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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

TYRONE ALLEN WILSON,
Petitioner,

v.

E. VALENZUELA,
Respondent.

Case No. 1:13-cv-00732 AWI MJS (HC)
FINDINGS AND RECOMMENDATION
REGARDING PETITION FOR WRIT OF
HABEAS CORPUS

Petitioner is a state prisoner proceeding *pro se* with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Respondent is represented by Darren Indermill of the office of the California Attorney General. The parties have not consented to Magistrate Judge jurisdiction under 28 U.S.C. § 636(c). (ECF Nos. 4, 14.)

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 Kern, following his conviction by jury trial on March 7, 2011, for possession of cocaine base for sale,

1 maintaining a place for the purpose of selling a controlled substance, and participation in
2 a criminal street gang. (Clerk's Tr. at 400-401.) On May 12, 2011, the trial court
3 sentenced Petitioner to serve a determinate term of ten years in prison. (Id.)

4 Petitioner's direct appeal, filed with the California Court of Appeal, Fifth Appellate
5 District, resulted in reversal of his conviction for maintaining a place for selling or using a
6 controlled substance, but otherwise was denied on December 17, 2012. (Lodged Docs.
7 21-24.) Petitioner filed a petition for rehearing with the appellate court on January 4,
8 2013. (Lodged Doc. 25.) The court modified the opinion on January 11, 2013, and
9 reversed Petitioner's conviction for participation in a criminal street gang. (Lodged Doc.
10 26.) Petitioner filed a petition for review with the California Supreme Court. (Lodged Doc.
11 27.) The Supreme Court summarily denied the petition on March 21, 2013. (Id.)

12 Petitioner did not file for post-conviction relief in the state courts.

13 Petitioner filed the instant federal habeas petition on April 18, 2013. (Pet., ECF
14 No. 1.) In his petition, Petitioner presents two claims for relief: (1) that the trial court erred
15 in allowing the testimony of the gang expert to attempt to establish that petitioner was an
16 active gang member; and (2) that the state courts' determination of the facts in light of
17 the evidence presented was unreasonable. (Pet.)

18 Respondent filed an answer to the petition on August 16, 2013. (Answer, ECF No.
19 15.) Petitioner did not file a traverse.

20 21 **II. STATEMENT OF THE FACTS**¹

22 On the evening of March 2, 2010, Bakersfield police officers Tim
23 Diaz and Pete Beagley pulled over a car with tinted windows and a
24 missing rear license plate. Wilson was driving the car. The officers
searched him, and in his pockets they found \$425 in cash and a key card
bearing the name of a hotel chain, America's Best Inn.

25 Diaz and Beagley turned Wilson over to another officer and
26 proceeded to the America's Best Inn at 8230 East Brundage Lane. The

27 ¹The Fifth District Court of Appeal's summary of the facts in its December 17, 2012 opinion is presumed
28 correct. 28 U.S.C. § 2254(e)(1).

1 desk clerk told them that Wilson was staying in room 221. The registration
2 form on file at the front desk for room 221 showed that the room was
3 registered to Scyotria Williams, Wilson's girlfriend. Copies of Wilson's and
4 Williams's driver's licenses were attached to the form. Williams's name
5 was misspelled "Wiliams" on the form.

6 The card the officers found in Wilson's pocket unlocked the door to
7 room 221. The officers found, hidden under a nightstand, a bag containing
8 a substance that was later determined to be 266.8 grams of cocaine base.
9 Behind a microwave oven they found a digital gram scale with white
10 residue on the weighing platform. A backpack filled with cash was behind
11 an armchair. There was \$11,400 in the backpack, sorted into bundles by
12 denomination. All but \$1,600 was in denominations smaller than \$50. On a
13 desk were two boxes of clear plastic sandwich baggies. The desk drawer
14 contained a razor blade with white residue on it. Beneath the desk was a
15 trash can; inside were several torn plastic baggies. Pieces of plastic bags
16 with torn corners were on the floor beside the trash can. On the floor of the
17 closet was a black plastic bag with its corners torn off.

18 Also behind the microwave was a receipt with numbers written on
19 it, and the words, "I love you, Holiday." A sign reading "Holiday" was on
20 the bed or against the wall. Bakersfield police officers knew Wilson by the
21 gang moniker Holiday. On previous occasions when he was incarcerated,
22 Wilson had identified himself as a member of the Country Boy Crips
23 criminal street gang and had asked to be housed apart from rival gang
24 members. He had the letter C tattooed on the back of his left arm and the
25 letter B tattooed on the back of his right arm.

26 The officers also found clothing, a shoulder bag, sunglasses, food,
27 toiletries, and other items in the room. From these, they inferred that at
28 least two people, a man and a woman, had been staying in the room.
When interviewed by police, Wilson denied any knowledge of the hotel
room or its contents. He said he had never been to that hotel and it was
impossible that the hotel would have a copy of his driver's license.

