Gabriel Adam Sanchez v. Clark E Ducart Doc. 16 Att. 1

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

GABRIEL ADAM SANCHEZ, Petitioner, v. CLARK E. DUCART, Warden, Respondent.	Case No. EDCV 14-2159 JGB(JC) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable Jesus G. Bernal, United States District Judge, pursuant to the provisions of 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California.

I. SUMMARY

On October 20, 2014, Gabriel Adam Sanchez ("petitioner"), a state prisoner proceeding with counsel, filed a Petition for Writ of Habeas Corpus by a Person in State Custody ("Petition") pursuant to 28 U.S.C. § 2254, with an attached addendum ("Petition Add.") and exhibits ("Petition Ex."), challenging a judgment in San Bernardino County Superior Court on multiple grounds.

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On November 24, 2014, respondent filed an Answer and a supporting memorandum ("Answer").[1] On December 23, 2014, petitioner filed a Traverse.

For the reasons stated below, the Petition should be denied, and this action should be dismissed with prejudice.

II. PROCEDURAL HISTORY

On August 1, 2011, a San Bernardino County Superior Court jury found petitioner guilty of first degree murder (count 1), robbery (counts 2-6), and attempted premeditated murder (counts 7-10). (CT 1-12, 313-22). The jury also found true allegations that petitioner knew that a co-participant was armed in the commission of the foregoing offenses. (CT 323-32).

At a bifurcated bench trial on August 4, 2011, the court found beyond a reasonable doubt that petitioner had one prior conviction of a serious or violent felony which qualified as a "strike" under California's Three Strikes law (Cal. Penal Code §§ 667(b)-(i), 1170.12(a)-(d)) ("strike prior"). (CT 152, 387-88; RT 502-10). On October 7, 2011, the trial court sentenced petitioner to a total of 50 years to life in state prison plus an additional consecutive term of one year. (CT 409-13; RT 515-22).

On May 8, 2013, the California Court of Appeal affirmed the judgment in a reasoned decision. (Lodged Doc. 10). On July 24, 2013, the California Supreme Court denied review without comment. (Lodged Doc. 13).

III. FACTS[2]

The instant case stems from the prosecution of petitioner and his co-defendant, Erik Ibarra, for the robbery of Michael Edayan, Bryan Juarez,

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[1]Respondent concurrently lodged multiple documents ("Lodged Doc."), including the Clerk's Transcript ("CT") and the Reporter's Transcript ("RT").

[2]The facts set forth in this section are drawn from the California Court of Appeal's decision on direct appeal. (Lodged Doc. 10 at 3). Such factual findings are presumed correct. 28 U.S.C. § 2254(e)(1).

Michael Hilliard, Juan Monge, and Juan Nieto, the first degree murder of Edayan, and the attempted premeditated murder of Juarez, Hilliard, Monge, and Nieto shortly thereafter.

On the late evening of June 14, 2009, Edayan, Juarez, Hilliard, Monge, and Nieto went to Blair Park in San Bernardino to do some target practicing with their airsoft[3] guns. Petitioner and Ibarra – who were also at the park – approached Edayan and the others. Ibarra had a black semiautomatic firearm pointed at them as petitioner went through everyone's pockets. As petitioner and Ibarra began to walk away, Edayan called out something to the effect of, "hey, if you put the gun down, we can fight." Ibarra, followed by petitioner, immediately "[t]urned around and took a few steps closer [to Edayan] and fired" into his face. Ibarra then opened fire on the others. Edayan died.

IV. STANDARD OF REVIEW

This Court may entertain a petition for writ of habeas corpus on "behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). 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

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[3]Airsoft guns fire only small plastic pellets with a force inadequate to break skin. They are toy "replicas" of guns that bear a distinct bright-orange plastic piece at the end of the barrel.

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).[4]

In applying the foregoing standards, federal courts look to the last reasoned state court decision. See Smith v. Hedgpeth, 706 F.3d 1099, 1102 (9th Cir.), cert. denied, 133 S. Ct. 1831 (2013). "Where there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground." Ylst v. Nunnemaker, 501 U.S. 797, 803 (1991) (cited with approval in Johnson v. Williams, 133 S. Ct. 1088, 1094 n.1 (2013)); Cannedy v. Adams, 706 F.3d 1148, 1158 (9th Cir. 2013) (it remains Ninth Circuit practice to "look through" summary denials of discretionary review to the last reasoned state-court decision), as amended on denial of rehearing, 733 F.3d 794 (9th Cir. 2013), cert. denied, 134 S. Ct. 1001 (2014).

