



People v. Rodriguez

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A jury found defendant Alberto Rodriguez guilty of one count of first degree murder (Pen. Code, § 187, subd. (a)) and found that defendant personally used a firearm in the commission of the offense (Pen. Code, § 12022.5, subd. (a)).

On appeal, defendant contends that (1) the trial court prejudicially erred by admitting gang evidence; (2) the prosecutor committed misconduct by denying that a witness received consideration for her testimony; (3) the trial court erred in failing to provide defendant with a Marsden ¹ hearing when he raised the issue of ineffective assistance of counsel at sentencing, and (4) there was insufficient evidence to support the jury's verdict. In a supplemental brief, defendant requests this court to review the trial court's decision on his Pitchess ² motion.

Defendant's concurrently filed habeas petition alleges that he was provided ineffective assistance of counsel because his counsel failed to investigate alibi and impeachment evidence, failed to follow up on Pitchess discovery, failed to use a gang expert, and failed to present impeachment evidence of the prosecution's principal eyewitness.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

This is an appeal from the third trial of this matter. In a prior opinion, we reversed defendant's conviction on the grounds that the trial court erred in excluding impeachment evidence of an eyewitness to the murder. ³ After the Supreme Court reversed, ⁴ we addressed the remaining contentions on remand and again reversed, ⁵ finding that that the trial court erred in excluding the testimony of an alibi witness. A July 2001 retrial of the matter ended in a mistrial, and the matter was re-tried in November 2001, resulting in the current conviction on appeal.

1. Trial Testimony ⁶

On October 11, 1995, Valerie Sanchez (Sanchez) was killed in a drive-by shooting on Cherokee Street in Hollywood. The 18th Street Gang controlled the area around Cherokee and Yucca, which had



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heavy narcotic trafficking and prostitution. Francine Owens (Owens) worked as a prostitute in the area and frequently "crashed" at an apartment at 1825 Cherokee. She sometimes got crack cocaine from defendant, and knew defendant belonged to the 18th Street gang and that he had an "18" tattooed on his cheek.

Owens, who was a friend of Sanchez, testified that on the day before the murder, she woke up in the apartment at 1825 Cherokee to find defendant yelling at Sanchez and accusing Sanchez of taking his drugs and his watch. Defendant told Sanchez he was going "to fuck you up, bitch." Owens left the apartment and saw Sanchez later that day on the street, but did not see her after that.

Rachel Houston⁷ testified that at the time of the shooting, she lived across the street at 1830 Cherokee. At about 1:30 a.m. on October 11, Houston, who lived on the fourth floor, heard a male voice yell "ocho." Houston, who previously lived in a building inhabited by members of the 18th Street Gang, knew this expression to mean that something was wrong and that something was "going to go down." She testified she heard several gunshots. She looked out the window and saw the passenger side of a white car, and saw a woman on the sidewalk get shot. She heard a male voice yelling "ocho, ocho, ocho." The next day Houston spoke to Detective Michael Pelletier of the Los Angeles Police Department about what she had seen and heard. She was not comfortable talking to him because they were on the street near the building.

Tommie Merritt⁸ was on the top of the seven-story apartment building at 1830 Cherokee with his dog. Because of gang activity in the neighborhood, the manager permitted the tenants to use the roof to walk their dogs. Merritt, who admitted he was "nosy," was looking into the apartment of a transvestite who lived across the street. Merritt saw defendant circling the block several times, heckling transvestites in front of his apartment building. Merritt knew defendant; he had seen him several times before in the same vehicle and around the area. Merritt recognized defendant from his goatee, hair, and face, as well as the "18" tattoo on his cheek.⁹ Defendant was the only one Merritt had seen in the neighborhood with that tattoo. The car came slowly up the street again, and defendant leaned out of the passenger window, his hands cupped together and pointed towards people gathered on the sidewalk. Merritt testified he saw "muzzle flashes" explode, heard three shots, and saw Sanchez staggering on the sidewalk, bleeding.

