UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SEAN MERMER, Petitioner, v. NEIL McDOWELL, Respondent.	NO. CV 16-932-VAP(E) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable Virginia A. Phillips, United States District Judge, pursuant to 28 U.S.C. section 636 and General Order 05-07 of the United States District Court for the Central District of California.

PROCEEDINGS

Petitioner, a state prisoner represented by counsel, filed a "Petition for Writ of Habeas Corpus By a Person in State Custody" on February 10, 2016, accompanied by a Memorandum ("Pet. Mem."). Respondent filed an Answer on March 30, 2016, asserting that Grounds

Seven, Eight, Nine, Ten and Eleven of the Petition were unexhausted. Petitioner filed a Traverse on April 7, 2016, disputing Respondent's arguments and conditionally requesting leave to amend the Petition to delete any of the claims that the Court determined to be unexhausted.

On April 27, 2016, the Court issued an "Order Adjudicating Exhaustion Issues, Deeming Petition Amended and Requiring Supplemental Answer." The Court found to be unexhausted Ground Nine and that portion of Ground Eleven which was based on Ground Nine. The Court deemed the Petition to be amended to delete those Grounds.

On May 23, 2016, Respondent filed a Supplemental Answer to the Petition, as deemed amended by the Court's April 27, 2016 Order. On June 8, 2016, Petitioner filed a second Traverse.

BACKGROUND

The State charged Petitioner and co-defendants Taaj Martin, Norman Cole and Patrick Birdsong with the murder of Richard Juarez and the attempted murders of Richard De la Cruz, Chloe McCarty and Ashleigh Rodriguez (Clerk's Transcript ["C.T."] 817-26). In an initially separate case, the State charged Martin alone with the murder of William McKillian (C.T. 730-31). Prior to trial, the court granted the prosecution's motion to consolidate the two cases (Augmented Reporter's Transcript of Proceedings on November 4, 2010, at 22; C.T. 755).

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A jury found Petitioner and his co-defendants guilty of the murder of Juarez and the attempted murder of De la Cruz (Reporter's Transcript ["R.T."] 7805-07, 7809-11, 7814-15, 7817-19; C.T. 1311, 1313, 1318-19, 1324-25, 1330-33, 1335-36). The jury acquitted Petitioner and Cole of the attempted murders of McCarty and Rodriguez, but was unable to reach a verdict on those attempted murder counts as to Martin and Birdsong, and the court declared a mistrial as to those counts (R.T. 7802-05, 7816-17, 7820; C.T. 1321-22, 1327-28, 1333-34, 1336-37). The jury found Martin not guilty of the murder of McKillian (R.T. 7813-14; C.T. 1331, 1338).

The jury found Martin, Birdsong and Cole guilty of street terrorism and found true as to all defendants the gang enhancement allegations in connection with the murder of Juarez and the attempted murder of De la Cruz (R.T. 7805-20; C.T. 1312, 1314-15, 1318, 1320, 1323-24, 1326).

The jury found not true the allegations that Martin and Birdsong personally and intentionally discharged a firearm causing Juarez' death and personally and intentionally discharged a firearm in the commission of the attempted murders (R.T. 7806, 7808; C.T. 1311, 1330). However, the jury found true the allegations that: (1) Martin and Birdsong personally and intentionally discharged a firearm within the meaning of California Penal Code section 12022.53(c); (2) Martin and Birdsong personally used a firearm within the meaning of California Penal Code section 12022.53(b); (3) a principal personally and intentionally discharged a firearm which caused Juarez' death within the meaning of California Penal Code sections 12022.53(d) and

12022.53(e)(1); and (4) a principal personally and intentionally discharged a firearm within the meaning of California Penal Code section 12022.53(b) and (e) (R.T. 7806-07, 7810; C.T. 1311-12).[1] The jury also found true the firearm enhancements alleged against Petitioner and Cole (R.T. 7806-7820; C.T. 1318-19, 1324-25, 1330-38).

Petitioner admitted suffering a prior conviction qualifying as a "strike" within the meaning of California's Three Strikes Law, California Penal Code sections 667(b) - (i) and 1170.12(a) - (d) (R.T. 8112).[2] Petitioner received a sentence of fifty years to life (R.T. 8118-19; C.T. 1386-88).

The California Court of Appeal ordered a correction to the abstract of judgment with respect to Cole's sentence but otherwise affirmed the judgment as to all defendants (Respondent's Lodgment 10; People v. Martin, 2014 WL 3736212 (Cal. App. July 30, 2014), cert. denied, 135 S. Ct. 1850 (2015)). The California Supreme Court

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[1] Section 12022.53(e)(1) provides that the firearm enhancements contained in that section "shall apply to any person who is a principal in the commission of an offense if both of the following are pled and proved: [¶] (A) The person violated subdivision (b) of Section 186.22. [¶] (B) Any principal in the offense committed any act specified in subdivision (b), (c), or (d)."

[2] The Three Strikes Law consists of two nearly identical statutory schemes. The earlier provision, enacted by the Legislature, was passed as an urgency measure, and is codified as California Penal Code §§ 667(b) - (I) (eff. March 7, 1994). The later provision, an initiative statute, is embodied in California Penal Code § 1170.12 (eff. Nov. 9, 1994). See generally People v. Superior Court (Romero), 13 Cal. 4th 497, 504-05, 53 Cal. Rptr. 2d 789, 917 P.2d 628 (1996). The State charged Petitioner under both versions (C.T. 616, 824).

summarily denied Petitioner's petition for review, as well as those of his co-defendants (Respondent's Lodgment 15).

SUMMARY OF RELEVANT TRIAL EVIDENCE

The following summary is taken from the opinion of the California Court of Appeal in People v. Martin, 2014 WL 3736212 (Cal. App. July 30, 2014), cert. denied, 135 S. Ct. 1850 (2015). See Slovik v. Yates, 556 F.3d 747, 749 n.1 (9th Cir. 2009) (taking factual summary from state court decision).

Murder of William McKillian

> On the morning of November 3, 2009, appellant Taaj Zakee Martin, a member of the Venice Shoreline Crips gang in the Venice area of Los Angeles, learned that his friend and fellow Venice Shoreline Crips gang member, William Charles McKillian, Jr., had been associating and regularly staying with Martin's ex-girlfriend, Raquel Miller, with whom Martin had broken up about a month earlier. Martin telephoned a female cousin of McKillian who lived next door to Miller, asking why she had not told him that McKillian and Miller had been "messin' around."
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> Sometime around 2:00 p.m. McKillian telephoned Martin on a cellphone borrowed from his cousin and was overheard saying "Hey, Cuz, where you at?" At about 3:30 p.m. McKillian again telephoned Martin on a phone borrowed from

another cousin, apparently upset, saying "You told me to come down here. I'm here. Where are you?" McKillian returned the phone and walked toward the area of 7th and Broadway near Oakwood Park in Venice. A few minutes later, his cousin heard gunshots. McKillian was shot and killed in a nearby alley.

On a witness's tip, the police recovered the murder weapon from a dumpster a few doors away. They found no fingerprints on the gun, and the DNA they recovered from it could not be linked conclusively to Martin. A few witnesses testified, with various degrees of uncertainty, to their observations of a man of various descriptions looking into the dumpster, and running through the alley.

Soon after the killing, word spread among local residents and friends that Santa Monica 13, a "Mexican" street gang, was responsible for killing McKillian. McKillian's cousin, who had heard of the nearby shooting and knew that Martin and McKillian were close friends, texted Martin's phone from the site of the shooting about 15 minutes later, asking if he was okay; Martin's only response was "Why?"

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Murder of Richard Juarez and Attempted Murder of Richard De la Cruz

Shortly before 9:00 p.m. on the evening of November 3, Richard Juarez and Richard De la Cruz had been sitting on a bench in Virginia Avenue Park in Santa Monica, with companions Chloe McCarty and Ashleigh Rodriguez. De la Cruz belonged to the Santa Monica 13 gang; Juarez belonged to a gang in another territory, but was associated with De la Cruz and the Santa Monica 13 gang. One or two African-American men approached the group, one wearing a hooded gray sweatshirt over a red striped shirt, the other a black sweatshirt; one had a black beanie hat. One man of the men fired several shots, killing Juarez.

Witnesses heard about eight or more gunshots, and multiple muzzle flashes were visible on the dashboard video recorder of a police car parked nearby on Pico Boulevard. After the shooting stopped, two men were seen running from the park, south across Pico Boulevard toward 22nd Street, one wearing a black sweatshirt, the other wearing a gray zip-up, hooded sweatshirt. One was wearing a black beanie cap.

A police officer who was parked nearby on Pico Boulevard heard the shots, saw the men running, and followed them in his car. When he turned onto 22nd Street he could no longer see the men he had followed, but saw a car parked with its headlights on. When the car pulled away as he shone his

spotlight on it, the officer followed and stopped the car.

After a backup officer arrived he detained the driver and passenger, appellants Norman Lovan Cole and Sean Alex Mermer. About 10 minutes later a police dog pulled appellant Patrick Dwight Birdsong, Jr., from under a parked van in a residential backyard on 22nd Street, near where Cole and Mermer had been parked. The police later found appellant Taaj Zakee Martin hiding under a tarp in a residential garage nearby on 21st Street. He was wearing a white T-shirt, jeans, red shoes, but no sweatshirt. The police found two abandoned handguns nearby, one with a silver barrel matching the description of the weapon used by one of the shooters. They also found a black beanie hat and a dark hooded sweatshirt in the corner of the yard, and a gray sweatshirt under a car parked on 21st Street. DNA testing linked the beanie cap and the black sweatshirt to Birdsong, with Mermer as a minor contributor to the DNA on the cap. Gunshot residue was found on Martin and Birdsong, indicated [sic] their recent contact with or close proximity to a gun that had been fired.

A search of the car revealed a cellphone registered to Martin, with DNA connecting Martin to it. Another phone found in the car was registered to Mermer's mother, at an address in Lancaster. Birdsong's fingerprints were on the Mermer phone, and on the car's front and rear passenger doors.

De la Cruz, Rodriguez, and McCarty were unable to identify any of the appellants.

(Respondent's Lodgment 10, pp. 3-4;[3] see People v. Martin, 2014 WL 3736212, at *1-2).

PETITIONER'S CONTENTIONS

Petitioner contends:

1. The trial court's refusal to sever Petitioner's trial from the trial of Martin for the McKillian murder allegedly violated Petitioner's rights to due process and a fair trial;

2. The trial court allegedly erred by refusing to bifurcate the gang enhancement allegations;

3. The evidence allegedly was insufficient to support Petitioner's convictions for wilful, deliberate and premeditated murder and attempted murder on a vicarious liability theory;

4. The evidence allegedly was insufficient to support the gang enhancement allegations;

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[3] The Court refers to Respondent's Lodgments in a related case, Birdsong v. Biter, CV 16-1015-VAP(E). Respondent did not lodge the same documents in the present action. However, Respondent did lodge copies of the Reporter's Transcript and the Clerk's Transcript in the present action.

