
No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ULICES AGUILAR, PETITIONER,
vs.
WARREN MONTGOMERY, RESPONDENT.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

APPENDIX
[Volume 2 of 2]

CARLTON F. GUNN
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Pasadena, California 91101

Attorney for the Petitioner

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8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE EASTERN DISTRICT OF CALIFORNIA
10
11

12 **ULICES AGUILAR,**

1:12-cv-01547-LJO-JLT

13 Petitioner,
14

15 v.

16 **MATTHEW CATE, Secretary, CDCR,**

17 Respondent.
18

19 3. Petition for Writ of Habeas Corpus, filed October 25, 2011, in the Superior Court of
20 the State of California, County of Tulare, Case Number VHC259287.
21
22
23
24
25
26
27
28

Name: ULICES AGUIAR
Address: IRONWOOD STATE PRISON
P.O. BOX 2199
BLYTHE, CA 92226
CDC or ID Number: G-48827

MC-275
FILED
TULARE COUNTY SUPERIOR COURT
VISALIA DIVISION

OCT 25 2011

LADYWE CLEER, CLERK
BY: [Signature]

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF TULARE
(Court)

<u>ULICES AGUIAR</u>	
Petitioner	vs.
<u>THE PEOPLE OF THE STATE OF CALIFORNIA</u>	
Respondent	

PETITION FOR WRIT OF HABEAS CORPUS

No. VHC 259287
(To be supplied by the Clerk of the Court)

INSTRUCTIONS—READ CAREFULLY

- If you are challenging an order of commitment or a criminal conviction and are filing this petition in the Superior Court, you should file it in the county that made the order.
- If you are challenging the conditions of your confinement and are filing this petition in the Superior Court, you should file it in the county in which you are confined.
- Read the entire form *before* answering any questions.
- This petition must be clearly handwritten in ink or typed. You should exercise care to make sure all answers are true and correct. Because the petition includes a verification, the making of a statement that you know is false may result in a conviction for perjury.
- Answer all applicable questions in the proper spaces. If you need additional space, add an extra page and indicate that your answer is "continued on additional page."
- If you are filing this petition in the superior court, you only need to file the original unless local rules require additional copies. Many courts require more copies.
- If you are filing this petition in the Court of Appeal and you are an attorney, file the original and 4 copies of the petition and, if separately bound, 1 set of any supporting documents (unless the court orders otherwise by local rule or in a specific case). If you are filing this petition in the Court of Appeal and you are *not* represented by an attorney, file the original and one set of any supporting documents.
- If you are filing this petition in the California Supreme Court, file the original and 10 copies of the petition and, if separately bound, an original and 2 copies of any supporting documents.
- Notify the Clerk of the Court in writing if you change your address after filing your petition.

Approved by the Judicial Council of California for use under rule 8.380 of the California Rules of Court (as amended effective January 1, 2007). Subsequent amendments to rule 8.380 may change the number of copies to be furnished to the Supreme Court and Court of Appeal.

This petition concerns:

- ☒ A conviction
 ☐ Parole
☐ A sentence
 ☐ Credits
☐ Jail or prison conditions
 ☐ Prison discipline
☐ Other (specify): _____

1. Your name: ULICES AGUILAR
2. Where are you incarcerated? IRONWOOD STATE PRISON
3. Why are you in custody? ☒ Criminal conviction ☐ Civil commitment

Answer items a through i to the best of your ability.

- a. State reason for civil commitment or, if criminal conviction, state nature of offense and enhancements (for example, "robbery with use of a deadly weapon").

SECOND DEGREE MURDER WITH GUN AND GANG ENHANCEMENTS

- b. Penal or other code sections: P.C. 187, P.C. 12022.53, P.C. 186.22
- c. Name and location of sentencing or committing court: SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF TULARE
- d. Case number: VCF 127019E
- e. Date convicted or committed: APRIL 7, 2008
- f. Date sentenced: JANUARY 16, 2009
- g. Length of sentence: 40 YEARS TO LIFE
- h. When do you expect to be released? EPRI 2044
- i. Were you represented by counsel in the trial court? ☒ Yes ☐ No *If yes, state the attorney's name and address:*

CRAIG COLLINS

221 NORTH "I" STREET, MADERA, CA 93637

4. What was the LAST plea you entered? (Check one):

☒ Not guilty ☐ Guilty ☐ Nolo contendere ☐ Other: _____

5. If you pleaded not guilty, what kind of trial did you have?

☒ Jury ☐ Judge without a jury ☐ Submitted on transcript ☐ Awaiting trial

6. GROUNDS FOR RELIEF

Ground 1: State briefly the ground on which you base your claim for relief. For example, "The trial court imposed an illegal enhancement!" (If you have additional grounds for relief, use a separate page for each ground. State ground 2 on page 4. For additional grounds, make copies of page 4 and number the additional grounds in order.)

THE TRIAL COURT COMMITTED REVERSIBLE CONSTITUTIONAL ERROR UNDER THE FOURTEENTH AMENDMENT BY DENYING PETITIONER'S MOTION TO DISMISS THE GUN USE AND CRIMINAL STREET GANG ENHANCEMENTS AFTER THE JURY FOUND THOSE ENHANCEMENTS NOT TRUE AT THE END OF THE FIRST JURY TRIAL. THE PRINCIPLES OF COLLATERAL AND DIRECT ESTOPPEL PRECLUDED THE RETRIAL OF THOSE ENHANCEMENTS AT THE SECOND JURY TRIAL.

a. Supporting facts:

Tell your story briefly without citing cases or law. If you are challenging the legality of your conviction, describe the facts on which your conviction is based. If necessary, attach additional pages. CAUTION: You must state facts, not conclusions. For example, if you are claiming incompetence of counsel, you must state facts specifically setting forth what your attorney did or failed to do and how that affected your trial. Failure to allege sufficient facts will result in the denial of your petition. (See *In re Swain* (1949) 34 Cal.2d 300, 304.) A rule of thumb to follow is, who did exactly what to violate your rights at what time (when) or place (where). (If available, attach declarations, relevant records, transcripts, or other documents supporting your claim.)

AT THE FIRST JURY TRIAL, PETITIONER WAS FOUND NOT GUILTY OF FIRST DEGREE MURDER, AND THE FELONY MURDER SPECIAL CIRCUMSTANCE, GUN USE ENHANCEMENT, AND CRIMINAL STREET GANG ENHANCEMENT WERE FOUND "NOT TRUE" BY THE JURY. (3CT 640.) THE JURY DID NOT RETURN A VERDICT ON SECOND DEGREE MURDER AT THE FIRST JURY TRIAL. (3CT 637-640.)

AFTER THE FIRST JURY TRIAL, THE TRIAL COURT DENIED PETITIONER'S MOTION TO DISMISS THOSE ENHANCEMENTS. (ART 1-14.) AFTER THE SECOND TRIAL PETITIONER WAS CONVICTED OF SECOND DEGREE MURDER AND THE ENHANCEMENTS WERE FOUND TRUE. (3CT 737.)

