UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

STEVE VALDIVIA, Petitioner, v. M. D. BITER, Respondent.	No. CV 13-07736-VBK MEMORANDUM AND ORDER DENYING FIRST AMENDED PETITION FOR WRIT OF HABEAS CORPUS AND DISMISSING CASE WITH PREJUDICE

INTRODUCTION; SUMMARY OF RULING

On October 18, 2013, Petitioner Steve Valdivia, a California state prisoner proceeding pro se, initiated this federal habeas action by filing a form "Petition for Writ of Habeas Corpus by a Person in State Custody 28 U.S.C. § 2254." On August 18, 2014, Petitioner filed a form "First Amended Petition [etc.]," and that First Amended Petition is the current petition of record in this action. On October 15, 2014, Respondent filed an "Answer" to the First Amended Petition, together with an attached "Memorandum of Points and Authorities" in support of the Answer (sometimes hereinafter "R's MPA"). On January 20, 2015, Petitioner filed a "Traverse" to Respondent's Answer.

Briefing having now been deemed completed, the case is ready for decision. Having reviewed the allegations of the First Amended Petition, the matters set forth in the record, and the parties' filings, it is hereby ORDERED that the First Amended Petition is DENIED and this case is DISMISSED WITH PREJUDICE.

PROCEDURAL HISTORY

On August 31, 2010, a jury in the Los Angeles County Superior Court found Petitioner guilty of shooting at an occupied vehicle (in violation of California Penal Code ["P.C."] § 246, count 3) and guilty of assault with a semiautomatic weapon (P.C. § 245(b), count 6). (See 2 CT 284, 286; Lodgment 4 at 1.) The jury also found true an allegation that Petitioner personally used a firearm in both of the offenses. (See 2 CT 284, 286; Lodgment 4 at 1.)

In a bifurcated second phase of the trial, the jury also found true an allegation that Petitioner had committed the offenses charged in count 3 "for the benefit of, at the direction of, [or] in association with a criminal street gang . . . within the meaning of [P.C. §] 186.22(b)(1)(C)." (2 CT 285; Lodgment 4 at 1.)

Petitioner was sentenced to 15 years to life for the gang allegation, pursuant to P.C. § 186.22(b)(4)(B); and a six year sentence imposed for the assault was ordered to run concurrently; and sentences for the firearm enhancements were stayed (pursuant to P.C. § 654). (See Lodgment 4 at 1; 2 CT 289-91, 322-23.)

Petitioner filed a direct appeal in the California Court of Appeal (Lodgment 3); and on May 24, 2012, the Court of Appeal denied that appeal in a reasoned, unpublished opinion. (Lodgment 4.)

Petitioner then filed a Petition for Review in the California

Supreme Court (Lodgment 5); and on August 13, 2012, the California Supreme Court denied that Petition for Review without comment or citation to authority. (Lodgment 6.)

Petitioner did not file any state habeas petitions in the California state courts with respect to this judgment of conviction. (See Petition at 3.)

As noted, Petitioner initiated this federal habeas action on October 18, 2013; and that original Petition contained three claims. (See Docket No. 1.) The case was originally assigned to both a District Judge and this Magistrate Judge; but both Petitioner and Respondent filed forms consenting to allow the Magistrate Judge to enter dispositive rulings (see Docket Nos. 2, 7, 27); and the Court ultimately issued a "Notice to Counsel from Clerk," noting that all parties had consented to proceed before the Magistrate Judge, and specifying that the District Judge's designation be removed from the case number. (See Docket No. 28.)

On November 22, 2013, Respondent moved to dismiss the original Petition on the grounds that two of the three claims raised in that Petition were unexhausted. (See Docket No. 8.)

On February 24, 2014, Petitioner filed an Opposition to Respondent's Motion to Dismiss. (Docket No. 15.) Also on February 24, 2014, Petitioner filed a document entitled "Petitioner's Request for a Kelly Stay," requesting that the Court stay this federal habeas action pursuant to Kelly v. Small, 315 F.3d 1063 (9th Cir. 2003), because "if the Court determines any claims are unexhausted the Court consider the full scope of his Opposition in that if there are claims unexhausted it would've been appellate counsel's sole responsibility at that time." (See Docket No. 16 at 1.)

