evidence Code, also known as the contemporaneous objection rule, "evidence is admissible unless there is an objection, the grounds for the objection are clearly expressed, and the objection is made the time the evidence is introduced." Melendez v. Pliler, 288 F.3d 1120, 1125 (9th Cir. 2002). The Ninth Circuit has held that California's contemporaneous objection rule is an adequate and independent state procedural rule when properly invoked by the state courts. See Rich v. Calderon, 187 F.3d 1064, 1066 (9th Cir. 1999).

When the state court discusses a procedural default but also reaches the merits of a claim, a denial of the claim cannot necessarily be said to have relied on the on the procedural default. See Thomas v. Hubbard, 273 F.3d 1164, 1176 (9th Cir. 2001), overruled on other grounds, Payton v. Woodford, 346 F.3d 1204 (9th Cir. 2003) (citing Harris, 489 U.S. at 263); see also

Panther v. Hames, 991 F.2d 576, 580 (9th Cir. 1993). As the Ninth Circuit stated in Panther, "because the Alaska Court of Appeals considered Panther's claims on the merits . . . so can we." 991 F.2d at 580. In Thomas, the state court discussed the issue of procedural default but then went on to deny the claim because any error was harmless. See 2743 F.3d at 1176. The Ninth Circuit held: "[i]n so doing, the [state] court left the resolution of the procedural default issue uncertain rather than making a clear and express statement that its decision was based on procedural default." Id.

In this case, the California Court of Appeal discussed the procedural default issue but also denied the claim on the merits in ultimately determining that "no objectionable propensity evidence was presented." (Slip Op. at p. 50.) Under these circumstances, the procedural default will not operate to bar federal review of this Claim on the merits.

Furthermore, it is worth noting that the California Supreme Court summarily denied Petitioner's petition for review. The United States Supreme Court has stated that "[s]tate procedural bars may expire because of later actions by state courts. If the last state court to be presented with a particular federal claim reaches the merits, it removes any bar to federal court review that might otherwise have been available." Ylst, 501 U.S. at 801. Recently, the United States Supreme Court reiterated that a summary denial constitutes a decision on the merits. Cf. Harrington v. Richter, 131 S.Ct. 770, 784-85 (2011) (citing Harris, 489 U.S. at 265). Thus, because of the summary denial by the California Supreme Court, the merits of Claim V should be addressed as opposed to relying on Respondent's procedural default argument.

ii. Merits

Petitioner argues that the trial court improperly allowed the evidence of his tattoos at trial because it impermissibly asked for whether Petitioner had a propensity for violence. Petitioner argues that this violated his due process rights. However, Petitioner does not demonstrate how the state court's allowance of this question was contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United

States." 28 U.S.C. § 2254(d)(1). The Supreme Court has yet to rule on whether propensity evidence admitted in a criminal trial pursuant to state law violates the Due Process Clause. See, e.g., Estelle v. McGuire, 502 U.S. 62, 75 n. 5 (1991) ("[W]e express no opinion on whether state law would violate the Due Process Clause if it permitted the use of 'prior crimes' evidence to show a propensity to commit a charged crime.") Furthermore, as stated by the California Court of Appeal, the gang expert did not state specifically that Petitioner's tattoos showed that he had a propensity for violence. Instead, he testified that the tattoos "are a way of sort of gangsters because they are more visible. Intimidating people and intimidating or projecting the sense of status by tattooing." (Reporter's Tr. at p. 1096.)

Petitioner also alludes to the Equal Protection Clause in arguing that his equal protection rights were violated by the admission of this tattoo evidence.[3] Similar to Claim IV however, he fails to show that he was intentionally treated differently that others similarly situated and he does not show that he was intentionally discriminated against based on his membership in a protected class. For the foregoing reasons, Petitioner is not entitled to federal habeas relief on Claim V.

F. Claim VI

In Claim VI, Petitioner argues that his due process and equal protection rights were violated "when the jurors were handed the prosecutor's chart as a guide to their deliberations, and was prejudicial by serving as a reminder that the prosecution had the correct view of the case." (Pet'r's Pet. at p. 10.) The California Court of Appeal analyzed this Claim on the merits on direct appeal and stated the following:

> Before closing argument, the prosecutor submitted a chart he proposed to use for closing argument, and which he wanted to let the jury take into the jury room. Defense counsel objected on the grounds the instructions were "more than sufficient." The trial

[3] As with the equal protection arguments in Claim IV, it appears as if this argument may be unexhausted as well. However, the claim can be decided on the merits so long as it is not "colorable." See Cassett, 406 F.3d at 624.

court asked defense counsel whether the chart contained any legal inaccuracies. Defense counsel replied that the chart did not appear to be intentionally deceptive, but that it did not spell out the rules completely. Defense counsel was particularly concerned about information provided under an asterisk. The trial court allowed the prosecutor to put the chart on the wall and to give the jury copies to hold during closing argument, but deferred ruling on whether it could go into the deliberation room.

During closing argument, the prosecutor gave copies of the chart to the jury. He explained that the chart was a kind of road map to work through the case. He explained that the chart showed two different charges – murder and being an active participant in a criminal street gang. He told the jury they would have to determine guilty or not guilty as to the two charges. He then explained that the jury would have to decide whether the murder was first or second degree. He said that if the jury found the murder to be first degree, it would have to determine whether there were special circumstances, but that if the jury found the murder to be second degree, there need be no special circumstances findings.

