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

TOMMY DAVIDSON,

Petitioner,

v.

RAYMOND MADDEN, Warden,

Respondent.

Case No. 1:14-cv-00745 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, Raymond Madden, acting warden of California State Prison, Centinela, is hereby substituted as the proper named respondent pursuant to Rule 25(d) of the Federal Rules of Civil Procedure. Respondent is represented by Robert C. Nash of the office of the California Attorney General. Respondent declined magistrate judge jurisdiction. (ECF No. 7.)

1 **I. Procedural Background**

2 Petitioner is currently in the custody of the California Department of Corrections
3 pursuant to a judgment of the Superior Court of California, County of Kern, following his
4 conviction by jury trial on March 9, 2010, for first degree murder, felon in possession of a
5 firearm, being an active member of a street gang, participation in a criminal street gang,
6 and numerous enhancements. (Lodged Doc. 1, Clerk's Tr. at 557-60.) On May 18, 2010,
7 Petitioner was sentenced to an indeterminate prison term of life without the possibility of
8 parole, and an additional determinate term of fifteen years. (Id.)

9 Petitioner filed a direct appeal with the California Court of Appeal, Fifth Appellate
10 District. (Lodged Doc. 2.) On October 31, 2011, the appellate court affirmed the
11 conviction. (Id.) Petitioner sought review by the California Supreme Court on November
12 21, 2011. (Lodged Doc. 3.) The petition for review was denied on February 15, 2012.
13 (Lodged Doc. 4.)

14 Petitioner proceeded to file collateral appeals in the forms of petitions for writ of
15 habeas corpus in the state courts. He filed a petition with the Kern County Superior
16 Court. (Lodged Doc. 5.) It was denied in a reasoned decision on April 16, 2013. (Lodged
17 Doc. 6.) Petitioner then filed a petition for writ of habeas corpus with the Fifth District
18 Court of Appeal. It was denied on July 26, 2013. (Lodged Docs. 7-8.) Finally, Petitioner
19 filed a petition for writ of habeas corpus with the California Supreme Court. The petition
20 was denied on January 21, 2014. (Lodged Docs. 9-10.)

21 Petitioner filed his federal habeas petition on May 19, 2014. (Pet., ECF No. 1.)
22 Petitioner raised the following seven claims for relief: (1) that the failure to grant defense
23 counsel's request to have a witness testify in a closed courtroom due to safety concerns
24 violated Petitioner's Sixth Amendment right to present a defense; (2) that the trial court
25 erred in striking the testimony of a witness that refused to answer questions during
26 cross-examination; (3) that the trial court erred when it allowed the defense expert to
27 testify regarding prejudicial gang evidence; (4) that the trial court erred in denying
28 Petitioner's motion to release information of a juror's identification; (5) that there was

1 insufficient evidence to prove the gang enhancement and special circumstance; (6) that
2 defense counsel was ineffective for failing to cross-examine several of the prosecution's
3 witnesses; and (7) the trial court violated Petitioner's constitutional rights by failing to
4 instruct the jury on the elements of active participation in a criminal street gang.

5 Respondent filed an answer to the petition on June 3, 2015. (Answer, ECF No.
6 25.) Petitioner filed a traverse to the answer on July 25, 2015. (Traverse, ECF No. 29.)

7 **II. Statement of Facts¹**

8 STATEMENT OF THE FACTS

9 Charnika Lee had known Jesse Hill, the murder victim, for
10 approximately three years. They started out as friends, but their
11 relationship developed into a boyfriend-girlfriend relationship. Lee was
12 familiar with street gangs and knew that Hill was a member of the East
13 Side Crips. Lee knew defendant and knew that Hill felt that defendant was
14 like family to him. Defendant was an "OG," an original gangster and older
15 person in the gang.

16 Hill began pulling back from the gang in 2008. When Hill was in jail
17 the beginning of 2009, Lee had daily contact with him. Hill told Lee he
18 wanted to change the way he was living and wanted to leave the gang.
19 Sometimes Hill would have a conference call with Lee and with Pastor
20 Wesson discussing his desire to change. In a taped conversation from jail
21 on February 10, 2009, Hill told Lee how he wanted to get out of the gang
22 and really wanted to change. Hill said he was not going to stay "on the
23 hood," which meant he was going to leave the gang.

24 On March 12, 2009, Hill called Lee and said he was going to be
25 released from jail that evening. He asked Lee to pick him up and to call
26 the pastor. Lee picked up Hill and drove him to Hill's Aunt Linda's house.
27 During the drive, Hill used Lee's phone to call the pastor. The pastor could
28 not talk at that time and said he would call back. Hill visited for a few
minutes with family, got a change of clothes, and left with Lee.

Lee drove Hill to the market where he cashed a check and bought
some liquor. They drove to a home on Powell Lane. When they arrived Hill
opened the liquor bottle and poured himself a cup. He put the bottle in the
trunk and then he and Lee went inside the house.

There were several men inside the house, including defendant who
was on the couch. Hill greeted everyone, but defendant did not reply. Hill
asked the others what was the matter with defendant. He was told that
someone had shot at defendant two hours earlier, and defendant was
upset.

¹ The Fifth District Court of Appeal's summary of the facts in its October 31, 2011 opinion is presumed correct. 28 U.S.C. § 2254(e)(1).

1 Defendant and Hill talked for a short while. Defendant then grabbed
2 a gun that was underneath the couch and stood by Hill and pointed the
3 gun at him. Jabbaar King, the owner of the house, wrestled defendant for
4 the gun and the two fell onto the couch. King retrieved the gun and took it
5 to another room of the house. Lee had seen the gun before, because it
6 had belonged to Hill.

7 At one point during the 30-minute visit by Hill and Lee to the house
8 on Powell Lane, defendant became angry that people were calling him
9 Tommy, he aggressively told them to call him "T." People were drinking at
10 the house, but were not using drugs. Lee and Hill left after half an hour.

11 After going to a few other places, including Lee's house where Hill
12 changed his clothes, Lee and Hill saw two males who asked Hill if he
13 wanted to purchase a bottle of vodka. Hill said he did not want to purchase
14 it, but he knew someone who would. One of the males with the vodka,
15 Paul Evans (Blue), accompanied Hill and Lee back to the residence on
16 Powell Lane. They went into the house. The same people were there who
17 had been there earlier, except Demarcus Burns. Burns returned after a
18 few minutes and purchased the bottle of vodka. The group drank from the
19 vodka bottle.

20 Defendant and Hill began talking. A woman barged in the front door
21 and defendant told her that she could get shot for walking into a house the
22 way she did. She joked and said she had a gun in her purse and knew
23 how to shoot back. This made defendant angry and he said he would kill
24 her. Hill tried to calm defendant; the woman left. Hill explained to Lee that
25 defendant had caught his wife with another man, and he was angry.

26 Hill and defendant began a serious conversation. Hill told defendant
27 he was going to leave the gang. Defendant said to Hill that he was not
28 going to leave the gang. Hill replied that he was. Defendant said, "[Y]ou
used to be my Loc, now you're acting like a square." A "Loc" is a fellow
gang member; a square is someone who does not "gang bang."

The two continued their conversation with Hill insisting he was
going to leave the gang, and defendant saying he was not going to. Hill
then swore he was going to leave the gang, and he swore on A-Loc's
grave. (A-Loc was a friend of Hill's who was killed in 2008.) This angered
defendant and he said Hill should swear on the life of Nub (Leon
Anderson), a Stroller Boy (the subset of the East Side Crips gang), who
was killed by a police officer. Hill replied that it did not matter whose life he
swore on because he was going to quit the gang.

Defendant was angry and was in Hill's face acting like he wanted to
fight. They continued to argue and the argument became heated. Lee tried
to stop them from arguing. Defendant rushed at Hill and Hill hit defendant.
They began fighting and fell on the couch. Hill was hitting defendant and
then got up and backed away. Defendant got up and went after Hill. They
continued to argue and Hill complained to defendant that he was
disrespecting him. To this defendant replied that he could disrespect Hill
because he (defendant) was a "big homie."

Defendant rushed at Hill again and they fought. They fell behind the
door and Hill was hitting defendant hard. Hill stopped hitting defendant

1 and they got up. Defendant said, "[L]et's take it outside." Everyone in the
2 house, except King, went outside and the arguing continued. Lee went to
3 her car, started it, and urged Hill to leave with her. Hill and defendant
continued to yell about respect with Hill saying he was being disrespected,
and defendant saying he did not have to respect Hill.

4 Hill calmed down and went to Lee's car. He put his sweater and
5 shirt in the back seat, and had his foot in the car. Defendant walked up
6 and said, "Got to disrespect you, and you're a square, and I'm your big
7 homie." Defendant and Hill returned to the driveway and continued to
argue. Nathaniel Jones got in the middle of the two and Hill pushed Jones
and told him to get out of his face. Jones returned to Hill and told him to
calm down. Hill pushed Jones to the ground. Jones got angry and told Hill
he was going to get a gun and kill him.

8 Hill continued to be angry about everyone disrespecting him. Hill hit
9 Jones and defendant ran into the house, got a gun, and came back
10 outside. As defendant came out of the house, Burns grabbed Hill and
11 broke up the fight. He told Hill to calm down. As defendant got near Hill
and Burns, he slid the slide of the semiautomatic pistol to the rear,
bringing it forward to load a round into the gun. Defendant was three to
five feet away from Hill.

12 Burns and Hill looked up and were surprised. Hill put his hands up
13 and backed up. In disbelief, Hill said to defendant, "[O]h, it's like that,
14 Tommy, you're gonna shoot me, you're gonna shoot me?" As soon as Hill
15 said this, defendant shot Hill. Hill clutched his stomach and ran to the end
16 of the driveway; defendant followed and fired another shot at Hill. Hill
17 continued to run, with defendant running behind him. Defendant kept firing
18 as he chased Hill down. Lee lost sight of the pair as they ran down the
street to the cul-de-sac, and she quickly left the scene. She drove to the
home of Hill's Aunt Linda and they returned to the crime scene. Everyone
had left the home on Powell Lane and it was dark. Hill was on the ground
and a sheriff deputy was there. Lee told officers what happened, she was
interviewed later that morning, and still later she gave further details after
she had calmed down.[fn1]

19 **FN1:** Lee was afraid of defendant and was in the witness protection
20 program when she testified at trial. She had previously acquired a gun
21 because of her fear. When she was stopped by law enforcement some
time after the murder, she had a gun in her purse. She was not charged
with this crime.

22 A neighbor on Powell Lane woke up after 1:00 a.m. on March 13,
23 2009, when he heard a big bang. He saw a man on the ground and man
24 standing over him. The neighbor could not hear what was being said, but
the man standing over the victim was moving his mouth and pointing. One
25 man ran away, the man on the ground was bleeding and asking for help.
The neighbor called 911. During a television interview the neighbor told
26 the reporter that one male was on the ground while the other male held a
gun on him before running off. Another neighbor heard four or five
gunshots and saw a car drive quickly away from the area.

27 Officers and medical personnel arrived on the scene. Hill was found
28 in a cul-de-sac area down the street from King's home. Hill was
transported to the hospital where he was pronounced dead at 2:01 a.m. At

1 the scene, Detective Lloyd Waters followed the trail of blood. He found a
2 drinking cup, a bag of marijuana, one live round and one spent shell
3 casing in the yard where the blood trail began. Additional shell casings
4 were found along the trail of blood.

5 Hill died from a gunshot wound to his torso. The bullet entered on
6 the back right side and traveled to the front left side in a slightly downward
7 angle. He had a blood alcohol level of .218. His blood alcohol reading may
8 have tested higher than usual because the blood tested was taken from
9 his stomach.

10 Burns testified that he knew defendant and Hill. Hill and Burns were
11 together when they were shot in 2006. Although Burns knew King, Burns
12 stated he had never been to the house on Powell Lane and was not
13 present when Hill was shot. He denied ever being in a gang or knowing
14 anyone who was a gang member.

15 At trial, Jones said he had seen defendant and Hill before. He
16 denied any gang involvement and denied talking to defendant while
17 defendant was in jail. In an interview before trial, Jones said he was not
18 present, and then eventually admitted he was present when defendant
19 and Hill got into the argument. Hill got upset and struck Jones. Jones
20 walked away and, as he walked, he heard screaming, running, and
21 gunshots.

22 King testified at trial that he had a barbeque on March 12, 2009,
23 and a lot of people came to his house on Powell Lane. He thought
24 defendant was at his house. Hill was at his house with a woman. King
25 could not remember who else was there that day. He testified there were a
26 lot of people arguing; he told the people to leave and they went outside.
27 King heard gunfire and heard people leaving so he also left. He did not
28 see a firearm in his house. King said he did not know any East Side Crips.

In an interview before trial, King said defendant and Hill were at his
house the day Hill was killed. Defendant and Hill got into an argument
about who was the "hardest." Although they argued, King said there was
no hand-to-hand combat. King said there was no flashing of guns, but he
saw defendant with a gun earlier. He described defendant as a bad man
with a reputation.

Evans said he was not a member of the East Side Crips, but he
hung out with family members who were. He knew Hill. On March 12,
2009, he approached Hill and asked him if he wanted to buy a bottle of
vodka. Hill said he knew someone who would. Hill, Lee and Evans drove
to the house on Powell Lane. Evans said there were approximately five
people there.