5. The evidence allegedly was insufficient to support the jury's finding that a principal personally and intentionally discharged a firearm proximately causing Juarez' death;

6. The trial court allegedly violated Petitioner's rights to due process and a fair trial by admitting assertedly unreliable cell tower evidence;

7. The trial court allegedly violated Petitioner's constitutional rights by admitting the prior testimony of Richard de la Cruz;

8. The trial court allegedly violated Petitioner's rights to due process and a fair trial by failing to investigate a juror's alleged use of a cell phone during trial; and

9. The cumulative effect of the above-described alleged errors assertedly violated due process.

STANDARD OF REVIEW

Under the "Antiterrorism and Effective Death Penalty Act of 1996" ("AEDPA"), a federal court may not grant an application for 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); Woodford v. Visciotti, 537 U.S. 19, 24-26 (2002); Early v. Packer, 537 U.S. 3, 8 (2002); Williams v. Taylor, 529 U.S. 362, 405-09 (2000).

"Clearly established Federal law" refers to the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision on the merits. Greene v. Fisher, 132 S. Ct. 38, 44 (2011); Lockyer v. Andrade, 538 U.S. 63, 71-72 (2003). A state court's decision is "contrary to" clearly established Federal law if: (1) it applies a rule that contradicts governing Supreme Court law; or (2) it "confronts a set of facts . . . materially indistinguishable" from a decision of the Supreme Court but reaches a different result. See Early v. Packer, 537 U.S. at 8 (citation omitted); Williams v. Taylor, 529 U.S. at 405-06.

Under the "unreasonable application prong" of section 2254(d)(1), a federal court may grant habeas relief "based on the application of a governing legal principle to a set of facts different from those of the case in which the principle was announced." Lockyer v. Andrade, 538 U.S. at 76 (citation omitted); see also Woodford v. Visciotti, 537 U.S. at 24-26 (state court decision "involves an unreasonable application" of clearly established federal law if it identifies the correct governing Supreme Court law but unreasonably applies the law to the facts).

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"In order for a federal court to find a state court's application of [Supreme Court] precedent 'unreasonable,' the state court's decision must have been more than incorrect or erroneous." Wiggins v. Smith, 539 U.S. 510, 520 (2003) (citation omitted). "The state court's application must have been 'objectively unreasonable.'" Id. at 520-21 (citation omitted); see also Waddington v. Sarausad, 555 U.S. 179, 190 (2009); Davis v. Woodford, 384 F.3d 628, 637-38 (9th Cir. 2004), cert. dism'd, 545 U.S. 1165 (2005). "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 v. Richter, 562 U.S. 86, 101 (2011). This is "the only question that matters under § 2254(d)(1)." Id. at 102 (citation and internal quotations omitted). Habeas relief may not issue unless "there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [the United States Supreme Court's] precedents." Id. "As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Id. at 103.

In applying these standards to Petitioner's exhausted claims, the Court looks to the last reasoned state court decision, here the decision of the California Court of Appeal. See Delgadillo v. Woodford, 527 F.3d 919, 925 (9th Cir. 2008).

DISCUSSION

I. Petitioner's Challenge to the Trial Court's Refusal to Sever the McKillian Murder Count from the Counts Against Petitioner Does Not Merit Federal Habeas Relief.

A. Background

Following the trial court's consolidation of the Virginia Avenue Park shooting counts with the McKillian murder count, Petitioner's counsel filed a motion to sever the McKillian murder count (C.T. 857-68). The court denied the motion (Augmented Reporter's Transcript of Proceedings on December 1, 2010, May 3, 2011 and June 16, 2011, at 309-14; C.T. 894). The California Court of Appeal upheld this ruling, stating that: (1) the crimes were offenses of the same class;[4] (2) the evidence was cross-admissible because the defendants' belief that the Santa Monica 13 gang was responsible for the McKillian murder was alleged to be the defendants' motive for the Virginia Avenue Park shootings; (3) nothing about the McKillian murder would tend to inflame the jury against those defendants, including Petitioner, who were not charged with involvement in that murder; and (4) the jury's acquittal of Martin for the McKillian murder and the jury's acquittal

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[4] California Penal Code section 954 permits the joinder of "two or more different offenses of the same class of crimes or offenses. . . ." Murder and attempted murder are crimes of the same class. See People v. Thomas, 52 Cal. 4th 336, 350, 128 Cal. Rptr. 3d 489, 256 P.3d 603 (2011), cert. denied, 132 S. Ct. 1568 (2012); People v. Stanley, 39 Cal. 4th 913, 934, 47 Cal. Rptr. 3d 420, 140 P.3d 736 (2006), cert. denied, 549 U.S. 1269 (2007).

of Cole and Petitioner for the attempted murders indicated that the jury "was fully willing to separately consider the evidence relating to each of the defendants and each of the charges" (Respondent's Lodgment 10, at 18-19; see People v. Martin, 2014 WL 3736212, at *10).

B. Discussion

As the Ninth Circuit has recognized, there exists no "clearly established Federal law, as determined by the Supreme Court of United States," mandating the severance of joined charges. See Grajeda v. Scribner, 541 Fed. App'x 776, 778 (9th Cir. 2013), cert. denied, 134 S. Ct. 1899 (2014) ("The Supreme Court has not held that a state or federal trial court's denial of a motion to sever can, in itself, violate the Constitution.") (citations omitted); accord Hollie v. Hedgpeth, 456 Fed. App'x 685, 685 (9th Cir. 2011) (federal habeas relief unavailable for state court's joinder of different charges); see also Collins v. Runnels, 603 F.3d 1127, 1132-33 (9th Cir.), cert. denied, 562 U.S. 904 (2010) (joinder of defendants asserting mutually antagonistic defenses did not violate any clearly established Supreme Court law).

Indeed, the United States Supreme Court has held that "improper joinder does not, in itself, violate the Constitution." United States v. Lane, 474 U.S. 438, 446 n.8 (1986). The Supreme Court did state in United States v. Lane that misjoinder could violate the Constitution if misjoinder resulted in prejudice so great as to deny the defendant the constitutional right to a fair trial. See United States v. Lane, 474 U.S. at 446 n.8. According to the Ninth Circuit, however, this

statement in United States v. Lane was mere dictum. See Collins v. Runnels, 603 F.3d at 1132 (United States v. Lane concerned the joinder standards under the Federal Rules of Criminal Procedure, and "no constitutional issue was before the court."). Supreme Court dictum does not constitute "clearly established" law for purposes of the AEDPA standard of review. See Howes v. Fields, 132 S. Ct. 1181, 1187 (2012); see also Runningeagle v. Ryan, 686 F.3d 758, 776-77 (9th Cir. 2012), cert. denied, 133 S. Ct. 2766 (2013) (Supreme Court has not set forth clearly established law supporting a misjoinder claim).

Accordingly, because no clearly established Supreme Court law forbade joinder of the McKillian murder count to the counts against Petitioner, Petitioner is not entitled to federal habeas relief on his claim of allegedly improper joinder. See Carey v. Musladin, 549 U.S. 70, 77 (2006) ("Given the lack of holdings from this Court [on the issue presented], it cannot be said that the state court "unreasonabl[y] applied clearly established Federal law.") (internal brackets and citation omitted); Moses v. Payne, 555 F.3d 742, 758-59 (9th Cir. 2009) (habeas relief unavailable where the Supreme Court had articulated no "controlling legal standard" on the issue); 28 U.S.C. § 2254(d).

In any event, Petitioner has failed to demonstrate that the trial court's denial of the motion to sever rendered Petitioner's trial fundamentally unfair. Under Ninth Circuit law, undue prejudice from misjoinder exists only "if the impermissible joinder had a substantial and injurious effect or influence in determining the jury's verdict." Sandoval v. Calderon, 241 F.3d 765, 772 (9th Cir. 2000), cert. denied,

534 U.S. 847 (2001) and 534 U.S. 943 (2001) (citation omitted). Undue prejudice sometimes can arise when "joinder of counts allows evidence of other crimes to be introduced in a trial where the evidence would otherwise be inadmissible," or when a "strong evidentiary case" is joined with a "weaker one." Id. at 771-72. Petitioner "bears the burden to prove unfairness rising to the level of a due process concern." Park v. State of California, 202 F.3d 1146, 1149 (9th Cir.), cert. denied, 531 U.S. 918 (2000) (citation omitted).

Here, as the Court of Appeal indicated, evidence of the McKillian murder was relevant to the issue of Petitioner's motive and intent. See Comer v. Schriro, 480 F.3d 960, 985 (9th Cir.), cert. denied, 550 U.S. 966 (2007) (cross-admissibility of evidence significantly reduces potential of prejudice from joinder). Neither case was particularly weaker or stronger than the other. The trial court instructed the jury to consider the evidence separately as it applied to each defendant, to decide each charge for each defendant separately, and to consider the evidence of gang activity only for the limited purposes of: (1) deciding the issue of the defendants' intent, purpose or knowledge required to prove the gang-related crimes and enhancements charged; (2) deciding whether the defendants had a motive to commit the crimes; and (3) evaluating a witness' credibility or believability (R.T. 6712, 6742-43; C.T. 1285, 1303). See Zafiro v. United States, 506 U.S. 534, 539-41 (1993) (risk of prejudice from joinder of multiple defendants for trial is of the type that can be cured with proper instructions); New v. Uribe, 532 Fed. App'x 743, 744 (9th Cir.), cert. denied, 134 S. Ct. 701 (2013) (joinder not unconstitutional where "evidence of both murders was relatively strong

and cross-admissible to prove identity or intent, and the trial court instructed the jury to consider each murder charge separately"). The jury is presumed to have followed the court's instructions. See Weeks v. Angelone, 528 U.S. 225, 226 (2000). Furthermore, as the Court of Appeal recognized, the jury's acquittal of Martin on the McKillian murder count and the jury's acquittal of Petitioner on the McCarty and Rodriguez attempted murder counts show that the jury was able to, and did, consider the charges separately. See Park v. California, 202 F.3d at 1150 (jury's failure to convict on all counts "is the best evidence of the jury's ability to compartmentalize the evidence") (citations and internal quotations omitted). Petitioner has failed to demonstrate that the trial court's denial of his severance motion violated the Constitution. Accordingly, Petitioner is not entitled to relief on Ground One of the Petition.

II. The Trial Court's Failure to Bifurcate the Gang Enhancement Allegations Does Not Merit Federal Habeas Relief.

Prior to trial, Petitioner moved to bifurcate the gang enhancement allegations (C.T. 917-23). Following a hearing, the court denied the motion (Augmented Reporter's Transcript of Proceedings on December 1, 2010, May 3, 2011 and June 16, 2011, at 656-75; C.T. 1026). The Court of Appeal upheld this ruling, reasoning that the defendants, including Petitioner, had "identified no evidence that was admissible in the trial only by virtue of the gang enhancement allegations, but would have been inadmissible to establish the appellants' guilt of the substantive offenses," and that "the evidence of gang involvement and activity was central to the prosecution's

proof of the appellants' motive for the Virginia Avenue Park shooting" (Respondent's Lodgment 10, p. 18; see People v. Martin, 2014 WL 3736212, at *9).

