UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JOSE ROBERT GUTIERREZ,

Petitioner,

v.

M. S. EVANS, Warden,

Respondent.

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No. C 08-3286 WHA (PR)

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

INTRODUCTION

This is a federal habeas corpus action filed by a state prisoner pursuant to 28 U.S.C. 2254. Respondent was ordered to show cause why the writ should not be granted based on the claims set forth in the petition. Respondent has filed an answer and a memorandum of points and authorities in support of it. Petitioner has responded with a "Denial and Exception to the Return to the Order to Show Cause and Memorandum of Points and Authorities in Support Thereof" which is construed as a traverse. For the reasons set forth below, the petition is **DENIED**.

STATEMENT

In 2005, a Monterey County Superior Court jury found petitioner guilty of one count of first-degree murder, and two counts of attempted deliberate and premeditated murder (Exh. C5 at 9-10). The jury found true the allegations that each offense was committed for the benefit of a criminal street gang, that petitioner had personally and intentionally discharged a firearm on all counts, and that he personally inflicted great bodily injury as to the first count of attempted deliberate and

premeditated murder (*id.* at 10).

On February 14th, 2006, the trial court sentenced petitioner to a term of 50 years to life for the count of murder, 40 years to life for the first count of attempted deliberate and premeditated murder, and 35 years to life for the second count of attempted deliberate and premeditated murder, for a total term of 125 years to life (*ibid.*). The California Court of Appeal for the Sixth Appellate District affirmed the judgment (*id.* at 24). The California Supreme Court denied his petition for review (Exh. E).

The following background facts describing the crime are taken from the opinion of the California Court of Appeal:

> On the evening of January 17, 2004, Gustavo Silva drove his red Chevy pickup truck with two friends, Victor Loyo and Ramiro Barrios, from the Monterey Peninsula to the Northridge Mall in Salinas and then to the parking lot of the Los Arcos Restaurant. They met Leticia Brisenio (Silva's friend), who arrived a short time later in another car along with her cousin, young nephew, and two other women.
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> Silva and Brisenio were together talking outside the truck on the passenger's side; they were standing about even with where the truck bed connected with the cab. Loyo and Barrios were talking on the other side of the truck behind the opening of the driver's door. (Both doors of the truck were open.) The car with the other girls was parked by the driver's side of the truck.
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> A male approached Loyo and Barrios on the driver's side of the truck. He was wearing black pants, a hooded sweater or sweatshirt, and a black beanie. Silva became suspicious of him by the way he approached his friends. The male asked Barrios and Loyo where they were from. According to Silva, Barrios responded that "he was from Monterey . . . he wasn't nothin.' " Silva understood from this that Barrios was saying that he wasn't in any gang, that he was an "[a]verage working guy." Loyo testified that he was the one who responded, saying, " 'We're not from around here. We're just here listening to music.' " (Loyo recalled that the male then turned and repeated his question to Silva.)
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> The male then pulled a gun from the pocket of his sweater and started shooting. He shot Barrios. Loyo started running. The male then went back behind the truck to shoot at Silva, who ran toward the front of the truck and to the front door of the restaurant. Silva was shot in the shoulder, and the bullet passed through his body. As he was running, Silva heard screams. Brisenio was shot in the back as she was running toward the car and was immediately paralyzed. [Footnote omitted].
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> Salinas Police Officer Steven Long was the first officer to respond to the scene of the shooting, arriving at approximately 9:00 p.m. The area was adequately lit and no additional illumination was needed to conduct the investigation. A deceased male was lying face down in the parking lot next to a light pole. There was a female seated near him (Brisenio) who was screaming that she had been shot in the back and had no feeling in her legs. There was a red pickup truck parked in the lot adjacent to the same light pole near where the deceased male was located. Officer Long observed numerous nine-millimeter shell casings "strewn about the truck and in the area of the victims."

> Dr. John Hain, a forensic pathologist, performed an autopsy two days after the shooting and concluded that Barrios had sustained at least six gunshot wounds. Four of the gunshot wounds were in the heart or aorta or both, and Dr. Hain opined that any one of those four wounds would have been fatal. Salinas Police Officer Neil Herrier, who attended the autopsy, testified that the six hollow-point bullets recovered were from a nine millimeter handgun.