Evans said that Hill and defendant began arguing. Hill was
complaining that the others had forgotten him while he was in jail and Hill
was not going to mess with them anymore. Hill and defendant continued
to argue. They talked about A-Loc and defendant cursed A-Loc. Hill and
defendant wrestled and Hill pushed defendant down on the couch and
started socking him. Defendant smiled at the others as if to indicate that
he thought Hill was crazy. Evans thought that it looked like defendant was
just "messing" with Hill, but Hill seemed serious. Evans pulled them off
each other, but they continued to argue. Evans wanted to leave.

1 Defendant told Hill that he had raised him and taught him.

2 Evans got Hill to go outside. Defendant went outside and Hill told
3 him he was tired of being treated like a kid. Jones grabbed Hill and told
4 him to calm down. Hill pushed Jones off of him. Defendant asked Hill why
5 he had pushed Jones, and Hill said he was tired of everyone grabbing
6 him. Hill asked the others to leave him alone. Defendant and Hill
7 continued to argue. At some point defendant told Hill he was being
8 disrespectful. Evans was walking away when he heard gunshots and then
9 he ran away.

10 Defendant was apprehended by law enforcement on April 2, 2009,
11 in Compton, at the home of Donnisha Reneau. Reneau had been friends
12 with defendant for a long time. Defendant called her on March 13, 2009,
13 and asked if he could go and stay with her because he had a
14 disagreement with his girlfriend. He arrived that same date having only the
15 clothes on his back and his cell phone with him. He had to purchase
16 clothes after he arrived.

17 Antoinette Mitchell, Hill's mother, testified that she had known
18 defendant for a very long time and he was a friend of the family. Hill
19 started hanging out with defendant when Hill was 17 years old. They hung
20 out all the time. Mitchell had knowledge of the East Side Crips and the
21 Stroller Boys. She testified that defendant was originally a member of the
22 Midnight Strollers, a dance group that evolved into the Stroller Boys, a
23 criminal street gang. Defendant was an OG in the Stroller Boys and was
24 well respected in the gang. Leon Anderson was a close friend of
25 defendant's. On the day Anderson was killed, he had gotten into an
26 argument with Hill. There had been problems between Mitchell's family
27 and Anderson's family since that day. Mitchell named several members of
28 the East Side Crips and Stroller Boys.

The mother of two of defendant's children, LaShanda Armstead,
testified. Armstead believed that defendant was in a gang. In the past 10
years, defendant had only been employed for three months total. Hill was
approximately 20 years younger than defendant, but they were friends. In
the days before Hill was killed, Armstead had received a voice message
from defendant that he was losing his mind, in another message
defendant said he was going to be responsible for someone's death.
Defendant also told Armstead she would not come between him and his
daughter and asked Armstead to give him their daughter so they could
move on. Defendant was upset that Armstead was having a relationship
with someone else.

Armstead testified that Hill and Anderson had an earlier dispute
because Hill wanted to be a shot caller. According to Armstead, defendant
thought Hill was responsible for Anderson's death, he thought Hill had
disrespected Anderson, and the day after Anderson was killed, defendant
thought he should have someone kill Hill.

Donald Wesson, the pastor of St. Paul Baptist Church, testified that
he met Hill as a child in 1995. Hill was changing in the months before he
died. Hill wanted to get his life straightened out. Wesson was trying to help
Hill leave the gang life.

Greg Jehle, a sergeant with the Bakersfield Police Department,

1 testified as a gang expert. He testified that the East Side Crips is a
2 criminal street gang with more than 600 members. A primary activity of the
3 gang is narcotic sales, and guns are the tools of their trade. A subset of
4 the East Side Crips is the Stroller Boy Crips. The larger group is broken
5 down into smaller groups to control drug sales in a particular
6 neighborhood.

7 The Stroller Boys started as Midnight Strollers, a group of street
8 dancers. Defendant is an original member of the Stroller Boys and in 2009
9 he was a senior member. The gang has engaged in a pattern of criminal
10 behavior, including murders.

11 Jehle testified that gang members typically do not quit the gang,
12 and it is a risky proposition when they do. One who leaves the gang is
13 considered disloyal. Gang members have to show respect to senior
14 members of the gang. If the proper respect is not shown, there will be
15 punishment, up to being killed. The top members of the gang are called
16 OG's, shot callers, or senior members. It is important for an OG to
17 command respect from younger gang members. It is disrespectful to try
18 and get out of the gang or for a younger gang member to argue with an
19 OG.

20 Jehle had known defendant for 20 years. Jehle described
21 defendant's tattoos, the times he had been booked into jail when he
22 claimed the East Side Crips and Stroller Boys as his gang, and the
23 numerous times he had been contacted by law enforcement while in the
24 presence of known gang members.

25 Jehle then identified several instances when defendant engaged in
26 criminal behavior. The first instance was in 1984. Defendant had a
27 personal disagreement with Lonnie Key over defendant's sister's
28 pregnancy. Defendant went to Key's residence and fired two shots at him.
Key ran and defendant continued to shoot at him. Defendant fled after the
shooting. Jehle said this incident was significant because it showed that a
gun is the tool used by gang members to gain respect.

In an incident in 1985, defendant had marijuana in jail. Jehle
testified that possessing narcotics in jail gives them status. Defendant was
involved in the sale of drugs in 1994. This was relevant because the East
Side Crips made money by selling narcotics. In 1994, defendant had a
gun under his bed. Defendant violated his parole on more than one
occasion by continuing to associate with gang members.

It was Jehle's opinion that defendant was an active member of the
East Side Crips Stroller Boys gang and had been an active member since
its inception, achieving senior status. It was also Jehle's opinion that Hill
was an active member of the East Side Crips Stroller Boys gang. After
Anderson was shot, defendant stepped up to be the leader of the gang.
Many people in the gang blamed Hill for Anderson's death. Lee was not a
gang member.

The district attorney posed a hypothetical question to the gang
expert mirroring the facts of the case; the gang expert said that in such a
hypothetical situation the actions of defendant would benefit the gang and
would be performed with the specific intent to further or assist the gang.
An OG could not maintain his position as an OG if he did not take action

1 when a younger gang member challenged him. If an OG lost to a younger
2 member, he would lose "face." The OG had to finish the fight and win.

3 DEFENSE

4 Defendant's cousin, Myja Gardner, testified on defendant's behalf.
5 Her testimony was stricken entirely after she refused to answer certain
6 questions on cross-examination.

7 Deputy sheriff Tommy Robins testified that he interviewed the
8 neighbor, Phillips, after the shooting. Phillips told him he saw one man on
9 the ground and another man running away. Phillips did not tell Robins that
10 he saw one man holding a gun and standing over the victim. Phillips was
11 nervous and reluctant to talk to Robins.

12 Defendant testified on his own behalf. He said he had several jobs
13 in the past 10 years including a three-month job at a refinery, a seven-to-
14 eight month job at a group home, a gardening service, and various
15 temporary jobs. In addition to working, he spent a lot of time taking care of
16 his children and his cousin's children.

17 He was a member of the Midnight Strollers, a dance group, which
18 became the Stroller Boys in the 1980's, and was a member of the Stroller
19 Boys. He had tattoos reflecting his membership. In the mid-1990's his
20 sister was killed in a drive-by shooting and he stopped participating in the
21 gang. He still associates with 20 or 30 members of the East Side Crips
22 because they are his friends.

23 Defendant said he knew Hill since Hill was a baby and saw him
24 every other day. Hill was a Stroller Boy. On the evening of March 12,
25 2009, someone shot at defendant. He did not have a gun and did not
26 retaliate in any way. He then went to King's home on Powell Lane.

27 Hill came to the house with Lee in the evening and stayed for a
28 short time. Hill and defendant did not argue. Hill returned later, with Lee
and Evans. Hill wanted to know why defendant had not retaliated after the
shooting earlier in the day. They argued about that. Hill swung at
defendant while inside the house. Someone broke up the fight, and then
Hill hit defendant again. They continued to argue, and argued about A-
Loc. King told everyone to go outside. The group at the house went
outside while King remained inside.

Hill and defendant argued again and Hill removed his shirt. Jones
tried to intervene and Hill hit Jones. Jones got up and walked away. Hill
and defendant continued to argue. Defendant asked Hill why he hit Jones.
Hill said he was tougher than all the others. Hill walked to the car to get
something. Hill returned, and defendant and Hill started fighting. While
wrestling, defendant noticed that Hill had a gun in his waistband.
Defendant gained control of the gun when it fell to the ground. Defendant
jumped up and fired one shot while Hill was some distance from him. Hill
ran away and defendant fired some shots into the air. Defendant turned
around and went back inside the house. Someone, who defendant could
not identify, took the gun. Defendant left.

Defendant testified that he fired the shot because he was in fear for
his life. He knew how Hill "was" and knew of assaults Hill had committed

1 on other people in the community. Defendant knew Hill was often armed,
2 and Hill had told him he had shot at someone before. Defendant thought if
3 he did not shoot Hill, Hill would shoot him. Defendant left town because he
4 was scared.

5 Defendant said he did not have a dispute with Hill about Anderson's
6 death. On the evening of March 12, 2009, Hill was upset that no one put
7 money on his books when he was in jail and no one looked up to him. Hill
8 did not say anything to defendant about wanting to leave the gang.

9 On cross-examination defendant admitted he had prior convictions,
10 but stated he did not commit any crimes on behalf of the East Side Crips.
11 He obtained his gang tattoos while in prison and stopped being a member
12 of the gang in the mid-1990's. Defendant admitted it was possible that he
13 may have said Hill should be killed after Anderson was killed. Defendant
14 denied telling officers he was on the ground when the gun went off.
15 Defendant said he cocked the gun and defendant was a couple of feet
16 away when he shot him. Defendant testified he did not run to the cul-de-
17 sac after he shot Hill. He only ran as far as the next house.

18 Defendant was afraid Hill would take the gun from him and kill him.

19 REBUTTAL

20 Detective Royce Haislip interviewed defendant on April 7, 2009.
21 Defendant initially denied shooting Hill. Haislip asked defendant 11 times if
22 he shot Hill and defendant said no. Haislip told defendant he knew that
23 defendant shot Hill. Defendant then said that Hill had a gun in his
24 waistband and while they were fighting the gun went off on its own.
25 Defendant later said the gun accidentally discharged after defendant picked
26 it up. Still later, defendant said he picked up the gun. Hill was choking him
27 and he feared for his life, so he shot the gun. Defendant said after this the
28 gun continued to fire.

People v. Davidson, 2011 Cal. App. Unpub. LEXIS 8291, 2-21 (2011).

II. Discussion

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 **III. Review of Petition**

8 **A. Claims One and Two: Refusing to Close Court and Striking Witness’s**
9 **Testimony**

10 Petitioner claims that the trial court erred in denying his request to have a defense
11 witness testify in a closed courtroom due to fear for her safety. Petitioner further claims
12 that the court denied him his right to present a defense by striking the witness’s
13 testimony after she refused to testify on cross-examination with spectators present.

14 **1. State Court Decision**

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

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

2 I. Refusal to Clear the Courtroom for Testimony by Defense Witness

3 Gardner, defendant's cousin, was called to testify on defendant's
4 behalf. She testified that she was 36 years old, had known defendant all
5 her life, and lived in the same house he lived in, her mother's house.
6 Gardner testified that she knew Hill, and knew that Hill and defendant had
7 been friends for years. Hill was at their home every day, and when Hill
8 was in jail he would call every day. Hill and defendant got along and did
9 not argue.

7 Gardner testified that she grew up in East Side Crips territory, lived
8 there continuously for more than 20 years, and currently lived there. She
9 testified that she knew more than 20 people who were affiliated with the
10 East Side Crips. Some of them were family members and friends. She
11 claimed to have discussed gang life and gang culture with them.

10 She testified that defendant had tattoos and had them for more
11 than 10 years. She said that defendant was not an active gang member.
12 He did not participate in activities that gang members normally
13 participated in, such as robbing, shooting, and selling drugs; he did not
14 possess drugs or guns; he did not participate in gang meetings and did
15 not tell others what to do. She said defendant spent most of his time at
16 home; he spent his time fishing, working around the house, and watching
17 his children and Gardner's children.

15 On cross-examination Gardner was asked about her visits with
16 defendant in the jail; the money she would put on his books; and the fact
17 that she loved him. She denied ever attending an East Side Crips
18 meeting. She said she was at the house when the sheriff came looking for
19 defendant after Hill was killed and denied knowing defendant's
20 whereabouts at the time. She said she spoke with defendant on the
21 telephone during the time period after Hill was killed and before the sheriff
22 arrested him and, again, denied knowing where defendant was. She was
23 asked if she knew defendant's oldest son, Tommy Davidson, Jr. She said
24 she did. She was asked if he was an East Side Crip. She said he was not.
25 When asked where Tommy Davidson, Jr., was, she said he was in jail and
26 agreed he was charged with a gang-related crime. She again said,
27 however, that he was not a gang member. She was asked about
28 Christopher Mills. She denied knowing him. She was asked about Blue
Foot. She denied knowing him. It was at that point, she was asked, "Who
are some of the people that you know who you believe are Eastside Crips,
their names?" She refused to answer the question. The People then said,
"Ma'am, you stated you knew lots of people that were." She answered, "I
do." The People then said, "Tell us." She refused to answer the question.