EVEN THOUGH THE MURDER COUNT COULD BE RETRIED HERE, THAT DOES NOT MEAN THAT THE GANG AND GUN USE ENHANCEMENTS COULD BE RETRIED WHEN THEY WERE ALREADY DECIDED BY THE JURY NOT TO BE TRUE HERE. THEREFORE, THE FACTUAL AND LEGAL ISSUES DECIDED BY THE JURY ON THOSE ENHANCEMENTS MUST BE CONSIDERED TO HAVE BEEN CONCLUSIVELY DECIDED BY THE JURY.

THE TRIAL COURT'S REASONING FOR DENYING PETITIONER'S MOTION TO DISMISS THE ENHANCEMENTS WERE UNPERSUASIVE AND CONTRARY TO RELEVANT STATE AND FEDERAL LAW. (CONTINUE ON ATTACHED PAGE.)

b. Supporting cases, rules, or other authority (optional):

(Briefly discuss, or list by name and citation, the cases or other authorities that you think are relevant to your claim. If necessary, attach an extra page.)

1 THE COURT ACTUALLY SAID THAT THERE WAS "NO WAY" TO SPECULATE ABOUT WHAT THE JURY
2 WAS THINKING. (ART 11:21-23.) THE COURT'S RULING WAS CONTRARY TO THE CLEAR AND
3 UNEQUIVOCAL FINDINGS OF THE FIRST JURY IN ITS VERDICT DATED JULY 16, 2007, WHERE IT
4 FOUND PETTINER NOT GUILTY OF FIRST DEGREE MURDER AND THE ENHANCEMENTS NOT TO BE
5 TRUE. (3CT640.) THE TRIAL COURT DIRECTLY INTERFERED UPON THE PROVINCE OF THE JURY BY
6 SPECULATING ABOUT WHAT THE JURY WAS THINKING ABOUT WHEN IT FILLED IN THE JURY
7 VERDICTS. (SEE P.C. §1161.)

8 THE COURTS ALSO COMMITTED REVERSIBLE ERROR BY INVADING THE JURY'S PROVINCE
9 BY ALLOWING A SECOND JURY TO RECONSIDER THE FIRST JURY'S CLEAR AND UNEQUIVOCAL
10 FINDINGS ON THOSE TWO ENHANCEMENTS. THE COURT CANNOT REQUIRE THE JURY TO
11 RECONSIDER... "A VERDICT OF ACQUITTAL, AS IT CLEARLY STATES IN SECTION 1161 OF THE
12 PENAL CODE. THAT IS IN EFFECT WHAT THE COURT DID HERE BY SPECULATING ABOUT WHAT THE
13 FIRST JURY DID, AND BY THEN ALLOWING A SECOND JURY TO RECONSIDER THE ENHANCEMENTS.

7 Ground 2 or Ground _____ (if applicable)

THE TRIAL COURT (COMMITTED) REVERSEIBLE CONSTITUTIONAL ERROR UNDER THE FOURTEENTH AMENDMENT BY DENYING PETITIONER'S MOTION FOR NEW TRIAL BECAUSE JUROR #9 (COMMITTED) MISCONDUCT WHEN SHE CONCEALED HER BIAS DURING VOIR DIRE, AND DEFENSE COUNSEL WAS INEFFECTIVE IN FAILING TO MOVE TO DISCHARGE THAT JUROR.

a. Supporting facts:

DURING JURY SELECTION, PROSPECTIVE JURORS WERE QUESTIONED ABOUT THEIR FEELINGS ON GANGS. JUROR #9 STATED "I HAVE A FAMILY MEMBER THAT'S INVOLVED IN IT, BUT I DON'T - I STAY AWAY. IT DOESN'T BOTHER MY MIND AT ALL. I'M NOT INVOLVED, AND DON'T CARE TO BE." (ART 140.)

DURING TRIAL, HER BIAS AGAINST PETITIONER CAME OUT ON TWO SEPARATE DAYS. ON MARCH 27, 2008, SHE SENT A NOTE TO THE COURT ABOUT EVIDENCE SHE HAD SEEN DURING TRIAL. WHEN SHE WAS QUESTIONED BY THE COURT IT CAME OUT THAT SHE KNEW AND LIVED WITH SOME GUY NAMED ALEX SANCHEZ AS SHE WAS DATING HIS BROTHER. (13 RT 1471-1475.) SANCHEZ WAS APPARENTLY A NORTEÑO GANG MEMBER. THE COURT ASKED HER IF THE FACT THAT SANCHEZ WAS A NORTEÑO GANG MEMBER AND PETITIONER WAS AFFILIATED WITH THE RIVAL SUREÑO GANG, I.E. THAT WAS GOING TO AFFECT HER ABILITY TO BE FAIR IN THIS CASE, SHE REVEALED HER BIAS, BUT CAUGHT HERSELF AND QUICKLY BACKTRACKED FROM HER ADMISSION OF BIAS. (SEE EXHIBIT "A")

ON THE NEXT COURT DATE OF APRIL 1, 2008, DEFENSE COUNSEL BROUGHT TO THE COURT'S ATTENTION THAT PETITIONER'S BROTHER HEARD HER LISTENING TO NORTEÑO RAP MUSIC WHICH CONTAINED DEROGATORY REFERENCES TO SUREÑOS. (14 RT 1479.) DEFENSE COUNSEL ALSO TOLD THE COURT THAT HE PERSONALLY SAW A "BIG RED STAR" TATTOO ON HER NECK. (SEE EXHIBIT "B") DEFENSE COUNSEL EXPLAINED TO THE COURT THAT HER RELATIONSHIP WITH NORTEÑO GANG MEMBERS WOULD MAKE HER "BIAS AGAINST MY CLIENT BECAUSE HE'S IN A RIVAL GANG." (14 RT 1480.)

(CONTINUE ON ATTACHED PAGES.)

b. Supporting cases, rules, or other authority:

1 At A HEARING ON PETITIONER'S MOTION FOR NEW TRIAL, THE COURT DENIED
2 PETITIONER'S MOTION ON ALL LEGAL GROUNDS. (21 RT 192 (6).) AT THE BEGINNING OF THE
3 SENTENCING HEARING ON JANUARY 16, 2009, THE COURT RESTATE ITS REASONS FOR DENYING
4 THE MOTION IN MORE DETAIL. THE COURT STATED IN REGARD TO JUROR #9 THERE WAS NO MISCONDUCT
5 BECAUSE SHE ALLEGEDLY REVEALED HER "FAMILY GANG CONNECTIONS." DURING TRIAL. (21 RT 200 (1).)
6 WHILE SHE REVEALED HER FAMILY GANG CONNECTIONS DURING JURY SELECTION SHE
7 CLEARLY STATED THAT "I STAY AWAY... I'M NOT INVOLVED." (ART 140.) SHE WAS NOT
8 COMPLETELY AND OPENLY HONEST, DURING TRIAL IT BECAME APPARENT THAT SHE DID HAVE
9 NORTEÑO GANG TIES AND SHE EVEN HAD A "BIG RED STAR" TATTOO ON HER NECK. (SEE EXHIBIT
10 "B") THAT IS INDICATION OF NORTEÑO GANG AFFILIATION. WHEN QUESTIONED ABOUT HER
11 POTENTIAL BIAS BECAUSE OF SANCHEZ'S GANG AFFILIATION AND PETITIONER'S ALLEGED
12 GANG AFFILIATION WITH THE RIVAL GANG, SHE STATED "MAIBE A LITTLE BIT." (SEE EX "A")
13 DEFENSE COUNSEL WAS INEFFECTIVE BECAUSE WHEN JUROR #9'S BIAS BECAME
14 APPARENT DURING TRIAL ON TWO SEPARATE DAYS, HE SHOULD HAVE MOVED TO DISCHARGE THAT
15 BIAS JUROR PURSUANT TO PENAL CODE 1089. DEFENSE COUNSEL ALSO DID NOT BRING A
16 PROPER MOTION FOR NEW TRIAL AFTER THE JURY'S VERDICT. HE SHOULD HAVE OBTAINED A
17 DECLARATION OF ANY WITNESS TO JUROR #9'S MISCONDUCT IN THE COURTHOUSE HALLWAY.
18 HE SHOULD HAVE ALSO OBJECTED ON FEDERAL CONSTITUTIONAL GROUNDS. A REASONABLE
19 COMPETENT ATTORNEY WOULD HAVE OBJECTED ON THE FEDERAL CONSTITUTIONAL GROUNDS
20 SINCE DEFENSE ATTORNEY'S NOW KNOW THAT SINCE THE PASSAGE OF PROPOSITION 115
21 AND THE ANTI-TERRORISM AND EFFECTIVE DEATH PENALTY ACT (AEDPA), THEY MUST
22 OBJECT ON FEDERAL CONSTITUTIONAL GROUNDS TO PRESERVE ANY ISSUES FOR FEDERAL
23 HABEAS REVIEW.

8. Did you appeal from the conviction, sentence, or commitment? ☒ Yes ☐ No If yes, give the following information:

a. Name of court ("Court of Appeal" or "Appellate Division of Superior Court"):

COURT OF APPEALS OF THE STATE OF CALIFORNIA, FIFTH APPELLATE DISTRICT

b. Result: AFFIRMED

c. Date of decision: JULY 8, 2010

d. Case number or citation of opinion, if known: F 057268

e. Issues raised: (1) DOUBLE JEPARDY - RETRYING THE GUN AND GANG ENHANCEMENTS.

(2) JURY MISCONDUCT - JUROR #9 CONCEALED HER BIAS DURING YOUR DIRE.

(3) EVIDENCE IS INSUFFICIENT TO SUPPORT THE GANG ENHANCEMENTS.

f. Were you represented by counsel on appeal? ☒ Yes ☐ No If yes, state the attorney's name and address, if known:

KIM MALCHESKI, P.O. BOX 40105, SAN FRANCISCO, CA 94140

9. Did you seek review in the California Supreme Court? ☒ Yes ☐ No If yes, give the following information:

a. Result: DENIED

b. Date of decision: OCTOBER 27, 2010

c. Case number or citation of opinion, if known: S 185614

d. Issues raised: (1) DOUBLE JEPARDY - RETRYING THE GUN AND GANG ENHANCEMENTS.

(2) JURY MISCONDUCT - JUROR #9 CONCEALED HER BIAS DURING YOUR DIRE.

(3) EVIDENCE IS INSUFFICIENT TO SUPPORT THE GANG ENHANCEMENTS.

10. If your petition makes a claim regarding your conviction, sentence, or commitment that you or your attorney did not make on appeal, explain why the claim was not made on appeal:

GROUND #4 WAS TO BE PROPERLY PRESENTED IN A PETITION FOR HABEAS CORPUS BECAUSE OF THE INEFFECTIVE

ASSISTANCE CLAIM. GROUND #3 I ASK THE APPELLATE ATTORNEY TO BRING IT UP, BUT HE DID NOT.

11. Administrative review:

a. If your petition concerns conditions of confinement or other claims for which there are administrative remedies, failure to exhaust administrative remedies may result in the denial of your petition, even if it is otherwise meritorious. (See *In re Muszalski* (1975) 52 Cal.App.3d 500.) Explain what administrative review you sought or explain why you did not seek such review:

b. Did you seek the highest level of administrative review available? ☐ Yes ☐ No

Attach documents that show you have exhausted your administrative remedies.

12. Other than direct appeal, have you filed any other petitions, applications, or motions with respect to this conviction, commitment, or issue in any court? ☐ Yes If yes, continue with number 13. ☒ No If no, skip to number 15.

13. a. (1) Name of court: _____
- (2) Nature of proceeding (for example, "habeas corpus petition"): _____
- (3) Issues raised: (a) _____
- (b) _____
- (4) Result (attach order or explain why unavailable): _____
- (5) Date of decision: _____
- b. (1) Name of court: _____
- (2) Nature of proceeding: _____
- (3) Issues raised: (a) _____
- (b) _____
- (4) Result (attach order or explain why unavailable): _____
- (5) Date of decision: _____

c. For additional prior petitions, applications, or motions, provide the same information on a separate page.

14. If any of the courts listed in number 13 held a hearing, state name of court, date of hearing, nature of hearing, and result:

15. Explain any delay in the discovery of the claimed grounds for relief and in raising the claims in this petition. (See *In re Swain* (1949) 34 Cal.2d 300, 304.)

16. Are you presently represented by counsel? ☐ Yes ☒ No If yes, state the attorney's name and address, if known:

17. Do you have any petition, appeal, or other matter pending in any court? ☐ Yes ☒ No If yes, explain:

18. If this petition might lawfully have been made to a lower court, state the circumstances justifying an application to this court:

I, the undersigned, say: I am the petitioner in this action. I declare under penalty of perjury under the laws of the State of California that the foregoing allegations and statements are true and correct, except as to matters that are stated on my information and belief, and as to those matters, I believe them to be true.

Date: OCTOBER 20, 2011

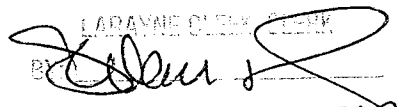


(SIGNATURE OF PETITIONER)

OCT 25 2011

PROOF OF SERVICE

Declaration of Service by Mail

LARAYNE CLEGG, CLERK
BY 
VHC 259287

I, ULICES AGUILAR, declare that I am over the age of
Eighteen (18) and that I (am/am not) a party to this action. On OCTOBER 20, 2011,

I deposited a copy of the following document (s):

2 COPIES OF MC-275 FORM,

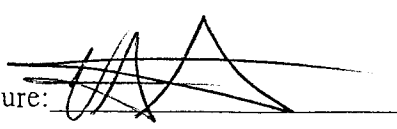
2 COPIES OF PETITION FOR WRIT OF HABEAS CORPUS AND MEMORANDUM OF POINTS AND
AUTHORITIES

in a sealed envelope with the postage prepaid into the United States mail outlet via an
authorized California Department of Corrections and Rehabilitation employee at
Ironwood State Prison, in Riverside County, Blythe California, and addressed as follows:

COUNTY CLERK
COUNTY CIVIC CENTER
VISALIA, CA 93291

I declare under penalty of perjury by the laws of the State of California that the foregoing
is true and correct (pursuant to 28 USCA 1746 (2)).

