**COMMONWEALTH OF MASSACHUSETTS**

**APPEALS COURT**

**Hampden, ss. No. 2019-P-1121**

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**COMMONWEALTH OF MASSACHUSETTS,**
**Appellee,**

**v.**

**ADRIAN HINDS,**
**Appellant.**

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**On Appeal from Judgments of the Hampden Superior Court**

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# BRIEF AND ADDENDUM FOR THE APPELLANT

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**For the Appellant/Defendant,**
**Adrian Hinds**

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**Date: December, 2019**

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II. **Did the lower court's refusal to make the requisite inquiry of prospective jurors deprive Hinds of his right to exercise peremptory challenges?**

III. **Did the lower court err in refusing to allow two expert witnesses' testimony about the symbolic significance of the complainant's tattoo and its association to racist ideology, thus violating Hinds's constitutional right to present his defense?**

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V. **Was Hinds prejudiced by lower court's evidentiary ruling erroneously excluding testimony that would have supported his only defense?**

## STATEMENT OF THE CASE

### Prior Proceedings

On April 27, 2016, Mr. Hinds was indicted as follows: counts one and two – assault to murder Nathaniel Cherniak and Miranda Arthur-Smith, while armed; counts three and four – assault and battery with a dangerous weapon resulting in serious bodily injury against Cherniak and Arthur-Smith; count 5 – assault and battery with a dangerous weapon against Arthur-Smith; count 6 – cruelty to an animal. RA/53-58.[1]

Hinds's jury trial (Ricciardone, J., presiding) ran from September 10, 2018 to October 3, 2018. RA/38-42. At the close of the government's evidence, the court dismissed so much of count five (assault and battery) that alleged it was done with a dangerous weapon for insufficient evidence [Tr5/99]; the jury found Hinds not guilty of all remaining charges except counts three and four: assault and battery with a dangerous weapon resulting in serious injury. RA/41. He was sentenced to not less

[1] References to the record on appeal are as follows:
- to the Record Appendix bound separately, by RA/[page #];
- to pretrial proceedings as "Tr[date]/[page #'s]";
- to the trial as "Tr[volume #]/[page #'s]."

than ten and not more than twelve years in prison with five years probation on and after. RA/42.

Hinds was represented by Dana Goldblatt, the government by A.D.A. Janine Simonian. Tr2/1. Hinds was appointed Attorney Elaine Fronhofer to represent him for this appeal. RA/15.

Hinds's trial counsel moved to stay Hinds's sentence based upon the trial court's refusal to allow him to exercise his final peremptory challenge. Tr2/204-205;RA/43. That motion was denied and an appeal of that denial is currently before this Court (docket number 2019-P-0741). RA/44,192-193.

## Statement of Facts

Pre-trial, the court granted the government's motions to preclude two defense witnesses who were to testify about the possible racist implications of Cherniak's tattoo. RA/196-209, 215-218.

The court also granted the government's motion to preclude the defense's remaining expert witness who was to testify about why a person might delay disengaging from life-threatening combat situation. RA/210-214.

Hinds's account

**Adrian Hinds**, an African-American man [Tr1/5] approximately age 26 when the altercation occurred, testified that he and his mother lived in the Southwood Acres apartment complex in Westfield for about three years. Tr5/101-102.

Prior to the underlying incident, he and his mother had been subjected to menacing incidents at those apartments. Tr5/102-111. Both their cars' tires were slashed on numerous occasions. Tr5/111-112. When the issue was reported to police, their complaints were not taken seriously. Tr5/112. Bananas were left around his car and he would sometimes hear menacing racial slurs ("nigger" and "lynch that nigger") yelled at him by unknown persons as he went to his car. Tr5/102,109,111.

Nathaniel Cherniak was Hinds's neighbor. Tr5/112-113. Hinds socialized with Cherniak for up to a year and felt they were friends. Tr5/113-115. Their friendship ended, however, when Cherniak repeatedly asked Hinds to sell drugs for him. Tr5/115-120. Cherniak insisted Hinds must be a drug-dealer, telling him: "You're black, you drive a Porsche, and you're only

twenty-something." Tr5/117. This, from Hinds's perspective, ended their relationship. Tr5/115.

While they were still speaking, Cherniak told Hinds that he was in a "biker club" or "gang" in New York City. Tr5/121.

On the morning of the incident, Hinds was showering and heard the loud bang of the outside door to the apartments. Tr5/122-123. He decided to check his car, which he had taken to parking directly in front of his bedroom window given how frequently it was vandalized. Tr5/121-124. Looking out, he saw Cherniak bend down and slash his rear tire with a long knife. Tr5/124. Miranda Arthur-Smith was standing next to him. Tr5/125.

Hinds quickly dressed and went up the interior stairs that are outside his apartment leading to the outside door. Tr5/126. Knowing Cherniak was armed with a long knife, Hinds grabbed a hammer in his living room, in case things escalated. Tr5/126. Before he made it to the top of the stairs, he saw Cherniak and Arthur-Smith enter the building. Tr5/127-128,134. Hinds verbally confronted them. Tr5/128. Arthur-Smith responded by suggesting Hinds had not seen what he saw. Tr5/130. After they

cursed at each other some more, Cherniak said something like: "What are you going to do about it?" Tr5/131.

During this exchange, Cherniak and Arthur-Smith were to Hinds's left and right, respectively. Tr5/134. Nothing was blocking them from going upstairs to their apartment. Tr5/135. Hinds proceeded to walk up the stairs, with both his hands down at his side and the hammer in his right hand. Tr5/135-136. As he did so, Arthur-Smith edged closer to the wall and Cherniak started coming down the stairs towards him. Tr5/136. Arthur-Smith then sprayed him with a Mace-like substance that made his eyes burn and breathing difficult. Tr5/136,138.

Hinds strained to keep his eyes open because he saw that Cherniak had started to reach for the knife. Tr5/136-137. He then felt what he thought was the knife touch his arm. Tr5/137. At that point, because of the burning sensation, it was difficult for him to keep his eyes open. Tr5/137.

With eyes burning and struggling to breathe, Hinds raised the hammer and also grabbed Cherniak's wrist, pulling Cherniak towards him, to try to separate him from Arthur-Smith. Tr5/138. This caused Cherniak to now be behind Hinds,

blocking Hinds's re-entrance to his own apartment while Arthur-Smith was in front of him blocking the door to the outside. Tr5/139. To avoid the pepper-spray Arthur-Smith was still spraying him with, Hinds tried to get outdoors, swinging his hammer as he went. Tr5/139-140.

From what Hinds could perceive, Arthur-Smith was walking backwards outside, continuing to spray him as they exited into the parking lot, and he saw or heard Arthur-Smith fall backwards. Tr5/140-141.

Hinds then saw Cherniak come outside and stand at the top of the outside steps, still blocking Hinds's access to his apartment. Tr5/143. Hinds's face, arms and shoulder were burning. Tr5/143. Cherniak raised his knife and started to walk forward, Hinds raised the hammer and Cherniak started slashing at him with the knife. Tr5/143-144. Hinds stepped back and also swung the hammer towards Cherniak. Tr5/144-145.

Hinds struck Cherniak two or three times, and Cherniak advanced towards Hinds. Tr5/144. The two grappled some more and, as they did so, Hinds's back was eventually to the building. Tr5/145. With Cherniak no longer blocking Hinds's

access to his apartment, Hinds escaped back into his apartment. Tr5/145-146.

Once inside, he wiped his eyes, which allowed him to see the orange substance sprayed on him and that he was bleeding a small amount. Tr5/146. He did not consider calling the police because the police were frightening figures to him. Tr5/146-147. (Hinds described having been pulled over some 18 to 20 times by police, interactions that were extremely frightening and stressful. Tr6/24-25.)

He felt he needed to get to his mother to protect her from coming home to the dangerous situation he was confronting. Tr5/147. He did not try calling her because he had been unsuccessful in his attempt to reach her earlier that morning. Tr5/147.

He put his car keys, wallet, and cellphone in his pockets. Tr5/148. He also picked up his laptop computer, which he pressed against his side with his right arm, picked up the hammer in his right hand, and headed back outside. Tr5/148-149.

Hinds exited the building but Cherniak was blocking his path to his car. Tr5/149. As Hinds walked towards his car,

Cherniak started to spray him with a Mace-like substance that again started to burn him. Tr5/150. In turning to protect himself from the spray, Hinds dropped the laptop and hammer. Tr5/150. With Cherniak still spraying him, Hinds felt on the ground for the hammer. Tr5/151. To stop Cherniak from spraying him, Hinds rose and swung the hammer towards Cherniak. Tr5/151. While Hinds advanced, Cherniak continued to spray him but when Cherniak finally stopped spraying him Hinds stopped swinging the hammer. Tr5/151-152.

Hinds then collected his belongings he had dropped, got in his car and left. Tr5/152.

Because his tire was slashed, however, Hinds eventually had to pull over. Tr6/25. He again tried to call his mother but was still unable to reach her. Tr6/27. He walked the four to five hours it took to get to his aunt's house where he thought his mother would be. Tr6/27.

The Complainants' Accounts

**Miranda Arthur-Smith** testified that around 10 am, on March 23, 2016, she left her apartment to go to class. Tr3/52. As she went down the outside steps, she heard someone running on

steps and bang on the door, opening it. Tr3/52. She was thrust to the ground, hitting her face on the concrete and recalls feeling hit on the back of her head. Tr3/49-50. Hinds, her downstairs neighbor, was the assailant. Tr3/38,52. While on the ground, Hinds continued to strike her with the hammer. Tr3/52. She was struck four or five times, on her head and shoulder. Tr3/52.

While this was happening, she was screaming for her roommate, Cherniak. Tr3/55. Hinds said: "That's for messing with my mother." Tr3/56.

Cherniak came out in his boxer shorts holding a decorative knife, pointed down, and said to Hinds: "What are you doing?" Tr3/58.

One of her dogs, a pitbull, came through the door. Tr3/64. Hinds grabbed the dog's nose, struck it with the hammer, and the dog ran away. Tr3/64-66. Hinds then went back into the building, Arthur-Smith got up and ran after her dog, and Cherniak went inside to get dressed. Tr3/66.

After finding the pitbull, Arthur-Smith came back to the apartment and saw Cherniak and Hinds standing by Hinds's car. Tr3/67. Hinds's hand was going up and down, Cherniak's hands

were behind his head "in a defensive position." Tr3/67. She saw both a hammer and a laptop in Hinds's hand. Tr3/67. She saw the laptop fall and Hinds strike Cherniak once in the head with the hammer. Tr3/67. Eventually, she saw Hinds pick up his laptop and speed away in his car. Tr3/69.

She denied seeing any tire damage on his car. Tr3/70.

She also denied using pepper-spray against Hinds. Tr3/105.

Arthur-Smith described five lacerations she received on her head from the altercation that required either a staple or stitches and identified photos of same. Tr3/74;RA/130-134.

**Nathaniel Cherniak** testified he was 31 years old and moved to Westfield from New York City. Tr3/108-109. He said he is of Polish and Asian descent but was adopted and raised by "Jewish attorneys." Tr3/110.

He moved in with his friend Arthur-Smith and then Hinds moved into the basement apartment. Tr3/111. He and Hinds were friendly, would work out together, and talked about starting a health center together. Tr3/112-113. They occasionally

smoked cigarettes together and twice smoked marijuana together, which Cherniak provided. Tr3/115.

Cherniak said he never sold Hinds drugs, nor told Hinds he was a drug-dealer, nor tried to recruit Hinds to deal drugs. Tr3/116.

Cherniak alleged that, "over the course of their relationship," Hinds accused him of being with the Russian mafia, Mexican cartel, Alchohol Tobacco and Firearms, and an undercover Drug Enforcement Agent. Tr3/122-123.

The last time they spoke was in mid-September 2015. Tr3/123-124. Due to Hinds's behavior, Cherniak bought a couple of cans of pepper-spray. Tr3/124.

On the Sunday before the March 23, 2016, incident, Cherniak alleged that, as he came home, Hinds came up behind him, told Cherniak he was going to be sent to a concentration camp and had a hammer in his hand. Tr3/126. Cherniak said he closed the door to his apartment and, the next day, reported the incident to the "building complex." Tr3/126.

On the morning of the incident, he was in the apartment, wearing boxer shorts and a t-shirt, and heard Arthur-Smith

yelling his name. Tr3/128. He grabbed the knife that was by the front door and exited. Tr3/128. The knife was pointing down. Tr3/128. He saw Arthur-Smith lying down, covered in blood, her hands up, and Hinds standing over her with a hammer. Tr3/129,135.

Cherniak stated that Hinds said: "This is for messing with my mother." Tr3/133. Arthur-Smith's dog then came out, Hinds hit it with the hammer, and the dog ran away. Tr3/133. Arthur-Smith then "popped up" and ran after the dog. Tr3/134.

Cherniak then went back inside, got dressed, put the knife down, grabbed pepper spray, then came back outside. Tr3/134,136. He saw Hinds come out from his apartment carrying a laptop and a hammer. Tr3/138. As Hinds stepped forward, Cherniak started spraying him with pepper-spray. Tr3/138. Hinds "charged" through the spray and started swinging at Cherniak with the hammer, hitting him on his head and hands. Tr3/139-140. Hinds then picked up his laptop, ran to his car and drove away. Tr3/142.

He and Arthur-Smith then spoke with an officer while still at the apartment complex. Tr3/143. They then went to the

hospital for about two to three hours and then traveled to the police station where Cherniak gave a statement to Officer Freeman. Tr3/166-167.

Cherniak testified he received fourteen staples on the back of his head for his lacerations and that he had swelling on his hand. Tr3/144. He identified a photo of the staples. Tr/145-147;RA/135.

Cherniak denied slashing Hinds's tire, or putting anything on his car, or ever telling Hinds he was in a biker gang. Tr3/155.

Cherniak said he told both Officer Freeman and the detective who investigated the case, Det. Tsatsos, about his use of the knife. Tr3/170-172. Neither examined it, collected it, or even photographed it. Tr3/170-172;T24/90.

(Hinds testified that the knife Arthur-Smith identified in court as the one Cherniak used was not, in fact, the one used. Tr3/62-63;Tr5/124. Hinds testified that the one Arthur-Smith brought to show in court was much smaller than the approximately sixteen-inch bladed knife Cherniak used against him. Tr3/62-63;Tr5/124.)

When Cherniak was shown reports of text messages and calls from cell phones found in Hinds's car, Cherniak identified text conversations he had with Hinds and identified his own phone number. Tr4/46-47;Tr5/81-87.

Asked about lyrics that Hinds would send him, Cherniak acknowledged that he expressed admiration for Hinds's music writing. Tr5/88. One example of a text he received from Hinds read:

> Try to recruit me when the cops could legally arrest and legally shoot me. Karma responded to set the truth free. Domestic war, wrong side of black. ….

Tr5/88,89-90; RA/176.

**Detective Todd Edwards** authenticated another report made from a phone taken from Hinds's car [Tr4/46-47] that included the following text, sent to an unknown person in June of 2015 (this was shortly after Cherniak moved in and at a time when Hinds and Cherniak were on friendly terms) [Tr3/47,109,124]:

> Death to those in 65 miranda and nate will work under false names they will die along with those who abuse their power and feed off suffering

Tr5/92;RA/191. Over defense counsel's objection, this evidence was admitted as relevant to Hinds's "state of mind" at the time of the incident, nine months later. Tr5/91.

Third-party accounts

Of the three eyewitnesses the government called, the one who had observed the most of the altercation was **Christina Berard**, another resident of Southwood Acres. Tr3/227.

On the morning of March 23rd, Berard looked out her window and saw two men, one black, one white, fist-fighting in the parking lot directly across from her apartment window. Tr3/228-229,237-238. Berard did not indicate hearing anyone scream but said the sound of scuffling, loud talking and grunting caught her attention. Tr3/234.

At one point, the black man had the white man in a headlock and was punching him. Tr3/230. Berard also saw a girl run after a dog. Tr3/230.

At some point, the black man went inside. Tr3/231. When the black man came outside again, he had a hammer and the white man sprayed him with something. Tr3/235. The black man then hit the white man in the head with the hammer.

Tr3/232. The white man was "fighting back" but then the black man got in his car drove quickly away. Tr3/233.

At no point did the white man go inside or change his clothes. Tr3/231,234-235.

**Tammy Poulos**, another resident of Southwood Acres testified that around 10 am on the morning of March 23rd she was ill, had been up all night, had taken painkillers a few hours earlier and, around 9:30 am had taken a Xanax and gone to lie down. Tr3/197-201.

She was disturbed by a woman yelling for their dog to "get back" and the dog barking. Tr3/202-203. She then heard a commotion, looked out her window and saw a black man and a white man fighting. Tr3/203-204. They were close together "wrestling/fighting with each other" up against a car. Tr3/204.

Poulos did not see anything in either man's hand but saw things on the ground. Tr3/205. She saw the black man striking the white man more than once. Tr3/205.

**Dennis Matlock** testified he was employed at Southwood Acres. Tr3/176. He knew Hinds and Cherniak. Tr3/177-178. Around 10 am on March 23, 2016, Matlock went to his car to

get something, when he exited it, he saw Arthur-Smith sitting down and Hinds swinging a hammer, hitting Arthur-Smith in the head. Tr3/182-185. Cherniak came out and Matlock left to tell his foreman to call the police. Tr3/185-188.

Matlock never heard anyone yelling. Tr3/189-190. At some undetermined later time, he came back and saw Arthur-Smith "busted up." Tr3/188.

Jury Selection

Defense counsel challenged seven jurors for cause based upon their responses to attorney-conducted voir dire but, after agreeing to re-question only three of them, the court agreed to exclude two of the challenged jurors. Tr2/171-173178-180,183-185.

The court also refused to allow Hinds to exercise his final peremptory challenge, asserting it was untimely. Tr2/204-205.

Additional facts are set forth in the argument section.

## SUMMARY OF ARGUMENTS

The trial judge improperly refused to allow Hinds to exercise his final available peremptory charge. The request was timely as it was made prior to the jury being sworn and the

judge's statements had left open the possibility there would be a second opportunity to exercise final peremptories. Hinds was prejudiced because the challenged juror participated in deliberations. [Pages 26-30]

After attorney-conducted voir dire, defense counsel challenged seven jurors who indicated they might be unable to adhere to the instruction on presumption of innocence. The judge agreed to only re-question three of them, two of whom he excused. Given the responses of the four challenged jurors who were not re-questioned, the court failed in its duty to conduct a meaningful follow-up inquiry. Hinds was then forced to expend peremptory challenges on jurors whom, the record establishes, might have been excluded for cause. [Pages 30-34]

The lower court improperly conflated the *Daubert-Lanigan* issue of reliability of methodology with reliability of results when it excluded testimony of two critical defense experts. It also improperly based its preclusion decision on expected testimony that defense counsel made clear neither expert would provide. [Pages 34-54]

The lower court precluded Hinds's remaining expert from testifying based upon late notice but failed to undertake the requisite balancing of all factors appropriate to consider when imposing that drastic remedy and abused its discretion with respect to factors it did consider. [Pages 54-66]

The lower court improperly refused to allow into evidence statements made by the complainants that were introduced to show their effect on Hinds and were necessary to establish his defense. [Pages 66-70]

## I. The lower court improperly refused to allow Hinds to exercise his final peremptory challenge.

At the start of Hinds's trial, the judge explained the following regarding jury empanelment:

> … we'll seat the twenty-four or so people …. You'll both have … six preemptory challenges. … After we go through … the group questioning, the individual questioning, and the attorney-conducted voir dire -- then I'll ask you if there are any cause requests[,] then I'll ask you to use your p[er]emptory challenges. … If we have to go to a second panel, however, I'll discuss with you the size of that second panel, depending on our needs …. And then we'll adjust accordingly, *depending on the number of p[er]emptories left and things like that*.

Tr1/8-9 (emphasis added).

On the first day of jury empanelment, the court conducted group and individual voir dire. Tr1/18-337. On the second day, the court again conducted group and individual voir dire [Tr2/1-155], then, after holding attorney-conducted voir dire, the court directed the government to exercise challenges for cause and peremptories. Tr2/155-167,168.

Both jurors selected for peremptory removal by the government had been specifically found to be indifferent the day before but, in accordance with the judge's directions, the

government did not exercise their peremptory removal of those jurors until the second day. Tr1/9,130,229.

When it was the defense's turn, counsel challenged seven prospective jurors for cause. Tr2/171-172. The court accepted the challenge for two and rejected the remaining five challenges. Tr2/179,185,189.

The defense then exercised five of its six peremptories. Tr2/189. The Commonwealth then, unsuccessfully, raised a *Soares* challenge (377 Mass. 461 [1979]). Tr2/190-199. That discussion concluded at 3:16 pm. Tr2/199.

The clerk then asked the jurors who had been challenged and removed to step down. Tr2/200. The clerk then began to announce the juror numbers that would make up the jury but was interrupted by defense counsel asking to address the court. Tr2/200-201. The judge directed the clerk to continue. Tr2/203.

When given a chance to speak, at 3:25 pm, defense counsel explained she thought the court was going to do another round of panel selection and therefore had saved one peremptory. Tr2/203. She explained she wanted to exercise the

Defendant's final peremptory to remove juror number 59. Tr2/203. The court refused to allow it, noting the defense's objection. Tr2/204-205.

Those not selected to sit on the jury were then excused from the courtroom. Tr2/206. The selected jurors were then sworn. Tr2/209. Juror 59 was selected as a deliberating juror. Tr2/201;Tr6/168.

Regarding peremptory challenges, our rules require only they be made after (as opposed to before) a finding of indifference. Specifically, Rules of the Superior Court (2018) 6(4)(i) provides:

> After the trial judge finds that each juror stands indifferent, the parties shall exercise their peremptory challenges. The trial judge may require exercise of peremptory challenges after completion of side bar inquiry of an individual juror, after filling the jury box with jurors found to stand indifferent, or at some other time after the trial judge's finding of indifference.

Rule 20(c)(2) of our Rules of Criminal Procedure dictates that peremptory challenges be exercised before the jury is sworn.

Thus, Hinds's exercise of his final peremptory challenge, after the juror was found indifferent and before the jury was

sworn, was timely made.

While a trial judge has authority to issue orders regarding jury selection, in Hinds's case, other than to inform the parties of the order of the phases of juror selection (and specifically leaving open the possibility for modifications in the event a second panel was needed [Tr1/9]), the judge did *not* articulate any additional timing requirements.

Here, in accordance with the judge's directions, both the government and the defense exercised their peremptories after attorney-conducted panel voir dire was complete and both did (or attempted to do) so before the panel was sworn. As such, the lower court erred when it refused to allow the Defendant to exercise his final peremptory challenge. Mass.R.Crim.P. 20(c).

*Standard of review*

In this case, the error, having been made and preserved, requires reversal without further inquiry. "[A] defendant need not show prejudice when his exercise of a peremptory challenge is erroneously denied and the challenged juror is seated on the panel and participates in deciding the case." *Commonwealth v. Bockman*, 442 Mass. 757, 763 (2004). "The erroneous denial of

the right to exercise a proper peremptory challenge is reversible error without a showing of prejudice." *Commonwealth v. Wood*, 389 Mass. 552, 564 (1983) (citing *Commonwealth v. A Juvenile (No. 2)*, 384 Mass. 390, 392-394 [1981]; *Swain v. Alabama*, 380 U.S. 202, 219 [1965]).

## II. Lower court's refusal to make requisite inquiry of prospective jurors deprived Hinds of his right to exercise peremptory challenges.

"A criminal defendant is entitled to a trial by an impartial jury pursuant to the Sixth Amendment to the United States Constitution and art. 12 of the Massachusetts Declaration of Rights." *Commonwealth* v. *Williams*, 481 Mass. 443, 447 (2019).

General Laws chapter 234A, section 67A provides:

> Upon motion of either party, the court shall … examine on oath a person who is called as a juror …. In a criminal case such examination shall include questions designed to learn whether such juror understands that a defendant is presumed innocent until proven guilty ….