25 The court gave defense counsel the option of striking Gardner's
26 testimony or holding her in contempt to see if she would testify. Defense
27 counsel stated that Gardner said she would answer the questions and
28 would be ready to proceed at 1:30 p.m. The court then recessed for lunch.

27 Upon returning after lunch, defense counsel made a motion to
28 exclude the public during the testimony of Gardner and another defense
witness. Counsel asserted that Gardner was reluctant to name East Side

1 Crips members in front of Hill's family or associates who were seated in
2 the courtroom; she felt her safety would be jeopardized or she would be
labeled a snitch. Defendant agreed to waive his right to a public trial for
the two witnesses.

3 The People refused to waive any right to a public trial. The
4 prosecutor argued that defense counsel opened the door regarding who
5 were members of the East Side Crips gang members in an open
6 courtroom, and the People should be allowed to cross-examine the
7 witness in front of the same people. The People also stated that there was
8 no indication that there was a safety issue. They pointed out that there
9 was no evidence anyone in the audience had behaved inappropriately,
10 threatened anyone, or intimidated anyone. In addition, the People noted
11 that these witnesses were not on the witness list, were undesignated
12 witnesses, and the People were deprived of running the names by the
13 jurors. The People also thought it was unfair that one side would be able
14 to clear the courtroom of spectators when the witnesses called by the
15 prosecution were required to testify in front of defendant's friends and
16 family.

17 The court stated that it had kept a close eye on the civilians in the
18 courtroom and had also instructed law enforcement to keep a close eye
19 on them. The court had not seen anything to indicate that any type of
20 intimidation was occurring. The court thought the People had a good point
21 that if the shoe were on the other foot, it would be difficult to clear the
22 courtroom for the People's witnesses. The court noted that defense
23 counsel had not designated the witnesses on the witness list, and it was
24 unfair to now call the witnesses and additionally ask that the courtroom be
25 cleared for their testimony. The court denied defense counsel's request to
26 clear the courtroom for cross-examination. The court stated, "So if you
27 wish to call somebody who's not on the witness list, that's your choice, and
28 they're going to have to answer the questions in front of the public."

Proceedings resumed with Gardner retaking the witness stand. The
People reminded Gardner that she had been asked, before lunch, whether
or not she could tell them who the East Side Crips gang members were
who she knew, and asked her if she was willing to tell them now. Gardner
said, "no." The court excused the jury, held Gardner in contempt, ordered
her taken into custody, and appointed an attorney to represent her.

The following morning, the court held a contempt hearing.
Gardner's counsel stated that she would be willing to answer the
questions with the proviso that the public be removed from the court
during her testimony. Her counsel indicated that she had a well-founded
fear that answering the questions would result in harm to her. Her fear
was based on the fact that her husband was murdered in front of 100
people by a youngster being initiated into a gang and yet not one person
would testify about what they saw. Gardner's counsel had asked members
of the Hill family to not come into the courtroom during Gardner's
testimony, but they refused his request.

Defense counsel stated that Gardner's testimony was important
and helpful to the case, and again asked that the public be removed just
for the one question. The court questioned defense counsel why he had
not brought up the issue before calling Gardner to the stand so the court
could have addressed the issue before she testified on direct examination.

1 Defense counsel replied that he did not anticipate that Gardner would be
2 asked this question, but did say he had discussed with Gardner, before
3 her initial testimony, that he would be asking her "questions about
4 Eastside Crips, about people that she knew, about the gang lifestyle, and
5 this would open the door to certain issues." During his discussion with
6 Gardner, after she first refused to answer the People's question, Gardner
7 agreed to "go ahead and name names." When she took the stand the
8 second time, he believed that she realized "that the public had not been
9 excluded from the courtroom" and so refused to testify.

10 The People argued that there had not been a proper showing
11 sufficient to exclude the public from hearing testimony in this case. In
12 addition, the People claimed Gardner's refusal to answer a question
13 unfairly limited the People's right to cross-examine her on a very material
14 issue in the case.

15 Counsel for Gardner argued that everyone knew that one of the
16 things East Side Crips were known for was witness intimidation. He
17 asserted that Gardner's recollection of her pretestimony conversation with
18 defense counsel was different than the recollection of defense counsel.
19 Gardner told him that defense counsel represented to her that she was not
20 going to be asked to name any names. Gardner's counsel emphasized
21 that Gardner had a well-founded fear of retaliation.

22 The court stated that it was clear from the testimony Gardner did
23 give, that she could testify that defendant was not a gang member
24 because she was familiar with gangs and the gang lifestyle, including who
25 was in the gang and how it worked. The court said that it was apparent
26 Gardner would understand the questions that would be asked of her in
27 court. The court noted the information Gardner had testified to regarding
28 defendant being her relative who had been "locked up" and who she had
been out to talk to on many occasions. The court concluded that, Gardner
was not a "simpleton who [did not] understand what [was] going on," and
that the people who had been present in the courtroom had done
absolutely nothing to intimidate anyone. The court concluded there had
not been the necessary showing to exclude the public. The court
determined that it would strike Gardner's answers given in both direct
examination and cross-examination.

Defense counsel asked the court to take a less drastic solution and
merely allow the jury to consider the failure to answer the question in
evaluating her credibility. The court denied defense counsel's request
finding that the question was a very material part of the case and the
inability to fully cross-examine Gardner limited the People's cross-
examination, which was a necessary part of a jury trial. After defendant
testified, the court informed the jury that it was striking all of Gardner's
testimony and they were not to consider it.[fn2]

FN2: After the court ruled it would not exclude the public from the
questioning of Gardner, defense counsel stated it would not be calling a
second witness because that witness was also fearful.

Defendant now claims his right to present a defense and his right to
compulsory process was violated when the trial court denied the request
to clear the courtroom because defense witnesses were fearful of
retaliation from the East Side Crips.

1 Defendant cites to People v. Esquibel (2008) 166 Cal.App.4th 539
2 (Esquibel) and Waller v. Georgia (1984) 467 U.S. 39 (Waller).

3 In Esquibel, a lone gunman, the defendant, entered a public park
4 and shot at a group of adults and children in the park. One of the children
5 was grazed by a bullet. As parents chased after the shooter, the shooter
6 shot again, paralyzing one of the adults. It was claimed that the shooting
7 was gang related. (Esquibel, *supra*, 166 Cal.App.4th at p. 546.)

8 One of the proposed witnesses at trial was a seven-year-old boy.
9 His mother expressed fear of retaliation in the neighborhood and asked for
10 several accommodations when her son testified including that certain
11 persons in the audience who were associated with the defendant and the
12 gang be removed. The prosecutor explained the mother was concerned
13 that the defendant's friends would recognize the child when they saw him
14 in the neighborhood and that would put the child's life in danger. (Esquibel,
15 *supra*, 166 Cal.App.4th at pp. 546-547.) Although there was no evidence
16 that anyone in the courtroom had engaged in intimidation, the trial court
17 agreed that certain accommodations sometimes had to be made for a
18 young witness and that a young child is more subject to intimidation than
19 an adult, particularly, because it is already traumatic for a witness of that
20 age to come into court and testify. The trial court excluded the two males
21 who were in the audience and were friends of the defendant from the
22 courtroom. The defendant appealed claiming this violated his right to a
23 public trial. (Esquibel, *supra*, 166 Cal.App.4th at pp. 548-549.)

24 The appellate court found that "the partial closure of a trial by the
25 temporary exclusion of select supporters of the accused [did] not create
26 an automatic violation of the constitutional right to a public trial." (Esquibel,
27 *supra*, 166 Cal.App.4th at p. 554.) "[T]he exclusion of the spectators was
28 for a minimal amount of time and appellant's family supporters remained in
the courtroom." (*Ibid.*) As such, there was no constitutional violation of
appellant's rights. (*Ibid.*)

Unlike Esquibel, this defendant has not asserted a constitutional
right to a public trial. Unlike Esquibel, this defendant did not ask for partial
closure by the exclusion of select supporters, but asked that the courtroom
be closed to the public. Unlike Esquibel, defendant's witness was not a
child whose fears of gang retaliation were credible. Defendant's witness
was an adult who demonstrated to the trial court sophistication regarding
the relevant criminal street gang. The trial court concluded, based on the
witness's testimony and its own observations of the audience in the
courtroom, that the fear the witness claimed was not believable.

Defendant's contention regarding Waller is that the trial court failed
to apply Waller's "standard" for closure.

In Waller the Supreme Court identified four issues that must be
addressed when considering denial of public access to a criminal
proceeding: "(1) there must be 'an overriding interest that is likely to be
prejudiced' if the proceeding is left open; (2) 'the closure must be no
broader than necessary to protect that interest'; (3) 'the trial court must
consider reasonable alternatives to closing the proceeding'; and (4) the
trial court must articulate the interest being protected and make specific
findings sufficient for a reviewing court to determine whether closure was

1 proper." (People v. Baldwin (2006) 142 Cal.App.4th 1416, 1421, fn.
2 omitted.)

3 The trial court did not deny the public access to defendant's
4 criminal proceeding; it denied defendant's request to deny the public
5 access. In doing so, the trial court made a determination that the witness's
6 assertion of fear was not credible.

7 Defendant argues that the trial court sought to punish defendant
8 because Gardner was not on the pretrial witness list and, in continuing
9 with its "punitive mood," the trial court put Gardner in jail. According to
10 defendant, the trial court then blamed Gardner for not anticipating that she
11 would be called upon to name East Side Crips in open court, and
12 defendant now claims Gardner's failure to be clairvoyant should not
13 outweigh his right to present a defense and to compulsory process. Next,
14 defendant asserts the trial court determined the defense had to make an
15 actual showing that someone had intimidated Gardner in order to close
16 the courtroom, which was wrong, particularly when the prosecution's case
17 was built on a theory of gang intimidation. Defendant claims these
18 concerns should not trump his right to call witnesses and present a
19 defense.

20 We do not view the trial court's statements as "punishment." Trial
21 courts are allowed to hold a witness in contempt when a witness refuses
22 to testify. This is not punishment, but an attempt to convince a witness to
23 testify as required by law.

24 The court did not expect Gardner to be clairvoyant, but noted she
25 was extremely familiar with East Side Crips and their practices, including
26 how they treat witnesses in court. The trial court could properly believe
27 that, because Gardner is not a "simpleton," she was well aware of the
28 questions she might be asked and the possible ramifications of her
testimony. It simply did not allow her to manipulate the system. The court
could properly view Gardner's fears, expressed only during cross-
examination, as disingenuous in light of her extensive knowledge of the
East Side Crips and her failure to show any apprehension while testifying
about the East Side Crips during direct examination by defense counsel.
The trial court was in the best position to determine whether Gardner was
intimidated or whether her fear was sufficiently well founded to constitute
an overriding interest necessitating closure of the courtroom. (See People
v. Baldwin, *supra*, 142 Cal.App.4th at p. 1422.) Its decision was, in
essence, a proper determination that defendant did not prove an
overriding interest essential to preserve higher values that necessitated
closure of the courtroom.

The fact that a witness is uncooperative or refuses to testify does
not constitute a deprivation of the rights asserted by a defendant. To hold
otherwise would mean built-in constitutional error each time a defense
witness refuses to testify unless his or her conditions are met. The court is
not a pawn in proceedings to be manipulated by the desires and requests
of witnesses, when those desires and requests have no adequate legal
basis.

Defendant also makes arguments related to the next three Waller
factors. He claims the proposed closure was no broader than necessary to
protect his right to present his defense, the trial court failed to consider

1 reasonable alternatives, and there was ample evidence to support closure.
2 Having found the trial court did not err when it determined the courtroom
3 need not be closed for a portion of Gardner's testimony, the next three
4 criteria from Waller are not relevant. Additionally, we need not determine
5 prejudice, because there was no error.

6 II. Striking the Testimony of Gardner

7 When Gardner refused to answer certain questions on cross-
8 examination, the trial court struck her testimony, in its entirety, and
9 rejected defendant's suggestion that the court merely instruct the jury to
10 consider the failure to answer the question in evaluating her credibility.
11 Defendant claims striking the testimony in its entirety violated his state and
12 federal due process right to a fair trial.

13 "In deciding whether to strike a defendant's or a defense witness's
14 testimony based on his or her refusal to answer one or more questions,
15 the trial court should examine "the motive of the witness and the
16 materiality of the answer." [Citation.] [Citation.] The court should also
17 consider if less severe remedies are available before employing the
18 'drastic solution' of striking the witness's entire testimony. [Citation.] These
19 include striking part of the testimony or allowing the trier of fact to consider
20 the witness's failure to answer in evaluating his credibility." (People v.
21 Seminoff (2008) 159 Cal.App.4th 518, 525-526.)

22 "[T]here is solid support, both judicial and scholarly, for the
23 proposition that when one or two questions asked during cross-
24 examination are at stake and those questions relate to a collateral matter
25 such as the nonparty witness's credibility, the trial court need not strike the
26 entirety of that witness's direct testimony." (People v. Sanders (2010) 189
27 Cal.App.4th 543, 556.)

