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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

JOHNNY ARELLANO,
Petitioner,
v.
JAMES E. TILTON, Director,
Respondent.

1:07-cv-01597 OWW MJS HC
FINDINGS AND RECOMMENDATION
THAT PETITION FOR WRIT OF HABEAS
CORPUS BE DENIED

Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

I. PROCEDURAL BACKGROUND

Petitioner is currently in the custody of the California Department of Corrections pursuant to a judgment of the Superior Court of California, County of Madera, following his conviction on July 7, 2003. Petitioner was found guilty, on trial by jury, of transporting methamphetamine for sale, possessing methamphetamine for sale, possessing a controlled substance while armed with a loaded firearm, child endangerment, being a felon in possession of a firearm, carrying a loaded firearm, and being a active member of a criminal street gang. (Lodged Doc. No 26 at 286.) The jury also found Petitioner guilty of gang enhancements. Petitioner was sentenced to a term of twenty years and eight months in state prison. (*Id.*)

Petitioner timely appealed to the California Court of Appeals, Fifth Appellate District

1 (hereinafter "Fifth DCA"). The Fifth DCA reversed the trial court's finding that Petitioner was
2 an active member of a criminal street gang as a lesser included offense of carrying a loaded
3 firearm, but otherwise affirmed the judgment and sentence. (LD¹ No. 8.) Petitioner then filed
4 a petition for review in the California Supreme Court. (LD No. 9.) On April 20, 2005, that
5 petition was summarily denied. (LD No. 10.)

6 On March 26, 2006, Petitioner filed the first of three state habeas petitions with the
7 Madera County Superior Court. (LD No. 11.) (Petitioner's first state habeas petition contains
8 all the claims at issue in the present petition. Accordingly, Petitioner's subsequently filed
9 petitions with the Superior Court are not relevant to the present petition.) The March 26, 2006,
10 petition was denied on April 7, 2006. (LD No. 12.) On May 10, 2006, Petitioner asserted the
11 same claims in a habeas petition filed with the Fifth DCA; it was denied without comment on
12 May 12, 2006. (LD No. 17.) Petitioner filed a habeas petition with the California Supreme
13 Court on December 10, 2006; it too was denied without comment on October 10, 2007. (LD
14 Nos. 22-23.)

15 Petitioner filed his original federal petition for writ of habeas corpus on October 30,
16 2007. (Pet., ECF No. 1.) It was followed on February 4, 2009, by an amended petition
17 identifying seven claims. (Am. Pet., ECF No. 28.) Respondent filed an answer to the amended
18 petition on January 26, 2010. (Answer, ECF No. 40.) On June 6, 2009, Petitioner filed a
19 traverse voluntarily withdrawing claims 1-2 and 5-6 of the amended petition. (Traverse, ECF
20 No. 56, at 8-9, and 18-19.) Accordingly, only claims three, four and seven remain at issue.
21 Those claims raise the following grounds for relief:

22 Claim 3: Ineffective assistance of both trial and appellate counsel inasmuch as the
23 evidence presented at trial was insufficient to prove beyond a reasonable doubt that the
24 transportation and possession of methamphetamine was for sale and committed on behalf of
25 a criminal street gang within the meaning of penal code section 186.22(a)-(f);

26 Claim 4: Ineffective assistance of both trial and appellate counsel for failing to challenge
27

28 ¹"LD" refers to the documents lodged by Respondent with his response.

1 a "question of law", i.e., that "Norteno" as the name of a criminal street gang was a qualifying
2 "element" within the meaning of penal code section 186.22(a)-(f); and

3 Claim 7: Ineffective assistance of both trial and appellate counsel for not challenging
4 the trial court's failure to instruct the jury on essential element of criminal street gang, i.e., the
5 name of the group, thereby depriving Petitioner of a fundamentally fair trial. (Am. Pet.)

6 **II. FACTUAL BACKGROUND**²

7 On November 13, 2002, Giachino Chiaramonte, a Madera patrol officer,
8 conducted a vehicle stop on a car that was speeding and had expired
9 registration tags. Defendant was the driver of the vehicle. Defendant did not
10 have a driver's license. He was placed under arrest and placed in the back of
11 the patrol car. Defendant's wife, Mary, was in the passenger seat and
12 defendant's four-year-old son was unrestrained in the back seat of the car.

13 Officer Chiaramonte asked Mary to get out of the car. He told Mary that
14 he was going to conduct a vehicle inventory search before impounding the
15 vehicle. Chiaramonte saw a purse in the middle of the front seat. He asked Mary
16 if the purse belonged to her; she said that it did. Chiaramonte asked Mary if he
17 could search the purse and she gave him permission to search the purse.

18 When Officer Chiaramonte opened the purse, he saw a gun on top of the
19 purse. He also saw a pouch next to the gun. Chiaramonte asked Mary if the gun
20 was loaded. She replied that she did not know. Chiaramonte asked her if she
21 was sure and she said that probably it was loaded. Chiaramonte opened the
22 pouch and found marijuana and a white rock substance. The gun was loaded.

23 Officer Chiaramonte asked Mary where the gun was before it was in her
24 purse. Mary told him that the gun and the pouch were on the seat of the car.
25 When Chiaramonte pulled the car over, Mary put the gun and the pouch in her
26 purse.

27 Continuing to search the car, Officer Chiaramonte found a pager on the
28 driver's seat. The pager continually went off while Chiaramonte searched the
car. Chiaramonte also found a blowtorch, condoms, and a bong under the
driver's seat of the car. A pipe was found in the pouch in Mary's purse.

Defendant asked Officer Chiaramonte what he was going to do with the
torch. Chiaramonte told him that the torch would be booked into evidence.
Defendant then said, "See, the torch shows you I'm not selling. I'm using the
stuff."

The white substance in the pouch weighed 21.71 grams and was
methamphetamine. According to the testimony of a police drug expert, Robert
Blehm, the amount would be sufficient to provide over 200 doses. Blehm said
that it was his opinion that the methamphetamine was possessed for purposes
of sale.

²The factual background is taken from the opinion of the state appellate court on direct appeal and is presumed correct. 28 U.S.C. § 2254(e)(1).

1 Jason Dilbeck testified as an expert on gangs. Dilbeck presented expert
2 testimony to establish that the Nortenos are a criminal street gang. In addition,
3 based on defendant's tattoos, moniker (street gang name), his prior admission
4 of gang affiliations, and his activities, the expert concluded that defendant is an
active member of the Norteno criminal street gang and committed the current
crimes for the benefit of that gang.