On April 8, 2014, the Court issued a "Memorandum and Order Granting Respondent's Motion to Dismiss with Leave to Amend," and dismissing the two unexhausted claims from the Petition, but allowing Petitioner to file a First Amended Petition containing only the single exhausted claim that was in the original Petition, and granting Petitioner a stay, pursuant to Kelly v. Small, to allow Petitioner to return to state court and exhaust his two other unexhausted claims. (See Docket No. 18.)

As noted, on August 18, 2014, Petitioner filed the instant First Amended Petition, containing only one claim. (See Docket No. 23.) On September 15, 2014, Petitioner filed a further document entitled "Notice of Intent to Proceed on First Amended Petition," confirming that the First Amended Petition would be the current petition of record. (See Docket No. 29.)[1]

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[1] In that Notice, Petitioner stated that "[a]fter careful consideration of the pertinent filing dates and applicable deadlines under the AEDPA, Petitioner has learned that any unexhausted claims that he could have attempted to exhaust in the state courts would be untimely under the provision of 28 U.S.C. § 2244. [¶] Therefore, Petitioner respectfully requests that the Court lift any stay and proceed on his exhausted claim as set forth in the [First Amended Petition]." (See Docket No. 29.)

The Court notes that the Ninth Circuit recently held, in two related cases, Mitchell v. Valenzuela, ___ F.3d ___, 2015 WL 3980746 (9th Cir. July 1, 2015) and Bastidas v. Chappell, ___ F.3d ___, 2015 WL 3972942 (9th Cir. July 1, 2015), that a Magistrate Judge, who was assigned to a case with a District Judge, and who was only assigned to the case for limited purposes, was without power under 28 U.S.C. § 636 to deny a habeas petitioner's request for a Kelly stay. See, e.g., Mitchell v. Valenzuela, 2015 WL 3980746, at *1.

In light of Petitioner's voluntary dismissal of his two unexhausted claims from this action, the parties' election to consent to proceed before the Magistrate Judge, and the fact that the Court did not deny Petitioner a Kelly stay, the Court notes that the Ninth Circuit's recent holdings in Mitchell and Bastidas are not directly relevant or controlling here.

FACTUAL BACKGROUND

The California Court of Appeal set forth a factual background in its unpublished opinion (see Lodgment 4 at 2-3) which this Court summarizes and supplements with its own review of the record as follows:

At approximately 4:15 a.m. on August 1, 2007, Los Angeles County Sheriff's Deputy Shawn Dumser heard gunshots while on patrol in Hawaiian Gardens, California. Deputy Dumser saw a green Honda Civic in the area, and he pursued and stopped the vehicle. Dumser was acquainted with the Honda driver, Edward Solorzano ("Solorzano"), and knew him to be a gang member.

Solorzano was frightened and yelled: "Dumser. They're shooting at me. Those fuckers in the white car are shooting at me." Just then, a white car came into view. Officer Dumser pursued the white car, and the car stopped in a parking lot. Three men were in the white car. The men were later identified as Petitioner, a man named "Louis Duby," and a man named "Gustavo Aquino." Petitioner and Duby ran away. Dumser detained Aquino.

Another deputy responding to the scene saw Petitioner and Duby running. The deputy captured Duby, but Petitioner climbed a fence into a nursery. A third deputy, positioned near the nursery, arrested Petitioner. A .22-caliber magazine with three bullets was recovered in a search of the area around the nursery.

In a post-arrest interview with Deputy Dumser, Petitioner admitted that he was becoming a member of the Chivas gang that night. He also admitted that he had been armed with a gun, and he threw the gun as far as he could when he climbed over the fence into the nursery.

On August 7, 2007, Detective Brandt House interrogated Solorzano in jail. Solorzano told House that, while driving around on the night of the shooting, he noticed that he was being followed by a white car. Solorzano accelerated and ran multiple red lights in an attempt to get away, and several shots were fired at his vehicle by someone in the white car. Solorzano admitted that he was a member of the Hawaiian Gardens gang; and he believed that the men in the white car were from the rival Chivas or Artesia gangs.

The trial court granted a defense motion to bifurcate the trial on the guilt phase of the charges from the trial on the gang enhancement. During the first part of the trial, Detective House testified as the prosecution's gang expert. He testified that Solorzano was a member of the Hawaiian Gardens gang, Aquino was a member of the Chivas gang, and Petitioner and Duby were "affiliates" of the Chivas gang. Detective House testified that the shooting occurred in the territory of the Hawaiian Gardens gang. Detective House also testified that the Chivas gang was "for all intents and purposes" the same gang as the Artesia gang.