As indicated above, there exists no clearly established Supreme Court law supporting a misjoinder claim. See Runningeagle v. Ryan, 686 F.3d at 776-77. For this reason alone, Petitioner is not entitled to federal habeas relief on his challenge to the trial court's refusal to bifurcate the gang enhancement allegations. See 28 U.S.C. § 2254(d); Carey v. Musladin, 549 U.S. at 77; Moses v. Payne, 555 F.3d at 758–59.

In any event, Petitioner has not shown that the failure to bifurcate rendered Petitioner's trial fundamentally unfair. In California, a court has discretion to bifurcate the trial of a gang enhancement allegation. People v. Hernandez, 33 Cal. 4th 1040, 1049-51, 16 Cal. Rptr. 3d 880, 94 P.3d 1040 (2004). However, bifurcation is unnecessary where the evidence supporting the gang enhancement allegation is admissible with respect to the issue of guilt. Id. at 1049-50. Moreover, even if some of the evidence offered to prove the enhancement allegation is inadmissible at the trial on the charged offense, a court may deny bifurcation where additional factors favor a unitary trial. Id. at 1050.

Here, as the Court of Appeal held, the gang evidence was admissible with respect to the Virginia Avenue Park offenses in order to show intent and motive. See People v. Hernandez, 33 Cal. 4th at 1087 (evidence concerning alliance between two gangs relevant to

issues of motive and intent); see also Monarrez v. Alameda, 268 Fed. App'x 651, 652 (9th Cir.), cert. denied, 555 U.S. 859 (2008) (evidence of gang membership relevant to show motive); Windham v. Merkle, 163 F.3d 1092, 1103-04 (9th Cir. 1998) (in prosecution for murder, attempted murder and assault on an aiding and abetting theory, testimony of gang expert regarding retributive behavior between rival gangs relevant to demonstrate defendant's motive for participating in the alleged crimes); Rodarte v. Ducart, 2015 WL 9914180, at *8-9 (C.D. Cal. Nov. 2, 2015), adopted, 2016 WL 304292 (C.D. Cal. Mar. 24, 2016) (failure to bifurcate gang enhancement did not entitle the petitioner to habeas relief where gang evidence was relevant to issue of retaliatory motive for underlying crimes of murder and attempted murder); Morrison v. Denny, 2014 WL 2013393, at *7-8 (C.D. Cal. Apr. 8, 2014), adopted, 2014 WL 2011687 (C.D. Cal. July 7, 2014) (failure to bifurcate gang enhancement did not entitle petitioner to habeas relief where gang evidence was admissible to establish motive for retaliatory gang shooting).

For the foregoing reasons, the Court of Appeal's rejection of this claim was not contrary to, or an objectively unreasonable application of, any clearly established Federal Law as determined by the Supreme Court of the United States. See 28 U.S.C. § 2254(d); Harrington v. Richter, 562 U.S. 86, 100-03 (2011). Petitioner is not entitled to federal habeas relief on this claim.

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III. Petitioner's Challenges to the Sufficiency of the Evidence Do Not Merit Federal Habeas Relief.

A. Governing Legal Principles

On habeas corpus, the Court's inquiry into the sufficiency of evidence is limited. Evidence is sufficient unless the charge was "so totally devoid of evidentiary support as to render [Petitioner's] conviction unconstitutional under the Due Process Clause of the Fourteenth Amendment." Fish v. Cardwell, 523 F.2d 976, 978 (9th Cir. 1975), cert. denied, 423 U.S. 1062 (1976) (citations and quotations omitted). A conviction cannot be disturbed unless the Court determines that no "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 317 (1979). A verdict must stand unless it was "so unsupportable as to fall below the threshold of bare rationality." Coleman v. Johnson, 132 S. Ct. 2060, 2065 (2012).

Jackson v. Virginia establishes a two-step analysis for a challenge to the sufficiency of the evidence. United States v. Nevils, 598 F.3d 1158, 1164 (9th Cir. 2010) (en banc). "First, a reviewing court must consider the evidence in the light most favorable to the prosecution." Id. (citation omitted); see also McDaniel v. Brown, 558 U.S. 120, 133 (2010).[5] At this step, a court "may not

[5] The Court must conduct an independent review of the record when a habeas petitioner challenges the sufficiency of the evidence. See Jones v. Wood, 114 F.3d 1002, 1008 (9th Cir. 1997).

usurp the role of the trier of fact by considering how it would have resolved the conflicts, made the inferences, or considered the evidence at trial." United States v. Nevils, 598 F.3d at 1164 (citation omitted). "Rather, when faced with a record of historical facts that supports conflicting inferences a reviewing court must presume - even if it does not affirmatively appear in the record - that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." Id. (citations and internal quotations omitted); see also Coleman v. Johnson, 132 S. Ct. at 2064 ("Jackson leaves [the trier of fact] broad discretion in deciding what inferences to draw from the evidence presented at trial, requiring only that [the trier of fact] draw reasonable inferences from basic facts to ultimate facts") (citation and internal quotations omitted); Cavazos v. Smith, 132 S. Ct. 2, 4 (2011) ("it is the responsibility of the jury — not the court — to decide what conclusions should be drawn from evidence admitted at trial"). The State need not rebut all reasonable interpretations of the evidence or "rule out every hypothesis except that of guilt beyond a reasonable doubt at the first step of Jackson [v. Virginia]." United States v. Nevils, 598 F.3d at 1164 (citation and internal quotations omitted). Circumstantial evidence and the inferences drawn therefrom can be sufficient to sustain a conviction. Ngo v. Giurbino, 651 F.3d 1112, 1114-15 (9th Cir. 2011).

At the second step, the court "must determine whether this evidence, so viewed, is adequate to allow *any* rational trier of fact to find the essential elements of the crime beyond a reasonable doubt." United States v. Nevils, 598 F.3d at 1164 (citation and

internal quotations omitted; original emphasis). A reviewing court "may not ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt." Id. (citations and internal quotations omitted; original emphasis).

In applying these principles, a court looks to state law for the substantive elements of the criminal offense, but the minimum amount of evidence that the Constitution requires to prove the offense "is purely a matter of federal law." Coleman v. Johnson, 132 S. Ct. at 2064.

B. Murder and Attempted Murder Convictions

1. Background

Petitioner contends the evidence did not suffice to support his murder and attempted murder convictions, arguing that he "had nothing to do with the killings and lacked the requisite pre-crime knowledge and intent to be convicted on a aiding and abetting theory" (Pet. Mem., p. 35). Petitioner contends he "just happened to be sitting in his car near the shooting," and there assertedly was no evidence showing that Petitioner knew about the McKillian murder, that Petitioner and the co-defendants "spoke about killing anyone," or that Petitioner waited in the car while Birdsong and Martin allegedly killed Juarez (id., pp. 38-39). Petitioner relies on evidence that three field showups allegedly generated no identifications, that eyewitnesses assertedly excluded Petitioner (a white male) as the shooter, and that no DNA, fingerprints or gunshot residue evidence

supposedly linked Petitioner to the murder (id., p. 39).

The Court of Appeal rejected Petitioner's claim, reasoning:

> Martin and Birdsong were members of the Venice Shoreline Crips gang. After McKillian, a member of that gang, was shot and killed, rumors attributing the killing to members of Santa Monica 13, a rival gang, circulated among McKillian's family and fellow Venice Shoreline Crips gang members. A few hours later Juarez, De la Cruz, members or associates of the Santa Monica 13 gang, were sitting in Virginia Avenue Park when one or two African-American men approached, shooting multiple rounds from a silver-barreled gun and killing Juarez.
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> Two similarly dressed African-American men were then seen running across Pico Boulevard and south on 22nd Street, toward a car parked with its headlights on - which drove away when a police car turned the corner. Two African-American men - members of a historically rival gang to the Santa Monica 13 gang - were found hiding in a nearby backyard and garage, along with clothes matching the description of those worn by the shooters. DNA testing linked the beanie cap and the black sweatshirt to Birdsong, with Mermer as a minor contributor to the DNA on the cap. Gunshot residue was found on Martin and Birdsong, indicated their recent contact with or close proximity to a gun that had been fired. Two handguns were also found discarded

nearby, one matching the silver-barrel gun described by one of Juarez's and De la Cruz's companions. In the car was a phone registered to Martin, and a phone bearing Birdsong's thumbprint. Telephone records for calls between the two phones found in the car driven by Mermer, during the time after McKillian was shot up to about 15 minutes before the Virginia Avenue Park shootings, indicated that Martin and Mermer had conversed by telephone shortly after the McKillian shooting, that Mermer and Cole had then driven from Lancaster to Venice, had picked up Martin in the Venice area, and had driven Martin and Birdsong to the Virginia Avenue Park shortly before the shooting at that location.

This evidence supports the jury's determinations that Martin and the others were aware of McKillian's killing and the rumors that the rival Santa Monica 13 gang was responsible, indicating a perceived motive to retaliate. It supports the determinations that after McKillian had been shot and before the Virginia Avenue Park shooting, Martin had communicated repeatedly with Mermer by telephone, and that Cole and Mermer had travelled to Venice to join Martin in retaliating against the Santa Monica 13 gang. It amply supports the jury's conclusion that Martin and Birdsong were active participants in the Virginia Avenue Park murder of Juarez and the attempted murder of De la Cruz, and that Cole and Mermer were aiders and abettors in those offenses.

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> The identification of Martin and Birdsong as the Virginia Avenue Park shooters is supported by the fact that after the shooting two men were seen running across Pico Boulevard to 22nd Street, that Birdsong and Martin were found hiding nearby bearing gunshot residue, and that clothes and a gun matching those used by the shooters were found abandoned near where they were found hiding. Cole's and Mermer's participation as aiders and abettors is supported by the evidence that after the shooting they were waiting nearby in Mermer's car, across from the park on 22nd Street in the direction that the shooters had run, that they drove away when the police officer approached from around the corner, and that Martin's phone was in Mermer's car, along with Mermer's phone bearing Birdsong's thumbprint. These facts, which we must presume were believed by the jury, are amply sufficient to establish the elements of the murder and attempted murder for which the appellants were convicted, and the participation of all four appellants in the offenses.

(Respondent's Lodgment 10, pp. 7-9; see People v. Martin, 2014 WL 3736212, at *4-5) (citation omitted).

2. Discussion

Under California law, "a person who aids and abets the commission of a crime is a 'principal' in the crime, and thus shares the guilt of the actual perpetrator." People v. Prettyman, 14 Cal. 4th 248, 259,

58 Cal. Rptr. 2d 827, 926 P.2d 1013 (1996). An aider and abettor "is a person who, 'acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense, (3) by act or advice aids, promotes, encourages or instigates, the commission of the crime.'" Id. at 259. Factors that are probative on the issue of knowledge and intent include "presence at the scene of the crime, [and] companionship and conduct before and after the offense, including flight." People v. Mitchell, 183 Cal. App. 3d 325, 330, 228 Cal. Rptr. 286 (1986); see also People v. Chagolla, 144 Cal. App. 3d 422, 429, 193 Cal. Rptr. 711 (1983).

