

Appendix "A"

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Appendix "A" (Court order)

UNITED STATES COURT OF APPEALS

**FILED**

FOR THE NINTH CIRCUIT

AUG 29 2018

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

DAVID VALENZUELA ARZATE,

Petitioner-Appellant,

v.

SCOTT FRAUENHEIM, Warden,

Respondent-Appellee.

No. 18-15472

D.C. No. 1:15-cv-01256-SKO  
Eastern District of California,  
Fresno

ORDER

Before: FARRIS and LEAVY, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 2) is denied. Appellant has not made a “substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

**DENIED.**

Appendix B"

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Appendix B" (court order denying reconsideration)

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D.C. No. 1:15-cv-01256-SKO  
Eastern District of California,  
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ORDER

Before: TROTT and WARDLAW, Circuit Judges.

The motion for reconsideration (Docket Entry No. 6) is denied. *See* 9th Cir.

R. 27-10.

No further filings will be entertained in this closed case.

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

DAVID VALENZUELA ARZATE,

Petitioner,

v.

SCOTT FRAUENHEIM, Warden,

Respondent.

No. 1:15-cv-01256-SKO HC

**ORDER DENYING PETITION FOR  
WRIT OF HABEAS CORPUS**

**(Doc. 1)**

Petitioner, David Valenzuela Arzate, is a state prisoner proceeding *pro se* with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.<sup>1</sup> In his petition, Petitioner presents two grounds for habeas relief: (1) violation of Petitioner's Due Process Rights by admission of highly prejudicial gang evidence; and (2) violation of Petitioner's right to a fair trial due to the trial court's failure to declare a mistrial or hold a hearing on juror bias. Having reviewed the applicable law, the Court will deny the petition.

<sup>1</sup> Pursuant to 28 U.S.C. § 636(c)(1), both parties consented, in writing, to the jurisdiction of a United States Magistrate Judge to conduct all further proceedings in this case, including the entry of final judgment.

1           **I. Procedural and Factual Background<sup>2</sup>**

2           Petitioner was dating Kari Moncibaiz (“Kari”) and was the father of her unborn child.  
3           Kari and her estranged husband, Joel Moncibaiz (“Joel”), were arguing in the parking lot of their  
4           place of employment.<sup>3</sup> Petitioner happened to call Kari on her cellular telephone while the  
5           argument between Kari and Joel was in progress. Joel took the telephone from Kari and  
6           exchanged taunts and heated words with Petitioner. After ending the call, Kari got into her car  
7           and drove away from the parking lot.  
8

9           A short time later, Kari drove back to the parking lot, followed by Petitioner in a separate  
10          car. Petitioner got out of the car and he and Joel immediately began fighting. During a lull in the  
11          fight, Kari approached Petitioner, lifted his shirt, and took a handgun out of his waistband. Kari  
12          returned to her car and Petitioner and Joel resumed fighting.  
13

14          At some point during the fight, Petitioner broke away and went to Kari’s car, entering the  
15          car on the passenger side. In the car, Petitioner and Kari struggled over the gun and Kari  
16          eventually threw the gun out of the car window. Petitioner exited the car and retrieved the gun.  
17

18          Petitioner pointed the gun at Joel, who was 20 to 25 feet from him, and fired the gun. Joel  
19          turned and ran in a zig zag pattern away from Petitioner until he fell down, unharmed. In total,  
20          Petitioner fired the gun at Joel seven times.  
21

22          After Petitioner stopped firing, Joel stood up and yelled at Petitioner. Kari left in her car,  
23          and Petitioner got into his car and left.

24          Petitioner was charged with four counts: count 1 - attempted premeditated murder (Cal.  
25          Penal Code §§ 664, 187); count 2 - assault with a firearm (Cal. Penal Code § 245(a)(2)); count 3 -  
26          participation in a street gang (Cal. Penal Code § 186.22(a)); and count 4 - possession of a firearm  
27

28          <sup>2</sup> The factual background, taken from the opinion of the California Court of Appeal, Fifth Appellate District, *People v. Arzate* (Cal. Ct. App. April 2, 2009) (No. F053074), is presumed to be correct. 28 U.S.C. § 2254(e)(1).

<sup>3</sup> The record does not specify the date on which the incident occurred.

1 by a convicted felon (Cal. Penal Code § 12021(a)). The attempted premeditated murder and  
2 assault with a firearm offense were also alleged to have been committed for the benefit of, at the  
3 direction of, or in association with a criminal street gang (“criminal street gang enhancement”).  
4 (Cal. Penal Code §186.22(b)(1)).

