

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

DAVID VALENZUELA ARZATE PETITIONER
(Your Name)

VS.

SCOTT FRAUENHEIM — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES NINTH CIRCUIT COURT OF APPEALS
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

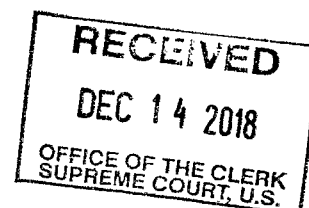
PETITION FOR WRIT OF CERTIORARI

DAVID VALENZUELA ARZATE
(Your Name)

P.O. BOX 290066
(Address)

REPPESA, CALIF, 95671
(City, State, Zip Code)

(Phone Number)



QUESTION(S) PRESENTED

- 1.) Did the Ninth Circuit Court of Appeals abuse discretion or err in denying petitioners certificate of appealability?
- 2.) Could reasonable jurist rule in Mr. Arzate's favor with respect to whether his 14th Amendment right to due process and a fair trial was breached by the admission of highly prejudicial gang evidence in a trial where there was insufficient evidence to support a gang charge?
- 3.) Could reasonable jurist rule in Mr. Arzate's favor with respect to whether his 14th Amendment due process right to a fair trial and sixth Amendment right to an impartial jury were breached by the trial court's failure to declare a mistrial or hold a hearing regarding juror bias?
- 4.) Should this court exercise its jurisdiction under 28 U.S.C. 1257(2) and grant petitioner request for a certificate of appealability to this court in light of United States 524 U.S. 236 (1998)?

LIST OF PARTIES

☒ All parties appear in the caption of the case on the cover page.

[] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

TABLE OF CONTENTS

OPINIONS BELOW.....	1
JURISDICTION.....	
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	
STATEMENT OF THE CASE	
REASONS FOR GRANTING THE WRIT	
CONCLUSION.....	

INDEX TO APPENDICES

APPENDIX A	<i>DECISION OF THE NINTH CIRCUIT COURT OF APPEALS</i>
APPENDIX B	<i>DECISION OF THE NINTH CIRCUIT COURT OF APPEALS ON MOTION FOR RECONSIDERATION</i>
APPENDIX C	
APPENDIX D	
APPENDIX E	
APPENDIX F	

TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
MILLER-EL V. COCKRELL	537 U.S. 322, 123 S.Ct. 1029 (2003)
BAREFOOT V. ESTELLE	463 U.S. 880 (1983)
THARPE V. SELLERS	2018 U.S. 199 L.Ed. 2d 424 2018 WL311568
BUCK V. DAVIS	137 S.Ct. 759, 197 L.Ed. 2d 1 (2017)
UNITED STATES	524 U.S. 236 (1998)
SLACK V. MCDANIEL	529 U.S. 473, 484 (2000)
HAINES V. KERNER	404 U.S. 519, 92 S.Ct. 594 (1972)
JENNINGS V. STEPHENS	(2015) U.S. 135 S.Ct. 793
CHAMBERS V. MISSISSIPPI	410 U.S. 284, 294 (1973)
SMITH V. PHILLIPS	455 U.S. 209 (1982)
STATUTES AND RULES	
28 U.S.C.	1257 (2)
28 U.S.C.	2253
FEDERAL RULE OF APPELLATE PROCEDURE	RULE 22(b)
FEDERAL RULES OF EVIDENCE	RULE 201(b)
CALIFORNIA PENAL CODE SECTION	186.22(b)(1)
CALIFORNIA PENAL CODE SECTION	186.22 12022.53(c)

OTHER

UNITED STATES CONSTITUTION 14th AMENDMENT

UNITED STATE CONSTITUTION 6th AMENDMENT

"Table of Authorities cited"

"CONTINUED"

- Wainwright v. Witt 469 U.S. 412, 429, 105 S.Ct. 844 (1985)
- McDonough v. Power Equip. v. Greenwood 464 U.S. 548, 555, 104 S. Ct. 845 (1984)
- Rushen v. Spain (1983) 464 U.S. 114, 120, 104 S.Ct. 453
- Sheppard v. Maxwell 384 U.S. 333, 351, 86 S.Ct. 1507 (1966),
- Turner v. Louisiana 379 U.S. 466, 471, 85 S.Ct. 546 (1965)
- Buck v. Davis U.S. 137 S.Ct. 759, 774 (2017)
- Brecht v. Abrahamson 507 U.S. 619, 637-38 (1993),
- Dawson v. Delaware 503 U.S. 159, 165-66 (1992)
- Mickelson v. United States 335 U.S. 469, 475 (1948)
- McKinney v. Rees 993 F.2d 1378 (9th Cir. (1993)
- Holmes v. South Carolina 547 U.S. 319, 326-26 (2006)
- Johnson v. Sublett 63 F.3d 926, 930 (9th Cir. (1995))
- Mattox v. United States 146 U.S. 140, 149-50 (1892)
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- Jones v. Buck 127 S.Ct. 910 (2007)
- United States v. Goldenberg 168 U.S. 95, 103, 18 S.Ct. 3, 42 L.Ed. 394 (1897).
- Haines v. Kerner 404 U.S. 519, 92 S.Ct. 594 (1972)
- Williams v. Woodford 384 F.3d 567, 583 (9th Cir. 2004) (quoting)
- Jennings v. Woodford 290 F.3d 1006, 1010 (9th Cir. 2002),
- Hedlund v. Ryan 750 F.3d 793, 804 (9th Cir. 2014).

IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

☐ reported at _____; or,
☒ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was AUGUST 29, 2018.

☐ No petition for rehearing was timely filed in my case.