Here, the evidence amply supported the jury's conclusion that Petitioner aided and abetted the murder of Juarez and the attempted murder of De la Cruz, including evidence that:

> Chloe McCarty told police she saw one shooter in a gray hooded sweatshirt fire a silver handgun at the group at the park (R.T. 3959). After the shooting, Ashleigh Rodriguez saw the two black males who had shot at her and her companions run down Pico toward 22nd Street (R.T. 4279-81).[6] The two men reached 22nd Street (R.T. 4292). One man was wearing a black hoodie and one was wearing a gray hoodie (R.T. 4269-70, 4281, 4298). Ashleigh testified at the preliminary hearing that the man wearing the gray hoodie was

[6] De la Cruz also told police that, after the shooting, he saw the two shooters running on Pico toward 22nd Street (R.T. 5784).

wearing a black beanie, although at trial she said she did not recall the beanie (R.T. 4283).

Officer Federico was stopped on Pico near 21st Street when he heard gunshots coming from Virginia Avenue Park (R.T. 3684-87). Federico drove eastbound on Pico toward the sound of the shots (R.T. 3688). He saw two suspects running across Pico and down 22nd Street (R.T. 3689-90).

As Federico followed the two people down 22nd Street, he observed a black Honda Fit parked on the side of the road (R.T. 3690). Federico lost sight of the two suspects (R.T. 3691). When Federico illuminated the Honda, the Honda quickly pulled away and began traveling down 22nd Street (R.T. 3691-92). Federico stopped the Honda at the next major intersection and waited for backup (R.T. 3692-93). Upon the arrival of other officers, Federico contacted the driver, who was Petitioner (R.T. 3693). The other occupant of the car was Cole (R.T. 3693-94). Federico's dashboard camera recorded muzzle flashes at the park, the suspects running across Pico and the stop of the Honda (R.T. 3695-99, 3903).

A police dog located Birdsong hiding under a van in the backyard of a residence, part of a duplex, at 2116 22nd Street near Pico, approximately 500 feet from the corner of Virginia Avenue Park (R.T. 4034, 4045, 4038-43). Police found a black or dark-colored sweatshirt in the backyard of

the residence where Birdsong was hiding (R.T. 4045-46). Police found fresh damage and a shoe print on a fence in the rear yard of a residence on 21st Street, across the alley from the residence where Birdsong was found (R.T. 4065-67). Police found a small caliber black revolver on the ground behind a patio chair in the side yard of the duplex at 2116-2118 22nd Street (R.T. 4231-33, 4237, 4252-53). Police located Martin hiding under a tarp in the garage at a house under construction located midway down the block on 21st Street (R.T. 4070-78).

A search of the Honda revealed a silver flip cell phone in the cup holder in the center console and a black "Boost" cell phone on the rear seat (R.T. 4323-25). Martin was the subscriber associated with the black cell phone (R.T. 4843, 5437, 5440). A duffle bag in the car's trunk contained clothing including a belt buckle with a "V" on it (R.T. 4326-28). The Venice Shoreline Crips' hand sign was a "V" shape (R.T. 6026).

Police found a knit beanie and a pair of gloves in the driveway of the residence at 2120 22nd Street, a home located next to the duplex (R.T. 4213-16). In an area between the homes at that location, police found a large .44 magnum silver revolver (R.T. 4217-18, 4248, 4252).

Birdsong's fingerprints were found on the passenger side rear door and front passenger side quarter panel of the

Honda and on the flip phone found inside the car (R.T. 4901, 4911-12, 4898-4902). Birdsong's DNA was consistent with that of the major contributor of DNA on the black beanie, a match rarer than one in a trillion (R.T. 5139, 5142-43). Petitioner's DNA was consistent with that of a minor contributor of DNA on the beanie, although this consistency was statistically possible in one in thirty (R.T. 5140-41). Birdsong was not excluded as a possible major contributor of DNA on the black sweatshirt, a match rarer than one in a million (R.T. 5144-45). Martin was not excluded as a possible source of DNA on the black cell phone, a match rarer than one in a trillion (R.T. 5146-47).

Cell phone records showed that, between the time of the McKillian murder and the Virginia Avenue Park shootings, several calls were made between Martin's phone and the phone registered to Petitioner's mother (R.T. 4873-79). Cell tower data traced the route of the phone of Petitioner's mother from Lancaster to Venice on the day of the Virginia Avenue Park shootings (R.T. 5485-5506).

A bedroom in the home of Petitioner's mother in Lancaster appeared to be occupied by a male. There, police recovered a photo album, photographs, a copy of a state court gang injunction against the Venice Shoreline Crips and a white t-shirt bearing the writing "Ghost Town"(R.T. 4330-44). "Ghost Town" is a reference to the Venice area of Los Angeles (R.T. 4341).

Photographs showed Petitioner throwing the "V" hand sign with Venice Shoreline Crips gang members (R.T. 6038-39, 6056-57). The photo album recovered from the house of Petitioner's mother contained writing concerning the Venice Shoreline Crips and photographs of Venice Shoreline Crips gang members (R.T. 6039-44). The prosecution's gang expert opined that Petitioner, Martin, Birdsong and Cole were members of the Venice Shoreline Crips (R.T. 6058-60).

From the above-described evidence, a rational juror could have concluded, beyond a reasonable doubt, that Petitioner aided and abetted the shootings at Virginia Avenue Park. See People v. Bishop, 202 Cal. App. 3d 273, 281 n.6, 248 Cal. Rptr. 678 (1988) ("It has been consistently held that one who was present . . . to take charge of an automobile and to keep the engine running and to give direct aid to others in making their escape, is a principal in the crime committed") (citations omitted); People v. Hammond, 181 Cal. App. 3d 463, 468 (1986) (defendant's "act of driving the getaway car was ample evidence of his intent to assist or facilitate [the perpetrator]"); see also Vasquez v. Keran, 2009 WL 256550, at *6 (C.D. Cal. Jan. 29, 2009) (evidence that the petitioner was driver of vehicle whose occupants shot at three men, killing one, sufficient to show the petitioner aided and abetted murder and attempted murder). Viewed in the light most favorable to the prosecution, the evidence showed that Petitioner was the getaway driver in the defendants' plan to shoot a rival gang member or members in retaliation for the McKillian murder. The evidence belies Petitioner's assertion that he "just happened to be sitting in his car near the shooting." Physical, fingerprint and DNA

evidence connected Petitioner and Cole, occupants of the Honda, with Martin and Birdsong, the shooters. Although Petitioner points to contrary evidence and inferences, this Court must presume that the jury resolved evidentiary conflicts in favor of the prosecution, and cannot revisit the jury's credibility determinations. See Cavazos v. Smith, 132 S. Ct. 2, 6-7 (2011) (jury entitled to credit prosecution experts' testimony despite conflicting testimony by defense experts); McDaniel v. Brown, 538 U.S. 120, 131-34 (2010) (ruling that the lower federal court erroneously relied on inconsistencies in trial testimony to deem evidence legally insufficient; the reviewing federal court must presume that the trier of fact resolved all inconsistencies in favor of the prosecution, and must defer to that resolution); United States v. Franklin, 321 F.3d 1231, 1239-40 (9th Cir.), cert. denied, 540 U.S. 858 (2003) (in reviewing the sufficiency of the evidence, a court does not "question a jury's assessment of witnesses' credibility" but rather presumes that the jury resolved conflicting inferences in favor of the prosecution).

Accordingly, the Court of Appeal's rejection of Petitioner's challenge to the sufficiency of the evidence to support his convictions for murder and attempted murder was not contrary to, or an objectively unreasonable application of, any clearly established Federal Law as determined by the Supreme Court of the United States. See 28 U.S.C. § 2254(d); Harrington v. Richter, 562 U.S. 86, 100-03 (2011). Petitioner is not entitled to federal habeas relief on this claim.

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C. Gang Enhancement

1. Primary Activities

California Penal Code section 186.22(b) authorizes the imposition of a sentence enhancement against "any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members. . . ." Section 186.22(e) defines a "criminal street gang" to mean "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 [enumerated] criminal acts . . . , having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity." The enumerated criminal acts include assault with a deadly weapon and unlawful homicide. Cal. Penal Code §§ 186.22(e)(1), (3).

The prosecution's gang expert testified that the expert: (1) was familiar with the Venice Shoreline Crips for the past three years; (2) had personal contact with approximately 60 members of that gang; (3) was familiar with the area claimed by that gang and went to the Oakwood area every day he was at work; and (4) regularly spoke to detectives and to gang members concerning the activities of the gang, including criminal activities (R.T. 6020-26). The gang expert testified that the primary activities of the Venice Shoreline Crips "range[d] from vandalisms to narcotic sales, to street robberies, to

assault with deadly weapons, and range up to even murder" (R.T. 6045).

Petitioner contends the evidence did not suffice to satisfy the "primary activities" element of section 186.22(b) because the prosecution's gang expert allegedly failed to testify that the Venice Shoreline Crips "consistently and repeatedly engaged in the requisite criminal conduct" (Pet. Mem., p. 48). The Court of Appeal ruled that the testimony of the prosecution's gang expert supplied substantial evidence to satisfy the "primary activities" element (Respondent's Lodgment 10, p. 15; see People v. Martin, 2014 WL 3736212, at *8).

The Court of Appeal's ruling was not unreasonable. The prosecution's expert testimony sufficed to show that the gang's primary activities included at least one of the enumerated offenses. See Cal. Penal Code §§ 186.22(e)(1), (3); People v. Lam Than Nguyen, 61 Cal. 4th 1015, 1058, 191 Cal. Rptr. 3d 182, 354 P.3d 90 (2015), cert. denied, 136 S. Ct. 1714 (2016) ("Sufficient proof of the gang's primary activities might consist of evidence that the group's members consistently and repeatedly have committed criminal activity listed in the gang statute. Also sufficient might be expert testimony. . . .") (quoting People v. Sengpadychith, 26 Cal. 4th 316, 324, 109 Cal. Rptr. 2d 851, 27 P.3d 739 (2001) (emphasis added; holding expert testimony sufficient); People v. Duran, 97 Cal. App. 4th 1448, 1465, 119 Cal. Rptr. 2d 272 (2002) ("The testimony of a gang expert, founded on his or her conversations with gang members, personal investigation of crimes committed by gang members, and information obtained from colleagues in his or her own and other law enforcement agencies, may be sufficient to prove a gang's primary activities.").

2. Specific Intent

As indicated above, California Penal Code section 186.22(b)(1) requires proof that the defendant harbored the "specific intent to promote, further, or assist in any criminal conduct by gang members." In response to a hypothetical question based on the prosecution's evidence, the gang expert testified that a crime such as the Virginia Avenue Park shooting would benefit the gang and the gang members who participated in the shooting. This benefit assertedly would consist of the enhancement of the gang's reputation for violence, the engendering of respect by manifesting a willingness to kill in retaliation for perceived disrespect, and the enhancement of the shooters' status within the gang (R.T. 6076-79). Petitioner contends the expert's testimony was speculative, arguing that the evidence did not suffice to prove Petitioner's specific intent because the prosecution assertedly presented no evidence that the perpetrators wore gang clothing, shouted gang slogans or flashed gang signs (Pet. Mem., pp. 45-47).