5 Defense

6 Although defendant's wife Mary was a codefendant, she was called as a
7 witness on defendant's behalf. She testified that she did not tell Officer
8 Chiaramonte that he could look in her purse. Mary told Chiaramonte that the gun
9 and the drugs belonged to her. In addition, Mary testified that the gun and the
10 methamphetamine were hers and were in her purse when the car was pulled
11 over. She said that she purchased the gun for her own protection because a
man had been threatening to beat her. She testified that she loves defendant
and she is not afraid of him. Mary said that defendant is not now a gang member
and he did not know that she had a gun in her purse. Defendant and Mary were
not living together at the time of the stop and he had come to pick her up. Mary
uses methamphetamine.

12 Defendant's mother testified that defendant had been called Nay Nay (his
13 moniker) since he was a small child. (LD No. 8 at 2-4.)

14 **III. DISCUSSION**

15 **A. Jurisdiction**

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

23 **B. Legal Standard of Review**

24 On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act
25 of 1996 ("AEDPA"), which applies to all petitions for writ of habeas corpus filed after its
26 enactment. Lindh v. Murphy, 521 U.S. 320, 326, 117 S. Ct. 2059, 138 L. Ed. 2d 481 (1997);
27 Jeffries v. Wood, 114 F.3d 1484, 1499 (9th Cir. 1997). The instant petition was filed after the
28 enactment of the AEDPA; thus, it is governed by its provisions.

1 Petitioner is in custody of the California Department of Corrections pursuant to a state
2 court judgment. Under the AEDPA, an application for a writ of habeas corpus by a person in
3 custody under a judgment of a state court may be granted only for violations of the
4 Constitution or laws of the United States. 28 U.S.C. § 2254(a); Williams v. Taylor, 529 U.S.
5 at 375 n. 7. Federal habeas corpus relief is available for any claim decided on the merits in
6 state court proceedings if the state court's adjudication of the claim:

7 (1) resulted in a decision that was contrary to, or involved an
8 unreasonable application of, clearly established federal law, as
determined by the Supreme Court of the United States; or

9 (2) resulted in a decision that was based on an unreasonable
10 determination of the facts in light of the evidence presented in the
State court proceeding.

11 28 U.S.C. § 2254(d); see Lockyer v. Andrade, 538 U.S. 63, 70-71 (2003). Accordingly,
12 Petitioner bears the burden of demonstrating that the state court's decision was either contrary
13 to or an unreasonable application of federal law Woodford v. Visciotti, 537 U.S. 19, 24,(2002);
14 Baylor v. Estelle, 94 F.3d 1321, 1325 (9th Cir. 1996). Although "AEDPA does not require a
15 federal habeas court to adopt any one methodology," there are certain principles which guide
16 its application. Lockyer, 538 U.S. at 71.

17 First, the AEDPA establishes a "highly deferential standard for evaluating state-court
18 rulings." Woodford, 537 U.S. at 24. Determinations of factual issues made by state courts are
19 presumed to be correct. 28 U.S.C. § 2254(e)(1). Accordingly, when assessing whether the law
20 applied to a particular claim by a state court was contrary to or an unreasonable application
21 of "clearly established federal law," a federal court must review the last reasoned state court
22 decision. Robinson v. Ignacio, 360 F.3d 1044, 1055 (9th Cir. 2004); Avila v. Galaza, 297 F.3d
23 911, 918 (9th Cir. 2002). If a state court summarily denies a claim, the court "looks through"
24 the summary disposition to the last reasoned decision. Shackleford v. Hubbard, 234 F.3d
25 1072, 1079 n. 2 (9th Cir. 2000); Ylst v. Nunnemaker, 501 U.S. 797, 803 (1991). Conversely,
26 de novo review, rather than AEDPA's deferential standard, is applicable to a claim that the
27 state court did not reach on the merits. Lewis v. Mayle, 391 F.3d 989, 996 (9th Cir. 2004);
28 Nulph v. Cook, 333 F.3d 1052, 1056 (9th Cir. 2003).

1 Second, the court must ascertain whether relevant federal law was "clearly established"
2 at the time of the state court's decision. To make this determination, the Court may only
3 consider the holdings, as opposed to dicta, of the U.S. Supreme Court. See Williams v. Taylor,
4 529 U.S. at 412. In this context, Ninth Circuit precedent remains persuasive but not binding
5 authority for purposes of determining whether a state court decision is an unreasonable
6 application of Supreme Court Law. See Clark v. Murphy, 331 F.3d 1062, 1069 (9th Cir. 2003).

7 Third, the "contrary to" and "unreasonable application" clauses of § 2254(d)(1) have
8 "independent meanings." Bell v. Cone, 535 U.S. 685, 694 (2002). Under the "contrary to"
9 clause, a federal court may grant a writ of habeas corpus only if the state court arrives at a
10 conclusion opposite to that reached by the Supreme Court on a question of law, or if the state
11 court decides the case differently than the Supreme Court has on a set of materially
12 indistinguishable facts. Williams, 529 U.S. at 405. It is not necessary for the state court to cite
13 or even to be aware of the controlling federal authorities "so long as neither the reasoning nor
14 the result of the state-court decision contradicts them." Early v. Packer, 537 U.S. 3, 8 (2002).

15 Under the "unreasonable application" clause, the court may grant relief "if the state
16 court correctly identifies the governing legal principle...but unreasonably applies it to the facts
17 of the particular case." Bell, 535 U.S. at 694; Williams, 529 U.S. at 407-08. As the Supreme
18 Court has emphasized, a court may not issue the writ "simply because that court concludes
19 in its independent judgment that the relevant state-court decision applied clearly established
20 federal law erroneously or incorrectly." Williams, 529 U.S. at 411. Thus, the focus is on
21 "whether the state court's application of clearly established federal law is objectively
22 unreasonable." Bell, 535 U.S. at 694.

23 **IV. REVIEW OF PETITION**

24 **A. Procedural Default**

25 The California Supreme Court denied Petitioner's remaining claims on the ground that
26 they should have been raised on direct appeal. This procedural bar was set out by the
27 California court in In re Dixon, 41 Cal. 2d 756 (1953), and reaffirmed in In re Harris, 5 Cal. 4th
28 813 (1993). Because Petitioner filed his direct appeal in 2004, and thus according to the

1 California Supreme Court should have raised these claims at that time, this is a post-Harris
2 default.

3 1. Respondent's Initial Pleading Requirement

4 Under Bennett, the state must first "adequately ple[a]d the existence of an independent
5 and adequate state procedural ground as an affirmative defense." Bennett v. Mueller, 322
6 F.3d 573, 586 (9th Cir. 2003). Respondent's initial burden is modest, and he is required only
7 to plead the existence of a procedural bar that is applicable to the claims at issue. See King
8 v. LaMarque, 464 F.3d 963, 967 (9th Cir. 2006). See also Rule 5, Rules Governing Section
9 2254 Cases in the United States District Courts (providing that a respondent's answer to a
10 petition "must state whether any claim in the petition is barred by . . . a procedural bar.").