5  
6 On March 28, 2007, a jury found Petitioner guilty on all counts. However, the jury did  
7 not find the criminal street gang enhancement allegations to be true. Petitioner was sentenced to a  
8 prison term of 45 years to life, plus 26 years for firearm and prior-conviction enhancements, for a  
9 total operative sentence of 71 years to life on count 1. The court imposed and stayed a sentence  
10 on count 2, pursuant to California Penal Code § 654(a).<sup>4</sup> The court imposed concurrent sentences  
11 of 25 years to life, plus six years, for each of counts 3 and 4.

12  
13 Petitioner filed a direct appeal, which was denied by the California Court of Appeal, Fifth  
14 Appellate District on April 2, 2009. The Court of Appeal affirmed the conviction, but corrected  
15 the sentence on count 1 to 25 years to life plus six years.<sup>5</sup> On July 15, 2009, the California  
16 Supreme Court summarily denied review.

17  
18 <sup>4</sup> California Penal Code § 654(a), states:

19 An act or omission that is punishable in different ways by different provisions of law shall be  
20 punished under the provision that provides for the longest potential term of imprisonment, but in  
21 no case shall the act or omission be punished under more than one provision. An acquittal or  
22 conviction and sentence under any one bars a prosecution for the same act or omission under any  
23 other.

24  
25 <sup>5</sup> The Court of Appeal held:

26 The prescribed sentence for willful, deliberate, and premeditated attempted murder (count [1]) is  
27 life in prison with the possibility of parole. ([Cal. Penal Code] § 664, subd. (a).) Under normal  
28 circumstances, the minimum period prior to parole is seven years. ([Cal. Penal Code] § 3046,  
subd. (a)(1).) [Petitioner], however, was found to have three qualifying “strikes,” so his sentence  
must be calculated under section 667, subdivision (e)(2)(a). That section provides that the  
minimum term of imprisonment must be the greater of three options set forth there. In this case,  
the second of those options, 25 years, provides the greatest minimum imprisonment. Accordingly,  
the correct sentence on count [1] is 25 years to life.

The trial court pronounced a sentence of 45 years to life on this count. We will modify the  
sentence on count [1] to conform to the statutory requirement of 25 years to life.

*People v. Arzate* (Cal. Ct. App. April 2, 2009) (No. F053074), at \*14.

1 On December 11, 2009, Petitioner filed a petition for writ of habeas corpus with the  
2 District Court (the “2009 Petition”). Petition for Writ of Habeas corpus, *Azarte v. Holland*, No.  
3 1:06-cv-02156-MSJ (E.D. Cal. Dec. 11, 2009), ECF No. 1. In his 2009 Petition for habeas relief,  
4 Petitioner raised seven claims: (1) insufficient evidence to convict Petitioner of active  
5 participation in a criminal street gang; (2) trial court improperly denied his objections to gang  
6 evidence; (3) trial court improperly allowed prejudicial and inflammatory evidence linking  
7 Petitioner to a planned 2004 killing and an attempt to shoot an expert witness; (4) trial court erred  
8 in admitting evidence connecting the Norteño street gang to the Mexican Mafia prison gang; (5)  
9 trial court failed to give a limiting instruction regarding gang evidence, and Petitioner’s counsel  
10 was ineffective for failing to request the instruction; (6) trial court improperly denied Petitioner’s  
11 request for a mistrial based on jury misconduct;<sup>6</sup> and (7) trial court improperly denied his motion  
12 for substitution of counsel. *Arzate v. Holland*, No. 1:09-cv-02156 MJS HC, 2012 WL 5386578,  
13 at \*1 (E.D. Cal. Nov. 1, 2012). On November 1, 2012, the District Court denied Petitioner’s  
14 petition.  
15

16  
17 On November 26, 2012, Petitioner filed his Notice of Appeal with the Ninth Circuit Court  
18 of Appeals. On November 18, 2015, the Ninth Circuit dismissed Petitioner’s appeal.

19  
20 On April 10, 2014, the Attorney General of the State of California submitted a petition for  
21 writ of habeas corpus on Petitioner’s behalf with the Superior Court of Stanislaus County. The  
22 Attorney General argued that Petitioner’s custody “with respect to count 3[, participation in a  
23 street gang,] is unlawful and the [Attorney General] should not be compelled to unlawfully  
24 constrain [Petitioner].” (Lodged Doc. 1 at 1.) The Attorney General based this argument on a  
25 2012 California Supreme Court opinion, which held that a defendant must act in concert with  
26 another in order to commit the crime of participation in a street gang. *People v. Rodriguez*, 55

27  
28 <sup>6</sup> Petitioner has raised the jury misconduct claim—claim 6 in the 2009 Petition—again, as claim 2 in the petition currently before this Court.



Cal. 4th 1125, 1132, 1138-39 (2012). Because Petitioner's conviction for participation in a street gang was based on his own conduct and not on conduct in concert with another person, the Attorney General argued Petitioner was factually innocent of the offense. (Lodged Doc. 1 at 2.)