At the time of the current offenses, Wilson was on probation in case
No. BF123662A. In that case, in 2008, Wilson pleaded no contest to one
count of being a felon in possession of a firearm. (Former Pen. Code, §
12021, subd. (a)(1).) He received three years' probation, including one
year in county jail. On March 9, 2010, Wilson was arraigned on a violation
of probation based on the facts of the current offenses.

The district attorney filed an information in case No. BF131206A on
August 6, 2010, charging three counts: (1) possessing cocaine base for
sale (Health & Saf. Code, § 11351.5); (2) maintaining a place for the
purpose of unlawfully selling, giving away, or using a controlled substance
(Health & Saf. Code, § 11366); and (3) actively participating in a criminal
street gang (Pen. Code, § 186.22, subd. (a)).¹ For sentence-enhancement
purposes on counts one and two, the information alleged that Wilson
committed the offenses for the benefit of, at the direction of, or in
association with a criminal street gang. (§ 186.22, subd. (b).) The
information also alleged for sentence-enhancement purposes on each
count that Wilson had served two prior prison terms. (§ 667.5, subd. (b).)

¹ Further statutory references are to the Penal Code, unless otherwise indicated.

1 At trial, police officers testified about the traffic stop and the search
2 of the hotel room as described above. Rashmi Mulgi, one of the owners
3 and managers of the hotel, testified that Wilson was staying in room 221
4 on March 2, 2010, and that he and Williams had been staying at the hotel
5 for about a month.

6 Officer Beagley, who had made many arrests for possession of
7 controlled substances, gave opinion testimony about illegal drugs. He said
8 that one gram of cocaine base has a street-level value of about \$100. For
9 street sales, a large rock of cocaine base is usually divided by means of a
10 razor blade into small pieces worth \$10 each and packaged in bindles. A
11 bindle is usually made from a corner of a plastic bag. A small rock of
12 cocaine base is placed in the corner of the bag and the corner is then
13 twisted off and tied or melted closed. Sandwich bags or grocery bags can
14 be used. Answering a hypothetical question based on the evidence found
15 in room 221, Beagley opined that whoever possessed the drugs would be
16 in possession of them for the purpose of selling them.

17 Bakersfield police officer Daniel Champness testified as an expert
18 on gangs. The parties stipulated that the Country Boy Crips are a criminal
19 street gang within the meaning of section 186.22. Champness opined that
20 Wilson was an active participant in the County Boy Crips on March 2,
21 2010. He mentioned a number of facts to support this opinion. Wilson had
22 a "C" and a "B" tattooed on the backs of his arms, which Champness said
23 he had seen on other Country Boy Crips members—and on no one else—
24 and which stood for "Country Boy." Defense counsel opined that the "C"
25 looked like a "G."

26 The jury was shown a photograph of another Country Boy Crips
27 member with similar tattoos on his arms. Wilson was known to officers in
28 the department as Holiday, which Champness opined was a gang
moniker. On seven occasions when Wilson was booked at the county jail
between 1999 and 2008, Wilson claimed he was a Country Boy Crip and
asked to be kept away from members of the Bloods gang. In addition:

- In 2003, Wilson was arrested with a controlled substance and cash in his possession, both in quantities that led officers to conclude he possessed the drugs for sale.
- On February 13, 2005, Wilson was stopped at D&A Market, a Country Boy hangout in Country Boy territory, where illegal drugs were sold.
- Wilson was identified as a suspect who, on February 18, 2005, held two women at gunpoint in an apartment, demanding to know what happened to some money.
- The same day, at a different apartment, Wilson conducted an illegal drug transaction.
- The following day, February 19, 2005, Wilson was stopped while driving in Country Boy territory with several other known Country Boy Crips and two firearms in the car. One of the other gang members called Wilson by his gang moniker, Holiday.

1 • On March 19, 2005, Wilson was arrested while in Country
2 Boy territory and in the company of another gang member.
3 The other gang member was in possession of an illegal
4 drug.

5 • On November 1, 2006, a shooting took place at the
6 Regency Bowling Alley, a place known to police as a
7 Country Boy Crips hangout. Wilson was interviewed by
8 police because he had connections to a person who was
9 arrested for the shooting and because a witness described a
10 person matching Wilson's general description as being
11 present.

12 • On February 23, 2007, police searched Wilson's home and
13 found a digital scale with a residue of a controlled substance
14 on it.

15 • On May 31, 2008, officers searched a home and found
16 "indications" that Wilson had sold drugs there.