At the first part of the trial, Solorzano recanted the statements that he had made to Detective House, and the testimony that he had given at the preliminary hearing that was consistent with his statements to Detective House. Now, at the first part of the trial, Solorzano claimed a total lack of memory of the incident.

After the verdict on the offenses, the bifurcated second trial on the gang enhancement began. Detective House again testified as the prosecution's gang expert; and he testified that Hawaiian Gardens and Chivas/Artesia were criminal street gangs, and he also gave testimony establishing two prior "predicate offenses." Detective House opined,

based on a hypothetical which tracked the evidence, that Petitioner's offenses were committed for the benefit of the Chivas/Artesia gang.

PETITIONER'S CONTENTIONS

The Petition presents the following one ground for relief:

1. There was insufficient evidence to support the gang enhancement for the shooting conviction on count 3 because the prosecution's gang expert only presented evidence of one "predicate act" committed by the Artesia gang, and one "predicate act" committed by the Chivas gang; and Petitioner argues that, since the gang enhancement statute requires evidence of "two predicate acts" committed by one gang, that is, the same gang, and since he was only affiliated with the Chivas gang, there was insufficient evidence to support the enhancement, notwithstanding the prosecution's gang expert's testimony that Chivas and Artesia were essentially the same and could be counted as one gang. (See Petition at 6.)

DISCUSSION

I

STANDARD OF REVIEW

A. AEDPA Standards.

This case is governed by the provisions of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). See Koerner v. Grigas, 328 F.3d 1039, 1044 (9th Cir. 2003). As explained by the Supreme Court, the AEDPA "places a new constraint on the power of a federal habeas court to grant a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court." Williams v. Taylor, 529 U.S. 362, 412 (2000); see also

Miller-El v. Cockrell, 537 U.S. 322, 337 (2003) ("Statutes such as AEDPA have placed more, rather than fewer, restrictions on the power of federal courts to grant writs of habeas corpus to state prisoners.").

Under the AEDPA, a federal court may not grant a writ of habeas corpus on behalf of a person in state custody "with respect to any claim that was adjudicated on the merits in state court proceedings unless the adjudication of the claim (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C. §2254(d).

Section "2254(d)(1)'s 'contrary to' and 'unreasonable application' clauses have independent meaning." Bell v. Cone, 535 U.S. 685, 694 (2002). The Supreme Court has explained that:

> [u]nder the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

Williams, 529 U.S. at 412-13; see also Brown v. Payton, 544 U.S. 133,

141 (2005); Weighall v. Middle, 215 F.3d 1058, 1061 (9th Cir. 2000) (discussing Williams).

"A state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." Harrington v. Richter, ___ U.S. ___, 131 S.Ct. 770, 786 (2011) (quoting Yarborough v. Alvarado, 541 U.S. 652, 664 (2004)). "Under § 2254(d), a habeas court must determine what arguments or theories supported or . . . could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." Harrington, 131 S. Ct. at 786. It is not necessary for the state court to cite or even to be aware of the controlling federal authorities "so long as neither the reasoning nor the result of the state-court decision contradicts them." Early v. Packer, 537 U.S. 3, 8 (2002); see also Smith v. Hedgpeth, 706 F.3d 1099, 1102 (9th Cir. 2013) (citing Early).

While Supreme Court precedent is the only authority that is controlling under the AEDPA, this Court may also look to Ninth Circuit case law as persuasive authority "for purposes of determining whether a particular state court decision is an 'unreasonable application' of Supreme Court law." Howard v. Clark, 608 F.3d 563, 568 (9th Cir. 2010) (citation omitted).

Furthermore, the AEDPA provides that state court findings of fact are presumed to be correct unless a petitioner rebuts that presumption by clear and convincing evidence. See 28 U.S.C. §2254(e)(1); Miller-El v. Cockrell, 537 U.S. 322, 340 (2003) (citing § 2254(e)(1)).