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[4]When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary. Harrington v. Richter, 562 U.S. 86, 99 (2011); see also Johnson v. Williams, 133 S. Ct. 1088, 1094-96 (2013) (extending Richter presumption to situations in which state court opinion addresses some, but not all of defendant's claims).

the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).[5] The federal habeas standard is "meant to be" very "difficult to meet." Harrington v. Richter, 562 U.S. 86, 102 (2011).

In applying the foregoing standards, federal courts look to the last reasoned state court decision. See Smith v. Hedgpeth, 706 F.3d 1099, 1102 (9th Cir.), cert. denied, 133 S. Ct. 1831 (2013). "Where there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground." Ylst v. Nunnemaker, 501 U.S. 797, 803 (1991) (cited with approval in Johnson v. Williams, 133 S. Ct. 1088, 1094 n.1 (2013)); Cannedy v. Adams, 706 F.3d 1148, 1158 (9th Cir. 2013) (it remains Ninth Circuit practice to "look through" summary denials of discretionary review to the last reasoned state-court decision), as amended on denial of rehearing, 733 F.3d 794 (9th Cir. 2013), cert. denied, 134 S. Ct. 1001 (2014).

V. DISCUSSION[6]

Petitioner claims that (1) the trial court improperly admitted irrelevant and prejudicial gang-related evidence in violation of the Due Process Clause of the Fourteenth Amendment; and (2) his trial counsel rendered ineffective assistance at sentencing by failing to seek dismissal of the strike prior. (Petition at 5; Petition Add. at 11-14; Traverse at 3-11). Petitioner is not entitled to habeas relief on either claim.

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[5]When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary. Harrington v. Richter, 562 U.S. 86, 99 (2011); see also Johnson v. Williams, 133 S. Ct. 1088, 1094-96 (2013) (extending Richter presumption to situations in which state court opinion addresses some, but not all of defendant's claims).

[6]The Court has read, considered and rejected on the merits all of petitioner's contentions. The Court discusses petitioner's principal contentions herein.

A. Petitioner's Claim of Evidentiary Error Does Not Merit Federal Habeas Relief

Petitioner contends that the trial court admitted irrelevant and unduly prejudicial gang-related evidence which was improper under California rules of evidence and violated federal due process. (Petition at 5; Petition Add. at 10-11; Traverse at 3-11). The California Court of Appeal – the last state court to render a reasoned decision on the issue – rejected petitioner's evidentiary claim on the merits. (Lodged Doc. 10 at 11-15). Petitioner is not entitled to federal habeas relief on this claim.

1. Pertinent Background[7]

a. Pretrial Proceedings

Prior to trial on July 19, 2011, the People moved to admit gang-related evidence to show that petitioner and Ibarra were "both gang members from the same gang out of Monrovia," and that they had been convicted of a gang-related battery which they had committed in concert. The prosecutor argued the evidence was relevant to show (1) petitioner's knowledge that (a) violence was the "natural and probable consequence" of committing a crime with Ibarra, and (b) Ibarra was armed on the night in question; and (2) petitioner's "intent" and "plan" in committing the charged crimes with his fellow gang member. The prosecutor also argued the evidence was relevant to the underlying reason, or motive, for the fatal shooting, namely, that as a gang member accompanied by another gang member, Ibarra was bound by code and a desire for personal glory to react to Edayan's challenging comment with deadly force.

The court remarked that Ibarra's gang membership did not "necessarily go to premeditation" but agreed that it was relevant to motive. The prosecutor

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[7]Unless otherwise indicated by citation to the record, the facts set forth in this section are drawn from the California Court of Appeal's decision on direct appeal. (Lodged Doc. 10 at 4-9). As noted above, such factual findings are presumed correct. 28 U.S.C. § 2254(e)(1).

continued that the gang-related motive was not limited only to elevating the gang's and Ibarra's own status, but included instilling fear in the community and discouraging witnesses from cooperating with the police.

The court clarified: "So with respect to Ibarra, there's motive, increased status in the gang . . . [and] witness fear and intimidation? [¶] . . . [¶] . . . [And w]ith respect to [petitioner], it's – [¶] . . . [¶] . . . natural and probable cause – foreseeability that he has a gun, that he might use the gun, and the fact that they have previously committed a crime together, which shows or can show that they planned this robbery together?" The prosecutor responded affirmatively.