(Exh. C5 at 2-3.) Additionally, the prosecution introduced gang evidence to support the gang enhancement (*id.* at 20). The state appellate court summarized the introduction of gang evidence at trial as follows:

> The prosecution introduced substantial gang evidence in connection with the gang enhancement. [] Detective Bohn offered significant expert testimony concerning the characteristics and criminal activities of Norteos [sic], defendant's membership in the Norteo [sic] SEM gang, his association over the years with Norteos [sic], and opinion evidence as to whether the Los Arcos shootings were committed for the benefit of the Norteo [sic] criminal street gang.
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> At the outset of the trial, defendant filed a motion in limine to exclude the gang expert testimony on the grounds that it included inadmissible hearsay and was cumulative. Defendant also moved to bifurcate the trial so that the gang enhancement would be tried separately. Those matters were argued extensively. The court denied the motion to bifurcate; [footnote omitted] it further denied defendant's request to limit the scope of the proposed gang expert testimony.
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> The objections were renewed prior to Detective Bohn's testimony, defendant arguing that certain gang evidence--namely, his tape-recorded jailhouse telephone conversations--was cumulative and subject to exclusion under Evidence Code section 352 because its probative value was substantially outweighed by the undue prejudice it would create. The court overruled this objection and concluded that any stipulation offered by defense counsel that defendant was a Norteo [sic] was insufficient to warrant the exclusion of the gang evidence. The court held that defendant's gang membership and the allegation that he committed the Los Arcos shootings for the benefit of the Norteo [sic] criminal street gang needed to be placed in context through evidence other than his mere gang membership. But the court agreed to defense counsel's proposal that it preinstruct the jury under CALJIC No. 2.50 at the time of the admission of the gang evidence.
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> At the beginning of Detective Bohn's testimony, the court did in fact caution the jury--based upon an adaptation of CALJIC No. 2.50--that the gang evidence (i.e., evidence of gang activity and criminal acts by gang members other than the charged crimes) could not be considered to prove that defendant had a criminal disposition; rather, it was being introduced only to attempt to establish the gang allegation.

(*Ibid.*)

ANALYSIS

A. STANDARD OF REVIEW

A district court may not grant a petition challenging a state conviction or sentence on the

basis of a claim that was reviewed on the merits in state court unless the state court's adjudication of the claim: "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. 2254(d). The first prong applies both to questions of law and to mixed questions of law and fact, *Williams (Terry) v. Taylor*, 529 U.S. 362, 407 09 (2000), while the second prong applies to decisions based on factual determinations, *Miller El v. Cockrell*, 537 U.S. 322, 340 (2003).

A state court decision is "contrary to" Supreme Court authority, that is, falls under the first clause of 2254(d)(1), only if "the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." *Williams (Terry)*, 529 U.S. at 412 13. A state court decision is an "unreasonable application of" Supreme Court authority, falls under the second clause of 2254(d)(1), if it correctly identifies the governing legal principle from the Supreme Court's decisions but "unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413. The federal court on habeas review may not issue the writ "simply because that court concludes in its independent judgment that the relevant state court decision applied clearly established federal law erroneously or incorrectly." *Id.* at 411. Rather, the application must be "objectively unreasonable" to support granting the writ. *See id.* at 409.

"Factual determinations by state courts are presumed correct absent clear and convincing evidence to the contrary." *Miller El*, 537 U.S. at 340. This presumption is not altered by the fact that the finding was made by a state court of appeals, rather than by a state trial court. *Sumner v. Mata*, 449 U.S. 539, 546 47 (1981); *Bragg v. Galaza*, 242 F.3d 1082, 1087 (9th Cir.), *amended*, 253 F.3d 1150 (9th Cir. 2001). A petitioner must present clear and convincing evidence to overcome Section 2254(e)(1)'s presumption of correctness; conclusory assertions will not do. *Ibid.*

Under 28 U.S.C. ' 2254(d)(2), a state court decision "based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence

presented in the state court proceeding." *Miller El*, 537 U.S. at 340; *see also Torres v. Prunty*, 223 F.3d 1103, 1107 (9th Cir. 2000).

When there is no reasoned opinion from the highest state court to consider the petitioner's claims, the court looks to the last reasoned opinion, which in this case is that of the California Court of Appeal. *See Ylst v. Nunnemaker*, 501 U.S. 797, 801 06 (1991).