28 The prosecution's question to Gardner asking her to name
members of the East Side Crips was not a collateral matter. Gardner was
not a percipient witness to the killing of Hill or any facts surrounding the
activities of that evening. The thrust of her testimony was that she was
knowledgeable about defendant's activities and knowledgeable about the
East Side Crips. She testified she knew at least 20 members of the gang.
Her testimony regarding her knowledge of the gang was used as the basis
to support her opinion that defendant was not an active member of the
gang when he shot and killed Hill. The two questions posed by the
evidence to the jury were the state of mind of defendant when he shot Hill
and whether the shooting was gang related. Defendant's gang status at
the time of the shooting was highly relevant to this second question, and
also relevant to the first question. The prosecution needed to be afforded
the opportunity to test Gardner's knowledge of the gang. Because
Gardner's knowledge of the gang was highly relevant to her entire
testimony, the question she refused to answer was pivotal and not
peripheral to the cross-examination.

We need not decide which standard of review applies to the trial
court's determination whether to strike all of a witness's testimony
because under either an abuse of discretion or an independent review
standard, we find the striking of the entire testimony was not erroneous.
(See People v. Sanders, *supra*, 189 Cal.App.4th at p. 554, fn. 2.)

1 People v. Davidson, 2011 Cal. App. Unpub. LEXIS 8291 at 17-37.

2 **2. Analysis**

3 Petitioner contends that the denial of the trial court to allow defense witnesses
4 Myja Gardner and Deandra Key to testify in a closed courtroom violated his Sixth
5 Amendment right to present a defense and call witnesses on his behalf. As described
6 above, Petitioner called Gardner as a defense witness, but on cross-examination, she
7 expressed fear about answering prosecution questions, and Petitioner's counsel
8 requested that she be able to testify in a closed courtroom. When the witness was asked
9 questions by the prosecution regarding her familiarity with the Eastside Crips gang and
10 its members, she refused to answer out of fear of retaliation.

11 Respondent argues that the appellate court properly defined the issue as follows:
12 "The trial court did not deny the public access to defendant's criminal proceeding; it
13 denied defendant's request to deny the public access." People v. Davidson, 2011 Cal.
14 App. Unpub. LEXIS 8291 at 21-35.) Respondent is correct. However, the additional
15 concern, in addition to the right to public access, is whether Petitioner's right to present a
16 defense witness under the Sixth Amendment was violated. The Court will address each
17 in turn.

18 **i. Public Trial**

19 First, "[t]he Sixth Amendment provides, in relevant part, that in all criminal
20 prosecutions, the accused shall enjoy the right to a speedy and public trial." United
21 States v. Cazares, 788 F.3d 956 (9th Cir. 2015). While not relevant here, the Sixth
22 Amendment has been broadly construed to extend beyond the actual proof presented at
23 a trial. Id., citing Waller v. Georgia, 467 U.S. 39, 44-47 (1984) (pretrial suppression
24 hearing must be open to the public)). Petitioner is not arguing that his right to a public
25 trial was violated. He is arguing the opposite – that the trial court did not allow his
26 witness to testify to a closed court out of safety concerns.

27 Even assuming that his witness had legitimate safety concerns (which the state
28 court found she did not), the claim fails as there is no clearly established Supreme Court

1 law requiring courts to close the courtroom to allow a defendant to present favorable
2 testimony. A state court decision is "contrary to" federal law if it "applies a rule that
3 contradicts governing law set forth in [Supreme Court] cases" or "confronts a set of facts
4 that are materially indistinguishable from" a Supreme Court case, yet reaches a different
5 result." Brown v. Payton, 544 U.S. at 141 (2005). A state court's decision is not "an
6 unreasonable application" of Supreme Court law if it merely "decline[s] to apply a specific
7 legal rule that has not been squarely established by this Court." Harrington v. Richter,
8 562 U. S. 86, 101 (2011). Petitioner presents no legal authority regarding a defendant's
9 right to request to close a courtroom for the benefit of a defense witness. The Court will
10 address whether the failure to do so denied Petitioner's right to present a defense, but
11 Petitioner's claim that the actions of the state court violated his right to a public trial is not
12 supported by Supreme Court authority, and therefore without merit.

13 **ii. Sixth Amendment Right to Present a Defense**

14 Petitioner alternatively argues that the denial to close the courtroom and the
15 striking of the witness's testimony violated Petitioner's right to present a defense under
16 the Sixth Amendment. "Whether rooted directly in the Due Process Clause of the
17 Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the
18 Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful
19 opportunity to present a complete defense.'" Holmes v. South Carolina, 547 U.S. 319,
20 324, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006) (quoting Crane v. Kentucky, 476 U.S.
21 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986)). Due process is violated only where
22 the excluded evidence had "persuasive assurances of trustworthiness" and was "critical"
23 to the defense. Chambers v. Mississippi, 410 U.S. 284, 302, 93 S. Ct. 1038, 35 L. Ed. 2d
24 297 (1973); accord Green v. Georgia, 442 U.S. 95, 97, 99 S. Ct. 2150, 60 L. Ed. 2d 738
25 (1979). A trial court retains wide latitude to exclude evidence that is repetitive or only
26 marginally relevant. See Crane, 476 U.S. at 689-90; Holmes, 547 U.S. at 326-27. "Only
27 rarely has [the Supreme Court] held that the right to present a complete defense was
28 violated by the exclusion of defense evidence under a state rule of evidence." Jackson,

1 133 S. Ct. at 1992. Moreover, even if this Court found a violation of petitioner's
2 constitutional rights, the error would only provide grounds to grant a writ of habeas
3 corpus if it had a "substantial and injurious effect or influence in determining the jury's
4 verdict." Brecht, 507 U.S. at 637.

5 In the case of apparent witness intimidation, California law provides courts with
6 discretion as to whether to remove members of the public to promote witness safety.
7 See People v. Esquibel, 166 Cal. App. 4th 539, 555 (2008); Cal. Penal Code §§ 686.2,
8 867, 868, 868.5-8. Relevant to this case, a court can exclude spectators under California
9 Penal Code section 686.2 if they are intimidating a witness. To do so, the Court must
10 hold a hearing and make factual findings that the spectator is engaging in intimidation,
11 which is preventing the witness from giving complete testimony, and removal is the only
12 reasonable means necessary. Id.

13 The state court found that Defendant has not shown that anyone was intimidating
14 the witness or that the witness was fearful based on any intimidation. The court found
15 that

16 Gardner's fears, expressed only during cross-examination, as
17 disingenuous in light of her extensive knowledge of the East Side Crips
18 and her failure to show any apprehension while testifying about the East
19 Side Crips during direct examination by defense counsel. The trial court
20 was in the best position to determine whether Gardner was intimidated or
21 whether her fear was sufficiently well founded to constitute an overriding
22 interest necessitating closure of the courtroom. (See People v. Baldwin,
23 supra, 142 Cal.App.4th at p. 1422.) Its decision was, in essence, a proper
24 determination that defendant did not prove an overriding interest essential
25 to preserve higher values that necessitated closure of the courtroom.

26 People v. Davidson, 2011 Cal. App. Unpub. LEXIS 8291 at 21-35. Petitioner has not
27 shown that the state court acted unreasonably in failing to exclude spectators. Nor has
28 Petitioner shown that the decision of the state court prevented him from a meaningful
opportunity to present a defense. Gardner was presented as a rebuttal witness to the
criminal street gang charges. While she testified for the defense that Petitioner was not
actively involved in the gang, she refused to answer questions on cross-examination that
might have undermined her credibility regarding Petitioner's involvement in the gang. As

1 the state Court of Appeal found, Gardner admitted that she and Petitioner lived in gang
2 territory and that she knew at least 20 people associated with the gang. However, as she
3 would not answer questions regarding the gang members that she knew, it created the
4 inference that Petitioner may have also known many of the individuals in the gang and
5 possibly associated with known gang members.

6 Even assuming that the trial court erred in failing to vacate the courtroom for
7 Gardner's testimony on cross examination, the error was harmless. A constitutional
8 violation only provides grounds to grant a writ of habeas corpus if it had a "substantial
9 and injurious effect or influence in determining the jury's verdict." Brecht, 507 U.S. at
10 637. In this case, there was strong evidence that Petitioner shot the victim. Charnika Lee
11 testified that she saw Petitioner shoot the victim. (Rep. Tr. at 218-219.) As the Court of
12 Appeal noted, a neighbor provided corroborating testimony of seeing a male with a gun
13 standing over the victim, and other witnesses testified that Petitioner and the victim were
14 arguing shortly before the shooting.

15 With regard to Petitioner's gang affiliation, Sargent Greg Jehle testified that he
16 knew Petitioner for 20 years. People v. Davidson, 2011 Cal. App. Unpub. LEXIS 8291 at
17 15-16. Jehle testified to numerous instances since 1984 where Petitioner engaged in
18 criminal activity, where Petitioner told law enforcement that he claimed the East Side
19 Crips and Stroller Boys as his gang, and numerous times Petitioner had been contacted
20 by law enforcement while in the presence of known gang members. Id. It was Jehle's
21 opinion that Petitioner was an active member of the East Side Crips Stroller Boys gang
22 since its inception and had become a leader of the gang. Id.

23 Based on the totality of the evidence presented, Petitioner has not shown that the
24 result of the trial would have been different had the Court cleared the courtroom and
25 allowed Gardner to testify. The California court's rejection of Petitioner's claims to a right
26 to a public trial or to present a defense was not contrary to nor an unreasonable
27 application of federal law. 28 U.S.C. § 2254(d)(1). It is recommended that Petitioner's
28 first and second claims for relief be denied.

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B. Claim Three – Admission of Propensity Evidence by Expert Witness

Petitioner next contends the trial court erred in allowing unduly prejudicial propensity evidence during the testimony of Sargent Jehle, the prosecution’s gang expert.

1. State Court Decision

Petitioner presented this claim by way of direct appeal to the California Court of Appeal, Fifth Appellate District. The claim was denied in a reasoned decision by the appellate court and summarily denied in subsequent petition for review by the California Supreme Court. (See Lodged Docs. 2-4.) Because the California Supreme Court’s opinion is summary in nature, this Court "looks through" that decision and presumes it adopted the reasoning of the California Court of Appeal, the last state court to have issued a reasoned opinion. See *Ylst*, 501 U.S. at 804-05.

In denying Petitioner’s claim, the Fifth District Court of Appeal explained:

III. Prior Conviction of Defendant as Basis for Gang Expert Testimony

Defendant made a motion in limine to exclude the admission of any evidence related to a shooting by defendant that occurred in 1984 and resulted in defendant’s conviction for assault with a deadly weapon. He claimed it was inadmissible negative character evidence and unduly prejudicial under Evidence Code section 352.

The People asked the court to conduct a "402 hearing" during which the gang expert would testify as to the significance of the 1984 shooting to his opinion as to whether defendant was a gang member, the period of time he was a gang member, and whether he was a gang member when Hill was shot.

The requested hearing was held. Jehle, the gang expert, testified that, in 1984, defendant had an argument with Lonnie Key concerning defendant’s sister and Key seeing someone who was related to a person responsible for the death of defendant’s brother. During the argument, defendant confronted Key, Key fled, and defendant fired a gun at Key twice. Defendant then fled, was later arrested, and was convicted, by plea, of assault with a deadly weapon. Jehle testified that, at the time of the 1984 incident, defendant was involved in the Midnight Strollers, a gang. The Midnight Strollers was also the "beginning of" the Stroller Boy Crips. Jehle believed defendant was a member of the East Side Crips at the time. In 1984 the STEP Act (Street Terrorism Enforcement and Prevention Act) was not in effect. Jehle said it did not matter if the members were called the Midnight Strollers or the Stroller Boys, in 1984 they were committing crimes now reflected in Penal Code section 186.22, or "gang crimes." Jehle testified that a dispute involving a gang member almost

1 always led to the use of a firearm, because a firearm is a tool gang
2 members use to solve disputes. Gang members use guns for intimidation
3 and to bolster their position and reputation. Additionally Jehle testified that,
4 in 1984, when law enforcement was looking for defendant, they obtained
5 information regarding where he was loitering or hiding. That location was
6 in East Side Crips gang territory. Jehle testified that he did not know
7 whether Key was a gang member at the time of the 1984 shooting. He had
8 not read all of Key's reports from "back then."

9 The People argued the evidence should be admitted because it
10 demonstrated that defendant was a member of a gang, that gang
11 members use guns to resolve disputes, and use of a gun shows their
12 dominance in the gang, promotes both the gang and their position within
13 the gang. Defendant argued that the shooting occurred 26 years earlier
14 and was not a gang-related incident; that the evidence was nothing more
15 than propensity or character evidence being offered to show he was the
16 type of person who would use a firearm and shoot at people. Defendant
17 asserted any relevance the evidence might have had to the gang aspects
18 of the case was far outweighed by the possibility for prejudice because the
19 facts of the 1984 incident were so similar to the facts of the case at issue.
20 The People replied that the 1984 assault was just one in a series of crimes
21 defendant committed, thus it was not remote. The prosecutor argued the
22 evidence was relevant to an expert witness's opinion as to whether
23 defendant was a gang member and how long he had been a gang
24 member. The prosecutor stated the jury could be given a cautionary
25 instruction telling them not to use the evidence as character evidence.
26 Defendant argued the curative instruction might not be followed because
27 the nature of the prior shooting was so similar to the facts of the instant
28 case.

The trial court found the 1984 shooting by defendant was relevant
to the expert's opinion regarding defendant's involvement in gang-related
activity. The fact that defendant's conviction was 26 years old did not sway
the court because defendant continued to lead a life that was other than
law abiding. The court found defendant's actions years ago showed he
was willing to use a firearm to promote himself and his position within the
gang consistent with the expert's testimony that gang members solve
disputes with guns. The court found the testimony was standard
information used by experts in gang cases and concluded the probative
value outweighed any prejudicial effect. The court allowed admission of
the evidence.