Where a higher state court has denied a petitioner's claim

without substantive comment, a federal habeas court "looks through" such a denial to the "last reasoned decision" from a lower state court to determine the rationale for the state courts' denials of the claim. See Cannedy v. Adams, 706 F.3d 1148, 1156 (9th Cir. February 7, 2013) (citing, inter alia, Ylst v. Nunnemaker, 501 U.S. 797, 803 (1991)). There is a presumption that a claim that has been silently denied by a state court was "adjudicated on the merits" within the meaning of 28 U.S.C. § 2254(d), and that AEDPA's deferential standard of review applies, in the absence of any indication or state-law procedural principle to the contrary. See Johnson v. Williams, ___ U.S. ___, 133 S. Ct. 1088, 1094 and n.1 (February 20, 2013) (citing, inter alia, Richter, 131 S. Ct. at 784-85 and Ylst, 501 U.S. at 806). Here, looking through the California Supreme Court's silent denial of Petitioner's direct appeal, it is clear that the California Court of Appeal considered and denied the one ground presented in the instant First Amended Petition on the merits; and accordingly, AEDPA's deferential standard of review applies to that claim. See id.

B. Ground One: Sufficiency of Evidence of Gang Enhancement.

As noted, in Ground One Petitioner contends that the conviction and the 15-years-to-life sentence that he received as a result of the jury's "true" finding on the gang enhancement allegation were not supported by sufficient evidence. Petitioner apparently argues that the prosecution presented evidence that the Chivas gang (the gang that Petitioner was allegedly in the process of joining) committed one "predicate offense"; and the Artesia gang (of which Petitioner was not a member) committed another, single "predicate offense"; but neither the Chivas gang nor the Artesia gang committed the requisite "two or

more" predicate offenses required to satisfy the gang enhancement statute as set forth at P.C. § 186.22. (See Petition at 6; see also Lodgment 3, Petitioner's Opening Brief at 20, citing, inter alia, People v. Hernandez, 33 Cal. 4th 1040, 1047, 94 P.3d 1080, 1084-85 (2004).) Petitioner complains that the prosecution's expert improperly elided the difference between the Chivas gang and the Artesia gang, testifying that they were essentially one and the same gang; and this testimony allowed the prosecution to improperly argue that the statutory requirement of "two or more" predicate offenses committed by the same gang was satisfied. (See Petition at 6; Lodgment 3 at 20 et seq.)

1. California Court of Appeal Opinion.

The California Court of Appeal characterized Petitioner's contention as "there was insufficient evidence to support the gang enhancement because the prosecution only presented evidence of one predicate act by the Chivas gang"; and the Court of Appeal said "[w]e disagree." (Lodgment 4 at 5.)

The Court of Appeal stated that, under California law, a "criminal street gang" is "any ongoing organization, association, or group of three or more persons, whether formal or informal" that has as one of its "primary activities" the commission of one or more statutorily enumerated criminal offenses and through its members engages in a "pattern of criminal gang activity." (Lodgment 4 at 5, citing P.C. § 186.22(f) and People v. Sengpadychith, 26 Cal.4th 316, 319-320 (2001).) "To establish a pattern of criminal gang activity, the prosecution must prove the commission of two or more predicate offenses committed on separate occasions by two or more gang members."

(Lodgment 4 at 5, citing P.C. §§ 186.22(a), (e), and (i), and People v. Duran, 97 Cal. App. 4th 1448, 1457 (2002).) The Court of Appeal also stated that under California law "[t]he charged offense may serve as a predicate offense." (See Lodgment 4 at 5, citing Duran, id.)

The Court of Appeal stated that:

> Here, the prosecution offered evidence of one qualifying offense committed by an Artesia gang member, and another qualifying offense committed by a member of the Chivas gang. The prosecution's gang expert, however, testified that the Artesia and Chivas gangs were elements of the same criminal street gang. He testified that Chivas "was once a very large clique or subgroup of Artesia; it got so big it became its own gang. However, Chivas and Artesia for all intents and purposes should be considered the same gang, because they are completely loyal to one another."

(Lodgment 4 at 5-6; quotation in original.)

The Court of Appeal noted Petitioner's argument that "the evidence shows that Chivas and Artesia were separate and distinct gangs even though they shared a common origin and continuing loyalty and allegiance to each other." (Lodgment 4 at 6.) In dismissing that argument, the Court of Appeal stated:

> We note that Detective House often referred to the Chivas and Artesia gangs separately, but concluded that they were a single criminal street gang "for all intents and purposes." Although somewhat idiomatic, the phrase "for all intents and purposes" means for every functional, relevant. or material purpose. Despite any semantic issue, the gang expert concluded that Chivas and Artesia were a single gang

based on his unchallenged expertise. The predicate acts element of the gang enhancement is a factual question and the jury could reasonably interpret House's testimony as establishing that Chivas and Artesia was a single gang.

(Lodgment 4 at 6.)