11 In the answer to the amended petition, Respondent identified each of Petitioner's claims
12 as procedurally defaulted under Dixon. (Answer at 22, 29, and 35.) Respondent has therefore
13 satisfied his initial burden of pleading the "affirmative defense" of a procedural bar for these
14 claims. Bennett, 322 F.3d at 586.

15 2. Petitioner's Interim Burden

16 Once the state properly pleads the existence of an independent and adequate
17 procedural bar, the burden shifts to the petitioner to place that defense in issue, and "[t]his
18 must be done, at a minimum, by specific allegations by the petitioner as to the adequacy of
19 the state procedure. The scope of the state's burden of proof thereafter will be measured by
20 the specific claims of inadequacy put forth by the petitioner." Bennett, 322 F.3d at 584-85. In
21 his traverse, Petitioner asserts that the Dixon procedural bar has not been consistently applied
22 and is therefore inadequate. (Traverse at 7-8.) The Court agrees.

23 In Ayala, the district judge examined a post-Harris default. The judge held that the
24 petitioner's interim burden was satisfied by the existence of other California district court cases
25 finding inconsistent application of the Dixon rule after 1993. Ayala v. Ayers, 2008 U.S. Dist.
26 LEXIS 31359, 2008 WL 1787317 at *6-7. The court first examined Vaughn v. Adams, No. CV-
27 F-015241OWW DLB HC, 2006 U.S. Dist. LEXIS 37742, 2006 WL 1439400, *4 (E.D. Cal. May
28 22, 2006), adopted, 2006 U.S. Dist. LEXIS 43057, 2006 WL 1774915 (E.D. Cal. Jun 24,

1 2006). In Vaughn, the court considered a 1997 default. It found Petitioner's burden of showing
2 inadequacy satisfied by identifying five cases in which just months prior to the instant default,
3 the California Supreme Court summarily denied petitions without a citation to In re Dixon,
4 wherein claims that were not raised on direct appeal were raised on state habeas corpus.³ The
5 Ayala court next examined Monarrez v. Alameda, No. SACV03-00104 AHM (MLG), 2005 U.S.
6 Dist. LEXIS 37876, 2005 WL 2333462 (C.D. Cal. Sept. 22, 2005), in which the date of the
7 default was January 2000. The Petitioner in Monarrez presented the court with a "survey of
8 210 non-capital habeas corpus petitions decided on December 21, 1999, just a month before
9 the date of the purported default, showing inconsistent application of the Dixon rule by the
10 California Supreme Court in that the Dixon bar was applied in only 19 cases, less than 10 per
11 cent of those decided." 2005 U.S. Dist. LEXIS 37876, 2005 WL 2333462 at *5. Unsurprisingly,
12 this showing satisfied the Petitioner's interim burden. Based on the cases examined by, and
13 the holdings of the courts in Vaughn and Monarrez, the Ayala court found the interim burden
14 of showing inadequacy of the Dixon rule satisfied. This Court finds no fault with the
15 conclusions in Vaughn, Monarrez, and Ayala. See also Dennis v. Brown, 361 F. Supp. 2d
16 1124, 1130-31 (2005) (petitioner shows inconsistent application of Dixon rule to meet burden
17 for a 1996 default); Carpenter v. Ayers, 548 F. Supp. 2d 736, 756-57 (2008) (relying in part
18 on Dennis, court finds Dixon rule inadequate to bar federal review).

19 Here again, Respondent has done nothing to show the Dixon rule was in fact
20 consistently applied. Furthermore, all of Petitioner's remaining claims are alleged to be claims
21 of ineffective assistance of counsel. As the Dixon rule does not apply to such claims, Petitioner
22 is not barred from proceeding with such claims in his federal petition. In re Robbins, 18 Cal.
23 4th 770, 814, n. 34 (1998). Accordingly, this Court shall consider the merits of claims denied
24 by the California Supreme Court based on Dixon.

25 ///

26 _____
27 ³The court in Ayala describes the petitioner in Vaughn as identifying fourteen cases. 2008 U.S. Dist. LEXIS
28 31359, 2008 WL 1787317 at *6. However, the court in Vaughn noted that the California courts decided nine of
those cases after the date of default, making them less relevant to a determination of the state of California law
at the time of the petitioner's default. 2006 U.S. Dist. LEXIS 37742, 2006 WL 1439400 at * 4-5.

1 B. **Ground Three - Ineffective Assistance of Counsel - Sufficiency of the**
2 **Evidence Relating to Gang Enhancements**

3 Petitioner asserts that counsel was ineffective for failing to challenge the sufficiency of
4 the evidence supporting the finding of criminal street gang enhancement pursuant to California
5 Penal Code Section 186.22(b)(1).

6 1. Standard for Ineffective Assistance of Counsel

7 The law governing ineffective assistance of counsel claims is clearly established for the
8 purposes of the AEDPA deference standard set forth in 28 U.S.C. § 2254(d). Canales v. Roe,
9 151 F.3d 1226, 1229 (9th Cir. 1998). In a petition for writ of habeas corpus alleging ineffective
10 assistance of counsel, the Court must consider two factors. Strickland v. Wahsington, 466
11 U.S. 668; 104 S. Ct. 2052; 80 L. Ed. 2d 674, 687(1984); Lowry v. Lewis, 21 F.3d 344, 346 (9th
12 Cir. 1994). First, the petitioner must show that counsel's performance was deficient, requiring
13 a showing that counsel made errors so serious that he or she was not functioning as the
14 "counsel" guaranteed by the Sixth Amendment. Strickland, 466 U.S. at 687. The petitioner
15 must show that counsel's representation fell below an objective standard of reasonableness,
16 and must identify counsel's alleged acts or omissions that were not the result of reasonable
17 professional judgment considering the circumstances. Id. at 688; United States v. Quintero-
18 Barraza, 78 F.3d 1344, 1348 (9th Cir. 1995). Judicial scrutiny of counsel's performance is
19 highly deferential. A court indulges a strong presumption that counsel's conduct falls within
20 the wide range of reasonable professional assistance. Strickland, 466 U.S. at 687; see also
21 Harrington v. Richter, 131 S.Ct. 770 (2011).