Date: OCTOBER 20, 2011

Signature: 

1 ULICES AGUILAR

2 G-48827

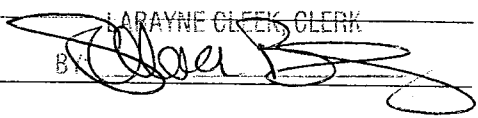
FILED
TULARE COUNTY SUPERIOR COURT
VISALIA DIVISION

3 IRONWOOD STATE PRISON

OCT 25 2011

4 P.O. Box 2199

5 BLYTHE, CA 92226

LARAYNE CLECK, CLERK
BY 

6 IN PRO PER

7 SUPERIOR COURT OF THE STATE OF CALIFORNIA
8 COUNTY OF TULARE

9
10 IN RE

No. VHC 259287

11 ULICES AGUILAR

12
13 ON HABEAS CORPUS

PETITION FOR WRIT OF HABEAS CORPUS
AND MEMORANDUM OF POINTS AND
14 AUTHORITIES IN SUPPORT THEREOF.

15
16 INTRODUCTION

17 PETITIONER'S FIRST JURY TRIAL ENDED IN A MISTRIAL WITH
18 A PARTIAL JURY VERDICT. THE JURY RETURNED VERDICTS FINDING PETITIONER
19 NOT GUILTY OF FIRST DEGREE MURDER, AND THE JURY SPECIFICALLY FOUND
20 THAT THE GANG-RELATED SPECIAL CIRCUMSTANCE, THE PERSONAL GUN USE
21 ENHANCEMENT, AND THE CRIMINAL STREET GANG ALLEGATIONS WERE "NOT
22 TRUE" (3CT 640.) PETITIONER CONTENDS THAT THE TRIAL COURT COMMITTED
23 FEDERAL CONSTITUTIONAL ERROR UNDER THE FOURTEENTH AMENDMENT BY
24 DENYING PETITIONER'S MOTION TO DISMISS THE GUN USE AND CRIMINAL
25 STREET GANG ENHANCEMENTS. AFTER THE JURY FOUND THOSE ENHANCEMENTS
26 NOT TO BE TRUE AT THE END OF THE FIRST JURY TRIAL.

27 PETITIONER'S MOTION FOR NEW TRIAL BECAUSE OF JURY
28 MISCONDUCT WAS DENIED. PETITIONER CONTENDS THAT THE TRIAL COURT

1 COMMITTED REVERSIBLE FEDERAL CONSTITUTIONAL ERROR UNDER THE
2 FOURTEENTH AMENDMENT BY DENYING PETITIONER'S MOTION FOR NEW TRIAL
3 BECAUSE JUROR #9 COMMITTED MISCONDUCT WHEN SHE CONCEALED HER BIAS
4 DURING VOIR DIRE, AND DEFENSE COUNSEL WAS INEFFECTIVE IN FAILING
5 TO MOVE TO DISCHARGE THAT JUROR.

6 PETITIONER'S MOTION FOR NEW TRIAL BECAUSE OF PROSECUTORIAL
7 MISCONDUCT WAS DENIED. PETITIONER CONTENTS THAT THE PEOPLE COMMITTED
8 PREJUDICIAL PROSECUTORIAL MISCONDUCT WHEN THE PEOPLE MADE REPREHENSIBLE
9 STATEMENTS TOWARD THE DEFENSE COUNSEL.

10 PETITIONER'S MOTION FOR NEW TRIAL BECAUSE OF JURY MISCONDUCT
11 WAS DENIED. PETITIONER CONTENTS THAT THE TRIAL COURT COMMITTED FEDERAL
12 CONSTITUTIONAL ERROR UNDER THE SIXTH AND FOURTEENTH AMENDMENT BY DENYING
13 PETITIONER'S MOTION FOR NEW TRIAL BECAUSE JUROR #3 COMMITTED
14 MISCONDUCT ON MANY LEVELS, SHE CONCEALED HER BIAS DURING VOIR DIRE, SHE
15 VIOLATED THE SEPARATION ADMONITION BY COMMUNICATING WITH THIRD PARTY
16 ABOUT THE CASE AND BY THEN CONSIDERING EVIDENCE NOT HEARD DURING
17 TRIAL. DEFENSE COUNSEL WAS INEFFECTIVE IN FAILING TO LAY THE PROPER
18 FOUNDATION IN THE HEARING FOR NEW TRIAL.

19 PETITIONER FURTHER CONTENTS THAT THE EVIDENCE IS
20 INSUFFICIENT TO SUPPORT THE CRIMINAL STREET GANG ENHANCEMENTS.

21 II

22 PARTIES

23 PETITIONER, ULICES AGUILAR, G-48827, IS A
24 PETITIONER OF THE STATE OF CALIFORNIA INCARCERATED AT
25 IRONWOOD STATE PRISON.
26
27
28

III

STATEMENT OF FACTS

1.) PETITIONER'S FIRST JURY TRIAL BEGAN ON JULY 2, 2007, AND ENDED IN A MISTRIAL WITH PARTIAL JURY VERDICTS ON JULY 16, 2007. THE JURY RETURNED VERDICTS FINDING PETITIONER NOT GUILTY OF FIRST DEGREE MURDER, AND THE JURY SPECIFICALLY FOUND THAT THE GANG-RELATED SPECIAL CIRCUMSTANCE, THE PERSONAL GUN USE ENHANCEMENT, AND THE CRIMINAL STREET GANG ALLEGATIONS WERE "NOT TRUE." (3CT 640.)

ON JANUARY 18, 2008, PETITIONER'S MOTION TO DISMISS THOSE THREE SPECIAL CIRCUMSTANCES AND ALLEGATIONS WAS DENIED BY THE TRIAL COURT. (3CT 654.)

2.) PETITIONER'S SECOND JURY TRIAL BEGAN ON MARCH 21, 2008, AND ENDED WITH THE JURY'S VERDICTS ON APRIL 7, 2008. IN COUNT 1, THE JURY FOUND PETITIONER GUILTY OF SECOND DEGREE MURDER, AND FOUND THE GUN USE AND CRIMINAL STREET GANG ALLEGATIONS TO BE TRUE. (3CT 737.)

DURING JURY SELECTION PROSPECTIVE JURORS WERE QUESTIONED ABOUT THEIR FEELING ABOUT GANGS. JUROR #9 RESPONDED TO THE COURT'S QUESTION ABOUT POTENTIAL BIAS AGAINST GANG MEMBERS AS FOLLOW: "I HAVE A FAMILY MEMBER THAT'S INVOLVED IN IT, BUT I DON'T - - I STAY AWAY. IT DOESN'T BOTHER MY MIND AT ALL. I'M NOT INVOLVED, AND DON'T CARE TO BE." (ART 140.)