Section 196.22(b) "applies to *any* criminal conduct, without a further requirement that the conduct be 'apart from' the criminal conduct underlying the offense of conviction sought to be enhanced." People v. Albillar, 51 Cal. 4th 47, 66, 119 Cal. Rptr. 3d 415, 244 P.3d 1062 (2010) (original emphasis). "There is no requirement that the defendant act with the specific intent to promote, further or assist a *gang*; the statute requires only the specific intent to promote, further, or assist criminal conduct by *gang members*." Id. at 67 (original emphasis; citations omitted). Here, the gang expert's

testimony sufficed to show that Petitioner harbored the specific intent to "promote, further, or assist in any criminal conduct by gang members." See Emery v. Clark, 643 F.3d 1210, 1214 (9th Cir. 2011) (deeming sufficient gang expert's testimony that the petitioner shot the victim because the victim had "disrespected" the petitioner's gang and that it was important for the petitioner to maintain the respect accorded to him as a gang member); People v. Vang, 52 Cal. 4th 1038, 1048, 132 Cal. Rptr. 3d 373, 262 P.3d 581 (2011) ("Expert opinion that particular criminal conduct benefited a gang is not only permissible but can be sufficient to support the Penal Code section 186.22, subdivision (b)(1), gang enhancement.") (citation and internal quotations omitted); People v. Albillar, 51 Cal. 4th at 68 ("if substantial evidence establishes that the defendant intended to and did commit the charged felony with known members of a gang, the jury may fairly infer that the defendant had the specific intent to promote, further, or assist criminal conduct by those gang members"); People v. Romero, 140 Cal. App. 4th 15, 18-19, 43 Cal. Rptr. 3d 862 (2006) (evidence sufficient to show crime was gang-related, where evidence showed defendant was a gang member, shootings occurred in territory and at hangout of rival gang, and gang expert testified that shootings were committed for benefit of defendant's gang, although evidence did not show victims were gang members or that anyone involved wore gang colors or used gang signs).

3. Conclusion

For the foregoing reasons, the Court of Appeal's rejection of Petitioner's challenges to the sufficiency of the evidence to support

the gang enhancement was not contrary to, or an objectively unreasonable application of, any clearly established Federal Law as determined by the Supreme Court of the United States. See 28 U.S.C. § 2254(d); Harrington v. Richter, 562 U.S. at 100-03. Petitioner is not entitled to federal habeas relief on these claims.

D. Firearm Enhancement

California Penal Code section 12022.53(d) mandates an additional and consecutive term of imprisonment in the state prison for 25 years to life for any person who, in the commission of enumerated felonies including murder and attempted murder, "personally and intentionally discharges a firearm and proximately causes great bodily injury or death." Section 12022.53(e)(1)(A) provides that section 12022.53(d) also applies to any principal in the commission of the section 12022.53(d) offense who "violated subdivision (b) of Section 186.22." See Garcia v. Yarborough, 2006 WL 6185670, at *10 (C.D. Cal. Apr.18, 2006), aff'd, 310 Fed. App'x 988 (9th Cir.), cert. denied, 558 U.S. 837 (2009) ("Subdivision (e) of section 12022.53 authorizes the imposition of the enhanced sentence under 12022.53(d) to aiders and abettors if a criminal street gang allegation is also pled and proven.") (citation omitted).

As indicated above, the jury found "not true" the allegations that Martin and Birdsong personally and intentionally discharged a firearm which caused Juarez' death and personally and intentionally discharged a firearm in the commission of the attempted murder of De la Cruz. However, the jury found true the allegations that a

principal personally and intentionally discharged a firearm which caused Juarez' death and personally and intentionally discharged a firearm in the commission of the attempted murder of De la Cruz. Petitioner contends the jury's "not true" findings regarding the discharge of a firearm by Martin and Birdsong "prove[] that no principal personally and intentionally discharged a firearm proximately causing Juarez' death under [section] 12022.53(d)" (Pet. Mem., p. 77). Petitioner argues that "the jury never determined whether any of the four defendants discharged a firearm," and hence the evidence assertedly did not support the firearm enhancement (Pet. Mem., pp. 77-78).

The Court of Appeal rejected Petitioner's claim, reasoning that the verdicts showed the jury found beyond a reasonable doubt that "*some* principal in the offense -- either Martin, Birdsong or both -- discharged a handgun, but that it had some reasonable doubt as to *which one of them* did the actual shooting" (Respondent's Lodgment 10, p. 10; see People v. Martin, 2014 WL 3736212, at *5) (original emphasis). The Court of Appeal explained:

> . . . The fact that the jury was unable to identify the actual shooter does not constitute an affirmative determination that neither of them fired that shot. It does not negate the jury's affirmative determination that a principal in the offense personally and intentionally discharged the handgun that killed Juarez, notwithstanding that the evidence was not sufficient to identify which of the appellants was the shooter.

(Respondent's Lodgment 10, pp. 10-11; see People v. Martin, 2014 WL 3736212, at *5). The Court of Appeal also held that, although an aider and abettor must be convicted of the underlying offense to be subject to the sentence enhancements contained in California Penal Code section 12022.53, "there is no requirement that the principal who intentionally and personally discharged the firearm must be convicted of the offense, or even that he or she must be identified" (Respondent's Lodgment 10, p. 11; see People v. Martin, 2014 WL 3736212, at *5) (citing People v. Garcia, 28 Cal. 4th 1166, 1173-74, 124 Cal. Rptr. 2d 464, 52 P.3d 648 (2002)).[7]

Moreover, to the extent that the verdicts were arguably inconsistent, "inconsistent verdicts may not be used to demonstrate the insufficiency of the evidence for the count on which the defendant was convicted." United States v. Ares-Garcia, 420 Fed. App'x 707, 708 (9th Cir.), cert. denied, 132 S. Ct. 355 (2011) (citation and footnote omitted); see also United States v. Powell, 469 U.S. 57, 67 (1984) (review of challenge to the sufficiency of the evidence "should be independent of the jury's determination that evidence on another count was insufficient"). "[I]t is well established that inconsistent verdicts may stand, even when a conviction is rationally incompatible with an acquittal, provided there is sufficient evidence to support a guilty verdict." United States v. Suarez, 682 F.3d 1214, 1218 (9th

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[7] Thus, under the Court of Appeal's interpretation of California law, Petitioner's argument that "the prosecution presented no evidence to identify the person who personally and intentionally fired the firearm that killed Juarez" (Traverse, p. 20, filed June 8, 2016) misses the point. Under California law, specific identification is not required to support the enhancement.

Cir. 2012) (citation, internal quotations and brackets omitted); accord People v. Lewis, 25 Cal. 4th 610, 655, 106 Cal. Rptr. 2d 629, 22 P.3d 392, cert. denied, 534 U.S. 1045 (2001). As discussed above, the evidence in the present case was sufficient to support the guilty verdicts. See People v. Federico, 127 Cal. App. 3d 20, 33, 179 Cal. Rptr. 315 (1982) (evidence sufficient to support murder conviction despite negative finding on firearm allegation, which "was a determination more favorable to the defendant than the evidence warranted"). No clearly established Supreme Court law supports Petitioner's claim. See Xatruch v. Uribe, 2011 WL 3235740, at *1, 31-32 (C.D. Cal. May 18, 2011), adopted, 2011 WL 3235946 (July 27, 2011) (rejecting inconsistent verdict claim where jury found untrue allegations that the petitioner was armed with a firearm, but found true the allegation that the petitioner personally used a firearm).

The verdicts showed the jury found that Martin and Birdsong personally used, and personally and intentionally discharged, a firearm in the commission of the murder and that a principal personally and intentionally discharged a firearm causing death to Juarez. The "not true" finding on the allegation that Martin and Birdsong personally and intentionally discharged a firearm causing Juarez' death suggests only that the jurors may not have been able to decide whether it was Martin or Birdsong who fired the shot which killed Juarez. As the Court of Appeal recognized, under California law the jury could have found Petitioner guilty of the murder as an aider and abettor, and could have found true the firearm enhancement allegations as to Petitioner, even if the jury acquitted Martin and Birdsong of the firearm enhancements, as long as the jury found true

the allegation that a principal had personally and intentionally discharged a firearm causing Juarez' death. See People v. Garcia, 28 Cal. 4th at 1173-75.

As the Court of Appeal ruled, Petitioner's reliance on People v. Camino, 188 Cal. App. 4th 1359, 116 Cal. Rptr. 3d 173 (2010), is unavailing (see Respondent's Lodgment 10, p.11; People v. Martin, 2014 WL 3736212, at *6). In People v. Camino, Camino and a fellow gang member, Palacios, were involved in a gunfight with a rival gang, resulting in Palacios' death by a bullet of unknown origin. People v. Camino, 188 Cal. App. 4th at 1363. Palacios was the only shooter in Camino's group. Id. A jury found Camino guilty of Palacios' murder on a provocative act theory, and found true the allegation that Camino vicariously had discharged a firearm within the meaning of California Penal Code sections 12022.53(c) and (c)(1). However, because the only shooter in Camino's gang was the victim, and Palacios could not be a principal in his own murder, the Court of Appeal held that the evidence failed to support a section 12022.53(e)(1) enhancement. People v. Camino, 188 Cal. App. 4th at 1380-81. By contrast, in Petitioner's case, either Martin or Birdsong (or both) qualified as a "principal" or "principals" in the shooting; the victims were not the defendants' accomplices.

For the foregoing reasons, the Court of Appeal's rejection of this claim was not contrary to, or an objectively unreasonable application of, any clearly established Federal Law as determined by the Supreme Court of the United States. See 28 U.S.C. § 2254(d); Harrington v. Richter, 562 U.S. at 100-03. Petitioner is not entitled

to federal habeas relief on this claim.

IV. The Admission of the Testimony of a Custodian of Records Concerning Cell Tower Information Does Not Entitle Petitioner to Federal Habeas Relief.

A. Background

The following summary is taken from the California Court of Appeal's opinion. See Slovik v. Yates, 556 F.3d 747, 749 n.1 (9th Cir. 2009).

> Ricardo Leal, a "subpoena analyst" for Sprint Nextel telephone company, testified concerning the contents of telephone records produced by Sprint under subpoena, relating to calls between the cellular telephones registered to Martin and to Mermer's mother. Over objections to the adequacy of Leal's qualifications and the foundation for his testimony, Leal was permitted to testify to the nature of the information that can and cannot be determined from the subpoenaed records. The prosecution argued that the information provided by the telephone records, as explained by Leal, constitute[d] strong circumstantial evidence supporting the charges against all the defendants. It show[ed], the prosecution contend[ed], that Martin (in Venice) and Mermer (in Lancaster) had conversed by telephone shortly after the McKillian shooting, that Mermer and Cole had then driven from Lancaster to Venice, had picked up

Martin in the Venice area, and had taken Martin and Birdsong to the Virginia Avenue Park shortly before the shooting at that location.