Lastly, the Court of Appeal stated that "[i]n any event, there was one uncontested predicate act, and the current offense qualifies as a second predicate act." (Lodgment 4 at 6, citing Duran, 97 Cal. App. 4th at 1457.)

2. Applicable Federal Law.

The Fourteenth Amendment's Due Process Clause guarantees that a criminal defendant may be convicted only "upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358, 364 (1970). The Supreme Court subsequently announced the federal standard for determining the sufficiency of the evidence to support a conviction in Jackson v. Virginia, 443 U.S. 307 (1979). See Fiore v. White, 531 U.S. 225, 228-229 (2001) ("We have held that the Due Process Clause of the Fourteenth Amendment forbids a State to convict a person of a crime without proving the elements of that crime beyond a reasonable doubt") (citing Jackson, 443 U.S. at 316 and In re Winship, 397 U.S. at 364); see also Juan H. v. Allen, 408 F.3d 1262, 1274 (9th Cir. 2005) (Jackson standard applies to federal habeas claims attacking the sufficiency of the evidence to support a state conviction); Chein v. Shumsky, 373 F.3d 978, 982-84 (9th Cir. 2004) (en banc) (same). Under the Jackson standard, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any

rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson, 443 U.S. at 319 (emphasis in original). "Put another way, the dispositive question under Jackson is 'whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt.'" Chein, 373 F.3d at 982-83 (quoting Jackson). In applying the Jackson standard, the federal court must refer to the substantive elements of the criminal offense as defined by state law at the time that a petitioner committed the crime and was convicted, and look to state law to determine what evidence is necessary to convict on the crime charged. See Jackson, 443 U.S. at 324 n.16; see also Boyer v. Belleque, 659 F.3d 957, 965 (9th Cir. 2011) (when assessing sufficiency of evidence claim in habeas petition, court looks to state law to establish elements of crime, then turns to federal question of whether state court was objectively unreasonable in concluding that evidence was sufficient) (citation, bracketed material, and internal punctuation omitted).

"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., 408 F.3d at 1274. All evidence must be considered in the light most favorable to the prosecution. Jackson, 443 U.S. at 319. When the factual record supports conflicting inferences, the federal court must presume - even if it does not affirmatively appear on the record - that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution. Jackson, 443 U.S. at 326; see also Wright v. West, 505 U.S. 277, 296-97 (1992) (citing Jackson and discussing presumption resolving conflicting inferences in

favor of prosecution); Bruce v. Terhune, 376 F.3d 950, 957 (9th Cir. 2004) (per curiam) (citing Jackson).

Moreover, a reviewing court "must respect the province of the jury to determine the credibility of witnesses, resolve evidentiary conflicts, and draw reasonable inferences from proven facts by assuming that the jury resolved all conflicts in a manner that supports the verdict." Walters v. Maass, 45 F.3d 1355, 1358 (9th Cir. 1995). Furthermore, "[a] jury's credibility determinations are . . . entitled to near-total deference under Jackson." Bruce, 376 F.3d at 957; see also Schlup v. Delo, 513 U.S. 298, 330 (1995) ("under Jackson, the assessment of the credibility of witnesses is generally beyond the scope of review"); Marshall v. Lonberger, 459 U.S. 422, 434 (1983) (federal habeas court cannot redetermine the credibility of a witness when the demeanor of the witness was not observed by the federal court). It is also well-settled that the testimony of even a single witness is sufficient to support a conviction under the Jackson standard. See Bruce, 376 F.3d at 957-58 (testimony of a single witness is sufficient to uphold a conviction); see also United States v. McClendon, 782 F.2d 785, 790 (9th Cir. 1986) (same); United States v. Larios, 640 F.2d 938, 940 (9th Cir. 1982) (same). Furthermore, "[c]ircumstantial evidence and inferences drawn from it may be sufficient to sustain a conviction." Walters v. Maass, 45 F.3d 1355, 1358 (9th Cir. 1995) (citation and internal quotation marks omitted). See also Jones v. Wood, 207 F.3d 557, 563 (9th Cir. 2000) (evidence may be found sufficient even where it "was almost entirely circumstantial and relatively weak"; and fact that reviewing court may have reached different result or have reasonable doubt not enough to overcome Jackson's "high standard"). Ultimately, "it is the

responsibility of the jury - not the court - to decide what conclusions should be drawn from evidence admitted at trial." Cavazos v. Smith, ___ U.S. ___, 132 S. Ct. 2, 4 (2011) (per curiam).