DURING TRIAL, HER BIAS AGAINST PETITIONER CAME OUT ON TWO SEPARATE DAYS ON MARCH 27, 2008, SHE SENT A NOTE TO THE COURT ABOUT EVIDENCE SHE HAD SEEN DURING TRIAL ABOUT A YOUNG MAN NAMED ALEX SANCHEZ. AS IT TURNS OUT, SHE LIVED IN THE SAME HOUSE AS ALEX SANCHEZ, AS SHE WAS DATING SANCHEZ'S BROTHER. (13 RT 1471-1475.) SANCHEZ WAS APPARENTLY A NORTEÑO GANG MEMBER.

ON THE NEXT COURT DATE OF APRIL 1, 2008, DEFENSE COUNSEL

1 REPRESENTED TO THE COURT THAT PETITIONER'S BROTHER LUIS AGUILAR
2 HEARD JUROR #9 LISTENING TO NORTEÑO RAP MUSIC. THE MUSIC CONTAINED
3 DEROGATORY REFERENCES TO SUREÑOS. (14 RT 1479.)

4 PETITIONER'S MOTION FOR NEW TRIAL BECAUSE OF JURY
5 MISCONDUCT BY JUROR #9 WAS DENIED ON JANUARY 9, 2009. (4CT 832.)

6 3.) DURING CLOSING ARGUMENTS DATED APRIL 3, 2008, THE
7 PROSECUTOR MADE A PERSONAL ATTACK ON THE DEFENSE COUNSEL. THE
8 PROSECUTOR'S STATEMENT THAT "[MR COLLINS] DOESN'T EVEN LIKE THE LAW....
9 [H]E DOESN'T LIKE THE WHOLE SYSTEM. (SEE RPT DATED APRIL 4, 2008,
10 ATTACHED AS EXHIBIT C.)" IS REPREHENSIBLE AND IS NOT CLOSE TO A
11 FAIR COMMENT ON THE STATE OF THE EVIDENCE.

12 4.) THIS CASE WAS SUBMITTED TO THE JURY ON OR ABOUT APRIL
13 3, 2008. THAT NIGHT THE PETITIONER HEARD ANOTHER INMATE OF THE
14 TULARE COUNTY JAIL, ABLE VASQUEZ, IN THE CELL NEXT DOOR TO PETITIONER
15 TALKING ABOUT THIS CASE.

16 DURING THE MOTION FOR NEW TRIAL DATED JANUARY 9, 2009, ABLE
17 VASQUEZ TESTIFIED THAT HE KNEW JUROR #3 WAS IN PETITIONER'S
18 JURY BECAUSE HE LIVED WITH HER. (20 RT 1899.) JUROR #3 VIOLATED
19 THE SEPARATION ADMONITION WHEN SHE TALKED TO ABLE VASQUEZ ABOUT THIS
20 CASE. SHE HAD A PHONE CONVERSATION WITH HIM. DURING THE CONVERSATION
21 SHE ASKED HIM WHAT SHE SHOULD DO IN TERMS OF THE VERDICT. (20
22 RT 1908-1911.)

23 JUROR #3 WAS QUESTIONED DURING JURY SELECTION ABOUT
24 GANGS. SHE DID NOT DISCLOSE RELEVANT AND IMPORTANT INFORMATION,
25 THAT HER BOYFRIEND WAS AFFILIATED. HE HAD TAKEN PICTURES WITH HER
26 WHILE HE WAS WEARING RED CLOTHES AND RED BANDANNAS. (20 RT 1904.)

27 5.) PETITIONER WAS ALLEGED TO BE A SUREÑO GANG MEMBER
28 AND WAS CONVICTED OF ALLEGEDLY COMMITTING A FELONY FOR THE BENEFIT

1 OF THE GANG. PETITIONER WAS ALSO CONVICTED OF A GUN USE ENHANCEMENT.
2 (3CT 737, 835.)

3 THE PROSECUTOR'S GANG EXPERT OPINED THAT PETITIONER WAS
4 A SUREÑO GANG MEMBER. HE ALSO THOUGHT THAT THE SHOOTING WAS GANG-
5 RELATED SO THAT CO-DEFENDANT COULD SWITCH FROM THE NORTEÑO GANG TO
6 THE SUREÑO GANG. (15 RT 1645-1655.)

7 THE EVIDENCE IS INSUFFICIENT TO ESTABLISH THE REQUIRED
8 LEGAL ELEMENTS OF THE GANG ENHANCEMENTS.

9 IV

10 CONTENTIONS

11 I. PETITIONER WAS DENIED HIS FEDERAL CONSTITUTIONAL
12 RIGHT UNDER THE FOURTEENTH AMENDMENT WHEN THE TRIAL
13 COURT DENIED PETITIONER'S MOTION TO DISMISS THE GUN USE
14 AND CRIMINAL STREET GANG ENHANCEMENTS.

15 II

16 II. PETITIONER WAS DENIED HIS FEDERAL CONSTITUTIONAL RIGHT
17 UNDER THE FOURTEENTH AMENDMENT WHEN THE TRIAL COURT DENIED
18 PETITIONER'S MOTION FOR NEW TRIAL BECAUSE JUROR #9
19 COMMITTED MISCONDUCT WHEN SHE CONCEALED HER BIAS
20 DURING VOIR DIRE, AND DEFENSE COUNSEL WAS INEFFECTIVE IN
21 FAILING TO MOVE TO DISCHARGE THAT JUROR.

22 III

23 THE PEOPLE COMMITTED PREJUDICIAL PROSECUTORIAL
24 MISCONDUCT WHEN THE PEOPLE MADE REPREHENSIBLE
25 STATEMENTS TOWARD THE DEFENSE COUNSEL.

26 IV

27 PETITIONER WAS DENIED HIS FEDERAL CONSTITUTIONAL
28 RIGHT UNDER THE SIXTH AND FOURTEENTH AMENDMENTS WHEN

THE TRIAL COURT DENIED PETITIONER'S MOTION FOR NEW TRIAL
BECAUSE JUROR # 3 COMMITTED MISCONDUCT ON MANY LEVELS.
SHE CONCEALED HER BIAS DURING VOIR DIRE, SHE ALSO VIOLATED
THE SEPARATION ADMONITION AND CONSIDERED EVIDENCE NOT
HEARD DURING TRIAL. DEFENSE COUNSEL WAS INEFFECTIVE.

V. THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE CRIMINAL
STREET GANG ENHANCEMENTS.

V

PRAYER FOR RELIEF

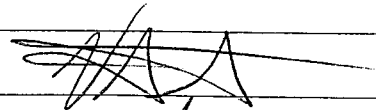
PETITIONER IS WITHOUT REMEDY SAVE BY WRIT OF HABEAS CORPUS.

WHEREFORE, PETITIONER PRAYS THE COURT:

1. ISSUE A WRIT OF HABEAS CORPUS;
2. DECLARE THE RIGHTS OF THE PARTIES;
3. REVERSE THE GUILTY VERDICTS;
4. VACATE THE GANG AND GUN USE ENHANCEMENTS;
5. APPOINT COUNSEL, AWARD REASONABLE ATTORNEY FEES;
6. GRANT ANY AND FURTHER RELIEF THE COURT DEEMS PROPER.