Leal testified that he had been a Sprint subpoena compliance analyst for eight years, that he had received on-the-job training concerning how to interpret Sprint's telephone records for law enforcement, that he had been trained about how Sprint's records are generated and maintained, and that he had testified in court on these subjects about 15 times. He was then asked to explain the information collected by Sprint and provided in response to a subpoena.

Leal testified, for example, that the records show[ed] the number making the call; the date, time, and duration of the call; whether the call was inbound or outbound from the subscribing phone; whether the call was answered or sent to voicemail; and the locations of the towers from which the call was originated and terminated. He explained that the originating and terminating towers are usually, but not necessarily, those that are then closest to the originating and receiving phones, and some of the factors (such as distance, terrain, and density of cellphone usage) that affect[] whether the call is routed to the closest tower. And he explained how a call is sometimes handed off from one tower to another, usually due to changes in the telephone's location during the call. He explained also how the location of the towers can be identified and determined from

maps provided by Sprint.

The defendants objected to the foundation for Leal's testimony, based on his admitted lack of technical expertise as an engineer and his inability to explain how calls are routed beyond what he had been taught by Sprint. They argued that Leal was qualified to do no more than identify the records he had brought, and "as far as what this line [in the records] says, the records speak for themselves." "He cannot testify to what towers they came off of. That is for an expert to interpret, not him." The trial court overruled the objections.

Leal then testified to the information on the records he had produced, concerning the cellphone registered to Martin, and the phone registered to Mermer's mother in Lancaster, which had been found in Mermer's car after the shooting. Following Leal's direct testimony, the defendants examined him at length — and without limitation — about the meaning of his testimony and the information in the records he had provided, as well as the limits of his training and expertise.

(Respondent's Lodgment 10, pp. 20-22; see People v. Martin, 2014 WL 3736212, at *11-12 (footnote omitted).

Petitioner contends Leal's allegedly "unreliable and speculative" testimony exceeded Leal's expertise, purportedly in violation of due

process (Pet. Mem., pp. 55-60). The Court of Appeal rejected this claim, stating that the evidence showed "it was well within [Leal's] training and expertise to explain what the telephone company records do and do not show concerning the locations of the cellular towers to which calls had been routed, and the times and durations of those calls" (Respondent's Lodgment 10, p. 23; see People v. Martin, 2014 WL 3736212, at *12).

B. Discussion

"'The admission of evidence does not provide a basis for habeas relief unless it rendered the trial fundamentally unfair in violation of due process.'" Holley v. Yarborough, 568 F.3d 1091, 1101 (9th Cir. 2009) (citation omitted); see also Jammal v. Van de Kamp, 926 F.2d 918, 919 (9th Cir. 1991) (proper analysis on federal habeas review is "whether the admission of the evidence so fatally infected the proceedings as to render them fundamentally unfair"). "The Supreme Court has made very few rulings regarding the admission of evidence as a violation of due process." Holley v. Yarborough, 568 F.3d at 1101. "Although the Court has been clear that a writ should issue when constitutional errors have rendered the trial fundamentally unfair [citation], it has not yet made a clear ruling that admission of irrelevant or overly prejudicial evidence constitutes a due process violation sufficient to warrant issuance of the writ." Id. Therefore, Petitioner's challenges to the admission of Leal's testimony necessarily fail under the AEDPA standard of review. See 28 U.S.C. § 2254(d).

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In any event, the Court of Appeal was not unreasonable in rejecting Petitioner's challenge to Leal's testimony. Leal testified that he had worked as a subpoena analyst at Sprint/Nextel for eight years (R.T. 4829). Leal had received on-the-job training, including small classes concerning the infrastructure and working of cell towers and daily training in interpreting records for law enforcement and in testifying regarding records and their accuracy (R.T. 4829, 4832). Leal previously had testified approximately fifteen times (R.T. 4829-30). Under these circumstances, the admission of Leal's testimony did not render Petitioner's trial fundamentally unfair. See United States v. Graham, 796 F.3d 332, 364-65 (4th Cir. 2015), adopted in relevant part, ___ F.3d ___, 2016 WL 3068018, at *1 n.1 (4th Cir. May 31, 2016) (en banc) (affirming admission of testimony of Sprint/Nextel custodian of records concerning connections to and operations of cell sites and conditions affecting a cellphone's connection to a particular tower). To the extent Petitioner contends the challenged testimony was "unreliable," "the potential unreliability of a type of evidence does not alone render its introduction at the defendant's trial fundamentally unfair." Perry v. New Hampshire, 132 S. Ct. 716, 728 (2012) (citation omitted).

For the foregoing reasons, the Court of Appeal's rejection of this claim was not contrary to, or an objectively unreasonable application of, any clearly established Federal Law as determined by the Supreme Court of the United States. See 28 U.S.C. § 2254(d); Harrington v. Richter, 562 U.S. at 100-03. Petitioner is not entitled to federal habeas relief on this claim.

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V. The Admission of De la Cruz' Preliminary Hearing Testimony Does Not Entitle Petitioner to Federal Habeas Relief.

A. Introduction

California's hearsay rule permits the admission of former testimony if: (1) the witness is unavailable; and (2) the party against whom the former testimony is offered was a party to the prior proceeding and had the right and opportunity to cross-examine the witness with an interest and motive similar to that which that party has at the present hearing. See Cal. Evid. Code § 1291(a)(2). California Evidence Code section 240 defines the term "unavailable as a witness" to include a situation in which the proponent of the absent witness' statement "has exercised due diligence but has been unable to procure his or her attendance by the court's process." Cal. Evid. Code § 240(a)(5).

Petitioner contends the trial court improperly admitted the preliminary hearing testimony of Richard de la Cruz following the court's determination that De la Cruz was "unavailable" to testify at trial. The Court of Appeal ruled that the trial court had not erred in finding De la Cruz unavailable and that the admission of De la Cruz' preliminary hearing testimony did not prejudice the defendants, including Petitioner (Respondent's Lodgment 10, pp. 32-34; see People v. Martin, 2014 WL 3736212, at *16-18).

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B. Factual Background

1. Preliminary Hearing - December 10, 2009

During the preliminary hearing, the prosecutor told the court that Richard de la Cruz had been subpoenaed to testify but had said he would not appear (C.T. 23-24). The court issued a body attachment (C.T. 24). Later that afternoon, De la Cruz appeared and testified (C.T. 53-54). De la Cruz stated that he was at the park with Juarez, Rodriguez and McCarty when he heard shots coming from the parking lot (C.T. 55-56, 59). De la Cruz allegedly ran to the teen center (C.T. 56-57). De la Cruz said he told police officer Lozano that De la Cruz had seen nothing and did not "know who it was" (C.T. 60). Later in his testimony, De la Cruz admitted telling Lozano that De la Cruz allegedly had seen two Black males in their twenties (C.T. 62). He denied telling Lozano that the shooter wore a black shirt and grey hoodie (C.T. 63). De la Cruz first denied describing the other man to Lozano, but later said he had described the man as wearing a blue shirt (C.T. 63, 80).

De la Cruz denied telling Lozano that, when the two men walked up, Juarez said "Who are these tintos?" (C.T. 70-71, 74). De la Cruz said that Juarez said "Who are these fools?" (C.T. 71). He denied telling Lozano that one of the men said "What's up cuz" before the shooting (C.T. 64). De la Cruz denied being a self-admitted member of the Santa Monica 13 gang (C.T. 68). De la Cruz admitted he told Lozano that the shooter or shooters ran from the parking lot toward Pico after the shooting (C.T. 78). De la Cruz said that, when police

took him to a show-up of two individuals whom police had in custody, De la Cruz told police those two people were not involved in the incident (C.T. 76). De la Cruz denied telling Lozano "[i]t was those shoelaces," a derogatory term for Venice Shoreline Crips (C.T. 78-79).

2. Due Diligence Hearing - August 31, 2011

On August 9, 2011, the first day of trial, the court again issued a body attachment for De la Cruz (C.T. 1037). On August 31, 2011, during trial, the court held a "due diligence" hearing concerning efforts to locate De la Cruz (R.T. 3966-67; C.T. 1108). Detective Hee Seok Ahn and Officer Alfonso Lozano testified at the hearing.

a. Hee Seok Ahn

Detective Hee Seok Ahn testified as follows:

> De la Cruz was 17 and had attended Santa Monica High School, although he was not a current student (R.T. 3976-77). On August 2, 2011, Ahn ran a DMV check on De la Cruz, which yielded an "old address" in Santa Monica and indicated De la Cruz' license had been suspended or revoked (R.T. 3978). Ahn conducted a computer check of De la Cruz' addresses (R.T. 3983). On August 3, 2011, Ahn served the initial subpoena on De la Cruz at an apartment on Felton Street in Inglewood, apparently De la Cruz' current address (R.T. 3968-69, 3975-78). At that time, Ahn spoke to De la Cruz, who said, among other things, that he, De la Cruz, was

living at the Felton address with his mother, who confirmed that De la Cruz was living there (R.T. 3983). De la Cruz said he was not working and not attending school (R.T. 3983-84, 3990).

After De la Cruz failed to appear in court, Ahn contacted De la Cruz' mother but she would not tell him where her son was then living (R.T. 3984). De la Cruz' stepbrother also would not reveal De la Cruz' location (R.T. 3985). On August 12, 2011, Ahn went to the Felton residence to attempt to locate De la Cruz and spoke with De la Cruz' brother (R.T. 3969). The brother said that De la Cruz had left on August 7, the Sunday before De la Cruz was supposed to appear in court on August 9, and that the brother did not know where De la Cruz was (R.T. 3970-71). The brother said that De la Cruz "knew he [De la Cruz] was wanted and that he wasn't going to come to court to testify" (R.T. 3970). Also on August 12, Ahn made a "wanted persons flyer" for De la Cruz and distributed it to Santa Monica police department personnel (R.T. 3970-72). Ahn said he did so because De la Cruz went to school in Santa Monica and "hung out" there, and many officers were "familiar with him and his hangouts" (R.T. 3972). Ahn asked Officer Lozano to look for De la Cruz in Santa Monica, where De la Cruz was known to "hang out" (R.T. 3972). Ahn spoke with other officers about De la Cruz on a daily basis and told officers that De la Cruz might be at the high school, the Pico Youth Family Center, the Virginia Avenue Park area or in the Pico neighborhood

(R.T. 3973). Ahn asked Lozano to return to the Felton Street address on August 18 and asked Lozano to perform a computer search (R.T. 3973-74).

Ahn returned to the Felton Street address on the day of the due diligence hearing, August 31, and again spoke with De la Cruz' brother (R.T. 3973). The brother said that he did not know where De la Cruz was and had not spoken with him, but that his mother had spoken to De la Cruz (R.T. 3974).

Prior to coming to court for the hearing, Ahn performed a computer check to determine whether De la Cruz was in custody (R.T. 3974, 3987). Ahn found no new address for De la Cruz (R.T. 3974). The phone number for De la Cruz, which had been working when Ahn served the subpoena, was no longer working (R.T. 3975). Family members said they had no new phone number for De la Cruz (R.T. 3975).

b. Alfonso Lozano

Officer Alfonso Lozano testified as follows:

Lozano had known De la Cruz "since he was a kid," for Lozano's entire police career of seven years, and was familiar with De la Cruz' "hangouts" (R.T. 3993-94). De la Cruz was a Santa Monica 13 gang member whose father was a shotcaller for that gang (R.T. 3993). Lozano had last seen

De la Cruz in June of 2011 (R.T. 3995).

In early August, Detective Ahn contacted Lozano with the request that Lozano "keep an eye out" for De la Cruz (R.T. 3995). On August 12, 2011, Ahn, Lozano and another officer went to the Felton Street address, but De la Cruz was not there (R.T. 3995). Thereafter, Lozano performed daily computer checks to make sure that the warrant was still active and that De la Cruz had not been arrested in another county or jurisdiction (R.T. 3995). Lozano also went to various locations where he had contacted De la Cruz in the past and contacted Santa Monica 13 gang members, who said they did not know De la Cruz' whereabouts (R.T. 3996). On August 17, Lozano went to the Felton Street address, but De la Cruz' mother and "half brother" said they had not seen De la Cruz for the past few weeks (R.T. 3996).

The trial court said that, based on the evidence then presented, the court was not ready to find that De la Cruz was unavailable, noting that efforts to find De la Cruz were ongoing (R.T. 4012).

3. <u>Due Diligence Hearing - September 8, 2011</u>

Detective Ahn and Officer Lozano testified at a further due diligence hearing on September 8, 2011.

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At that time, Detective Ahn testified as follows:

On September 1, 2011, Ahn caused the bulletin concerning De la Cruz to be sent to agencies in Los Angeles County and other counties (R.T. 5466). On September 2, Ahn spoke to an Inglewood Police Department supervisor who said he had distributed the flyer to patrol and gang officers, and had briefed officers at roll call (R.T. 5466). Inglewood police conducted a computer check which showed no recent contacts with De la Cruz (R.T. 5467). A utilities check on the Felton Street address showed De la Cruz' father as the account holder at that location (R.T. 5466). Ahn knew De la Cruz and his parents, but was unaware of any other family members in the area (R.T. 5468).

Ahn served the initial subpoena on De la Cruz only, in the presence of De la Cruz' mother and stepbrother (R.T. 5469-71). Ahn did not serve the mother with a subpoena (R.T. 5471-72). Ahn explained to the mother that it was important that De la Cruz appear in court and that, if De la Cruz did not do so, the judge would probably find De la Cruz in contempt and issue an arrest warrant (R.T. 5471). De la Cruz' mother said she would have her son at court on the court date (R.T. 5471).

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Officer Lozano testified as follows:

Since the prior hearing, Lozano had continued to look for De la Cruz (R.T. 5453-55; C.T. 1138). Lozano and others conducted surveillance at the home of De la Cruz' father on August 31 and September 1, but observed no activity (R.T. 5455-56). On September 1, Lozano met with officials of other Los Angeles police agencies, including the West Los Angeles gang unit, the Pacific gang unit, the Culver City gang unit, the probation department, and an official in charge of all the Los Angeles west bureaus (R.T. 5456). Lozano told the agencies that De la Cruz was still wanted and officers were trying to locate him (R.T. 5456). A lieutenant said that he would pass on the information to the Los Angeles Police Department west and south bureaus and to all of the gang units (R.T. 5456).

Lozano said that he checked the warrant system every day to confirm that the warrant was still active (R.T. 5456). On September 1, Lozano spoke to a probation officer, who had no record of De la Cruz in juvenile facilities (R.T. 5456). On September 2, Lozano and his partner conducted an undercover surveillance of the home of De la Cruz' father, but again saw no activity, and no one answered the door (R.T. 5456-57). Lozano located a 2009 field identification card for De la Cruz' father and went to the address listed on the card, but no one answered the door (R.T. 5457).

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On September 3, Lozano conducted a surveillance of the Felton Street address but saw no activity (R.T. 5457). Later, Lozano returned to that address and spoke to De la Cruz' brother, who again said he had not seen or spoken to De la Cruz (R.T. 5457). Lozano went to three other locations which Detective Ahn reportedly said De la Cruz had used in the past, but was unsuccessful in locating De la Cruz at any of those locations (R.T. 5457-58).

Lozano returned to the home of De la Cruz' father and spoke to the father's alleged girlfriend, who claimed that she had not seen De la Cruz for approximately a year and had not seen the father for six months (R.T. 5458-59).

On Lozano's next work day, September 6, Lozano returned to one of the addresses he visited on September 3 and spoke to a woman who said she had no relationship with the De la Cruzes and did not know what the officers were doing there (R.T. 5459). Lozano ran the father through the DMV database and went to the addresses listed but was unsuccessful in locating either De la Cruz or his father (R.T. 5459). Lozano determined that De la Cruz was not in Sheriff's Department custody (R.T. 5459). Santa Monica community organizations where De la Cruz usually congregated had not seen or heard of De la Cruz (R.T. 5459-60).

Lozano talked to an officer who contacted De la Cruz' ex-girlfriend, who reportedly said she did not know De la

Cruz' whereabouts (R.T. 5460). Lozano conducted a surveillance of the home of the ex-girlfriend on September 6, to no avail (R.T. 5460). On September 7, Lozano knocked on the ex-girlfriend's door, but no one answered (R.T. 5460). Lozano and his partner had been patrolling the neighborhood frequented by De la Cruz without success (R.T. 5460-61).

The trial court then ruled that the prosecution had shown due diligence in attempting to locate De la Cruz, observing that the officers had made "more efforts in this case than I've seen in the vast majority of cases," and that it was clear that De la Cruz "does not wish to be here" and had been avoiding places at which he could be located (R.T. 5552-53). The court permitted the prosecution to introduce De la Cruz' preliminary hearing testimony (R.T. 5553, 5557-58; C.T. 1138).

C. Discussion

Petitioner contends the prosecution did not show due diligence because the prosecution assertedly should have subpoenaed De la Cruz' mother (Pet. Mem., p. 64). According to Petitioner, had the prosecution done so, the mother "could have produced De la Cruz" (id., pp. 64-65). Petitioner argues that California Penal Code section

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1328[8] required that Detective Ahn serve the subpoena on a parent of De la Cruz, and that the court should have compelled the mother to come to court and give information concerning her son's whereabouts (id., pp. 61-62). The Court of Appeal rejected these arguments, ruling that: (1) any alleged noncompliance with section 1328 did not affect the diligence inquiry; (2) the defendants, including Petitioner, had not shown that additional efforts to locate De la Cruz "would have helped"; and (3) the evidence "amply" supported the trial court's determination of due diligence (Respondent's Lodgment 10, p. 32; see People v. Martin, 2014 WL 3736212, at *17). The Court of Appeal also deemed the admission of the challenged testimony harmless because it was "more or less consistent with the observations and testimony of other witnesses and in some respects helpful to the . . . defense" (Respondent's Lodgment 10, p. 33; see People v. Martin, 2014 WL 3736212, at *17).

The Confrontation Clause prohibits the admission of an out-of-court testimonial statement at a criminal trial unless the witness is unavailable to testify and the defendant had a prior opportunity for cross-examination. Crawford v. Washington, 541 U.S. 36, 59 (2004) ("Crawford"). Neither side disputes that De la Cruz' preliminary hearing testimony was "testimonial" hearsay within the meaning of Crawford, or that the defense had a prior opportunity to cross-examine

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[8] At the time of Petitioner's trial, section 1328(b)(1) provided in pertinent part that service of a subpoena on a minor "shall be made on the minor's parent, guardian, conservator, or similar fiduciary. . . ." A 2016 amendment to the statute did not alter this particular provision. See 2016 Cal. Leg. Serv. Ch. 59 (S.B. 1471), approved by the Governor and filed with the Secretary of State on July 1, 2016.

De la Cruz (see C.T. 67-77 [defense cross-examination of De la Cruz]).

"The constitutional requirement that a witness be 'unavailable' stands on separate footing that is independent of and in addition to the requirement of a prior opportunity for cross-examination." United States v. Yida, 498 F.3d 945, 950 (9th Cir. 2007) (citations omitted). A witness is not "unavailable" for purposes of the hearsay exception for former testimony "'unless the prosecutorial authorities have made a good-faith effort to obtain [the witness'] presence at trial.'" Hardy v. Cross, 132 S. Ct. 490, 493 (2011) (quoting Barber v. Page, 390 U.S. 719, 724-25 (1968)); Windham v. Merkle, 163 F.3d 1092, 1102 (9th Cir. 1998); People v. Smith, 30 Cal. 4th 581, 609, 134 Cal. Rptr. 2d 1, 68 P.3d 302 (2003), cert. denied, 540 U.S. 1163 (2004) (noting good faith requirement of Barber v. Page is "similar" to due diligence requirement of California Evidence Code section 240(a)(5)). However, "the law does not require the doing of a futile act, and the extent of the effort the prosecutor must make is a question of reasonableness." United States v. Olafson, 213 F.3d 435, 441 (9th Cir.), cert. denied, 531 U.S. 914 (2000) (citation, quotations and brackets omitted).

In Ohio v. Roberts, 448 U.S. 56 (1980), abrogated on other grounds, Crawford v. Washington, 541 U.S. 36 (2004), the Supreme Court held that the prosecution had made a good faith effort to locate an unavailable witness, despite the prosecution's failure to contact a social worker who might have been able to assist in finding the witness. Ohio v. Roberts, 448 U.S. at 75-76. The Court held that, although "[one], in hindsight, may always think of other things," the "great improbability that such efforts would have resulted in locating

the witness, and would have led to her production at trial, neutralized any intimation that a concept of reasonableness required their execution." Id. at 76.

The United States Supreme Court also addressed the issue of diligence in locating a witness in Hardy v. Cross, supra. In that case, a kidnap and sexual assault victim testified at the petitioner's first trial prior to the grant of a motion for a mistrial. Hardy v. Cross, 132 S. Ct. at 491. Nine days prior to the retrial, the prosecutor informed the court that the witness could not be located. Id. at 492. The day before the retrial, the prosecutor moved to have the witness declared unavailable and to introduce her prior testimony. Id. The prosecutor told the court that after the first trial the witness, although "extremely frightened," had indicated her willingness to testify at the retrial, and that the prosecution had remained in "constant contact" with the witness and her mother. Id. However, approximately three weeks before the retrial, the witness had disappeared. Id. The witness' mother, father and brother told investigators they did not know the witness' whereabouts. Id. Investigators made personal visits to the witness' home and that of her father, and contacted the witness' parents and other family members. Id. Investigators also contacted the county medical examiner, the witness' school, the family of the witness' old boyfriend, the office of the state secretary of state, the welfare department, the morgue, the public health department, the jail, the post office, and immigration authorities. Id. at 492-93. The day before the retrial, the witness' mother told a detective that the witness had called two weeks previously, saying she did not want to

testify and would not return to the area. Id. at 493.