17 Champness also opined that Wilson possessed the drugs in room
18 221 and maintained the room as a place for selling drugs for the benefit of
19 and in association with his gang. In support of this, he testified that illegal
20 drug sales are a common crime among the Country Boy Crips. Street-
21 level sales of the drugs "are primarily controlled by these gang members."
22 The America's Best Inn was outside Country Boy Crips territory, but
23 Champness stated that there was a trend among the County Boy Crips to
24 work outside their territory to avoid prosecution. Money from drug sales
25 often is "funneled back into the gang," and used to pay for guns, bail,
26 more drugs to sell, and apartments or houses to use as safe houses or for
27 drug storage. Even when drug profits are not returned to the gang, the
28 sales benefit the gang because they allow "that individual who is selling to
continue in a lifestyle—a gangster lifestyle" and to conduct other illegal
activities, enhancing the member's reputation and the gang's reputation.
Wilson's activities at the hotel room would promote criminal gang conduct
by providing "a place to distribute or at least package the very narcotics
that they are selling, the monies generated from that benefiting the gang."
Champness said many Country Boy Crips members had told him they
were aware of the gang's criminal activities.

21 On cross-examination, Champness testified that people sometimes
22 leave gangs. On redirect, however, he said that if a person who was a
23 gang member in the past commits a "crime that is consistent with a gang
24 crime" now, the person is probably still a gang member.

25 Jacob Gallegos testified for the defense. He said that a couple of
26 days after Martin Luther King Day in 2010 (i.e., in January, over a month
27 before police searched Wilson's room), he stayed for two nights at a hotel
28 on East Brundage Lane at Weedpatch Highway. On the second night, a
man and woman who were not Wilson and Williams knocked on
Gallegos's door. The man said the police were searching his room and
had told him to stay away during the search. He offered Gallegos \$20
to drive him to a 7-Eleven. Gallegos accepted. When he returned, he saw
police officers searching a room.

1 Devon Steen testified for the defense. He had been Wilson's friend
2 for 13 years. Steen believed Wilson had always held down a job and was
3 a family man. Steen testified that gang members were bad people with no
4 morals; he believed Wilson shared this view and was not a gang member.
5 Steen had never heard of the Country Boy Crips. He had never seen the
6 "C" and "B" tattoos on the backs of Wilson's arms, although the two had
7 often lifted weights together. Steen had never seen or heard of Williams;
8 Wilson spoke to him only of Wilson's children's mother. He remembered
9 that, years ago, Wilson had a girlfriend named Gina.

10 The jury found Wilson guilty of all counts and found the gang-
11 enhancement allegations true. The court found one of the prior-prison-
12 term allegations true and dismissed the other. The court also found Wilson
13 to have violated his probation in case No. BF123662A.

14 Wilson received an aggregate sentence of 10 years, consisting of
15 five years for possessing cocaine base for sale, four years for the gang
16 enhancement on that count, and one year for the prior-prison-term
17 enhancement on that count. For maintaining a place for selling, giving
18 away, or using a controlled substance, the court imposed a sentence of
19 three years plus four years for the gang enhancement, all stayed under
20 section 654. For the substantive gang-participation offense, the court
21 imposed a sentence of three years, stayed under section 654. A term of
22 two years for the underlying offense in the probation case also was
23 imposed, to be served concurrently with the term for the possession count.

24 People v. Wilson, 2012 Cal. App. Unpub. LEXIS 9123, 9-12 (Cal. App. Dec. 17, 2012).

25 The California Court of Appeal ultimately reversed the convictions on counts two and
26 three, but the conviction on count one was affirmed. (Answer, Ex. B; ECF No. 26.)

27 **III. GOVERNING LAW**

28 **A. Jurisdiction**

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

1 **B. Legal Standard of Review**

2 On April 24, 1996, Congress enacted the Antiterrorism and Effective Death
3 Penalty Act of 1996 ("AEDPA"), which applies to all petitions for writ of habeas corpus
4 filed after its enactment. Lindh v. Murphy, 521 U.S. 320, 326 (1997); Jeffries v. Wood,
5 114 F.3d 1484, 1499 (9th Cir. 1997). The instant petition was filed after the enactment of
6 the AEDPA; thus, it is governed by its provisions.

7 Under AEDPA, an application for a writ of habeas corpus by a person in custody
8 under a judgment of a state court may be granted only for violations of the Constitution
9 or laws of the United States. 28 U.S.C. § 2254(a); Williams v. Taylor, 529 U.S. at 375 n.
10 7 (2000). Federal habeas corpus relief is available for any claim decided on the merits in
11 state court proceedings if the state court's adjudication of the claim:

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

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

16 28 U.S.C. § 2254(d).