B. ISSUES PRESENTED

As grounds for federal habeas relief, petitioner claims that the trial court: (1) violated his rights under the Confrontation Clause of the Sixth Amendment by refusing to unseal evidence petitioner wanted to use to cross-examine a prosecution witness referred to as "John Doe;" (2) violated his due process rights when it refused to hold a hearing on whether to reveal juror identities to petitioner for use in a juror misconduct investigation; and (3) violated his right to due process when it admitted expert testimony on Norteño gang activity (Pet. 8).

1. Confrontation Clause

Petitioner claims that the trial court violated his Confrontation Clause right by refusing to unseal evidence that petitioner wanted to use to cross-examine "John Doe," a prosecution witness. The evidence petitioner wanted, which the trial court reviewed in camera, were: (1) the identity of a person identified in the record as "Witness Two;" (2) John Doe's juvenile court records; (3) police reports from Doe's vehicle theft conviction, and (4) an affidavit supporting a search warrant for petitioner's residence (Pet. 8). Petitioner argues that if he obtained this evidence, he could have used it to cross-examine Doe more effectively and the jury would not have found him guilty (*id.* at 8c). The state appellate court denied petitioner's claim because the in-camera materials had little to no probative value, Doe was substantially impeached with other evidence of his lengthy history of criminal activity and dishonesty in dealing with law enforcement, and the police report and warrant affidavit were neither discoverable nor of use to petitioner (Exh. C5 at 13-16).

The Confrontation Clause of the Sixth Amendment provides that in criminal cases the accused has the right to "be confronted with witnesses against him." U.S. Const. amend. VI. It does not prevent a trial judge from imposing reasonable limits on cross-examination based on concerns of

harassment, prejudice, confusion of issues, witness safety or interrogation that is repetitive or only marginally relevant. *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986). The Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish. *See Delaware v. Fensterer*, 474 U.S. 15, 20 (1985) (per curiam). A defendant meets his burden of showing a Confrontation Clause violation by showing that "[a] reasonable jury might have received a significantly different impression of [a witness'] credibility . . . had counsel been permitted to pursue his proposed line of cross-examination." *Van Arsdall*, 475 U.S. at 680.

To determine whether a criminal defendant's Sixth Amendment right of confrontation has been violated by the exclusion of evidence on cross-examination, a court must inquire whether: "(1) the evidence was relevant; (2) there were other legitimate interests outweighing the defendant's interests in presenting the evidence; and (3) the exclusion of evidence left the jury with sufficient information to assess the credibility of the witness." *United States v. Beardslee*, 197 F.3d 378, 383 (9th Cir. 1999).

First, petitioner claims that the trial court violated his rights under the Confrontation Clause by refusing to unseal the identity of a possible witness identified by the prosecution prior to trial as "Witness Two" (Pet. 8). Petitioner argued to the trial court that he wanted to find Witness Two because Witness Two could offer testimony undermining the credibility of prosecution witness John Doe (Exh. C5 at 11). The trial court held an in-camera hearing and found that Witness Two had the same information about John Doe as another witness that was disclosed to the defense, Edgar Vargas (*ibid.*). After finding that Witness Two's testimony would be cumulative to Vargas's, and weighing that against the risk to Witness Two of disclosing his identity to the defense, the trial court denied Petitioner's request to unseal Witness Two's identity (*id*. at 12). At trial, Vargas testified for the defense that John Doe had admitted to him that he had shot a person in a schoolyard for gang reasons, and Witness Two was not called as a witness by either side. The state appellate court agreed with the trial court, finding that any anticipated testimony of Witness Two was cumulative of Vargas's testimony and would not have provided any additional evidence that might have

exonerated petitioner (Exh. C5 at 13).

It is true that while Witness Two's testimony would have been cumulative to Vargas's, the prosecutor brought out evidence on cross-examination that undermined Vargas's credibility (Reporter's Transcript at 3616-37). Vargas explained that he was offering this testimony in order to improve his position with the police and District Attorney with respect to a weapons possession charge (*id*. at 3610-11), testified that he did not know Doe very well (*id*. at 3617), and testified to his lengthy criminal history (*id.* at 3630-31). Nevertheless, even assuming that Witness Two's credibility could not have been similarly undermined, his absence did not substantially deprive petitioner of the opportunity to impeach Doe. Doe had been impeached by a variety of other evidence in addition to Vargas's testimony, including "his lengthy criminal history, [and] his frequent dishonesty in his dealings with law enforcement" (Exh. C5 at 13). Given the cumulative nature of Witness Two's testimony, the substantial other evidence upon which the jury could assess Doe's credibility, and the trial court's finding that there was a risk of harm to Witness Two if his identity were disclosed given the gang-related charges, the trial court did not violate petitioner's rights under the Confrontation Clause when it refused to unseal the identity of Witness Two.