On May 6, 2014, the Stanislaus County Superior Court "recalled" Petitioner's sentence imposed on count 3, vacated Petitioner's conviction pursuant to California Penal Code § 186.22(a), and issued a new judgment on the remaining counts. (Lodged Doc. 5.)

On August 14, 2015, Petitioner filed a new petition for writ of habeas corpus with this Court, seeking relief based on the new judgment.<sup>7</sup> Petitioner presents two grounds for habeas relief: (1) violation of Petitioner's Due Process Rights by admission of highly prejudicial gang evidence; and (2) violation of Petitioner's right to a fair trial due to the trial court's failure to declare a mistrial or hold a hearing on juror bias. Respondent filed a response to the petition on October 8, 2015, and Petitioner filed a reply on October 30, 2015.

## II. Standard of Review

A person in custody as a result of the judgment of a state court may secure relief through a petition for habeas corpus if the custody violates the Constitution or laws or treaties of the United States. 28 U.S.C. § 2254(a); *Williams v. Taylor*, 529 U.S. 362, 375 (2000). On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which applies to all petitions for writ of habeas corpus filed thereafter. *Lindh v. Murphy*, 521 U.S. 320, 322-23 (1997). Under the statutory terms, the petition in this case is governed by AEDPA's provisions because it was filed after April 24, 1996.

Habeas corpus is neither a substitute for a direct appeal nor a device for federal review of the merits of a guilty verdict rendered in state court. *Jackson v. Virginia*, 443 U.S. 307, 332 n. 5

<sup>7</sup> Petitioner may file a new petition for writ of habeas corpus based on the new judgment issued by the state court. *Magwood v. Patterson*, 561 U.S. 320, 340 n. 15 (2010) (quoting *Burton v. Stewart*, 549 U.S. 147, 156 (2007) ("[W]here . . . there is a 'new judgment intervening between [ ] two habeas petitions,' . . . an application challenging the resulting new judgment is not 'second or successive' at all."))

1 (1979) (Stevens, J., concurring) [hereinafter *Virginia*]. Habeas corpus relief is intended to address  
2 only "extreme malfunctions" in state criminal justice proceedings. *Id.* Under AEDPA, a  
3 petitioner can obtain habeas corpus relief only if he can show that the state court's adjudication of  
4 his claim:

5  
6 (1) resulted in a decision that was contrary to, or involved an unreasonable  
7 application of, clearly established Federal law, as determined by the Supreme  
8 Court of the United States; or

9  
10 (2) resulted in a decision that was based on an unreasonable determination  
11 of the facts in light of the evidence presented in the State court proceeding.

12 28 U.S.C. § 2254(d); *Lockyer v. Andrade*, 538 U.S. 63, 70-71 (2003); *Williams*, 529 U.S. at  
13 413.

14 "By its terms, § 2254(d) bars relitigation of any claim 'adjudicated on the merits' in state  
15 court, subject only to the exceptions set forth in §§ 2254(d)(1) and (d)(2)." *Harrington v.*  
16 *Richter*, 562 U.S. 86, 98 (2011).

17 As a threshold matter, a federal court must first determine what constitutes "clearly  
18 established Federal law, as determined by the Supreme Court of the United States." *Lockyer*,  
19 538 U.S. at 71. In doing so, the Court must look to the holdings, as opposed to the dicta, of the  
20 Supreme Court's decisions at the time of the relevant state-court decision. *Id.* The court must  
21 then consider whether the state court's decision was "contrary to, or involved an unreasonable  
22 application of, clearly established Federal law." *Id.* at 72. The state court need not have cited  
23 clearly established Supreme Court precedent; it is sufficient that neither the reasoning nor the  
24 result of the state court contradicts it. *Early v. Packer*, 537 U.S. 3, 8 (2002). The federal court  
25 must apply the presumption that state courts know and follow the law. *Woodford v. Visciotti*,  
26 537 U.S. 19, 24 (2002). Petitioner has the burden of establishing that the decision of the state  
27 court is contrary to, or involved an unreasonable application of, United States Supreme Court  
28 precedent. *Baylor v. Estelle*, 94 F.3d 1321, 1325 (9th Cir. 1996).

1 //

2 "A federal habeas court may not issue the writ simply because the court concludes in its  
3 independent judgment that the relevant state-court decision applied clearly established federal law  
4 erroneously or incorrectly." *Lockyer*, 538 U.S. at 75-76. "A state court's determination that a  
5 claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on  
6 the correctness of the state court's decision." *Harrington*, 562 U.S. at 101 (quoting *Yarborough v.*  
7 *Alvarado*, 541 U.S. 652, 664 (2004)). Thus, the AEDPA standard is difficult to satisfy since even  
8 a strong case for relief does not demonstrate that the state court's determination was unreasonable.  
9 *Harrington*, 562 U.S. at 102.