Ibarra's counsel objected that the evidence was irrelevant. He argued that the evidence would only have been relevant had there been a gang charge or allegation. He denied that the evidence tended to establish motive and characterized the prosecution's argument as an illogical leap that a gangster would have a special reason for pulling the trigger. The court clarified that the expert would simply testify to "how important not being . . . disrespected is to a gang member and that that sort of disrespect will be met with violence, especially when it's committed in front of another gang member." The court again remarked that it did not "buy the premeditation argument," but stated that the evidence was relevant to Ibarra's motive for shooting.

Ibarra's counsel countered that the evidence was "extremely prejudicial" and that it would permit the prosecutor to "present a picture to the jury of a violent gang member. . . ." He again asserted that the evidence would only have been admissible had petitioner and Ibarra been charged with a gang crime. The court stated: "It also becomes relevant . . . if some of th[e] witnesses are fearful about testifying because they suspect these people are gang members . . . so I think it's relevant for motive and witness reactions and fear." The prosecutor noted that "[w]ith respect to prejudice," the charged crimes, namely, that "Ibarra shot some kid point-blank in the face during a robbery," were far more egregious than the

anticipated gang evidence, so the latter evidence was unlikely to emotionally sway jurors.

Petitioner's counsel argued that the evidence was inadmissible "character evidence" proscribed by California Evidence Code section 1101(a). He acknowledged the exceptions for "knowledge, intent, motive, plan, or scheme," but contended there was "no question about the motive for the robbery," or the "intent of the shooter." According to petitioner's interpretation of the case, the motive was obvious from the fact that "the victim made a statement, and that Ibarra responded to that statement." He also complained that the People were not required to prove motive, and they had "plenty of evidence as to the issues that they have to prove." Finally, he repeated the argument of Ibarra's counsel that only a gang crime charge or gang allegation would have made gang evidence relevant.

The court found it significant that petitioner and Ibarra had committed prior crimes together and pointed out that the People sought to introduce the gang evidence to show the motive not for the robbery but for the shooting. The court then took the matter under submission.

A few days later, on July 20, 2011, prior to the start of trial, the court ruled the gang evidence was:

> admissible as to Ibarra regarding motive with respect to the murder charge. [¶] It's significant that one of those gang priors that the defendants committed together and, therefore, the identity of each of them in this crime, it goes to whether they had a plan or scheme to commit the robbery ahead of time. [¶] It goes to [petitioner] regarding knowing whether the codefendant was armed, if, in fact, he was, and it goes to whether he would have known that the commission of murder was a natural and probable consequence of an armed robbery. . . ."

The court also expressly found that "the probative value was not substantially outweighed by the danger of undue prejudice. . . ."

b. Gang Expert Testimony

At trial, Officer Yolanda Gutierrez testified as a gang expert. She testified that victims of and witnesses to crimes committed by gang members tend not to cooperate with the investigation because they "fear . . . what might happen to them or their family." "Monrovia Nuevo Varrio" (MNV) is a Hispanic criminal street gang based in Monrovia. Members, including petitioner and Ibarra, display "MNV," "MNVR" (Monrovia Nuevo Varrio Rifa), and "X" with a number three tattoos. Ibarra was known as "Stomps" or "Stomper," and petitioner was known as "Lucky" and "Lil' Vago.

Based on the conduct and tattoos of petitioner and Ibarra, as well as information provided by other officers who had encountered petitioner and Ibarra on the street, Officer Gutierrez opined that petitioner and Ibarra were MNV gang members. She explained that when a gang member is challenged by someone, he must respond. A response to perceived disrespect would be even more important if another gang member were present to witness the confrontation. Gang members back one another up in the commission of crimes. They "communicate with one another. If one has a gun, the other is going to know." Officer Gutierrez opined that petitioner knew that Ibarra had a gun. The prosecutor asked whether it "matter[ed] to the gang" that petitioner and Ibarra were from Monrovia, but had allegedly committed crimes in San Bernardino. (RT 302). The gang expert opined that such conduct would inure to the benefit of MNV by raising its profile in the surrounding communities and increasing the gang's stature. The gang expert testified that the commission of the robbery at Blair Park enhanced Ibarra's reputation in the gang.

Regarding Edayan's statement about putting down the gun, Officer Gutierrez stated that Ibarra was "being called out," and that had he failed to

respond to the challenge, the gang would have found out. The prosecutor then asked, "What would be the motive [of] . . . shooting at . . . the other young men?" Officer Gutierrez replied, "To eliminate any possible witnesses." Similarly, when petitioner was in the getaway car, he had told Ibarra's then girlfriend and another girl they had "better not say anything about what happened to anybody and that whatever happened stays with the people . . . in the car." Officer Gutierrez opined it was reasonable for the girls to take petitioner's statement as a threat.