22 Second, the petitioner must demonstrate that "there is a reasonable probability that, but
23 for counsel's unprofessional errors, the result ... would have been different," Strickland, 466
24 U.S. at 694. Petitioner must show that counsel's errors were so egregious as to deprive
25 defendant of a fair trial, one whose result is reliable. Id. at 687. The Court must evaluate
26 whether the entire trial was fundamentally unfair or unreliable because of counsel's
27 ineffectiveness. Id.; Quintero-Barraza, 78 F.3d at 1348; United States v. Palomba, 31 F.3d
28 1456, 1461 (9th Cir. 1994).

1 A court need not determine whether counsel's performance was deficient before
2 examining the prejudice suffered by the petitioner as a result of the alleged deficiencies.
3 Strickland, 466 U.S. at 697. Since the defendant must affirmatively prove prejudice, any
4 deficiency that does not result in prejudice must necessarily fail. However, there are certain
5 instances which are legally presumed to result in prejudice, e.g., where there has been an
6 actual or constructive denial of the assistance of counsel or where the State has interfered
7 with counsel's assistance. Id. at 692; United States v. Cronin, 466 U.S., at 659, and n.25
8 (1984).

9 As the Supreme Court reaffirmed recently in Harrington v. Richter, the meeting the
10 standard for ineffective assistance of counsel in federal habeas is extremely difficult: _

11 The pivotal question is whether the state court's application of the Strickland
12 standard was unreasonable. This is different from asking whether defense
13 counsel's performance fell below Strickland's standard. Were that the inquiry,
14 the analysis would be no different than if, for example, this Court were
15 adjudicating a Strickland claim on direct review of a criminal conviction in a
16 United States district court. Under AEDPA, though, it is a necessary premise
17 that the two questions are different. For purposes of § 2254(d)(1), "an
18 unreasonable application of federal law is different from an incorrect application
19 of federal law." Williams, supra, at 410, 120 S. Ct. 1495, 146 L. Ed. 2d 389. A
20 state court must be granted a deference and latitude that are not in operation
21 when the case involves review under the Strickland standard itself.

17 A state court's determination that a claim lacks merit precludes federal habeas
18 relief so long as "fairminded jurists could disagree" on the correctness of the
19 state court's decision. Yarborough v. Alvarado, 541 U.S. 652, 664, 124 S. Ct.
20 2140, 158 L. Ed. 2d 938 (2004). And as this Court has explained, "[E]valuating
21 whether a rule application was unreasonable requires considering the rule's
22 specificity. The more general the rule, the more leeway courts have in reaching
23 outcomes in case-by-case determinations." Ibid. "[I]t is not an unreasonable
24 application of clearly established Federal law for a state court to decline to apply
25 a specific legal rule that has not been squarely established by this Court."
26 Knowles v. Mirzayance, 556 U.S. ___, ___, 129 S. Ct. 1411, 1419, 173 L. Ed.
27 2d 251, 261 (2009) (internal quotation marks omitted).

23 Harrington v. Richter, 131 S.Ct. 770, 2011 U.S. LEXIS 912, *26-28 (2011).

24 "It bears repeating that even a strong case for relief does not mean the state court's
25 contrary conclusion was unreasonable." Id. at 29. "As amended by AEDPA, § 2254(d) stops
26 short of imposing a complete bar on federal court relitigation of claims already rejected in state
27 proceedings." Id. "As a condition for obtaining habeas corpus from a federal court, a state
28 prisoner must show that the state court's ruling on the claim being presented in federal court

1 was so lacking in justification that there was an error well understood and comprehended in
2 existing law beyond any possibility for fairminded disagreement." Id. at 30.

3 Accordingly, even if Petitioner presents a strong case of ineffective assistance of
4 counsel, this Court may only grant relief if no fairminded jurist could agree on the correctness
5 of the state court decision.

6 2. Standard for Insufficiency of the Evidence

7 The law on insufficiency of the evidence claim is clearly established. The United States
8 Supreme Court has held that when reviewing an insufficiency of the evidence claim on
9 habeas, a federal court must determine whether, viewing the evidence and the inferences to
10 be drawn from it in the light most favorable to the prosecution, any rational trier of fact could
11 find the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443
12 U.S. 307, 319 (1979). Sufficiency claims are judged by the elements defined in state law. Id.
13 at 324, n. 16.

14 3. Analysis of the Claim

15 Petitioner claims there was insufficient evidence to prove that the charges of
16 possession and transport of drugs and related crimes benefitted a criminal street gang, as
17 defined in California Penal Code Section 186.22. This claim was presented to the Madera
18 County Superior Court, the California Court of Appeal, and the California Supreme Court by
19 way of post-conviction review petitions. The Madera County Superior Court found that
20 Petitioner could have, but did not, raise this claim on direct review. The California Court of
21 Appeal and the California Supreme Court summarily denied the claim, and it is presumed
22 these courts denied the claim on the same procedural ground identified by the Madera County
23 Superior Court. Ylst v. Nunnemaker, 501 U.S. at 803.

24 Petitioner has asserted in this claim that there was insufficient evidence to prove that
25 the transportation and possession of methamphetamine for sale was committed on behalf of
26 a criminal street gang. (Am. Pet. at 8.) Petitioner's argument is based on testimony from the
27 prosecution's gang expert that at least two other individuals, Alejandro Martinez and Moses
28 Peter McGuire, were members of the same gang (thus qualifying the group as a criminal

1 street gang). However, Petitioner contends that the expert only provided evidence that the
2 other individuals were 'Nortenos', not 'Varrío West Side' gang members, the specific gang to
3 which Petitioner was allegedly affiliated. Petitioner also asserts that the expert did not produce
4 evidence that Varrío West Side existed as a criminal street gang as defined by the California
5 Penal Code. Finally, Petitioner asserts that his counsel was ineffective in that he failed to
6 investigate and discover and present evidence that Martinez and McGuire were not members
7 of the Varrío West Side gang.