☒ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: NOVEMBER 5, 2018, and a copy of the order denying rehearing appears at Appendix B.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from **state courts**:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

PETITIONERS "SIXTH" AND "FOURTEENTH" AMENDMENTS RIGHTS TO THE UNITED STATES CONSTITUTION WAS VIOLATED. THE NINTH CIRCUIT COURT OF APPEALS VIOLATED PETITIONERS RIGHT TO HAVE A CERTIFICATE OF APPEALABILITY GRANTED PURSUANT TO 28 U.S.C. 2253(C)(2) AS PETITIONER MADE THE NECESSARY SUBSTANTIAL SHOWING THAT REASONABLE JURISTS COULD DEBATE OR DISAGREE WITH THE DISTRICT COURT'S DECISION ON THE ISSUE PRESENTED AND THE ISSUE WAS ADEQUATE TO DESERVE ENCOURAGEMENT TO PROCEED FURTHER. "JUDICIAL NOTICE" IS NEEDED IN THIS CASE PURSUANT TO FEDERAL RULES OF EVID. 201(b) OF LOWER COURTS DECISIONS IN THE UNITED STATES EASTERN DISTRICT FEDERAL COURT CASE NO. 1:15-CV-01256-SKD AND THE NINTH CIRCUIT COURT OF APPEALS CASE NO. 18-15472. THIS COURT HAS JURISDICTION PURSUANT TO 28 U.S.C. 1257(2) OVER THE FINAL JUDGMENTS OF STATE POSTCONVICTION COURTS AND HAS JURISDICTION TO ISSUE AND GRANT A CERTIFICATE OF APPEALABILITY. (ALSO SEE) FEDERAL RULES OF APPELLATE PROCEDURE RULE 22(b).

STATEMENT OF THE CASE

THIS CASE CONCERNS THE STANDARD FOR A FEDERAL DISTRICT COURT AND CIRCUIT COURT OF APPEAL ISSUANCE OF A PETITIONER'S APPLICATION FOR CERTIFICATE OF APPEALABILITY UNDER 28 U.S.C. 2253, THE FEDERAL RULES OF APPELLATE PROCEDURE RULE 22 AND THE LONG STANDING HOLDINGS IN THIS COURT IN BOTH MILLER-EL V. COCKRELL 537 U.S. 322, 123 S.Ct. 1029 (2003) AND SLACK V. MCDANIEL 529 U.S. 473, 484 (2000) OF THE COURT CLARIFYING THE STANDARDS FOR ISSUANCE OF A CERTIFICATE OF APPEALABILITY WHICH INCLUDE AND STATE: A PRISONER SEEKING A (COA) NEED ONLY DEMONSTRATE A SUBSTANTIAL SHOWING OF THE DENIAL OF A CONSTITUTIONAL RIGHT. A PETITIONER "SATISFIES" THIS STANDARD BY DEMONSTRATING THAT JURISTS OR REASON COULD DISAGREE WITH THE DISTRICT COURT'S RESOLUTION OF HIS CONSTITUTIONAL CLAIMS OR THAT JURISTS COULD CONCLUDE THE ISSUES PRESENTED ARE ADEQUATE TO DESERVE ENCOURAGEMENT TO PROCEED FURTHER.

* (statement of the case "CONTINUED") * page #2

2.) ON AUGUST 14, 2015 petitioner filed a petition for writ of habeas corpus in the UNITED STATES EASTERN DISTRICT FEDERAL COURT CASE NO. 1:15-CV-01256-SKO IN CALIFORNIA CHALLENGING MULTIPLE CONSTITUTIONAL VIOLATIONS THAT OCCURRED DURING A JURY TRIAL WITH RESPECT TO HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS AND A FAIR TRIAL WAS BREACHED BY THE ADMISSION OF HIGHLY PREJUDICIAL GANG EVIDENCE IN A TRIAL WHERE THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT A GANG CHARGE AND RESPECT TO WHETHER HIS FOURTEENTH AMENDMENT DUE PROCESS RIGHT TO A FAIR TRIAL AND SIXTH AMENDMENT RIGHT TO AN IMPARTIAL JURY WERE BREACHED BY THE TRIAL COURT'S FAILURE TO DECLARE A MISTRIAL OR HOLD A HEARING REGARDING JUROR BIAS.

3.) PETITIONER'S FEDERAL WRIT OF HABEAS CORPUS WAS DENIED ON MARCH 2, 2018.

4.) PETITIONER THEN FILED AN APPLICATION FOR (COA) IN THE DISTRICT COURT WHICH WAS DENIED AND A APPLICATION FOR (COA) IN THE UNITED STATES COURT OF APPEALS (9th CIRCUIT) WHICH WAS DENIED ON AUGUST 29, 2018.

* (Statement of the case "CONTINUED") * page #3

5.) The ninth circuit court of appeals denied petitioners motion for reconsideration on November 5, 2018.

6.) The ninth circuit court of appeals abused discretion or erred in denying petitioners application for a certificate of appealability because petitioner through counsel from the office of the federal defender demonstrated and presented enough information and facts that reasonable jurist could rule in Mr. Arzates favor whether his 14th amendment right to due process and a fair trial was breached by the admission of highly prejudicial gang evidence in a trial where there was insufficient evidence to support a gang charge as the superior court of California for the county of Stanislaus issued an amended judgment on May 6, 2014 acknowledging that Mr. Arzate's actions could not be in violation of California penal code section 186.22(a) because to violate that statute,

A person must promote, further, or assist at least one other member of a gang in committing a felony, and that reasonable jurist could rule in Mr. Arzate's favor with respect to an impartial jury were breached by the trial courts failure to declare a mistrial or hold a hearing regarding juror bias.