Officer Gutierrez also testified that petitioner had been convicted in 2004 of robbery and assault, and both crimes were found to have been committed for the benefit of a criminal street gang. Petitioner was also convicted of being a felon in possession of a firearm, and that crime, too, was found to have been committed in association with a criminal street gang. Petitioner and Ibarra had previously committed a battery together, which was found to have been committed for the gang. (RT 292-94).

On cross-examination, Officer Gutierrez acknowledged that Blair Park is not in the territory claimed by MNV, and that the commission of a crime outside the gang territory could be either good or bad for the member depending on the gang's policy about off-territory crimes. She reiterated that gang members work to "instill fear" in the community.

c. Jury Instructions

The jury was instructed that it was not required to accept Officer Gutierrez's opinions as true or correct. The jurors were further instructed that gang evidence could only be considered for the limited purposes of (1) deciding defendants' identity or motive; or whether petitioner had a plan or scheme to commit robbery, knew that Ibarra was armed, or knew that murder or attempted murder was a natural and probable consequence of robbery committed in concert with Ibarra; and (2) evaluating witness credibility. The jury was admonished not to consider

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the evidence for any other purpose or to conclude therefrom that petitioner or Ibarra were of bad character or disposed to commit crime.

2. Analysis

Petitioner essentially argues that the trial court violated California evidence laws and federal due process by admitting the gang-related testimony and opinions from Officer Gutierrez (collectively "gang evidence"), and also by admitting testimony that petitioner and Ibarra had previously committed a gang-related battery together ("prior gang crime"). (Petition at 5; Petition Add. at 11-12; Traverse at 3-9). Petitioner is not entitled to federal habeas relief on this claim.

First, to the extent petitioner contends that the trial court erred under state law, his claim is not cognizable on federal habeas review. See Estelle v. McGuire, 502 U.S. 62, 67-68 (1991) (correctness of state evidentiary rulings presenting only issues of state law not cognizable on federal habeas corpus review) (citations omitted); see also 28 U.S.C. § 2254(a) (federal habeas corpus relief may be granted "only on the ground that [petitioner] is in custody in violation of the Constitution or laws or treaties of the United States."); Perry v. New Hampshire, 565 U.S. 228, 132 S. Ct. 716, 723 (2012) ("Apart from [federal Constitutional] guarantees, . . . state and federal statutes and rules ordinarily govern the admissibility of evidence . . . .") (citation omitted); Smith v. Phillips, 455 U.S. 209, 221 (1982) ("A federally issued writ of habeas corpus, of course, reaches only convictions obtained in violation of some provision of the United States Constitution.").

Second, to the extent petitioner argues that the trial court's admission of the gang evidence violated due process, his claim fails because the admission of such evidence did not violate any clearly established Supreme Court authority. As petitioner correctly notes (Traverse at 8-9), habeas may be granted "when constitutional errors have rendered the trial fundamentally unfair[.]" Holley v. Yarborough, 568 F.3d 1091, 1101 (9th Cir. 2009) (citing Williams v. Taylor, 529

U.S. 362, 375 (2000)). Nonetheless, the United States Supreme Court has not clearly established "that admission of irrelevant or overtly prejudicial evidence constitutes a due process violation sufficient to warrant [federal habeas relief]." Id. Where, like here, the Supreme Court has not "squarely established" a legal rule that governs a particular claim, it cannot be said that a state court's decision unreasonably applied federal law when it adjudicated that claim. See Knowles v. Mirzayance, 556 U.S. 111, 122 (2009) ("not 'an unreasonable application of clearly established Federal law' for a state court to decline to apply a specific legal rule that has not been squarely established by this Court"); Wright v. Van Patten, 552 U.S. 120, 126 (2008) (per curiam) (federal habeas relief "unauthorized" where Supreme Court cases provided "no clear answer to the question presented") (citations omitted); Carey v. Musladin, 549 U.S. 70, 77 (2006) ("Given the lack of holdings from this Court regarding" a particular claim, "it cannot be said that the state court 'unreasonabl[y] appli[ed] clearly established Federal law.'") (alterations in original); Brewer v. Hall, 378 F.3d 952, 955 (9th Cir.) ("If no Supreme Court precedent creates clearly established federal law relating to the legal issue the habeas petitioner raised in state court, the state court's decision cannot be contrary to or an unreasonable application of clearly established federal law."), cert. denied, 543 U.S. 1037 (2004); see, e.g., Holley, 568 F.3d at 1101 (absent "clearly established Federal law" that admission of irrelevant or overtly prejudicial evidence could violate due process sufficient to warrant habeas relief, court cannot conclude that state court's ruling on the issue was an "unreasonable application" of federal law) (citing Musladin, 549 U.S. at 77); Hill v. Virga, 588 Fed. Appx. 723, 724 (9th Cir. 2014) (state court's conclusion that admission of "evidence of gang crimes and shooting" did not violate due process not an unreasonable application of "clearly established Supreme Court precedent.") (citing Holley, 568 F.3d at 1101), cert. denied, 135 S. Ct. 2355 (2015); Pena v. Tilton, 578 Fed. Appx. 695 (9th Cir. 2013) (affirming district court's rejection of