If it appears a juror might not stand indifferent, the judge *must* hold an individual voir dire. *Commonwealth* v. *Williams*, 481 Mass. at 447. While the scope of the inquiry and the

determination of the prospective juror's indifference is within the judge's discretion, that discretion "is not unfettered." *Id.*

> [T]he judge's conclusion must be supported by a voir dire that sufficiently uncovers whether the prospective juror can fairly evaluate the evidence *and follow the law*.

*Id.* (emphasis added).

This is necessary to ensure parties are able to fully exercise their lawfully provided peremptory challenges. Mass.R.Crim.P. 20(c). "The purpose of the properly exercised peremptory challenge is to aid the constitutional right to a fair and impartial jury." *Commonwealth* v. *Wood*, 389 Mass. at 560, citing *Swain* v. *Alabama,* 380 U.S. at 216–220.

*Standard of review*

Where it is shown that the judge's probing of prospective jurors was insufficient to insure a panel of impartial jurors, the defendant has met their burden of establishing abuse of discretion. *Commonwealth* v. *Auguste*, 414 Mass. 51, 56-57 (1992). "[T]he erroneous denial of the right to exercise a proper peremptory challenge is reversible error without a showing of prejudice." *Commonwealth* v. *Wood,* 389 Mass. at 564.

During attorney-conducted voir dire, after inquiring and thereby reminding the seated jurors of the court's prior instruction that they were to presume the Defendant innocent, Hinds's counsel asked: "Does anyone here currently presume he's innocent?" Tr2/162. Thirteen of the twenty-five seated jurors answered affirmatively. Tr2/163. Counsel asked the remaining jurors their reasons for not doing so. Tr2/163. In the limited time the judge allocated for attorney-conducted voir dire, counsel elicited that three jurors felt that way because of "the facts that counsels have agreed upon." Tr2/164. Counsel challenged and requested the court make further inquiry of seven jurors based upon their verbal and non-verbal responses that indicated their inability to adhere to the presumption of innocence instruction (a law which they had repeatedly been instructed on [Tr1/26,27,28;Tr2/13,15,159-167]). Tr2/171-173,183.

The court refused to inquire of four of the seven that were challenged asserting those four had not made clear enough statements of their inability to apply the law as instructed. Tr2/183-184. This, despite the fact that the reason the defense

had limited statements from all seven was because the court-allotted time for attorney-conducted questioning was insufficient to probe all seven individually. Tr2/167,180.

Further, as the defense noted, one of the jurors whom the court refused to re-question, who had indicated by a show of hands that she might have difficulty adhering to the presumption of innocence, was a former prosecutor. Tr2/171,181. (This prospective juror's live-in boyfriend was a police officer for the same police force as some of the officers working with the prosecution on Hinds's case and who would testify at trial, and she also personally knew the attorney prosecuting Hinds's case as they had worked in the same District Attorney's office at the same time. Tr2/260-261;Tr4/151.[2])

The lower court abused its discretion where it failed to conduct *any* further inquiry of four of the seven challenged jurors. *Commonwealth* v. *Auguste*, 414 Mass. at 57 (where a prospective juror's response to voir dire questioning suggests possible

[2] The court had denied defense's earlier request that she be dismissed for cause given her professional and personal affiliations. Tr1/276.

partiality, "the judge's duty is to conduct a *meaningful inquiry* into the juror's impartiality …." [emphasis added]).

As a result, Hinds was forced to expend peremptory challenges excluding jurors who, on meaningful examination, may have been excluded for cause and, therefore, he likely "suffered a prejudicial diminution of peremptory challenges warranting reversal and a new trial." *Commonwealth* v. *Susi,* 394 Mass. 784, 789 (1985).

Because Hinds exhausted his peremptory challenges, this case differs from those where, even though the judge erred, the defendant could still have peremptorily challenged a questionable juror. See e.g. *Commonwealth* v. *Amazeen,* 375 Mass. 73, 84 (1978).

## III. The lower court erred in refusing to allow Hinds's two expert witnesses to testify, violating his constitutional right to present his defense.

"Few rights are more fundamental than that of an accused to present witnesses in his own defense." *Chambers* v. *Mississippi*, 410 U.S. 284, 302 (1973). The lower court's evidentiary ruling precluding Hinds's only witnesses from testifying deprived him of

that fundamental right enshrined in our constitutions. *Id.*; U.S. Const. Amend. VI and IV; MA Decl. Rights Art. XII; *Commonwealth* v. *Dranka*, 46 Mass.App.Ct. 38, 43 (1998).

*Standard of Review*

The issue is whether the lower court's preclusion of defendant's witnesses' testimony was an abuse of discretion. *Canavan's Case*, 432 Mass. 304, 312 (2000). Here, where the error implicated a constitutional right, for his convictions to stand, the Commonwealth bears the burden of proving "the error is harmless beyond a reasonable doubt." *Commonwealth* v. *Dranka*, 46 Mass.App.Ct. at 43.

Cherniak and Arthur-Smith claimed that prior to Hinds's assault, he had been behaving oddly and was the initial aggressor who attacked them without provocation. Tr3/52,70,105, 122,126,155. Hinds's defense was that all his actions were in self-defense against persons who were acting aggressive toward him: slashing his tire and then attacking him with a knife and pepper-spray when he verbally confronted them, as well as when he was trying to leave to get to his mother. Tr/5105-111,124-150.

For the jury to find Hinds's defense was established, he needed to rebut the government witness's suggestion that he did *not* have "… a reasonable apprehension of great bodily harm or death [or] reasonable belief that no other means would suffice to prevent such harm." *Commonwealth* v. *Santos*, 454 Mass. 770, 772 (1990).

The only evidence Hinds was allowed to present to support his defense was his own testimony about how he and his mother had been subjected to menacing racially-tinged incidents ever since moving to the apartment complex, that Cherniak told him he (Cherniak) was in a biker gang in New York City, and that Cherniak had said things suggestive of racial bias (e.g., when trying to get Hinds to sell drugs for him, Cherniak indicated his assumption Hinds was already a drug-seller given he was black and drove a nice car). Tr5/105-111,115,117,121.

While this information was important to show the reasonableness of Hinds's perception of the danger he was confronting when attacked by Cherniak and Arthur-Smith, without corroboration, his testimony could also be easily dismissed as self-serving.

One piece of independent evidence Hinds had to counter the government's narrative related to the numeric symbol Cherniak had tattooed on his arm. Two expert witnesses were available who could testify that Cherniak's "211" tattoo was a symbol used by a group in New York City connected to white supremacist ideology. Tr[9.4.18]/28-33,40,42-43;Tr[9.5.18]/27-28. That fact was a significant piece of independent evidence Hinds should have been able to present to challenge the government's narrative and to corroborate Hinds's account of the danger Cherniak presented.

(At trial, Cherniak claimed his tattoo was actually an "M" either for his roommate [Miranda Arthur-Smith], whom he described as a close friend, or his dog. Tr3/108,148. Arthur-Smith testified she and Cherniak had once gone on a single date but were just friends. Tr3/37. Pretrial, the lower court acknowledged it appeared to be a 211, although said it could also be a 217. Tr[8.29.18]/32.)

Expert testimony about the possible meaning of tattoos and similar symbols has frequently been accepted as relevant probative evidence. For example, in *People* v. *Skinner*, 53 P.3d 720

(Co. 2002), where the accused was alleged to have murdered a black man, the prosecution was allowed to introduce expert testimony that the defendant's Norse god tattoo "could be viewed as a symbol of a person's belief in the supremacy of the white race." *Id.* at 722-724. That court noted that the defendant's concerns of prejudice were mitigated by the fact that the expert did not opine the defendant "was a white supremacist or was likely to attack a person of a different race" and had acknowledged it could also be a symbol of fertility. *Id.*

Similarly, in *People* v. *Lindberg*, 190 P.3d 664, 698 (2008), the prosecution's expert was allowed to testify about the meaning and significance of symbols and writings found in the defendant's room, such as the "SS" lightning bolts on a box, as it was relevant to establish whether he killed a Vietnamese victim because of his race.

And in *People* v. *Slavin*, 1 N.Y.3d 392, 395-397 (2004), in the prosecution of a man for attacking two Mexican men, an expert was allowed to testify about the customary meaning of a variety of tattoos the defendant had including a tattoo of a Celtic cross, two lightning bolts, a Viking ship with many shields along

its side, etc. *Id.* at 397. The court ruled the testimony was acceptable especially given the "trial court directed the expert not to testify that the defendant belonged to or shared the views of any particular group …." *Id.*

Hinds sought to call Dr. DeLaCruz, a gang expert, and Dr. Bjork-James, a cultural anthropologist to testify about the symbolic significance of Cherniak's "211" tattoo. Tr[9.4.18]/20;Tr[9.5.18]/10. The government moved to preclude their testimony under *Daubert* v. *Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993) and *Commonwealth* v. *Lanigan*, 419 Mass. 15 (1994). RA/101.

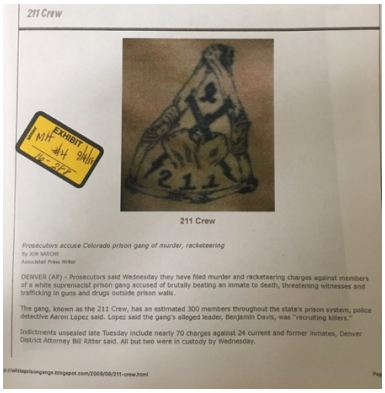
At the voir dire hearing on the government's motion, it was established that Dr. DeLaCruz has a doctorate of philosophy in educational leadership, with a focus on street gangs, prison gangs, and gangs in general. Tr[9.4.18]/17. He had testified about gangs in courtrooms some sixty-two times. Tr[9.4.18]/20. His personal background included being a former member of a street gang. Tr[9.4.18]/25.

DeLaCruz testified that when defense counsel sent him a photo of Cherniak's "211" tattoo he recalled having seen the

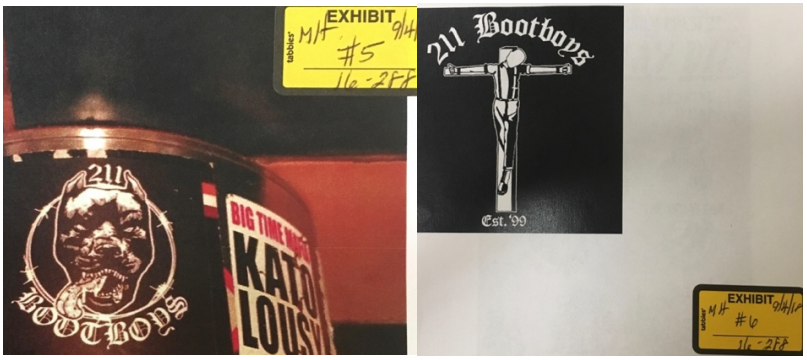
symbol while doing his dissertation. Tr[9.4.18]/28. After conducting further research on the issue (on approximately seventeen different sites such as The Southern Poverty Law Center), he recalled it was a symbol that first originated out of a Colorado prison gang in the mid-1990's. Tr[9.4.18]/28.

He further explained that the "211 Bootboys" are a street gang that is fairly new in the New York area, unconnected to the "211 Crew" prison gang yet they also identify themselves as 211 Crew. Tr[9.4.18]/28-33,40,42-43.

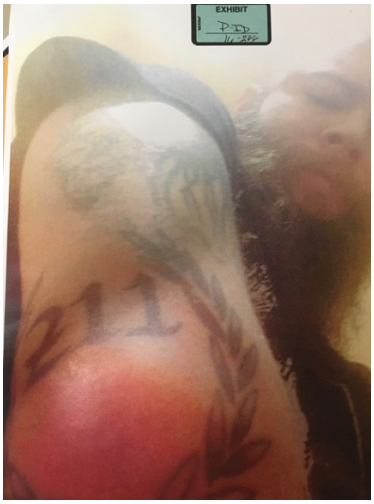
DeLaCruz described both 211 Crew and the 211 Bootboys as being "Neo-Nazi" and "Aryan." Tr[9.4.18]/38-40,43. He was asked about the various ways the "211" symbol appears. He identified variants of the 211 Crew prison gang member's tattoos, shown below. Tr[9.4.18]/32,87;RA/136,137.

Below are two variants of "211 Bootboys" symbols he identified on cross-examination, noting that the common theme was the number 211. Tr[9.4.18]/89;RA/138,139.




Below left is a known "211 Bootboy" member's tattoo, an individual DeLaCruz described as having been arrested for assaulting Columbia University students, alongside Mr. Cherniak's 211 tattoo (right). Tr[9.4.18]/28,138,155-157;RA/140,141.




DeLaCruz explained that the 211 Bootboys adopted the 211 number but not the shield used by 211 Crew (shown in exhibit 4 above). Tr[9.4.18]/30. He further explained that, depending on the individual, some 211 Bootboys will use a different type of shield, like the one on Cherniak's tattoo, while others will forego any shield at all. Tr[9.4.18]/30.

Asked what the image Cherniak tattooed on his arm tells him, De LaCruz replied: "that that particular individual … believes or has adopted … white supremacist ideology." Tr[9.4.18]/47.

Consistent with DeLaCruz's testimony, the images associated with 211 Crew and 211 Bootboys introduced at the hearing indicated there was no unique way in which the 211 symbol appeared. None were the same style, including variation in the way the number 211 was written or tattooed. The common thread was the number 211. There was no evidence presented countering this fact.

Despite this, the lower court ruled DeLaCruz' "methodology" of identifying Cherniak's tattoo as associated with these "211" groups was unreliable under *Daubert-Lanigan* because

the court was not shown "exemplars that clearly, in the estimation of the Court, looked like the same tattoo on the arm of the Complainant." RA/197. The lower court stated: "if it's merely the numbers '211' that make this a gang tattoo … I see no connection with any kind of … scientific methodology …." RA/202.

Here, the lower court recognized Dr. DeLaCruz was an expert on gangs who had testified as such in some sixty-two cases. RA/196. It also recognized that, through his study, DeLaCruz was familiar with the symbols used by such groups, including the symbol Cherniak had tattooed on his arm. RA/196-197. It then, however, conflated the issue of the reliability of the expert's methodology with the reliability of the expert's *conclusion*. See *Daubert*, 509 U.S. at 594–595 ("The focus [of inquiry], of course, must be solely on principles and methodology, not on the conclusions that they generate").

A judge does not have authority to exclude expert evidence because *they* find an expert's opinion unpersuasive. See *Commonwealth* v. *Joyner*, 467 Mass. 176, 185 (2014) ("The weight and credibility to be accorded the identification evidence

provided by [fingerprint expert's] testimony was for the jury to determine").

The lower court erroneously determined that the only "reliable methodology" for determining whether Cherniak's 211 tattoo had a particular symbolic meaning, under the *Daubert-Lanigan* standard, would be if -- *in the court's* "estimation" -- it matched other 211 images the court was shown. RA/197.

Significantly, the government also failed to even establish that *Daubert-Lanigan* was an appropriate standard to apply to these experts's testimony. Neither the court below, nor the prosecution in its motion, cited a single case that held such an expert's opinion should be evaluated under *Daubert-Lanigan.*

Not one of the aforementioned cases that involved expert testimony on the meaning or significance of tattoos or symbols indicated their testimony was or should have been evaluated under the Daubert-Lanigan standard. See supra at pp. 37-38.

To the contrary, in one recent federal case, *Garcia* v. *Peery*, 2015 WL 5159279, *2,12 (U.S. Dist. Ct. C.D. Ca. 2015), the Court specifically stated the government's expert's recognition of the symbolic significance of the defendant's tattoos would *not*

have been precluded under *Daubert* as the testimony was not "based on any scientific technique."

Ironically, in the case of *Commonwealth* v. *Kercado*, 2014 WL 6682470, relied upon by the lower court to preclude DeLaCruz's testimony, that court too *specifically rejected* the notion that a government's proposed expert on the gang affiliation of the defendant would need to pass muster under *Daubert*. *Id.* at *3.

Other rationales offered by the lower court to preclude Dr. DeLaCruz's testimony were even more problematic.

At the close of testimony, the lower court declared: "If somebody's going to argue in court that somebody's a white supremacist, it's got to be on some pretty compelling evidence." Tr[9.4.18]/133-134. The court's view that Hinds had to have particularly compelling evidence before being allowed to present evidence damaging to a government witness's reputation, even if that evidence was important to Hinds's defense, conflicts with rights guaranteed by our constitution. See *Davis* v. *Alaska*, 415 U.S. 308, 320-321 (1974) (when 6th Amendment right of the accused to examine a witness is compared to "the State's desire that [that witness] fulfill his public duty to testify free from

embarrassment and with his reputation unblemished," "the right of confrontation is paramount to the State's policy" which "must fall before the right of petitioner to seek out the truth in the process of defending himself").

The lower court also improperly based its decision to preclude DeLaCruz's testimony on its conclusion that the evidence presented at the voir dire was insufficient to establish Cherniak *was a gang member*, despite the fact that defense counsel *repeatedly* explained that DeLaCruz would *not* testify Cherniak was a member of any gang at trial. Tr[9.4.18]/35,132;RA/196-204.

The lower court's rationale for precluding Dr. Bjork-James's testimony suffered from the same flaws.

At the hearing on the government's motion to preclude her testimony, it was established she is a cultural anthropologist and assistant professor at Vanderbilt University whose area of study for the last fifteen years is "the online white supremacist movement." Tr[9.5.18]/11. At the hearing, Bjork-James identified materials she used in her research, including messages posted on a website called "Stormfront" where participants discussed and posted photos of their tattoos. Tr[9.5.18]/13-22;

RA/142-145. (The masthead of the Stormfront website includes the subheading "Every month is white history month" and the site description: "We are the voice of the new, embattled white minority!" RA/142).

Dr. Bjork-James testified she also utilized studies such as a report by the Southern Poverty Law Center of a "skinhead music scene in New York City" [Tr[9.5.18]/23;RA/146] and a 2012 report by the Anti-Defamation League on the "white power" music scene. Tr[9.5.18]/23;RA/151.

Bjork-James explained her objective was "to understand the symbolic meaning of different ideas and markings, in shaping people's identities." Tr[9.5.18]/24. She did this by looking for themes or patterns that emerge across multiple online postings and sites. Tr[9.5.18]/24.

She testified her research showed tattoos are an important way people demonstrate their white nationalism ideology. Tr[9.5.18]/24. She explained the markings fall into two patterns: either overt Neo-Nazi symbols (e.g., swastikas) or symbols that people outside the community would not recognize as such (e.g.,

the number "14", the number "88", Nordic runes, Celtic knots). Tr[9.5.18]/25,51-52.

She explained that in her research, the number 211 appeared in connection with the New York City skinhead music scene, connected with a group known as the "211 Bootboys." Tr[9.5.18]/27-28. In support of this, Bjork-James identified still photographs from a music video of the band "Lonewolf" posted by a music label affiliated with the skinhead music scene in New York City, and specifically the 211 Bootboys. Tr[9.5.18]/40,41. A still from the video states the band's name as "Lonewolf-211" and the song is "NYC Skins." Tr[9.5.18]/40;RA/157-160.

Bjork-James further identified a drawing from a promotion posted online by that same music label showing "a person in traditional skinhead attire … boots and suspenders, crucified on a cross", which, she explained, is the 211 Bootboys "logo." Tr[9.5.18]/44;RA/161.

Of the four stills from Lonewolf's video, one is of a gun with the number 211 spelled out in bullets. Tr[9.5.18]/41; RA/157. Another shows band members performing, one with the number 211 tattooed on his left forearm. RA/158. A third

reads New York City Bootboys with "211" in the middle. Tr[9.5.18]/44;RA/159. The fourth still shows 211 tattooed on the back of someone's neck with someone making the hand signal for 211 above it. Tr[9.5.18]/42;RA/160.

Bjork-James explained that the number 211 is also associated with a violent white supremacist prison gang called 211 Crew. Tr[9.5.18]/66. (An interview with a 211 Bootboy shows that, when asked about "211 *Crew*", he replied simply: "211 is my family and a stronghold in NYC , as well as other parts of the country …." [RA/163] showing that 211 Bootboys perceive a connection to, and identify with, the term 211 "Crew".)

Bjork-James testified that in the contexts she has seen the number "211" it has a cultural significance. Tr[9.5.18]/56. She stated that if, for example, someone was posting on the website "Stormfront" showing a "211" tattoo, she would assume they were becoming radicalized to white nationalism. Tr[9.5.18]/56. She based that view, on having seen multiple uses of the "211" symbol. Tr[9.5.18]/57.

She stated that, to her knowledge, it does not matter how the 211 is written. Tr[9.5.18]/62. She further testified that she knows of no other uses of the number "211" outside the white supremacist movement. Tr[9.5.18]/58,66.

When shown a photo of Cherniak's tattoo, Dr. Bjork-James described it as the number 211 inside a badge. RA/141;Tr[9.5.18]/59. The lower court, however, refused to allow Dr. Bjork-James to respond when asked if Cherniak's 211 tattoo "f[e]ll within the range of tattoos that can have this cultural significance?" asserting that "interpreting a tattoo … is beyond her expertise." Tr[9.5.18]/62-63.

As noted, Dr. Bjork-James testified she had seen numerous examples of "211" appearing in her research, that it always either came up in association with the 211 Bootboys or 211 Crew and nowhere else, and that there was no unique or single way in which it appeared. This was further established by the array of ways in which the "211" symbol appeared in exhibits introduced through her at the hearing.

Despite this, the lower court stated it would preclude Dr. Bjork-James from testifying before Hinds's jury because, in the

court's view, "the distinctive font of the Complainant's tattoo" did not "match" the examples of tattoos and images from gang members or skinhead music followers presented at the hearing. RA/216-217. Thus, the court concluded her "methodology" did not "pass muster under *Daubert/Lanigan* analysis." RA/217.

Once again, the court confused the issue of the reliability of an expert's methodology with its persuasiveness. Once again, the court's ruling was not based upon the expert's education or familiarity with the white supremacist or skinhead movement and symbols these groups used. As such, for the reasons discussed at pages 43-45 above, the court's determination constitutes an abuse of discretion.

And, here again, despite defense counsel having made clear that the expert would *not* opine Cherniak was associated with any gang [RA/89;Tr[9.5.18]/6-7], the lower court inexplicably precluded her testimony because he

> … liken[ed] the matter here to *Commonwealth* v. *Wolcott*, [28 Mass. App. Ct. 200 (1990)] where the Court 'provided guidance on the dangers posed by evidence only establishing a thin association with a gang.' Where the evidence only presents ambiguous associations between the defendant and a gang, it amounts to 'a memorable example of the vagaries, circularity, and dangers of trying to prove some guilt by association.'

RA/217.

The court's reliance upon *Wolcott* is particularly inappropriate as the circumstances in *Wolcott* are diametrically opposite this case. In *Wolcott* the issue the court redressed was that the witness, after testifying about his experience studying Jamaican gangs, testified he was "certain" that the defendant *was* a member of such a gang (based on nothing more than the defendant's nickname). *Wolcott*, 28 Mass. App. Ct. 200, 206-210. Given Hinds was *not* calling Bjork-James to opine Cherniak was in a gang, the court's reliance upon *Wolcott* to preclude Dr. Bjork-James' testimony was an abuse of discretion.

Finally, the lower court's focus on the fact that Bjork-James acknowledged she was not a "tattoo expert" (testimony the judge elicted) suffers from the same lack of legal support. Tr[9.5.18]/33,53;RA/216. In the cases where experts have been allowed to give testimony on the meaning of a symbol or tattoo, *none* were qualified as "tattoo experts." Rather, they were variously described as: "an expert on the subject of White supremacy" (*Lindberg*, 190 P.3d at 679), "an expert in bias and hate crimes" (*Slavin*, 1 N.Y.3d at 397), and "a gang expert"

(*Garcia* v. *Peery*, 2015 WL 5159279, *12). See also *People* v. *Wagner*, 811 N.Y.S.2d 125, 126 (2006) (witness described as "an expert on hate crimes and the meaning of the defendant's tattoos").