During trial, Jehle gave extensive testimony regarding the East
Side Crips, their primary activities, their subsets, their members, their
pattern of criminal behavior, and their structure and mode of operation.

Jehle then focused his testimony on defendant. He had known
defendant for about 20 years. Jehle described defendant's tattoos, his
bookings into jail, and the times Jehle or other officers had encountered
defendant during street checks. The People then asked Jehle about some
of the offense reports involving defendant. The first was the 1984 shooting
of Key. Jehle testified that defendant had a disagreement with Key and
fired a shot at him. Key ran, defendant followed and fired another shot
at him. The disagreement was personal and involved Key and defendant's
sister, as well as Key being with a girl who had been involved in the death
of defendant's brother. Jehle testified this evidence was significant

1 because, on the issue of what gang members do and how they take care
2 of their business, a gun is the tool they use to enforce or gain respect or to
3 take care of their business.

4 It was Jehle's opinion that defendant was an active OG of the East
5 Side Stroller Boy Crips having been with them since the inception when
6 the Midnight Strollers dance group formed a gang into the Stroller Boys. In
7 2009, defendant was the senior active member of the gang.

8 On cross-examination defense counsel asked Jehle if the 1984
9 shooting had any specific gang motive. Jehle said it did not. Defense
10 counsel asked Jehle if he was aware whether Key was a gang member.
11 Jehle said he had no knowledge of that. Jehle testified that he gathered
12 his information primarily from reading police reports regarding the incident.

13 Defendant claims the shooting evidence was not a proper basis for
14 the gang expert's opinion because it was irrelevant and unreliable.
15 Because it was not admissible as support for the gang expert's testimony,
16 then it was improperly admitted as highly prejudicial propensity evidence.
17 He asserts the evidence was not relevant because his actions in a
18 personal dispute in 1984 did nothing to prove he was a gang member at
19 the time of the 2009 murder of Hill. He also claims it was unreliable
20 because Jehle was unable to establish when the Midnight Strollers
21 became the Stroller Boys and when the Stroller Boys began to commit
22 crimes for the benefit of the gang rather than for their own individual
23 benefit. He concludes that Jehle's expert opinion was overbroad and
24 illogical; using a gun to commit an assault in 1984 does not equate with
25 gang membership in 2009.

26 "Gang evidence, including expert testimony, is relevant and
27 admissible to prove the elements of the substantive gang crime and gang
28 enhancements. [Citation.]" (People v. Williams (2009) 170 Cal.App.4th
587, 609.) The culture and habits of criminal street gangs are proper
subject matters for such testimony. (People v. Gardeley (1996) 14 Cal.4th
605, 617.) The information that forms the basis of the expert's opinion
testimony must, however, be reliable. (Id. at p. 618.)

We disagree with defendant's contention that the evidence was
unreliable because Jehle was unable to establish when the Midnight
Strollers became the Stroller Boys and when the Stroller Boys began to
commit crimes for the benefit of the gang rather than for their own benefit
as individuals. Although he could not pinpoint an exact date, Jehle testified
that the Midnight Strollers became the Stroller Boys and defendant was a
member of the Midnight Strollers and continued as a member of the
Stroller Boys, a subset of the East Side Crips. Jehle further testified that,
although the STEP Act had not yet been passed in 1984, the crimes
committed then by members of these groups were gang crimes. We fail to
see how Jehle's testimony regarding when the Midnight Strollers became
the Stroller Boys establishes the information as unreliable hearsay.

Defendant argues the 1984 shooting was not probative on the issue
of whether he was a street gang member in 2009. To the contrary, even
though the 1984 shooting did not have a gang motive, it demonstrated an
aspect of defendant's history that helped prove he had been a gang
member for a long time. This is so because defendant was a gang
member at the time and he was willing to use a gun—the tool of a gang

1 member—to resolve a dispute. His use of the gun, even for a crime that
2 was not gang motivated, gave him respect within the gang. The People's
3 claim that defendant held a position of respect in 2009 was bolstered by
4 evidence that he was part of the gang in 1984 and acted in accordance
5 with the expected practices of gang members.

6 The evidence was relevant and reliable; defendant's argument fails.

7 People v. Davidson, 2011 Cal. App. Unpub. LEXIS 8291 at 17-45.

8 **2. Legal Standard**

9 Evidence erroneously admitted warrants habeas relief only when it results in the
10 denial of a fundamentally fair trial in violation of the right to due process. See Briceno v.
11 Scribner, 555 F.3d 1069, 1077 (9th Cir. 2009) citing Estelle v. McGuire, 502 U.S. 62, 67-
12 68, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991). "[I]t is not the province of a federal habeas
13 court to reexamine state-court determinations on state-law questions." See Estelle at 67-
14 68. In conducting habeas review, a federal court is limited to deciding whether a
15 conviction violated the Constitution, laws, or treaties of the United States. Id. The court's
16 habeas powers do not allow for the vacatur of a conviction "based on a belief that the
17 trial judge incorrectly interpreted the California Evidence Code in ruling" on the
18 admissibility of evidence. Id. at 72.

19 The United States Supreme Court has expressly left open the question of whether
20 the admission of propensity evidence violates due process. See Estelle, 502 U.S. at 75,
21 n.5; Garceau v. Woodford, 275 F.3d 769, 774 (9th Cir. 2001). In Estelle, the Supreme
22 Court expressly refused to determine whether the introduction of prior crimes evidence
23 to show propensity to commit a crime would violate the Due Process Clause. Id.
24 ("Because we need not reach the issue, we express no opinion on whether a state law
25 would violate the Due Process Clause if it permitted the use of 'prior crimes' evidence to
26 show propensity to commit a charged crime."); see also Alberni v. McDaniel, 458 F.3d
27 860, 866 (9th Cir. 2006) ("Estelle expressly left this issue an 'open question'"). Because
28 the Supreme Court has specifically declined to address whether the introduction of
propensity evidence violates due process, Petitioner lacks the clearly established federal
law necessary to support his claims. Id.; see also Mejia v. Garcia, 534 F.3d 1036, 1046-

1 47 (9th Cir. 2008) (relying on Estelle and Alberni and concluding that the introduction of
2 propensity evidence under California Evidence Code § 1108 does not provide a basis for
3 federal habeas relief, even where the propensity evidence relates to an uncharged
4 crime); Holley v. Yarborough, 568 F.3d 1091, 1101 (9th Cir. 2009) (The Supreme Court
5 "has not yet made a clear ruling that admission of irrelevant or overtly prejudicial
6 evidence constitutes a due process violation sufficient to warrant issuance of the writ.").

7 Accordingly, the state courts' rejection of Petitioner's claim could not have been
8 "contrary to, or an unreasonable application of, clearly established" United States
9 Supreme Court authority, since no such "clearly established" Supreme Court authority
10 exists. 28 U.S.C. § 2254(d)(1).

11 Nevertheless, there can be habeas relief for the admission of prejudicial evidence
12 if the admission was fundamentally unfair and resulted in a denial of due process.
13 Estelle, 502 U.S. at 72; Walters v. Maass, 45 F.3d 1355, 1357 (9th Cir. 1995); Jeffries v.
14 Blodgett, 5 F.3d 1180, 1192 (9th Cir. 1993); Gordon v. Duran, 895 F.2d 610, 613 (9th
15 Cir.1990). Constitutional due process is violated if there are no permissible inferences
16 that may be drawn from the challenged evidence. Jammal v. Van de Kamp, 926 F.2d
17 918, 919-20 (9th Cir. 1991). "Evidence introduced by the prosecution will often raise
18 more than one inference, some permissible, some not." Id. at 920. "A habeas petitioner
19 bears a heavy burden in showing a due process violation based on an evidentiary
20 decision." Boyde v. Brown, 404 F.3d 1159, 1172 (9th Cir. 2005).

21 Here, the California Court of Appeal appropriately found that the evidence was
22 properly admitted to allow the gang expert to determine whether Petitioner was a
23 member of a street gang at the time of the offense. The California Court of Appeal
24 applied a standard identical to the federal standard. On appeal, the court found that
25 "gang evidence, including expert testimony, is relevant and admissible to prove the
26 elements of the substantive gang crime and gang enhancements." Davidson, 2011 Cal.
27 App. Unpub. LEXIS 8291 at 17-45 (citing People v. Williams, 170 Cal.App.4th 587, 609.
28 (2009)). Federal law holds that evidence of gang affiliation is admissible when it is

1 relevant to a material issue in the case. United States v. Easter, 66 F.3d 1018, 1021 (9th
2 Cir. 1995) (citing United States v. Abel, 469 U.S. 45, 49, 105 S. Ct. 465, 83 L. Ed. 2d
3 450 (1984) (finding gang evidence admissible to show bias)). The Court of Appeal
4 concluded that the evidence of the 1984 shooting was relevant and reliable, and “helped
5 prove that [Petitioner] had been a gang member for a long time.” Davidson, 2011 Cal.
6 App. Unpub. LEXIS 8291 at 44. The gang evidence was introduced to establish
7 permissible inferences that were essential to the prosecution's theory. See Jammal, 926
8 F.2d at 919. These inferences include that Petitioner was part of a criminal street gang
9 and Petitioner's motive. See Abel, 469 U.S. at 49. The California Court of Appeal
10 decision denying this claim was not contrary to clearly established Supreme Court
11 precedent. Accordingly, Petitioner is not entitled to habeas relief.

12 **C. Claim Four – Request for Juror Identification Information**

13 Petitioner next contends the trial court erred in failing to provide Petitioner juror
14 identification information after his trial based on Petitioner's claims that the victim's
15 relatives were speaking with jurors during trial.

16 **1. State Court Decision**

17 Petitioner presented this claim by way of direct appeal to the California Court of
18 Appeal, Fifth Appellate District. The claim was denied in a reasoned decision by the
19 appellate court and summarily denied in subsequent petition for review by the California
20 Supreme Court. (See Lodged Docs. 2-4.) Because the California Supreme Court's
21 opinion is summary in nature, this Court "looks through" that decision and presumes it
22 adopted the reasoning of the California Court of Appeal, the last state court to have
23 issued a reasoned opinion. See Ylst, 501 U.S. at 804-05.

24 In denying Petitioner's claim, the Fifth District Court of Appeal explained:

25 **IV. Adequacy of Request to Disclose Juror Identifying Information**

26 Code of Civil Procedure section 237 provides that any person may
27 petition the court for access to sealed juror identifying information. The
28 person asking for the information must establish a prima facie showing of
good cause. The denial of a petition for release of juror identifying
information is reviewed under the deferential abuse of discretion standard.

1 (People v. Carrasco (2008) 163 Cal.App.4th 978, 990-991.)

2 Defendant filed a motion for an order disclosing personal identifying
3 information for the jurors and alternate jurors who served on the case.
4 Attached to the motion was a declaration by defense counsel. He stated
5 that it had come to his attention after trial that there may have been some
6 type of communication during the trial between the victim's family and
7 some jurors. Counsel's investigator spoke to family members of defendant
8 to determine what they had observed. Deondra Key, defendant's niece,
9 told the investigator that on two different occasions during the trial she
10 observed Hill's mother and two of his aunts speaking to two Caucasian
11 female jurors during courtroom breaks.

12 The People filed written opposition to the motion. The People
13 asserted defendant's declaration did not include facts sufficient to
14 establish good cause for release of the information. In particular, it was
15 claimed the declaration by defense counsel was double hearsay and
16 furthermore was vague, lacking sufficient detail to be considered as
17 reliable facts to qualify as good cause. Also, the People argued Deondra
18 Key was not credible. The prosecutor stated Deondra Key had made
19 derogatory comments about the prosecutor's questions and was ejected
20 from the courtroom during the cross-examination of defendant. She was
21 potentially biased, as demonstrated by her courtroom outburst and her
22 failure to provide any details regarding her accusations.

23 At the hearing on the motion, defense counsel argued that he had
24 shown good cause for the release of juror identifying information. The
25 prosecutor reiterated the points made in her written opposition to the
26 motion. The court questioned defense counsel why he did not have
27 Deondra Key in court, or have a declaration from her, or a declaration
28 from his investigator. Defense counsel responded that he thought his
declaration was sufficient, but would try to take steps to correct the
deficiencies, if necessary.

 The court denied the motion stating there were no details about the
events in the declaration, it did not have a declaration from Deondra Key,
it did not have a declaration from the investigator, Deondra Key's
credibility was questionable, the matter was not brought to the court's
attention during the course of the trial, and the request was overbroad.
The court found the facts were not sufficient to establish good cause for
the release of the jurors' personal information.

 Defendant now asserts his motion for the release of juror
identification information should have been granted because defense
counsel's motion established good cause. As a secondary argument,
defendant claims that denying his motion deprived him of the effective
assistance of counsel because it made it impossible for counsel to
investigate potential juror misconduct.

 "Absent a satisfactory, preliminary showing of possible juror
misconduct, the strong public interests in the integrity of our jury system
and a juror's right to privacy outweigh the countervailing public interest
served by disclosure of the juror information." (People v. Carrasco, *supra*,
163 Cal.App.4th at p. 990.) "Normally, hearsay is not sufficient to trigger
the court's duty to make further inquiries into a claim of juror misconduct."
(People v. Avila (2006) 38 Cal.4th 491, 605.)