state habeas petitioner's due process challenge to admission of gang-related evidence as there was no clearly established federal law prohibiting admission of such evidence for state court's determination to contravene).

Third, to the extent the Petition claims that admission of evidence regarding the prior gang crime constituted impermissible propensity evidence and violated federal law, such a claim likewise fails because the admission of such evidence is not contrary to any clearly established Supreme Court authority. Indeed, the United States Supreme Court has expressly declined to address whether admission of evidence of a defendant's past crimes – even if the evidence was irrelevant, prejudicial, or it showed that the defendant has a propensity for criminal activity – could ever violate due process. See Estelle, 502 U.S. at 75 n.5 ("[W]e express no opinion on whether a state law would violate the Due Process Clause if it permitted the use of 'prior crimes' evidence to show propensity to commit a charged crime."); Larson v. Palmateer, 515 F.3d 1057, 1066 (9th Cir. 2008) ("The Supreme Court has expressly reserved the question of whether using evidence of the defendant's past crimes to show that he has a propensity for criminal activity could ever violate due process.") (citing id.), cert. denied, 555 U.S. 871 (2008); see, e.g., Munoz v. Gonzales, 596 Fed. Appx. 588, 589 (9th Cir. 2015) ("Even if [] evidence [of prior auto theft] was improperly admitted to show that [petitioner had] committed the crime for which he was on trial, this claim would not be grounds for relief.") (citations omitted).

Fourth, even if petitioner's due process claim could properly be considered here, it would still not merit habeas relief. "A habeas petitioner bears a heavy burden in showing a due process violation based on an evidentiary decision." Boyde v. Brown, 404 F.3d 1159, 1172 (9th Cir.), as amended on reh'g, 421 F.3d 1154 (9th Cir. 2005). "The admission of evidence does not provide a basis for habeas relief unless it rendered the trial fundamentally unfair in violation of due process." Johnson v. Sublett, 63 F.3d 926, 930 (9th Cir.), cert denied, 516 U.S.

1017 (1995) (citation omitted). The "[a]dmission of evidence violates due process only if there are *no* permissible inferences the jury may draw from it." Boyde, 404 F.3d at 1172 (quoting Jammal v. Van de Kamp, 926 F.2d 918, 920 (9th Cir. 1991)) (internal quotation marks omitted; emphasis in original).

Here, the Court of Appeal reasonably concluded that testimony from the gang expert was probative on multiple relevant issues, including motive and intent. (Lodged Doc. 10 at 11-12). The Court of Appeal explained:

> [T]he People argue that motive and intent are relevant to explain why [] Ibarra would "walk[] up to an unarmed man and [shoot] him in the face point-blank for nothing more than his having suggested that [] Ibarra would not have been so brazen without his gun. We agree. [Petitioner and Ibarra], two armed men, had successfully robbed five young unarmed men. While one of the five made a verbal challenge to fight without a gun, why did [] Ibarra have to respond so violently? As the People aptly point[ed] out, "[t]he gang expert's testimony put this otherwise inexplicably violent response in context." Namely, Officer Gutierrez explained that when gang members perceive they have been disrespected, they respond with violence. [Edayan's] verbal challenge was disrespectful to [] Ibarra in the presence of another gang member, [petitioner]. Thus, [] Ibarra had to defend his reputation along with that of the gang. The probative value of the gang evidence as to motive was more than substantial.