Neither the lower court nor the government cited any case holding the expert must declare they are a "tattoo expert" – whatever that means.

Moreover, "[t]here is no requirement that testimony on a question of discrete knowledge come from an expert qualified in that subspecialty rather than from an expert more generally qualified." *Commonwealth* v. *Mahoney,* 406 Mass. 843, 852, (1990).

To the lower court's point that the witness had never before been qualified as an expert [RA/215], our high Court has observed that "even for the most highly qualified expert there must always be a first time." *Commonwealth v. Rhoades,* 379 Mass. 810, 818 (1980). "The crucial issue is whether the witness has sufficient 'education, training, experience and familiarity' with the subject matter of the testimony." *Letch v. Daniels,* 401 Mass. 65, 68 (1987).

Where a court prevents a defendant from calling a witness, the issue for this Court is whether that witness was "necessary."

*Commonwealth* v. *Degrenier*, 40 Mass.App.Ct. 212, 215 (1996). In *Degrenier*, this Court explained that: "[a] 'necessary' witness is one whose testimony is relevant, material, and not cumulative." *Id.*

By preventing Hinds from presenting reliable evidence that Cherniak's tattoo might represent a racist ideological bent, Hinds was deprived of evidence that was not just relevant, material, and not cumulative, but crucial to corroborate his only defense: that he was under threat of serious harm and therefore his actions were reasonable.

The lower court's erroneous evidentiary rulings violated Hinds's state and federal constitutional right to present a defense. Given the importance of this evidence to Hinds's defense, the Commonwealth cannot meet its burden of proving this violation was "harmless beyond a reasonable doubt." *Commonwealth* v. *Dranka*, 46 Mass.App.Ct. at 43.

## IV. The lower court's preclusion of a psychologist who would explain Hinds's behavior when defending himself from a life-threatening situation, violated his constitutional right to present a defense.

On May 1, 2018, the trial court ordered the parties to complete reciprocal discovery by June 22, 2018. RA/28,59.

On July 9, 2018, Hinds's counsel filed a motion for funds to consult with clinical psychologist Paul Zeizel. RA/32,61. Given that, at trial, Hinds's only defense was that his actions were in self-defense, counsel sought to introduce expert testimony to explain "how people behave in combat situations … and … why a person might delay disengaging from combat despite gaining a clear tactical advantage …. RA/89.

The lower court did not grant the motion for funds for another month, until August 9th. RA/33. Just six days later, on August 15, 2018, Hinds's counsel served the Commonwealth with a notice of expert testimony setting forth her intention to call Dr. Zeizel as an expert witness and the subject of his testimony. RA/88;Tr[9.4.18]/117.

The notice indicated Zeizel's curriculum vitae (CV) was attached but, at a September 4, 2018 hearing on the government's motion to preclude his testimony, defense counsel stated she had not attached the CV because she had hand delivered it to the prosecutor. Tr[9.4.18]/174. The prosecutor denied she had been handed a copy. Tr[9.4.18]/175.

After receiving notice of the proposed expert, the

government waited until the eve of trial, on August 27th, to file a motion to preclude Zeizel's testimony asserting the failure to provide his CV and the lateness of the notice. RA/91. The prosecutor did acknowledge she was sent a digital copy of the CV, a week before the September 4th hearing. Tr[9.4.18]/117.

A trial judge has authority to sanction a party for violating a discovery order, including the exclusion of a witness's testimony altogether. *Commonwealth* v. *Durning*, 406 Mass. 485, 495 (1990). A decision to preclude a defense witness, however, implicates a defendant's state and federal constitutional right to present a defense. *Id.* at 494-495, citing Sixth and Fourteenth Amendment of the US Constitution and art. 12 of the Mass. Dec. of Rights. As such, "[t]he exercise of the authority to exclude must … be balanced against a defendant's constitutional right to present evidence." *Commonwealth* v. *Chappee*, 397 Mass. 508, 517 (1986).

The factors that must be taken into account in assessing that balance include: (1) prevention of surprise; (2) evidence of bad faith in the violation; (3) prejudice to the other party caused by the testimony; (4) the effectiveness of less severe sanctions; and (5) the materiality of the testimony to the outcome of the case.

*Commonwealth* v. *Dranka*, 46 Mass.App.Ct. 38, 41 (1998).

Our courts have stressed that while a judge has authority, pursuant to Mass.R.Crim.P. 14(c)(2) to preclude a witness from testifying for violating a discovery order or agreement: "the preclusive sanction should be reserved for 'hard core transgressions.'" *Id.* at 42, citing *Chappee* v. *Vose*, 843 F.2d 25, 31 (1988).

The Reporters' Notes to rule 14(c)(2) state that "[a] court should only employ this sanction ... when convinced that a failure to comply with an order was deliberate and prejudicial to the Commonwealth." See also *Commonwealth* v. *Steinmeyer*, 43 Mass.App.Ct. 185, 190 (1997) ("In imposing the 'severest sanction,' that of preclusion or striking of evidence, the judge should make clear that she has taken into account [the] requisite factors in the course of balancing the vindication of the rules against a defendant's right to present witnesses.")

*Standard of review*

The issue is whether the trial judge abused his discretion. *Commonwealth* v. *Dranka*, 46 Mass.App.Ct. at 41. If error is found, given that a constitutional right is implicated, "the convictions …

cannot stand unless the error is harmless beyond a reasonable doubt." *Id.* at 43.

The case of *Commonwealth* v. *Paiva*, 71 Mass.App.Ct. 411 (2008), illustrates the need to balance the enumerated factors with the defendant's right to present their defense.

In *Paiva*, the defendant was charged with unlawful gun possession. *Id.* at 412. *After the Commonwealth rested*, to counter the prosecution's expert's testimony that the gun was operable, the defendant sought to call a purported gun expert of whom he had never provided notice. *Id.* at 413. This Court recognized that the lack of notice of an expert witness introduced for the first time in the middle of trial violated Mass.R.Crim.P. 14(a)(1) and, as such, the judge had authority to sanction the conduct. *Id.* at 415.

Nevertheless, this Court held the judge abused its discretion when it imposed the preclusion sanction explaining the judge's error was a failure to

> …make a finding that counsel had acted in bad faith, [or] address the materiality of the testimony or the effectiveness of less severe sanctions or of alternative ways of dealing with the problem.

*Id.*

In *Paiva*, this Court further noted that, on appeal, the Commonwealth focused on the strength of its case and the weakness of the proposed testimony by the defendant's expert. To that, this Court replied:

> As we have indicated, the Commonwealth's case was sufficient; that does not mean, however, that it was immune from defeat. … We prefer that questions of this nature be decided by juries, not by assumptions at the appellate level.

*Id.* at 416-417.

Similarly, in *Commonwealth* v. *Dranka,* supra, where the defendant, accused of rape, failed to give the prosecution notice of a witness (a doctor) until the first day of trial, this Court held the judge abused their discretion when they precluded the doctor from testifying even though the DNA/sperm evidence the doctor was called to counter had been available to the defense for one month. 46 Mass.App.Ct. at 40 n.1,41. This Court reversed the conviction given the lack of a showing of bad faith and the importance of the evidence to the defendant's case. *Id.* at 42.

Finally, this Court stressed that "the prosecution knew about this evidence for two and one-half *days* and that the

defendant did not conclude its evidence … for another two and one-half days," leaving it "ample time to prepare for an examination of this witness with or without a short continuance." *Id*. at 43 (emphasis added); contrast *Commonwealth* v. *Durning*, 406 Mass. 485, 494-496 (1990) (sanction of witness preclusion did not violate due process rights, where, in violation of pretrial conference report, defendant made definite announcement to call witness only *two to three hours before witness' proposed testimony*, the surprise was prejudicial to prosecution's case, *and* witness' proposed testimony was cumulative and collateral); *Commonwealth* v. *Chappee*, 397 Mass. at 514-518 (not abuse of discretion when judge ruled defense would not be allowed to call witnesses after the defense's *mid-trial disclosure* of three expert witnesses, in violation of a discovery order, which witnesses, the record established, *defense counsel had been prepared to call long before trial*).

Consideration of Requisite Factors

Prevention of surprise

Here, at the time the trial judge made the decision to preclude Dr. Zeizel from testifying, the government (1) had known of this proposed witness for three weeks, (2) had received

notice of his proposed testimony approximately three and a half weeks before the start of trial, and (3) had over a month before the defense rested to prepare to find such a witness.

Thus, especially when contrasted with the circumstances of the cases discussed above, the record does not support this harsh sanction to "prevent surprise."

Evidence of bad faith

With respect to this key factor (which our courts indicate should be found before imposing witness preclusion), there was no evidence to suggest the late notice was deliberate. Indeed, defense counsel explained that she served notice on the government as soon as she found out Dr. Zeizel would be available. Trt[9.4.18]/172-174. Further, the record establishes counsel provided notice just six days after being granted funds to consult with him. RA/88;Tr[9.4.18]/117

The government provided no evidence to the contrary. Moreover, the only documented significant delays were the one month the lower court took to grant the motion for funds for the defense to consult with Dr. Zeizel, and the nearly two weeks the government took to alert the defense that they would be seeking

to preclude his testimony.

Moreover, the record establishes that although Hinds's case had been on the lower court's docket for two and half years, the trial attorney who eventually tried Hinds's case and found Dr. Zeizel had been on the case for approximately nine months, and in that time had addressed numerous issues, including several substantial suppression motions, a motion to dismiss, several motions for bail reduction, as well as interlocutory appeals. RA/11,22,23-32.

In sum, the judge's assertion that the timing of the disclosure "smacks of surprise tactics" (stated in reference to the judge's evaluation of the possible prejudice to the government) based upon nothing more than the age of the case, was not supported by evidence, was unreasonable and, if constituting the basis of the preclusion sanction, was an abuse of discretion. Tr[9.4.18]/176.

Prejudice to Commonwealth

With respect to the only factor the lower court squarely addressed: the prejudice to the government, at the September 4th hearing, the court declared that the government would now have

insufficient time to secure a witness should it decide it wanted to rebut Dr. Zeizel's testimony. Tr[9.4.18]/176. As noted, however, at the time of the court's ruling, the government had known of this proposed witness for three weeks -- over a month before the defense would rest its case.

Moreover, the court did not suggest Zeizel's testimony was scientifically complex, indeed, it dismissed it as merely a "soft science" "theory." Tr[9.4.18]/176-177. As such, the record did not support the judge's finding of prejudice and its determination constituted an abuse of discretion. See *Commonwealth* v. *Dranka*, 46 Mass.App.Ct. at 42 (abuse of discretion to preclude witness even though defendant did not notify prosecution of witness until after trial started given witness's testimony was not sophisticated scientifically and, therefore, at most, a short continuance to allow prosecution time to secure a rebuttal witness would have sufficed).

Effectiveness of less severe sanctions

When making his ruling, the trial judge did not consider the effectiveness of less severe sanctions.

Materiality of testimony to outcome of case

The trial judge explained his decision *not* to evaluate this final factor as follows:

> I don't really see the need to get into the substance. … we're talking about a soft science … not a science that deals with actual pieces of evidence that were garnered against the Defendant…. it's a theory of … how the … Defendant acted …. Tr[9.4.18]/176-177.

As in *Paiva*, supra, where this Court reversed the defendant's conviction because of the trial judge's failure to "address the materiality of the testimony or the effectiveness of less severe sanctions …" [71 Mass.App.Ct. at 415] here too, the trial judge's failure to address these factors constitutes an abuse of discretion.

And, just as in *Paiva*, the judge improperly rebuffed defense counsel's attempts to establish the materiality of the witness's testimony. *Id.* at 415 & n. 3 ("We cannot know whether some or all of the considerations in *Commonwealth v. Chappee*, supra, would have emerged had he been given an opportunity to state his position"). At the hearing, defense counsel repeatedly explained she had Dr. Zeizel on call and asked the court if it wanted him to come into court where defense would have been

able to elicit testimony to establish the materiality of his proposed testimony. Tr[9.4.18]/5,116. Each time, the trial judge rebuffed counsel's suggestion. Tr[9.4.18]/5,116.

The following day, at a second pretrial hearing, defense counsel asked the judge to reconsider the sanction and suggested an alternative of a continuance. Tr[9.5.18]/128. She explained Zeizel's testimony was essential and that the preclusion sanction would deprive Hinds of his ability to present his defense. Tr[9.5.18]/127. Specifically, Zeizel would explain the nature of combat and the difficulty of withdrawing suddenly when one is in the middle of a life-threatening fight. Tr[9.5.18]/127.

Here, where Hinds's only defense was that he acted in self-defense, where some third party witnesses described seeing Hinds strike Cherniak and Arthur-Smith as if Hinds were the initial aggressor and not immediately flee, this expert testimony was critical to the juror's understanding of why a person in Hinds's position would continue to fight and not immediately flee.

Following defense counsel's plea, the trial judge again refused to even address this final factor stating:

> [G]oing to the contents, I really don't have a basis to get into that, because [it] remains to be seen what the expert

> would testify to, especially, again, in a soft science of the psychological basis for somebody acting in the way they did. But I'll note your objection.

Tr[9.5.18]/128-129.

Given the nature of Dr. Zeizel's testimony known from the existing record, which establishes that Hinds was deprived of his ability to fully present his only defense, it cannot be said this error was "harmless beyond a reasonable doubt" and thus his convictions must be reversed.

## V. Hinds was prejudiced by lower court's ruling excluding testimony that would have supported his only defense.

Hinds testified that after seeing Cherniak slash his tire, and then coming upon the perpetrator as he exited his apartment, when he confronted Cherniak and Arthur-Smith about what he just observed, Arthur-Smith replied: "Even if you did, how the fuck can you prove that?" Tr5/128.

Despite defense counsel's explanation that Arthur-Smith's question/statement was not being offered for its truth, the court sustained the government's hearsay objection. Tr5/129-130.

A statement is not hearsay if not offered for its truth. Mass. Guide to Evidence §801(c)(2).

Plainly, jurors hearing this utterance may reasonably have concluded its impact on Hinds was to cause him to fear he was dealing with aggressive individuals.

Evidence of a statement introduced, not for its truth, but for its effect on the listener is therefore not hearsay. See *Commonwealth* v. *Santana*, 477 Mass. 610, 622 (2017) (trooper's statement not hearsay where offered to elucidate defendant's response to trooper's question); *Commonwealth* v. *Daley*, 55 Mass.App Ct. 88, 94 n.9 (2002) (a passerby's remark ["Hey, are you all right"], not hearsay if offered to explain why defendant fled), *S.C.* , 439 Mass. 558 (2003); *Wallace-Bey* v. *State*, 234 Md.App. 501, 539-540 (2017) (in murder case arising from shooting of defendant's boyfriend, victim's declarations to defendant that "you are not leaving" and to "get naked", where defendant raised defense of self-defense, evidence was probative of how victim's words affected defendant).

Hinds's testimony recounting Arthur-Smith's statement should have been admitted as it was relevant to whether his fear

and corresponding behavior was reasonable. *Id.* The lower court erred in excluding this evidence.

For similar reasons, the lower court also erred when, over defense counsel's objection, it excluded Hinds from testifying that Cherniak had tried to give him cocaine. Tr5/117-120. Hinds was able to testify Cherniak had told him he was in a biker gang in New York City, and about the feelings Cherniak generated when he tried to get Hinds to sell drugs for him. Tr5/119-121. Information that Cherniak was also trying to push him to use this illicit drug would have completed the picture of the kind of person Hinds believed he was dealing with and would have explained the fear Hinds felt when he saw Cherniak slash his tires and then confront him, while holding a long knife. *Id.*

*Standard of review*

Where a court incorrectly excludes testimony that was not hearsay, the issue is

> whether the exclusion prejudiced the defendants. … An error is nonprejudicial only if it did not influence the jury, or had but very slight effect....
>
> But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially

> swayed by the error, it is impossible to conclude that substantial rights were not affected.

*Commonwealth* v. *Santos*, 460 Mass. 128, 137-138 (2011) (internal quotations and citations omitted).

In the context of Hinds's attempt to establish his overall defense, the erroneous exclusion of this evidence was prejudicial.

## Conclusion

For the foregoing reasons, Mr. Hinds's convictions should be reversed.

Respectfully submitted,

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Dated: December 31, 2019

# ADDENDUM

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Decision on "Commonwealth's Motion for Reciprocal Discovery"

After hearing, ALLOWED. The defendant is ordered to produce the requested discovery regarding any such evidence to be offered at trial by June 22, 2018.
– 5/1/18

were arguing, that I'd like to integrate with my other notes. Just give me five minutes to gather my thoughts, and I'll come out and dictate some findings.

[Court in Recess at 2:40:07 p.m.]

[Back on Record at 2:48:27 p.m.]

THE COURT: All right. So, I thought I'd read some findings and conclusions into the record. So, Mr. Jesse De La Cruz has been qualified to testify as an expert in gang-related issues in some 65 different cases. The overwhelming majority of these cases dealt with whether the offense involved was connected to gang activity. These cases were mostly located in California, where a person may face an enhanced penalty as a gang member or for gang-related activity. Jesse De La Cruz's education and experience generally support a basis to testify as to gang membership and activity in a way that could help laypersons on the jury.

The issues here or the issue here is whether in this case he should be allowed to testify as to his opinion that the Complainant basically had and willingly obtained a gang tattoo, which ultimately could be used to argue that the Complainant identified with racist -- a racist ideology espoused by a particular gang.

The witness bases this opinion on a photograph of a tattoo on the Complainant's arm that at least arguably shows the number "211" in a stylized font, within a shield. The witness

stated that this particular tattoo jumped out in his mind as something that he had seen before, in his general gang research or connections with gangs in real life. He stated that when he further researched the 211 reference, all kinds of links came up, and then he remembered that the reference was to a gang that was -- that originated in Colorado prisons in the 1990s. This tattoo -- This particular tattoo photo was shown in Exhibit 1.

However, the witness never interviewed the Complainant, and none of the specific research pertaining to the identification of this tattoo was put before the Court. Rather, the witness summarized the research as showing that the tattoo was not necessarily indicative of gang membership in the 211 Crew prison gang but potentially a non-prison gang that shares their philosophy -- that is, with the 211 Crew -- and their racist ideology, called the 211 Bootboys.

Although the witness stated that he looked at Southern Poverty Law Group documents and even FBI documents, these specific documents were never produced or offered or specified, beyond passing reference. Nor was the Court ever shown any particular exemplars that clearly, in the estimation of the Court, looked like the same tattoo on the arm of the Complainant.

The witness testified, in addition to his own dissertation, in which eight known factors are considered in

the analysis of whether someone can be considered as affiliated with a gang, or whether the -- more strictly speaking, whether the tattoo worn on -- somewhere on his body can be affiliated with a gang. So, where the dissertation had to have been done back as far as the 1990s or within 10 years of his being released from prison -- I would take that as no later than 2005 -- as of that time-period, there were eight -- at least eight specific factors that could be considered regarding gang affiliation.

And those would be based on a personal interview of the individual, that individual's family members having a criminogenic background, the work history of the person, his school history, his substance abuse issues, gang tattoos are definitely at least one significant factor, prior criminal history, and known gang association.

Obviously, of all these eight criteria, the expert admittedly only could indicate one factor underlying his opinion, that of the tattoo, because he did not do any -- could -- did not have any personal knowledge of the Complainant. So, none of the other factors were found.

In addition, I noticed that one of my colleagues, in a separate case, looked to -- for similar considerations, looked to the Bristol County Sheriff's Department factors, not to suggest that they necessarily set the standards as to how a person can be identified with gang affiliations in any way, but

because it was considered at least some objectification of this process.

And the Bristol County Sheriff's Department gang criteria, at least in 2014, consisted of the following: one, self-admission by the inmate; two, information received from outside law enforcement/criminal justice agency; three, use and possession of group paraphernalia or identifiers; four, group-related photo; five, known group tattoo or marking; six, information from reliable confidential informants; seven, victims/targets affiliated with members of a rival group; eight, possession of documents; nine, named in documents as a member or associate; ten, possession of publications; eleven, participation in publications; twelve, court documents; thirteen, published news accounts; fourteen, contact with known associates; fifteen, observed association; sixteen, membership documents; and, seventeen, information developed during a -- during investigation or surveillance.

I note that -- And that was from a case decided by Justice Robert Kane in 2014. Because it was not published, I use it only for a reference to the rationale used in that case. It was called Commonwealth vs. Kercado, K-E-R-C-A-D-O, 214 Mass. Superior, Lexus 111.

In that same proceeding, Judge Kane mentioned Lanigan, Canavan's Case, and cited the -- or expressed the Court's ability, that is, the trial judge's ability, and discretion in

devising a method for testing a scientific theory's reliability.

In this case, the Department of Justice criteria was also put before the Court. And I notice in several of the categories they track the witness's own dissertation factors, the Bristol County Sheriff's Department factors. But in other Massachusetts cases, interestingly, the Courts have considered other jurisdiction, specifically California's Code of Regulations.

California Code of Regulations, Title 15, section 3378, requires that three source items be used to verify identification with gangs. And the -- Interestingly, the actual regulations use similar language. The source items used to verify the identification of an inmate as a gang member -- and I understand we're talking about something different from identifying as a gang member, but, willingly identifying and associating oneself via a tattoo with a gang member's philosophy.

But, regardless, the source items under the California Code of Regulations are: self-admission, tattoos and symbols, written material, photographs, staff information, information from other sources, association with other gang affiliates, information from informants, prior gang-related crimes, legal documentation, receiving visits from gang affiliates, communication with other gang affiliates, information from

debriefing reports.

Now, I mentioned these different criteria of identifying sources of gang affiliation because these would be considered, in my estimation, reliable methods of identifying a person, to connect that person with gang activity, gang membership, or gang tattoos. So, the use of these objective source identifiers is, to me, a method of making reliable and showing that there's reliability to the underlying expert opinion.

In this case, the witness readily admitted that the only factor was that of the tattoo. In particular, he said the most significant aspect of the tattoo was the number "211." Putting aside the fact the -- there at least -- there is an argument that the Commonwealth makes that the "211" is not something that's conceded, but it could be, rather, a different font for the letter "M," if in fact were -- if it were the number "211," that appears to be the sole overriding factor that the expert used to conclude that this particular tattoo is associated either with the 211 Crew or the 211 Bootboys.

In looking at the reliability, therefore, of that conclusion, I consider also the evidence that was placed before me, with regard to the photographs.

May I see the exhibits, please.

THE CLERK: Yes, Your Honor.

THE COURT: Exhibit 1 is, of course, the Complainant's.

Exhibit 2 shows a person's back that has -- well, purports

to be a prison gang tattoo on a person's back. It clearly spells out the numbers "211" and the word "Crew." I think it's unequivocal that that could be construed as a 211 Crew tattoo. But the wearer specifically made it unequivocal that this is his preferred association. The number is, I would say, Arabic. It's not the stylized numbers of the Complainant's. And it doesn't include a shield. But I understand that the expert says that that still doesn't matter; it could be a 211 Crew affiliation.

Then I look at Exhibits 3 and 4, which do show the 211 Crew insignia. It looks nothing like what is in Exhibit 1, except for the number "211," which, like I say, is not in the stylized print.

In looking at the other exhibits, 5, 6, and 6, these purport to be exemplars of 211 Bootboys, which was the specific gang that the tattoo is alleged to be affiliated with. And these, the imagery of these particular pictures, spells out specifically the word "Bootboys," which is not in Exhibit 1 at all, including -- There's one image of a person on a crucifix. And the second one, Exhibit 5, is a dog. And Number 7 is some kind of military imagery.

What I'm coming to is that if the -- if it's merely the numbers "211" that make this a gang tattoo, that is so broad as to frankly be -- I see no connection with any kind of science -- scientific methodology involved here, whatsoever. It's a -- By

saying that or analogizing the expert's testimony to "I speak French. Trust me, this word is French for such-and-such," if -- That's not the requirements of our law. The requirements of our law require something more than "I say it; therefore, it is so." And that's the impression I get from this testimony.

If you look to --

MS. GOLDBLATT: Judge, if I could, for a moment.