17 1. Contrary to or an Unreasonable Application of Federal Law

18 A state court decision is "contrary to" federal law if it "applies a rule that
19 contradicts governing law set forth in [Supreme Court] cases" or "confronts a set of facts
20 that are materially indistinguishable from" a Supreme Court case, yet reaches a different
21 result." Brown v. Payton, 544 U.S. 133, 141 (2005) citing Williams, 529 U.S. at 405-06.
22 "AEDPA does not require state and federal courts to wait for some nearly identical
23 factual pattern before a legal rule must be applied. . . . The statute recognizes . . . that
24 even a general standard may be applied in an unreasonable manner" Panetti v.
25 Quarterman, 551 U.S. 930, 953 (2007) (citations and quotation marks omitted). The
26 "clearly established Federal law" requirement "does not demand more than a 'principle'
27 or 'general standard.'" Musladin v. Lamarque, 555 F.3d 830, 839 (2009). For a state
28 decision to be an unreasonable application of clearly established federal law under §

1 2254(d)(1), the Supreme Court's prior decisions must provide a governing legal principle
2 (or principles) to the issue before the state court. Lockyer v. Andrade, 538 U.S. 63, 70-
3 71 (2003). A state court decision will involve an "unreasonable application of" federal
4 law only if it is "objectively unreasonable." Id. at 75-76, quoting Williams, 529 U.S. at
5 409-10; Woodford v. Visciotti, 537 U.S. 19, 24-25 (2002). In Harrington v. Richter, the
6 Court further stresses that "an *unreasonable* application of federal law is different from
7 an *incorrect* application of federal law." 131 S. Ct. 770, 785 (2011), (citing Williams, 529
8 U.S. at 410) (emphasis in original). "A state court's determination that a claim lacks
9 merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the
10 correctness of the state court's decision." Id. at 786 (citing Yarborough v. Alvarado, 541
11 U.S. 653, 664 (2004)). Further, "[t]he more general the rule, the more leeway courts
12 have in reading outcomes in case-by-case determinations." Id.; Renico v. Lett, 130 S.
13 Ct. 1855, 1864 (2010). "It is not an unreasonable application of clearly established
14 Federal law for a state court to decline to apply a specific legal rule that has not been
15 squarely established by this Court." Knowles v. Mirzayance, 129 S. Ct. 1411, 1419
16 (2009), quoted by Richter, 131 S. Ct. at 786.

17 2. Review of State Decisions

18 "Where there has been one reasoned state judgment rejecting a federal claim,
19 later unexplained orders upholding that judgment or rejecting the claim rest on the same
20 grounds." See Ylst v. Nunnemaker, 501 U.S. 797, 803 (1991). This is referred to as the
21 "look through" presumption. Id. at 804; Plascencia v. Alameida, 467 F.3d 1190, 1198
22 (9th Cir. 2006). Determining whether a state court's decision resulted from an
23 unreasonable legal or factual conclusion, "does not require that there be an opinion from
24 the state court explaining the state court's reasoning." Richter, 131 S. Ct. at 784-85.
25 "Where a state court's decision is unaccompanied by an explanation, the habeas
26 petitioner's burden still must be met by showing there was no reasonable basis for the
27 state court to deny relief." Id. ("This Court now holds and reconfirms that § 2254(d) does
28 not require a state court to give reasons before its decision can be deemed to have been

1 'adjudicated on the merits.'").

2 Richter instructs that whether the state court decision is reasoned and explained,
3 or merely a summary denial, the approach to evaluating unreasonableness under §
4 2254(d) is the same: "Under § 2254(d), a habeas court must determine what arguments
5 or theories supported or, as here, could have supported, the state court's decision; then
6 it must ask whether it is possible fairminded jurists could disagree that those arguments
7 or theories are inconsistent with the holding in a prior decision of this Court." Id. at 786.
8 Thus, "even a strong case for relief does not mean the state court's contrary conclusion
9 was unreasonable." Id. (citing Lockyer v. Andrade, 538 U.S. at 75). AEDPA "preserves
10 authority to issue the writ in cases where there is no possibility fairminded jurists could
11 disagree that the state court's decision conflicts with this Court's precedents." Id. To put
12 it yet another way:

13 As a condition for obtaining habeas corpus relief from a federal
14 court, a state prisoner must show that the state court's ruling on the claim
15 being presented in federal court was so lacking in justification that there
was an error well understood and comprehended in existing law beyond
any possibility for fairminded disagreement.

16 Id. at 786-87. The Court then explains the rationale for this rule, i.e., "that state courts
17 are the principal forum for asserting constitutional challenges to state convictions." Id. at
18 787. It follows from this consideration that § 2254(d) "complements the exhaustion
19 requirement and the doctrine of procedural bar to ensure that state proceedings are the
20 central process, not just a preliminary step for later federal habeas proceedings." Id.
21 (citing Wainwright v. Sykes, 433 U.S. 72, 90 (1977)).