Merritt did not go to the police immediately because he feared for his life. Merritt was threatened by another 18th Street gang member and also by defendant, who revealed a gun in his waistband, shoved it under Merritt's chin, and told him not to talk to the police, or "I will do to you what I did to them." The next day, Merritt spoke to Detective Pelletier about the shooting, and identified defendant from a photo array.

James Ribe, medical examiner, determined Sanchez died from a gunshot wound to the chest. Stippling on her skin indicated Sanchez had been shot from a distance of less than three feet.



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Officer Gustavo Chacon of the Los Angeles Police Department worked with the Hollywood Gang Unit, specializing in the 18th Street Gang. Officer Chacon was a member of the C.R.A.S.H. ¹⁰unit, and comes into contact with gang members on a daily basis. It is common for gang members to get tattoos with the name of their gang as a form of expressing loyalty to their gang. In addition, respect is important to gang members, and fear and intimidation are important means of garnering respect among gangs. Respect is also earned by having a presence in the neighborhood through graffiti, the presence of gang members on the street corners, and the commission of violent crimes. A gang member who did not retaliate for being victimized would lose respect within the gang. If a female stole from a gang member, the gang member would have to retaliate, or they would lose face. Prior to committing a "pay back," or retaliation, gang members will yell out the name of their gang as a signal to others that they control the neighborhood. If a gang does not maintain a level of fear and intimidation, its neighborhood runs the risk of being taken over by rival gangs. A non-gang member who cooperated with the police would be at risk of harm from the gang. Officer Chacon personally knew defendant as an 18th Street Gang member, and from his observation, defendant was the only member of that gang with an "18" tattoo on his cheek.

Detective Pelletier is assigned to the Hollywood area. Merritt told him that he was positive that defendant was in the car and not on the sidewalk when the shooting occurred. Owens approached Pelletier at the crime scene the morning of October 11, 1995, and he gave her a business card because he had concluded his investigation and was leaving the scene. Owens called him on November 2, 1995, and told him about the dispute between defendant and Sanchez. Owens had a friend in jail and she hoped Pelletier could help her friend. Pelletier told her he could not help her out, and he did not make any deal with her. ¹¹

2. Defendant's Habeas Petition.

At defendant's first trial, he put on two defense witnesses who testified that defendant was walking with them on the street at the time of the shooting and that defendant was not the shooter. As Sanchez approached one of the witnesses (Gutierrez) and asked for a cigarette, the witness was shot twice from behind by a young Latino man with black hair and brown skin. The witness heard Sanchez cry out, but left the scene without waiting for an ambulance. The other witness (Al-Alusi) testified that he was walking down the street with Sanchez, defendant, and two other men when a car slowed down near them, a passenger in a disguise stuck his head out the window, and fired approximately five shots at them. Dorcas Powell would have testified that she saw defendant on the street with these two witnesses immediately after the shooting. ¹²

In addition, Douglas Urschel, an investigator, testified for defendant at the first trial that his 1996 investigation disclosed there was no physical evidence that dogs had been on the roof. His photographs depicted a corner of the roof where a rise in the roof obstructed the view to the south. Urschel did not testify at the second or third trial. Defendant hired a private investigator, C. J. Ford, whose investigation of the scene of the crime led him to conclude that defense counsel (both initial



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counsel and replacement counsel) had not made sufficient use of the shell casing evidence found in the street to establish, among other things, that Merritt could not have observed muzzle flashes. Based upon his investigation, he concluded the roof of Merritt's apartment would not have afforded a view of any muzzle flashes.