1 The trial court did not abuse its discretion when it denied the motion
2 for the disclosure of juror identifying information. The declaration was
3 double hearsay and vague, the reporting party lacked credibility and failed
4 to bring the matter to the court's attention when it occurred, and the
5 request was overbroad.

6 Defendant claims the trial court's error in denying the motion
7 deprived him of the effective assistance of counsel because his counsel
8 could not properly investigate potential jury misconduct. Defendant does
9 not claim his counsel was ineffective in the manner in which he brought
10 the motion. Because the trial court did not err in denying the motion,
11 defendant's claim of ineffective assistance of counsel is baseless.

12 People v. Davidson, 2011 Cal. App. Unpub. LEXIS 8291 at 44-49.

13 2. Analysis

14 California law entitles a defendant to a hearing to obtain juror identifying
15 information only if he first presents a petition that establishes good cause for the
16 information. Cal. Civ. Proc. Code § 237; People v. Jefflo, 63 Cal. App. 4th 1314, 1318-
17 23, n.8, 74 Cal. Rptr. 2d 622 (1998). However, a state court does not need to hold a
18 hearing on the issue of juror information if the defendant's petition and declaration in
19 support of his request fail to establish a prima facie showing of good cause for the
20 release of juror information or if there exists "a compelling interest against disclosure."
21 Cal. Civ. Proc. Code § 237(b), (d). "To establish good cause a defendant must set forth
22 a sufficient showing to support a reasonable belief that jury misconduct occurred."
23 People v. Jones, 17 Cal. 4th 279, 317, 70 Cal. Rptr. 2d 793, 949 P.2d 890 (1998).

24 Even if the state laws set forth above were misapplied Petitioner's claim would fail
25 as he has not shown any clearly established federal law supporting his claim. Several
26 Supreme Court decisions address juror impartiality and misconduct, but the Court is
27 unaware of any clearly established federal right to investigate a claim of juror
28 misconduct. See e.g., Smith v. Phillips, 455 U.S. 209 (1982) and Tanner v. United
States, 483 U.S. 107, 127 (1987). The Supreme Court in Smith considered a defendant's
due process right to a hearing before the trial court on a claim of juror misconduct. 455
U.S. at 218. The Smith court said nothing of a defendant's right to receive juror
information to assist in his investigation of juror misconduct. Tanner is even less helpful

1 to Petitioner, as the Supreme Court in Tanner warned "long-recognized and very
2 substantial concerns support the protection of jury deliberations from intrusive inquiry."
3 483 U.S. at 127. Ultimately, the Tanner court held the state court's refusal to conduct an
4 evidentiary hearing into a juror's alleged use of narcotics did not violate the defendant's
5 right to a fair and impartial jury where other safeguards, such as voir dire and
6 observations of fellow jurors, sufficiently protected his rights. Id. More recently, the Ninth
7 Circuit found no constitutional violation based on a state court's denial of an evidentiary
8 hearing on a claim of juror misconduct where there was no allegation the jurors
9 considered impermissible extrinsic evidence. Grotemeyer v. Hickman, 393 F.3d 871, 881
10 (9th Cir. 2004).

11 In the absence of clearly established federal law on the issue of a defendant's
12 right to access juror information, Petitioner cannot show that the state court's denial of
13 his claim was contrary to, or an unreasonable application of, clearly established federal
14 law. Carey v. Musladin, 549 U.S. 70, 77 (2006) (in the absence of a Supreme Court
15 holding regarding the prejudicial effect of spectators' courtroom conduct, the state court's
16 decision could not have been contrary to or an unreasonable application of clearly
17 established federal law); see also Brewer v. Hall, 378 F.3d 952, 955 (9th Cir. 2004).

18 Finally, even if the Court could construe Petitioner's claim as presenting a
19 cognizable issue, the trial court reasonably rejected Petitioner's request for the release
20 of juror information, as he failed to make a prima facie showing of good cause for the
21 release of the information. Petitioner failed to make a proper showing of juror
22 misconduct, and did not present the witnesses or a declaration from the witness that
23 supposedly saw the victim's relatives talking to jurors. The state court's denial of
24 Petitioner's claim was not "contrary to" or an "unreasonable application" of "clearly
25 established federal law." 28 U.S.C. § 2254(d). Accordingly, habeas relief is not
26 warranted on claim four.

27 **D. Claim Five – Insufficiency of the Evidence**

28 Petitioner next contends that there was insufficient evidence that Petitioner's

1 motive for committing the offense was to further the activities of the Eastside Crip gang.

2 **1. State Court Decision**

3 Petitioner presented this claim by way of direct appeal to the California Court of
4 Appeal, Fifth Appellate District. The claim was denied in a reasoned decision by the
5 appellate court and summarily denied in subsequent petition for review by the California
6 Supreme Court. (See Lodged Docs. 2-4.) Because the California Supreme Court's
7 opinion is summary in nature, this Court "looks through" that decision and presumes it
8 adopted the reasoning of the California Court of Appeal, the last state court to have
9 issued a reasoned opinion. See *Ylst*, 501 U.S. at 804-05.

10 In denying Petitioner's claim, the Fifth District Court of Appeal explained:

11 V. Sufficient Evidence of Gang Enhancement and Special Circumstance

12 The jury found true the criminal street gang enhancement for count
13 one, murder, and count two, felon in possession of a firearm. In addition,
the jury found the criminal street gang special circumstance to be true.

14 The sentence enhancements charged under Penal Code section
15 186.22, subdivision (b)(1), required proof that the underlying felony was
16 "committed for the benefit of, at the direction of, or in association with any
17 criminal street gang, with the specific intent to promote, further, or assist in
18 any criminal conduct by gang members" To prove the special
19 circumstance alleged under Penal Code section 190.2, subdivision (a)(22)
it must be shown "[t]he defendant intentionally killed the victim while the
defendant was an active participant in a criminal street gang, as defined in
subdivision (f) of Section 186.22, and the murder was carried out to further
the activities of the criminal street gang."

20 Defendant claims the evidence is insufficient to support the gang
21 enhancement and special circumstance. Defendant contends the
22 evidence was insufficient to find his motive was to benefit or further the
23 activities of the East Side Crips because what occurred was a personal
24 quarrel between Hill and defendant that escalated to the use of a gun. It is
asserted by defendant that Jehle's opinions regarding defendant's gang
motive were simply speculation based on general statements about gang
culture. Defendant argues the only evidence that his actions were to
benefit the street gang came from Jehle's opinion.

25 "In considering a challenge to the sufficiency of the evidence to
26 support an enhancement [or special circumstance], we review the entire
27 record in the light most favorable to the judgment to determine whether it
28 contains substantial evidence—that is, evidence that is reasonable,
credible, and of solid value—from which a reasonable trier of fact could
find the defendant guilty [find the allegations true] beyond a reasonable
doubt. [Citation.] We presume every fact in support of the judgment the
trier of fact could have reasonably deduced from the evidence. [Citation.] If

1 the circumstances reasonably justify the trier of fact's findings, reversal of
2 the judgment is not warranted simply because the circumstances might
3 also reasonably be reconciled with a contrary finding. [Citation.] 'A
4 reviewing court neither reweighs evidence nor reevaluates a witness's
5 credibility.'" (People v. Albillar (2010) 51 Cal.4th 47, 59-60.)

6 Defendant relies on People v. Ramon (2009) 175 Cal.App.4th 843,
7 a case from this court, to support his argument that expert speculation
8 about motive to benefit the gang, standing alone, is not substantial
9 evidence that will sustain a true finding on the gang enhancement. In
10 Ramon defendant was driving a stolen truck and there was a gun under
11 the driver's seat. The truck was stopped by officers in the heart of gang
12 territory and defendant and his passenger were both gang members. (Id.
13 at pp. 846-848.) We found the evidence was insufficient to support the
14 gang enhancements that the jury found true. "The section 186.22(b)(1)
15 enhancement requires the jury to find that the crime was committed for the
16 benefit of a criminal street gang and with the specific intent to promote the
17 criminal street gang. The only evidence on this issue was provided by the
18 People's expert witness, Lopez.... In summary, Lopez relied on two
19 independent facts in forming his opinion: (1) Both Ramon and codefendant
20 Martinez were members of the Colonia Bakers criminal street gang, and
21 (2) the two were stopped in territory claimed by the Colonia Bakers. From
22 these two facts, along with the crimes the two were accused of
23 committing, Lopez opined that the crime was committed for the benefit of
24 the Colonia Bakers criminal street gang and was intended to promote the
25 Colonia Bakers. Lopez's opinion was based on his belief that because the
26 gun and the stolen vehicle could be used to facilitate the commission of a
27 crime, and the Colonia Bakers commit crimes, the two must have been
28 acting on behalf of the Colonia Bakers." (Id. at p. 849.) We concluded that
expert testimony about a possible reason for committing a crime was not
sufficient, by itself, to establish the crime was committed with the specific
intent to promote, further, or assist in criminal conduct by gang members.
(Id. at p. 853.)

The facts in this case to prove the gang enhancement and special
circumstance are extensive and are not comparable to the lack of factual
support in the Ramon case. The argument between defendant and Hill
was precipitated by Hill's expressed desire, as testified to by Lee, that he
wanted to leave the gang. Hill and defendant exchanged words over this
with defendant stating, "[Y]ou used to be my Loc, now you're acting like a
square." As previously set forth, a "Loc" is a fellow gang member; a
square is someone who does not "gang bang." As the two continued to
argue and Hill complained to defendant that he was disrespecting him,
defendant replied that he could disrespect Hill because he (defendant) is a
"big homie." When the two were outside defendant walked up to Hill and
said, "Got to disrespect you, and you're a square, and I'm your big homie."
The facts were overwhelming that the dispute between Hill and defendant
was gang related, involving Hill wanting to leave the gang, and the
question of whom in the gang should be respecting who. The possession
of the gun and the killing of Hill were clearly for the benefit of the criminal
street gang. Jehle's opinion that the crimes were gang related was
supported by ample evidence presented at trial and was not based on
speculation.

People v. Davidson, 2011 Cal. App. Unpub. LEXIS 8291 at 47-53.

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2. Legal Standard

The Due Process Clause "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358, 364 (1970). There is sufficient evidence to support a conviction if, "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 v. Virginia, 443 U.S. 307, 319 (1979). "[T]he dispositive question under Jackson is 'whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt.'" Chein v. Shumsky, 373 F.3d 978, 982 (9th Cir. 2004) (quoting Jackson, 443 U.S. at 318). Put another way, "a reviewing court may set aside the jury's verdict on the ground of insufficient evidence only if no rational trier of fact could have agreed with the jury." Cavazos v. Smith, 565 U.S. 1, 132 S.Ct. 2, *4, 181 L. Ed. 2d 311 (2011).

In conducting federal habeas review of a claim of insufficient evidence, "all evidence must be considered in the light most favorable to the prosecution." Ngo v. Giurbino, 651 F.3d 1112, 1115 (9th Cir. 2011). "Jackson leaves juries broad discretion in deciding what inferences to draw from the evidence presented at trial," and it requires only that they draw "reasonable inferences from basic facts to ultimate facts." Coleman v. Johnson, 132 S.Ct. 2060, 2064 (2012) (citation omitted). "Circumstantial evidence and inferences drawn from it may be sufficient to sustain a conviction." Walters v. Maass, 45 F.3d 1355, 1358 (9th Cir. 1995) (citation omitted).

"A petitioner for a federal writ of habeas corpus faces a heavy burden when challenging the sufficiency of the evidence used to obtain a state conviction on federal due process grounds." Juan H. v. Allen, 408 F.3d 1262, 1274 (9th Cir. 2005). In order to grant relief, the federal habeas court must find that the decision of the state court rejecting an insufficiency of the evidence claim reflected an objectively unreasonable application of Jackson and Winship to the facts of the case. Ngo, 651 F.3d at 1115; Juan H., 408 F.3d at 1275 & n.13. Thus, when a federal habeas court assesses a sufficiency

1 of the evidence challenge to a state court conviction under AEDPA, "there is a double
2 dose of deference that can rarely be surmounted." Boyer v. Belleque, 659 F.3d 957, 964
3 (9th Cir. 2011). The federal habeas court determines sufficiency of the evidence in
4 reference to the substantive elements of the criminal offense as defined by state law.
5 Jackson, 443 U.S. at 324 n.16; Chein, 373 F.3d at 983.

6 Petitioner's claim is whether there was sufficient evidence to satisfy the elements
7 of the criminal street gang enhancement under California law. To establish a gang
8 enhancement, the prosecution must prove two elements: (1) that the crime was
9 "committed for the benefit of, at the direction of, or in association with any criminal street
10 gang," and (2) that the defendant had "the specific intent to promote, further, or assist in
11 any criminal conduct by gang members" Cal. Penal Code § 186.22(b)(1).) "Not every
12 crime committed by gang members is related to a gang." People v. Albillar, 51 Cal.4th
13 47, 60, 119 Cal. Rptr. 3d 415, 244 P.3d 1062 (2005). Even "when two or more gang
14 members commit a crime together, they may be on a frolic and detour unrelated to the
15 gang." Emery v. Clark, 643 F.3d 1210, 1214 (9th Cir. 2011) (citing Albillar, 244 P.3d at
16 1072.)