8 Gang enhancement applies to any felony that is committed “for the benefit of, at the
9 direction of, or in association with any criminal street gang” and “with the specific intent to
10 promote, further, or assist in any criminal conduct by gang members....” Cal. Penal Code §
11 186.22(b)(1). As further defined by California Penal Code § 186.22, a “criminal street gang”
12 is “any ongoing organization” whose “primary activities” include the commission of one or more
13 statutorily enumerated criminal acts (including transporting and possession of
14 methamphetamine), and which is identified by a designed “common name or common
15 identifying sign or symbol,” and “whose members individually or collectively engage in...a
16 pattern of criminal gang activity.” Cal. Penal Code § 186.22(f). A “pattern of criminal gang
17 activity” is defined, in turn, as “the commission...of two or more” statutorily enumerated crimes
18 (such as attempted murder, discharging a firearm, or transporting methamphetamine),
19 “committed on separate occasions, or by two or more persons,” within three years of each
20 other. Cal. Penal Code §186.22(e). The current charged offense may serve as one of the
21 predicate offenses for purposes of establishing a pattern of criminal gang activity. People v.
22 Gardeley, 14 Cal. 4th 605, 625 (1996).

23 In the instant case, there is ample evidence to satisfy the requisite elements for
24 Petitioner’s gang enhancement under California Penal Code Section 186.22. The majority of
25 the prosecution's evidence regarding gang activity was provided by the prosecution’s expert,
26 Officer Dilbeck. He testified that Madera County has approximately 5,000 street gang
27 members belonging to two primary gangs: the Nortenos and Surenos. (LD No. 27 at 2434,
28 2438, 2443.) Nortenos wear red and identify with the number 14 as it signifies “N” for “Nuestra

1 Familia.” (LD No. 27 at 2446-47, 2461.) The Nortenos’ activities consist of a “wide variety of
2 crimes,” ranging from murder, drug sales, rape, robbery, burglary, assault, and drive-by
3 shootings. (LD No. 27 at 2458-59.)

4 Office Dilbeck testified that a "turf" is an area where gang members grew up, live or
5 congregate and that one “turf” in Madera County is the “Varrío West Side territory,” (LD No.
6 27 at 2445-46.) He further explained that “Varrío West Side” is “a clique or set of the whole”
7 larger Norteno gang. (LD No. 27 at 2446.) There are other Norteno subsets in Madera County
8 and throughout the state. (LD No. 27 at 2445-46, 2458.) Significantly, all of the cliques are a
9 subset of the whole, i.e., the Norteno gang, and all affiliate with the number 14 and the
10 Nuestra Familia. (LD No. 27 at 2446-47, 2456.)

11 Officer Dilbeck testified, that in his opinion, Petitioner was a member of the “Norteno”
12 gang. (LD No. 27 at 2461.) One factor supporting his opinion was Petitioner’s “West Side 14”
13 tattoo located “across the top of his chest.” (LD No. 27 at 2454.) “West Side” indicated
14 Petitioner’s claim to a particular “clique or subset,” and the “14” signified Petitioner’s “overall
15 allegiance to the Nortenos as a whole.” (LD No. 27 at 2455.) In addition, Petitioner repeatedly
16 admitted to California prison officials that he was affiliated with the Norteno gang, dating back
17 to 1995 and most recently in 2003. (LD No. 27 at 2462-65.) In May 1995, Petitioner and
18 “another Norteno gang member” were “involved in a drive-by shooting against two rival Sureno
19 gang members.” (LD No. 27 at 2466.) Petitioner was specifically identified by the Sureno
20 victims as a “Varrío West Side gang member.” (LD No. 27 at 2466.) In March 2002, Petitioner
21 was spotted carrying a red bandana, which is a sign commonly displayed by Norteno gang
22 members. (LD No. 27 at 2467-68.) Then, in February 2003, Petitioner was hanging out with
23 other Norteno gang members in the Varrío West Side territory when a rival Sureno snuck up
24 and fired twenty rounds from an automatic weapon. (LD No. 27 at 2471-73.) Immediately after
25 the shooting commenced, Petitioner “dove” into his car, which was subsequently found to
26 contain a firearm and methamphetamine. (LD No. 27 at 2473.) Petitioner was also contacted
27 by police while in the presence of Jessie Candilla, a known “Varrío West Side gang member”
28 with a high stature as a “larger drug dealer[].” (LD No. 27 at 2475-76.) Finally, Petitioner was

1 jumped by some Surenos while in the company of another gang member wearing red clothing.
2 (LD No. 27 at 2475.)

3 Based on this information, Officer Dilbeck opined that Petitioner was a “hard-core”
4 member “in the Norteno street gang.” (LD No. 27 at 2476-77.) Officer Dilbeck also believed
5 that Petitioner committed the charged offenses for the benefit of the Norteno gang. (LD No.
6 27 at 2474, 2480.) As he explained, “by doing those types of violent acts you are actually in
7 essence making it easier for other members of your gang to do criminal activity.” (LD No. 27
8 at 2478.) Also, the proceeds of drug sales are used to finance more criminal operations and
9 provide income to the Norteno members, including those incarcerated. (LD No. 27 at 2474.)
10 As for carrying a firearm, it enables the member to control his “turf or territory...from rival gang
11 members who may enter their territory.” (LD No. 27 at 2482.) It additionally discourages local
12 citizens from reporting the gang’s criminal activity by instilling a fear of retaliation. (LD No. 27
13 at 2478-79, 2483.)

14 Officer Dilbeck described an offense committed by Alejandro Martinez, whom he
15 identified as a Norteno gang member from Madera. (LD No. 27 at 2450.) Martinez was
16 convicted in 2001 for discharging a firearm (Cal. Penal Code § 246). (LD No. 27 at 2450-51.)
17 Officer Dilbeck also referred to another offense committed by Moses Peter McGuire, whom
18 he identified as another Norteno gang member from Madera. (LD No. 27 at 2451-52.) McGuire
19 was convicted in 2001 of attempted murder and transportation of methamphetamine. (LD No.
20 27 at 2451-52.)

21 Accordingly, the prosecution provided significant evidence regarding Petitioner's
22 involvement in the Norteno gang and to prove the elements required for finding a criminal
23 street gang enhancement. The evidence presented by the expert witness functions as strong
24 circumstantial evidence from which the jury could readily infer that Petitioner committed the
25 charged offenses “for the benefit of,...or in association with” the Norteno gang” and that he did
26 so “with the specific intent to promote, further, or assist” his fellow Nortenos engage in other
27 criminal conduct. Cal. Penal Code § 186.22(b)(1); see also People v. Romero, 140 Cal. App.
28 4th 15, 18 (2006) (explaining that § 186.22 enhancement may be proven with expert testimony

1 about criminal street gangs).