7.1 A criminal defendant has a due process right to a fair trial. (see) Chambers v. Mississippi 410 U.S. 284, 294 (1973). A petition for federal habeas corpus relief may be based on the issue of juror bias or misconduct. Misconduct that demonstrate a juror was biased may also violate the right to fair and impartial jury under the sixth amendment. Wainwright v. Witt 469 U.S. 412, 429, 105 S.Ct. 844 (1985); McDonough Power Equip. v. Greenwood 464 U.S. 548. 555. 104 S.Ct. 845 (1984); Rushen v. Spain (1983) 464 U.S. 114 120, 104 S.Ct. 453; Sheppard v. Maxwell 384 U.S. 333, 351, 86 S.Ct. 1507 (1966), and Turner v. Louisiana 379 U.S. 466. 471. 85 S.Ct 546 (1965). (juror misconduct involving the consideration of information not in evidence may also violate a defendants right to confrontation and counsel).

* (statement of the case "CONTINUED") *

PAGE # 5

8.) IN THE NINTH CIRCUIT, THE COURT RULED THERE IS NO CONTROLLING AUTHORITY FOR RELIEF BASED ON A THEORY OF IMPLIED bias, INSTEAD OF ACTUAL bias. (see) HELLUND V. RYAN 750 F.3d 793 804 (9th CIR. (2014)).

9.) THE PLAIN LANGUAGE OF 28 U.S.C. 2253 (C) AND THE DECISIONS OF THIS COURT IN MILLER-EL-COCKRELL 537 U.S. 322, 123 S.Ct. 1029 (2003) AND SLACK V. MCDANIEL 529 U.S. 473, 484 (2000) AUTHORIZES RELIEF AND FOR THE COURT • TO ISSUE AND GRANT PETITIONERS APPLICATION FOR A CERTIFICATE OF APPEALABILITY AS PETITIONER MET THE STANDARD AND DEMONSTRATED THAT THE DISTRICT COURT'S RESOLUTION OF THE CONSTITUTIONAL CLAIMS IS DEBATABLE AND THAT REASONABLE JURIST WOULD FIND THE DISTRICT COURT'S ASSESSMENT OF THE CONSTITUTIONAL CLAIMS DEBATABLE OR WRONG AS PETITIONERS TRIAL WAS FUNDAMENTALLY UNFAIR RELATED TO THE PREJUDICIAL GANG EVIDENCE AND JUROR BIAS WHICH INFECTED THE INTEGRITY OF THE PROCEEDINGS.

- 10.) Based on the Ninth Circuit Court of Appeal Ruling in; Hedlund v. RYAN 750 F.3d 793 804 (9th Cir. (2014)) and denying petitioners request for a (COA) certificate of appealability, "Ruling that petitioner/appellant has not made a substantial showing of the denial of a constitutional right undermines confidence in the judicial process and resulted in a fundamental miscarriage of justice."
- 11.) ON MARCH 21, 2007 A second amended information was filed in the STANISLAUS COUNTY SUPERIOR COURT charging MR. ARZATE, with the following: one count: attempted murder in violation of CALIFORNIA penal code sections 664/187 with three enhancements: (1) that the crime was committed intentionally, deliberately and with premeditation, (2) that the crime was committed to benefit a criminal street gang CALIFORNIA penal code section 186.22(b)(1), and (3) that MR. ARZATE personally and intentionally discharged a firearm. (CALIFORNIA penal code 12022.53(c)).

● COUNT TWO: ASSAULT WITH A FIREARM IN VIOLATION OF CALIFORNIA PENAL CODE SECTION 245(2)(2) WITH ONE ENHANCEMENT ALLEGATION, THAT THE CRIME WAS COMMITTED TO BENEFIT A CRIMINAL STREET GANG CALIFORNIA PENAL CODE, COUNT THREE: PARTICIPATION IN A CRIMINAL STREET GANG IN VIOLATION OF CALIFORNIA PENAL CODE SECTION 186.22(2), COUNT FOUR: POSSESSION OF A FIREARM IN VIOLATION OF CALIFORNIA PENAL CODE 12021(2).

12.) THE SECOND AMENDED INFORMATION ALLEGED THAT MR. ARZATE, HAD SUFFERED THREE PRIOR CONVICTIONS THAT QUALIFIED AS STRIKES UNDER CALIFORNIA'S THREE STRIKES LAW CALIFORNIA PENAL CODE SECTION 667(2), AND ONE PRISON PRIOR CONVICTION, CALIFORNIA PENAL CODE 667.5(b). MR. ARZATE PLEADED NOT GUILTY AND DENIED ALL OF THE ENHANCEMENT ALLEGATIONS. THE TRIAL BEGAN ON MARCH 19, 2007.

13.) DURING the TRIAL, JURORS HEARD NOT ONLY FROM witnesses to the encounter between MR. ARZATE AND MR. MONCIBAIZ, but ALSO FROM AN expert witness regarding gangs IN GENERAL AND MR. ARZATE'S CONNECTION to the NORTENOS GANG.