11 **III. Decisions Regarding the Admission of Evidence are Matters of State Law, Not**  
12 **Cognizable on Federal Habeas Review**

13 In his first ground for habeas review, Petitioner asserts his Due Process Rights were  
14 violated when the trial court admitted "highly prejudicial gang evidence." (Doc. 1 at 6.)  
15 Petitioner argues that the effect of this prejudicial evidence was exacerbated by the fact that the  
16 jury was not given a limiting instruction to only consider the gang evidence in connection with  
17 the gang charges. (Doc. 14 at 2.) Respondent counters that the admission of evidence is a matter  
18 of state law that is not cognizable on federal habeas review. (Doc. 12 at 7.)

20 **A. Standard of Review for Admission of Evidence**

21 Issues regarding the admission of evidence are matters of state law, generally outside the  
22 purview of a federal habeas court. *Holley v. Yarborough*, 568 F.3d 1091, 1101 (9th Cir. 2009).  
23 "The admission of evidence does not provide a basis for habeas relief unless it rendered the trial  
24 fundamentally unfair in violation of due process." *Johnson v. Sublett*, 63 F.3d 926, 930 (9th Cir.  
25 1995). "[T]he Due Process Clause does not permit the federal courts to engage in a finely tuned  
26 review of the wisdom of state evidentiary rules." *Marshall v. Lonberger*, 459 U.S. 422, 438 n. 6  
27 (1983). "Although the [U.S. Supreme] Court has been clear that a writ should be issued when  
28

constitutional errors have rendered the trial fundamentally unfair, see *Williams*, 529 U.S. at 375 . . . , it has not yet made a clear ruling that admission of irrelevant or overtly prejudicial evidence constitutes a due process violation sufficient to warrant issuance of the writ." *Holley*, 568 F.3d at 1101.

**B. Proceedings Before the State Court**

Petitioner was charged, among other charges, with active participation in a criminal street gang (Cal. Penal Code § 186.22(a)), and enhancements alleging his commission of attempted premeditated murder and assault with a firearm offense were committed for the benefit of, at the direction of, or in association with a criminal street gang (Cal. Penal Code § 186.22(b)(1)). *People v. Arzate* (Cal. Ct. App. April 2, 2009) (No. F053074). On May 6, 2014, the Stanislaus County Superior Court vacated Petitioner's conviction for active participation in a criminal street gang and issued a new judgment. (Lodged Doc. 5.)

Petitioner then filed a petition for writ of habeas corpus with the Court of Appeal based on the new judgment issued by the Superior Court on May 6, 2014. On January 22, 2015, the Court of Appeal summarily denied the petition, citing to a California Supreme Court opinion, *People v. Rios*, 222 Cal. 4th 542, 560-64 (2013). The Court in *Rios* analyzed California Penal Code § 186.22(b)(1),<sup>8</sup> and held that the § 186.22(b)(1) gang enhancement "may be applied to a lone actor." *Id.* at 564. Therefore, by citing to *Rios*, the Court of Appeal ruled that Petitioner was properly charged with the gang enhancement, even though he acted alone when he shot Joel.

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<sup>8</sup> California Penal Code § 186.22(b)(1) states:

any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished as [prescribed].

**C. Evidentiary Decisions Made by a State Court Are Generally Not Reviewable by the Federal Court**

Petitioner contends that presenting the gang evidence at trial was so prejudicial that it violated his constitutional rights. (Doc. 1 at 6.) Petitioner maintains the evidence was admitted only to “show [Petitioner] had a criminal disposition.” (Doc. 14 at 3.)

“Evidence introduced by the prosecution will often raise more than one inference, some permissible, some not; we must rely on the jury to sort them out in light of the court’s instructions.” *Jammal v. Van de Kemp*, 926 F.2d 918, 920 (9th Cir. 1991). However, when there is no permissible inference the jury could draw from evidence, its admission violates due process. *Id.*

Here, Petitioner was charged with active participation in a criminal street gang, (Cal. Penal Code § 186.22(a)), and enhancements alleging his commission of attempted premeditated murder and assault with a firearm offense were committed for the benefit of, at the direction of, or in association with a criminal street gang (Cal. Penal Code § 186.22(b)(1)). The gang evidence was admitted to establish Petitioner’s culpability for the murder and assault with a firearm offense based on his gang participation, which was impermissible. *See Kennedy v. Lockyer*, 379 F.3d 1041, 1055-56 (9th Cir. 2004) (“Evidence of gang membership may not be introduced . . . to prove intent or culpability.”) (citing *Mitchell v. Prunty*, 107 F.3d 1337, 1342-43 (9th Cir. 1997) (holding that evidence of membership in a gang cannot serve as proof of intent, because, while someone may be an “evil person,” that is not enough to make him guilty under California law)).