As to the asterisk, the prosecutor said it referred to the different theories for a finding of murder, and told the jury it did not have to agree as to which one of the theories applied as long as the finding of murder or murder in the first degree was unanimous. Prior to the defense counsel's closing argument, the court told the prosecutor to take off the district attorney's label and delete the asterisks and footnotes. The court stated it would let the chart go to the jury room as a supplement to the written instructions. Thereafter, defense counsel used the chart to argue Roque Bejarano was guilty of first degree murder, lying in wait and felony murder.

The chart that was sent to the jury lists in chart form the crimes for which defendant was being tried, the possible degrees, the special circumstance allegations, and the enhancements. The trial court instructed the jury that the chart would be included as page 114 of their instructions as a supplement to the instructions. "It's not intended to be a detailed explanation of all the elements required for everything that's depicted on the chart. That explanation is within the written instructions that you have there in your binder. If you perceive a conflict between the chart and any of the written instructions, follow the written instructions, okay?"

The chart does not contain any error of law or fact, nor does defendant argue it contains any such error. Instead, he argues the chart implied the prosecution's analysis of the case was the correct one.

Section 1137 provides that the jury may take to the deliberation room documentary evidence, written instructions given, and notes they have taken on the testimony. While the trial court's decision

> to make the chart a supplement to the written instructions is certainly irregular, defendant has shown no prejudice. The chart sent to the jury does nothing more than set forth the allegations of the complaint in graphic form. The task of the jury was to analyze the evidence within the framework of the crimes charged. The chart was merely an aid to that end, and did not favor one side over the other. No prejudice can be implied where defendant does not make any showing that the chart contained information not contained in the instructions, that the jury actually used the chart in its deliberations, or that the jury obtained an improper impression from the chart. (See People v. Herrera (1917) 32 Cal.App. 610, 615 [defendant not prejudiced by fact that jury took non-documentary evidence into the jury room in the absence of showing that jury used such evidence in its deliberation or received any improper impression therefrom].)
>
> Defendant argues the trial court erred in telling the jurors to follow the written instructions if there was a conflict between the instructions and the chart. He argues the jury may have relied on the chart entirely if they did not perceive any discrepancy with the instructions. It is not possible that the jury relied entirely on the chart. As the trial court instructed, it was not intended as a detailed explanation, which could only be found only in the instructions. The chart itself contains only the names, and none of the elements of the various crimes, enhancements, and special circumstances alleged. The jury could not have relied on the chart for any information other than as an impartial flow chart that directed the mechanics of coming to a decision, but not the result itself. There was no error.

(Slip Op. at p. 51-55.)

A challenge to a jury instruction solely as an error under state law does not state a claim in a federal habeas corpus action. See Estelle, 502 U.S. at 71-72. To obtain federal collateral relief for errors in a jury charge, a petitioner must show that the ailing instruction so infected the entire trial that the resulting conviction violates due process. See id. at 72. Additionally, the instruction may not be judged in artificial isolation, but must be considered in the context of the instructions as a whole and the trial record. See id. The court must evaluate jury instructions in the context of the overall charge to the jury as a component of the entire trial process. See United States v. Frady, 456 U.S. 152, 169 (1982). Furthermore, even if it is determined that the instruction violated the petitioner's right to due process, a petitioner can only obtain relief if the unconstitutional instruction had a substantial influence on the conviction and thereby resulted in

actual prejudice under Brecht, 507 U.S. at 637, which is whether the error had a substantial and injurious effect or influence in determining the jury's verdict.

In this case, Petitioner does not argue that the chart itself misstated the law, rather he argues that by submitting the chart to the jury, it served as a reminder that the prosecution had the correct view of the case. Petitioner is not entitled to federal habeas relief on this Claim. First, as noted by the California Court of Appeal, even defense counsel used the chart during his closing argument. (See Reporter's Tr. at p. 2066.) Second, the trial judge specifically instructed the jury that if the chart and the instructions were at odds, the jury was to follow the instructions as given rather than the chart. The jury is presumed to have followed this instruction. Petitioner failed to show that the chart so infected the trial that it amounted to a due process violation.

As with Claim IV and V, Petitioner also argues that his equal protection rights were violated by the prosecutor's chart.[4] However, he fails to show that he was intentionally treated differently that others similarly situated and he does not show that he was intentionally discriminated against based on his membership in a protected class. Petitioner is not entitled to federal habeas relief on Claim VI.

V. CONCLUSION

For all of the foregoing reasons, IT IS RECOMMENDED that the petition for writ of habeas corpus be DENIED.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(l). Within twenty-one days after being served with these findings and recommendations, 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 Recommendations." Any reply to the objections

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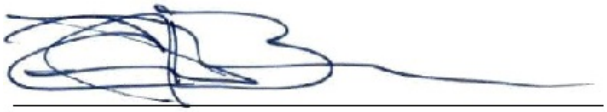
[4] As with the equal protection arguments in those claims, it appears as if this argument may be unexhausted. However, the claim can be decided on the merits so long as it is not "colorable." See Cassett, 406 F.3d at 624.

shall be served and filed within seven days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991). In any objections he elects to file, Petitioner may address whether a certificate of appealability should issue in the event he elects to file an appeal from the judgment in this case. *See* Rule 11, Federal Rules Governing Section 2254 Cases (the district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant).

DATED: March 3, 2011



TIMOTHY J BOMMER
UNITED STATES MAGISTRATE JUDGE