2 Petitioner points to several bases for concluding the evidence is insufficient to show that
3 his actions were associated with or benefitted a street gang. First, Petitioner asserts that the
4 prosecution failed to prove that the other individuals referenced by the expert, Martinez and
5 McGuire, were Varrio West Side gang members or that Varrio West Side existed as a criminal
6 street gang. (Pet. at 8.) Petitioner's claims lack merit. The prosecution need not prove what
7 subset of a criminal street gang was involved. In People v. Ortega, 145 Cal.App.4th 1344,
8 1356-57 (2006), the California Court of Appeal addressed this issue with regard to the Norteno
9 street gang, the same gang in which Petitioner was allegedly involved. The Court held that the
10 prosecution need not prove which subset of the gang is involved when there is evidence that
11 members, regardless of subset, act in concert for the same goals. Specifically the court stated,

12 Detective Aurich testified there were thousands of Norteño gang members in the
13 Sacramento area, and 20 to 25 subsets of Norteños. We reject defendant's
14 assertion that the prosecution had to prove precisely which subset was involved
15 in the present case. No evidence indicated the goals and activities of a particular
16 subset were not shared by the others. There was sufficient evidence that
17 Norteño was a criminal street gang, that the murder was related to activity of that
18 gang, and defendant actively participated in that gang. There is no further
19 requirement that the prosecution prove which particular subset was involved
20 here. As stated in [People v. Valdez 58 Cal.App.4th 494, 506–507 (1997),
21 “gangs are not public and open organizations or associations like the YMCA or
22 State Bar Association, which have a clearly defined and ascertainable
23 membership. Rather, gangs are more secretive, loosely defined associations of
24 people, whose involvement runs the gamut from ‘wannabes’ to leaders.
25 Moreover, determining whether someone is involved and the level of
26 involvement is not a simple matter and requires the accumulation of a wide
27 variety of evidence over time and its evaluation by those familiar with gang
28 arcana in light of pertinent criteria.” (Fn. omitted.) In this case there was
testimony that it was not uncommon for members of different gangs to work in
concert to commit a crime. In light of the nature of gang structure and the apparent willingness
of members to work with other gangs to commit crimes, requiring the prosecution to prove the
specific subset of a larger gang in which a defendant operated would be an impossible, and
ultimately meaningless task.

24 Ortega, 145 Cal. App. 4th at 1356-1357.

25 On the other hand, a California Court of Appeal found that there was insufficient
26 connection between different factions of a white supremacist gang organization. In People v.
27 Williams, 167 Cal.App.4th 983, 987-88 (2008), the court found that the factions of the
28 Peckerwood gang shared a common name and ideology with other Peckerwood factions, but

1 that there was a lack of organization within the gang and that different factions did not
2 necessarily know the activities of other factions within the gang. Id. The distinction drawn by
3 the Williams court is instructive. Here, the same expert who testified in Williams that the
4 Peckerwood factions were loosely organized, testified that the Nortenos is a more structured
5 and organized criminal street gang. Specifically, the expert testified that due to inner struggles
6 between factions, the Nuestra Familia, the prison gangs associated with the Nortenos, sent
7 out CD's to remind Norteno members of their affiliation to the gang as a whole and prevent
8 further disruption to the income created by gang activity. (LD No. 27 at 2456-57.) Based on
9 the testimony of the prosecution expert, sufficient testimony existed to show that Petitioner
10 need only be found a member of the Nortenos not any specific subset.

11 In addition to providing sufficient evidence to show that the Nortenos operate as a
12 criminal street gang, the prosecution provided evidence that Petitioner was affiliated with the
13 Nortenos. The expert described Petitioner as being a 'hard-core' member based on many
14 factors, including Petitioner's gang related tattoos and Petitioner's statements of his gang
15 affiliation as a Norteno when in prison.

16 Petitioner also asserts that there was insufficient evidence to show that the other alleged
17 gang members, Martinez and McGuire, were Varrio West Side gang members. However, as
18 noted, the prosecution need only show that Petitioner and others were members of the greater
19 Norteno gang. As Petitioner's claim is premised on a finding that he and the other individuals
20 must be shown to be members of the Varrio West Side gang and such inquiry is not relevant,
21 his claim of insufficient evidence fails.

22 In his traverse, Petitioner also claims that there was insufficient evidence to show that
23 he possessed the specific intent to act in the benefit of the gang while committing the offense.
24 (Traverse at 13.) Petitioner bases his claim on People v. Ramon 175 Cal.App.4th 843 (2009),
25 which held that the expert witness only speculated that the defendants acted with specific
26 intent to promote, further, or assist criminal conduct of gang members by stealing a vehicle.
27 However, the court stated that the analysis "might be different if the expert's opinion had
28 included 'possessing stolen vehicles' as one of the activities of the gang." Ramon, 175 Cal.

1 App. 4th at 853. In the present case, the Petitioner committed crimes relating to the
2 possession and transport of drugs. The expert witness testified that drug sales were a primary
3 activity of the gang, and that the sale of drugs helped the gang financially.

4 With regard to the sufficiency of the evidence to support a gang enhancement under
5 section 186.22, the Ninth Circuit has recently held:

6 California law requires the prosecutor to prove two things. First, the prosecutor
7 must demonstrate that the defendant committed a felony "for the benefit of, at
8 the direction of, or in association with [a] criminal street gang." Cal. Penal Code
9 § 186.22(b)(1). Second, the prosecutor must show that the defendant committed
10 the crime "with the specific intent to promote, further, or assist in any criminal
conduct by gang members." *Id.* We have previously recognized the importance
of keeping these two requirements separate, and have emphasized that the
second step is not satisfied by evidence of mere membership in a criminal street
gang alone.

11 Briceno v. Scribner, 555 F.3d 1069, 1078 (9th Cir. 2009) (citing Garcia v. Carey, 395 F.3d
12 1099, 1102-1103 & n.9 (9th Cir. 2005). In Briceno, the gang expert testified in terms of
13 "generalities" that the crimes could glorify the gang, but did not provide direct or circumstantial
14 evidence regarding the defendant's specific intent. Briceno, 555 F.3d at 1078. In such
15 circumstances, the Ninth Circuit held the expert testimony did not establish the petitioner's
16 specific intent in committing the crimes. *Id.* at 1078-1079. This was particularly so in Briceno
17 because the defendant submitted proof of a different motivation, i.e. personal gain.