The expert witness OFFICER PERRY testified that there members of the NORTENO gang engage in property crime, drug crimes, AND violent crimes which consists of ASSAULTS with weapons, whether that be bats OR sticks OR deadly weapons such AS KNIVES AND FIREARMS, AND then violent crimes ALSO consisting of RAPE AND MURDER. OFFICER PERRY FURTHER testified that there were thousands of NORTENO gang members in the UNITED STATES, with the MAJORITY of them IN CALIFORNIA

14.) INTIMIDATION OF JURORS AND DENIAL OF
MOTION FOR MISTRIAL

(statement of the case "continued")

Page #9

ON THURSDAY 22, (2007), the fourth day of MR. ARZATE, TRIAL, the JURY WAS PREPARING TO TAKE A SHORT ~~break~~ AFTER NOON BREAK WHEN JUROR #12 SAID TO THE JUDGE, YOUR HONOR, I HAVE A PROBLEM BEFORE WE WALK OUT THIS DOOR WITH WHAT HAPPENED YESTERDAY, WHEN THE JUDGE INVITED THE JUROR TO STAY BEHIND AND EXPLAIN THE PROBLEM, JUROR NO. 12 STATED, I'M SURE THE WHOLE JURY FEELS THE SAME WAY, AND JUROR NO. 11 STATED WE DO. JUROR NO. 12 STATED I DON'T THINK ANYBODY WANTS TO WALK OUT THAT DOOR. THE JUDGE HAD THE JURY GO TO THE JURY ROOM AND WRITE NOTES REGARDING THEIR CONCERNS. THE NOTES READ AS FOLLOWS; JUROR NO. 1: AN ACTUAL GOOD LOOKING LATIN GIRL WITH HER CAMERA PHONE, HAD HER CAMERA PHONE OUT YESTERDAY WHEN WE EXITED THE COURT YESTERDAY FOR THE BREAK. SHE WAS STANDING BY THE WALL NEXT TO THE ELEVATOR WHEN WE CAME BACK FROM BREAK.

(statement of the case "continued") Page #10

MY CONCERN IS DID SHE TAKE PICTURES OF THE JURY,
AND WHAT IS TO BECOME OF OUR SAFETY IF THESE
FALL INTO GANG HANDS. RT D. 282. JUROR NO. 2:
I DIDN'T SEE ANYTHING. I JUST HEARD THAT THERE
WAS SOMEONE TAKING PICTURES OF THE JURY WHEN
LEAVING FOR BREAK YESTERDAY, MARCH 21st.
SOME OF THE JURORS ARE SCARED FOR RETALIATION
AGAINST THEM BECAUSE OF THE DEFENDANT IS A
GANG MEMBER. JUROR NO. 3: I HAVE CONCERNS
WITH ~~ALL~~ THE PEOPLE IN THE HALLWAY AND ON THE
BENCHES LOITERING, QUESTION MARK, WHEN COME
IN AND OUT FOR RECESS. * I HAVE CONCERNS WITH
THE NATURE OF THIS CASE. GANGS AND VIOLENCE
THAT WE HAVE SO MUCH PERSONAL INFORMATION
OUT AT THE BEGINNING. THE DEFENDANT ~~██████████~~
CONSTANTLY TAKES NOTES, WHAT DOES HE DO WITH
THAT ~~██████████~~ PAPER? I SAW THE GIRL WITH THE CAMERA
PHONE YESTERDAY, IF THAT'S WHAT IT ~~██████████~~ WAS, I
DIDN'T REALIZE WHAT SHE WAS DOING UNTIL IT

(statement of the case "continued") Page # 11

was pointed out to me. I could [REDACTED] identify her again. What happen to the camera phone? where did it go? she could have sent pictures on it right away.

JUROR NO. 4: my concern is with a person

who was in the hall outside the courtroom yesterday. It appeared that she was taking pictures [REDACTED] with a camera phone of the jury as we [REDACTED] left the courtroom at the afternoon break. Also, it is not a good feeling to be coming out of the courtroom and seeing the people who have testified sitting in the hall watching us. JUROR NO. 5:

When leaving the courtroom yesterday afternoon break, I saw a hispanic woman standing by the elevator area with a camera phone pointed at us as we were leaving. It looked like she was taking pictures of the jury. That freaked me out, along with the lack of security for the jurors in the hallways.

(statement of the case "continued") Page #12

A FELLOW JURY member told A SHERIFF IN THE COURTROOM ABOUT IT YESTERDAY, BUT WE HAVE NO WAY OF KNOWING IF ANYTHING WAS DONE ABOUT IT. THAT WOMAN WAS NOT THERE WHEN WE LEFT YESTERDAY FOR THE DAY. I DID NOT SEE HER TODAY EITHER. JUROR NO. 6: DID NOT SEE THE INCIDENT THAT IS IN QUESTION BUT CONCERNED ABOUT JURY SAFETY AFTER HEARING GANG RELATED TRIAL. JUROR NO. 7: I DO NOT HAVE ANY COMMENT. JUROR NO. 8: I DID NOT SEE THE LADY HOLD THE CAMERA PHONE, AND IT MAY HAVE BEEN INNOCENT; HOWEVER, IT CONCERNS ME THAT SOMEONE IS EVEN ALLOWED IN THE COURTHOUSE WITH A CAMERA. AS JURORS, WE HAVE TO WALK RIGHT BY MANY PEOPLE TO GET OUT. WE DON'T KNOW WHO THEY ARE, BUT THEY KNOW WHO WE ARE. IT ALSO CONCERNS ME THAT WE HAD TO GIVE OUR PERSONAL INFO WHERE WE WORK, ETCETERA.

GIVEN ALL THE TALK OF ALLEGED GANG INVOLVEMENT IN THIS CASE. IF THERE WERE GANG MEMBERS OUTSIDE OF THE COURTROOM, THAT WOULD BE A GREAT CONCERN. TAKING OUR PICTURES COULD BE SEEN AS A FORM OF INTIMIDATION. WAS THE CAMERA CONFISCATED, THE WOMAN LOCATED.