DATED: OCTOBER 20, 2011

RESPECTFULLY SUBMITTED,



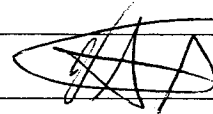
ULISES AGUILAR

VERIFICATION

I, ULICES AGUILAR, STATE:

I AM THE PETITIONER TO THIS ACTION. I HAVE READ THE FOREGOING FOR WRIT OF HABEAS CORPUS AND THE FACTS STATED THEREIN ARE TRUE OF MY OWN KNOWLEDGE, EXCEPT AS TO MATTERS THAT ARE THEREIN STATED ON MY OWN INFORMATION AND BELIEF, AND AS TO THOSE MATTERS I BELIEVE THEM TO BE TRUE.

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT AND THAT THIS DECLARATION WAS EXECUTED AT BLYTHE ON OCTOBER 20, 2011



ULICES AGUILAR

G-48827

1 THE COURT ALSO COMMITTED REVERSIBLE ERROR BY INVADING THE
2 JURY'S PROVINCE BY ALLOWING A SECOND JURY TO RECONSIDER THE FIRST
3 JURY'S CLEAR AND UNEQUIVOCAL FINDINGS ON THOSE TWO ENHANCEMENTS.
4 (PEOPLE V. GUERRA (2009) 176 CAL. APP. 4TH 933.) SECTION 1161 CLEARLY
5 STATES THAT THE "COURT CANNOT REQUIRE THE JURY TO RECONSIDER..."
6 A VERDICT OF ACQUITTAL.

7 II. PETITIONER WAS DENIED HIS FEDERAL CONSTITUTIONAL RIGHT
8 UNDER THE FOURTEENTH AMENDMENT WHEN THE TRIAL COURT DENIED
9 PETITIONER'S MOTION FOR NEW TRIAL BECAUSE JUROR #9
10 COMMITTED MISCONDUCT WHEN SHE CONCEALED HER BIAS DURING
11 VOIR DIRE, AND DEFENSE COUNSEL WAS INEFFECTIVE IN FAILING TO
12 MOVE TO DISCHARGE THAT JUROR.

13 JUROR #9, A YOUNG HISPANIC WOMAN WHO HAD FAMILY MEMBERS IN GANGS,
14 INTENTIONALLY CONCEALED HER BIAS DURING VOIR DIRE EXAMINATION. HER BIAS AGAINST
15 PETITIONER BECAUSE OF HIS ALLEGED SUREÑO GANG AFFILIATION CAME OUT AT TRIAL
16 ON TWO SEPARATE DAYS.

17 ON MARCH 27, 2008, SHE SENT A NOTE TO THE COURT ABOUT EVIDENCE SHE
18 HAD SEEN DURING TRIAL ABOUT A YOUNG MAN NAMED ALEX SANCHEZ, WHO HAD COMMITTED
19 SUICIDE AFTER BREAKING UP WITH HIS GIRLFRIEND. (13RT 1471-1475.) AS IT
20 TURNS OUT, SHE LIVED IN THE SAME HOUSE AS ALEX SANCHEZ, AS SHE WAS "DATING"
21 SANCHEZ'S BROTHER. (13RT 1472.) SANCHEZ WAS APPARENTLY A NORTEÑO GANG MEMBER.
22 IN RESPONSE TO THE COURT'S QUESTION ABOUT WHETHER SANCHEZ'S GANG AFFILIATION
23 WAS GOING TO AFFECT HER ABILITY TO BE FAIR, SHE SAID "MAYBE A LITTLE BIT."
24 (SEE RPT DATED 03-27-08 ATTACHED AS EXHIBIT A.) SHE THEN CAUGHT HERSELF AND
25 QUICKLY BACKTRACKED FROM HER ADMISSION OF BIAS. (EX A-4-5.)

26 ON THE NEXT COURT DATE OF APRIL 1, 2008, DEFENSE COUNSEL REPRESENTED
27 TO THE COURT THAT PETITIONER'S BROTHER LUIS AGUILAR HEARD JUROR #9 LISTENING
28 TO NORTEÑO RAP MUSIC WHILE WAITING IN THE HALLWAY IN THE COURTHOUSE. THE RAP

1 MISC. CONTAINED) DEGRADATORY REFERENCES TO SURENO BY CALLING THEM "SUR RATTAS."
2 (14 RT 1479.) DEFENSE COUNSEL ALSO TOLD THE COURT THAT HE PERSONALLY SAW A
3 "BIG RED STAR" TATTOOED ON HER NECK. (SEE DECLARATION ATTACHED AS EXHIBIT B.)
4 IT WAS ESTABLISHED AT TRIAL THAT NORTEÑO GANG MEMBERS IDENTIFY WITH THE
5 COLOR RED AND STARS. DEFENSE COUNSEL EXPLAINED TO THE COURT THAT HER RELATIONSHIP
6 WITH NORTEÑO GANG MEMBERS WOULD MAKE HER "BIASED AGAINST MY CLIENT BECAUSE
7 HE'S IN A RIVAL GANG." (14 RT 1480.)

8 THE JUROR'S CONCEALMENT OF HER POTENTIAL BIAS AGAINST PETITIONER ON
9 VOIR DIRE DEPRIVED PETITIONER OF HIS STATE AND FEDERAL CONSTITUTIONAL RIGHT TO A
10 JURY TRIAL BY AN IMPARTIAL JURY. (U.S. CONST., 6TH AND 14TH AMENDS.; CAL. CONST.,
11 ART. I, § 16; PEOPLE V. WHEELER (1978) 22 CAL. 3D 258, 265; WEATHERS V.
12 KAESER FOUNDATION HOSPITALS (1971) 5 CAL. 3D 98, 110.) AS WELL AS HIS FEDERAL
13 CONSTITUTIONAL RIGHT TO DUE PROCESS AND A FAIR TRIAL. (McDONOUGH POWER EQUIPMENT,
14 INC. V. GREENWOOD (1984) 464 U.S. 548, 554. (PLUR. OPN. OF REHNQUIST.))

15 THE IMPARTIALITY OF PROSPECTIVE JURORS IS EXPLORED AT THE PRELIMINARY
16 PROCEEDING KNOWN AS VOIR DIRE. VOIR DIRE PLAYS A CRITICAL FUNCTION IN ASSURING
17 THE CRIMINAL DEFENDANT THAT HIS SIXTH AMENDMENT RIGHT TO AN IMPARTIAL JURY
18 WILL BE HONORED. LACK OF ADEQUATE VOIR DIRE IMPAIRS THE DEFENDANT'S RIGHT
19 TO EXERCISE PEREMPTORY CHALLENGES WHERE PROVIDED BY STATUTE OR RULE. (ROSALES-
20 LOPEZ V. UNITED STATES (1981) 451 U.S. 187, 188.)

21 JUROR #9 WAS NOT COMPLETELY AND OPENLY HONEST DURING VOIR DIRE.
22 A JUROR WHO CONCEALS RELEVANT FACTS OR GIVES FALSE ANSWERS DURING VOIR DIRE
23 EXAMINATION THIS UNDERMINES THE JURY SELECTION PROCESS AND COMMITTS MISCONDUCT.
24 (PEOPLE V. CASTALDIA (1959) 51 CAL. 2D 569, 572; PEOPLE V. GALLOWAY (1927) 202
25 CAL. 92-93; PEOPLE V. BLACKWELL (1987) 191 CAL. APP. 3D 925, 929; PEOPLE V.
26 DIAZ (1984) 152 CAL. APP. 3D 926, 932; IN RE HITCHINGS (1993) 6 CAL. 4TH 97,
27 199-200.)