22 3. Prejudicial Impact of Constitutional Error

23 The prejudicial impact of any constitutional error is assessed by asking whether
24 the error had "a substantial and injurious effect or influence in determining the jury's
25 verdict." Brecht v. Abrahamson, 507 U.S. 619, 623 (1993); see also Fry v. Pliler, 551
26 U.S. 112, 121-22 (2007) (holding that the Brecht standard applies whether or not the
27 state court recognized the error and reviewed it for harmlessness). Some constitutional
28 errors, however, do not require that the petitioner demonstrate prejudice. See Arizona v.

1 Fulminante, 499 U.S. 279, 310 (1991); United States v. Cronin, 466 U.S. 648, 659
2 (1984). Furthermore, where a habeas petition governed by AEDPA alleges ineffective
3 assistance of counsel under Strickland v. Washington, 466 U.S. 668 (1984), the
4 Strickland prejudice standard is applied and courts do not engage in a separate analysis
5 applying the Brecht standard. Avila v. Galaza, 297 F.3d 911, 918, n. 7 (2002). Musalin
6 v. Lamarque, 555 F.3d at 834.

7 8 **IV. REVIEW OF PETITION**

9 **A. Claims One and Two – Admission of Gang Evidence**

10 In Petitioner's first claim, he asserts that the state court erred in allowing
11 prejudicial expert witness testimony regarding his gang affiliation. Petitioner asserts that
12 the probative weight of the evidence was outweighed by its prejudicial effect. Petitioner
13 asserts that the evidence was used to attempt to manufacture a nexus between the drug
14 charge and gang membership when the prosecution lacked credible reliable evidence to
15 otherwise prove the elements of the offense. In his second claim, Petitioner asserts that
16 the state courts' determination of this claim was unreasonable. Respondent asserts that
17 the second claim is really an extension of Petitioner's first claim, and not a separate
18 claim. The Court agrees. Petitioner's second claim is a statement of the legal standard
19 under which his first claim must be reviewed. Accordingly, the Court shall consider both
20 claims at the same time.

21 1. Exhaustion and State Court Opinion

22 Petitioner did not raise this claim with the state court. Respondent notes that the
23 claim could be dismissed for failure to exhaust Petitioner's state remedies, but
24 alternatively addresses the claim on the merits. Petitioner has not presented this claim
25 with the California Supreme Court. The Court has considered Petitioner's interest in
26 having the present case adjudicated, but it is not ready for federal adjudication.

27 Despite Petitioner's failure to exhaust his state remedies, the Court may review
28 the claims on the merits to determine if they must be denied. See 28 U.S.C. § 2254(b)(2)

1 ("An application for writ of habeas corpus may be denied on the merits, notwithstanding
2 the failure of the applicant to exhaust the remedies available in the courts of the State.").
3 The Court shall exercise its right to review and deny this claim, rather than allow
4 Petitioner to attempt the futile exercise of exhausting claims that are without merit.

5 As stated, this claim has not been presented to the state courts. Accordingly,
6 "[u]nder § 2254(d), a habeas court must determine what arguments or theories
7 supported or, as here, could have supported, the state court's decision; then it must ask
8 whether it is possible fairminded jurists could disagree that those arguments or theories
9 are inconsistent with the holding in a prior decision of this Court." Richter, 131 S. Ct. at
10 786.

11 2. Analysis

12 To the extent that Petitioner contends that gang evidence should have been
13 excluded pursuant to California state evidentiary law, his claim fails because habeas
14 corpus will not lie to correct errors in the interpretation or application of state law. Estelle
15 v. McGuire, 502 U.S. 62, 67, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991).

16 With respect to Petitioner's due process claim, the United States Supreme Court
17 has held that habeas corpus relief should be granted where constitutional errors have
18 rendered a trial fundamentally unfair. Williams v. Taylor, 529 U.S. 362, 375, 120 S. Ct.
19 1495, 146 L. Ed. 2d 389 (2000). No Supreme Court precedent has made clear, however,
20 that admission of irrelevant or overly prejudicial evidence can constitute a due process
21 violation warranting habeas corpus relief. See Holley v. Yarborough, 568 F.3d 1091,
22 1101 (9th Cir. 2009) ("The Supreme Court has made very few rulings regarding the
23 admission of evidence as a violation of due process. Although the Court has been clear
24 that a writ should be issued when constitutional errors have rendered the trial
25 fundamentally unfair, it has not yet made a clear ruling that admission of irrelevant or
26 overtly prejudicial evidence constitutes a due process violation sufficient to warrant
27 issuance of the writ." (citation omitted)).