Douglas Goldstein of the Los Angeles Public Defender's Office represented defendant at the first trial. Prior to the second trial, Goldstein filed a Pitchess motion on the grounds that he believed some of the testifying officers had a motive to lie. After Goldstein was advised Francine Owen would be a prosecution witness, he was forced to substitute out as defense counsel because the public defender's office had previously represented Owens in another matter. Lawrence Sperber was appointed to represent defendant, and although he received all of Goldstein's files, Sperber claimed he never received materials that had been ordered produced in connection with Goldstein's Pitchess motion. Defendant claims Sperber did not follow up on this discovery, and no materials were used at the third trial to impeach the testifying officers. Sperber did not use a gang expert identified by his own investigator, nor did he use evidence uncovered by his investigator that many gang members had an "18" tattooed on their cheek. Defendant claims Sperber did nothing to investigate or challenge the accuracy of trial testimony that Owens received nothing in exchange for her testimony, which he knew might have been the result of a deal made with the prosecution in which Owens may have received dismissal of her probation.¹³

Defendant urged Sperber to contact his witnesses who would put him at the scene on the sidewalk, rather than in the car. Sperber's trial tactics, however, specifically excluded witnesses who would put defendant at the scene. At the third trial after Kim testified, Sperber decided to have defendant testify, but defendant did not want to testify unless he had other witnesses to back him up. Defendant also knew of an 18th Street Gang member in prison who could have testified at his trial to the frequency of the "18" tattoos.

DISCUSSION

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN RULING ON DEFENDANT'S PITCHESS MOTION.

Prior to the November 2001 retrial, defendant made a pre-trial Pitchess and Brady¹⁴ motion to obtain matters in the personnel files of the investigating and arresting officers. Defendant contended the materials were relevant because the testifying and investigating officers could be biased against 18th Street gang members. Defendant sought complaints from all sources relating to acts of aggressive behavior, excessive force, racial, gender, ethnic and gang bias, violation of constitutional rights, acts of moral turpitude (false arrest, planting of evidence, false testimony, false police reports), discipline imposed, and any other material or evidence which was impeaching or exculpatory.

The trial court held Pitchess hearings and ordered disclosure of some material. On appeal, defendant



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requested this court to independently review the documents submitted in the trial court and the sealed transcripts to determine whether the requested discovery was adequately disclosed and whether the trial court abused its discretion in failing to order all discoverable documents disclosed. After an initial review of the record, we determined the record was inadequate to determine what information was turned over to the defense, and that the record was ambiguous with respect to the nature and extent of the files reviewed. We ordered the trial court to conduct a detailed Pitchess hearing on accordance with *People v. Mooc* (2001) 26 Cal.4th 1216. The sealed transcripts of those proceedings have been transmitted to this court.

Trial courts are vested with broad discretion when ruling on motions to discover peace officer records, and we review the trial court's rulings for abuse of discretion. (*People v. Samayoa* (1997) 15 Cal.4th 795, 827; *People v. Mooc*, supra,) 26 Cal.4th at p. 1228.) We have reviewed the sealed transcripts of the in camera hearings conducted, which we find constitute an adequate record of the trial court's review of any documents provided to it. The record reveals no abuse of discretion. ¹⁵ II. THE TRIAL COURT DID NOT ERR IN ADMITTING GANG EVIDENCE.

Defendant argues the evidence of his membership in a gang was highly prejudicial, and that the trial court erred in admitting it on the grounds that it was relevant to the issue of his identity, motive, and to explain why Merritt did not come forward at first to identify defendant. Defendant also argues prejudicial effect from the cumulative nature of the gang evidence in this case. Lastly, defendant argues the court should have given a limiting instruction, and the trial court's failure to do so gave violated his due process right to a fair trial. (See, e.g., *McGuire v. Estelle* (9th Cir. 1989) 873 F.2d 1323.)

Evidence of gang affiliation and activity is admissible when relevant to prove some fact other than the defendant's criminal propensity. (Evid. Code, § 1101, subd. (b); *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1369; see also *People v. Williams* (1997) 16 Cal.4th 153, 193-194 [admissible to establish motive and identity]; *People v. Funes* (1994) 23 Cal.App.4th 1506, 1519 [admissible to establish motive and intent]; *People v. Sanchez* (1997) 58 Cal.App.4th 1435, 1449-1450 [admissible on issue of witness credibility].) Because the "admission of evidence of a criminal defendant's gang membership creates a risk the jury will improperly infer the defendant has a criminal disposition and is therefore guilty of the offense charged," a trial court must carefully scrutinize gang evidence before admitting it into evidence. (*People v. Williams*, supra, 16 Cal.4th at p. 193.) There is also a danger that gang evidence may constitute an impermissible opinion on guilt or innocence. (See *People v. Torres* (1995) 33 Cal.App.4th 37, 46-47.) Gang evidence is not admissible where it is merely cumulative of other less inflammatory evidence. (*People v. Maestas* (1993) 20 Cal.App.4th 1482, 1497-1498.) The admission of gang evidence over relevancy and Evidence Code section 352 objections is reviewed for an abuse of discretion. (*People v. Olguin*, supra, 31 Cal.App.4th at p. 1369.)

Here, gang evidence was relevant to establish motive (defendant's need to save face and earn respect by retaliating against Sanchez for stealing his property), identity (the "18" on defendant's cheek assisted Merritt and the police in identifying defendant), and to explain Merritt's reluctance to



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immediately come forward. We reject defendant's argument that this evidence was cumulative, because Officer Chacon's background discourse on gang sociology was necessary to an understanding of the offense, and would have assisted the jury. It is therefore not cumulative. (Evid. Code, § 801 [expert may offer opinion testimony where the subject is sufficiently beyond common experience that such testimony would assist the trier of fact].)

To the extent defendant argues error because the gang evidence was so pervasive as to deny him a right to a fair trial, to which the absence of a limiting instruction contributed, we reject this argument. Defendant's "guilt by association" argument, that the jury found him guilty merely because he belonged to a gang, is misplaced in the instant case. The gang testimony here was limited to specifics, i.e., motive, identity, and witness credibility; any background non-specific testimony served only to educate the jury on gang activity as it would relate to these issues. Appellant further argues that the court erred in failing to give the jury a limiting instruction that the evidence could not be used to prove that he had a bad character or a disposition to commit crimes. (CALJIC No. 2.50.) The court did not have a sua sponte duty to give such an instruction, and defense counsel did not request it. Accordingly, the claim is waived. (People v. Padilla (1995) 11 Cal.4th 891, 950, overruled other grounds in People v. Hill (1998) 17 Cal.4th 800, 823, fn. 1.)

III. NO EVIDENCE OF PROSECUTORIAL MISCONDUCT REGARDING OWENS TESTIMONY.

At trial, both Owens and Detective Pelletier testified that Owens had not received any special consideration in exchange for her testimony. Defendant contends that Owens received termination of her probation from Deputy District Attorney Cynthia Rayvis after the conclusion of the July 2001 retrial. At the third trial, the prosecution again denied any deal had been made, and explained that Owens had no knowledge of the deal, as the probation was terminated after the conclusion of the second trial. Rayvis was not called to testify concerning any deal that allegedly had been made. Defendant contends the prosecution is guilty of misconduct because the prosecution has an affirmative duty to refrain from using improper methods, and the suppression of this evidence favorable to the accused violates due process. (People v. Hill, supra, 17 Cal.4th at p. 820; see also Brady v. Maryland, supra, 373 U.S. at pp. 88-89.)

Prosecutorial misconduct consists of conduct which infects a trial with such unfairness as to deny a defendant due process of law or the use of deceptive or reprehensible methods to persuade the jury. (People v. Hill, supra, 17 Cal.4th at p. 819; People v. Gionis (1995) 9 Cal.4th 1196, 1214-1215.) There may be prosecutorial misconduct even in the absence of intent or bad faith. (Hill, supra, at pp. 822-823.) However, reversal for prosecutorial misconduct is not necessary unless defendant has been prejudiced thereby; i.e., if it is reasonably probable defendant would have obtained a more favorable result absent the misconduct. (People v. Bolton (1979) 23 Cal.3d 208, 214.)

The issue of prosecutorial misconduct may not be raised on appeal absent a timely objection on the ground of misconduct and request for a curative admonition. (People v. Hill, supra, 17 Cal.4th at p.



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820; *People v. Gionis*, supra, 9 Cal.4th at p. 1215.) The failure to request a curative admonition does not waive a claim of prosecutorial misconduct if the nature of the misconduct was such that an admonition would have been futile to obviate its prejudicial effect. (*Hill*, supra, at p. 820; *Gionis*, supra, at p. 1215.)

Here, the record in this direct appeal is incomplete on whether the prosecution wrongfully withheld information that was in fact crucial to the defense. The only evidence of any alleged deal is the termination of Owens's probation. On the other hand, Owens's testimony was consistent throughout, as her statements in 1995 and 1996 to Detective Pelletier were the same as her statements at trial. Thus, the impact of any deal on her testimony was in any event minimal, rendering any purported error harmless.

IV. NO ERROR IN FAILURE TO CONDUCT MARSDEN MOTION.

Defendant contends the court failed to hold a hearing on his Marsden motion, which he made just before sentence was pronounced. Defendant contended his counsel was ineffective because he had not located and interviewed the witnesses defendant had identified. Counsel advised the court that the witnesses were either unavailable or he had concluded their testimony was not worthwhile. The court stated it found counsel had provided effective assistance.

A defendant is entitled to substitution of counsel if the record clearly shows the appointed attorney is not providing adequate representation or the defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation will likely result. (*People v. Welch* (1999) 20 Cal.4th 701, 728.) Denial of a Marsden motion is not an abuse of discretion unless the defendant shows that a failure to replace the appointed attorney would "substantially impair" his or her right to assistance of counsel. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1085.)

The question of whether to call certain witnesses is a matter of trial tactics, unless the decision results from an unreasonable failure to investigate. (*People v. Bolin* (1998) 18 Cal.4th 297, 334.) In the instant case, the trial court properly conducted an inquiry, considered the issue and accepted counsel's explanation. (*People v. Smith* (1993) 6 Cal.4th 684, 696 [court entitled to accept counsel's explanation where there was a credibility question between defendant and counsel at Marsden hearing]; *People v. Webster* (1991) 54 Cal.3d 411, 436 [trial court satisfied duty to consider defendant's complaints where it "sought a response from counsel and considered the information provided in reaching a decision"].) The fact that the prosecutor was present at the hearing does not render the court's consideration of the matter defective. We find no error.

V. SUFFICIENT EVIDENCE SUPPORTS DEFENDANT'S CONVICTION.

Defendant argues insufficient evidence supports the verdict because the only evidence of his guilt was Merritt's testimony that Merritt saw defendant driving down Cherokee Street leaning out of the



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passenger window of the car with a gun. However, the medical examiner testified that Sanchez had been shot from a distance of less than three feet based upon his evaluation of stippling on her skin. Defendant contends these two facts are irreconcilable from a factual standpoint because Sanchez could not have been shot from a car at such close range, rendering the verdict factually impossible.

We disagree. We view the facts adduced at trial in full and in the light most favorable to the judgment, drawing all inferences in support of the judgment. (People v. Silva (1988) 45 Cal.3d 604; People v. Johnson (1980) 26 Cal.3d 557, 576.) We resolve the issue based upon the entire record and determine whether there is substantial direct or circumstantial evidence of the convicted offenses. (People v. Johnson, supra, 26 Cal.3d at p. 577.) The test is not whether the evidence proves guilt beyond a reasonable doubt, but whether substantial evidence, of credible and solid value, supports the jury's conclusion. (People v. Arcega (1982) 32 Cal.3d 504, 518.) We simply consider whether any rational trier of fact could have found the essential elements of the alleged offenses beyond a reasonable doubt. (People v. Rich (1988) 45 Cal.3d 1036, 1081.) Unless "on no hypothesis whatever is there sufficient substantial evidence to support the [jury's] verdict," we will not reverse. (People v. Hicks (1982) 128 Cal.App.3d 423, 429.)

Defendant's theory of factual impossibility is misplaced. The car had circled the block slowly, several times. Defendant was leaning out of the car with his arm extended, cupping a weapon. The victim was on the sidewalk in an undescribed location. Defendant knew the victim, and may have called her over to curb near the car, and shot her from the car as she stood or leaned on the sidewalk. These factual scenarios, which are reasonably inferable from the evidence, would be consistent with the stippling on the victim's skin. Thus, the verdict is rational and supported by substantial evidence.

VI. DEFENDANT'S HABEAS PETITION IS DENIED.

Defendant contends his counsel at the third trial failed to follow up on Pitchess discovery, failed to challenge Owens's testimony that she did not receive any concessions for her testimony; failed to use the investigators' testimony concerning the condition of the roof and the shell casings; failed to contact Dorcas Powell, who saw defendant on the street, not in a car; failed to present evidence that defendant's "18" tattoo was not unique to defendant, and failed to call a gang expert. We reject these contentions.

The right to effective assistance of counsel derives from the Sixth Amendment right to assistance of counsel. (Strickland v. Washington (1984) 466 U.S. 668, 686-674; see also Cal. Const., art. I, § 15.) To obtain a reversal of his conviction based upon ineffective assistance of counsel, appellant must show (1) counsel's conduct was deficient when measured against the standards of a reasonably competent attorney, and (2) prejudice resulting from counsel's performance "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as producing a just result." (People v. Mayfield (1997) 14 Cal.4th 668, 784 [quoting Strickland v. Washington].) Prejudice is shown where there is a reasonable probability, but for counsel's errors, that the result of the proceeding



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would have been different. (In re Harris (1993) 5 Cal.4th 813, 832-833.) "[T]he petitioner must establish prejudice as a demonstrable reality, not simply speculation as to the effect of the errors or omissions of counsel." (In re Clark (1993) 5 Cal.4th 750, 766 [internal citations and quotation marks omitted].) In a habeas proceeding, the defendant may present evidence outside of the trial record to establish a prima facie case for habeas relief; if a prima facie case is made, we will issue an order to show cause. (People v. Shoals (1992) 8 Cal.App.4th 475, 502.)

Our review of counsel's performance is deferential, and strategic choices made after a thorough investigation of the law and facts are "virtually unchallengeable." (In re Cudjo (1999) 20 Cal.4th 673, 692.) The decision to call or not to call any particular witness is generally a matter of trial tactics within the discretion of the defense counsel on which this court "will not ordinarily exercise judicial hindsight." (People v. Beagle (1972) 6 Cal.3d 441, 458; accord, People v. Bolin, supra, 18 Cal.4th at p. 334.) However, defense counsel has an obligation to investigate all defenses, explore the factual bases for defenses, and evaluate the applicable law. (People v. Maguire (1998) 67 Cal.App.4th 1022, 1028.) The defendant "can be expected to rely on counsel's independent evaluation of the charges, applicable law, and evidence, and of the risks and probable outcome of the trial." (In re Alvernaz (1992) 2 Cal.4th 924, 933.)

First, the materials ordered released to defense counsel in connection with the Pitchess motion did not relate to Officer Chacon, the officer who defendant believed might be lying. With respect to the other officers involved with the arrest and investigation, the materials ordered produced either related to officers who did not testify at trial, or, the case of Detective Pelletier, consisted of one item viable for impeachment purposes. We are unable to determine from the record whether counsel obtained the materials ordered produced, but even assuming counsel failed to investigate whether the Pitchess materials would have been useful at trial, given the nature of the evidence actually ordered produced, any error from its absence at trial was not prejudicial.