THE COURT: If you look to the Massachusetts Guide to Evidence, section 702, Testimony by Expert Witnesses, you need some factual underpinnings that go beyond "I conclude this." And, specifically, "A witness who is qualified by -- as an expert, by knowledge," -- I'm quoting, now -- "skill, experience, training, or education, may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; the testimony is based on sufficient facts or data; the testimony is the product of reliable principles and methods; and the expert has reliably applied the principles and methods to the fact of the case."

On the strength of the evidence before me, I have serious issues with subparts (b), (c), and (d) of section 702 of the Massachusetts Guide to Evidence. I cannot conclude that the testimony connecting the one photograph on the Complainant's -- of the Complainant's tattoo to some -- to two different gang --

to affiliation with two different gangs as "based on sufficient facts of data." I do not conclude that the testimony is a product of reliable principles and methods as those methods were spelled out in the course of the hearing. And I don't find, either, that the expert has reliably applied the principals and methods to the facts of the case.

This is independent of the analysis of the limited or the proffered relevance versus its inflammatory or prejudicial effect. I make these conclusions based on the analysis of the evidence presented to me in this voir dire hearing and the requirements of Daubert, Lanigan, Canavan's Case, the Barbosa case that was quoted to me, as well as the case that I looked at, written by a fellow judge of this court, and that's Kercado.

MS. GOLDBLATT: Judge?

THE COURT: Having concluded that the expert opinion is not sufficiently reliable, I cannot allow that opinion to be placed before the jury in this matter. So, I'll note the Defendant's objection. Where we go from here, now, is --

MS. GOLDBLATT: Judge, I'd like to ask that this photo be admitted into identification, because if the absence of an exemplar that looks like the tattoo is the thing that is missing, then I have been ineffective. And I think it is important that I put this into evidence now and explain what the expert would have proffered, so that I can make a record of

my ineffectiveness and contact CPCS, because, if having this in front of you, you said that an exemplar of a tattoo in the stylized font would've been enough --

THE COURT: I would've expected that. I would've also expected that it wouldn't necessarily be one match but potentially a whole database from which a match was made, which would indicate the reliability of the selection process.

MS. GOLDBLATT: I'm just --

THE COURT: There was nothing before me that --

MS. GOLDBLATT: -- asking that this be put in for identification.

THE COURT: There's nothing before me that showed any reliability in the selection process. The entire connection was limited to the number "211," which, in the Commonwealth's estimation, is not conceded. It's too much from which the opinion that -- the ultimate opinion that the Complainant is a white supremacist can be based on, in my estimation.

MS. GOLDBLATT: Judge, I'm moving this into evidence.

THE COURT: The second question of whether to reopen the record to allow the photograph is something else. What do --

MS. GOLDBLATT: For identification.

THE COURT: -- you say? What --

MS. GOLDBLATT: Solely --

THE COURT: -- do you say, Ms. Simonian? Do you object to me seeing that as or taking it as an exhibit?

MS. GOLDBLATT: Not as an exhibit, Judge; I understand it can't come in as an objection. You will get an objection to that.

MS. SIMONIAN: I'm not going to object to it being marked for identification. I mean, there's no witness to introduce this or to provide any background to it. So, I mean, it's being submitted for what it's being submitted for.

And, again, I would argue that that tattoo looks nothing like Exhibit A --

THE COURT: Well, --

MS. SIMONIAN: -- or Exhibit 1 --

THE COURT: -- if it's not --

MS. SIMONIAN: -- in this matter.

THE COURT: -- something that I'm being asked to consider evidentiarily, then it is whatever it is. But --

MS. GOLDBLATT: When I spoke to the expert, I had him describe the tattoo of what -- John Young.

THE COURT: All right.

MS. GOLDBLATT: This is the tattoo he was describing.

THE COURT: All right. Let's --

MS. GOLDBLATT: I didn't put it into evidence.

THE COURT: -- have it marked for identification, as you asked me.

MS. GOLDBLATT: I'd --

THE COURT: So it's referred to something --

MS. GOLDBLATT: -- like to have it marked for identification.

THE COURT: -- that you felt like you should have or thought he did put into evidence.

MS. GOLDBLATT: And you indicated that you expected it to be there at the time of your reading the --

THE COURT: I expected some factual --

MS. GOLDBLATT: -- findings. You didn't --

THE COURT: I expected some factual basis to connect the Exhibit 1 to some known database of gang photographs. And I didn't have that before me, so.

MS. GOLDBLATT: There is no known database that was coming into evidence. But --

THE COURT: Well, however --

MS. GOLDBLATT: -- there was that photograph. So, I -- Because that --

THE COURT: However there was a conclusion that this was done, --

MS. GOLDBLATT: Because the photograph was not in evidence, --

THE COURT: -- it was not put sufficiently before me.

MS. GOLDBLATT: -- I think it -- If it wasn't put sufficiently before you, and if that photograph of an exemplar of a tattoo with the same font and the same stylized writing would have made -- in case there's a conclusion that that

would've made the difference in --

THE COURT: Well, let's --

MS. GOLDBLATT: -- qualifying the expert, --

THE COURT: -- see what's been marked for identification.

MS. GOLDBLATT: I'd like to mark it for identification so that it can --

[Photo of John Young's Tattoo Marked D for Identification]

MS. GOLDBLATT: Thank you.

THE COURT: Okay. May I see it, please.

THE CLERK: Yes, Your Honor.

THE COURT: That's not the same font as Exhibit 1. Look, it wasn't put before me, but I think it's an overstatement to say that this matches Exhibit 1. My decision stands. I mean, the -- on the -- this is evidently given to me for appellate review. But, I'm telling you, if I were to consider this in the course of the hearing, I would not conclude that this was a match beyond the -- And even the number is written differently, with a slash through the "2," from that which is given in the 211 Crew exhibits, which were, I think, Number 3 and 4. All right. My decision stands.

MS. SIMONIAN: Thank you, Your Honor.

THE COURT: Where do we go from here?

MS. SIMONIAN: So, it's fair to say that the Commonwealth's motion in limine to preclude the Defendant from calling an expert, Mr. De La Cruz, has been allowed at this

point?

THE COURT: That's right.

MS. SIMONIAN: Thank you.

THE COURT: That's -- For the record, motion -- Pleading 131 is, after hearing, allowed.

MS. SIMONIAN: Okay. So then, that brings us to the Commonwealth's second motion in limine: to preclude the Defendant from calling an expert concerning the modern which supremacist movement. If Mr. De La Cruz is not permitted to testify, then I would assume the natural course would be that the white supremacist expert would not be allowed to testify.

THE COURT: Well, now, the lynchpin of the second expert's testimony would be the connection to a racist gang's insignia, right? I mean, without that, I don't see how you --

MS. GOLDBLATT: Perhaps this expert is aware, as I might not have been, of an existing database of all of the white supremacist tattoos that are known to anyone. And if that expert is aware of the existence of such a database and if such a database exists, I will ask her to bring in exemplars of all of the 211 Bootboy tattoos that are on that database, and we will go from there.

THE COURT: In essence, the -- Mr. De La Cruz testified as a gang expert but, I would say, even having -- even purported to have a subspecialty in recognition of gang tattoos. I don't know, from the way you've headlined the woman who you would ask

THE COURT: Unfortunately, on the record of this matter, I am persuaded that the Defendant failed to give proper notice or timely notice of his intent to call Paul Zeizel, with the factual -- or a statement of the basis for the opinion until at least two weeks before the date set for trial.

And the next step is: is there any good reason for it? I haven't heard any good reason for it, or good cause to give late notice.

And then, finally, I look at whether there's prejudice to the Commonwealth. And, clearly, if the Commonwealth were to turn around and say, "We want to hire an expert," they're not going to have time to do so, on a case that dates back to 2016, in which there has been some significant consideration of the timing involved. This man's been held for a long time. And he states that he wants to get his day in court as efficiently and rapidly as can be; but then, at the same time, he doesn't give notice of what's claimed to be a very substantial and necessary witness, until right before trial. It smacks of surprise tactics.

Now, I haven't gone into the -- and I don't really see the need to get into the substance. But I know, too, that we're talking about a soft science, another "soft science" type of expert. It's not some kind of -- It's not some kind of -- It's not a science that deals with actual pieces of evidence that were garnered against the Defendant. But it's a theory of

interpretation of how the Complainant or the Defendant acted in what's been described as this combat.

On all the factors before me, I find that the Commonwealth's motion is persuasive, and I allow the motion to exclude the evidence to be presented through Paul Zeizel.

MS. SIMONIAN: Thank you.

So, tomorrow, at 9:00 or 9:30, Your Honor?

THE COURT: I don't know. I -- That's -- The fact that I'm giving the hearing, I think, is the important thing. Whether it's 9:00 or 9:30 doesn't matter so much to me. Did -- Does either side have a position on that?

MS. SIMONIAN: Nine-thirty's fine.

THE COURT: All right with you, Ms. Goldblatt?

MS. GOLDBLATT: I accept the ruling of the Court as to the time.

THE COURT: Okay.

MS. GOLDBLATT: Whatever --

THE COURT: So, --

MS. GOLDBLATT: -- works for you.

THE COURT: -- the Commonwealth's motion in Docket Paper No. 133 is also allowed.

There've been a number of rulings I made previously that were not opposed, and I'll have to make sure that the Clerk's Office is aware of --

MS. GOLDBLATT: Judge, if I --

Commonwealth's position that it shows the Defendant's state of mind, consciousness of guilt, and it also corroborates the victim's -- Commonwealth anticipates, the victim's testimony as to why he ended the friendship with the Defendant: because of similar statements that were made to him.

THE COURT: Okay.

[Pause]

THE COURT: Okay. And we were just talking about logistics. I probably will try to get us into Courtroom 2, which will hold more people comfortably.

Is that it?

MS. GOLDBLATT: Judge, to address -- I have one more issue I'd like to address; it's not a filed motion. The Commonwealth has moved to exclude Dr. Zeizel, on the grounds that they didn't have sufficient notice. And, again, I argue that they did, but the Court found that they did not. And if that's the only reason he's being excluded, then I would just point out he's an essential witness. He would explain both the Defendant's conduct and discrepancies in his account, between his and other victims' -- his and other witnesses' and the alleged victims'. He has a -- an important role to play, explaining the nature of memory and combat, and the difficulties of withdrawing suddenly from in the middle of a combat situation, "combat" being any life-threatening fight that you're having, not necessarily a military engagement.

And the fac that he can't testify to that because I was late getting the Commonwealth the materials, really, especially in the absence of any other evidence to explain -- any evidence to explain the alleged victims' behavior, is going to seriously prejudice him. And my concern is that it is ineffective and that this is just going to come right back if there's a conviction for ineffective assistance: that I didn't get that in on time.

So, I would propose that if the Commonwealth is truly prejudiced that we continue the trial until such time as they can prepare for this witness, because there is simply no way -- I can't see a way around the ineffectiveness problem. If it's true that I got it to them this late, then, in fact, I was ineffective.

THE COURT: Okay. Would you like to be heard in response again, Ms. Simonian?

MS. SIMONIAN: Your Honor, I have nothing more to add than -- That's been previously argued.

THE COURT: Okay. Well, to the extent that the individual is an essential witness, it belies the fact that you would wait until the last minute to let me know of his -- or the Commonwealth know of his existence.

But, number two, going to the contents, I really don't have a basis to get into that, because it's -- remains to be seen what the expert would testify to, especially, again, in a

soft science of the psychological basis for somebody acting in the way they did.

But I'll note your objection. Your comments will be part of the record. And I deny the request to continue the case.

THE CLERK: Those modified questions will be due Friday: Friday morning, 11 a.m.

MS. GOLDBLATT: And just to clarify the schedule of what -- Jury voir dire is to begin on Monday the 10th?

THE COURT: Yes, Monday --

MS. GOLDBLATT: Thank you.

THE COURT: -- the 10th. My goal would be to start right at nine o'clock. I know that's always an optimistic goal, but that's what I'm shooting for. And to the extent we can make sure that the Defendant's here, ready to go at that time, I'd ask for the Court Officer's help in that.

Anything else, from the Government?

MS. SIMONIAN: No, Your Honor; thank you.

THE COURT: Okay.

[Court in Recess at 3:09:31 p.m.]

back at two o'clock, you can let me know.

MS. SIMONIAN: Two o'clock is fine, Your Honor.

MS. GOLDBLATT: I have no reason I can't be back at two o'clock.

THE COURT: Okay.

[Court in Recess at 12:20:01 p.m.]

[Back on Record at 2:16:15 p.m.]

[Appearances Noted]

**DECISION OF THE COURT**

THE COURT: Okay. After a hearing on the matter involving Motion No. 132 in the pleadings, I find as follows:

Ms. Sophie Bjork-James is an assistant professor of anthology [sic] at the -- at Vanderbilt University. Her listed research interests are race and racism, evangelicalism, whiteness, sexuality, and reproductive health.

The witness has never testified as an expert before, but she has very recently undertaken some study of the 211 Crew and the 211 Bootboys, in the larger context of white supremacy groups, skinhead groups, Neo-Nazis, and others, as well as their preferred music. She perused websites and chatrooms having postings from avowed members of such groups.

She testified credibly that individuals use tattoos and symbols to identify themselves as belonging to specific racist and racialist groups. She gave specific examples from her research where a tattoo, for example, involving the number

"88," is likely to pertain to a Neo-Nazi membership, where "8" refers to the letter "H," the eighth letter in the alphabet, and "HH," therefore, is an abbreviation for "Heil Hitler." She also mentioned a specific example of "14," which refers to an evidently famous 14-work manifesto of the so-called "White Children" race -- racist or racialist group.

With regard to the case at hand, the witness concludes that as a matter of cultural anthropology she knows of no other use of the number "211," except in reference to 211 Crew or 211 Bootboys. However, she was unable to -- Well, strike that. She does not claim expertise in tattoos. She does claim some expertise in symbols, but only in a broad sense as they pertain to white supremacist and similar groups.

When asked if she were to see the number "211" around New York City on a person and to -- and asked if she could conclude that that meant that the person was a member of the 211 group or espoused their ideology, she wasn't able to say so without guessing.

She specifically testified that she had no evidence linking the Complainant in this case to any racist or racialist group. She did not interview the Complainant, nor has she -- was she given any other information regarding this individual, besides the image in Exhibit 19.

In particular, and although the witness interprets Exhibit 19 to be of the number "211," the examples of tattoos and

images from alleged known gang or skinhead music followers in Exhibits 11 through 18 do not match the distinctive font of the Complainant's tattoo, even if one concludes, as the Complainant evidently denies, that this tattoo actually is of the number "211."

On balance, I can find no reliable methodology to support alleged expert testimony that the Complainant's tattoo is connected to a white supremacist group or ideology, to place it before a jury. In short, the alleged connection between the Complainant's tattoo and him espousing any racist ideology is too specious to pass muster under Daubert/Lanigan analysis, even if that analysis is given quite a flexible interpretation, as I mentioned yesterday, in considering the fact that this is a soft science and maybe such analysis should be broadened, which seems to be the position of the SJC in Canavan's Case, 432 Mass. at 311-312.

I liken the matter here to a case in the Appeals Court, Commonwealth vs. Walcott, where, in a different setting, the Court provided guidance on the dangers posed by evidence only establishing a thin association where a gang -- with a gang. Where the evidence only presents ambiguous associations between the defendant and a gang, it amounts to "a memorable example of the vagaries, circularity, and dangers of trying to prove some guilt by association." That is Commonwealth vs. Walcott, 28 Mass. App. Ct., 200 at 2018 [phonetic], 1990.

In short, then, for all the reasons stated, I allow the Commonwealth's motion to exclude Assistant Professor Bjork-James' testimony before the jury.

MS. SIMONIAN: Thank you.

THE COURT: Now we've dealt with three different expert motions. There are other motions that are still pending, which -- In particular, I'd look to Number 134, which is the Commonwealth's motion in limine to exclude any allegations against Nathaniel Cherniak.

Now, the Defendant, making some argument or making some argument at to what the -- as to what the -- The Defendant making a -- any statements as to what the Complainant says to him is a different matter. If he wants to attribute words to the Complainant, that he belonged in a New York bike gang, well, then, if he claims that was said and he's -- he wants to testify to that under oath, I don't know how that can be precluded from evidence.

Do you want to be heard further, as to that?

MS. SIMONIAN: Your Honor, I would argue that it's hearsay, that the complaining witness is not a party opponent, so, therefore, that statement would not come in.

THE COURT: Well, I'll let the Defendant-counsel speak to that.

But there is also an alleged statement that Cherniak referred to himself as a drug dealer.

## U.S. Constitution, Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

## U.S. Constitution, Fourteenth Amendment

1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. …

## art. 12, Massachusetts Declaration of Rights

No subject shall be held to answer for any crimes or offence, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself. And every subject shall have a right to produce all proofs, that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defense by himself, or his council at his election. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land. …

## Mass. G.L., c. 234A, § 67A – Examination of Jurors

Upon motion of either party, the court shall, or the parties or their attorneys may under the direction of the court, examine on oath a person who is called as a juror, to learn whether the juror related to either party or has any interest in the case, or has expressed or formed an opinion, or is sensible of any bias or prejudice. The objecting party may introduce other competent evidence in support of the objection. If the court finds that the juror does not stand indifferent in the case, another juror shall be called in. In a criminal case such examination shall include questions designed to learn whether such juror understands that a defendant is presumed innocent until proven guilty, that the commonwealth has the burden of proving guilt beyond a reasonable doubt, and that the

defendant need not present evidence on the defendant's behalf. If the court finds that such juror does not so understand, another juror shall be called in.

To determine whether a juror stands indifferent in the case, if it appears that, as a result of the impact of considerations which may cause a decision to be made in whole or in part upon issues extraneous to the case, including, but not limited to, community attitudes, possible exposure to potentially prejudicial material or possible preconceived opinions toward the credibility of certain classes of persons, the juror may not stand indifferent, the court shall, or the parties or their attorneys may, with the permission and under the direction of the court, examine the juror specifically with respect to such considerations, attitudes, exposure, opinions or any other matters which may cause a decision to be made in whole or in part upon issues extraneous to the issues in the case. Such examination may include a brief statement of the facts of the case, to the extent the facts are appropriate and relevant to the issue of such examination and shall be conducted individually and outside the presence of other persons about to be called as jurors or already called.

## Massachusetts Rules of Criminal Procedure Rule 14 - Pretrial Discovery

(a) Procedures for Discovery.

(1) *Automatic Discovery.*

(A) Mandatory Discovery for the Defendant. The prosecution shall disclose to the defense, and permit the defense to discover, inspect and copy, each of the following items and information at or prior to the pretrial conference, provided it is relevant to the case and is in the possession, custody or control of the prosecutor, persons under the prosecutor's direction and control, or persons who have participated in investigating or evaluating the case and either regularly report to the prosecutor's office or have done so in the case:

(i) Any written or recorded statements, and the substance of any oral statements, made by the defendant or a co-defendant.

(ii) The grand jury minutes, and the written or recorded statements of a person who has testified before a grand jury.

(iii) Any facts of an exculpatory nature.

(iv) The names, addresses, and dates of birth of the Commonwealth's prospective witnesses other than law enforcement witnesses. The Commonwealth shall also provide this information to the Probation Department.

(v) The names and business addresses of prospective law enforcement witnesses.

(vi) Intended expert opinion evidence, other than evidence that pertains to the defendant's criminal responsibility and is subject to subdivision (b)(2). Such discovery shall include the identity, current curriculum vitae, and list of publications of each

intended expert witness, and all reports prepared by the expert that pertain to the case.
(vii) Material and relevant police reports, photographs, tangible objects, all intended exhibits, reports of physical examinations of any person or of scientific tests or experiments, and statements of persons the party intends to call as witnesses.
(viii) A summary of identification procedures, and all statements made in the presence of or by an identifying witness that are relevant to the issue of identity or to the fairness or accuracy of the identification procedures.
(ix) Disclosure of all promises, rewards or inducements made to witnesses the party intends to present at trial.

(B) Reciprocal Discovery for the Prosecution. Following the Commonwealth's delivery of all discovery required pursuant to subdivision (a)(1)(A) or court order, and on or before a date agreed to between the parties, or in the absence of such agreement a date ordered by the court, the defendant shall disclose to the prosecution and permit the Commonwealth to discover, inspect, and copy any material and relevant evidence discoverable under subdivision (a)(1)(A) (vi), (vii) and (ix) which the defendant intends to offer at trial, including the names, addresses, dates of birth, and statements of those persons whom the defendant intends to call as witnesses at trial.

…

(4) *Continuing Duty.* If either the defense or the prosecution subsequently learns of additional material which it would have been under a duty to disclose or produce pursuant to any provisions of this rule at the time of a previous discovery order, it shall promptly notify the other party of its acquisition of such additional material and shall disclose the material in the same manner as required for initial discovery under this rule.

…

(c) Sanctions for Noncompliance.

(1) *Relief for Nondisclosure.* For failure to comply with any discovery order issued or imposed pursuant to this rule, the court may make a further order for discovery, grant a continuance, or enter such other order as it deems just under the circumstances.

(2) *Exclusion of Evidence.* The court may in its discretion exclude evidence for noncompliance with a discovery order issued or imposed pursuant to this rule. Testimony of the defendant and evidence concerning the defense of lack of criminal responsibility which is otherwise admissible cannot be excluded except as provided by subdivision (b)(2) of this rule.

## Massachusetts Rules of Criminal Procedure Rule 20. Trial Jurors

(a) Motion for Appropriate Relief. Either party may challenge the array by a motion for appropriate relief pursuant to Rule 13(c). A challenge to the array shall be made only on the ground that the prospective jurors were not selected or drawn according to law. Challenges to the array shall be made and decided before any individual juror is examined unless otherwise ordered by the court. A challenge to the array shall be in writing supported by affidavit and shall specify the facts constituting the ground of the challenge. Challenges to the array shall be tried by the court and may in the discretion of the court be decided on the basis of the affidavit filed with the challenge. Upon the hearing of a challenge to the array, a witness may be examined on oath by the court and may be so examined by either party. If the challenge to the array is sustained, the court shall discharge the panel.

(b) Challenge for Cause.

(1) *Examination of Juror*. The court shall, or upon motion, the parties or their attorneys may under the direction of the court, examine on oath a person who is called as a juror in a case to learn whether he is related to either party, has any interest in the case, has expressed or formed an opinion, or is sensible of any bias or prejudice. The objecting party may, with the approval of the court, introduce other competent evidence in support of the objection.

(2) *Examination Upon Extraneous Issues*. The court shall examine or cause a juror to be examined upon issues extraneous to the case if it appears that the juror's impartiality may have been affected by the extraneous issues. The examination may include a brief statement of the facts of the case, to the extent the facts are appropriate and relevant to the issues of such examination, and shall be conducted individually and outside the presence of other persons about to be called or already called as jurors.

(3) *Challenge of Juror*. Either party may challenge an individual prospective juror before the juror is sworn to try the case. The court may for cause shown permit a challenge to be made after the juror is sworn but before any evidence is presented. When a juror is challenged for cause, the ground of the challenge shall be stated. A challenge of a prospective juror and the statement of the grounds thereof may be made at the bench. The court shall determine the validity of each such challenge.

(c) Peremptory Challenges.

(1) *Number of Challenges*. Upon the trial of an indictment for a crime punishable by imprisonment for life, each defendant shall be entitled to twelve peremptory challenges of the jurors called to try the case; in any other criminal case tried before a jury of twelve,

each defendant shall be entitled to four peremptory challenges; and in a case tried before a jury of six, each defendant shall be entitled to two peremptory challenges. Each defendant in a trial of an indictment for a crime punishable by imprisonment for life in which additional jurors are impaneled under subdivision (d) of this rule shall be entitled to one additional peremptory challenge for each additional juror. Each defendant in a case in which several indictments or complaints are consolidated for trial shall be entitled to no more peremptory challenges than the greatest number to which he would have been entitled upon trial of any one of the indictments or complaints alone. In every criminal case the Commonwealth shall be entitled to as many peremptory challenges as equal the whole number to which all the defendants in the case are entitled.