Although Petitioner’s conviction for active participation in a criminal street gang was eventually overturned, the presentation of gang evidence was proper to prove the gang enhancement. As the Court of Appeal noted in its original opinion:

the [gang] evidence in this case was relevant to both the gang enhancement

1       allegations and the substantive gang participation charge. It was clear that the  
2       expert's testimony was presented to establish that (1) the Norteños were, in fact, a  
3       criminal street gang and that they, as defined by section 186.22, subdivision (f),  
4       were an "ongoing organization" that had "as one of its primary activities the  
5       commission of one or more" enumerated crimes, and (2) that defendant knew so  
6       much detailed information about the gang's activities that he was a member of the  
7       gang. These were core requirements for proof of the prosecution's case. . . .

8       *People v. Arzate* (Cal. Ct. App. April 2, 2009) (No. F053074), at \*8.

9       The Court does not find the admission of the gang evidence violated Petitioner's Due  
10       Process Rights.

11       Petitioner additionally argues that the prejudicial effect of the gang evidence was  
12       exacerbated because the court did not give a limiting instruction as to how the jury should use the  
13       evidence. (Doc. 14 at 2.) However, a state trial court's instructional error alone does not raise a  
14       cognizable ground for federal habeas relief. *Dunckhurst v. Deeds*, 859 F.3d 110, 114 (9th Cir.  
15       1988). To form the basis of a federal constitutional claim, the error must so infect the trial that  
16       the resulting conviction violates due process. *Estelle*, 502 U.S. at 72. Here, given the fact that  
17       the jury did not find the gang enhancement to be true, the Court cannot say that the evidence  
18       improperly influenced their verdict. *See Park v. California*, 202 F.3d 1146, 1150 (9th Cir. 2000)  
19       ("We have held that the failure of the jury to convict on all counts is the best evidence of the  
20       jury's ability to compartmentalize the evidence.") (internal quotation marks and citations  
21       omitted). Therefore, the Court will deny Petitioner's claim that the admission of gang evidence  
22       violated his Due Process Rights.

23       Further, even if the Court found that Petitioner's Due Process Rights had been violated, no  
24       clearly established Federal law applies to permit a grant of federal habeas relief for the admission  
25       of evidence that is considered prejudicial. *Holley*, 568 F.3d at 1101 (The Supreme Court has not  
26       determined whether the admission of irrelevant or prejudicial evidence constitutes a due process  
27       violation.). Consequently, the Court will deny relief on Petitioner's claim that gang evidence was  
28

1 improperly admitted at trial.

2 **IV. The Juror Bias Claim Was Previously Decided With the Decision Denying the**  
3 **2009 Petition.**

4 In his second ground for habeas relief, Petitioner contends that the trial court erred by  
5 failing to declare a mistrial or holding a hearing on juror bias. (Doc. 1 at 8.) Respondent  
6 counters that this claim was raised in the 2009 Petition and the Court need not revisit the issue,  
7 because the claim was properly rejected on the merits. (Doc. 12 at 11.)

8 **A. District Court Opinion on the 2009 Petition**

9  
10 In his 2009 Petition, Petitioner argued that the trial court erred in failing to declare a  
11 mistrial due to juror bias. *Arzate v. Holland*, 2012 WL 5386578. The District Court described  
12 Petitioner's argument and the state court opinion:

13 Petitioner contends that his motion to declare a mistrial was improperly denied,  
14 and that he was not tried by a fair and impartial jury. Specifically, Petitioner  
15 asserts that the jurors were scared after an incident occurred where they were  
16 photographed in the hallway during a break. Despite the court investigating and  
questioning the jurors regarding their ability to remain impartial, Petitioner asserts  
that they were not and that a mistrial was appropriate.

17 **1. State Court Opinion**

18 The last reasoned state court decision is from the California Court of Appeal,  
19 Fifth Appellate District Court's decision confirming Petitioner's conviction. The  
20 court explained:

21 **IV. Jury Misconduct Issues**

22 **A. Additional Facts.**

23 The courtroom in which this case was tried was configured such that the  
24 members of the jury had to exit into a common hallway to reach the elevators.  
25 On the third day of the seven-day trial, when the jurors left the courtroom, a  
26 young woman standing by the elevators appeared to be using her cellular  
27 telephone to take pictures of the jurors. Some of the jurors noticed this and,  
28 apparently, discussed it among all the jurors the next day. At the afternoon  
break on the fourth day of the trial, one of the jurors brought the matter to the  
court's attention: "Your honor, I have a problem before we walk out of this  
door with what happened yesterday." When the court asked that juror to  
remain behind to discuss the matter, the juror said: "I'm sure the whole jury

1 feels the same way.” Another juror said: “We do.” The original juror added:  
2 “I don’t think anybody wants to walk out that door.”