JUROR NO. 9: I SAW A GIRL TAKING PICTURES WITH HER PHONE. I'M JUST CONCERNED ABOUT MY SAFETY. JUROR NO. 10: I DID NOT NOTICE A GIRL TAKING PICTURES, BUT NOW THAT I KNOW, I HAVE CONCERNS. NO. 1, WHEN WE CAME IN FOR JURY SELECTION, THERE SHOULD HAVE BEEN THREE EMPTY SEATS, BUT ONE PERSON HAD TO STAND. THAT MEANS FOUR PEOPLE THAT SHOULD NOT HAVE BEEN IN THE COURTROOM WERE PRESENT. THEY HAVE ALL OF THE PERSONAL INFORMATION ON US, OUR SPOUSES, CHILDREN, AND COULD EASILY GOOGLE ANYTHING THEY WANTED ABOUT US. THE DEFENDANT IS SITTING, TAKING NOTES.

What happens to those notes, these notes? The defense list of JURORS sat in front of him for the entire day. No. 3, the camera phone incident also gives him pictures of us all. These factors give me great concern for the safety of myself and my family. JUROR NO. 11: CONCERN REGARDING the young hispanic woman I observed with a camera phone. She appeared to be taking pictures of the JURORS as we went ~~to~~ for the afternoon break yesterday at 3:00 p.m. He was located at the top of the stairs at the handrail in front of the elevator area. JUROR NO. 12: It came to my attention that yesterday a young lady was taking our pictures with a camera phone. I'm concerned about my and the other jury members safety as we walk down the railroad tracks to our cars.

* (statement of the case "continued") * Page # 15

15.) The court then stated; it is a concern to me that there seems to be almost a universal ~~con-~~cern for their safety expressed by the JURORS, and we can certainly probe further to see if they can set those feelings aside, but I do have some serious concerns, frankly, about whether or not this incident has so tainted this JURY panel that we can continue. The prosecutor then asked that before the court issue a ruling the prosecutor be allowed to research the issue in the evening and come back with caselaw on point. The prosecutor asked that the court not declare a mistrial. The court agreed to wait to rule. The court decided to send ALL OF the JURORS home until the following Monday.

*(statement of the case "continued") * Page #16

16.) When the parties appeared in court on Monday March 27, 2007 the Judge stated that he believed the court could cure whatever problem exists with ~~an~~ an admonition to the jury. Defense counsel pointed out that it appeared the jury was already prejudiced against Mr. Arzate. * The court did not grant the defense ~~the~~ motion for mistrial but instead reiterated that it believed it could cure any bias by admonishing the jury and then asking them as a group if they could be fair.

17.) After the court admonished the jurors the defense request to question jurors was rejected by the court.

18.) "conviction and sentencing"

ON MARCH 28, 2007 THE JURY FOUND MR. ARZATE GUILTY ON COUNT ONE DELIBERATE, INTENTIONAL, PREMEDITATED ATTEMPTED MURDER, BUT FOUND NOT TRUE THE ALLEGATION THAT THE ATTEMPTED MURDER WAS COMMITTED TO BENEFIT A CRIMINAL STREET GANG. THE JURY FOUND THAT MR. ARZATE, DID DISCHARGE A FIREARM IN VIOLATION OF CALIFORNIA PENAL CODE SECTION 12022.53. THE JURY ALSO FOUND MR. ARZATE, GUILTY OF COUNT TWO. ASSAULT WITH A FIREARM, BUT AGAIN FOUND THAT IT WAS NOT COMMITTED FOR THE BENEFIT OF A CRIMINAL STREET GANG. THE JURY FOUND MR. ARZATE, GUILTY OF THE COUNT THREE, THE ACTIVE GANG PARTICIPATION PART. FINALLY, THE JURY FOUND APPELLANT GUILTY OF THE COUNT FOUR POSSESSION OF A FIREARM BY A FELON. ON APRIL 5, 2007 THE TRIAL COURT FOUND ALL OF THE PRIOR ~~CONVICTIONS~~ ALLEGATIONS TO BE TRUE. ON MAY 17, 2007 MR. ARZATE, WAS SENTENCE TO 71-YEARS TO LIFE.

(statement of the case "continued") Page #18

19.) "Amended Judgment and subsequent
"Proceedings"

AFTER MR. ARZATE, WENT THROUGH AN INITIAL DIRECT APPEAL AND UNSUCCESSFUL FEDERAL HABEAS CORPUS PROCEEDINGS, THE SUPERIOR COURT OF CALIFORNIA FOR THE COUNTY OF STANISLAUS ISSUED AN AMENDED JUDGMENT IN THIS CASE ON MAY 6, 2014. THE SUPERIOR COURT "ACKNOWLEDGED" THAT MR. ARZATE ACTIONS COULD NOT BE A VIOLATION OF CALIFORNIA PENAL CODE SECTION 186.22 (a) BECAUSE TO VIOLATE THAT STATUTE, A PERSON MUST PROMOTE, FURTHER, OR ASSIST AT LEAST ONE OTHER MEMBER OF A GANG IN COMMITTING A FELONY. BECAUSE OF THIS AMENDMENT OF THE STATE COURT JUDGMENT, ON DECEMBER 16, 2015 THIS COURT DISMISSED MR. ARZATE'S APPEAL OF DENIAL OF HIS INITIAL FEDERAL HABEAS CORPUS PETITION. DAVID ARZATE V. F. GONZALES NINTH CIRCUIT CASE NO. 12-17618.