(2) *Time of Challenge*. Peremptory challenges shall be made before the jurors are sworn and may be made after the determination that a person called to serve as a juror stands indifferent in the case. …

…

**Massachusetts Superior Court Rule 6. Jury Selection**

1. Subject to applicable statutes, rules, and controlling authority, the trial judge in each case has discretion to determine a procedure for examining and selecting jurors designed to maintain juror privacy and dignity, identify explicit and implicit bias, and foster efficiency in the session and among sessions using the same jury pool. This rule provides a standard procedure for each civil and criminal case unless otherwise ordered by the trial judge, while permitting attorneys and self-represented parties a fair opportunity to participate in voir dire so as to identify bias.

2. Conference With the Trial Judge

a. In civil cases, unless otherwise ordered, the court shall schedule a final trial conference in accordance with Standing Order 1-88, as may be amended from time to time. In criminal cases, unless otherwise ordered, a final pretrial conference shall be scheduled in accordance with Standing Order 2-86. These conferences with the trial judge shortly before trial serve as the primary opportunity to discuss empanelment, including without limitation: the statement of the case to be read to the venire; the extent of any pre-charge on significant legal principles; the method and content of the judge's intended voir dire of jurors; the method and content of any attorney or party participation in voir dire; judicial approval or disapproval of proposed questions or subject matters; any time limits on attorney or party voir dire; the number of jurors to be seated; any agreement to allow deliberation by fewer jurors if seated jurors are dismissed post-empanelment; the content and method of employing any supplemental juror questionnaire; the number of

peremptories; and the order and timing of the parties' assertions of challenges for cause and peremptory challenges.

b. If the court has not scheduled a final trial conference in a civil case or a final pre-trial conference in a criminal case, any party planning to submit a request, proposal, or motion regarding jury selection should request such a conference or submit a motion requesting voir dire procedures in time for a pretrial ruling by the trial judge. All parties shall avoid proposing jury selection procedures (including attorney/party voir dire) for the first time on the day of trial.

3. Voir Dire by Attorneys and Parties

a. On or before the final trial conference in a civil case or final pre-trial conference in a criminal case, or 5 business days before trial if no such conference is scheduled, the parties shall submit in writing any requests for attorney/party voir dire; motions in limine concerning the method of jury selection; proposed subject matters or questions for inquiry by the parties or trial judge; any proposed supplemental questionnaire; any proposed preliminary legal instructions to the venire or juror panels; the location within the courtroom where jurors and parties will stand or sit during voir dire; and any other matter setting forth the party's position regarding empanelment.

b. The trial judge shall allow attorney or party voir dire if properly requested at or before the time set forth in paragraph 3(a), above. The trial judge may deem any subsequent request for attorney or party voir dire untimely, but may in the judge's discretion allow the request in the absence of prejudice to any other party or significant impact on trial efficiency or on other sessions using the same jury pool.

c. When attorney or party voir dire is allowed, the trial judge shall, at a minimum, allow the attorneys or parties to ask reasonable follow-up questions seeking elaboration or explanation concerning juror responses to the judge's questions, or concerning any written questionnaire. After considering the goals set forth in paragraph 1 above, the trial judge should generally approve a reasonable number of questions that (i) seek factual information about the prospective juror's background and experience pertinent to the issues expected to arise in the case; (ii) may reveal preconceptions or biases relating to the identity of the parties or the nature of the claims or issues expected to arise in the case; (iii) inquire into the prospective jurors' willingness and ability to accept and apply pertinent legal principles as instructed; and (iv) are meant to elicit information on subjects that controlling authority has identified as preferred subjects of inquiry, even if not absolutely required.

d. At the final trial conference in a civil case, or final pre-trial conference in a criminal case (or in a written submission in lieu of such conference), any attorney or party wishing

to inquire into any of the following disfavored subjects must explain how the inquiry is relevant to the issues, may affect the juror's impartiality, or may assist the proper exercise of peremptory challenges:

i. The juror's political views, voting patterns or party preferences;

ii. The juror's religious beliefs or affiliation.

e. Counsel and Parties May Not Ask:

i. Questions framed in terms of how the juror would decide this case (prejudgment), including hypotheticals that are close/specific to the facts of this case (any hypotheticals that may trigger this rule must be presented to the judge before trial).

ii. Questions that seek to commit juror(s) to a result, including, without limitation, questions about what evidence would cause the juror(s) to find for the attorney's client or the party.

iii. Questions having no substantial purpose other than to argue an attorney's or party's case or indoctrinate any juror(s).

iv. Questions about the outcome in prior cases where the person has served as a juror, including the prior vote(s) of the juror or the verdict of the entire jury.

v. Questions in the presence of other jurors that specifically reference what is written on a particular juror's confidential juror questionnaire.

f. The trial judge may impose reasonable restrictions on the subject matter, time, or method of attorney or party voir dire and shall so inform the attorneys or parties before empanelment begins.

g. In approving or disapproving voir dire questions and procedures, the trial judge, on request, should consider whether questions or methods proposed by the attorneys or parties may assist in identifying explicit or implicit bias.

h. If employing panel voir dire, the trial judge shall determine the procedure and may elect to follow the method set forth in Addendum A or adopt variations thereof. The trial judge may also elect to use some of the methods set forth in Addendum A even if not employing panel voir dire. Nothing in Appendix A restricts the trial judge from selecting an alternative method of voir dire, including but not limited to:

i. Filling empty seats as they arise due to challenges for cause or the exercise of peremptories. The trial judge may do this by clearing additional prospective jurors or filling in from additional already cleared jurors;

ii. The "Walker method"': Through panel voir dire or otherwise, the trial judge may

clear as indifferent a number of prospective jurors that equals or exceeds the total number of jurors needed, plus alternates, plus the total number of peremptory challenges held by the parties. *See Commonwealth v. Walker*, 379 Mass. 297, 299 n.1 (1979). *But see Commonwealth v. Johnson*, 417 Mass. 498, 507-508 (1994).

4. Empanelment

a. The trial judge shall ask all voir dire questions specifically required by statute, court rule, or controlling authority, but retains discretion as to when and how to do so. The trial judge may allow individual voir dire, panel voir dire, or any combination.

b. Questioning shall occur through individual voir dire if (i) required by statute, rule, or controlling authority; (ii) inquiry concerns private or potentially embarrassing information; or (iii) questioning would specifically reference what is written on a particular juror's confidential juror questionnaire.

c. The trial judge should consider some individual voir dire in all cases to (i) determine whether any juror has an impediment concerning hearing, language or visual ability, mental health, or comprehension and to determine whether a reasonable accommodation would enable the juror to serve; (ii) address any private or embarrassing information not disclosed in public portions of the voir dire; or (iii) identify any other impediment to jury service that the trial judge and parties might not observe without personal contact with the juror.

d. Attorneys and parties shall limit their questioning of any juror(s) to such subject matters and methods as previously approved by the trial judge and shall avoid questions set forth in paragraph 3(e) above, even as follow-up, without court approval.

e. *Questions about the Law*

i. If the parties have obtained approval to ask voir dire questions about the law, the trial judge shall take appropriate measures to ensure that the jury is accurately and effectively instructed on the law. Such measures may include, but are not limited to: a brief pre-charge; requiring the questioner to use the words specifically approved by the judge; stating the law in a written supplemental questionnaire; or contemporaneous instructions by the trial judge at the time the question is asked.

ii. If a juror asks counsel a question to clarify an aspect of the law, counsel shall request that the trial judge answer the question; the trial judge may interrupt if counsel attempts to respond to a juror question by instructing on such a point of law.

f. Any party may object to a question posed by another party by stating "objection," without elaboration or argument. The trial judge may rule on the objection in, or outside of, the juror's presence. The trial judge may, on the judge's own motion, strike or rephrase a party's question and may interrupt or supplement a party's questioning to provide the

juror(s) with an explanation of the law or the jury trial process, or to ask any additional questions that the trial judge believes will assist the trial judge in determining the juror's impartiality.

g. Counsel and the parties must ensure an accurate record of attorney or party voir dire. In an electronically recorded courtroom, counsel must stand near a microphone at all times. During panel voir dire in any courtroom, counsel must also call out the juror seat number (or juror number) of any individual juror who is questioned individually or who responds audibly. Failure to do so may constitute a waiver of any claim of error arising from any inaudible or unattributable portions of the record.

h. *Challenges for Cause*

i. The court will consider all its observations, including the juror's responses, to determine whether or not the juror will be fair, focus on the facts of the case and follow the law despite a particular viewpoint or experience.

ii. Whether at side bar or during panel inquiry, a juror's "yes" or "no" answer to a question about a viewpoint or experience may not, by itself, support a challenge for cause. If intending to challenge a juror for cause as a result of attorney or party voir dire, the questioner ordinarily should lay an adequate foundation showing that, in light of the information or viewpoint expressed, the juror may not be fair and impartial and decide the case solely on the facts and law presented at trial. The court may inquire further or may decide without further questioning, if the judge believes that the existing record is sufficient to resolve the challenge for cause.

i. *Peremptory Challenges*

i. After the trial judge finds that each juror stands indifferent, the parties shall exercise their peremptory challenges. The trial judge may require exercise of peremptory challenges after completion of side bar inquiry of an individual juror, after filling the jury box with jurors found to stand indifferent, or at some other time after the trial judge's finding of indifference.

ii. If the trial judge does not expressly rule on a juror's bias or impartiality, the trial judge's direction for the parties to exercise peremptory challenges constitutes an implicit finding that the juror stands indifferent. On request, made after the trial judge's direction but before exercise of a peremptory challenge, the trial judge shall make an explicit finding as to the juror's impartiality.

…

## ADDENDUM A

## SAMPLE PANEL VOIR DIRE PROTOCOL

1. Pretrial

The trial judge may permit counsel or self-represented parties to question jurors as a group, in a so-called "panel voir dire" procedure. Any attorney or self-represented party who seeks to examine the prospective jurors in panel format shall serve and file a motion requesting leave to do so in accordance with Superior Court Rule 6(3)(a). The motion shall identify generally the topics the moving party proposes to ask the prospective jurors and shall state whether each topic is for individual voir dire or for a panel of jurors. The trial judge may, in the exercise of discretion, require attorneys and self-represented parties to submit the specific language of the proposed questions for pre-approval. The motion and any responsive filing shall also include any proposed language for brief preliminary instructions on principles of law to be given pursuant to paragraph 2(b) below.

2. Initial Stages of Empanelment

Before any questioning of a juror panel by attorneys or self-represented parties, or at such other time as the trial judge deems most appropriate, the trial judge shall:

(a) provide the venire with a brief description of the case, including the nature of the facts alleged and of the claims or charges, including the date and location of the pertinent alleged event(s), and the identity of persons or entities significantly involved;

(b) provide the venire with brief, preliminary instructions on significant legal principles pertinent to the case. Such instructions should include a brief recitation of: the burden and standard of proof: the elements of at least the primary civil claim or at least the most serious criminal charge; if appropriate to the case and requested by counsel or a self-represented party, the elements of any affirmative defense that will be presented to the jury; and, in criminal cases, the defendant's right not to testify or to present any evidence;

(c) explain the empanelment process, describe the nature and topics of the questions that will be posed during panel examination, and inform the jurors that any juror who finds either a particular question or the process of questioning by attorneys or self-represented parties intrusive on the juror's privacy may request that steps be taken to protect the privacy of any information disclosed;

(d) ask all questions required by statute or case law, and any additional questions the trial judge deems appropriate in light of the nature of the case and the issues expected to be raised;

(e) if not previously established, inform the parties of any reasonable time limit the trial judge has set for examination of each panel of prospective jurors by attorneys or self-represented parties, giving due regard to (i) the objective of identifying bias in fairness to all parties; (ii) the interests of the public and of the parties in reasonable expedition, in proportion to the nature and seriousness of the case and the extent of the anticipated

evidence; and (iii) the needs of cases scheduled in other sessions drawing on the same jury pool for access to prospective jurors;

(f) ask the clerk to direct into the jury box any juror who appears impartial, based upon initial questioning of the venire and individual voir dire, if any. The trial judge has discretion to seat a juror on a voir dire panel without making a preliminary determination of impartiality.

3. Panel Examination

(a) As the jury box is filled, and prior to any panel questioning, the clerk shall read into the record which juror, identified by juror number, is seated in which numbered seat in the jury box. All attorneys and self-represented parties at the trial are responsible for correcting any misstatement as to juror numbers and seat numbers being read for the record.

(b) If the trial judge has not already done so, he or she shall remind the jurors that during such questioning, if any juror seeks, due to privacy concerns, to respond to a question outside the presence of other jurors, the juror may alert the judge to that request.

(c) Upon request, the trial judge may permit each party to make a brief introductory statement to the venire limited to explaining the process and purpose of the questioning of jurors by attorneys or self-represented parties. During the introductory statement and subsequent questioning, counsel shall not refer to his or her own personal circumstances, personal history, or family, even by way of example. Any examples of what may or may not make a juror biased shall be phrased hypothetically.

(d) The parties shall then proceed with the panel portion of questioning. Parties with the burden of proof shall conduct their questioning first. In cases with multiple parties on a side, the parties on each side shall agree as to an order in which to proceed, In the absence of agreement, the judge shall assign an order. The attorney or party may pose questions to the entire panel, or to individual members.

(e) The trial judge and the attorneys participating shall at all times during panel questioning take reasonable steps to ensure that the identity of each juror speaking is adequately maintained on the record, by reference to juror number or seat number. In particular:

i. In an electronically recorded courtroom, the attorney or party shall stand near a microphone; and

ii. When posing questions to, or receiving a response from, any specific juror(s), the attorney or party must identify each such juror(s) by juror seat number (or, less ideally, by juror number). They shall not refer to any juror by name.

(f) The trial judge may intervene at any time to ensure an accurate record (including recording of seat numbers of jurors who respond to questions), to clarify or instruct on a point of law, or to ensure that panel voir dire proceeds in an orderly, fair, and efficient

manner.

(g) The trial judge may at any time bring an individual juror to sidebar for questioning out of the hearing of other jurors about any potential bias revealed by panel questioning. If a juror is brought to sidebar, the judge may direct all other parties to do their own questioning on the same subject matter at that time to avoid a need to return to sidebar for later questioning on that subject matter. If the juror's responses to such questioning at sidebar result in a challenge for cause, the judge may rule on the challenge at that time or at the conclusion of all panel questioning. If time limits on panel questioning have been set, the judge may decide whether to exclude all or part of the time spent at side bar from the questioning party's time.

(h) Any party may object to a question posed by another party by stating "objection," without elaboration or argument. The judge may rule on the objection in the presence of the juror or jurors, or may hear argument and rule on the objection outside the presence or hearing of the juror or jurors.

(i) Unless the judge specifically allows, there shall be no follow-up questioning of a panel by attorneys or self-represented parties once each has taken his or her turn.

4. Challenges for Cause and Peremptories

(a) After panel examination by all parties, the trial judge shall hear any further challenges for cause as to any panel members at sidebar.

(b) Unless the trial judge decides to postpone exercise of peremptories until after voir dire of additional panels, the parties shall then exercise at sidebar any peremptory challenges they have as to any jurors remaining on the panel. The party with the burden shall proceed first, using all peremptories the party seeks to use with that panel. All other parties shall then proceed, using all peremptories each seeks to use with that panel. In civil cases, the judge may alternate sides. The jurors remaining after challenge shall then be directed to a separate location, usually outside the courtroom.

(c) Upon any challenge for cause, the judge may ask additional questions, with or without further instructions on the law, and may allow opposing counsel further opportunity to question the juror.

5. Additional Panels of Jurors

The same procedures shall apply for all subsequent panels required to seat a full jury, except:

(a) the judge may seat a different number of jurors in a subsequent panel;

(b) the judge may allow a different amount of time for attorney or party voir dire of second

and subsequent panels;

(c) if, after the final panel, more than the necessary number of jurors have been declared indifferent and remain unchallenged at the conclusion of those procedures, the jurors shall be seated for trial in the order in which they were originally seated for panel questioning (generally in order of juror number), and the remaining jurors shall be excused; and

(d) the judge has discretion to vary panel voir dire procedures after the first panel in any lawful manner the judge deems fair and efficient.

## Mass. Guide to Evidence §801

(c) Hearsay

"Hearsay" means a statement that

(1) the declarant does not make while testifying at the current trial or hearing, and
(2) a party offers in evidence to prove the truth of the matter asserted in the statement.

2015 WL 5159279
Only the Westlaw citation is currently available.
United States District Court, C.D. California.

Adrian GARCIA, Petitioner,
v.
Suzanne M. PEERY, Acting Warden,[1] Respondent.

Case No. EDCV 12–01641–JGB (DTB)
|
Signed July 8, 2015

**Attorneys and Law Firms**

Adrian Garcia, Susanville, CA, pro se.

Susan E. Miller, CAAG–Office of Attorney General, San Diego, CA, for Respondent.

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

THE HONORABLE DAVID T. BRISTOW, UNITED STATES MAGISTRATE JUDGE

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

## PROCEEDINGS

On September 27, 2012, petitioner filed a Petition for Writ of Habeas Corpus by a Person in State Custody ("Pet.") herein, along with a supporting attachment ("Pet.Att.") and exhibits. On October 10, 2012, the Court issued an Order to Show Cause because it was unclear to the Court whether petitioner had exhausted his available state remedies. On November 7, 2012, petitioner filed a Response thereto, and on November 16, 2012, the Court issued an Order Requiring Response to Petition.

In accordance with the Court's Order Requiring Response to Petition, and after one extension of time, respondent filed a Motion to Dismiss Petition for Writ of Habeas Corpus ("Motion") on January 15, 2013, on the basis that the Petition was untimely. On August 22, 2013, the Court issued its Report and Recommendation, wherein it recommended granting respondent's Motion to Dismiss to the extent it sought dismissal of Grounds One through Six of the Petition with prejudice because the claims were time-barred; denying respondent's Motion to Dismiss with respect to Ground Seven of the Petition; and ordering respondent to serve and file an Answer addressing the merits of Ground Seven. On December 27, 2013, the District Court accepted the findings, conclusions, and recommendations of the Magistrate Judge.

On February 14, 2014, respondent filed an Answer to Petition for Writ of Habeas Corpus. On April 14, 2014, after two extensions of time, petitioner filed his Traverse ("Trav.").

Thus, this matter is now ready for decision. For the reasons discussed hereafter, the Court recommends that the Petition be denied.

## PROCEDURAL HISTORY

On July 31, 2008, a Riverside County jury found petitioner guilty of one count of willful, deliberate, and premeditated attempted murder, one count of being an active participant in a criminal street gang, and one count of being a convicted felon in possession of a gun. The jury also found true various sentence enhancement allegations regarding the discharge of a firearm and that the attempted murder was committed for the benefit of, or at the direction of, or in association with a criminal street gang with the specific intent to promote, further, or assist in any criminal conduct by gang members. (2 Clerk's Transcript on Appeal ["CT"] 342–48.) On October 3, 2008, the trial court sentenced petitioner to state prison for life with the possibility of parole, plus a consecutive indeterminate term of 25 years-to-life and a consecutive term of 10 years. (2 CT 427–29; 9 Reporter's Transcript on Appeal ["RT"] 1883–84.)

On or about August 21, 2009, petitioner appealed his conviction and sentence to the California Court of Appeal. (Respondent's Notice of Lodgment ["Lodgment"] No. 3.) In an unpublished decision issued on June 30, 2010, the court of appeal modified the judgment to strike the 10–year enhancement and imposed in its place a 15–year parole eligibility minimum and affirmed the judgment in all other respects. (Lodgment No. 5.) Petitioner's ensuing Petition for Review to the California Supreme Court was denied on October 20, 2010, without comment or citation to authority. (Lodgment Nos. 6, 7.)

***2** On January 13, 2012, petitioner filed a petition for writ of habeas corpus in the California Court of Appeal.

(Lodgment Nos. 8, 10.) The petition was apparently re-filed on January 30, 2012, and the court of appeal denied the petition on February 9, 2012, with citations to *In re Steele,* 32 Cal.4th 682, 692, 10 Cal.Rptr.3d 536 (2004) (explaining that petitioner indicated that he had not pursued relief in the superior court) and *People v. Duvall,* 9 Cal.4th 464, 474, 37 Cal.Rptr.2d 259 (1995) (explaining that petitioner failed to include any supporting documentation). *(Id.)* On March 9, 2012, petitioner filed a habeas petition in the California Supreme Court, which was denied on June 20, 2012, without comment or citation to authority. (Lodgment Nos. 12, 14.)

Meanwhile, petitioner began a second round of collateral review in the state courts. On May 30, 2012, petitioner filed a habeas petition in the Riverside County Superior Court, which was denied on June 25, 2012, with citation to *In re Clark,* 5 Cal.4th 750, 765, 21 Cal.Rptr.2d 509 (1993) (explaining that the issues raised in the petition could have been, but were not raised in an appeal, and no excuse for failing to do so was demonstrated).[2] (Lodgment Nos. 13, 15.) On July 31, 2012, petitioner filed a habeas petition in the California Court of Appeal, which was denied on August 13, 2012, without comment or citation to authority. (Lodgment Nos. 16, 17.) On August 17, 2012, petitioner filed a habeas petition in the California Supreme Court, which was denied on October 31, 2012, with citation to *In re Miller,* 17 Cal.2d 734, 735 (1941).[3] (Lodgment Nos. 18, 19.)