(Lodged Doc. 10 at 11-12). The Court of Appeal specifically concluded that evidence of the prior gang crime was properly admitted, in part, to show petitioner's knowledge that Ibarra had been armed, and "[petitioner's] willingness to commit violent crimes with his partner." (Lodged Doc. 10 at 12). In addition, the Court of Appeal reasonably found that the gang expert's testimony "also

helped the jury evaluate witness credibility,"[8] and that admission of the gang evidence generally was not unduly prejudicial.[9] (Lodged Doc. 10 at 14). This Court is bound by the Court of Appeal's reasonable determinations under state law which are supported by the record. See Waddington v. Sarausad, 555 U.S. 179, 192 n.5 (2009) ("we have repeatedly held that it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions") (citation and internal quotations omitted); Bradshaw v. Richey, 546 U.S. 74, 76 (2005) ("a state court's interpretation of state law, including one announced on

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[8]More specifically, the Court of Appeal explained:

> Here, Officer Gutierrez's testimony . . . helped the jury evaluate witness credibility. Several witnesses provided conflicting and incomplete accounts of what had happened when interviewed by the police. Their testimonies at trial were not consistent with their statements. Absent the gang evidence, the jury could have concluded that the witnesses were lying. In fact, defense counsel encouraged the jurors to do just that. The officer's testimony provided an explanation for the conflicting witness testimonies. She explained that victims and witnesses to gang crimes normally fail to cooperate with law enforcement because they fear the gang member or gang will retaliate against them and/or their families. In fact, gang members go to great lengths to instill this fear in the community. Here, witnesses testified to their fear.

(Lodged Doc. 10 at 14).

[9]More specifically, the Court of Appeal explained:

> Given the facts in this case, the gang evidence was mild compared to the actual crimes. While [petitioner and Ibarra] describe[d] [] Ibarra as acting "rashly, impulsively, or without careful consideration and thus without deliberation or premeditation," the record does not support such description. . . . According to the record, [] Ibarra turned, walked up to the [Edayan] (who had done nothing more than issue a verbal challenge) and fired right in his face. He then opened fire on the four others who had not said one word. There was nothing rash or impulsive about [] Ibarra's actions. The trial court carefully scrutinized the proffered evidence and correctly found its prejudicial effect did not outweigh its probative value in establishing motive, intent, plan, and knowledge.

(Lodged Doc. 10 at 15) (emphasis and citation omitted).

direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus"); Hicks v. Feiock, 485 U.S. 624, 630 n.3 (1988) (federal habeas court may not disregard intermediate appellate state court's interpretation of state law unless the federal court "is convinced by other persuasive data that the highest court of the state would decide otherwise") (citation and quotations omitted).

As there were multiple permissible inferences the jury could draw from the gang-related evidence, and the admission of such evidence was not unduly prejudicial, the Court of Appeal's rejection of petitioner's due process claim was not an objectively unreasonable application of the governing Supreme Court authority.

In sum, the California Court of Appeal's rejection of this claim was not contrary to, or an unreasonable application of clearly established federal law. Nor was it based on an unreasonable determination of the facts in light of the evidence presented. Accordingly, petitioner is not entitled to federal habeas relief on this claim.

B. Petitioner's Ineffective Assistance of Counsel Claim Does Not Merit Habeas Relief

Petitioner contends that his trial counsel rendered ineffective assistance at sentencing by failing to file a motion to strike the strike prior pursuant to People v. Superior Court (Romero), 13 Cal. 4th 497 (1996) ("Romero Motion"). (Petition at 5; Petition Add. at 12-14; Traverse at 9-11). The California Court of Appeal – the last state court to render a reasoned decision on the issue – rejected petitioner's ineffective assistance of counsel claim on the merits, essentially finding that, even if counsel's performance was deficient in the foregoing respect, petitioner nonetheless failed to show that he suffered prejudice as a result. (Lodged Doc. 10 at 16-19). Petitioner is not entitled to federal habeas relief on this claim.

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1. Pertinent Law

a. Ineffective Assistance of Counsel

The Sixth Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment, guarantees a criminal defendant the right to effective assistance of counsel at all "critical stages of a criminal proceeding," including during sentencing in noncapital cases. See Lafler v. Cooper, 132 S. Ct. 1376, 1383, 1385-86 (2012) (citations omitted); Daire v. Lattimore, 816 F.3d 454, 461 (9th Cir. 2016) (citation omitted). To warrant habeas relief for violation of this right, a petitioner must demonstrate that: (1) counsel's representation was deficient; and (2) petitioner suffered prejudice as a result. Strickland v. Washington, 466 U.S. 668, 687-93 (1984). As both prongs of the Strickland test must be satisfied to establish a constitutional violation, failure to satisfy either prong requires that an ineffective assistance claim be denied. Id. at 697.