Lastly, under AEDPA, federal courts must "apply the standards of Jackson with an additional layer of deference." Juan H., 408 F.3d at 1274; Boyer v. Belleque, 659 F.3d 957, 964 (9th Cir. 2011) (where Jackson claim is "subject to the strictures of AEDPA, there is a double dose of deference that can rarely be surmounted"). Even where a state court decision does not cite to or discuss the relevant Jackson standard, habeas relief is not warranted "so long as neither the reasoning nor the result of the state-court decision contradicts" Supreme Court precedent. Juan H., 408 F.3d at 1275 n.12 (quoting Early v. Packer, 537 U.S. 3, 8 (2002)). The question for a federal habeas court is whether "the state court in substance made an objectively unreasonable application of the Winship and Jackson standards for sufficiency of the evidence." Juan H., 408 F.3d at 1275 n.12.

3. Further Background, Legal Authorities.

The record reflects that the trial court correctly instructed the jury on the pertinent elements of the gang enhancement statute, P.C. § 186.22(b)(1), which are: (1) the group is an ongoing association of three or more persons sharing a common name, identifying sign, or symbol; (2) one of the group's primary activities is the commission of one or more statutorily enumerated criminal offenses; and (3) the group's members must engage in, or have engaged in, a pattern of criminal gang activity. (See 4 RT 1217.) See also Duran, 97 Cal. App. 4th at 1457 (setting forth elements of P.C. § 186.22(b)(1)).

The trial court also instructed the jury that:

> It is alleged in Counts 3 and 6 [sic] that the crimes charged were committed for the benefit of, at the direction of, or in association with a criminal street gang with the specific intent to promote, further, or assist in any criminal conduct by gang members. [¶] "Criminal street gang" means any ongoing organization, association, or group of three or more persons, whether formal or informal, () having as one of its primary activities the commission of one or more of the following criminal acts: Health and Safety violation 11378 [sic] and Penal Code section 245(a)(2) and (2) having a common name or common identifying sign or symbol and (3) whose members individually or collectively engage in, or have engaged, in a pattern of criminal gang activity. [¶] "Pattern of criminal gang activity" means the commission of, sustained juvenile petition for, or conviction of two or more of the following crimes, namely, Health and Safety Code section 11378 and Penal Code section 245(a)(2) . . . . [¶] . . . In determining this issue you should consider any expert opinion evidence offered, as well as evidence of a past or present conduct by gang members involving the commission of one or more of the identified crimes include the crimes charged in this proceeding.

(4 RT 2125-26; emphasis added.) See also Duran, 97 Cal. App. 4th 1448, 1457-58 (discussing requirement of "two or more enumerated 'predicate offenses'"; and noting that "[t]he charged crime may serve as a predicate offense").

As Respondent notes, Detective Brandt House testified as the

prosecution's gang expert at the first phase of the trial. (See 3 RT 987 et seq.) On direct examination, Detective House testified that "the primary rivals of Hawaiian Gardens are the Chivas and Artesia street gangs." (3 RT 1013.) He testified that Artesia was a criminal street gang with approximately 160 members, and that Artesia had "common identifying signs and signals," and Artesia claimed the entire city of Artesia and parts of East Lakewood as its territory. (3 RT 1014-15.) He also testified that Chivas was a criminal street gang with 130 members, and that Chivas had "common identifying signs and signals," and he said that Chivas shared Artesia's territory as their own territory. (2 RT 1015-16.) With regard to the relationship between Chivas and Artesia, Detective House explained that Chivas was once part of Artesia and then "it got so big it became its own gang," yet he said that "Chivas and Artesia for all intents and purposes - should be considered the same gang, because they are completely loyal to one another." (3 RT 1015.) Furthermore, on cross-exam, when Petitioner's defense counsel asked "are you making a difference between Artesia and Chivas, or are you counting Artesia and Chivas as one?," Detective House stated, "I'm counting them as one, because for all intents and purposes they're the same." (3 RT 1028-29.)