Next, petitioner argues that the trial court violated his rights under the Confrontation Clause when it refused to unseal John Doe's juvenile court records in order to find materials which might aid in impeaching Doe (Pet. 8). At the in-camera hearing, the trial court found that nothing in the juvenile record could have been admitted and used for the purpose of impeaching Doe (Exh. C5 at 13). The state appellate court agreed and further explained that Doe had been substantially impeached with his "his lengthy criminal history, his frequent dishonesty in his dealings with law enforcement, and his alleged involvement in a schoolyard shooting" (*id.* at 13-14). There is nothing in the record to indicate that Doe's juvenile record contained any admissible impeachment evidence. Further, because Doe was impeached with his lengthy criminal history and dishonesty with law enforcement, it was reasonable for the trial court to find that further cross-examination based upon Doe's juvenile record would have added little. As the exclusion of Doe's juvenile record did not leave the jury with insufficient information to assess the credibility of John Doe, the trial court did

not violate petitioner's rights under the Confrontation Clause.

Next, petitioner claims that the trial court violated his rights under the Confrontation Clause when it refused to unseal a police report regarding Doe's prior conviction for car theft (Pet. 8). The state appellate court affirmed the trial court's ruling because Doe had been properly impeached with the vehicle theft conviction and the report itself contained no additional information for impeachment (Exh. C5 at 14-15). Because evidence other than the name or type of crime and the date and place of convictions would have been inadmissible under California law (*id.* at 14), petitioner could not have used any such evidence in the report to cross-examine Doe. Furthermore, because Doe was properly impeached with the vehicle theft conviction itself, *ibid.*, the jury was not deprived of sufficient evidence with which to assess Doe's credibility. For this reason, the trial court did not violate petitioner's rights under the Confrontation Clause when it refused to unseal the police report of Doe's vehicle theft.

Lastly, petitioner claims that the trial court violated his rights under the Confrontation Clause when it refused to unseal the affidavit for a warrant to search petitioner's house (Pet. 8b). According to petitioner, the affidavit would show that John Doe made an untruthful assertion that weapons would be found within petitioner's residence (*id.* at 8b). Doe's statement that guns were in the house was not evidence relied upon by the jury when it convicted petitioner. Thus, even if the affidavit could show that petitioner's statement were not true, it had minimal value because, as the California Court of Appeal explained, it "did not contain material that had any impact upon defendant's guilt or innocence with respect to the charged crimes" (Exh. C5 at 16). Moreover, as discussed above, the jury had ample other evidence with which to assess Doe's credibility insofar as he was impeached with his lengthy criminal history and dishonesty with law enforcement. Consequently, the trial court did not violate petitioner's rights under the Confrontation Clause when it refused to unseal the search warrant affidavit.

For the reasons discussed, the trial court's failure to disclose to petitioner sealed information regarding John Doe did not violate the Confrontation Clause. Consequently, petitioner is not entitled to federal habeas relief on this claim.

2. Juror Identities

Petitioner alleges that the trial court violated his due process rights when it refused to hold a hearing on disclosing the identities of jurors (Pet. 8). Petitioner claims that jurors considered extrajudicial information during trial when they discussed whether a large man in attendance in the courtroom was there to intimidate witnesses (*id.* at 8c-8d). According to petitioner, he needed juror contact information in order to investigate any possible juror misconduct, and the trial court's refusal to hold a hearing on this issue "deprived him of a state conferred benefit, and thus Federal Due Process" (*id.* at 8d).

Under Sections 206 & 207 of the California Code of Civil Procedure, "any person may make a motion to obtain access to the sealed records, accompanied by a showing of good cause" (Exh. C5 at 17). The trial court denied the motion because neither the judge nor bailiff had seen the man, and the judge found that there had been nothing more than "idle chit-chat between a couple of jurors about" a large man observing court proceedings (*ibid*.). The state appellate court denied petitioner's claim finding that he had failed to make a showing of good cause (*id.* at 18-20).