Counsel's representation is "deficient" if it "fell below an objective standard of reasonableness." Id. at 688; Richter, 562 U.S. at 104, 111. Courts must apply a "strong presumption" that an attorney's performance fell within "the wide range of reasonable professional assistance." Richter, 562 U.S. at 104 (citation omitted); see also Strickland, 466 U.S. at 689 (defendant must overcome presumption that challenged action "*might* be considered sound trial strategy") (emphasis added; citation and internal quotation marks omitted). A petitioner can overcome the presumption only by showing that, when viewed from counsel's perspective at the time, the challenged errors were so egregious that counsel's representation "amounted to incompetence under 'prevailing professional norms.'" Id. at 105 (citation omitted); see also Maryland v. Kulbicki, 136 S. Ct. 2, 3 (2015) (attorney performance "deficient" where errors are "'so serious'" that attorney "no longer functions as 'counsel'") (citing Strickland, 466 U.S. at 687).

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Deficient performance is prejudicial if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[10] Strickland, 466 U.S. at 694. To establish prejudice in the sentencing context involving a Romero motion, a petitioner must show a reasonable probability that the motion would have been successful and that his sentence would concomitantly have been reduced. Daire, 818 F.3d at 465-66. A "reasonable probability" is one that is "sufficient to undermine confidence in the outcome" of a trial. Strickland, 466 U.S. at 694. The likelihood of a different outcome "must be substantial, not just conceivable." Richter, 562 U.S. at 112 (citation omitted); see also Daire, 818 F.3d at 466 (counsel's alleged errors prejudicial only if "egregious enough to 'undermine confidence' in the outcome of the proceeding") (citation omitted).

Where there has been a state court decision rejecting a Strickland claim, review is "doubly" deferential. Richter, 562 U.S. at 105 (citing Mirzayance, 556 U.S. at 123-24). "The pivotal question is whether the state court's application of the Strickland standard was unreasonable." Richter, 562 U.S. at 101; see also 28 U.S.C. § 2254(d). "[E]ven a strong case for relief does not mean the state court's contrary conclusion was unreasonable." Richter, 562 U.S. at 102 (citing Lockyer v. Andrade, 538 U.S. 63, 71 (2003)). Relief is available only if "there is no possibility fairminded jurists could disagree" that the state court's application of Strickland was incorrect. Id. Moreover, since "[t]he Strickland standard is a general one, [] the range of reasonable applications is substantial." Id. at 105 (citing Mirzayance, 556 U.S. at 123).

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[10]As the foregoing reflects, the Strickland prejudice prong is satisfied only when there is a reasonable *probability* of a different result absent counsel's unprofessional errors – not the mere "possibility" of a different outcome as petitioner repeatedly asserts (Petition Add. at 12-14; Traverse at 9-11).

b. California Three Strikes Law

California's Three Strikes law is specifically "designed to increase the prison terms of repeat felons," and thus significantly limits the circumstances in which a trial court may depart from the greatly enhanced sentencing requirements applicable to repeat offenders. See Rios v. Garcia, 390 F.3d 1082, 1084-85 (9th Cir. 2004) (citing Romero, 13 Cal. 4th at 504), cert. denied, 546 U.S. 827 (2005); People v. Carmony, 33 Cal. 4th 367, 377 (2004) ("[T]he Three Strikes law does not offer a discretionary sentencing choice, as do other sentencing laws, but establishes a sentencing requirement to be applied in every case where the defendant has at least one qualifying strike. . . .") (citations omitted).

Pursuant to California Penal Code section 1385(a) ("Section 1385(a)"), a trial court may, *sua sponte* and in the interest of justice, "strike prior felony conviction allegations." Romero, 13 Cal. 4th at 529-30 (citation omitted). Consistent with the intent of the Three Strikes law, however, a sentencing court must comply with "stringent standards" in order to do so. Carmony, 33 Cal. 4th at 377-78 ("[T]he three strikes law not only establishes a sentencing norm, it carefully circumscribes the trial court's power to depart from this norm and requires the court to explicitly justify its decision to do so."). Thus, in exercising its discretion under Section 1385(a), "the court in question must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the [] spirit [of California's Three Strikes law], in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." People v. Williams, 17 Cal. 4th 148, 161 (1998). Only under "extraordinary" circumstances, however, may a career criminal be deemed to fall outside the spirit of the Three Strikes law. Carmony, 33 Cal. 4th at 378.