At the second phase of the bifurcated trial, on the gang enhancement charge (which was apparently held before the same jury that heard the first phase of the trial (see, e.g., 4 RT 2107 et seq.)), Petitioner's counsel informed the jury that "we will not present any witnesses on this particular count [i.e., the gang enhancement], but what I will ask to you do [sic] is consider the witnesses that have already been put forth as to these particular counts." (4 RT 2108.) The prosecution then re-called Detective

House. (4 RT 2108-09.) The prosecution had marked as "certified predicates" two cases, one involving a conviction of "Sal Fernandez" for assault with a firearm, in violation of P.C. § 245(a)(2); and one involving a conviction of "Leonardo Delgadillo" for a violation of California Health and Safety Code ["H.S."] § 11378 (which the Court's own review reveals concerns possession for sale of a controlled substance). (See 4 RT 2110-12.) Detective House identified Fernandez as a member of the Artesia gang; and he identified Delgadillo as a member of the Chivas gang. (4 RT 2111-12.) Detective House opined that the two separate offenses, of both Fernandez and Delgadillo, fell "within the primary activities of the Chivas criminal street gang." (4 RT 2112-13; emphasis added.) The prosecutor then posed a hypothetical to Detective House, recounting the details of the shooting and the fact that Petitioner admitted that, after the police asked him if he was a gang member, he said "I was becoming one tonight." (See 4 RT 2113-15.) Detective House then opined that the crimes mentioned in the hypothetical "were committed for the benefit of, in association with, and at the direction of the Chivas criminal street gang." (4 RT 2115.)

In closing at the second phase of the trial, the prosecutor effectively, though not always explicitly, argued that Chivas and Artesia were the same gang. (See 4 RT 2120 et seq.) He began by arguing that the "criminal street gang" at issue for the enhancement was Chivas, and he implied that the "predicate offenses" that he had earlier examined Detective House about, for violations of P.C. § 245(a)(2) and H.S. § 11378, also concerned Chivas (although, as noted above, the P.C. § 245(a)(2) offense was committed by Fernandez, a member of the Artesia gang, and the H.S. § 11378 was committed by

Delgadillo, a member of the Chivas gang. (See 4 RT 2120-21.) The prosecutor also noted that he had asked Detective House "[d]oes Chivas or Artesia have a common name or symbol?," and the Detective "said yes, the goat [sic], or for Artesia anything with an 'A'. They are known as Chivas, common name or symbol." (4 RT 2121.) The prosecutor then argued that the two identified predicate offenses satisfied the statutory requirement for a "pattern of criminal gang activity." (4 RT 2121.) The prosecutor argued that "[a]ll these elements have been met and I ask you to find this allegation true." (4 RT 2122.)

Petitioner's defense counsel also made a closing statement, essentially arguing that Petitioner was "impulsive" and had "ADHD" (see 4 RT 2122 et seq.); but he did not explicitly argue that the gang enhancement statute was not satisfied for a lack of evidence. (See id.)

4. Analysis.

At the threshold, this Court notes that federal habeas review is generally not available for claims that merely allege that a state court erred in the interpretation or application of its own state law. See, e.g., Estelle v. McGuire, 502 U.S. 62, 67-68 (1991) ("federal habeas corpus relief does not lie for errors of state law"); Hubbart v. Knapp, 379 F.3d 773, 779-80 (9th Cir. 2004) ("[f]ederal habeas corpus relief is generally unavailable for alleged error in the interpretation or application of state law") (citing, inter alia, Estelle; internal quotation marks and other citations omitted). Thus, to the extent that the California Court of Appeal found that, under California law, a charged offense could serve as a qualifying "predicate offense," or that two gangs with different names could

theoretically be treated as one gang if there was sufficient evidence to show that they were one gang, those legal conclusions are not subject to federal habeas review here, absent some further showing that those legal conclusions violated a constitutional right. See, e.g., Richmond v. Lewis, 506 U.S. 40, 50 (1992) (state law error is not cognizable on habeas review unless error was so "arbitrary or capricious as to constitute an independent due process or Eighth Amendment violation") (citation and internal quotation marks omitted). The Court's own review of California law confirms that those legal conclusions were consistent with California cases, and not so "arbitrary or capricious" as to constitute a due process violation. See, e.g., Duran, 97 Cal. App. 4th at 1457 ("[t]he charged crime may serve as a predicate offense"); People v. Gardeley, 14 Cal. 4th 605, 720-21 (1996) (gang expert's opinion may form basis for finding that elements of P.C. § 186.22 gang enhancement have been satisfied).