## SUMMARY OF THE EVIDENCE PRESENTED AT TRIAL

Since petitioner is not challenging the sufficiency of the evidence to support his convictions, the following summary is taken from the "Factual Background" section of the California Court of Appeal opinion (Lodgment No. 5 at 3–10):[4]

> *On July 1, 2005, 18–year–old Joseph Flowers, an African American, was walking home with his Hispanic friend, Daniel Ayala, by Dario Vasquez Park (Vasquez Park), an area in Riverside, California "claimed" by the predominately Hispanic gang East Side Riva (ESR). As they did so, they noticed a silver car driving by the park stop in the middle of the street. At the same time, Flowers saw an Hispanic male spray painting gang letters on the park's wall nearby. The Hispanic male driver of the car asked Flowers and Ayala, "Do you guys gangbang?" When they told him they did not, the man said, "Yeah, you better not." The car then sped away. [¶] As Flowers and Ayala continued walking on the sidewalk past Vasquez Park, they saw the silver car make a u-turn, come back to the park near them, and six or seven Hispanic men get out of the car. The men ran at Flowers and Ayala, swinging their fists and a fight ensued. According to Flowers, he and Ayala "won" the fight and the men got back into their car and drove away, yelling "ESR." [¶] Two weeks later, on July 14, 2005, while Flowers talked on his cell phone as he sat waiting for Ayala and another friend near Vasquez Park, he saw the same silver car driving slowly by with two Hispanic males inside. The passenger made some gang hand gestures as the car past by Flowers. The car then made a quick u-turn and drove back to where Flowers was sitting, pulling up to the curb with the passenger side of the car facing him. Flowers thought he recognized the man sitting in the passenger seat from the earlier fight. [¶] The two men then got out of the car. When the driver approached Flowers, he threw a shoe at him. Flowers, who was alone and unarmed, ducked to avoid being hit. Although there were no words exchanged, Flowers believed the men were going to fight him and tried to get Ayala and his friend's attention who were then about 20 feet away. As Flowers backed away quickly, he heard the driver say to the passenger, "Just shoot 'em." The passenger then pulled out a revolver and fired four or five shots at Flowers, hitting him, in the hand and upper thigh. The two men then sped away in the silver car. [¶] Ayala and several witnesses immediately called 911 about the shooting. Ayala and another witness reported that the getaway car occupied by the two Hispanic males was a silver or gray Honda, and one*

*of the callers, who was following the car from the shooting scene but would not identify herself, reported that the car was a silver or gray Mitsubishi with license plate number 4KCM456. When one of the Riverside police officers who received the information from dispatch ran the license number through the DMV database, it came back as being registered to a Lexus whose owner resided in a city distant from Riverside. Believing that the caller might have mistaken the C for a Q, the officer again checked the database for license plate number 4KQM456, which came back as being registered to a silver Mitsubishi owned by Vanessa Montanez, who resided in Corona, a city closer to Riverside. This information was passed on to the detective in charge of the shooting investigation. [¶] Meanwhile, other officers who responded to the shooting scene took statements from several witnesses and another officer interviewed Flowers at the hospital about the incident. Flowers described the man who shot him as an 18 year old, 5'7" tall Hispanic male, weighing about 164 pounds, with a mustache, slicked back black hair and wearing a white tank top and jeans. Flowers believed the driver was an older Hispanic male and the car was a silver four-door Honda Civic. Flowers also told the officer about the earlier fight and his belief the same Honda and men were involved in that earlier incident. [¶] On July 21, 2005, Riverside Police Detective Scott Impola and another police detective set up surveillance of the Corona residence discovered in the earlier DMV check after observing a silver Mitsubishi, "that looked a lot like a Honda Accord," with license plate number 4KQM456, parked in front. Subsequently, the detectives saw Montanez, two young children, and a male Hispanic fitting "almost exactly" the description of one of the suspects get into the car and drive off. Impola contacted a unit of uniformed officers to follow the car. When the officers noticed that one of the rear brake lights on the Mitsubishi was not working, they conducted a traffic stop, telling Montanez and the man in the car that they were being pulled over for the traffic violation. The man initially told the officers his name was John Chagolla, but then told them he was [petitioner] and admitted he had given a false name and incorrect birth date because he knew there was a felony warrant out for his arrest. [¶] After the officers told Montanez and [petitioner] that they were investigating an attempted murder and Montanez's car was towed, the officers took the couple and the children back to Montanez's house where they met up with Impola. When they arrived, Montanez and her mother, who also lived there, gave the officers and Impola permission to enter. Montanez, who identified herself as [petitioner's] girlfriend and the mother of his child, told the officers that she had loaned her car to [petitioner] on the day Flowers was shot. When Impola showed Montanez a silver Smith and Wesson revolver with a black rubber grip, Montanez indicated she had seen [petitioner] with the gun six months before. [¶] After [petitioner's] arrest that day, the police created several six-pack photographic lineups, one of which included his photograph. Flowers was subsequently shown the lineups and positively identified [petitioner's] photograph as the shooter. Stephanie Perez, who was in Vasquez Park with her boyfriend at the time of the shooting, also identified [petitioner's] photograph as the shooter in one of the lineups. [¶] At trial, in addition to the above evidence, the prosecution introduced [petitioner's] booking information, which showed he was 5'6" tall and weighed 165 pounds on the day he was arrested. Flowers and Perez both identified [petitioner] at trial as the shooter. Both Perez and Montanez testified that [petitioner] was wearing a white "wife beater" t-shirt and jeans on the day of the shooting,*

*which was consistent with Flowers's original description of the shooter's attire. Perez also identified a photograph of Montanez's silver Mitsubishi as similar to the car she had seen driving away after the shooting. In her testimony, Montanez confirmed that [petitioner] had tattoos on his back saying Riva Side, but claimed they referred to the area he lived in and not to any gang. Montanez denied she had ever seen [petitioner] with a gun or had told detectives that she had seen him with one six months earlier. [¶] Besides Impola testifying about the investigation and the fact that a Honda Accord owned by one of the detectives looked the same as Montanez's Mitsubishi, he testified as a gang expert, explaining about the ESR, which is one of the oldest and largest Hispanic street gangs in Riverside. Impola noted that Vasquez Park, where the shooting occurred, was in ESR gang territory and that the gang's primary criminal activities included violent assaults, methamphetamine sales, and robberies. He also explained that violent assaults by the ESR were frequently committed against African Americans in general and specifically against members of the rival predominately African American Crips gang that often resulted in homicides. Impola was familiar with several members of the ESR who had been convicted of attempted murder against African Americans and had been found to have committed those crimes for the benefit of a criminal street gang. [¶] Impola testified he had contacted [petitioner] on prior occasions, including arresting him previously with other ESR gang members. Based on these contacts and arrest, and on [petitioner's] prior admissions that he was a gang member, his association with other ESR gang members, his presence in ESR gang territory, his gang tattoo, and gang paraphernalia found in his house, Impola opined that [petitioner] was a member of the ESR gang. [¶] Impola noted that during a search of [petitioner's] jail cell, he found letters addressed to [petitioner] from ESR gang members containing ESR gang symbols and phrases and referring to other ESR gang members. Impola also found drawings of gang symbols in [petitioner's] cell, a photograph of another ESR gang member, and an address book containing the names and phone numbers of documented ESR gang members. Copies of the police reports related to this case were also found in [petitioner's] cell. Impola noticed that the addresses of the victims and witnesses had not been properly redacted on those reports and noted that Flowers had expressed concern to police about gang members driving by his house. [¶] Impola further noted that while [petitioner] was in custody he had obtained new tattoos of the letters R and C on his calves, which referred to Riverside County. Impola explained that it was typical for gang members to have such tattoos and that they showed ongoing gang membership and activity. Based on a hypothetical involving the same facts as those in the present case, Impola opined that the charged crimes by [petitioner] were committed for the benefit of a criminal street gang. [¶] The Riverside detective who had created the photographic lineups also testified that he had had previous contact with [petitioner] in 2003 when he was part of the gang unit and that during the field interview [petitioner] had admitted he was an ESR gang member. Riverside Police Detective Gary Toussaint further testified that he was at the house with Impola when Montanez had been shown a chrome revolver and had identified it as looking like the one she saw [petitioner] with six months before either at his house or his aunt's house. [¶] Defense Case [¶] [Petitioner] called numerous witnesses in support of his defense of mistaken identity and to show he was not a member of any criminal street gang. In addition, [petitioner] presented an eyewitness*

*identification expert who opined the identifications in this case, made three years after the crime, were highly unreliable. [Petitioner] also called Montanez's mother to testify about the entry and search of her home; called several family members to discuss gangs in Riverside; and called Perez's boyfriend, Flowers's friend Ayala, and a defense investigator regarding the inability of any witness to identify [petitioner] as the shooter in Vasquez Park on July 14, 2005. [¶] Perez had told the defense investigator that she had not been sure of her identification when shown the photographic lineups, but that she had pointed out two photos that appeared familiar to her. Although Perez's boyfriend had told the investigator he had never identified anyone from the shooting and testified he had not been able to pick out anyone in the photos shown to him by police, he identified [petitioner] as the shooter in court. Under further questioning, Perez's boyfriend said he was not sure of his identification because [petitioner] looked different now even though he still had the same green eyes as the shooter. Perez's boyfriend was certain that the photograph of the car entered as an exhibit was the same "Honda" he had seen at the shooting scene. [¶] Ayala testified he had never been in a fight with [petitioner] and had not seen the shooter's face because his back was to him when Flowers was shot. After admitting that he did not want to be in court testifying, Ayala noted he had seen the man who had been with the shooter two or three times since the incident. Ayala said the man, the driver, tried to threaten him, had come by his house twice and had told him not to come to court. On cross-examination, Ayala said that several people, including the driver, had told him not to identify [petitioner] in court. He believed he had been told not to do so at least six times. On cross, Ayala also conceded he had told the police that he had fought with the men in the car before the shooting, but would not say that he had ever fought with the shooter. [¶] Eddie Joe Chagolla, a former gang member and distant cousin of [petitioner's], who was now a counselor for a continuation high school that worked closely with law enforcement to assist youths in getting out of gangs in Riverside, testified that [petitioner's] father, who was a gang member, had been shot and killed in 1991 by a Riverside police officer. Chagolla explained his expertise in Riverside Hispanic gangs and opined that [petitioner] was not a gang member in 2005. He disputed Impola's testimony that ESR is a criminal street gang, testifying it was merely an area where people grew up and their tattoos identified their neighborhoods. Chagolla noted that gangs sometimes commit criminal acts that do not benefit the gang. On cross-examination, Chagolla conceded that if a person has "self-admitted" to being a gang member, that that would present "a whole different story." [¶] Another cousin of [petitioner's] testified he had been accused of being a street gang member by Riverside police officers numerous times even though he was not a gang member. Between 2002 through 2005, he had never seen [petitioner] in the company of any gang members.*

**PETITIONER'S CLAIM HEREIN**

***3** Appellate counsel rendered ineffective assistance by failing to raise the following claims on direct appeal: (1) Judicial bias during voir dire; (2) the Information failed to provide petitioner with proper notice of the gang enhancement; (3) the trial court denied petitioner's right to a fair trial and due process by failing to grant his motion for mistrial; (4) petitioner was denied his right to a resentencing hearing; (5) the expert gang testimony constituted junk science; and (6) petitioner was denied his confrontation rights. (Pet. at 19–20; *see generally* Pet. Att.)[5]

**STANDARD OF REVIEW**

The standard of review applicable to petitioner's claims herein is set forth in 28 U.S.C. § 2254(d), as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (the "AEDPA"):

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Under the AEDPA, the "clearly established Federal law" that controls federal habeas review of state court decisions consists of holdings (as opposed to dicta) of Supreme Court decisions "as of the time of the relevant state-court decision." *Williams v. Taylor,* 529 U.S. 362, 412, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000); *see also Howes v. Fields,* 565 U.S. ——, 132 S.Ct. 1181, 1187, 182 L.Ed.2d 17 (2012); *Greene v. Fisher,* 565 U.S. ——, 132 S.Ct. 38, 44, 181 L.Ed.2d 336 (2011); *Carey v. Musladin,* 549 U.S. 70, 74, 127 S.Ct. 649, 166 L.Ed.2d 482 (2006).

Although a particular state court decision may be "contrary to" and "an unreasonable application of" controlling Supreme Court law, the two phrases have distinct meanings. *Williams,* 529 U.S. at 391, 413. A state court decision is "contrary to" clearly established federal law if the decision either applies a rule that contradicts the governing Supreme Court law, or reaches a result that differs from the result the Supreme Court reached on "materially indistinguishable" facts. *Brown v. Payton,* 544 U.S. 133, 141, 125 S.Ct. 1432, 161 L.Ed.2d 334 (2005); *Early v. Packer,* 537 U.S. 3, 8, 123 S.Ct. 362, 154 L.Ed.2d 263 (2002) (per curiam); *Williams,* 529 U.S. at 405–06. When a state court decision adjudicating a claim is contrary to controlling Supreme Court law, the reviewing federal habeas court is "unconstrained by § 2254(d)(1)." *Williams,* 529 U.S. at 406. However, the state court need not cite or even be aware of the controlling Supreme Court cases, "so long as neither the reasoning nor the result of the state-court decision contradicts them." *Packer,* 537 U.S. at 8.

State court decisions that are not "contrary to" Supreme Court law may only be set aside on federal habeas review "if they are not merely erroneous, but 'an *unreasonable* application' of clearly established federal law, or based on 'an *unreasonable* determination of the facts.' " *Packer,* 537 U.S. at 11 (citing 28 U.S.C. § 2254(d) and adding emphasis). A state court decision that correctly identified the governing legal rule may be rejected if it unreasonably applied the rule to the facts of a particular case. *See Williams,* 529 U.S. at 406–10, 413 (e.g., the rejected decision may state *Strickland* rule correctly but apply it unreasonably); *Woodford v. Visciotti,* 537 U.S. 19, 24–27, 123 S.Ct. 357, 154 L.Ed.2d 279 (2002) (per curiam). However, to obtain federal habeas relief for such an "unreasonable application," a petitioner must show that the state court's application of Supreme Court law was "objectively unreasonable." *Visciotti,* 537 U.S. at 24–27; *Williams,* 529 U.S. at 413. An "unreasonable application" is different from an erroneous or incorrect one. *See Williams,* 529 U.S. at 409–11; *see also Visciotti,* 537 U.S. at 25; *Bell v. Cone,* 535 U.S. 685, 699, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002). "To obtain habeas corpus relief from a federal court, a state prisoner must show that the challenged state-court ruling rested on 'an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.' " *Metrish v. Lancaster,* 569 U.S. ——, 133 S.Ct. 1781, 1786–87, 185 L.Ed.2d 988 (2013) (quoting *Harrington v. Richter,* 562 U.S. 86, 131 S.Ct. 770, 786–87, 178 L.Ed.2d 624 (2011)). Moreover, as the Supreme Court recently held in *Cullen v. Pinholster,* 563 U.S. ——, 131 S.Ct. 1388, 1398, 179 L.Ed.2d 557 (2011), review of state court decisions under § 2254(d)(1) "is limited to the record that was before the state court that adjudicated the claim on the merits."

***4** In *Richter,* 562 U.S. at 99, the Supreme Court held that a summary denial order will be presumed to be a merits determination "in the absence of any indication or state-law procedural principles to the contrary." The Supreme Court further held that the AEDPA standard of review applies to such summary denial orders. *See id.* at 98.[6] "Where a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief." *Id.; see also Pinholster,* 131 S.Ct. at 1402 ("Section 2254(d) applies even where there has been a summary denial."). "A habeas court must determine what arguments or theories could have supported the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." *Pinholster,* 131 S.Ct. at 1402 (quoting *Richter,* 562 U.S. at 102 (internal quotation marks and alterations omitted)). As such, "when the state court does not supply reasoning for its decision," the federal court must conduct

an "independent review of the record and ascertain whether the state court's decision was objectively unreasonable." *Walker v. Martel,* 709 F.3d 925, 939 (9th Cir.2013) (internal quotation marks and citation omitted); *see also Murray v. Schriro,* 745 F.3d 984, 996 (9th Cir.2014).

Here, petitioner raised his ineffective assistance of appellate counsel claim in his state habeas petitions, which were denied on procedural grounds. *(See* Lodgment Nos. 8, 19.)[7] When the state courts deny habeas claims on procedural grounds and do not reach the merits, the Court must review the claims *de novo* rather than under the AEDPA's deferential standard. *See Cone v. Bell,* 556 U.S. 449, 472, 129 S.Ct. 1769, 173 L.Ed.2d 701 (2009); *Reynoso v. Giurbino,* 462 F.3d 1099, 1109 (9th Cir.2006) ("When it is clear, however, that the state court has not decided an issue, we review that question *de novo*."); *see also Sherwood v. Sherman,* No. ED CV 11–1728–CJC (PLA), 2015 WL 1564857, at *5 (C.D.Cal. Apr. 7, 2015) (reviewing claims under a *de novo* standard of review where the California Supreme Court denied the state habeas petition with citations to *Duvall* and *In re Swain,* 34 Cal.2d 300, 304 (1949)), *appeal filed* (Apr. 29, 2015) (No. 15–55659); *Mitchell v. Martel,* No. 10–cv–0963 GPC (DHB), 2014 WL 1912592, at *7 (S.D.Cal. May 13, 2014) ("[C]ourts have found AEDPA's deferential standard inapplicable where the state court denied the petition with citations to *Swain* and *Duvall."*); *Lopez v. Valenzuela,* No. CV 13–3337–JFW (MAN), 2014 WL 994927, at *4 (C.D.Cal. Mar. 13, 2014) (applying *de novo* review because claims were denied by state supreme court under *Duvall), appeal filed* (Apr. 23, 2014) (No. 14–55655); *Bey v. Tampkins,* No. CV 13–1356–ABC (JPR), 2014 WL 334481, at *8 (C.D.Cal. Jan. 29, 2014) (applying *de novo* review to claims denied by state court decision citing *Swain* and *Duvall)*; *Cole v. McDonald,* No. CV 10–9742–JVS (PLA), 2012 WL 3029777, at *5 (C.D.Cal. Jun. 12, 2012) (same), *Report and Recommendation adopted* by 2012 WL 3030224 (Jul. 23, 2012).

## DISCUSSION

### I. *Petitioner is not entitled to habeas relief on his ineffective assistance of appellate counsel claim.*

***5** Petitioner contends that his counsel provided ineffective assistance by failing to raise the following claims on appeal: (1) Judicial bias during voir dire; (2) the Information failed to provide him with proper notice of the gang enhancement; (3) the trial court denied petitioner's right to a fair trial and due process by failing to grant his motion for mistrial; (4) petitioner was denied his right to a resentencing hearing; (5) the expert gang testimony constituted junk science; and (6) petitioner was denied his confrontation rights. (Pet. at 19–20, *see generally* Pet. Att.)

A. *Applicable legal authority*

In *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the Supreme Court held that there are two components to an ineffective assistance of counsel claim: "[D]eficient performance" and "prejudice."

"Deficient performance" in this context means unreasonable representation falling below professional norms prevailing at the time of trial. *Strickland,* 466 U.S. at 688–89. To show "deficient performance," petitioner must overcome a "strong presumption" that his lawyer "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 689–90. Further, petitioner "must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." *Id.* at 690. The Court must then "determine whether, in light of all the circumstances, the identified acts or omissions were outside the range of professionally competent assistance." *Id.* The Supreme Court in *Strickland* recognized that "it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Id.* at 689. Accordingly, to overturn the strong presumption of adequate assistance, petitioner must demonstrate that "the challenged action cannot reasonably be considered sound trial strategy under the circumstances of the case." *Lord v. Wood,* 184 F.3d 1083, 1085 (9th Cir.1999).[8]

To meet his burden of showing the distinctive kind of "prejudice" required by *Strickland,* petitioner must affirmatively "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland,* 466 U.S. at 694; *see also Lockhart v. Fretwell,* 506 U.S. 364, 372, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993) (noting that the "prejudice" component "focuses on the question whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair").

In *Richter,* the Supreme Court reiterated that the AEDPA requires an additional level of deference to a state court decision rejecting an ineffective assistance of counsel claim. "The pivotal question is whether the state court's application of the *Strickland* standard was unreasonable. This is different from asking whether defense counsel's performance fell below *Strickland's* standard." *Richter,* 562 U.S. at 101. "Under § 2254(d), a habeas court must determine what arguments or theories supported or ... could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." *Id.* at 102. As the Supreme Court observed in *Richter (id.* at 105):

> ***6** "Surmounting *Strickland's* high bar is never an easy task." Padilla v. Kentucky, 559 U.S. ——, ——, 130

S.Ct. 1473, 1485, 176 L.Ed. 2d 284 (2010). An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the *Strickland* standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. *Strickland,* 466 U.S., at 689–690, 104 S.Ct. 2052. Even under *de novo* review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is "all too tempting" to "second-guess counsel's assistance after conviction or adverse sentence." *Id.,* at 689, 104 S.Ct. 2052; see also *Bell v. Cone,* 535 U.S. 685, 702, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002); *Lockhart v. Fretwell,* 506 U.S. 364, 372, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993). The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom. Strickland, 466 U.S., at 690, 104 S.Ct. 2052.

Establishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult. The standards created by *Strickland* and § 2254(d) are both "highly deferential," *id.,* at 689, 104 S.Ct. 2052; *Lindh v. Murphy,* 521 U.S. 320, 333, n. 7, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997), and when the two apply in tandem, review is "doubly" so, *Knowles,* 556 U.S., at ——, 129 S.Ct. at 1420. The *Strickland* standard is a general one, so the range of reasonable applications is substantial. 556 U.S., at ——, 129 S.Ct. at 1420. Federal habeas courts must guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under § 2254(d). When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard.

The *Strickland* standard also applies to claims of ineffective assistance of appellate counsel. *See Smith v. Robbins,* 528 U.S. 259, 285, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000). A habeas petitioner must show that his counsel's conduct was objectively unreasonable and that there is a reasonable probability that, but for his appellate counsel's objectively unreasonable conduct, petitioner would have prevailed on appeal. *Id.*; *Cockett v. Ray,* 333 F.3d 938, 944 (9th Cir.2003).

B. *Failure to raise claim regarding the trial court's comments during voir dire*

Petitioner contends that his appellate counsel provided ineffective assistance by failing to raise a claim regarding "judicial bias" during voir dire. (Pet. at 19.) In particular, petitioner contends that the trial judge's comments regarding his right to remain silent, the East Side Riva ("ESR") gang, the definition of reasonable doubt, and that there was some evidence suggesting the guilt of every criminal defendant violated his constitutional rights. Petitioner further maintains that his attempt to coercively rehabilitate a juror was improper and the cumulative effect of the trial judge's comments denied him due process. (Pet. at 6; Pet. Att. at 1–10.)

A defendant in a criminal trial is guaranteed the right to an impartial judge. *Lang v. Callahan,* 788 F.2d 1416, 1418 (9th Cir.1986); *see also Haupt v. Dillard,* 17 F.3d 285, 287 (9th Cir.1994) (as amended). On federal habeas review of a claim arising from the conduct of a state trial judge, the issue is not whether the trial judge committed judicial misconduct. Rather, the issue is whether, in the context of the trial as a whole, the challenged behavior rendered the trial so fundamentally unfair as to violate federal due process. *Duckett v. Godinez,* 67 F.3d 734, 740–41 (9th Cir.1995). To succeed on a judicial bias claim, the petitioner must "overcome the presumption of honesty and integrity in those serving as adjudicators." *Withrow v. Larkin,* 421 U.S. 35, 47, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975); *Larson v. Palmateer,* 515 F.3d 1057, 1067 (9th Cir.2008).

***7** Additionally, a criminal defendant has a Sixth Amendment right to a fair trial by an impartial jury. *Duncan v. Louisiana,* 391 U.S. 145, 149, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968); *Irwin v. Dowd,* 366 U.S. 717, 722, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961); *Dyer v. Calderon,* 151 F.3d 970, 973 (9th Cir.1998). "If only one juror is unduly biased or prejudiced or improperly influenced, the criminal defendant is denied his Sixth Amendment right to an impartial panel." *United States v. Hendrix,* 549 F.2d 1225, 1227 (9th Cir.1977); *Dyer,* 151 F.3d at 973.

Here, the Court concludes that petitioner has failed to show that the trial judge's comments during voir dire rendered his trial fundamentally unfair or violated his right to an impartial jury. First, nothing in the trial judge's comments interfered with petitioner's right to remain silent. The trial court repeatedly instructed both the prospective jury and later the empaneled jurors that petitioner had the constitutional right not to testify and that they could not assume from the fact that he did not take the stand that he was guilty or otherwise consider the fact that he did not testify. *(See* 1 Augmented Reporter's Transcript on Appeal ["Aug. RT"] 131, 133; 2 Aug. RT 388; 3 Aug. RT 511; 9 RT 1736.)

Second, the Court disagrees with petitioner's contention that the trial judge's comments regarding ESR violated his constitutional rights. Petitioner contends that the trial judge's remarks to the prospective jury that ESR had been in the papers a lot lately because the District Attorney's

Office had obtained a civil injunction against 114 alleged gang members violated his constitutional rights. (Pet. Att. at 5–7.) Preliminarily, although petitioner notes that his counsel moved to bifurcate the gang allegations, that motion was denied. (1 RT 185–87.) Given the nature of the case, which involved multiple gang allegations, it was reasonable for the trial judge to inquire into the prospective jurors' opinions regarding gangs. Additionally, after the trial judge commented on the civil injunction (1 Aug. RT 104–05), petitioner's counsel moved to discharge the jury on the ground that the trial judge had told the prospective jury that ESR was a "criminal street gang." (1 Aug. RT 123.) Rather than discharging the prospective jury, the trial judge gave a curative instruction, clarifying to the prospective jurors that he did not "mean to suggest" that it had been decided that ESR was a criminal street gang, that it met the definition of the elements of any crime, or that petitioner was a member or other active participant in ESR. The trial judge went on to explain that "[a]ll of those are questions that are to be decided in this trial." (1 Aug. RT 138.) At the close of evidence, the empaneled jury was instructed regarding the definition of a "criminal street gang" and the State's burden of proof with respect to the gang allegations. (9 RT 1743–46.) Petitioner does not contend that these instructions were improper or inadequate. On this record, the Court has no basis for finding or concluding that the trial judge's comments rendered the trial so fundamentally unfair as to violate federal due process.