(Statement of the case "continued") Page # 19

AFTER MR. ARZATE'S JUDGMENT WAS AMENDED, he filed state habeas corpus petitions, and then the federal petition UNDERLYING this petition FOR WRIT OF CERTIORARI AND REQUEST FOR A CERTIFICATE OF APPEALABILITY RAISING THE ~~THE~~ FOLLOWING TWO CLAIMS;

20.) (1) MR. ARZATE'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS AND A FAIR TRIAL WAS BREACHED BY THE ADMISSION OF HIGHLY PREJUDICIAL GANG EVIDENCE IN A TRIAL WHERE THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT EVEN BRINGING A CHARGE INVOLVING GANG ACTIVITY,

(2) MR. ARZATE'S FOURTEENTH AMENDMENT DUE PROCESS RIGHT TO A FAIR TRIAL AND SIXTH AMENDMENT RIGHT TO AN IMPARTIAL JURY WERE BREACHED BY THE TRIAL COURT'S FAILURE TO DECLARE A MISTRIAL OR HOLD A HEARING REGARDING JUROR BIAS.

* (Statement of the case "continued") *

Page # 20

ON JANUARY 22, 2015 the CALIFORNIA COURT OF APPEAL SUMMARILY denied MR. ARZATE'S appeal (citing) to A CALIFORNIA ~~RECEIVED~~ SUPREME COURT OPINION, PEOPLE V. RIOS 222 CAL. 4th 542, 560-64 (2013). IN RE DAVID VALENZUELA ARZATE, CALIFORNIA COURT OF APPEAL CASE NO. F070523. MR. ARZATE, filed a petition re-raising these claims in the supreme court of CALIFORNIA, and the petition was denied without comment ON JUNE 10, 2015. IN RE DAVID VALENZUELA ARZATE, CALIFORNIA SUPREME COURT CASE NO. S225011. MR. ARZATE, then filed a federal petition raising the two claims, and the petition was denied IN A ORDER ISSUED ON MARCH 2, 2018.

22.1

"Argument"

TO OBTAIN A (COA), A HABEAS CORPUS, PETITIONER MUST make A SUBSTANTIAL showing of the denial of A CONSTITUTIONAL RIGHT. (28 U.S.C. 2253 (c) (2)). The petitioner need not show that he would prevail on the merits. (SEE) BAREFOOT V. ESTELLE 463 U.S. 880, 893 N.4 (1983).

MILLER EL V. COCKRELL 537 U.S. 322 342 (2003).

RECENTLY, this court reiterated that in deciding whether to grant a (COA), the court should ask ONLY IF the district court's decision was debatable. BUCK V. DAVIS U.S. 137 S.Ct. 759 774 (2017).

The Ninth circuit has clarified that (AEDPA'S) SUBSTANTIAL SHOWING REQUIREMENT FOR A (COA) IS RELATIVELY LOW. WILLIAMS V. WOODFORD 384 F.3d 567, 583 (9th Cir. (2004)) (quoting) JENNINGS V. WOODFORD 290 F.3d 1006, 1010 (9th Cir. (2002)).

This court CAN GRANT RELIEF finding it debatable whether MR. ARZATE, right to due process and ~~and~~ A FAIR TRIAL WAS BREACHED when extremely prejudicial expert testimony connecting MR. ARZATE, to the NORTENOS gang, and connecting the NORTENOS gang to ALL MANNER OF VIOLENT CRIME, WAS INTRODUCED IN A CASE THAT HAD NOTHING TO DO WITH GANG ACTIVITY. THARPE V. SELLERS (2018) U.S. 799 L. Ed. 2d 424, 2018 WL311568.

23.) according to the prosecution's case, MR. ARZATE, got into a verbal dispute with his girlfriend's ex-husband and eventually, fired a gun at him. NO ALLEGATION OR EVIDENCE WAS INTRODUCED SUGGESTING THAT MR. ARZATE'S, ACTIONS WERE RELATED TO GANG ACTIVITY OR THAT HE ACTED IN CONCERT WITH ANY OTHER PERSON. NONETHELESS, IN ADDITION TO CHARGING HIM WITH ATTEMPTED MURDER, ASSAULT WITH A FIREARM, AND POSSESSION OF A FIREARM BY A FELON, the prosecution "improperly charged" MR. ARZATE, with "active" participation in a criminal street gang under CAL. PENAL CODE SEC. 186.22(a). AS A RESULT, when MR. ARZATE, went to trial, a "tremendous" amount of expert evidence was admitted indicating that MR. ARZATE, was a member of the NORTENOS gang and that NORTENOS gang members regularly commit violent crimes and use firearms.

*this prejudicial effect of the gang evidence was exacerbated by the fact that there was no limiting instruction given telling the JURY that gang evidence could ONLY be considered

ONLY be considered in connection with the gang charges. The JURY WAS NEVER INSTRUCTED THAT IT WAS prohibited from using the gang evidence to conclude that MR. ARZATE, WAS A PERSON OF bad CHARACTER, had a disposition to commit crime, OR committed the offenses of attempted murder, assault with a FIREARM, AND possession of a FIREARM BY A FELON. * MANY members of the JURY, UNDOUBTEDLY ALARMED BY the evidence, expressed a FEAR that they might become victims of gang violence AS A RESULT OF THEIR JURY duty AND service IN this case. The CALIFORNIA supreme court has NOW CLARIFIED that MR. ARZATE'S actions could NOT have been a violation of CALIF. PENAL CODE SEC. 186.22(a) PURSUANT TO; PEOPLE V. RODRIGUEZ 55 CAL. 4th 1125 (2012). There WAS NO EVIDENCE that MR. ARZATE, WAS acting IN COOPERATION with ANYONE. * IN Light of the FACT THAT MR. ARZATE, ~~could~~ could NOT have violated CALIF. PENAL CODE SEC. 186.22(a), the admission of gang evidence IN his trial WAS highly PREJUDICIAL AND IRRELEVANT to the valid charges, thus, had A SUBSTANTIAL AND INJURIOUS effect OR INFLUENCE IN the JURY'S verdict. (see) BRECHT V. ABRAHAMSON 507 U.S. 619, 637-38 (1993).