3 The court directed the jury to return to the jury room and told the jurors that  
4 any who wished to could write out on a piece of paper what had happened and  
5 what concerns they had, sign the paper, and give it to the bailiff for delivery to  
6 the court. Each of the jurors turned in a note. The content ranged from  
7 (paraphrasing) “I saw nothing and am not concerned” through “I am  
8 concerned because of the woman taking pictures” to “I am concerned because  
9 of the nature of this case, gangs, defendant’s note-taking, and the presence of  
10 people in the hallway outside the courtroom.”

11 After reviewing the notes with counsel, the court stated: “It is a concern to me  
12 that there seems to be almost a universal concern for their safety expressed by  
13 the jurors, and we can certainly probe further to see if they can set those  
14 feelings aside, but I do have some serious concerns, frankly, about whether or  
15 not this incident has so tainted this jury panel that we can continue.” In the  
16 ensuing discussion, defense counsel did not request a mistrial. Counsel  
17 suggested additional security measures such as those proposed by the court,  
18 and requested the jurors be told the personal information provided to the court  
19 had been sealed and was not available to anyone without a court order.

20 The court decided to send the jury home for the weekend. It advised the jury  
21 that the personal information was under seal and there would be additional  
22 security both that day and when the jurors returned Monday morning. The  
23 court also stated it understood the jurors’ concerns and that the matter would  
24 be investigated in an effort to determine who was taking the pictures.

25 The following Monday the court met with counsel, said it had thought about  
26 the matter over the weekend, and proposed to admonish the jury in a manner  
27 the court shared with counsel. Defense counsel then moved for a mistrial on  
28 the basis that the juror notes showed the jurors were now prejudiced against  
defendant. He contended they could not be “rehabilitated” and that the jurors  
would not truthfully admit that they no longer could give defendant a fair trial.  
The court impliedly denied the mistrial motion and stated that it would  
proceed with the admonition and further inquiries to the jury.

After introductory remarks about additional security for the jurors and the  
possibility of imposition of sanctions on the person taking the pictures if any  
juror saw her at the courthouse again, the court stated to the jury: “There is no  
evidence that defendant was in any way connected with this incident. It  
would be improper for any of you to assume that defendant is responsible for  
this incident. You must – you must put this matter out of your minds and be  
fair in this case, deciding this case based upon the evidence that is produced in  
the courtroom and upon the law as I give it to you. Can you all assure me and  
the parties that you will wait until you hear all of the evidence and the law  
before deciding any of the issues in this case and that you can be fair and  
impartial jurors in this case? If you can be, would you please raise your



1 hand?" All of the jurors did.

2 The court then sent all of the jurors except juror No. 2 to the jury room. The  
3 court explained to juror No. 2 that there was some concern because his written  
4 statement to the court had said, "Some of the jurors are scared for retaliation  
5 against them because of the defendant is a gang member." The Court: "I just  
6 want to make sure, sir, that you have not already come to a conclusion and  
7 judgment about this case, because that's one of the issues that you will be  
8 called upon to decide." Juror No. 2: "All right." The court: "Can you assure  
9 all of us that you have not decided this case and that you will wait until the  
10 evidence is in and the law is given to you before reaching your conclusions?"  
11 Juror No. 2: "Yeah."

12 The court rejected defense counsel's request to question juror No. 2 and  
13 rejected counsel's request that the court conduct further questioning as to  
14 whether the jurors had already discussed the case among themselves. The  
15 court stated: "I rejected that request because of the assurances that have  
16 already been given to us by [juror No. 2] and the rest of the jurors." The jury  
17 returned to the courtroom and trial resumed.

#### 18 B. Discussion

19 Defendant contends the court did not make a sufficient inquiry of the jurors to  
20 determine "the facts," that is, to determine whether there are grounds to  
21 "discharge one or more of the jurors." Defendant cites People v. Burgener  
22 (1968) 41 Cal. 3d 505, 519 (Burgener), in support of his claim.

23 The issue in Burgener was whether a particular juror was intoxicated, as was  
24 reported to the court by the jury foreperson. At the request of defense  
25 counsel, the court failed to inquire about the issue and permitted the jury to  
26 continue its deliberations. Defendant then appealed from his conviction,  
27 contending the court had failed in its duty of inquiry. (Burgener, supra, 41  
28 Cal. 3d at p. 517.) The Supreme Court agreed the court had a duty to  
investigate the matter and determine whether the juror should be discharged  
and that it was error not to do so. (Id. at p. 520.) However, the court  
concluded the error did not require reversal because the record did not reflect  
that the juror was in fact incapacitated; the record did not do so because of  
defense counsel's actions. The court held that, in these circumstances,  
defendant should be relegated to a showing on habeas corpus that the juror  
was incapacitated, in much the same way a defendant can establish additional  
facts for a claim of constitutionally ineffective counsel. (Id. at pp. 521-522.)