18 Subsequent to Garcia v. Carey, California courts have held that section 186.22's
19 specific intent element does not require a showing of intent to enable or assist criminal
20 activities aside from the offense charged; the intent to commit the gang related offense
21 suffices. See e.g., People v. Hill, 142 Cal.App.4th 770, 774 (2006); People v. Romero, 140
22 Cal.App.4th 15, 19-20 (2006); People v. Vazquez, 178 Cal.App.4th 347, 353-354 (2009).
23 Because of the conflict, the Ninth Circuit recently asked the California Supreme Court to
24 decide the question of state law. Emery v. Clark, 604 F.3d 1102 (9th Cir. 2010). On June 23,
25 2010, the California Supreme Court granted the request for certification and deferred further
26 action pending consideration of a related issue in People v. Albillar, 162 Cal.App.4th 935
27 (2008). On December 20, 2010, the California Supreme Court issued its decision in Albillar
28 and rejected the Ninth Circuit's reasoning in Garcia and Briceno finding "[t]here is no statutory

1 requirement that this 'criminal conduct by gang members' be distinct from the charged offense,
2 or that the evidence establish specific crimes the defendant intended to assist his fellow gang
3 members in committing." (Citations omitted). People v. Albillar, 51 Cal.4th 47, 2010 WL
4 5140768 *13 (2010). Therefore, the California Supreme Court has specifically interpreted its
5 law contrary to the interpretation in Briceno and Garcia, and such rulings are inoperative.

6 As there is no requirement that the prosecution prove intent to benefit the gang,
7 Petitioner's claim that sufficient evidence did not support such a conclusion is not relevant.
8 Substantial evidence supports Petitioner's multiple gang enhancements. When viewing the
9 evidence and the inferences to be drawn from it in the light most favorable to the prosecution,
10 any rational trier of fact could find the essential elements of the crime beyond a reasonable
11 doubt. Jackson v. Virginia, 443 U.S. 307 at 319. Accordingly Petitioner's sufficiency of the
12 evidence claim fails.

13 Moreover, Petitioner's counsel was not ineffective in failing to pursue a contrary
14 argument. See Strickland, 466 U.S. at 688-94; Harrington v. Richter, 131 S.Ct. 770, 2011 U.S.
15 LEXIS 912, *26-28. Petitioner has asserted that counsel should have presented evidence that
16 Petitioner did not know the other Norteno gang members described by the prosecution expert
17 and that Petitioner did not have the specific intent required to be found guilty of the gang
18 enhancements. However, the prosecution need not prove that Petitioner personally knew the
19 other gang members or that he had the specific intent to commit the crimes for the benefit of
20 the gang. Petitioner was not prejudiced by his counsel's failure to present such arguments to
21 the jury, and his ineffective assistance of counsel claim lacks merit.

22 C. **Ground Four - Ineffective Assistance of Counsel - Sufficiency of the**
23 **Evidence Relating to 'Norteno' as the Name of a Gang**

24 Petitioner asserts that counsel was ineffective for failing to challenge the sufficiency of
25 the evidence, necessary to prove criminal street gang enhancement, that 'Norteno' qualifies
26 as the name of a gang pursuant to California Penal Code Section 186.22.

27 A criminal street gang is defined as "any ongoing organization, association, or group
28 of three or more persons, whether formal or informal, having as one of its primary activities the

1 commission of one or more of [certain enumerated] criminal acts . . . , having a common name
2 or common identifying sign or symbol, and whose members individually or collectively engage
3 in or have engaged in a pattern of criminal gang activity." Cal. Penal Code § 186.22(f); People
4 v. Sengpadychith, 26 Cal.4th 316, 323 (2001).

5 Here, Petitioner claims that Norteno is not the name of a gang, but only describes a
6 geographic region, and the prosecution did not prove that he was a member of the Varrio West
7 Side subset. Defendant relies on People v. Valdez 58 Cal.App.4th 494, 499 n.2 (1997), noting
8 that in Valdez the California Court of Appeal stated, "Norteño and Sureño are not the names
9 of gangs," and merely identify gangs located either in Southern or Northern California.
10 However, as described above, in People v. Ortega, 145 Cal.App.4th 1344, 1356-57 (2006),
11 the California Court of Appeals later determined that the expert witness testimony presented
12 in that case was sufficient to prove that Nortenos was a criminal street gang. See also In re
13 Jose P., 106 Cal. App. 4th 458, 467 (2003) ("Valdez does not hold that there is no criminal
14 street gang called Norteno."). As later California cases have shown that Norteno can be and
15 has been found to be the name of a criminal street gang, Petitioner's claim based on Valdez
16 fails.

17 Petitioner also claims that he does not personally know the other members described
18 by the expert as Norteno gang members in Madera County. However, California Penal Code
19 Section 186.22(f) defines a criminal street gang as a group of three or more persons engaged
20 in certain criminal acts and using common name, sign or symbol. The statute does not require
21 personal knowledge of the specific identity of others in the gang. In the present case, the
22 expert testified that in addition to the Varrio West Side subgroup there were other subgroups
23 of the Norteno gang in Madera County and throughout California. As the expert testified that
24 the various subgroups are organized and work in concert, it is possible that the Norteno
25 members that the expert discussed belonged to other subgroups, but were members of the
26 Norteno gang nonetheless. Penal Code Section 186.22(f) does not require knowledge of the
27 identity of other members of the criminal street gang. Petitioner's claim lacks merit.

28 When viewing the evidence and the inferences to be drawn from it in the light most

1 favorable to the prosecution, any rational trier of fact could find, beyond a reasonable doubt,
2 that the Norteno gang met the elements to be considered a criminal street gang. Jackson v.
3 Virginia, 443 U.S. 307 at 319. Accordingly Petitioner's sufficiency of the evidence claim fails.

4 Petitioner's counsel was not ineffective for failing to pursue a contrary argument. See
5 Strickland, 466 U.S. at 688-94; Harrington v. Richter, 2011 U.S. LEXIS 912, at *26-28. While
6 Petitioner claims ineffective assistance of counsel, he does not specify what action his counsel
7 should have taken that would have changed the result. Strong evidence was presented
8 regarding the existence of the Norteno street gang, and it is not likely that Petitioner's counsel,
9 even if attempting to object to the testimony, could have prevented it from being admitted.
10 Accordingly, Petitioner's ineffective assistance of counsel claim also fails.

11 D. **Ground Seven - Ineffective Assistance of Counsel - Failure to Challenge**
12 **the Court's Failure to Instruct Jury Regarding the Name of the Gang**

13 Petitioner asserts that counsel was ineffective for not challenging the court's failure to
14 properly instruct the jury regarding a criminal street gang under California Penal Code Section
15 186.22.