It is a "reasonable probability" that the jury considered the voluminous and "prejudicial gang evidence" that was introduced at trial and determined that because Mr. Arzate, was a member of a group that had committed crimes in the past, he had a bad character and disposition to commit the charged offenses. When state court rulings allow admission of prejudicial and irrelevant evidence with no limiting instruction for the jury, federal and state courts have acted to vindicate a state criminal defendant's rights under the Fourteenth Amendment. (see) DAWSON V. DELAWARE 503 U.S. 159, 165-66 (1992). (also) MICHELSON V. UNITED STATES 335 U.S. 469, 475 (1948) and McKINNEY V. REES 993 F.2d 1378 (9th Cir. (1993)). *The admission of the prejudicial gang evidence rendered Mr. Arzate's trial fundamentally unfair in violation of due process. (see) HOLMES V. SOUTH CAROLINA 547 U.S. 319, 326-26 (2006). (also see) JOHNSON V. SUBLETT 63 F.3d 926, 930 (9th Cir. (1995)). The prejudice here is not de minimis. This court has determined, "some toxins can be deadly in small doses". (see) BUCK V. DAVIS 137 S.Ct. 759, 197 L. Ed. 2d 1 (2017).

24.) IN CLAIM "TWO," REASONABLE JURIST COULD debate whether MR. ARZATE, IS ENTITLED TO HABEAS RELIEF. CLEARLY ESTABLISHED SUPREME COURT AUTHORITY PROVIDES THAT DUE PROCESS IN CRIMINAL PROCEEDINGS REQUIRES A JURY CAPABLE AND WILLING TO DECIDE THE CASE SOLELY ON THE EVIDENCE BEFORE IT, AND A TRIAL JUDGE EVER WATCHFUL TO PREVENT PREJUDICIAL OCCURRENCES AND TO DETERMINE THE EFFECT OF SUCH OCCURRENCES WHEN THEY HAPPEN. SMITH V. PHILLIPS 455 U.S. 209, 217 (1982). THE SIXTH AMENDMENT SIMILARLY PROVIDES THAT IN ALL CRIMINAL PROSECUTIONS, THE ACCUSED SHALL ENJOY THE RIGHT TO A SPEEDY AND PUBLIC TRIAL BY AN IMPARTIAL JURY IN CRIMINAL TRIALS. *WELL ENTRENCHED SUPREME COURT AUTHORITY ABSOLUTELY FORBIDS EXTERNAL CAUSES TENDING TO DISTURB THE JURYS EXERCISE OF DELIBERATE AND UNBIASED JUDGMENT AT LEAST UNTIL THEIR HARMLESSNESS IS MADE TO APPEAR. MATTOX V. UNITED STATES 146 U.S. 140, 149-50 (1892).

(Statement of the case "continued")

Page #26

when events take place outside of the courtroom that could prejudice members of the jury, the trial court "must" conduct a hearing at which the defendant has the "opportunity" to prove actual bias. Remmer v. United States 347 U.S. 227, 229-30 (1954). A review of the notes from the jurors can leave no question that a substantial number of jurors believed or suspected that they were photographed so that members of a gang would know they served on Mr. Arzate's case and potentially would harm them. *Mr. Arzate, ask that the court take judicial notice pursuant to ~~the~~ (Fed. R. Evid. Rule 201(b)) of the jurors notes on file with the courts. The jury notes reveal that a large number or percentage of the jurors believed (1) they were photographed by a person in the court hallway, (2) the ~~photographs~~ photographs were going to end up in the hands of gang members, 3

(3) MR. ARZATE, WAS IN A GANG, AND (4) MR. ARZATE, AND OR GANG AFFILIATES might harm them. EQUALLY TROUBLING, THE JURORS CLEARLY DISCUSSED ~~OF~~ these INCIDENTS AND THEORIES WITH EACH OTHER WELL BEFORE DELIBERATIONS BEGAN; WHEN A JUROR FIRST SPOKE OF THE INCIDENT TO THE JUDGE, ANOTHER JUROR INDICATED THAT ALL OF THE JURORS WERE SCARED TO WALK OUT THE DOOR, REVEALING THAT THE TOPIC AND THEORIES HAD ALREADY BEEN DISCUSSED AMONG THE JURORS. ALL OF THIS HAPPENED IN A CONTEXT OF A TRIAL IN WHICH THE JURORS WERE BEING IMPROPERLY EXPOSED TO EXPERT TESTIMONY INDICATING THAT MR. ARZATE, WAS A MEMBER OF THE NORTEND GANG THAT THOUSANDS OF NORTEND GANG MEMBERS RESIDE IN CALIFORNIA AND THAT NORTEND GANG MEMBERS REGULARLY COMMIT VIOLENT CRIMES WHICH CONSIST OF ASSAULTS WITH WEAPONS, WHETHER THAT BE BATS OR STICKS OR DEADLY WEAPONS SUCH AS

(statement of the case "continued") Page # 28

KNIVES AND FIREARMS, AND THEN VIOLENT CRIMES ALSO CONSISTING OF RAPE AND MURDER. IN LIGHT OF THE NATURE OF THE GANG EVIDENCE THAT WAS EXPLICITLY TIED TO MR. ARZATE, AND THE JURORS EXPRESSION OF FEAR AND BIAS, THE TRIAL JUDGE SHOULD HAVE HELD A HEARING TO DETERMINE WHETHER JURORS HAD BECOME BIASED AGAINST MR. ARZATE, BEFORE DENYING THE DEFENSE'S MOTION FOR A MISTRIAL. (COMPARE) UNITED STATES V. ANGULO 4 F.3d 843, 847-48 (9th CIR. 1993).