28 DEFENSE COUNSEL WAS INEFFECTIVE BECAUSE HE FAILED TO IMMEDIATELY

1 MOVE TO DISCHARGE JUROR #9 PURSUANT TO PENAL CODE SECTION 1089 WHEN HER
2 BIAS BECAME READILY APPARENT DURING TRIAL.

3 AN ACCUSED IN A CRIMINAL PROSECUTION HAS THE RIGHT TO THE
4 EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL UNDER THE SIXTH AMENDMENT OF THE UNITED
5 STATES CONSTITUTION AND ARTICLE I, SECTION 15 OF THE CALIFORNIA CONSTITUTION.
6 (PEOPLE V. LEDESMA (1987) 43 CAL. 3D 171, 215.)

7 DEFENSE COUNSEL HERE WAS INEFFECTIVE FOR SEVERAL REASONS. FIRST, WHEN
8 JUROR #9'S BIAS BECAME APPARENT DURING THE TRIAL ON MARCH 27, AND APRIL 1, 2008,
9 DEFENSE COUNSEL SHOULD HAVE IMMEDIATELY MOVED TO DISCHARGE THAT BIASED JUROR
10 PURSUANT TO PENAL CODE SECTION 1089. DEFENSE COUNSEL HIMSELF BROUGHT TO THE COURT'S
11 ATTENTION THAT SHE HAD A RED STAR TATTOO AND WAS APPARENTLY LISTENING TO
12 NORTEÑO RAP MUSIC IN THE HALLWAY (EXHIBIT B) RATHER THAN JUST MAKING A
13 GENERAL COMPLAINT TO THE COURT. DEFENSE COUNSEL SHOULD HAVE MADE AN ORAL MOTION
14 TO DISCHARGE THAT JUROR, AND/OR A MOTION FOR MISTRIAL BECAUSE OF THE JUROR'S
15 BIAS.

16 THE SECOND REASON DEFENSE COUNSEL WAS INEFFECTIVE IS THAT HE DID
17 NOT BRING A PROPER MOTION FOR NEW TRIAL AFTER THE JURY'S VERDICT. DEFENSE
18 COUNSEL HIMSELF SUBMITTED A DECLARATION ABOUT SEEING HER RED STAR TATTOO,
19 BUT HE DID NOT OBTAIN A DECLARATION FROM PETITIONER'S BROTHER WHO HEARD
20 HER LISTENING TO NORTEÑO RAP MUSIC IN THE HALLWAY. (14 RT 1479-1482.) A
21 REASONABLY COMPETENT ATTORNEY WOULD HAVE OBTAINED DECLARATIONS FROM THE
22 WITNESSES TO HER MISCONDUCT IN THE HALLWAY.

23 TO ESTABLISH INEFFECTIVE ASSISTANCE OF COUNSEL, A DEFENDANT MUST
24 DEMONSTRATE THAT (1) COUNSEL'S REPRESENTATION WAS DEFICIENT IN FALLING BELOW
25 AN OBJECTIVE STANDARD OF REASONABLENESS UNDER PREVAILING PROFESSIONAL NORMS,
26 AND (2) COUNSEL'S DEFICIENT REPRESENTATION PREJUDICED PETITIONER, I.E. THERE
27 IS A REASONABLE PROBABILITY THAT, BUT FOR COUNSEL'S FALLING, THE RESULT WOULD
28 HAVE BEEN MORE FAVORABLE TO THE DEFENDANT. (STRICKLAND V. WASHINGTON (1984))

1 466 U.S. 668, 687; *IN RE JONES* (1996) 13 CAL. 4TH 552, 561.) A REASONABLE
2 PROBABILITY IS A PROBABILITY SUFFICIENT TO UNDERMINE CONFIDENCE IN THE
3 OUTCOME. (I.B.I.D.)

4 III. THE PEOPLE COMMITTED PREJUDICIAL PROSECUTORIAL MISCONDUCT
5 WHEN THE PEOPLE MADE REPREHENSIBLE STATEMENTS TOWARD
6 THE DEFENSE COUNSEL.

7 DURING THE PROSECUTION'S CLOSING ARGUMENTS, THE PROSECUTOR
8 MADE A PERSONAL ATTACK ON DEFENSE COUNSEL. THE PROSECUTOR'S STATEMENT THAT,
9 "[MR COLLINS] DOESN'T EVEN LIKE THE LAW... [H/E] DOESN'T LIKE THE WHOLE SYSTEM."
10 IS REPREHENSIBLE AND IS NOT CLOSE TO A FAIR COMMENT ON THE STATE OF THE
11 EVIDENCE. (SEE RPT 04-03-08 ATTACHED AS EXHIBIT C.) THIS STATEMENT ATTEMPTS
12 NOT ONLY TO SHIFT THE BURDEN FROM THE PEOPLE, BUT TO INFORM THE JURY THAT
13 DEFENSE COUNSEL IS A BAD ATTORNEY WHO CANNOT PROVIDE EFFECTIVE ASSISTANCE TO
14 PETITIONER. THE STATEMENT ALSO CREATES THE IMPERMISSIBLE INFERENCE THAT THE FACTS
15 MAY ONLY BE VIEWED CONSISTENTLY WITH THE THEORY OF THE PROSECUTION, BECAUSE
16 ANY ARGUMENT BY DEFENSE COUNSEL FOR PETITIONER IS BASED UPON FALSE LAW.
17 FURTHERMORE, THIS PERSONAL ATTACK FAR FROM COMMENTING ON ANY EVIDENCE AT ALL,
18 IS AN IMPERMISSIBLE STATEMENT OF THE LAW ITSELF. FOR, IF INDEED DEFENSE
19 COUNSEL MADE INCORRECT STATEMENTS OF THE LAW, THE PROSECUTOR'S REMEDY WOULD
20 HAVE BEEN TO OBJECT. BUT, INSTEAD OF ADHERING TO COURT RULES AND DECORUM,
21 THE PROSECUTOR MADE AN ADHOMINEM ATTACK ON DEFENSE COUNSEL, AND THERE BY
22 PETITIONER.

23 "A PROSECUTOR MAY MAKE FAIR COMMENT ON THE STATE OF THE EVIDENCE."
24 (*PEOPLE V. COOK* (2006) 39 CAL. 4TH 566, 608.) HOWEVER, "A PROSECUTOR WHO USES
25 DECEPTIVE OR REPREHENSIBLE METHODS COMMITS MISCONDUCT EVEN WHEN THOSE
26 ACTIONS DO NOT RESULT IN A FUNDAMENTALLY UNFAIR TRIAL. [CITATIONS]." (*PEOPLE V.*
27 *LOPEZ* (2008) 42 CAL. 4TH 960, 965-966.) NEVERTHELESS, TO BE PREJUDICIAL
28 REQUIRES THAT IT IS REASONABLY PROBABLE THAT A RESULT MORE FAVORABLE TO THE

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EXHIBIT . A

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF TULARE

DEPARTMENT 10

HON. LLOYD L. HICKS, JUDGE

THE PEOPLE OF THE STATE
OF CALIFORNIA,

Plaintiff,

vs.