Petitioner's claim here is then quickly disposed of, in light of the California Court of Appeal's finding that the charged offense on count 3, for shooting at an occupied vehicle in violation of P.C. § 246, counted as one of the two required "predicate offenses" necessary to satisfy the statute. The version of P.C. § 186.22 in effect at the time of Petitioner's conviction (from January 1, 2010 to December 31, 2010), stated both that "a felony violation of [P.C.] Section 246" could justify an indeterminate sentence of 15 years to life; and a "pattern of criminal gang activity" could be established from evidence of convictions for "two or more of the following offenses," including "[s]hooting at an [] occupied motor vehicle, as defined in [P.C.] 246." See P.C. §§ 186.22(b)(4)(B), (e)(5). The jury could have reasonably found that Petitioner was acting "for the benefit of, at

the direction of, or in association with a criminal street gang" based on his admission that he was becoming a member of the Chivas gang on the night of the shooting. The prosecution also presented evidence that Leonardo Delgadillo, a Chivas member, had violated H.S. § 11378, and the prosecutor argued the possession offense could also be considered a "predicate offense" to satisfy P.C. § 186.22. See, e.g., P.C. § 186.22(e)(4). Thus, as the Court of Appeal reasonably found, Petitioner's conviction on the charged offense of shooting at an occupied vehicle, done for the benefit of Chivas, taken together with the conviction of Delgadillo, a Chivas member, for possession of a controlled substance, satisfied the statute's requirement of two predicate offenses showing a pattern of criminal gang activity. See, e.g., Duran, 97 Cal. App. 4th at 1457.

The Court notes that Respondent does not even discuss whether Petitioner's charged offense, together with Delgadillo's offense, could have satisfied the statute; and it could be said that the California Court of Appeal only mentioned this finding in passing. However, even assuming, arguendo, that for some reason Petitioner's charged offense and Delgadillo's conviction together did not satisfy the "two or more predicate offenses" requirement of the statute, the Court of Appeal's finding that the gang's expert's testimony also adequately supported the conviction is entitled to deference.

As noted, the Court of Appeal found that the prosecution's gang expert Detective House's use of the phrase "for all intents and purposes" effectively meant that "[d]espite any semantic issue, the gang expert [had] concluded that Chivas and Artesia were a single gang"; and accordingly the Court of Appeal found that "the jury could reasonably interpret House's testimony as establishing that Chivas and

Artesia was [sic] a single gang." (Lodgment 4 at 6.) In light of the standards set forth in Jackson and its progeny, and the deferential standard of AEDPA review applicable here, it cannot be said that no rational juror could have found that Chivas and Artesia were not a single gang. See, e.g., Cavazos v. Smith, ___ U.S. ___, 132 S. Ct. 2, 4 ("it is the responsibility of the jury - not the court - to decide what conclusions should be drawn from evidence admitted at trial"); see also Fuentes v. Gonzalez, 457 Fed. Appx. 695, 697-98 (9th Cir. 2011) (where state presented specific and thorough gang expert testimony, and fairminded jurists could disagree about correctness of California Court of Appeal's conclusion that evidence was sufficient to support conviction, federal habeas relief not warranted under Jackson and AEDPA standards) (citing, inter alia, Cavazos). Taken together, the jury could have found that Chivas and Artesia were effectively one gang; and that any combination of two of the three predicate offenses that it was presented with - that is, Fernandez's firearm assault for Artesia, Delgadillo's possession of a controlled substance for Chivas, or Petitioner's own charged offense for Chivas - could have satisfied the gang enhancement statute. Since the California Court of Appeal's opinion here was not contrary to, nor an unreasonable application of, clearly established federal law or, in particular, the Jackson standards for sufficiency of the evidence, habeas relief is not warranted on this claim.

ORDER

For all of the foregoing reasons, **IT IS HEREBY ORDERED THAT:**

1. The First Amended Petition **IS DENIED;**

2. This Court declines to issue a Certificate of

Appealability;[2] and

3. Judgment be entered denying and dismissing the First Amended Petition with prejudice.

IT IS SO ORDERED.

DATED: 7-17-15

VICTOR B. KENTON
UNITED STATES MAGISTRATE JUDGE

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[2] Under 28 U.S.C. §2253(c)(2), a COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." The Supreme Court has held that, to obtain a Certificate of Appealability under §2253(c), a habeas petitioner must show that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further'." Slack v. McDaniel, 529 U.S. 473, 483-84, 120 S.Ct. 1595 (2000)(internal quotation marks omitted); see also Miller-El v. Cockrell, 537 U.S. 322, 336, 123 S.Ct. 1029 (2003). After review of Petitioner's contentions herein, this Court concludes that Petitioner has not made a substantial showing of the denial of a constitutional right, as is required to support the issuance of a COA.