16 1. Standards Regarding Instructional Error

17 A challenge to a jury instruction solely as an error under state law does not state a claim
18 cognizable in a federal habeas corpus action. See Estelle v. McGuire, 502 U.S. 62, 71-72
19 (1991). To obtain federal collateral relief for errors in the jury charge, a petitioner must show
20 that the ailing instruction by itself so infected the entire trial that the resulting conviction
21 violates due process. See id. at 72. The instruction may not be judged in artificial isolation, but
22 must be considered in the context of the instructions as a whole and the trial record. Id. The
23 court must evaluate jury instructions in the context of the overall charge to the jury as a
24 component of the entire trial process. See United States v. Frady, 456 U.S. 152, 169 (1982)
25 (citing Henderson v. Kibbe, 431 U.S. 145, 154 (1977)).

26 Even if it is determined that the instruction violated the petitioner's right to due process,
27 a petitioner can only obtain relief if the unconstitutional instruction had a substantial influence
28 on the conviction and thereby resulted in actual prejudice under Brecht v. Abrahamson, 507

1 U.S. 619, 637 (1993) ("The test . . . is whether the error had substantial and injurious effect
2 or influence in determining the jury's verdict." (citation and internal quotation marks omitted)).
3 See Hanna v. Riveland, 87 F.3d 1034, 1039 (9th Cir. 1996). The burden of demonstrating that
4 an erroneous instruction was so prejudicial that it will support a collateral attack on the
5 constitutional validity of a state court's judgment is even greater than the showing required to
6 establish plain error on direct appeal." Id. Where "no erroneous instruction was given[.]" a
7 petitioner's burden is "especially heavy," because "[a]n omission, or an incomplete instruction,
8 is less likely to be prejudicial than a misstatement of the law." Henderson v. Kibbe, 431 U.S.
9 at 155.

10 2. Analysis of the Claim

11 In his petition, Petitioner discusses the jury instructions given during trial relating to
12 finding a criminal street gang enhancement under California Penal Code Section 186.22(a).
13 However, Petitioner's only objection to the jury instructions is that they do not identify the name
14 of the criminal street gang. Petitioner contends that the jury instructions were improper
15 because the jury could find Petitioner to be a member of the Norteno gang or the Varrío West
16 Side gang. Petitioner further contends that Norteno is not the name of a criminal street gang,
17 and that the prosecution has not proven that Varrío West Side meets the elements of a
18 criminal street gang.

19 To the extent that Petitioner is again claiming that Norteno is not a criminal street gang
20 based on People v. Valdez, 58 Cal. App.4th at 499 n.2, such claim is without merit for the
21 reasons discussed above. Further, in his traverse, Petitioner alleges that the prosecution
22 presented insufficient evidence to find the criminal street gang enhancement. (Traverse at 19-
23 24.) Such allegations do not raise issues regarding the jury instructions and were already
24 addressed with regard to claims three and four. Accordingly, claims relating to the sufficiency
25 of the evidence or whether or not Norteno is the name of a gang do not warrant further
26 discussion here.

27 Petitioner claims that the jury instructions deprived him of adequate due process by
28 failing to instruct the jury regarding the name of the criminal street gang. During trial, the jury

1 was given several instructions, including the following regarding criminal street gangs:

2 "Criminal street gang" means any ongoing organization, association, or group
3 of three or more persons, whether formal or informal, (1) having as one of its
4 primary activities the commission of one or more of the following criminal acts,
5 unlawful discharge of a firearm..., attempted murder ..., or transportation of
methamphetamine..., (2) having a common name or common identifying sign
or symbol and (3) whose members individually or collectively engage in or have
engaged in a pattern of criminal gang activity. (LD No. 26 at 216.)

6 In reaching a verdict, the jury found Petitioner guilty of the criminal street gang
7 enhancements, and expressly identified Norteno as the particular gang that benefitted by
8 Petitioner's criminal offenses (LD No. 26 at 239-43, 246, 249, 251, 254, and 256.) Petitioner
9 does not claim that the instructions were vague, or so prejudicial that it creates questions as
10 to the constitutional validity of the state court judgment. Petitioner's argument hinges on the
11 premise that Norteno is not a criminal street gang, and therefore the finding was improper.
12 Petitioner's claim lacks merit. As discussed, California courts have considered Norteno a
13 criminal street gang. Further, while the jury instruction does not specify the name of the
14 criminal street gang, Petitioner does not present any persuasive argument as to why the
15 instruction was erroneous. With such instructions, and the evidence presented at trial, the jury
16 concluded that Petitioner committed the offenses for the benefit of the Norteno gang.
17 Petitioner's instructional error claim only restates his claim that there is insufficient evidence
18 to be found guilty of the criminal street gang enhancement as Norteno is not a gang. Petitioner
19 has not shown that he has suffered any prejudice resulting from the omission of the name of
20 the specific street gang in the jury instruction. He is not entitled to relief on this ground.

21 Petitioner further claims that counsel was ineffective for failing to object to the jury
22 instruction. However, even if the jury instruction did include the name of the specific gang, in
23 this case the 'Nortentos', Petitioner has not shown that the result would have been any
24 different. Petitioner's counsel's conduct was reasonable in not objecting to the jury instruction,
25 and Petitioner did not suffer any prejudice from counsel's action. Accordingly, Petitioner's
26 ineffective assistance of counsel allegations fail with regard to this claim. See Strickland, 466
27 U.S. at 688-94; Harrington v. Richter, 2011 U.S. LEXIS 912, at *26-28. As such, Petitioner is
28 not entitled to relief.

1 V. **RECOMMENDATION**

2 Accordingly, IT IS HEREBY RECOMMENDED that the petition for a writ of habeas
3 corpus be DENIED WITH PREJUDICE. It is FURTHER RECOMMENDED that the Clerk of
4 Court be DIRECTED to enter judgment.

5 This Findings and Recommendation is submitted to the assigned District Judge,
6 pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within forty (40) days after being
7 served with the Findings and Recommendation, any party may file written objections with the
8 Court and serve a copy on all parties. Such a document should be captioned "Objections to
9 Magistrate Judge's Findings and Recommendation." Any reply to the objections shall be
10 served and filed within ten (10) days after service of the objections. The parties are advised
11 that failure to file objections within the specified time may waive the right to appeal the District
12 Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

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15 IT IS SO ORDERED.

16 Dated: February 28, 2011

1s/ Michael J. Seng
UNITED STATES MAGISTRATE JUDGE

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