29 We have similar concerns in the present case. When the matter was first  
30 brought to the court's attention and the court stated an inclination to discharge  
31 the jury, defense counsel sought to minimize the issue, contending, "[J]urors  
32 sometimes do, I think, sometimes, you know, unreasonably expect a certain  
33 amount of anonymity to their process and all. And all I can tell you is in my  
34 position is freedom does not come without some risk that applies to all

1 citizens.” FN6

2 FN6 One can well imagine counsel making a calculated judgment that, even if  
3 his client was not behind the incident, if the jury had been intimidated by the  
4 picture-taking, it might be reluctant to convict defendant.

5 By Monday, morning, after an opportunity to confer further with his client  
6 and, possibly, being reminded that defendant thought the witnesses would not  
7 show up for the current trial and perhaps they would not show up if there had  
8 to be a retrial, counsel moved for a mistrial.

9 In any event, even if there are other, wholly innocent, explanations for  
10 counsel’s change of direction, one thing is indisputable: counsel did not  
11 request the dismissal of particular jurors who might have been prejudiced by  
12 the hallway encounter. His only request was that the trial end, not that it  
13 continue with a more unbiased jury. His only request to the court to conduct a  
14 further inquiry was in the context of the mistrial motion, not in the context of  
15 a particularized objection to any individual juror.

16 We are satisfied that the trial court here conducted the proper inquiry,  
17 addressed the jurors’ concerns, and determined the jury would be able to  
18 decide the case based on the evidence. Its admonition to the jury further  
19 ensured this result. (See People v. Harris (2008) 43 Cal. 4th 1269, 1304-  
20 1305.) The record contains nothing that leads to a different conclusion: the  
21 jury was able to consider the evidence in such a manner that it determined the  
22 shooting offenses were not gang related, an indication the jurors had not been  
23 prejudiced by the camera incident. As in Burgener, any showing of prejudice  
24 that conflicts with the state of the record should be established through habeas  
25 corpus proceedings. (See Burgener, supra, 41 Cal. 3d at pp. 521-522.)

18 *Id.* at \*16-19.

19 Addressing the trial court’s failure to declare a mistrial based on juror bias from  
20 the 2009 Petition, the District Court noted:  
21

22 [t]he Fourteenth Amendment of the United States Constitution safeguards a  
23 criminal defendant’s Sixth Amendment right to be tried by a panel of impartial  
24 and indifferent jurors. See Irvin v. Down, 366 U.S. 717, 722 (1961); see also  
25 Hayes v. Ayers, 632 F.3d 500, 507 (9th Cir. 2011) (quoting Irvin, 366 U.S. at 722)  
26 (“The Sixth Amendment right to a jury trial ‘guarantees to the criminally accused  
27 a fair trial by a panel of impartial, indifferent jurors.’”) “It is not required,  
28 however that the jurors be totally ignorant of the facts and issues involved.” Irvin,  
366 U.S. at 722-23 (finding that [the] mere existence of preconceived notion of  
guilt or innocence of accused is insufficient by itself to rebut the presumption that  
a prospective juror is impartial). Rather, due process requires that a defendant be  
tried by “a jury capable and willing to decide the case solely on the evidence  
before it.” Smith v. Phillips, 455 U.S. 209, 217 (1982); see also Fields v. Brown,

1 503 F.3d 755, 766 (9th Cir. 2007). Jurors are objectionable if they have formed  
2 such strong and deep impressions that their minds are closed against conflicting  
3 testimony. *See Irvin*, 366 U.S. at 722 n. 3. The presence of even one biased juror  
4 deprives a defendant of the right to an impartial jury. *Dyer v. Calderon*, 151 F.3d  
5 970, 973 (9th Cir. 1998).

6 The Sixth Amendment also requires the jury verdict be based entirely on the  
7 evidence produced at trial. *Turner v. Louisiana*, 379 U.S. 466, 472-473 (1965).  
8 When presented with allegations of jury misconduct or juror bias, the trial court is  
9 required to determine what transpired, the impact on the jurors, and whether or  
10 not what transpired was prejudicial. *Remmer v. United States*, 347 U.S. 227, 229-  
11 230 (1954); *Dyer*, 151 F.3d at 974 (“A court confronted with a colorable claim of  
12 juror bias must undertake an investigation of the relevant facts and  
13 circumstances.”). As the Supreme Court noted:

14 [T]ampering directly or indirectly, with a juror during a trial about the  
15 matter pending before the jury is, for obvious reasons, deemed  
16 presumptively prejudicial . . . The presumption is not conclusive, but the  
17 burden rests heavily upon the Government to establish, after notice to and  
18 hearing of the defendant, that such contact with the juror was harmless to  
19 the defendant.

20 *Remmer*, 347 U.S. at 299 (citing *Mattox v. United States*, 146 U.S. 140, 148-150  
21 (1892)); *see also Xiong v. Felker*, 681 F.3d 1067, 1076 (9th Cir. 2012).