Violations of state law generally do not implicate federal due process concerns. It is only when a state statute creates a protected "liberty interest" that the violation of state law raises federal constitutional concerns on federal habeas corpus. *See Bonin v. Calderon*, 59 F.3d 815, 841 (9th Cir. 1995). A state law creates a "liberty interest" protected by the Due Process Clause if the law: (1) contains "substantive predicates" governing official decision making; (2) contains "explicitly mandatory language" specifying the outcome that must be reached if the substantive predicates are met; and (3) protects "some substantive end." *See id.* at 842. The state law must provide more than merely procedure. *Ibid.*; *Dix v. County of Shasta*, 963 F.2d 1296, 1299 (9th Cir. 1992).

No protected liberty interest exists with respect to obtaining juror identification information. To begin, neither statute provides substantive predicates. Instead, Section 237 requires a prima facie showing of good cause but does not define good cause or explain how good cause is shown other than to state that it is not established "where allegations of jury misconduct are speculative, vague, or conclusory." Cal. Code Civ. Proc. §237. Furthermore, the state law does not contain explicitly

mandatory language specifying the outcome that must be reached if the substantive predicates are met. Instead, the state rules provide a process in which a party "may" petition for an order unsealing the records and providing the jurors' contact information for the purpose of preparing a motion for new trial, and the trial judge has discretion to grant or deny the motion (*ibid.*). Moreover, even if petitioner would have had a liberty interest in obtaining juror contact information, it was not arbitrarily taken away from him by the state in this case. Instead, petitioner was unable to show good cause in order to obtain a hearing on the matter (Exh. C5 at 19-20). For these reasons, the trial court did not violate petitioner's right to due process when it denied his request to hold a hearing on disclosure of juror identities.

3. Due Process and Expert Gang Testimony

Petitioner claims that the "trial court erred in admitting irrelevant and highly prejudicial testimony by the State's gang expert" (Pet. 8). The state appellate court rejected petitioner's claim and explained that the testimony was "unquestionably relevant, at a minimum, to issues related to the gang enhancement" (Exh. C5 at 22).

The United States Supreme Court has left open the question whether the Constitution is violated by the admission of expert testimony concerning an ultimate issue to be resolved by the trier of fact. *See Moses v. Payne*, 555 F.3d 742, 761 (9th Cir. 2009). Thus, while, under Ninth Circuit precedent, it is "well established . . . that expert testimony concerning an ultimate issue is not per se improper," *ibid.*, for purposes of habeas corpus review it suffices to determine that no Supreme Court case has squarely addressed the issue and, therefore, a state appellate court's decision affirming the admission of such testimony is not contrary to or an unreasonable application of clearly established Supreme Court precedent under section 2254(d)(1). *See id*. at 761-62. Because the admission of such testimony is not contrary to or an unreasonable application of clearly established Supreme Court precedent, it cannot be grounds for habeas relief here.

Moreover, even if federal habeas relief were available on the grounds that the admission of overly prejudicial evidence violates due process, the expert gang testimony presents no such grounds. Juries are presumed to follow a court's limiting instructions with respect to the purposes

for which evidence is admitted. *Aguilar v. Alexander*, 125 F.3d 815, 820 (9th Cir. 1997). The trial court gave the jury a limiting instruction that the expert gang evidence being introduced was for the "purpose of showing criminal street gang activities and of criminal acts by gang members other that [sic] the crimes for which the defendant is on trial" and "if believed, may not be considered . . . to prove that the defendant is a person of bad character or that he has a disposition to commit crimes (Exh. C5 at 21 n. 20). To the extent that any of the expert's testimony was not directly on point with relating general gang information to the jury, the jury is presumed to have followed the trial court's limiting instructions. Therefore, petitioner was not unduly prejudiced and the trial court did not violate his right to due process when it admitted the expert gang testimony.

CONCLUSION

The state court's adjudication of these claims did not result in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, nor did it result in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Accordingly, the petition is **DENIED**.

A certificate of appealability will not issue. Reasonable jurists would not "find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Petitioner may seek a certificate of appealability from the Court of Appeals.

The Clerk shall enter judgment in favor of respondent, and close the file.

IT IS SO ORDERED.

Dated: August 9, 2010.

WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE