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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ALBERTO ALEJANDRE, Defendant and Appellant.	A131367 (Contra Costa County Super. Ct. No. 05-100134-6)
In re ALBERTO ALEJANDRE on Habeas Corpus.	A137456

A jury convicted defendant Alberto Alejandre of first degree murder (Pen. Code, § 187),[1] conspiring to commit murder (§§ 182, subd. (a)(1), 187), conspiring to shoot a firearm from a motor vehicle (§ 182, subd. (a)(1), former § 12034, subd. (c)),[2] and street terrorism (§ 186.22, subd. (a)). The jury also found that the murder and conspiracy offences were committed to benefit a street gang (§ 186.22, subd. (b)(1)), and that a principal in the offenses used a firearm resulting in the death of the victim (§ 12022.53, subd. (e)(1)).

Defendant appeals his conviction on several grounds. He claims that (1) defense counsel rendered ineffective assistance of counsel in failing to move to suppress evidence

[1] All further section references are to the Penal Code except as noted.

[2] Former section 12034 was repealed and re-enacted as section 26100 without substantive change. (Stats. 2010, ch. 711, § 4.)

obtained from an electronic tracking device placed on defendant's vehicle without a warrant; (2) the prosecutor acted with purposeful ethnic discrimination during jury selection in exercising a peremptory challenge against a Hispanic man; (3) a gang expert's testimony that gangs retaliate against informants, and his opinion that the victim here was killed for testifying against a gang member, was admitted without proper foundation because the expert's opinion was based on police reports and testimony transcripts collected by the prosecutor rather than the expert's own police investigations; and (4) evidence that defendant wrote gang graffiti in his courtroom holding cell during trial was wrongly admitted because the conduct occurred after the charged crimes and thus was irrelevant.

Defendant also filed a petition for a writ of habeas corpus, which we have consolidated with the appeal. In his petition, defendant reiterates his claim of ineffective assistance of counsel and also asserts that the prosecutor presented inconsistent theories of guilt at separate trials and failed to disclose exculpatory evidence.

We shall affirm the judgment and deny the petition for a writ of habeas corpus.

STATEMENT OF FACTS

The August 3, 2009 freeway shooting

Defendant and his friends went out drinking late on the night of August 2, 2009, to celebrate his 24th birthday and their party extended into the early morning hours of the next day. The group consisted of defendant, his cousin Martin Cerda and his friends Hung Nguyen and Claude Richards. According to the police, defendant, Cerda and Nguyen are Sureño street gang members.

Around 1:00 a.m. on August 3, the group headed home with Richards driving defendant's white van. They crossed the Carquinez Bridge and were driving on Interstate 80 when someone in the group opened the van's sliding side door and fired gun shots at another vehicle. A police officer who viewed a surveillance video of the van and its occupants recorded at the Carquinez Bridge toll plaza testified that Nguyen matched the

victim's physical description of the shooter. At trial, codefendant Nguyen admitted the group's involvement in the shooting but claimed that Cerda was the shooter.

Surveillance of defendant's vehicle used in the shooting

The police used the Carquinez Bridge surveillance video to obtain the license plate number of the van used in the shooting. Motor vehicle records showed the registered owner sold the van to defendant. The police went to defendant's house on the afternoon of August 3, 2009, the day of the freeway shooting, and saw the van parked nearby. Later that day, the police placed a global positioning system (GPS) electronic tracking device on the van.

The GPS device permitted the police to monitor the movement, location, and speed of the van from a laptop computer. The device alerted the police when it detected motion and police officers then responded to the scene and followed the van, sometimes keeping the van under direct visual observation but often monitoring the van's movement at a distance with the GPS device. At trial, the police explained that covert surveillance of the van was necessary to preserve evidence of the freeway shooting until they could obtain a search warrant for defendant's vehicle and home.

The GPS device was placed on defendant's van late on August 3, 2009, and no motion was detected until around 11:00 p.m. on August 4, about 24 hours later. The police followed the movements of the van throughout the night of August 4 and into the early morning hours of August 5 as the van traveled to multiple locations around the East Bay. The police were never close enough to identify the van occupants or observe their activity, but during the course of tracking the van the police discovered a parked vehicle with its tires and rims removed. At trial, Nguyen admitted that he, defendant, and Cerda spent the night driving in the van, stealing wheel rims from cars along the way.

The van returned to defendant's San Pablo home around 5:00 a.m. on August 5. At 6:30 a.m., the van left defendant's house and the police followed it with the aid of the GPS device. At 6:55 a.m., a police officer saw a van occupant repeatedly open and close the vehicle's sliding side door; the officer thought the van occupant was practicing for

another shooting. The van then drove down a small street and the surveillance officer did not follow directly behind for fear of being observed by the van occupants. The officer used the GPS device to monitor the van's location over the next few minutes. The device showed that the van slowly drove back and forth through the neighborhood of 23rd and Maricopa Streets in San Pablo, making two U-turns and stopping at that intersection at 7:06 a.m.

The August 5, 2009 shooting

Francisco Perez lived on Maricopa Street. Perez was a former Sureño gang member. Years earlier, in 2003, Perez was with Martin Cerda's older brother, Victor, when Victor shot and killed a rival Norteño gang member. Perez testified against Victor, and Victor was convicted of murder and sentenced to prison.

In 2009, Perez lived with his grandmother and worked as a roofer, leaving for work around 7 a.m. On the morning of August 5, Perez left his home for work and a fusillade of gunfire erupted. Perez's grandmother saw a man in a white van shooting at her grandson. A bullet grazed Perez's head and another bullet pierced his liver, heart, and left lung. Perez collapsed on the street and died at his grandmother's feet.

The police arrived at the scene and found 19 shell casings from two different firearms. The recovered shell casings were nine-millimeter and .40 caliber. The police also obtained a surveillance videotape from a nearby store that shows a white van driving back and forth on Maricopa Street in the minutes before the shooting. The videotape shows Perez initially walking toward the store then running from the van as it drove slowly towards him with its side door open.

Cell phone records revealed several calls from defendant's and Nguyen's phones to a known Sureño gang member minutes after the shooting. Nguyen's calls were transmitted by cell phone towers along the route traveled by defendant's white van. The police arrested defendant, Nguyen, and Cerda. A search of defendant's house found the two handguns used in the Perez shooting; one of those guns had been used in the earlier freeway shooting.

Defendant and Nguyen were tried together.[3] At trial, Nguyen admitted that he, defendant, and Cerda were at the Perez shooting. Nguyen denied planning the shooting. Nguyen said defendant was driving the van, looking for more tire rims to steal when Cerda saw the man who "snitched" on Cerda's brother and directed defendant to make a U-turn. Nguyen said defendant and Cerda spoke together in Spanish and defendant made several turns to bring the van back to Perez. Cerda dropped to his knees, opened the van's sliding door, pulled a gun from under his jacket, and fired multiple rounds at Perez. Nguyen said he could not see if defendant was also shooting at Perez but, when confronted with the fact that two guns were used in the shooting, Nguyen said the second shooter had to be defendant.

Gang evidence

Sergeant Jeff Palmieri of the San Pablo Police Department testified as a gang expert. He testified to the rivalry between Sureño and Norteño street gangs and described their history, criminal activities, and symbols. Palmieri testified that gangs rely on violence and fear to maintain territory and retain control over its members. He said a gang member who talks to the police puts his life in danger and is labeled a "snitch." The sergeant said a Sureño gang member who snitches on another gang member will be "put in check" by the gang with "a good beat down" or "worse." On cross-examination, Palmieri conceded that the specific instances of Sureño retaliation against cooperating witnesses that he knew about were drawn from police reports and other documents compiled by the prosecutor, not prior personal experience. In closing, the sergeant opined that Perez's killing was done to benefit the gang: "what more of a powerful statement could a gang make . . . than everybody in the area knows that this individual was involved [as] a witness in a crime and now . . . he's dead in the street."

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[3] Cerda made a pretrial admission that implicated defendant and Nguyen and was thus tried separately. (*Bruton v. United States* (1968) 391 U.S. 123, 126.) The three men have separately appealed. (See *People v. Cerda* (Sept. 5, 2013, A133103) [nonpub. opn.]; *People v. Nguyen* (Sept. 5, 2013, A135195).)

A sheriff's deputy who served as the court room bailiff during defendant's trial testified that he checked the holding cell after he found pencils in defendant's sock and discovered new gang graffiti, including defendant's nickname, defendant's gang name, and the words "fuck snitchin." The graffiti was consistent with "Sureño gang tagging" and the "fuck snitchin" message reflects a gang "motto" against witnesses who cooperate with the police, an officer testified.

Following his conviction, defendant was sentenced to prison for a term of 50 years to life and timely filed this appeal.

DISCUSSION

I. *Evidence obtained from installation of a GPS tracking device on defendant's vehicle was not subject to exclusion because the device was authorized by controlling law at the time.*

Defendant invokes a recent United States Supreme Court case to contend that his Fourth Amendment rights were violated when the police surreptitiously placed a GPS tracking device on his vehicle without a warrant, and that defense counsel rendered ineffective assistance in failing to move to suppress the evidence obtained from the tracking device. The contention that the placement and use of the GPS device in this manner constitutes a search subject to the restrictions of the Fourth Amendment is supported by the recent decision in *United States v. Jones* (2012) ___ U.S. ___ [132 S.Ct. 945, 949]. However, defendant's contention fails here because controlling law at the time the device was used authorized police use of GPS tracking devices. (*People v. Zichwic* (2001) 94 Cal.App.4th 944, 953-956; *United States v. McIver* (9th Cir. 1999) 186 F.3d 1119, 1126-1127.) [4]

The police installed a GPS tracking device on defendant's vehicle in 2009 and evidence obtained from the device was introduced at defendant's trial the following year.

[4] The People make numerous additional arguments in support of the admission of the evidence, including the contention that even if use of the GPS is deemed a search, the search was reasonable under the circumstances. We need not and do not address these additional contentions.

It was not until 2012 that the Supreme Court held that "the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a 'search' " within the meaning of the Fourth Amendment. (*United States v. Jones, supra,* 132 S.Ct. at p. 949.) In *Jones*, government agents attached a GPS tracking device to defendant's vehicle and used the device to monitor the vehicle's movements on public streets over a four-week period. (*Id.* at p. 948.) Installation and use of the GPS device was held to be a search because it was a "physical intrusion" of "private property for the purpose of obtaining information." (*Id.* at p. 949.) The court reaffirmed the Fourth Amendment's historical protection against trespass and explained that its more recently articulated reasonable-expectation-of-privacy standard (see *Katz v. United States* (1967) 389 U.S. 347) adds to, but does not substitute for, the common-law trespass test in evaluating whether a search has occurred. (*Id.* at p. 952.)

Jones changed the law in California. Prior to *Jones,* California state and federal courts had held that installation of a GPS device is not a search governed by the Fourth Amendment because a vehicle operator has no reasonable expectation of privacy in a vehicle's exterior. (*People v. Zichwic, supra,* 94 Cal.App.4th at pp. 953-956; *United States v. McIver, supra,* 186 F.3d at pp. 1126-1127.) In *Zichwic,* the police attached a GPS tracking device to the undercarriage of a truck owned by the defendant, a parolee and suspected burglar, and monitored the truck's movements for several hours until defendant was arrested at the site of a burglary. (94 Cal.App.4th at pp. 949-950.) The trial court denied defendant's motion to suppress evidence obtained as a result of monitoring the GPS device and that ruling was affirmed on appeal. (*Id.* at pp. 950-956.) The appellate court based its decision on two separate grounds. Initially, the court held that "if we assume that attaching an electronic tracking device to the undercarriage of defendant's truck constituted a search, it was authorized by defendant's parole search condition." (*Id.* at p. 953.) Second, the court held: "If defendant was not subject to a parole search condition, we would conclude, on the record before us, that installing an electronic tracking device on the undercarriage of defendant's truck did not amount to a search within the meaning of the Fourth Amendment." (*Ibid.*) The court noted that

"Federal circuit courts disagree about whether the installation of a monitoring device is a search" and followed the Ninth Circuit Court of Appeal's holding that the installation of a GPS device on a vehicle is not a search because " '[t]he undercarriage is part of the car's exterior, and as such, is not afforded a reasonable expectation of privacy.' " (*Id.* at p. 955, quoting *United States, v. McIver, supra,* 186 F.3d at p. 1127.)

Defendant argues that the federal *McIver* decision is not binding on California courts (see *People v. Crittenden* (1994) 9 Cal.4th 83, 120, fn. 3) and that the court's Fourth Amendment discussion in *Zichwic* was dicta and thus also not controlling. While defendant is correct that state courts are not bound by Ninth Circuit decisions, whether the police may reasonably rely on such decisions in the absence of conflicting California authority is quite another matter. Nonetheless, we need not pursue this issue because, in all events, the only California authority at the time of the police conduct in question relied upon and adopted the holding in *McIver*. The *Zichwic* court's analysis was not mere dictum. The discussion of the Fourth Amendment issue was not a brief comment made in passing but instead an extended analysis spanning several pages. The court closed its discussion by saying, "For all the reasons above, we conclude that the trial court did not err in denying defendant's suppression motion." (*People v. Zichwic, supra,* 94 Cal.App.4th at p. 956.) The court's Fourth Amendment analysis provided an alternative, independent ground for affirming the ruling.

Where, as here, " 'two independent reasons are given for a decision, neither one is to be considered mere dictum, since there is no more reason for calling one ground the real basis of the decision than the other. The ruling on both grounds is the judgment of the court and is of equal validity.' " (*Southern Cal. Ch. of Associated Builders etc. Com. v. California Apprenticeship Council* (1992) 4 Cal.4th 422, 431, fn. 3.) While the *Zichwic* court found that defendant was subject to a parole search condition, it also adopted the Ninth Circuit view that installation of a vehicular GPS device is not a search subject to Fourth Amendment protection. (*People v. Zichwic, supra,* 94 Cal.App.4th at pp. 953-956.) The holding in *Zichwic* was binding precedent upon which the police could reasonably rely when they installed a GPS device on defendant's vehicle in 2009.

"Evidence obtained during a search conducted in reasonable reliance on binding precedent is not subject to the exclusionary rule." (*Davis v. United States* (2011) ___ U.S. ___, ___ [131 S.Ct. 2419, 2429].) "Exclusion is 'not a personal constitutional right,' nor is it designed to 'redress the injury' occasioned by an unconstitutional search." (*Id.* at p. 2426.) The exclusionary rule's "sole purpose" is "to deter future Fourth Amendment violations." (*Ibid.*) "[T]he deterrence benefits of exclusion 'var[y] with the culpability of the law enforcement conduct' at issue. [Citation.] When the police exhibit 'deliberate,' 'reckless,' or 'grossly negligent' disregard for Fourth Amendment rights, the deterrent value of exclusion is strong and tends to outweigh the resulting costs. [Citation.] But when the police act with an objectively 'reasonable good-faith belief' that their conduct is lawful, [citation], or when their conduct involves only simple, 'isolated' negligence [citation], the ' "deterrence rationale loses much of its force," ' and exclusion cannot 'pay its way.' " (*Id.* at pp. 2427-2428.)

A police officer who acts in compliance with binding judicial precedent is "not culpable in any way." (*Davis v. United States*, *supra*, 131 S.Ct. at p. 2428.) If the exclusionary rule were applied in that context, it would deter "conscientious police work," not police misconduct as is its aim. (*Id.* at p. 2429.) "Responsible law-enforcement officers will take care to learn 'what is required of them' under Fourth Amendment precedent and will conform their conduct to these rules. [Citation.] But by the same token, when binding appellate precedent specifically *authorizes* a particular police practice, well-trained officers will and should use that tool to fulfill their crime-detection and public-safety responsibilities. An officer who conducts a search in reliance on binding appellate precedent does no more than ' "ac[t] as a reasonable officer would and should act" ' under the circumstances. [Citation.] The deterrent effect of exclusion in such a case can only be to discourage the officer from ' "do[ing] his duty." ' [Citation.] [¶] That is not the kind of deterrence the exclusionary rule seeks to foster." (*Ibid.*) The police here acted in reasonable reliance on binding judicial precedent in placing a GPS device on defendant's vehicle. Thus, the evidence obtained from the device was not subject to exclusion (*United States v. Pineda-Moreno* (9th Cir. 2012) 688 F.3d 1087,

1090-1091.) and defense counsel did not render ineffective assistance by failing to raise the issue.[5]

II. *The court did not err in holding that the prosecutor's peremptory discharge of one prospective Hispanic male juror did not make a prima face showing of ethnic discrimination.*

Defendant claims he was "tried by a jury chosen in a racially-discriminatory manner" and that the prosecutor acted with purposeful discrimination against Hispanic men when he exercised a peremptory challenge against one Hispanic man, prospective juror Stephen Q.[6] Defendant moved to disallow the challenge to Stephen Q., claiming impermissible group bias. (*Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*); *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*).) The court found the defense had failed to establish a prima facie case of discrimination and denied the motion. The prosecutor was then permitted to state on the record his reasons for the peremptory challenge, explaining that he excused Stephen Q. because the prospective juror was an unmarried man without children, was "reserved" during voir dire, and "was a total mystery because he virtually wrote no answers" on the written juror questionnaire. After receiving this explanation, the court reiterated its ruling denying the motion.

" 'Under *Wheeler*, *supra*, 22 Cal.3d 258, "[a] prosecutor's use of peremptory challenges to strike prospective jurors on the basis of group bias — that is, bias against 'members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds' — violates the right of a criminal defendant to trial by a jury drawn from a representative cross-section of the community under article I, section 16 of the state Constitution. [Citation.]" [Citation.] Such a practice also violates the defendant's right to

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[5] Moreover, even if the approval of police installation of a GPS device without a warrant in *Zichwic* were considered as dicta and not as a binding precedent, the refusal to apply the exclusionary rule in this case was nonetheless justified under the broader good faith exception to the exclusionary rule. (See *United States v. Leon* (1984) 468 U.S. 897; *Illinois v. Krull* (1987) 480 U.S. 340; *Arizona v. Evans* (1995) 514 U.S. 1; *People v. Willis* (2002) 28 Cal.4th 22.)

[6] To protect privacy, we do not use the full names of jurors and prospective jurors.

equal protection under the Fourteenth Amendment.' " (*People v. Taylor* (2010) 48 Cal.4th 574, 611.)

"In ruling on a motion challenging the exercise of peremptory strikes, the trial court follows a three-step procedure." (*People v. Clark* (2011) 52 Cal.4th 856, 904.) "First, the defendant must make out a prima facie case 'by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.' [Citations.] Second, once the defendant has made out a prima facie case, the 'burden shifts to the State to explain adequately the racial exclusion' by offering permissible race-neutral justifications for the strikes. [Citations.] Third, '[i]f a race-neutral explanation is tendered, the trial court must then decide . . . whether the opponent of the strike has proved purposeful racial discrimination.' " (*Johnson v. California* (2005) 545 U.S. 162, 168, fn. omitted.)

The trial court here found that the defense had not made a sufficient prima facie showing because the facts did not permit an inference of ethnic discrimination. On review from such a finding, we conduct "an independent review of the entire record to decide 'the legal question whether the record supports an inference that the prosecutor excused a juror on the basis of race' " or ethnicity. (*People v. Taylor, supra,* 48 Cal.4th at p. 614.)

We reject defendant's contention that because the prosecutor volunteered his reasons for excusing Stephen Q., we should proceed immediately to the third step of the *Batson/Wheeler* analysis. A prosecutor may provide an explanation for a contested peremptory challenge, which will preclude the need for a subsequent hearing if the appellate court should find the prima facie showing sufficient, but on appeal, the court still proceeds through the three-step analysis and must determine whether the defense made a prima facie case of discrimination. (*People v. Bonilla* (2007) 41 Cal.4th 313, 343, fn. 13.)

Defendant asserts that federal law is contrary to California law on this point and dictates that "the question of a prima facie case becomes moot . . . once the prosecutor states his reasons," citing *Hernandez v. New York* (1991) 500 U.S. 352. Defendant misreads that decision. *Hernandez* provides: "Once a prosecutor has offered a race-neutral explanation for the peremptory challenges *and the trial court has ruled on the*

ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot" on appeal. (*Id.* at p. 359, italics added.) As the California Supreme Court has explained, *Hernandez* concerned an implicit finding of a prima facie case of discrimination. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1103, overruled on another ground in *People v. Rundle* (2008) 43 Cal.4th 76, 151.) State law is in accord in holding that a trial court that rules on the ultimate question of discrimination, without any statement regarding the establishment of a prima facie case, may be presumed to have implicitly found a prima facie case. (*People v. Lewis* (2008) 43 Cal.4th 415, 471; accord *People v. Riccardi* (2012) 54 Cal.4th 758, 786-787.) The ultimate ruling on discrimination thus becomes the proper focus of appellate review. But the trial court here did not make an implicit finding of a prima facie case followed by a consideration of the prosecutor's proffered race-neutral reasons for the strike. Instead, the court made an explicit finding that no prima facie case was established and denied the *Batson/Wheeler* motion on that basis. We therefore focus our attention upon the ruling that was made by the trial court.

"In deciding whether a prima facie case was stated, we consider the entire record before the trial court [citation], but certain types of evidence may be especially relevant: '[T]he party may show that his opponent has struck most or all of the members of the identified group from the venire, or has used a disproportionate number of his peremptories against the group. He may also demonstrate that the jurors in question share only this one characteristic — their membership in the group — and that in all other respects they are as heterogeneous as the community as a whole. Next, the showing may be supplemented when appropriate by such circumstances as the failure of his opponent to engage these same jurors in more than desultory voir dire, or indeed to ask them any questions at all. Lastly, . . . the defendant need not be a member of the excluded group in order to complain of a violation of the representative cross-section rule; yet if he is, and especially if in addition his alleged victim is a member of the group to which the majority of the remaining jurors belong, these facts may also be called to the court's attention.' " (*People v. Bonilla, supra*, 41 Cal.4th at p. 342.)

Defendant claims the prosecutor excluded Hispanic men from the jury.[7] The number and pattern of the prosecutor's peremptory strikes does not support the claim. During jury selection, a large number of prospective jurors (including many Hispanics) were excused for hardship or removed for cause until 87 eligible jurors remained, 10 of whom were Hispanic.[8] Of these, five were men and five were women. Four of the Hispanic women were peremptorily challenged by defendants, one by the prosecutor. Two of the Hispanic men were peremptorily challenged by defendants, one by the prosecutor. The remaining two Hispanic men served on the jury, one as a regular juror and the other as an alternate.

The prosecution and defense each had 30 peremptory strikes to use. (Code of Civ. Proc., § 231, subd. (a) [defense and prosecution each entitled to 30 peremptory strikes in joint trial of two defendants charged with crimes punishable by life imprisonment].) Of the 26 peremptory strikes he exercised, the prosecutor used just one against a Hispanic male and did not use it until strike number 20. At the time of that challenged strike, there was another Hispanic man (Juror 14) in the jury box who had been passed repeatedly by the prosecutor from the beginning of voir dire and went on to serve as a juror in the case. Defendant claims that Juror 14's ethnicity is uncertain, but we think the trial court's identification of Juror 14 as a Hispanic man is clear in the voir dire transcript and his ethnicity is further confirmed by the unredacted juror list, which shows the juror to have Spanish first and last names. The prosecutor ultimately accepted two Hispanic men, Juror 14 and alternate Juror 228, on the jury despite having additional peremptory strikes at his disposal.

The fact that there was only one Hispanic man who served as a regular juror does not suggest discriminatory exclusion given the size of the jury pool. The jury pool of 87

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[7] We assume that Hispanic men constitute a cognizable group for *Batson/Wheeler* purposes, distinct from Hispanics generally and men generally, and that individuals are accurately identified as Hispanic by having Spanish surnames. (*People v. Bonilla, supra,* 41 Cal.4th at p. 344.) The People do not challenge these assumptions.

[8] We requested and received an unredacted list of the venire from the trial court that lists the names of all prospective jurors.

had only five Hispanic men, representing 6 percent of the total number of prospective jurors. The one Hispanic man on the jury of 12 constituted eight percent of the jury, exceeding the percentage of Hispanic men available in the jury pool. (See *People v. Bonilla, supra,* 41 Cal.4th at p. 346 [ultimate composition of the jury is a factor to be considered in evaluating a *Batson/Wheeler* motion].) It is true that " ' "[e]ven the exclusion of a single prospective juror may be the product of an improper group bias. As a practical matter, however, the challenge of one or two jurors can rarely suggest a *pattern* of impermissible exclusion." ' " (*Id.* at p. 343.)

No inference of discriminatory exclusion arises here. The prosecutor's voir dire of Stephen Q. was not absent or "desultory," which, if present, may suggest exclusion based on group bias rather than individual assessment. (*People v. Bonilla, supra,* 41 Cal.4th at p. 342.) The prosecutor began his questioning with Stephen Q. among the prospective jurors in the panel and engaged in a series of substantive questions relevant to the case being tried.

Although an inference of discrimination may arise when the defendant is a member of the excluded group, that inference is weaker where, as here, the victim is also a member of the excluded group. (*People v. Bonilla, supra,* 41 Cal.4th at p. 342.) Any possible inference of discrimination is also weakened by the fact that race-neutral reasons for excusing Stephen Q. were established during voir dire. The prosecutor said the prospective juror was "reserved" when questioned in court and expressed "virtually nothing about himself" on the written questionnaire. Defendant's trial counsel conceded that "[t]he answers given by [Stephen Q.] were extremely brief and he appeared to be a blank slate." Defendant argues on appeal that others selected to serve on the jury provided no more information than did Stephen Q., but the significance of that comparison is significantly weakened by defense counsel's concession and a review of the record.

Defendant also challenges the prosecutor's claim that Stephen Q.'s status as an unmarried man without children was among the reasons for striking the prospective juror. In selecting a jury, a prospective juror's marital status and other life experiences are valid

considerations relevant to societal involvement. (*People v. Taylor, supra*, 48 Cal.4th at p. 616) The prosecutor here excused a number of prospective jurors who were unmarried and without children, not just Stephen Q. Defendant argues that Stephen Q.'s marital and parental status was used by the prosecutor as a pretext for ethnic discrimination and asserts that three non-Hispanic males were accepted as jurors or alternates despite being unmarried and without children. The California Supreme Court has questioned the utility of such "comparative juror analysis" in the first stage of the *Batson/Wheeler* analysis. (*Id.* at p. 617.) In any event, defendant's analysis here is factually flawed. One of the single "non-Hispanic males" referenced by defendant, alternate Juror 228, was actually a Hispanic male. Another of the referenced individuals, Juror 134, was married. Juror 134 did not state any marital status on the questionnaire but the matter was clarified during voir dire when he said he lived with his wife. The last referenced individual, Juror 179, was not male but female and, while she was unmarried and without children, she was only 28 years old whereas Stephen Q. was 40 years old and thus at an age when many individuals are settled with a spouse or domestic partner. The prosecutor exercised peremptory challenges against six unmarried prospective jurors, only one of whom was a Hispanic man. " '[T]he totality of the relevant facts' " does not give rise to " 'an inference of discriminatory purpose.' " (*Johnson v. California, supra*, 545 U.S. at p. 168.) The court did not err in denying the *Batson/Wheeler* motion.

III. *Sufficient foundation was provided for the gang expert's opinion that the victim was killed for testifying against a Sureño gang member*.

As noted above, Sergeant Jeff Palmieri of the San Pablo Police Department testified as a gang expert. He testified that gangs rely on violence and fear to maintain territory and to retain control over its members, and will retaliate against those who cooperate with the police. Palmieri opined that the killing of Perez, who had testified against Sureño gang member Victor Cerda, was done to benefit the gang. Defendant contends there was insufficient foundation for Palmieri's opinion because it was based on evidence of gang retaliation contained in police reports and transcripts of testimony selected and provided to the officer by the prosecutor and not on the officer's personal

knowledge of gang assaults or information he personally collected. Defendant contends that admission of the officer's opinion was prejudicial because Victor Cerda was defendant's cousin and in the absence of the officer's testimony the jury may have found that defendant killed for family revenge rather than to benefit the gang.[9]

The foundation for the officer's opinion was properly established in a pretrial hearing. (Evid. Code, § 402.) At that hearing, Sergeant Palmieri testified that Sureño and other street gangs have a practice of inflicting injury or death upon those who provide information to law enforcement agencies. The Sureños retaliate against "snitches" to "keep the gang strong and send a message that snitching or telling on the gang will not be tolerated." The officer said the Sureños believe that "if the gang did not punish those individuals who were involved in giving up information, the gang would become weak and soon would not be able to operate." Palmieri acknowledged that he had not personally investigated cases where Sureños retaliated against cooperating witnesses but knew of multiple cases of retaliation from documents provided by the prosecution. The officer read and relied upon police reports and excerpts of grand jury transcripts to describe in detail five specific instances in which Sureños attacked, or tried to attack, cooperating witnesses. Defendant objected that there was no proper foundation for Palmieri's opinion because it was based on documents provided by the prosecutor rather than information personally known or independently obtained. The court overruled the objection, stating that it "goes to the weight not the admissibility" of the officer's testimony.

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[9] Defendant requests the court to take judicial notice of a trial transcript from another case in which a police officer was asked how the police investigate a homicide if they have no "hot leads." In response, the officer offered an example that appears to refer to the Perez homicide: "we had a killing recently in San Pablo. And that person was a witness to a homicide and testified in trial. And they went out and killed him, the suspect's family. [¶] So we immediately focused our attention at them, and they were found guilty of that crime." The proffered testimony is irrelevant. It is not evidence that defendant or other members of "the suspect's family" killed solely for personal revenge rather than to benefit the gang to which they all belonged. Judicial notice is denied.

The evidence was properly ruled admissible. Contrary to defendant's argument, an expert witness' testimony need not be "based on information which he personally collected." An expert witness may base his opinion on matter "personally known to the witness *or made known to him at or before the hearing*, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates . . . ." (Evid. Code, § 801, subd. (b), italics added.) Sergeant Palmieri reasonably relied on police reports and grand jury transcripts provided to him by the prosecutor before the hearing that detailed Sureño gang retaliation against cooperating witnesses. Defendant argues that the information in the reports and transcripts selected by the prosecutor may not have "presented an accurate picture of Sureño behavior." But the defense reviewed the materials and cross-examined Palmieri at length about the basis for his opinion. No evidence was presented, then or now, that the information was faulty. The foundation for the officer's opinion was properly established.

IV. *The trial court properly admitted evidence that defendant wrote gang graffiti in the courtroom holding cell during trial.*

Defendant contends that the trial court erred in admitting evidence that, during the trial, the court room bailiff discovered fresh graffiti in defendant's holding cell with the inscriptions "Easter Hill Locos" (defendant's Sureño gang subset), "El Topo" (defendant's Sureño nickname), "N Killa" (meaning Norteño killer), and "fuck snitchin." Defendant argues that gang-related conduct occurring after the charged crimes was irrelevant to the issues being tried. Defendant is mistaken.

It is true that "[c]rimes occurring *after* the charged offense cannot serve as predicate offenses to prove a pattern of criminal gang activity" nor can they be used to establish that a group is a criminal street gang. (*People v. Duran* (2002) 97 Cal.App.4th 1448, 1458, italics omitted.) But the evidence of the holding cell graffiti was not admitted to establish a predicate offense. The evidence was admitted to substantiate defendant's affiliation and loyalty to the Sureños and his violent attitude toward informants. "Cases have repeatedly held that it is proper to introduce evidence of gang affiliation and activity

where such evidence is relevant to an issue of motive or intent." (*People v. Funes* (1994) 23 Cal.App.4th 1506, 1518.) The graffiti evidence was properly admitted.

V. *No basis for habeas relief has been established*.

An appellate court receiving a petition for a writ of habeas corpus "evaluates it by asking whether, assuming the petition's factual allegations are true, the petitioner would be entitled to relief. [Citation.] If no prima facie case for relief is stated, the court will summarily deny the petition." (*People v. Duvall* (1995) 9 Cal.4th 464, 474-475.)

Defendant concedes that his habeas "argument that defense counsel rendered ineffective assistance of counsel . . . for failure to move to suppress the GPS evidence is essentially the same argument" made on appeal. The same conclusion thus applies. As discussed above, the police acted in reasonable reliance on binding judicial precedent in placing a GPS device on defendant's vehicle. (*People v. Zichwic, supra,* 94 Cal.App.4th at pp. 953-956; *United States v. McIver, supra,* 186 F.3d 1119 at pp. 1126-1127.) The evidence obtained from the device therefore was not subject to exclusion (*United States v. Pineda-Moreno* (9th Cir. 2012) 688 F.3d 1087, 1090-1091) and defense counsel did not render ineffective assistance by failing to raise the issue.

Defendant also asserts in his habeas petition that the prosecutor presented inconsistent theories of guilt at separate trials and failed to disclose material exculpatory evidence. (*Brady v. Maryland* (1963) 373 U.S. 83.) Both claims rest on the same facts. After the conclusion of defendant's trial, the same assistant district attorney prosecuted other Sureño gang members for unrelated murders. In the course of one of those trials, the prosecutor presented the testimony of an informant and former Sureño, Luis Ruelas. Ruelas testified he feared retaliation by the Sureños and, to substantiate that fear, was asked if he knew of "any actual witness killings that have been accomplished." Ruelas said he did. When Ruelas was asked to relate what he knew, over a hearsay objection, he was permitted to answer not "for the truth but just for the effect on the witness." Ruelas testified that Francisco Perez, the victim of the murder in the present case, was killed for testifying against Victor Cerda. The prosecutor asked Ruelas, "Do you know who

murdered him?" and Ruelas answered yes, it was "Kirby," a "Chinese guy" and "Little Geo."

Defendant argues that the prosecutor presented inconsistent theories of guilt by charging defendant with murdering Perez but in later trials presenting evidence that a man nicknamed Kirby, subsequently identified as Stephen Miranda, was the murderer along with Martin Cerda (Little Geo) and Hung Nguyen (the "Chinese guy").[10] However, the prosecutor never presented contradictory evidence about the killing of Perez. The prosecutor consistently argued in the trial of defendant and Nguyen and the later trial of Cerda that these three men killed Perez. As he explains in a declaration submitted to this court, the prosecutor's examination of Ruelas in a later, unrelated murder trial was "not designed to seek out substantive information" about the Perez murder but "to elicit Mr. Ruelas' fears about testifying as an informant witness and the legitimacy of those fears based on the fact that he knew a fellow Sureño that had been killed for acting as a witness against another Sureño." In no trial did the prosecution present evidence or contend that Miranda, rather than defendant, was involved in the killing of Perez.

Also unavailing is defendant's claim that Ruelas's testimony constituted material exculpatory information that Miranda killed Perez. Evidence is not material unless " 'there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.' " (*Kyles v. Whitley* (1995) 514 U.S. 419, 433.) Ruelas's testimony naming Perez's murderers was pure hearsay. Nothing in the record suggests that Ruelas had any first-hand information about the murder and the prosecutor affirmatively denies the existence of any such information. Ruelas had "been labeled a 'snitch' by Sureños at least one year before the murder [of Perez] ever occurred." The jury's finding that defendant was one of the three men responsible for Perez's death is supported by overwhelming evidence that defendant was in the van at the time of the shooting. Nguyen testified that defendant was with him and Cerda in the van, defendant owned the van, the van was electronically detected at the scene of the shooting

[10] The surname Nguyen is actually Vietnamese, not Chinese.

and tracked along a route matching defendant and Nguyen's cell phone activity, defendant's fingerprint was on the van, gunshot residue was on defendant's clothes, and the guns used in the shooting were concealed in a lawn mower grass catcher bag in the backyard of defendant's home. Ruelas's hearsay statement about who he thought was involved in the killing of Perez does not undermine confidence in the outcome of the trial. Even if the statement had been made before defendant's trial, which it was not, it would not have constituted material evidence that the prosecutor was bound to disclose. (*Kyles v. Whitley, supra*, 514 U.S. at p. 434.)

DISPOSITION

The judgment is affirmed and the petition for writ of habeas corpus is denied.

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Pollak, Acting P.J.

We concur:

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Siggins, J.

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Jenkins, J.