The Court also concludes that the trial judge properly instructed the jury regarding the State's burden of proof beyond a reasonable doubt. "[T]he Constitution does not require that any particular form of words be used in advising the jury of the government's burden of proof." "Rather, 'taken as a whole, the instructions [must] correctly conve[y] the concept of reasonable doubt to the jury.' " *Victor v. Nebraska,* 511 U.S. 1, 5, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994) (citation omitted, alteration in original). In this case, neither of the challenged comments by the trial judge could have been misunderstood to reduce the prosecution's burden. First, petitioner challenges the trial judge's explanation of proof beyond a reasonable doubt as "proof that is going to convince you, not just today and not just tomorrow. But if you were to think back on this case five years from now, and you were to review in your mind what all of the evidence was, you would still be convinced that he was guilty." (1 Aug. RT 117–18.) This definition is consistent with the instruction on reasonable doubt, which instructs "[p]roof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt." *(See* 9 RT 1727.) *See also* CALCRIM. No. 220. "Use of the term 'abiding' tells the jury his conviction must be of a 'lasting, permanent nature,' and it informs him 'as to how strongly and how deeply his conviction must be held.' " *People v. Zepeda,* 167 Cal.App. 4th 25, 30–31, 83 Cal.Rptr.3d 793 (2008) (citation omitted, emphasis omitted). Additionally, petitioner misconstrues the trial judge's comments that petitioner was starting the trial with a head start. (Pet. Att. at 7.) It appears that petitioner ascribes a negative implication by these comments, but a review of the record shows that the trial court was explaining that the State had the burden of proof and petitioner "starts way ahead of the game" because he is presumed innocent: "In a criminal case, the defendant starts way ahead of the game. The defense starts with the assumption that defendant is not guilty. The prosecution not only has to catch up to them so that you're not sure which way the decision would go, the prosecution has to go beyond that and prove it so clearly that i[t] removes any reasonable doubt in your mind." (1 Aug. RT 85; *see also* 2 Aug. RT 375.) The prospective and empaneled jury were otherwise repeatedly instructed regarding the standard of proof beyond a reasonable doubt. *(See, e.g.,* 1 Aug. RT 91, 97–98, 103, **211**, 221–22; 2 Aug. RT 352; 3 Aug. RT 482, 500, 602; 4 Aug. RT 707; 1 RT 256; 9 RT 1727.)

***8** Petitioner also contends that the trial judge's attempt to rehabilitate potential juror Anna Marie Agnalt ("Agnalt") resulted in judicial abuse. *(See* Pet. Att. at 8–9.) Agnalt, a waitress and student from Corona, California told the trial court that she did "not feel like [she] could be a fair judge on this case, because about ten years ago, [their] townhome apartments—[their] townhomes were shot at by gang members. [Her] stepdad's friend/coworker, he was in a gang and he was trying to get out of it, and they came in and shot his family and killed them as well as himself." (1 Aug. RT 201.) Upon this statement, the trial judge inquired, asking additional questions regarding the circumstances. (1 Aug. RT 201–02.) The trial court further inquired as follows (1 Aug. RT 202–04):

> Q And so you've got one event that you heard, but you didn't know what it was, when you were presumably a child?
>
> A Yes.
>
> Q And then one event that happened to somebody that you've never known?
>
> A Right.
>
> Q And the effect of those is so powerful on you that you don't think that you could be objective?
>
> A The story that my stepfather told me, he was very—he didn't really tell me much, but he was very emotional about it. And I have always been—felt very strongly about gangs since I was young, because our walls were always tagged. My mom never let me go out of the house. She was always on to me. She never let me out to play, just because it was a bad neighborhood. My life was sheltered because of that.

Q Okay. As we have discussed earlier with group one, while gang participation is charged in this case, so far there's no evidence that [petitioner] is involved in a gang.

A Correct.

Q Do you think that your feelings about gangs are going to be so strong that you're going to conclude that he is a gang member, even though he's—you haven't heard any evidence yet?

A I feel like I've already made a decision, and I don't normally change my mind.

Q So you've decided. As to how many of the three charges have you already made a decision?

A I feel like he's guilty on all of them.

Q He is?

A Yes.

Q That is because he's been charged with being a gang member?

A Uh-huh.

Q That's enough?

A Uh-huh, for me, yes.

Q If there were no—if there were no gang allegations here—so if the only charges here were attempted murder and illegal possession of a handgun, you think that you would also conclude from those charges that he was—the defendant in that case was guilty?

A Yes.

Q So trials are just a waste of time?

A I guess so. For me at least.

Q Is that because you just don't want to serve as a juror? You have better things to do?

A No, I feel like if he's been brought here—like someone already said before—or has gone through this before—he's gone through three years of this. It happened three years ago. It's obviously something that matters.

Q Right.

A I feel like he's done something wrong.

Q It does matter.

A I feel like he's done something wrong in order to be here.

Q Has he committed attempted murder?

A I feel if he's charged with that, he probably has been.

Q So all of the trials that we have in this building, all of the trials we have nationwide, they're all a waste of time? Because if the prosecutor charges somebody with something, it's true? So all of the juries that have come back not guilty in the trials I've conducted, they're all wrong?

A Well, no, not necessarily, I guess. But—

The court: You're excused, ma'am. I hope no one in your family is ever charged with a crime and has twelve jurors like you.

Petitioner contends that the trial judge's attempt to "coercively rehabilitate demonstrably bias jurors deprived [him] of a level field in the jury selection process. This forced him to use his coveted preemptory [sic] challenges to excuse bias jurors that ordinarily should have been excused for implied bias, if not actual." (Pet. Att. at 9.) First, as noted, the trial judge did excuse this juror and thus, petitioner did not have to use a peremptory challenge to strike Agnalt. Petitioner has not referred to any other prospective jurors that were purportedly biased that his counsel sought to excuse for cause, but was denied by the trial court. Further, courts have wide discretion in conducting voir dire, *see Mu'Min v. Virginia,* 500 U.S. 415, 427, 111 S.Ct. 1899, 114 L.Ed.2d 493 (1991), and may take the lead in examining the jury for prejudice. *United States v. Patterson,* 648 F.2d 625, 630 (9th Cir.1981). Here, the trial judge reasonably inquired into Agnalt's alleged bias against petitioner and thereafter, excused this juror. The Court concludes that the trial judge's inquiry did not render petitioner's trial fundamentally unfair.

***9** Finally, with respect to the trial judge's comments that there was evidence that petitioner was guilty; some evidence to support the charges; and that there was some evidence suggesting the guilt of every criminal defendant *(see* 1 Aug. RT 78–79, 90; 2 Aug. RT 372–73), the Court concludes that these comments, although poorly phrased, did not violate petitioner's right to a fair trial in light of the instructions as a whole. Beyond these brief comments during several days of voir dire, the trial judge otherwise expressly and repeatedly instructed the prospective jury that the defendant is presumed to be innocent. *(See, e.g.,* 1 Aug. RT 52, 83–85, 89, 116, 141, 219; 2 Aug. RT 281, 373, 375; 3 Aug. RT 498, 613; 4 Aug. RT 723–24, 726.) Additionally, it must be noted that these comments were made during voir dire, and once the venire was empaneled, the jury was instructed both at the beginning and at the end of trial on the presumption of innocence. (1 RT 256; 9 RT 1727.) The jury is presumed to follow the instructions

given, *see Weeks v. Angelone,* 528 U.S. 225, 234, 120 S.Ct. 727, 145 L.Ed.2d 727 (2000), and petitioner has not rebutted this presumption or claimed that these instructions were inadequate. The Court concludes that the trial judge's remarks at voir dire were cured by the later instructions given to the empaneled jurors and did not render petitioner's trial fundamentally unfair. *See Guam v. Ignacio,* 852 F.2d 459, 461 (9th Cir.1988) ("General orientation at the beginning of a trial should be cautiously worded, but it will not require reversal unless it produces prejudice or misleads the jury in a material way."); *Alley v. Cash,* No. 1:11–CV–01444 LJO GSA HC, 2012 WL 1067167, at *12 (E.D.Cal. Mar. 28, 2012) (explaining that the challenged comments "were made during voir dire" before the empaneled jury was formally instructed on the applicable instructions and as such, any possible erroneous statement made during voir dire could not have had a substantial and injurious effect on the verdict).

In sum, the Court concludes petitioner has failed to show a reasonable probability that, but for appellate counsel's failure to raise a claim regarding the trial judge's comments during voir dire (either individually or cumulatively), petitioner would have prevailed on appeal.

C. *Failure to raise claim regarding Information*

Petitioner was charged in the Information with one count of willful, deliberate, and premeditated attempted murder. In relevant part, the Information further alleged that the offense was committed for the benefit of, at the direction of, and in association with a criminal street gang with the specific intent to promote, further, and assist in any criminal conduct by gang members within the meaning of Cal.Penal Code § 186.22(b). (1 CT 84–85.) Petitioner alleges that, because the Information did not identify the particular subdivision under which he would be sentenced if the jury found the gang enhancement true, he was convicted on the basis of facts different than those facts on which the charges were based or he was not given sufficient notice of the specific gang allegation to defend himself. (Pet. Att. at 10.) Petitioner maintains that his appellate counsel provided ineffective assistance by failing to raise this claim on appeal. (Pet. at 19.)

"The Sixth Amendment guarantees a criminal defendant the fundamental right to be informed of the nature and cause of the charges made against him so as to permit adequate preparation of a defense." *Gautt v. Lewis,* 489 F.3d 993, 1002 (9th Cir.2007); *see also In re Oliver,* 333 U.S. 257, 273, 68 S.Ct. 499, 92 L. Ed 682 (1948); *Cole v. Arkansas,* 333 U.S. 196, 201, 68 S.Ct. 514, 92 L. Ed 644 (1948) ("No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal."). However, as the Supreme Court observed in *Russell v. United States,* 369 U.S. 749, 763, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962), "[t]his Court has ... upheld many convictions in the face of questions concerning the sufficiency of the charging papers. Convictions are no longer reversed because of minor and technical deficiencies which did not prejudice the accused." (Citation omitted).

Here, petitioner was adequately informed of the nature and cause of the charges against him. The Information expressly stated that petitioner was being charged with a gang enhancement under Cal.Penal Code § 186.22(b), and the Information alleged every fact necessary to place petitioner on notice of what conduct he had to defend against. Cal.Penal Code § 186.22(b) sets forth all of the potential sentences for the gang enhancement allegation, including that, if the defendant was convicted of a felony punishable by imprisonment in the state prison for life, he would be subject to a 15–year parole eligibility minimum. *See* Cal.Penal Code § 186.22(b)(5). The Court concludes that petitioner had notice of both the facts the prosecution sought to prove and the potential consequences if those facts were proved.

***10** Additionally, petitioner appears to contend that because he was sentenced under Section 186.22(b)(5), not (b)(1)(C), the prosecutor would have been precluded from using the gang enhancement to bolster her argument opposing the motion to bifurcate the gang allegations. (Pet. Att. at 10–11.) Petitioner was originally sentenced under Cal.Penal Code § 186.22(b)(1)(C), but on appeal, the California Court of Appeal struck the 10–year gang enhancement imposed under this subdivision, and instead, imposed a 15–year parole eligibility minimum under Section 186.22(b)(5). (Lodgment No. 5 at 34–35.) The court of appeal explained that because petitioner was sentenced to an indeterminate term of life on the attempted murder conviction, under *People v. Lopez,* 34 Cal.4th 1002, 1004, 22 Cal.Rptr.3d 869 (2005), Section 186.22(b)(1)(C) was inapplicable and the 15–year minimum parole eligibility term in Section 186.22(b)(5) governed. *(Id.)*

Regardless of the sentence imposed, however, and as further discussed, *infra,* petitioner was charged with a gang enhancement in count 1 and a substantive criminal street gang allegation under Cal.Penal Code § 186.22(a) in count 2. The gang evidence was relevant to both charges. As the trial court concluded in denying the motion to bifurcate, petitioner was essentially seeking to sever certain charges from others in order to try them separately, which, in the interest of judicial economy, did not make sense. (1 RT 187.) The trial court explained that the two predicate offenses which the prosecution was going to rely upon were the same type of offense petitioner was charged with, and thus, it was not the type of situation in which petitioner was charged with some minor offense and the predicate offenses were substantially different and more prejudicial

types of offenses. *(Id.)*

As such, petitioner's claim lacks merit and his appellate counsel was not ineffective in failing to raise this claim on appeal.[9]

D. *Failure to raise claim regarding denial of motion for mistrial*

Petitioner contends that his appellate counsel provided ineffective assistance by failing to raise a claim that the trial court's denial of his motion for mistrial violated his right to a fair trial and due process. (Pet. at 19; Pet. Att. at 9.) In particular, petitioner maintains that the trial court's failure to grant his motion for mistrial on the ground that the prosecutor intentionally introduced gun evidence that had been ordered excluded rendered the trial fundamentally unfair. *(See* Pet. Att. at 9.) Prior to the beginning of trial, petitioner moved to suppress certain evidence obtained as the result of an allegedly unreasonable search and seizure of a third party residence. (1 CT 136–45.) The trial court granted the motion to suppress a gun and other items and concluded that the consent was not free and voluntary. (1 RT 163–64, 168.) The trial court, however, granted the prosecutor's request to admit Vanessa Montanez's ("Montanez") statements that she had seen a gun. (1 RT 171–75.)

***11** Thereafter, during the testimony of Sergeant Gary Toussaint ("Toussaint"), the prosecutor elicited testimony regarding Montanez seeing a gun. (6 RT 1273.) When the prosecutor asked what her demeanor was at the time she was looking at the gun and making these statements, Toussaint replied, "She did seem surprised that the weapon was there and—which made us believe that she didn't really have any knowledge of its presence." (6 RT 1274.) At that point, petitioner's counsel indicated that he had a motion, which he reserved. *(Id.)* Outside the presence of the jury, petitioner's counsel moved for a mistrial because the prosecutor elicited testimony from Toussaint regarding the gun, which was in violation of the trial court's earlier ruling regarding the gun not being admitted into evidence. (6 RT 1282.) Following argument, the trial court concluded that that the testimony violated the exclusion order, but denied the motion for mistrial because it found that it was not an express statement that the weapon was found in the residence and thus, was not so prejudicial as to warrant a mistrial. (6 RT 1284–85.)

The following day, petitioner's counsel submitted a written motion for a mistrial. (7 RT 1290.) The trial court denied the motion for mistrial, declined petitioner's counsel's request to strike all of Toussaint's testimony, and gave the jury a curative instruction, instructing the jury that all of the references in Toussaint's testimony to Montanez's statements regarding being shown a gun and his interpretation of her reaction were stricken and should be disregarded. (7 RT 1294, 1300, 1306–07.)

On appeal, petitioner's counsel argued that petitioner was denied his state and federal constitutional rights to due process and a fair trial based on the prosecutor's misconduct in eliciting the testimony regarding the gun. (Lodgment No. 3 at 40.)[10] The court of appeal denied this claim, concluding that any conceivable misconduct was harmless. (Lodgment No. 5 at 27.) In his Petition, petitioner now appears to contend that his appellate counsel provided ineffective assistance by failing to also argue that the trial court's denial of the motion for mistrial based on the prosecutor's alleged misconduct rendered the trial fundamentally unfair. Petitioner's appellate counsel may have strategically decided not to alternatively argue that the trial court also violated petitioner's constitutional rights by failing to grant the motion for mistrial. Moreover, petitioner has failed to demonstrate that had his counsel challenged the trial court's denial of the mistrial motion, there was a reasonable probability that petitioner would have prevailed on appeal. Since the court of appeal concluded that any conceivable misconduct was harmless, there is no evidence that had the claim been framed differently, petitioner would have prevailed on appeal. Accordingly, petitioner is not entitled to habeas relief on this claim.

E. *Failure to raise claim regarding right to resentencing*

Petitioner's counsel argued on appeal that the 10–year gang enhancement under Cal.Penal Code § 186.22(b)(1) should be stricken because his conviction for willful, deliberate, and premeditated attempted murder was punishable by imprisonment in the state prison for life and thus, Section 186.22(b)(1) could not be imposed on petitioner. *(See* Lodgment No. 3 at 61–65.) The court of appeal agreed, modified the judgment to strike the 10–year enhancement and imposed a 15–year parole eligibility minimum under Section 186.22(b)(5). (Lodgment No. 5 at 34–35.) In his Petition, petitioner appears to contend that his appellate counsel provided ineffective assistance by failing to argue that the sentencing error entitled petitioner to a new sentencing hearing or new trial because the admission of gang evidence at trial was based on the stricken enhancement. (Pet. at 19; Pet. Att. at 17.) Petitioner's claim lacks merit.

***12** As explained, *supra,* petitioner also was charged with a substantive criminal street gang allegation in count 2 under Cal.Penal Code § 186.22(a). (1 CT 85.) As such, gang evidence was directly relevant to this charge. Further, although the court of appeal struck the sentence on the gang enhancement finding and instead imposed a 15–year parole eligibility minimum, the court of appeal did not strike the underlying enhancement finding. The court of appeal's decision only impacted the sentence, not the underlying

true finding on the gang enhancement allegation. Thus, the gang evidence remained relevant to this enhancement allegation as well. Accordingly, petitioner's appellate counsel was not ineffective in failing to raise this meritless claim on appeal.

F. *Failure to raise claim regarding expert testimony*

Petitioner contends that his appellate counsel provided ineffective assistance by failing to raise a claim that the expert gang testimony constituted "junk science." (Pet. at 19; Pet. Att. at 18–20.) Petitioner maintains that the admission of gang evidence was erroneous and unreliable. Petitioner claims that the testimony of Detective Scott Impola ("Impola") regarding the issue of intent was "tantamount to telling the jury the gang allegation was true." (Pet. Att. at 19.) Petitioner also takes issue with the testimony of Detective Joe Meira ("Meira") that three individuals that petitioner once knew were members of a criminal street gang. (*Id.* at 19–20.)

Petitioner's appellate counsel did raise a claim on direct appeal that the trial court erred in permitting the gang expert to testify regarding "profile" evidence and the ultimate issue of whether petitioner shot the victim to benefit his criminal street gang. *(See* Lodgment No. 3 at 30.) Petitioner has not shown what additional arguments should have been made that would have resulted in a reasonable probability that he would have prevailed on this claim.

Additionally, although petitioner's appellate counsel only challenged Impola's testimony, petitioner has failed to demonstrate that similarly challenging Meira's testimony would have assisted the underlying claim. As such, the Court concludes that petitioner has failed to show that had his appellate counsel also challenged Meira's testimony, there was a reasonable probability that petitioner would have prevailed on appeal.

Finally, as explained, petitioner contends that the gang evidence admitted at his trial constituted "junk science." (Pet. Att. at 18.) Petitioner appears to be referring to the district court's duty to act as a "gatekeeper" in federal cases to exclude junk science that does not meet Fed.R.Evid. 702's reliability standards. *See Messick v. Novartis Pharm. Corp.,* 747 F.3d 1193, 1197 (9th Cir.2014). "To aid courts in exercising this gatekeeping role, the Supreme Court has suggested a non-exclusive and flexible list of factors that a court may consider when determining the reliability of expert testimony, including: (1)[W]hether a theory or technique can be tested; (2) whether it has been subjected to peer review and publication; (3) the known or potential error rate of the theory or technique; and (4) whether the theory or technique enjoys general acceptance within the relevant scientific community." *Id.* (citing ***Daubert*** *v. Merrell Dow Pharm., Inc.,* 509 U.S. 579, 592–94, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993)). To the extent petitioner contends under ***Daubert*** that the gang experts' testimony failed to meet the threshold of reliability for scientific evidence, ***Daubert*** is inapplicable here because there is no suggestion that the gang experts' testimony was based on any scientific technique and petitioner failed to challenge these witnesses at trial. Petitioner's appellate counsel was not ineffective in failing to raise a claim under ***Daubert***.

G. *Failure to raise Confrontation Clause claim*

***13** Petitioner further contends that his appellate counsel provided ineffective assistance by failing to argue that the gang expert testimony based on hearsay statements violated the Confrontation Clause. (Pet. at 20; Pet. Att. at 20–24.)

A primary interest secured by the Confrontation Clause of the Sixth Amendment is the right of an accused in a criminal prosecution to cross-examine witnesses against him. *See Delaware v. Van Arsdall,* 475 U.S. 673, 678, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986); *Davis v. Alaska,* 415 U.S. 308, 315, 94 S.Ct. 1105, 39 L. Ed.2d 347 (1974). In *Crawford v. Washington,* 541 U.S. 36, 68, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), the United States Supreme Court held that the Confrontation Clause bars the admission of testimonial hearsay unless the declarant is unavailable and the accused had "a prior opportunity for cross-examination."

However, the Confrontation Clause does not bar the use of out-of-court statements for purposes other than establishing the truth of the matter asserted. *Williams v. Illinois,* 567 U.S. ——, 132 S.Ct. 2221, 2228, 183 L.Ed.2d 89 (2012) (plurality opinion); *Crawford,* 541 U.S. at 59 n. 9. As the Supreme Court has explained:

> When an expert testifies for the prosecution in a criminal case, the defendant has the opportunity to cross-examine the expert about any statements that are offered for their truth. Out-of-court statements that are related by the expert solely for the purpose of explaining the assumptions on which that opinion rests are not offered for their truth and thus fall outside the scope of the Confrontation Clause.

*Williams,* 132 S.Ct. at 2228.

Numerous federal courts since *Crawford* have found that a gang expert's reliance on hearsay evidence does not violate the Confrontation Clause where the underlying hearsay is

not admitted for the truth of the matter asserted, but rather to explain the basis of the gang expert's opinion. *See, e.g., Mundell v. Dean,* No. CV 11–7367 DSF (JC), 2014 WL 7338819, at *7–8 (C.D.Cal. Dec. 22, 2014) (concluding that the gang expert's reliance on police reports and lack of personal knowledge regarding the predicate offenses did not deprive petitioner of a meaningful opportunity to cross-examine the expert and did not violate the Confrontation Clause); *Valdez v. Virga,* No. SACV 13–335–FMO (JEM), 2014 WL 3709634, at *1618 (C.D.Cal. Jul. 28, 2014) (gang expert's reliance on hearsay statements as a basis for his opinion did not violate the Confrontation or Due Process Clauses); *Alejandre v. Brazelton,* No. C 11–4803 CRB (PR), 2013 WL 1729775, at *10–11 (N.D.Cal. Apr. 22, 2013) (rejecting claim that gang **expert's** opinion concerning the **meaning** of his **tattoos** violated his right to confrontation because it was based on hearsay statements); *Walker v. Clark,* No. CV 08–5587–CJC (JEM), 2010 WL 1643580, at *13–15 (C.D.Cal. Feb. 18, 2010) (rejecting claim that petitioner's confrontation rights were violated by the admission of hearsay testimony relating to the gang enhancement allegation), Report and Recommendation adopted by 2010 WL 1641372 (C.D.Cal. Apr. 20, 2010).

Here, the detectives' testimony regarding the underlying basis for their opinions did not violate the Confrontation Clause because such testimony was not offered for the truth, but to explain the basis for their opinions. Both Impola and Meira testified regarding their training and experience as it relates to gangs and their familiarity with the ESR gang. *(See* 3 RT 562, 567; 5 RT 929, 955–56.) Impola testified that, based on a number of different factors, including petitioner's own admission that he was a gang member and paraphernalia found in his residences, it was his opinion that petitioner was a member of the ESR gang. *(See* 5 RT 975, 980, 983–96, 1017–18, 1029; 6 RT 1119–21, 1263–64.) Based on a hypothetical question, Impola also opined that the shooting was committed for the benefit of or at the direction of a criminal street gang to further, promote, or assist in felonious conduct by gang members. (5 RT 1021.) The record reflects that Impola's testimony regarding out-of-court statements regarding gangs and gang membership was not offered for the truth of the information asserted, but as foundation for Impola's expert testimony regarding criminal street gangs and his opinions. Similarly, Meira's testimony regarding Rodriguez's admission that he was a member of the ESR gang and any other minimal references to out-of-court statements regarding gangs and gang members were not offered for the truth of the information asserted, but again as foundation for Meira's testimony regarding criminal street gangs and his opinions that certain individuals were members of the ESR gang. As experts, these detectives could properly base their opinions on such out-of-court information. Impola and Meira were subject to cross-examination regarding their opinions and the reasons for such opinions.