The trial court admitted the prior testimony and the state court of appeals affirmed, ruling that the prosecution's efforts met the constitutional diligence standard. Id. On habeas review, the United States Court of Appeals for the Seventh Circuit disagreed, noting that investigators had not contacted the victim's current boyfriend and a school at which the victim once had been enrolled. Id. at 494. In an unanimous summary per curiam disposition, the United States Supreme Court reversed. Id. at 494-95. The Supreme Court held that, under the deferential AEDPA standard of review, the Seventh Circuit erred in deeming the state court of appeals' determination unreasonable. Id. The Supreme Court stated that the constitution did not "require the prosecution to exhaust every avenue of inquiry, no matter how unpromising." Id. The Court continued: "And, more to the point, the deferential standard of review set out in 28 U.S.C. § 2254(d) does not permit a federal court to overturn a state court's decision on the question of unavailability merely because the federal court identifies additional steps that might have been taken." Id. at 495.

Similarly here, this Court cannot deem unreasonable the state court's diligence determination on the basis of Petitioner's arguments that more could have been done. The exhaustive efforts to locate De la Cruz resemble those described in Hardy v. Cross and far exceed the efforts deemed deficient in Barber v. Page, 390 U.S. at 723 ("the State made absolutely no effort to obtain the presence of [the witness] at trial other than to ascertain that he was in federal prison outside Oklahoma"). Furthermore, no "clearly established"

Supreme Court law requires the prosecution to attempt to subpoena a witness who has gone into hiding. See Hardy v. Cross, 132 S. Ct. at 494-95 ("the issuance of a subpoena may do little good if a sexual assault victim is so fearful of an assailant that she is willing to risk his acquittal by failing to testify at trial"). Petitioner's suggestion that De la Cruz' mother would have revealed her son's whereabouts if only she had been compelled to come to court constitutes dubious speculation in light of the evidence that the mother repeatedly told officers she did not know her son's whereabouts. Although Petitioner points to other potential avenues of inquiry that purportedly could have been pursued in an effort to locate De la Cruz, the efforts that the officers did undertake were not unreasonable. See Hardy v. Cross, 132 S. Ct. at 494-95.[5]

Therefore, the Court of Appeal's rejection of Petitioner's Confrontation Clause claim was not contrary to, or an objectively unreasonable application of, any clearly established Federal law as determined by the United State Supreme Court. See 28 U.S.C. § 2254(d). Petitioner is not entitled to federal habeas relief on this claim.

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[5] To the extent Petitioner contends the trial court violated state law by admitting De la Cruz' prior testimony although the prosecution assertedly had not served a subpoena on De la Cruz' mother, Petitioner alleges only a state law claim for which federal habeas relief is unavailable. See Estelle v. McGuire, 502 U.S. 62, 67-68 (1991); see also Wilson v. Corcoran, 562 U.S. 1, 5 (2010) (per curiam) ("it is only noncompliance with federal law that renders a State's criminal judgment susceptible to collateral attack in the federal courts") (original emphasis); Hendricks v. Vasquez, 974 F.2d 1099, 1105 (9th Cir. 1992) ("Federal habeas will not lie for errors of state law").

VI. Petitioner's Challenge to the Trial Court's Failure to Investigate a Juror's Alleged Use of a Cell Phone During Trial Does Not Merit Federal Habeas Relief.

A. Background

On the first day of trial, the prosecutor called witnesses who testified concerning the McKillian murder (R.T. 2130-2220). The witnesses did not provide any testimony concerning Petitioner. During a break, the prosecutor said that she had seen a juror "consistently on his phone" but that she did not know whether the juror was "texting or surfing the web" (R.T. 2224). There followed some joking comments made by the court and defense counsel that the likely subject of any web search was the presence of Minerva on the Great Seal of California (R.T. 2224). Neither the prosecutor nor defense counsel requested any further inquiry concerning the juror's alleged use of a cell phone. The court said it would admonish the jurors (R.T. 2224). When the jurors reentered the courtroom, the court said: ". . . I want to remind you, don't research Minerva or anything else while we're in session here. The phones stay put away, okay, while the court is in session" (R.T. 2224).

Petitioner faults the trial court for failing to investigate the juror's use of a cell phone, analogizing the situation to that of a sleeping juror (Pet. Mem., pp. 17-19). The Court of Appeal ruled that the situation "indicated at most a failure to adhere to the court's instructions concerning courtroom behavior (not unusual at the trial's outset). . . ." (Respondent's Lodgment 10, p. 39; People v. Martin,

2014 WL 3736212, at *21). The Court of Appeal observed that Petitioner sought no further inquiry, apparently satisfied with the court's admonishment to the jury, that there was no reason to doubt the effectiveness of that admonishment, and that the record did not show that the juror was unable to perform his duties during the remainder of the trial (Respondent's Lodgment 10, p. 39; People v. Martin, 2014 WL 3736212, at *21). The Court of Appeal further held that any error was "unquestionably harmless" because the incident occurred during the first day of trial during testimony which related to the McKillian murder, of which Martin was acquitted (Respondent's Lodgment 10, pp. 39-40; People v. Martin, 2014 WL 3736212, at *21).

B. Discussion

"Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." Smith v. Phillips, 455 U.S. 209, 217 (1982) ("Smith"). "A court confronted with a colorable claim of juror bias must undertake an investigation" that is "reasonably calculated to resolve doubts raised about the juror's impartiality." Dyer v. Calderon, 151 F.3d 970, 974-75 (9th Cir.) (en banc), cert. denied, 525 U.S. 1033 (1998); see Remmer v. United States, 347 U.S. 227 (1954) ("Remmer"); Smith, 455 U.S. at 215-17. However, "Remmer and Smith do not stand for the proposition that *any time* evidence of juror bias comes to light, due process requires the trial court to question the jurors alleged to have bias." Tracey v. Palmateer, 341 F.3d 1037, 1044 (9th Cir. 2003), cert. denied, 543 U.S. 864 (2004).

The Ninth Circuit has held that a state court's failure to hold a sua sponte evidentiary hearing into the issue of juror bias or misconduct is not contrary to, or an unreasonable application of, any clearly established federal law as determined by the United States Supreme Court. Sims v. Rowland, 414 F.3d 1148, 1152-56 (9th Cir.), cert. denied, 546 U.S. 1066 (2005). Therefore, the trial court's failure to hold a sua sponte hearing in Petitioner's case to inquire concerning an allegedly inattentive juror cannot entitle Petitioner to federal habeas relief. See 28 U.S.C. § 2254(d).

Furthermore, even if a juror is found to have been inattentive during portions of the trial, "a new trial may not be required if [the juror] did not miss essential portions of the trial and was able fairly to consider the case." United States v. Barrett, 703 F.2d 1076, 1083 n.13 (9th Cir. 1983). Petitioner has not shown a colorable claim of juror inattentiveness or misconduct sufficient to warrant further inquiry. None of the defense attorneys sought investigation at the time of the incident, and none argued that the juror had been using the cell phone during an "essential portion" of the trial. Petitioner, who was present at trial, has not alleged that he saw any juror displaying inattentiveness during any portion of the trial, much less during any "essential portion." Hence, Petitioner has not shown any need for further inquiry or any violation of Petitioner's right to a fair trial. See United States v. Springfield, 829 F.2d 860, 864 (9th Cir. 1987) (presence of sleeping juror did not violate constitution where the "testimony missed during the nap" was "insubstantial"); Zarate v. Chrones, 2009 WL 866858, at *9 (C.D. Cal. Mar. 25, 2009) (even assuming trial court erred in failing to conduct

further inquiry into whether juror was sleeping during trial, any error was harmless, where petitioner failed to show juror "missed essential portions of the trial" or was "unable fairly to consider the case"). Accordingly, the Court of Appeal's rejection of this claim was not contrary to, or an objectively unreasonable application of, any clearly established Federal law as determined by the United States Supreme Court. See 28 U.S.C. § 2254(d); Harrington v. Richter, 562 U.S. 86, 100-03 (2011).

Additionally, because Petitioner has failed to show that any allegedly inattentive juror missed "essential portions" of the trial, Petitioner has failed to show that the absence of further inquiry had any "substantial and injurious effect" on the verdict within the meaning of Brecht v. Abrahamson, 507 U.S. 619, 637-38 (1993) ("Brecht") (forbidding a grant of habeas relief for a trial-type error unless the error had a "substantial and injurious effect or influence" on the outcome of the case). The testimony adduced prior to the prosecutor's revelation concerning a juror's alleged use of a cell phone largely concerned the McKillian murder. Witness Lekeidra Hodnett did testify that the Venice Shoreline Crips was a Venice gang, that McKillian was a member of that gang, that she had seen Martin, Birdsong and Cole around in Oakwood and Venice and that Cole's nickname "on the streets" was "T-Dogg" (R.T. 2151-53, 2179). However, there was no testimony concerning Petitioner. To the extent that Hodnett's testimony showed Martin, Birdsong and Cole were gang members, the prosecution introduced substantial evidence, after the judge's admonishment to the jury concerning alleged cell phone use, that those three defendants were gang members and/or gang associates

(see R.T. 3097-99, 3103-04, 3128-29, 3341, 3344, 3351-52, 3391-93, 3423-24, 3443, 3450-51, 3458-59, 3461-64, 3621-22, 3628-29, 3633, 6031-35, 6044-45, 6058-60). Accordingly, the failure to investigate the juror's alleged use of a cell phone was harmless under the Brecht standard. For all of these reasons, Petitioner is not entitled to federal habeas relief on this claim.

VII. Petitioner's Claim of Cumulative Error Does Not Merit Federal Habeas Relief.

"While the combined effect of multiple errors may violate due process even when no single error amounts to a constitutional violation or requires reversal, habeas relief is warranted only where the errors infect a trial with unfairness." Payton v. Cullen, 658 F.3d 890, 896-97 (9th Cir. 2011), cert. denied, 133 S. Ct. 426 (2012). Habeas relief on a theory of cumulative error is appropriate when there is a "'unique symmetry' of otherwise harmless errors, such that they amplify each other in relation to a key contested issue in the case." Ybarra v. McDaniel, 656 F.3d 984, 1001 (9th Cir. 2011), cert. denied, 133 S. Ct. 424 (2012) (citation omitted). Here, no such symmetry of otherwise harmless errors exists. Accordingly, the state court's rejection of Petitioner's cumulative error claim was not contrary to, or an objectively unreasonable application of, any clearly established Federal Law as determined by the Supreme Court of the United States. See 28 U.S.C. § 2254(d); Harrington v. Richter, 562 U.S. at 100-03. Petitioner is not entitled to federal habeas relief on this claim.

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RECOMMENDATION

For the foregoing reasons, IT IS RECOMMENDED that the Court issue an Order: (1) accepting and adopting this Report and Recommendation; (2) directing that Judgment be entered denying and dismissing the Petition with prejudice.

DATED: August 15, 2016.

/s/
CHARLES F. EICK
UNITED STATES MAGISTRATE JUDGE

NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but may be subject to the right of any party to file objections as provided in the Local Rules Governing the Duties of Magistrate Judges and review by the District Judge whose initials appear in the docket number. No notice of appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the judgment of the District Court.

If the District Judge enters judgment adverse to Petitioner, the District Judge will, at the same time, issue or deny a certificate of appealability. Within twenty (20) days of the filing of this Report and Recommendation, the parties may file written arguments regarding whether a certificate of appealability should issue.