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2. Analysis

Here, the Court of Appeal presumed (as permitted by California law) that the trial court had been aware of its discretion under Section 1385(a) to strike petitioner's strike prior, and concluded that the trial court had not done so *sua sponte* because "it did not find [petitioner] or his circumstances to be so extraordinary as to take him outside the purview of the Three Strikes Law." (Lodged Doc. 10 at 17-18) (internal quotation marks omitted). Thus, in light of the foregoing, and given petitioner's serious criminal record noted below, petitioner's counsel could reasonably have concluded that filing a Romero motion under the circumstances would have been futile. Petitioner's counsel cannot be deemed deficient for failing to make such a meritless motion and petitioner cannot have been prejudiced by his counsel's failure to do so. See, e.g., Juan H. v. Allen, 408 F.3d 1262, 1273 (9th Cir. 2005) (counsel not ineffective in failing to raise meritless objection), cert. denied, 546 U.S. 1137 (2006); Rupe v. Wood, 93 F.3d 1434, 1445 (9th Cir. 1996) (failure to take a futile action can never be deficient performance), cert. denied, 519 U.S. 1142 (1997).

Even so, the Court of Appeal reasonably concluded that, even assuming the failure to file a Romero motion was deficient performance, petitioner still failed to satisfy the prejudice prong of his Strickland claim. (Lodged Doc. 10 at 18-19). The Court of Appeal explained:

> Notwithstanding the above, we will assume that counsel's performance was deficient in not filing a *Romero* motion. Thus, we consider whether [petitioner] was prejudiced by the deficient representation, i.e., was there a reasonable probability that, but for counsel's failings, [petitioner] would have obtained a more favorable result? We conclude that there was not. [Petitioner] was an active gang member who had been convicted of possession of a firearm for the benefit of his gang, who had committed a prior offense with []

> Ibarra, again for the benefit of their gang, who willing[ly] assisted [] Ibarra in the armed robbery of five young unarmed men, late at night, in a deserted park, who followed [] Ibarra when he turned around and shot the [Edayan], and who then warned witnesses not to tell anyone what had happened. [Petitioner] does not fit the description of a defendant who should be treated as being outside the purview of the Three Strikes law. While [petitioner] claims that "the trial court indicated at the sentencing hearing that [he] should be given some leniency because he was not the shooter," we find that the only leniency contemplated by the trial court was to run the sentences concurrently. As the People point out, the trial court chose to sentence [petitioner] to the upper term on all of the robbery and attempted murder convictions, notwithstanding the fact that any term imposed would be doubled by the strike.

(Lodged Doc. 10 at 18-19). The Court of Appeal's determination is well-supported by the facts and law, and its application of Strickland was not objectively unreasonable.

In sum, the California courts' rejection of this claim was not contrary to, or an objectively unreasonable application of clearly established federal law. Nor was it based upon an unreasonable determination of the facts in light of the evidence presented. Accordingly, petitioner is not entitled to federal habeas relief on this claim.

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VI. RECOMMENDATION

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

DATED: January 31, 2017

/s/

Honorable Jacqueline Chooljian
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

GABRIEL ADAM SANCHEZ, Petitioner, v. CLARK E. DUCART, Warden, Respondent.	Case No. EDCV 14-2159 JGB(JC) (PROPOSED) ORDER ACCEPTING FINDINGS, CONCLUSIONS, AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition for Writ of Habeas Corpus by a Person in State Custody ("Petition"), all of the records herein, and the attached Report and Recommendation of United States Magistrate Judge ("Report and Recommendation"). The Court approves and accepts the Report and Recommendation.

IT IS ORDERED that Judgment be entered denying the Petition and dismissing this action with prejudice.

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IT IS FURTHER ORDERED that the Clerk serve copies of this Order, the Report and Recommendation, and the Judgment herein on counsel for petitioner and respondent.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: ___________________________

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HONORABLE JESUS G. BERNAL
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

GABRIEL ADAM SANCHEZ, Petitioner, v. CLARK E. DUCART, Warden, Respondent.	Case No. EDCV 14-2159 JGB(JC) (PROPOSED) JUDGMENT

Pursuant to this Court's Order Accepting Findings, Conclusions and Recommendations of United States Magistrate Judge,

IT IS ADJUDGED that the Petition for Writ of Habeas Corpus is denied and this action is dismissed with prejudice.

DATED: ___________________________

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HONORABLE JESUS G. BERNAL
UNITED STATES DISTRICT JUDGE