22 The appellate court ultimately concluded that the trial court “conducted the proper  
23 inquiry, addressed the jurors’ concerns, and determined the jury would be able to  
24 decide the case based on the evidence.” *Arzate*, 2009 Cal. App. Unpub. LEXIS  
25 2667, \*38-\*39, 2009 WL 866849. Further, the appellate court found that the trial  
26 court’s admonition to the jury further ensured that the jury would decide the case  
27 based on the evidence. *Id.* The Court finds the state court’s decision to be an  
28 objectively reasonable application of the Supreme Court precedents. The trial  
court in this case conducted the hearing required by *Remmer* with all counsel  
present and participating. The trial court in this case conducted the hearing  
required by *Remmer* with all counsel present and participating. The trial court  
examined the juror’s answers and demeanor for signs of potential prejudice  
stemming from [the] hallway incident in which several of the jurors may have  
been photographed and in assessing the juror’s ability to render an impartial  
decision on the evidence. Thus, the appellate court’s finding that Petitioner’s  
constitutional rights were not offended when the trial court denied Petitioner’s  
motion for mistrial was not an objectively unreasonable application of Supreme  
Court precedents and Petitioner is not entitled to habeas corpus relief.

29 *Id.* at \*19-20.

30 In sum, the District Court dismissed Petitioner’s claim in the 2009 Petition that the trial  
31 court erred by failing to declare a mistrial due to juror bias because the state court’s decision was

not an objectively unreasonable application of Supreme Court precedent. *Id.*

**C. The Juror Bias Claim Was Correctly Decided in the 2009 Petition.**

The issue of whether the trial court erred in failing to declare a mistrial based on juror bias was decided with the denial of the 2009 Petition. *See Id.* Generally, a petitioner may not make a claim in a second or successive habeas petition that was presented in a prior application. 28 U.S.C. § 2244(b)(1). However, in this case, a new judgment was entered in state court after the 2009 Petition was denied. The Supreme Court has held “where . . . there is a ‘new judgment intervening between [ ] two habeas petitions,’ . . . an application challenging the resulting new judgment is not ‘second or successive’ at all.” *Magwood v. Patterson*, 561 U.S. 320, 340 n. 15 (2010) (quoting *Burton v. Stewart*, 549 U.S. 147, 156 (2007)).

The Supreme Court has not directly decided whether a new judgment allows a petitioner to re-raise a claim rejected on the merits in a previous federal petition. Instead, the Court has noted “[i]t will not take a court long to dispose of such claims where the court has already analyzed the legal issues.” *Magwood v. Patterson*, 561 U.S. 320, 340 n. 15 (2010).

In this case, a new judgment was entered in state court, but Petitioner is simply re-raising a claim that was rejected on the merits in the 2009 Petition. The new state court judgment did not alter the legal or factual basis upon which the District Court’s analysis of this claim rests. Accordingly, this Court will deny Petitioner’s juror bias claim. As thoroughly analyzed and expounded upon in the order denying the 2009 Petition, the Court of Appeal’s finding that Petitioner’s constitutional rights were *not* violated when the trial court denied Petitioner’s motion for mistrial, was not objectively unreasonable. Consequently, the Court will deny Petitioner’s claim that the trial court erred in failing to declare a mistrial due to juror bias.

V. Certificate of Appealability

A petitioner seeking a writ of habeas corpus has no absolute entitlement to appeal a district court's denial of his petition, but may only appeal in certain circumstances. *Miller-El v. Cockrell*, 537 U.S. 322, 335-36 (2003). The controlling statute in determining whether to issue a certificate of appealability is 28 U.S.C. § 2253, which provides:

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c) (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issues or issues satisfy the showing required by paragraph (2).

If a court denies a habeas petition, the court may only issue a certificate of appealability "if jurists of 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." *Miller-El*, 537 U.S. at 327; *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Although the petitioner is not required to prove the merits of his case, he must demonstrate "something more than the absence of frivolity or the existence of mere good faith on his . . .

1 part." *Miller-El*, 537 U.S. at 338.

2 Reasonable jurists would not find the Court's determination that Petitioner is not entitled  
3 to federal habeas corpus relief debatable, wrong, or deserving of encouragement to proceed  
4 further. Accordingly, the Court declines to issue a certificate of appealability.  
5

6 **VI. Conclusion**

7 Based on the foregoing, the Court hereby DENIES with prejudice the petition for writ of  
8 habeas corpus pursuant to 28 U.S.C. § 2254 and declines to issue a certificate of appealability.

9 The Clerk of the Court is directed to enter judgment for the Respondent.  
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11 IT IS SO ORDERED.  
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13 Dated: March 1, 2018

14 /s/ Sheila K. Oato  
15 UNITED STATES MAGISTRATE JUDGE  
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