Second, whether counsel's failure to challenge whether Owens received a quid pro quo in exchange for her testimony is pure speculation. The evidence at trial revealed no concessions, and defendant offers no evidence any were made aside from the slender inference that may be drawn from the fact her probation was terminated.

Third, counsel's decision not to use the investigator testimony concerning the condition of the roof and bullet casings is within reasonable trial tactics given some of the foundational and relevance problems with the evidence. Urschel's investigation took place in 1996, well after the crime, and thus lacked probative value as to the condition of the roof in 1995. Ford's assertion that Merritt could not see muzzle flashes lacked any foundation other than his personal speculation.

Fourth, counsel's decision not to contact Dorcas Powell or the fact that she may have been missing at the time of the third retrial cannot be the basis of prejudicial error, as counsel's primary trial strategy was to avoid using witnesses who would place defendant at the scene of the crime. The fact that this



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strategy may have changed mid-trial when counsel attempted to put defendant on the stand does not make counsel's initial decision regarding whether to use this witness substandard.

Fifth, any evidence that defendant's "18" tattoo was not unique would not undermine Merritt's identification testimony, as Merritt's identification was also based upon his recognition of defendant's facial features and hair. Therefore, any extensive testimony on the presence of "18" tattoos on the cheeks of other 18th Street gang members would have been corollary and done little to impeach Merritt.

Finally, defendant's argument concerning the failure to use a gang expert is not adequately developed. Aside from the identification of the potential expert, defendant's petition does not establish the substance of the expert's testimony, or how its presentation would have supported his position, or how it would have affected the trial.

DISPOSITION

The judgment of the superior court is affirmed. Defendant's petition for habeas corpus is denied.

We concur:

JOHNSON, Acting P. J.

WOODS, J.

1. People v. Marsden (1970) 2 Cal.3d 118.

2. People v. Superior Court (1974) 11 Cal.3d 531.

3. People v. Rodriguez (Nov. 19, 1997, B104864) [nonpub. opn.].

4. People v. Rodriguez (1999) 20 Cal.4th 1. The issues before the Supreme Court were limited to whether (1) the exclusion of the impeachment evidence was error and (2) there was sufficient evidence to support a finding the gun used in the shooting was loaded. (Id. at p. 10, 14.) The latter issue was mooted by the dismissal of an assault charge.

5. People v. Rodriguez (Oct. 26, 1999, B104864) [nonpub. opn.].

6. At the November 2001 retrial, defendant did not put on the testimony of the alibi witness (Dorcas Powell) this court found had been erroneously excluded.

7. At the time of the November 2001 trial, Houston went by the name of "Rachel Kim."



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8. Merritt was deceased at the time of trial, and his testimony came in by way of transcript from the prior trial.

9. Merritt testified that he could not actually see the "18," but because he recognized defendant's other features, he knew the mark on defendant's cheek was an "18."

10. R.A.S.H. stands for Community Resources Against Street Hoodlums.

11. Owens's testimony on this subject was consistent with Detective Pelletier's testimony: In November 1995, she spoke to Detective Pelletier about the argument between defendant and Sanchez; she contacted Detective Pelletier because she wanted to get her boyfriend out of jail; however, Detective Pelletier did not let her boyfriend out of jail. In May 1996, Detective Pelletier contacted her, and she signed a statement. Although Owens testified at the July 2001 trial, the prosecution did not promise her anything for coming to court. Defendant disputes that Owens did not receive any concessions for her testimony. See discussion *infra*.

12. Owell's testimony was excluded at the first trial; although this ruling was reversed on appeal, she did not testify at the third trial.

13. Defendant's habeas petition contains minimal factual support for this contention, but defendant submits that he would address it in full if this court were to issue an order to show cause to the trial court to conduct an evidentiary hearing.

14. *Radley v. Maryland* (1963) 373 U.S. 83.

15. In connection with his concurrently filed habeas petition, defendant argues that defense counsel's failure to use those Pitchess materials released to the defense at the third retrial constituted ineffective assistance. See discussion *infra*.