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

26 Evidence that a crime would enhance a gang's status or reputation or that it would
27 intimidate rival gangs or potential witnesses within the gang's territory, has been found to
28 be sufficient to support a finding that the crime was "for the benefit of" the gang. See,

1 e.g., People v. Garcia, 153 Cal.App.4th 1499, 1503-06, 64 Cal. Rptr. 3d 104 (2007).

2 3. Analysis

3 As described by the California Court of Appeal in its decision, there was
4 significant evidence that the dispute between Petitioner and the victim was caused by
5 the victim's stated intent to leave the gang and his showing disrespect for Petitioner. The
6 Court of Appeal determined that, "The facts were overwhelming that the dispute between
7 Hill and defendant was gang related, involving Hill wanting to leave the gang, and the
8 question of whom in the gang should be respecting who. The possession of the gun and
9 the killing of Hill were clearly for the benefit of the criminal street gang. Jehle's opinion
10 that the crimes were gang related was supported by ample evidence presented at trial
11 and was not based on speculation." (Lod. Doc. 2 at 31.)

12 Review of the records confirms that there was significant evidence that Petitioner
13 was a senior member of the gang and that the dispute was based on the victim's
14 attempts to leave the gang. However, Petitioner does not challenge whether the gang
15 qualified as a criminal street gang, or whether he was an active member of the gang. His
16 sole argument was that the dispute and murder of the victim was a personal dispute, and
17 was not motivated by any desire to further the benefit of the gang.

18 Jehle testified Petitioner was the senior active member of the gang at the time of
19 the offense. (Lod. Doc. 14, Rep. Tr. at 1422-1423.) Jehle opined that a murder such as
20 the one here would further the activities of the gang. (Id. at 1485.) Jehle explained that
21 when a senior member of a gang, such as Petitioner, was disrespected by a more junior
22 member of the gang, it was incumbent on him to act, so as to not lose his status in the
23 gang structure. (Id. at 1486.) By keeping the hierarchical structure of the gang intact,
24 Jehle testified that it helped maintain the success of the gang organization. (Id. at 1487.)

25 While Petitioner does not challenge whether there was sufficient evidence to
26 support finding the existence of a criminal street gang, Jehle presented significant
27 testimony to that effect. Jehle testified that the Eastside Crips has over 600 members.
28 (Rep. Tr. at 1324.) The Eastside Crips has multiple subsets including the Stroller Boy

1 Crips. (Id. at 1337-1338.) Petitioner was one of the original members of Stroller Boy
2 Crips which formed in the late seventies or early eighties. (Id. at 1345-47.) Jehle
3 personally knew Petitioner for about 20 years, and also knew members of Petitioner's
4 family. (Id. at 1383-84.) Jehle also knew the victim and opined that he was an active
5 member of the Eastside Stroller Boy Crips. (Rep. Tr. 1423, 1435.)

6 There was yet even more evidence of Petitioner's gang status and evidence that
7 the crimes were committed for the benefit of a criminal street gang. Lee testified that
8 while the victim was in custody, she spoke to him a couple of times per day and would
9 visit him. (Rep. Tr. at 99.) In their conversations, the victim expressed a desire to change
10 his life and leave the gang. (Id. at 101.) She knew it was not going to be easy for him to
11 get out of the gang. (Id. at 101.)

12 Regarding the events on the evening of the shooting, Lee testified that she
13 accompanied the victim to see Petitioner, and the victim confronted Petitioner and told
14 him that he was going to leave the gang. (Rep. Tr. at 138, 147, 182, 185, 195.) Petitioner
15 told the victim he was not leaving the gang. (Id. at 195.) A heated argument ensued
16 between Petitioner and the victim, and they began to physically fight. (Id. at 201-02.) The
17 victim demanded Petitioner respect him, but Petitioner said he had the right disrespect
18 the victim because he was the victim's "big homie." (Id. at 204.)

19 Petitioner rushed Mr. Hill again, and again Mr. Hill landed on top of Petitioner
20 hitting him. (Rep. Tr. at 205.) The two men continued to argue about "respect." (Id. at
21 210.) The fight culminated when Petitioner ran in the house and came back with a gun
22 and shot the victim. (Id. at 214-218.)

23 Providing the state court with the appropriate level of deference, there was
24 sufficient evidence to support a finding that the murder was committed for the benefit of
25 the criminal street gang. The dispute arose because of the victim's status in the gang,
26 and more specifically based on his desire to leave the gang. In order to ensure the
27 structure and hierarchy of the gang, Petitioner committed the act to show dominance and
28 intimidation and to illustrate to others that it was not acceptable to disrespect a senior

1 member of the gang or attempt to leave the gang. The fact that the evidence was
2 presented as expert opinion does not diminish its sufficiency under California law.
3 California courts have specifically found sufficient evidence based on gang expert
4 opinion. "[T]o prove the elements of the criminal street gang enhancement, the
5 prosecution may ... present expert testimony on criminal street gangs." People v.
6 Hernandez, 33 Cal.4th 1040, 1047-48, 16 Cal. Rptr. 3d 880, 94 P.3d 1080 (2004).

7 Under Jackson and AEDPA, the state decision is entitled to double deference on
8 habeas review. Based on review of the trial record, there was sufficient evidence based
9 on the testimony of witnesses and the gang expert to deny Petitioner's challenge to
10 whether the crime was committed in furtherance of the criminal street gang. There was
11 no constitutional error, and Petitioner is not entitled to relief with regard to this claim.

12 **E. Claim Six – Ineffective Assistance of Counsel**

13 Petitioner next contends the trial court was ineffective for failing to investigate and
14 present favorable evidence. Specifically, Petitioner argues that counsel failed to cross-
15 examine witnesses presented by the prosecution.

16 **1. State Court Decision**

17 Petitioner presented this claim by way of a petition for writ of habeas corpus to the
18 Kern County Superior Court. (Lodged Doc. 5.) The claim was denied in a reasoned
19 decision. (Lodged Doc. 6.) Petitioner proceeded to present petitions for writs of habeas
20 corpus to the appellate court and California Supreme Court. (Lodged Docs. 7-10.)
21 Because the higher court's opinions are summary in nature, this Court "looks through"
22 those decisions and presumes it adopted the reasoning of the Kern County Superior
23 Court, the last state court to have issued a reasoned opinion. See Ylst, 501 U.S. at 804-
24 05.

25 In denying Petitioner's claim, the Kern County Superior Court explained:

26 To prevail on a claim of ineffective assistance of counsel, petitioner
27 must show that counsel's performance fell below an objective professional
28 level causing prejudice, which in its absence, would create a probability of
a different outcome. Strickland v. Washington (1984) 466 U.S. 668, 694.
The court may reverse a conviction and order a new trial where it found no

1 evidence supporting the trial court's denial of a new trial, and where there
2 is manifest ineffective assistance of counsel. People v. Taylor (1984) 162
3 Cal.App.3d 720, 724.

4 Defense counsel vigorously cross-examined the prosecution
5 witnesses. If there was any failure to cross-examine a witness, it was done
6 as a tactical choice based upon the comprehensive direct examination by
7 the prosecution. For example, there is nothing to impeach the credentials
8 of Sgt. Jehle given his experience in police work both within the military
9 and civilian realms and his experience in gang and narcotics arrests.

10 Petitioner also fails in his argument that he acted in self-defense.
11 Although petitioner and Hill initially fought two times, petitioner retreated
12 inside the house before ultimately obtaining a weapon. He came outside
13 and ultimately shot Hill mortally wounding him. Although petitioner testified
14 that he acted in self-defense, the jury found his testimony lacked
15 credibility. Petitioner cannot demonstrate ineffective assistance of counsel
16 on the grounds he alleges.

17 (Lod. Doc. 6 at 3.)

18 **2. Legal Standard**

19 The law governing ineffective assistance of counsel claims is clearly established
20 for the purposes of the AEDPA deference standard set forth in 28 U.S.C. § 2254(d).
21 Canales v. Roe, 151 F.3d 1226, 1229 (9th Cir. 1998). In a petition for writ of habeas
22 corpus alleging ineffective assistance of counsel, the Court must consider two factors.
23 Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); Lowry
24 v. Lewis, 21 F.3d 344, 346 (9th Cir. 1994). First, the petitioner must show that counsel's
25 performance was deficient, requiring a showing that counsel made errors so serious that
26 he or she was not functioning as the "counsel" guaranteed by the Sixth Amendment.
27 Strickland, 466 U.S. at 687. The petitioner must show that counsel's representation fell
28 below an objective standard of reasonableness, and must identify counsel's alleged acts
or omissions that were not the result of reasonable professional judgment considering
the circumstances. Id. at 688; United States v. Quintero-Barraza, 78 F.3d 1344, 1348
(9th Cir. 1995). Judicial scrutiny of counsel's performance is highly deferential. A court
indulges a strong presumption that counsel's conduct falls within the wide range of
reasonable professional assistance. Strickland, 466 U.S. at 687; see also, Harrington v.
Richter, 562 U.S. 86, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011).

Second, the petitioner must demonstrate that "there is a reasonable probability

1 that, but for counsel's unprofessional errors, the result ... would have been different."
2 Strickland, 466 U.S. at 694. Petitioner must show that counsel's errors were "so serious
3 as to deprive defendant of a fair trial, a trial whose result is reliable." Id. at 687. The
4 Court must evaluate whether the entire trial was fundamentally unfair or unreliable
5 because of counsel's ineffectiveness. Id.; Quintero-Barraza, 78 F.3d at 1348; United
6 States v. Palomba, 31 F.3d 1456, 1461 (9th Cir. 1994).

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

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

17 The pivotal question is whether the state court's application of the
18 Strickland standard was unreasonable. This is different from asking
19 whether defense counsel's performance fell below Strickland's standard.
20 Were that the inquiry, the analysis would be no different than if, for
21 example, this Court were adjudicating a Strickland claim on direct review
22 of a criminal conviction in a United States district court. Under AEDPA,
23 though, it is a necessary premise that the two questions are different. For
24 purposes of § 2254(d)(1), "an unreasonable application of federal law is
25 different from an incorrect application of federal law." Williams, *supra*, at
26 410, 120 S. Ct. 1495, 146 L. Ed. 2d 389. A state court must be granted a
27 deference and latitude that are not in operation when the case involves
28 review under the Strickland standard itself.

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

1 Knowles v. Mirzayance, 556 U.S. 111, 129 S. Ct. 1411, 1419, 173 L. Ed.
2d 251, 261 (2009) (internal quotation marks omitted).

2 Harrington v. Richter, 131 S. Ct. at 785-86.

3 "It bears repeating that even a strong case for relief does not mean the state
4 court's contrary conclusion was unreasonable." Id. at 786. "As amended by AEDPA, §
5 2254(d) stops short of imposing a complete bar on federal court relitigation of claims
6 already rejected in state proceedings." Id. "As a condition for obtaining habeas corpus
7 from a federal court, a state prisoner must show that the state court's ruling on the claim
8 being presented in federal court was so lacking in justification that there was an error
9 well understood and comprehended in existing law beyond any possibility for fairminded
10 disagreement." Id. at 786-87.

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

14 **3. Analysis**

15 Petitioner contends that counsel was ineffective by failing to investigate and
16 present favorable witnesses, and for failing to cross-examine several of the prosecution's
17 witnesses.

18 The reasoning of the state court did not provide great detail, however, it noted
19 that the failure to cross-examine witnesses was a tactical choice in light of the
20 comprehensive direct examination of the prosecution. (Lodged Doc. 6.) Petitioner
21 describes several witnesses that defense counsel did not cross-examine, including the
22 following:

- 23 a. Lloyd Watters, a detective with the Sherriff's Office, who responded to the
24 scene. (Pet. at 13.)
- 25 b. Jeff Slaton, an evidence technician that extracted information off cell
26 phones. (Pet. at 13.)
- 27 c. Officer Joseph Arms, who responded to the scene.
- 28 d. Officer Ryan Miller, who collected evidence at the scene. (Pet. at 13-14.)

- 1 e. Deputy Sheriff Alex Miller.
- 2 f. Forensic technician Ivette Ruvalcaba.
- 3 g. DNA specialist Kaci Keeney.
- 4 h. Sergeant Sean Pratt.

5 Respondent counters that many other prosecution witness were cross-examined
6 by Petitioner's counsel, and that counsel presented Petitioner and four other witnesses
7 in Petitioner's defense. Based on counsel's active role in Petitioner's defense
8 Respondent argues that counsel did not abdicate his role in defending Petitioner, but
9 that the state court was reasonable to find that counsel chose not to cross-examine
10 some of the witnesses based on strategy.

11 The Court has reviewed the testimony of the witnesses in question. Detective
12 Lloyd Watters testified that he arrived at the scene and observed a trail of blood leading
13 away from the house and several .45 caliber spent shell casings. (Rep. Tr. at 758-81.)
14 While the evidence presented by Watters was damaging to Petitioner's defense,
15 Petitioner has not presented any argument as to what, if any, questions on cross-
16 examination would have impeached or otherwise weakened Watter's testimony.

17 Jeff Slaton testified that he has worked as an evidence technician for over 23
18 years. (Rep. Tr. at 827-36.) Slaton obtained the phone longs and phone number contact
19 lists from several cell phones. (Id.) Petitioner has not presented any argument as to how
20 cross-examination of Slaton would have elicited any evidence favorable to his defense.
21 Upon review of Slaton's testimony, there is no reason to believe that there was any basis
22 to challenge the method in which he obtained data from the cell phones. The state
23 court's determination that not cross-examining Slaton as a matter of strategy was
24 reasonable.