28 Even assuming that improper admission of evidence under some circumstances

1 rises to the level of a due process violation warranting habeas corpus relief under
2 AEDPA, this is not such a case. Petitioner's claim would fail even under Ninth Circuit
3 precedent, pursuant to which an evidentiary ruling renders a trial so fundamentally unfair
4 as to violate due process only if "there are *no* permissible inferences the jury may draw
5 from the evidence." Windham v. Merkle, 163 F.3d 1092, 1102 (9th Cir 1998) (emphasis
6 in original) (quoting Jammal v. Van de Kamp, 926 F.2d 918, 920 (9th Cir. 1991)). See
7 also Boyde v. Brown, 404 F.3d 1159, 1172 (9th Cir. 2005) ("A habeas petitioner bears a
8 heavy burden in showing a due process violation based on an evidentiary decision.").
9 Here, the testimony was relevant to proving the substantive gang participation charge
10 and the gang enhancement on the drug charge.

11 In any event, the admission of the challenged evidence did not deny petitioner a
12 fair trial. After a review of the record, this Court finds that the trial court's admission of
13 the testimony of the gang expert would not have had a "substantial and injurious effect"
14 on the verdict. Brecht, 507 U.S. at 623. See also Penry v. Johnson, 532 U.S. 782, 793-
15 96, 121 S. Ct. 1910, 150 L. Ed. 2d 9 (2001). First, the trial court gave a limiting
16 instruction regarding the gang evidence and instructed the jury not to consider it as
17 evidence of Petitioner's propensity to commit the charged crimes. (Clerk's Tr. at 334.)

18 Furthermore, the state courts found significant evidence supported Petitioner's
19 conviction for possession of cocaine base for sale. See 28 U.S.C. § 2254(e)(1)
20 ("Determinations of a factual issue by a state court shall be presumed to be correct.").
21 Law enforcement officers found a key card bearing the name the hotel on Petitioner.
22 People v. Wilson, 2012 Cal. App. Unpub. LEXIS 9123 at 3-5. The desk clerk told law
23 enforcement that Petitioner was staying in the room in question and the registration form
24 on file had copies of Petitioner's and his girlfriend's drivers licenses attached to it. Id. In
25 the room officers found 266.8 grams of cocaine base, a digital gram scale with white
26 residue on the weighing platform, \$11,400 in cash in a backpack, clear plastic sandwich
27 baggies, and a razor blade with white residue. Id. Accordingly, the jury was provided
28 strong eyewitness testimony regarding the drug offense. In light of the trial testimony as

1 a whole, there is no reasonable probability the verdict as to the drug offense would have
2 been different if the gang expert's testimony had been excluded. Petitioner is not entitled
3 to federal habeas corpus relief on his first and second claims.

4 **B. Sufficiency of the Evidence**

5 Respondent notes that Petitioner's primary contention is that the trial court
6 violated his constitutional rights by admitting testimonial evidence of Officer Champness,
7 when there was insufficient evidence that Petitioner was an active gang member.
8 (Answer at 14.) While Petitioner does not expressly raise a sufficiency of the evidence
9 claim, Respondent addressed the claim out of an abundance of caution. The Court shall,
10 in turn, review Petitioner's claims of insufficiency of the evidence.

11 1. State Court Decision

12 Petitioner presented this claim by way of direct appeal to the California Court of
13 Appeal, Fifth Appellate District. The claim was denied in a reasoned decision by the
14 appellate court and summarily denied in subsequent petition for review by the California
15 Supreme Court. (See Lodged Docs. 21-26.) Because the California Supreme Court's
16 opinion is summary in nature, this Court "looks through" that decision and presumes it
17 adopted the reasoning of the California Court of Appeal, the last state court to have
18 issued a reasoned opinion. See Ylst v. Nunnemaker, 501 U.S. 797, 804-05 & n.3 (1991)
19 (establishing, on habeas review, "look through" presumption that higher court agrees
20 with lower court's reasoning where former affirms latter without discussion); see also
21 LaJoie v. Thompson, 217 F.3d 663, 669 n.7 (9th Cir. 2000) (holding federal courts look
22 to last reasoned state court opinion in determining whether state court's rejection of
23 petitioner's claims was contrary to or an unreasonable application of federal law under
24 28 U.S.C. § 2254(d)(1)).

25 In denying Petitioner's claim, the California Court of Appeal explained:²

26
27 ² The Court notes that Petitioner's conviction for the offense of active participation in a criminal
28 street gang was reversed on appeal. (See Answer, Ex. A.) Accordingly, the sufficiency claim is only
relevant to the gang enhancement which was affirmed on appeal.

1 Section 186.22, subdivision (b)(1), provides a sentence
2 enhancement for “any person who is convicted of a felony committed for
3 the benefit of, at the direction of, or in association with any criminal street
4 gang, with the specific intent to promote, further, or assist in any criminal
5 conduct by gang members” Wilson argues that the prosecution failed to
6 present sufficient evidence to prove the enhancement allegations against
7 him. We hold that the evidence was sufficient.

8 Wilson first argues that the evidence did not prove that he
9 committed the current offense for the benefit of, at the direction of, or in
10 association with a gang. Officer Champness testified that if a Country Boy
11 Crips member possessed cocaine base for sale, the offense would be for
12 the benefit of, at the direction of, or in association with the Country Boy
13 Crips, but Wilson argues that this testimony is not substantial evidence
14 that he possessed the cocaine base for sale for the benefit of, at the
15 direction of, or in association with the Country Boy Crips, because it was
16 not proved that he was a member of the gang.

17 We disagree. Wilson claimed gang membership seven times to
18 booking officers, most recently in 2008, 21 months before his arrest in this
19 case. During those 21 months, Wilson was ordered to spend a year in
20 county jail as a condition of probation in case No. BF123662A, so he had
21 even fewer than 21 months of freedom between the time of his last
22 admission of gang membership and the commission of the current
23 offense. Further, there was physical evidence of Wilson’s current gang
24 participation at the scene of the current offense itself: the sign and note
25 bearing Wilson’s gang moniker, Holiday. The possession-for-sale offense
26 was a characteristic gang crime, according to the police expert. When
27 confronted with a seven-time admitted gang member, bearing gang
28 tattoos, committing a characteristic gang crime in a room where a sign and
another writing showed his gang moniker, the jury could reasonably find
that the defendant was a current, active participant in a gang.

Wilson argues that the evidence that he claimed gang membership
seven times while being booked into jail shows nothing because he “could
have claimed to be a County Boy Crip (if in fact this is what he actually
claimed as opposed to what was written down or how it was interpreted by
Officer Champness) out of an abundance of caution for his safety due to
being acquainted with some Country Boy Crips, and not because he was
a member of the gang himself. This is the logical inference because
[Wilson] has never been a documented gang member.”

The idea that Wilson claimed he was a Country Boy Crip even
though he was not is contradicted by the other evidence. Wilson had gang
tattoos on his arms and a sign and a note with his gang moniker in his
room. As for not being a “documented gang member,” Wilson appears to
mean that he was never before ordered to register as a gang member.
There is, of course, no requirement that a defendant must be a registered
gang member before his sentence can be enhanced under section
186.22, subdivision (b).

Wilson says the tattoos on his arms do not show gang membership
because “[i]t appears just as likely that this was actually a tattoo of a
former girlfriend’s initials.” It is not just as likely. The prosecution
presented photographs of the tattoos; opinion testimony that the letters
were “C” and “B” and that many County Boy Crips had tattoos like these;

1 and a photograph of another Country Boy Crip with similar tattoos in the
2 same places on his arms. On the other side of the balance was only
3 defense counsel's opinion that the "C" looked like a "G" and a witness's
4 remark that Wilson once had a girlfriend named Gina, whose last name
5 was unknown. The evidence that the tattoos were indicative of Country
6 Boy Crips membership was strong, and the evidence that they stood for
7 someone named Gina B. was nearly nonexistent.

8 Wilson next argues that the prosecution failed to show by
9 substantial evidence that he acted with the specific intent to promote,
10 further, or assist in any criminal conduct by gang members. His reasoning
11 is similar to the reasoning that prevailed on the section 186.22, subdivision
12 (a), issue in Rodriguez: the reference to "conduct by gang members"
13 appears to indicate that the statute applies only if multiple gang members
14 are involved in the underlying offense. The Rodriguez court, however,
15 explicitly denied that the reasoning of that case applies to section 186.22,
16 subdivision (b)(1), enhancements. It stated:

17 "A lone gang member who commits a felony ... would not be
18 protected from having that felony enhanced by section
19 186.22(b)(1), which applies to 'any person who is convicted
20 of a felony committed for the benefit of, at the direction of, or
21 in association with any criminal street gang, with the specific
22 intent to promote, further, or assist in any criminal conduct
23 by gang members....' Because the gang enhancement under
24 section 186.22(b)(1) requires both that the felony be gang
25 related and that the defendant act with a specific intent to
26 promote, further or assist the gang, these requirements
27 provide a nexus to gang activity sufficient to alleviate due
28 process concerns." (Rodriguez, supra, __ Cal.4th __ [2012
WL 6699638, at p. 9].)

(Answer, Ex. B, at 3-5.)

2. Legal Standard - Sufficiency of the Evidence

The Fourteenth Amendment's Due Process Clause guarantees that a criminal defendant may be convicted only by proof beyond a reasonable doubt of every fact necessary to constitute the charged crime. Jackson v. Virginia, 443 U.S. 307, 315-16, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). Under the Jackson standard, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson, 443 U.S. at 319 (emphasis in original).

In applying the Jackson standard, the federal court must refer to the substantive elements of the criminal offense as defined by state law. Jackson, 443 U.S. at 324 n.16. A federal court sitting in habeas review is "bound to accept a state court's interpretation

1 of state law, except in the highly unusual case in which the interpretation is clearly
2 untenable and amounts to a subterfuge to avoid federal review of a constitutional
3 violation." Butler v. Curry, 528 F.3d 624, 642 (9th Cir. 2008) (quotation omitted).

4 Petitioner asserts that there was insufficient evidence to support finding him guilty
5 of the gang enhancement. To establish a gang enhancement, the prosecution must
6 prove two elements: (1) that the crime was "committed for the benefit of, at the direction
7 of, or in association with any criminal street gang," and (2) that the defendant had "the
8 specific intent to promote, further, or assist in any criminal conduct by gang members
9" Cal. Penal Code § 186.22(b)(1).) "Not every crime committed by gang members is
10 related to a gang." People v. Albillar, 51 Cal.4th 47, 60 (2005). Even "when two or more
11 gang members commit a crime together, they may be on a frolic and detour unrelated to
12 the gang." Emery v. Clark, 643 F.3d 1210, 1214 (9th Cir. 2011) (citing Albillar, 244 P.3d
13 at 1072.)

14 The specific intent element of § 186.22(b)(1) does not "require[] that the
15 defendant act with the specific intent to promote, further, or assist a gang; the statute
16 requires only the specific intent to promote, further, or assist criminal conduct by gang
17 members." Albillar, 51 Cal.4th at 67. This element "applies to any criminal conduct,
18 without a further requirement that the conduct be apart from the criminal conduct
19 underlying the offense of conviction sought to be enhanced." Id. at 66; see Emery v.
20 Clark, 643 F.3d at 1215 (recognizing that Albillar "definitively interpreted § 186.22(b)(1),"
21 "overruled" the Ninth Circuit's interpretation of the statute, and that federal courts are
22 bound by the California Supreme Court's interpretation).

23 Evidence that a crime would enhance a gang's status or reputation or that it would
24 intimidate rival gangs or potential witnesses within the gang's territory, has been found to
25 be sufficient to support a finding that the crime was "for the benefit of" the gang. See,
26 e.g., People v. Garcia, 153 Cal.App.4th 1499, 1503-06 (2007).

27 Petitioner contends that insufficient evidence was shown to support the
28 enhancements because the prosecution did not show that offenses were gang related.

1 The Court of Appeal considered Petitioner's challenge to the sufficiency of the evidence
2 for the gang enhancement on direct appeal. The court explained the elements of the
3 gang charge under Section 186.22(b) and clearly reviewed the evidence underlying that
4 conviction in the light most favorable to the prosecution. In support of finding that
5 sufficient evidence existed, the court relied on the fact that Petitioner had claimed gang
6 membership seven times in the past, a sign and a note bearing his gang moniker were
7 present at the scene of the drug offense, he bore tattoos commonly worn by gang
8 members, and the drug offense was a characteristic gang crime. (See Answer, Ex. A.)

9 Additional evidence showed that petitioner was selling narcotics from his
10 residence, that he had previously engaged in, and associated with Country Boy Crips
11 gang members who engaged in, narcotics possession and sales, and that he frequented
12 a known Country Boy Crips hangout where illegal narcotics are sold. (Rep. Tr. at 473-
13 480.) The Court therefore finds that the appellate court analysis was based on the
14 correct federal legal standard and did not unreasonably apply federal law in evaluating
15 Petitioner's sufficiency of the evidence claim.

16 Under Jackson and AEDPA, the state decision is entitled to double deference on
17 habeas review. Based on the Court's independent review of the trial record, it is
18 apparent that Petitioner's challenge to whether the crime was committed in furtherance
19 of the criminal street gang is without merit. There was no constitutional error, and
20 Petitioner is not entitled to relief with regard to this claim.

21
22 **V. RECOMMENDATION**

23 Accordingly, it is hereby recommended that the petition for a writ of habeas
24 corpus be DENIED with prejudice.

25 This Findings and Recommendation is submitted to the assigned District Judge,
26 pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within thirty (30) days after
27 being served with the Findings and Recommendation, any party may file written
28 objections with the Court and serve a copy on all parties. Such a document should be

1 captioned "Objections to Magistrate Judge's Findings and Recommendation." Any reply
2 to the objections shall be served and filed within fourteen (14) days after service of the
3 objections. The parties are advised that failure to file objections within the specified time
4 may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153
5 (9th Cir. 1991).

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IT IS SO ORDERED.

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Dated: December 8, 2014

/s/ Michael J. Seng
UNITED STATES MAGISTRATE JUDGE

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