UNDER THE NINTH CIRCUIT PRECEDENT; (WHEN EVENTS TAKE PLACE OUTSIDE OF THE COURTROOM THAT COULD PREJUDICE MEMBERS OF THE JURY, THE TRIAL COURT MUST CONDUCT A HEARING AT WHICH THE DEFENDANT HAS THE OPPORTUNITY TO PROVE ACTUAL BIAS. (SEE) TARANGO V. MCDANIEL 837 F.3d 936 950 - 51 (9th CIR. (2016)).

* (statement of the case "continued") * Page # 29

The trial judge's decision not to hold a hearing at which further evidence regarding the feelings of individual jurors could have been explored itself deprived Mr. Arzate, of his constitutional right to due process and trial before an unbiased jury. (see) Smith v. Phillips 455 U.S. 209, 215 (1982). (also see) Turner

V. Louisiana 379 U.S. 466, 471, 85 (1965). A criminal defendant has a due process right to a fair trial. (see) Chambers v. Mississippi 410 U.S. 284 294 (1973). As such, Mr. Arzate, respectfully

request for the court to grant relief that it may deem fair, just, and proper. Mr. Arzate, further move for the court to issue/grant Mr. Arzate, a certificate of appealability per this court's holding in; Hohn v. U.S. 524 U.S. 236, 118 S.Ct. 1969 (1998). Finally, Mr. Arzate, ask

that the court invoke its jurisdiction under 28 U.S.C. 1257(a) over final judgment of state court postconviction proceedings.

REASONS FOR GRANTING THE PETITION

this court should grant the petition because the ninth circuit court of appeals entered a decision in conflict with this courts long standing decisions and standards for issuance of a certificate of appealability in light of the totality of the circumstances, facts, and evidence in this case that deprived a criminal defendant due process of law, a fair trial, ~~3~~ poisons public confidence in the judicial process and if the court refuse to grant review it will result in a fundamental miscarriage of justice and leaving the risk of undermining the public's confidence in the judicial process. ALL persons including pro se litigants have a right to access to the courts. *THE ERRORS IN THIS CASE RENDERED MR. ARZATE'S TRIAL FUNDAMENTALLY UNFAIR AND "SOME TOXINS" CAN BE DEADLY IN SMALL DOSES WHICH CAN ENTITLE A PRO SE CRIMINAL DEFENDANT TO HABEAS CORPUS RELIEF. (SEE) BUCK V. DAVIS 137 S.Ct. 759, 197 L.Ed. 2d 1120 (71).

(see continuation)
*

REASONS FOR GRANTING THE PETITION
("CONTINUED")

MR. ARZATE, RAISED ISSUES OF JUROR BIAS IN HIS FEDERAL petition for writ of habeas corpus and when the petition was denied he sought issuance of a certificate of appealability. HOWEVER, the NINTH CIRCUIT COURT OF APPEALS decision IN HERLUND V. RYAN 750 F.3d 793, 804 (9th CIR. (2014)) RULED that there is NO CONTROLLING AUTHORITY FOR RELIEF BASED ON A THEORY OF IMPLIED BIAS INSTEAD OF ACTUAL BIAS AND BASED ON THIS DECISION THE COURT DECISION IN THIS CASE DENYING MR. ARZATE, APPLICATION/REQUEST FOR A CERTIFICATE OF APPEALABILITY FILED AUGUST 29, 2018 (CITING) THIS COURT'S DECISION MILLER-EL V. BUCKRELL 537 U.S. 322, 327 (2003) & 28 U.S.C. 2253(c)(2) CLAIMING APPELLANT HAS NOT MADE A SUBSTANTIAL SHOWING OF A CONSTITUTIONAL RIGHT MAY BE ERRONEOUS IN THE FIRST INSTANCE WHICH NARROWS THIS COURTS DECISIONS IN; SLACK V. MCDANIEL 529 U.S. 473 484 (2000) AND BUCK V. DAVIS 137 S.Ct. 759, 197 L.Ed. 2d 1 (2017). FURTHER, JUDGE'S MAY NOT READ IN BY WAY OF CREATION WHICH APPEARS TO BE THE CASE HERE RELATED TO (28 U.S.C. 2253). (SEE) JONES V. BUCK 127 S.Ct. 910 (2007). WHATEVER TEMPTATIONS THE STATEMANSHIP OF POLICYMAKING MIGHT WISELY SUGGEST, THE JUDGE'S JOB IS TO CONSTRUCT THE STATUTE NOT TO MAKE IT BETTER. FRANKFURTER, SOME REFLECTIONS ON THE READING OF STATUTES. 47 COLUM. L. REV. 527 533 (1947).

* REASONS FOR GRANTING the Petition *
("CONTINUED")

The Judge must not read in by way of creation, but instead abide by the duty of restraint, the humility of function as merely the translator of another's command. Id. at 533-534. (see) United States v. Goldenberg, 168 U.S. 95, 103. 18 S.Ct. 3, 42 L.Ed. 394 (1897). Review is needed because the Ninth Circuit Court of Appeals made a judicial determination related to (28 U.S.C. 2253), the Ninth Circuit has departed from the accepted and usual course of judicial proceedings related to issuance of a certificate of appealability as to call for an exercise of this court's supervisory power. As such, Mr. Arzate, respectfully ask that this court grant review and issue a certificate of appealability on writ of certiorari. (see) Hohn v. U.S. 524, U.S. 236, 118 S.Ct. 1969 (1998). (also see) Haines v. Kerner 404 U.S. 519, 92 S.Ct. 594 (1972).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

David V. Hazate

Date: November 21, 2018