***14** Because there is no merit to petitioner's underlying claim, his appellate counsel was not ineffective in failing to raise a claim under the Confrontation Clause.

**II.** ***Petitioner is not entitled to an evidentiary hearing.***

Petitioner also requests an evidentiary hearing. (Trav. at 2.) An evidentiary hearing is not warranted where, as here, "the record refutes the applicant's factual allegations or otherwise precludes habeas relief." *Schriro v. Landrigan,* 550 U.S. 465, 474, 127 S.Ct. 1933, 167 L.Ed.2d 836 (2007); *see also Pinholster,* 131 S.Ct. at 1399 (citing *Schriro* with approval); *Estrada v. Scribner,* 512 F.3d 1227, 1235 (9th Cir.2008) ("[A] federal court must consider whether such a[n] [evidentiary] hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief." (citation omitted, alterations in original)); *Totten v. Merkle,* 137 F.3d 1172, 1176 (9th Cir.1998). Therefore, petitioner's request for an evidentiary hearing should be denied.

## RECOMMENDATION

IT THEREFORE IS RECOMMENDED that the District Court issue an Order: (1) Approving and accepting this Report and Recommendation; (2) denying petitioner's request for an evidentiary hearing; and (3) directing that Judgment be entered denying the Petition and dismissing this action with prejudice.

### All Citations

Not Reported in Fed. Supp., 2015 WL 5159279

Footnotes

1 Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Suzanne M. Peery, the Acting Warden of High Desert State Prison in Susanville, California, where petitioner currently is incarcerated, is hereby substituted as the proper respondent in this case.

2 As the Court concluded in its previous Report and Recommendation, the citation to *Clark* did not refer to petitioner's ineffective assistance of appellate counsel claim in Ground Seven since this claim could not have been raised on direct review. (*See* Dkt. No. 22 at 10–11.)

3 A citation to *Miller* "signals that the Court is denying the petition for the same reasons that it denied the previous one." *Kim v. Villalobos,* 799 F.2d 1317, 1319 n.1 (9th Cir.1986).

4 The Court notes that Ninth Circuit cases have accorded the factual summary set forth in an opinion of a state court a presumption of correctness pursuant to 28 U.S.C. § 2254(e)(1). *See Slovik v. Yates,* 556 F.3d 747, 749 n.1 (9th Cir.2009) (as amended); *Moses v. Payne,* 555 F.3d 742, 746 n.1 (9th Cir.2009) (as amended); *Tilcock v. Budge,* 538 F.3d 1138, 1141 (9th Cir.2008); *Mejia v. Garcia,* 534 F.3d 1036, 1039 n.1 (9th Cir.2008). Petitioner has the burden of rebutting the presumption of correctness by clear and convincing evidence. Here, petitioner does not contest the California Court of Appeal's summary of the underlying facts, nor has he attempted to overcome the presumption of correctness accorded to it. *Tilcock,* 538 F.3d at 1141.

5 Petitioner initially raised seven claims in his Petition. Grounds One through Six were dismissed on December 27, 2013.

6 However, the Supreme Court did not state in *Richter* that it was overruling any existing Supreme Court jurisprudence. For example, under existing Supreme Court jurisprudence, when a state court in a reasoned decision denies an ineffective assistance of counsel claim without ever reaching the issue of prejudice, the AEDPA does not circumscribe federal habeas review of the prejudice issue, which is considered de novo. *See Rompilla v. Beard,* 545 U.S. 374, 390, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005); *Wiggins v. Smith,* 539 U.S. 510, 534, 123 S.Ct. 2527, 156 L. Ed.2d 471 (2003). Similarly, when a state court in a reasoned decision denies an ineffective assistance claim without ever reaching the issue of deficient performance, the deficient performance issue is reviewed de novo. *See Porter v. McCollum,* 558 U.S. 30, 39, 130 S.Ct. 447, 175 L.Ed.2d 398 (2009) (per curiam).

7 It appears that the applicable decision is that of the California Court of Appeal, which denied petitioner's habeas petition with citation to *Duvall,* on the ground that petitioner failed to include any supporting documentation. (Lodgment No. 8.)

8 Because the standard for "deficient performance" is an objective one, a reviewing court is not confined to evidence of counsel's subjective state of mind, "[a]lthough courts may not indulge [in] '*post hoc* rationalization' for counsel's decisionmaking that contradicts the available evidence of counsel's actions." *See Richter,* 562 U.S. 109 (emphasis in original).

9 To the extent that petitioner contends that his appellate counsel should have raised this claim in his Petition for Review to the California Supreme Court *(see, e.g.,* Trav. at 21), this claim also fails because petitioner has no constitutional right to counsel to pursue discretionary state appeals. *Wainwright v. Torna,* 455 U.S. 586, 587–88, 102 S.Ct. 1300, 71 L.Ed.2d 475 (1982) ("a criminal defendant does not have a constitutional right to counsel to pursue discretionary state appeals or applications for review in this Court" and as such, the defendant "could not be deprived of the effective assistance of counsel by his retained counsel's failure to file the application timely"); *Ross v. Moffitt,* 417 U.S. 600, 610, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974) ("We do not believe that the Due Process Clause requires North Carolina to provide respondent with counsel on his discretionary appeal to the State Supreme Court."); *Smith v. Idaho,* 392 F.3d 350, 356–57 (9th Cir.2004) (as amended) ("It is well-established that criminal defendants have no constitutional right to counsel beyond their first appeal as of right, and hence no right to counsel in a discretionary appeal to the State's highest court."); *Miller v. Keeney,* 882 F.2d 1428, 1432 (9th Cir.1989).

10 The Court notes that petitioner nevertheless maintains in his Traverse that his appellate counsel failed to raise a prosecutorial misconduct claim. *(See* Trav. at 30, 34.)

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Only the Westlaw citation is currently available.
Superior Court of Massachusetts,
Bristol County.

COMMONWEALTH,
v.
Carmelo KERCADO.

Nos. BRCR201000631, BRCR2010–00631.
|
June 27, 2014.

MEMORANDUM OF DECISION ON OPINION TESTIMONY

Robert J. Kane, Justice.

***1** The Commonwealth asks the court to reverse its ruling severing Carmelo Kercado's trial from the trial of Tyrell Baptiste and Reggie Greene. All three defendants face indictments charging them with first degree murder. According to the Commonwealth's theory, the three defendants, acting together as joint venturers, murdered Anthony Samedo on June 18, 2006 in the city of New Bedford. The killing of Samedo was purportedly motivated by the group's desire to retaliate for the shootings of Justin Barry and John Burgos, members of the Gangsta Disciples operating out of the United Front Housing Development. It is posited by the Commonwealth that this retaliatory shooting of Samedo, who was thought to be Minute Silva, had its origins in the historical feuds between the United Front Group and the Monte Park Group.

Persuaded that the evidence would establish Greene and Baptiste's membership in the United Front gang, known as the Gangsta Disciples and the gang's desire to retaliate against Silva for the shootings of Barry and Burgos, the court consolidated the trials of Greene and Baptiste. The court severed Kercado's trial because the Commonwealth's proffer had failed to establish his proximate membership in the United Front Group and his awareness or belief about Minute Silva's role in the Burgos and Barry shootings.

COMMONWEALTH'S MOTION

On March 31, 2014, the Commonwealth submitted papers in support of its argument that four officers attached to the New Bedford Police Department could offer opinions on the violent relations existing in 2006 between the United Front Group and the Monte Park Group, and Kercado's membership in the "United Front Group." The court now examines closely the papers that support the proposed opinion evidence. The papers consisted of: (1) the resumes of Detective David Conceicao and Detective David Brown; (2) a two-page report authored by Sergeant Scott Morton; (3) a two-page gang intelligence report authored by Conceicao; and (5) assorted "reference materials," including internal security documents prepared by personnel attached to the Bristol County Sheriff's Department and Grand Jury Minutes.

The documents directly relevant to Kercado's membership in the "United Front Group" consisted of Morton and Conceicao's reports. Morton, in his report, recited his patrol activities starting in 2004 that included the United Front Housing Development and his subsequent work as a detective that included investigating conflicts between the United Front and Monte Park Groups. In investigating these acts of violence and other crimes, Morton learned of the United Front Group's involvement with guns and drugs; as to who belonged to the groups, Morton conceded that the membership fluctuated. He failed to offer any opinion or commentary about Kercado's involvement in the United Front Group.

Conceicao's report centered on the arrest of Kercado, John Burgos, and Justin Sebastian on July 17, 2006. The arrests occurred in Roxbury and were based on the arresting officer's belief that the three men had been planning a home invasion. Kercado was incidentally arrested for possession of a .45 magnum pistol that had been found by the police in the area where Kercado had attempted to flee. After Sebastian's arrest, the police searched his car, finding Percocet pills, ammunition and $753. On September 6, 2006, Burgos had been observed by Conceicao in Sebastian's vehicle.

***2** Giving "four points" for Sebastian's arrest with Burgos and four points for Sebastian's prior association with Burgos, a known member of the Gangsta Disciples, Conceicao "validated" Sebastian's membership in the Gangsta Disciples.

Giving Kercado "eight points" for the Bristol County Sheriff's Department's classification of him as a Gangsta Disciple and four points for Kercado's arrest with Burgos, Conceicao "validated" Kercado as a Gangsta Disciple member.

According to the Sheriff Department's gang classification system Kercado received 27 points. Inspection of the classification sheets revealed that the 27 points accrued from the following: (1) nine points on the basis of a report from an outside law enforcement/criminal justice agency with the supposedly attached report missing; (2) five points because of the alleged but undocumented news report; and (3) other points on the basis of generic criteria.

SUPPLEMENTARY INFORMATION

The court also possesses a one-page report by Julio DeFigueiredo, an investigator attached to the Bristol County Sheriff Department. In that report, DeFigueirido documented the following facts relied upon for the Sheriff Department's classification of Kercado as a gang member: (1) Kercado's possession of a firearm in the area of Tremont and Maple Streets in New Bedford that the United Front Gang claims; (2) Kercado's association with members of the United Front gang; and (3) Kercado's telephone conversation where he referred to the United Front gang, and to Barry and William Payne, considered to be gang members, and reported that Payne and a Kiana Canto would "make money" to bail him.[3]

DEFENDANT'S OBJECTIONS

Defendant lodges numerous objections to the opinion testimony's factual and scientific foundations. He characterizes the underlying information as incomplete, unreliable and misleading. Claiming the evidence of defendant's gang membership falls under *Daubert's* scientific regimen, he contends that the proposed opinion testimony fails to satisfy *Daubert's* scientific scrutiny. See *Daubert v. Merrell Dow Pharmaceuticals,* 509 U.S. 579 (1993). According to Kercado, the proposed gang membership opinion testimony fails to pass any of the four non-exclusive tests set forth in *Daubert.*

DISCUSSION

Gang evidence must be carefully considered. It possesses potential to cast a defendant in a light inhospitable to fair trial rights. *Commonwealth v. Gray,* 463 Mass. 731, 756–57 (2012); *Commonwealth v. Smith,* 450 Mass. 395, 400 (2008); *Commonwealth v. Swafford,* 441 Mass. 329, 332–33 (2004); *Commonwealth v. Maldonado,* 429 Mass. 502, 505 (1999).

Its admission requires as an initial matter a showing that it provides information relevant to the case at hand. *Swofford,* at 329. Admittedly, Kercado's purposeful operation of the motor vehicle while Baptiste pursued and shot Silva provides evidence of his participation in a lethal joint venture. The Commonwealth, however, to prove first degree murder by deliberate premeditation must prove an intent to kill, rather than an intent to wound or frighten. Proof of defendant's affiliation with the Gangsta Disciples, a group that followed a military regimen and used firearms to secure their ends, which included retaliation, would constitute strong evidence of the defendant's intent and motive.

***3** Admitting an opinion on gang membership and the gang's relationship with a rival gang rather than the underlying facts serves the interest of introducing relevant evidence without presenting background information that will either cause undue prejudice or distract the jury's attention from the issues to be decided. Because of its evidentiary framework, opinion testimony allows for introduction of the opinions on gang membership and inter-gang conflicts on direct without mention of the underlying facts. *Commonwealth v. Barbosa,* 457 Mass. 773, 784 (2010). Omission of the underlying facts accomplishes the objective of keeping the jury's attention on facts probative of the defendant's involvement in the indicted offense. Where defense counsel deems it prudent, counsel can secure relevant impeachment material by examining the witness on the basis of the opinions on the defendant's membership in the gang and gang conflicts and motivations.

NECESSARY

The proposed opinion testimony must address a matter beyond lay understanding. Here, the Commonwealth lacks any direct evidence that Kercado was a Gangsta Disciple member. Apparently, the Commonwealth lacks any witness, including its chief witness Randy Torres, a witness to the shooting, prepared to assign to Kercado words indicating his proximate membership in the Gangsta Disciples. It must instead rely on circumstances whose full implications would elude lay understanding.

RELIABILITY

Defendant urges this court to apply one or more of the *Daubert* tests to the Commonwealth's proposed opinion testimony. Little in the cases issued by the Massachusetts appellate courts support the proposition that the scientific

tests endorsed in *Daubert* and followed with qualifications in *Commonwealth v. Lanigan,* 419 Mass. 15, 25–27 (1999), apply to a police official's opinions on gang membership.

In *Canavan's Case,* 432 Mass. 304 (2000), the court, in discussing application of the scientific tests set out in *Lanigan,* 419 Mass. at 15, used the terms "scientific evidence" and "scientific experts' opinion." In his concurrence in *Canavan,* Judge Greaney differentiated the case before that court as one involving "hard science," as compared to other cases involving the "so-called soft sciences." *Canavan's Case,* 432 Mass. at 317–18.

Where the theory underlying expert testimony lends itself to lay understanding, then the scientific evaluation prescribed in *Daubert* fails to apply. *Commonwealth v. Sands,* 424 Mass. 184, 185–89 (1997). As observed in *Sands,* "If jurors can evaluate an expert's testimony with common sense and experience and can understand the underlying methods or theories of the testimony, then ... the logical basis of the testimony can be effectively tested through cross-examination and rebuttal evidence." *Id.* at 186. Where the expert's opinion lacks a foothold in "scientific theory or research" but rather relies on a honed awareness of how a group practices its craft or enterprise such testimony "need not be subject to a *Daubert / Lanigan* analysis." *Palandjian v. Foster,* 446 Mass. 100, 106–09 (2006); *Commonwealth v. Goodman,* 54 Mass.App.Ct. 385, 386–91 (2002).

***4** Even if *Daubert / Lanigan* applies, Massachusetts and federal cases converge in endorsing a trial court's authority to apply the *Daubert* evaluation of reliability flexibly. *United States v. Taylor,* 2009 U.S.Dist. Lexis 100318 (D.N.M.2009); *United States v. Monteiro,* 407 F.Sup.2d 351 (D.Mass.2006). This endorsement of flexibility particularly applies where the expert relies on professional experience in formulating the opinion. As stated in *Taylor,* "Many courts have recognized that the list of factors the Supreme Court outlined in *Daubert* 'may not perfectly fit every type of expert testimony, particularly technical testimony based primarily on the training and experience of the expert.' " *Id.* at *7, citing *Monteiro,* 407 F.Sup.2d at 357. In evaluating the reliability of a warden's opinion on prison gangs, the *Taylor* court observed that, "to evaluate the reliability of [the warden's] testimony by the same standards that would be applied to the testimony of a laboratory scientist simply would not make any sense." *Id.* at *11.

In *Lanigan* and *Canavan's Case,* the Supreme Judicial Court failed to require the trial judge to follow a particular approach in assessing "scientific evidence." Rather, the Court emphasized the trial judge's discretion in devising a method for testing a scientific theory's reliability. *Canavan's Case,* 432 Mass at 311–12.

MASSACHUSETTS CASES ON GANG EVIDENCE

Our appellate courts have yet to comprehensively address what requirements apply to admission of an opinion of a defendant's gang membership. See *Smith,* 450 Mass. 395; *Commonwealth v. Wolcott,* 28 Mass.App.Ct. 200 (1990). In *Wolcott,* the court treated the testimony on gang membership as lay testimony that ought not to have been admitted, but the court provided guidance on the dangers posed by evidence only establishing a thin association with a gang. Where the evidence only presents ambiguous associations between the defendant and the gang, it amounts to "a memorable example of the vagaries, circularity and dangers of trying to prove some guilt by association." *Id.* at 208; see also *Commonwealth v. Ortega,* 441 Mass. 170, 180 (2004); *Scales v. United States,* 367 U.S. 203, 224–25 (1961).

In *Smith,* the defendant objected to the admission of evidence of his gang membership on the grounds of lack of relevancy. The court stated that any erroneous admission of gang affiliation evidence was harmless. In *Smith,* the evidence of gang affiliation came from a number of sources, including the expert witness's frequent visits to Columbia Point, where he came to know who belonged, during the relevant time period, to the gang known as the "Columbia Point Dawgs." He identified the defendant as a member of the Columbia Point Dawgs. A Columbia Point resident also identified the defendant as a member of the Columbia Point Dawgs.

No Massachusetts appellate decision has fully addressed the admissibility of opinion testimony on a defendant's gang membership. The gap necessitates review of other jurisdiction's views.

***5** In *State v. DeShay,* 669 N.W.2d 878 (2003), the court reviewed a ten-point criteria for determining gang membership developed by the Criminal Gang Oversight Counsel composed of the Commissioners of Public Safety and Correction, the Superintendent of the Bureau of Crime Apprehension, the Attorney General and several police chiefs, sheriffs, and other law enforcement officers.[4]

The criteria came from criteria used in the West Coast and areas of the Midwest. It consisted of the following:

(1) admits gang membership or associations;

(2) is observed to associate on a regular basis with known gang members;

(3) has tattoos indicating gang membership;

(4) wears gang symbols to identify with a specific gang;

(5) is in a photograph with known gang members and/or using gang-related hand signs;

(6) name is on a gang document, hit list or gang-related graffiti;

(7) is identified as a gang member by a reliable source;

(8) arrested in the company of identified gang members or associates;

(9) corresponds with known gang members or writes and/or receives correspondence about gang activities; and

(10) writes about gangs which would be graffiti on walls, books and/or paper.

The opinion testimony came from Scott Jenkins, attached to the Minnesota Gang Task Force. Jenkins, trained in gang behaviors, investigated the gang involved in the case before the court. Although he hadn't gathered the information underlying the analysis of the defendant's membership in the gang, he had gathered considerable information about the gang based on a review of official documents and fieldwork.

The *DeShay* court noted the dangers of admitting gang evidence. It cautioned against admission of unnecessary evidence regarding gang activities. It endorsed the practice of scrutinizing the evidence's reliability and scope "preferably outside the presence of the jury."

MASSACHUSETTS PRECEDENTS

Our appellate courts have allowed opinion testimony from law enforcement officials on such matters as code words and modus operandi. *Commonwealth v. Rosa,* 468 Mass. 231, 240 (2014) ("expert testimony is useful where speakers engage in coded conversation or speak about a subject using specialized vocabulary"); *Commonwealth v. Pike,* 430 Mass. 317, 324 (1999) ("Testimony about [drug diversion] operations ... is helpful to the fact finders and is admissible [because] it is more akin to a description of the modus operandi of [drug diverters] than a 'profile' of a drug dealer"); *Commonwealth v. Johnson,* 410 Mass. 199, 202 (1991); see also *Commonwealth v. Grissett,* 66 Mass.App .Ct. 454, 457–59 (2006). Admission has been conditioned upon a showing of the officer's specialized knowledge and experience in the area, for example, of drug sales, and the evidence has been confined to a construct of activities that are consistent with the particular modus operandi or criminal intent.

Here, the evidence would exceed an opinion on modus operandi or what characteristics coincide with a particular gang. The evidence instead would present an opinion on this defendant's membership in the Gangsta Disciples operating out of the United Front housing development. An opinion as opposed to a description of activities consistent with a criminal modus operandi requires a deeper understanding of the particular subject matter. See McCormick on Evidence Seventh Edition Volume 1 § 13, pgs 107–10.

***6** To be admissible, such evidence must come from a law enforcement official knowledgeable about the Gangsta Disciples in the proximate period of July 18, 2006. That law enforcement official would need to have studied the gang's purposes, structures, methods of operation, rules, symbols and membership.

Based on that predicate foundation, the witness would have to present criteria for determining the identity of members, with the criteria endorsed by the court as reliable. The underlying information would have to satisfy standards set out in *Commonwealth v. The Department of Youth Services,* 398 Mass. 516 (1986). Finally, the hearing would need to occur before trial and, if during trial, outside the presence of the jury. In reviewing the admissibility of such opinion testimony, the court would follow the reasoning as set forth in *DeShay* that every effort should be expended to ensure that only necessary information comes before the jury.

FILING REQUIREMENTS

Based on the above analysis, the court requires the Commonwealth to file within the next 21 days the following: (1) the identity of its expert and its qualifications to present an opinion on Kercado's membership in the Gangsta Disciples; and (2) the criteria relied upon in rendering this opinion; for each criterion, the proposed witness will explain how it reliably relates to the opinion on gang membership.

Within ten days of the Commonwealth's filing the defendant must respond by filing a brief and or affidavits in opposition to the Commonwealth's proffer. At that time the Court will schedule a hearing. No later than 21 days prior to the hearing, both sides must submit proffers of evidence. Each proposed witness's testimony must be summarized with a clear explanation of its materiality. The

court retains the right to assemble a factual record in accordance with the procedures set forth in Massachusetts Guide to Evidence 104(a) ed.2014.

**All Citations**

Not Reported in N.E.3d, 2014 WL 6682470

Footnotes

3 The Commonwealth's reconsideration motion also includes excerpts from intercepted jailhouse telephone calls. Details on the transcription's origins and completeness are lacking.

4 Other municipalities have developed criteria for determining gang membership. In the city of Portland, Oregon, the police consider the following as criteria of gang membership: (1) the individual admits or asserts affiliation with a gang; (2) a reliable informant has identified an individual as a gang affiliate; (3) the individual displays clothes, jewelry, hand signs and/or tattoos unique to gang affiliation, with clothing color alone insufficient for designation; (4) a law enforcement agency including out-of-state or federal agencies has identified an individual as affiliated with a gang; (5) an individual is present with an identified gang affiliate involved in suspected criminal behavior during the commission of a crime; and (6) the individual conspires to commit or commits crimes against persons or property based on race, color, religion, sexual preference, national origin or rival gang association. Mayer, Jeffrey. *Individual Moral Responsibility and the Criminalization of Youth Gangs,* 28 Wake Forest L.Rev. 943 (1993).

End of Document

## CERTIFICATE OF COMPLIANCE

Pursuant to Mass. R. App. P. 16, I, Elaine Fronhofer, hereby certify that this Brief and its accompanying Record Appendix comply with the rules of court that pertain to the filing of such papers, including but not limited to Mass. R. A. P. 16(a)(13) (addendum); Mass. R. A. P. 16(e) (references to the record); Mass. R. A. P. 18 (appendix to the briefs); Mass. R. A. P. 20 (form and length of briefs, appendices, and other documents); and Mass. R. A. P. 21 (redaction).

I also certify that this Brief has been produced using 14-point Baskerville, a proportionally spaced font, and contains 10,981 words (including headings, footnotes and quotations, but excluding portions of the Brief exempted from the word limit under Mass. R. A. P. 20(a)(2)(D)).

The word-processing program I used is Microsoft Word, version 16.3.1.

/s/ Elaine Fronhofer___
Elaine Fronhofer

## CERTIFICATE OF SERVICE

I, Elaine Fronhofer, hereby certify that I have this day served a copy of this brief and appendix on counsel for the appellant, ADA David Mark, by electronic service to katherine.mcmahon@state.ma.us.

/s/ Elaine Fronhofer___
Elaine Fronhofer

Dated: December 31, 2019