25 Officer Joseph Arms testified that he arrived at the scene, talked to several
26 witnesses, and then assisted in the search of the area which revealed several .45 caliber
27 shell casings that were taken into evidence. (Rep. Tr. at 892-97.) Officer Ryan Miller
28 testified that he assisted in the search, and was the one who collected the casings and

1 put them in a sealed, labeled evidence bag. (Rep. Tr. at 897-902.) Petitioner has
2 presented no basis for challenging Arms or Miller's testimony, both of which were brief
3 and not particularly critical in light of eyewitness testimony of Lee who observed
4 Petitioner shoot the victim. Defense counsel's decision not to cross-examine Arms or
5 Miller was reasonable.

6 Petitioner's claims that defense counsel should have cross-examined the other
7 listed witnesses fare no better. Los Angeles Sherriff Deputy Alex Miller testified
8 regarding Petitioner's apprehension after he fled to Los Angeles. (Rep. Tr. at 862-879.)
9 Despite Petitioner's contentions, defense counsel did cross-examine Miller, and
10 confirmed that Petitioner cooperated and voluntarily exited the house without incident
11 when ordered by law enforcement officers. (Id. at 877-79.) Forensic technician Ivette
12 Ruvalcaba testified that she assisted in the DNA testing of rounds from the crime scene,
13 but did not offer an opinion as to the results of the testing. (Id. at 904-14.) DNA specialist
14 Kaci Keeney testified that they were unable to find any DNA from the rounds found at
15 the crime scene. (Id. at 914-922.) Finally, sergeant Sean Pratt testified that he assisted
16 in retrieving phone log and other data from the victim and Charnika Lee. (Rep. Tr. at
17 952-67.) A review of his testimony reveals little significant evidence implicating
18 Petitioner.

19 Even assuming that Petitioner could show that counsel failed to act reasonably
20 based on his failure to cross-examine several of the prosecution's witnesses, Petitioner
21 has made no showing that he was prejudiced by counsel's conduct, and that but for
22 counsel's ineffective representation, that the result of trial would be different. There was
23 significant evidence, as witnessed by several individuals that he and the victim were
24 verbally and physically fighting prior to the shooting. All of the above witnesses
25 presented testimony regarding physical evidence that aided in linking Petitioner to the
26 murder. However, in reality, there appears to be little question, in light of both the
27 physical evidence presented, and the eye-witness testimony that Petitioner was the only
28 likely person to have shot the victim. Defense counsel was aware of this fact, and as

1 explained by the Court of Appeal, focused on a self-defense theory for the shooting,
2 based on the victim's assaults on Petitioner earlier that evening.

3 As there was no basis to challenge the actions of law enforcement in conducting
4 its investigation, Petitioner has not shown that he was prejudiced by counsel's conduct.
5 Counsel was not ineffective for failing to cross-examine each of the named witnesses in
6 light of his self-defense strategy, and regardless, Petitioner has not shown that he was
7 prejudiced by counsel's action.

8 The arguments or theories supporting the state court's decision rejecting
9 Petitioner's claim of ineffective assistance of counsel are not "so lacking in justification
10 that there was an error well understood and comprehended in existing law beyond any
11 possibility for fairminded disagreement." Richter, 131 S. Ct. at 786-87. Petitioner is not
12 entitled to federal habeas relief on this claim.

13 **F. Claim Seven – Failure to Properly Instruct Jury**

14 Petitioner, in his final claim, contends the trial court violated his Sixth and
15 Fourteenth Amendment rights by failing to properly instruct the jury on the factual
16 elements of active participation in a criminal street gang. Respondent contends that the
17 claim is procedurally barred. Petitioner presented the claim in his petition for writ of
18 habeas corpus filed before California Supreme Court. (Lodged Doc. 9.)

19 In its decision, the California Supreme Court denied the petition based on a state
20 procedural bar. The court addressed Petitioner's claims as follows:

21 The petition for writ of habeas corpus is denied. (See People v. Duvall
22 (1995) 9 Cal.4th 464, 474; In re Dixon (1953) 41 Cal.2d 756, 759; In re
23 Swain (1949) 34 Cal.2d 300, 304; In re Lindley (1947) 29 Cal.2d 709,
723.)

24 (Lodged Doc. 10.)

25 Based on the cases cited by the California Supreme Court, it appears that the
26 California Supreme Court found the claims procedurally barred for failure to raise the
27 claims on direct appeal.
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1. Legal Framework for Procedural Default

The Supreme Court described the legal requirements that prevent review of claims that were rejected on state court grounds as follows:

“A federal habeas court will not review a claim rejected by a state court ‘if the decision of [the state] court rests on a state law ground that is independent of the federal question and adequate to support the judgment.’ “ Kindler, 558 U.S., at 55, 130 S.Ct., at 615 (quoting Coleman v. Thompson, 501 U.S. 722, 729, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991)). The state-law ground may be a substantive rule dispositive of the case, or a procedural barrier to adjudication of the claim on the merits. See Sykes, 433 U.S., at 81-82, 90, 97 S.Ct. 2497.

To qualify as an “adequate” procedural ground, a state rule must be “firmly established and regularly followed.” Kindler, 558 U.S., at 60, 130 S.Ct., at 618 (internal quotation marks omitted). FN4 [omitted] “[A] discretionary state procedural rule,” we held in Kindler, “can serve as an adequate ground to bar federal habeas review.” Ibid. A “rule can be ‘firmly established’ and ‘regularly followed,’” Kindler observed, “even if the appropriate exercise of discretion may permit consideration of a federal claim in some cases but not others.” Ibid. California’s time rule, although discretionary, meets the “firmly established” criterion, as Kindler comprehended that requirement.

Walker v. Martin, 562 U.S. 307, 131 S. Ct. 1120, 1127-1128, 179 L. Ed. 2d 62 (2011) (abrogating Townsend v. Knowles, 562 F.3d 1200 (9th Cir. 2009)).

2. Failure to Raise Claims on Direct Review

Claim seven is potentially procedurally barred by the California Supreme Court’s decision to deny state habeas review because the claim was not raised on direct review.

Here, the California Supreme Court applied the Dixon rule to deny the claims in the petition. Dixon states that:

[t]he general rule is that habeas corpus cannot serve as a substitute for an appeal, and, in the absence of special circumstances constituting an excuse for failure to employ that remedy, the writ will not lie where the claims errors could have been, but were not, raised upon a timely appeal from the judgment of conviction.

41 Cal. 2d at 759. Thus, pursuant to Dixon, a California court will not review the merits of a claim in a state habeas proceeding if it could have been raised in a timely appeal but was not.

3. Is the Dixon Rule Adequate and Independent Bar?

The Court must determine whether the Dixon rule is an adequate and

1 independent state rule to serve as a procedural bar. The Supreme Court explained that
2 "a discretionary rule can serve as an adequate ground to bar federal habeas review,"
3 and that a rule may be adequate "even if the appropriate exercise of discretion may
4 permit consideration of a federal claim in some cases but not others." Beard v. Kindler,
5 130 S. Ct. 612, 618 (2009); see also Martin, 131 S. Ct. at 1128-29. As the Supreme
6 Court recently observed in Martin, 131 S. Ct. at 1130, "[d]iscretion enables a court to
7 home in on case-specific considerations and to avoid the harsh results that sometimes
8 attend consistent application of an unyielding rule."

9 The Supreme Court has held that the Dixon rule "qualifies as adequate to bar
10 federal habeas review." Johnson v. Lee, 136 S. Ct. 1802, 1806, 195 L. Ed. 2d 92 (2016).
11 Accordingly, the Court finds that the California Supreme Court expressly invoked an
12 independent and adequate procedural rule in California, commonly referred to as the
13 Dixon rule, and Petitioner has procedurally defaulted this claim.

14 **4. Reasons to Overcome Procedural Default**

15 Even when a federal claim has been procedurally defaulted, "[t]he bar to federal
16 review may be lifted, if 'the prisoner can demonstrate cause for the [procedural] default
17 [in state court] and actual prejudice as a result of the alleged violation of federal law.' "
18 Maples v. Thomas, 132 S.Ct. 912, 922, 181 L. Ed. 2d 807 (2012) (quoting Coleman, 501
19 U.S. at 750, 746-47); see also Schneider v. McDaniel, 674 F.3d 1144, 1153 (9th Cir.
20 2012). Adequate "cause" for a default must be an "external" factor that cannot fairly be
21 attributed to the petitioner. Coleman, 501 US. at 753.

22 **a. Cause**

23 In Coleman, the court noted that attorney error which rises to the level of
24 ineffective assistance of counsel is considered "cause" within the meaning of this rule.
25 Coleman, 501 U.S. at 753-54. This is because a defendant has a right to effective
26 assistance of counsel under the Sixth Amendment, and a violation of that must be seen
27 as an external factor, and thus the error must be imputed to the state. Id.; Murray, 477
28 U.S. at 488. Petitioner has not alleged any cause for his procedural default.

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b. Prejudice

In addition to cause, prejudice is a required element for Petitioner to overcome a procedural bar. In order to establish prejudice to overcome a procedural default, Petitioner must show "not merely that the errors at his trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." See United States v. Frady, 456 U.S. 152, 170, 102 S. Ct. 1584, 71 L. Ed. 2d 816 (1982) (discussing prejudice where defendant failed to object to jury instructions in proceeding under 28 U.S.C. § 2255); Schneider v. McDaniel, 674 F.3d 1144, 1153 (9th Cir. 2012). "Prejudice [to excuse a procedural default] is actual harm resulting from the alleged error." Vickers v. Stewart, 144 F.3d 613, 617 (9th Cir. 1998).

Petitioner cannot establish prejudice with regard to the failure to present his claim that the court erred in failing to instruct the jury regarding the charge of active participation in a criminal street gang. The California Supreme Court has explained that the gravamen of a violation of Penal Code section 186.22(a) "is active participation in a street gang." People v. Albillar, 51 Cal. 4th 47, 55, 119 Cal. Rptr. 3d 415, 244 P.3d 1062 (2010). The elements of the offense are: (1) active participation in a criminal street gang, in the sense of participation that is more than nominal or passive; (2) knowledge that the gang's members engage in or have engaged in a pattern of criminal gang activity; and (3) the willful promotion, furtherance, or assistance in any felonious criminal conduct by members of that gang. People v. Lamas, 42 Cal. 4th 516, 523, 67 Cal. Rptr. 3d 179, 169 P.3d 102 (2007). "All three elements can be satisfied without proof" that the promoted crime was gang-related. Albillar, 51 Cal. 4th at 56. The state supreme court's "authoritative interpretation of section 186.22" must be applied by this Court. Emery v. Clark, 643 F.3d 1210, 1215-16 (9th Cir. 2011) ("Emery II").

The interpretation of this statute on habeas review in the Ninth Circuit was in flux. In Emery v. Clark, 604 F.3d 1102 (9th Cir. 2010) ("Emery I"), the Ninth Circuit certified a series of questions to the state supreme court regarding the specific intent requirement

1 under another provision of section 186.22. The California Supreme Court decision in
2 Albillar addressed the elements of the substantive gang participation offense (section
3 186.22(a)) and a gang activity enhancement (section 186.22(b)(1)). The Albillar Court
4 expressly noted that its decision conflicted with various Ninth Circuit panels.

5 The Albillar decision did not answer the specific questions listed in Emery I.
6 Nevertheless, the Emery II Court acknowledged that the state court definitively resolved
7 the elements and mental intent necessary to commit the substantive offense of active
8 street gang participation.

9 Here, the jury was correctly instructed on the elements of the charge. In
10 accordance with CALCRIM 1400, the jury was instructed that, in order to convict
11 Petitioner of participating in a criminal street gang in violation of California Penal Code §
12 186.22(a), it had to find that: (1) petitioner actively participated in a criminal street gang;
13 (2) when petitioner participated in the gang, he knew that members of the gang engage
14 in or have engaged in a pattern of criminal gang activity; and (3) petitioner willfully
15 assisted, furthered, or promoted felonious criminal conduct by members of the gang. . .
16 by directly and actively committing a felony offense. . . or aiding and abetting a felony
17 offense. (Lodged Doc. 11, Clerk's Tr. at 480-481.)

18 The Court finds that Petitioner would not be successful in his claim of failure to
19 instruct the jury on the active gang participation. As the claim would not be successful,
20 Petitioner is unable to show prejudice based on failure to properly instruct the jury.
21 Accordingly, Petitioner is procedurally barred from presenting his seventh claim, and
22 therefore it recommended that it be denied.

23 **IV. Recommendation**

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

26 This Findings and Recommendation is submitted to the assigned District Judge,
27 pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within thirty (30) days after
28 being served with the Findings and Recommendation, any party may file written

1 objections with the Court and serve a copy on all parties. Such a document should be
2 captioned "Objections to Magistrate Judge's Findings and Recommendation." Any reply
3 to the objections shall be served and filed within fourteen (14) days after service of the
4 objections. The parties are advised that failure to file objections within the specified time
5 may waive the right to appeal the District Court's order. Wilkerson v. Wheeler, 772 F.3d
6 834, 839 (9th Cir. 2014).

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IT IS SO ORDERED.

Dated: February 27, 2017

/s/ Michael J. Seng
UNITED STATES MAGISTRATE JUDGE