ULISCES AGUILAR,

Defendant.

NO. VCF 127019 E

Visalia, California

March 27, 2008

REPORTER'S PARTIAL TRANSCRIPT

APPEARANCES:

For the Plaintiff: PHILLIP CLINE
DISTRICT ATTORNEY
BY: DANIEL UNDERWOOD, DEPUTY
County Civic Center, Rm 224
Visalia, CA 93291

For the Defendant: CHRIS COLLINS
ATTORNEY AT LAW
210 South "D" Street
Madera, CA 93638

TAMMY A. WARREN, C.S.R. No. 6047, RMR, CRR

March 27, 2008

PARTIAL TRANSCRIPT.

(Whereupon, the following proceedings were had outside the presence of the jury, to wit:)

THE COURT: Still on the record out of the presence of the jurors, everyone except juror number nine. And you passed us a note to the effect that you --

JUROR NO. 9: If it's the same Alex Sanchez from Tulare that shot himself, that's the Alex I'm talking about. I don't know if it's Alex from Pixley, but I only know one Alex Sanchez, and I know he passed away around that time. So that's why I thought I should let you know that. I lived with him at the time. I was dating his brother. He was like my little brother.

THE COURT: Anybody know?

MR. COLLINS: It's the same one.

THE COURT: It is the same one.

MR. COLLINS: My impression is that what I read the guy was upset at his girlfriend or something.

JUROR NO. 9: Right.

MR. COLLINS: Then he killed himself.

JUROR NO. 9: Right. Right.

THE COURT: This was just, I think I can say,

1 for the purpose of indicating will be tied together
2 later that poster that you saw.
3 JUROR NO. 9: The what?
4 THE COURT: The poster you saw that had that
5 in it.
6 JUROR NO. 9: Right, that said, "In Memory of
7 Alex".
8 THE COURT: It had to do with -- I think it's
9 going to be used later for part of the expert's
10 opinion.
11 MR. UNDERWOOD: That's what it's going
12 toward, gang enhancement, yes.
13 THE COURT: Right.
14 JUROR NO. 9: I just thought -- I felt I
15 should let you know because I didn't want to get in
16 trouble.
17 THE COURT: I appreciate it.
18 MR. COLLINS: Can I ask her?
19 THE COURT: Is that going to affect your
20 ability to sit fairly in this case in any way?
21 JUROR NO. 9: If it doesn't have nothing to
22 do with him, no.
23 THE COURT: It doesn't.
24 JUROR NO. 9: If it doesn't, then no.
25 THE COURT: Doesn't have a thing to do with

1 him.

2 MR. COLLINS: Can I ask her some questions?

3 THE COURT: Well, why don't you approach and
4 see what you want to ask.

5 (Off the record discussion.)

6 THE COURT: The fact that he was
7 Norteno-associated and defendant here may be
8 Sureno-associated, is that going to affect your ability
9 to be fair in this?

10 JUROR NO. 9: [Maybe a little bit.]

11 THE COURT: Well --

12 JUROR NO. 9: I'm not saying that -- I still
13 have to see everything, so I can't say --

14 THE COURT: That's what we're asking.

15 JUROR NO. 9: No.

16 THE COURT: You could see the evidence and
17 decide this based on the evidence?

18 JUROR NO. 9: Like, okay, put it this way.
19 Right now I can't say he's guilty or not guilty. (Just
20 because he's a Sureno,) that doesn't have nothing to do
21 with me. I don't claim. My family does, but that has
22 nothing to do with me.

23 THE COURT: What you disclosed before?

24 JUROR NO. 9: Right.

25 THE COURT: That's all we want to know.

1 You're t going to say --
2 JUROR NO. 9: Because he --
3 THE COURT: Because he's a Sureno, therefore,
4 I'm not going --
5 JUROR NO. 9: [I don't claim,] so I don't care
6 about that.
7 THE COURT: All right. Thank you very much.
8 And we'll see you back Monday.
9 THE BAILIFF: Tuesday.
10 THE COURT: Tuesday. Thank you. Have a good
11 weekend.
12 JUROR NO. 9: You too.
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TAMMY A. WARREN, C.S.R. No. 6047, RMR, CRR

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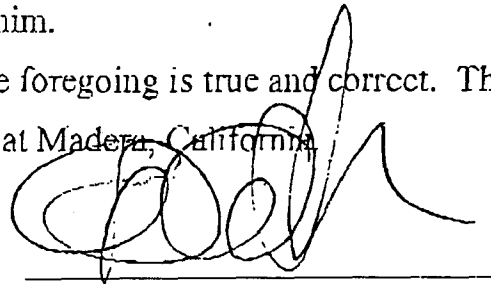
EXHIBIT B

DECLARATION OF CRAIG COLLINS

I, Craig Collins, am the attorney for ULISES AGUILAR in this matter and if called upon to testify, I could and would testify to the following:

1. During trial on this matter, juror number 9, Veronica Huerta played Norteno rap in front of fellow jurors and the defendant's family in the courthouse hallway.
2. Juror number 9 had a red star tattoo and wore stars throughout trial indicative of Norteno gang affiliation.
3. Juror number 9 stated she lived with a deceased Norteno gang member Alex Sanchez.
4. The defendant is Sureno affiliated and the victim was a Norteno gang member.
5. On or about October 16, 2008, my investigator located Abel Vasquez.
6. Abel Vasquez just paroled from prison last week. He has been located, and my investigator is attempting to contact him.

I declare under penalty of perjury that the foregoing is true and correct. This declaration was executed on October 27, 2008, at Madera, California.



1 KAMALA D. HARRIS, State Bar No. 146672
Attorney General of California
2 KATHLEEN A. MCKENNA, State Bar No. 202916
Supervising Deputy Attorney General
3 WILLIAM K. KIM, State Bar No. 207818
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4 2550 Mariposa Mall, Room 5090
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5 Telephone: (559) 477-1675
Fax: (559) 445-5106
6 E-mail: william.kim@doj.ca.gov
Attorneys for Respondent
7

8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE EASTERN DISTRICT OF CALIFORNIA
10
11

12 **ULICES AGUILAR,**

1:12-cv-01547-LJO-JLT

13
14 Petitioner,

15 v.

16 **MATTHEW CATE, Secretary, CDCR,**

17 Respondent.
18

19 5. Petition for Writ of Habeas Corpus, filed November 14, 2011, in the Fifth District
20 Court of Appeal, Case Number F063652.
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COURT OF APPEAL
FIFTH APPELLATE DISTRICT
FILED

NOV 14 2011

Name: ULICES AGUILARAddress: IRONWOOD STATE PRISONP.O. Box 2199BLYTE, CA 92226CDC or ID Number: G-48827**FILE**

By _____ Deputy

COURT OF APPEALS OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT
(Court)

PETITION FOR WRIT OF HABEAS CORPUS

F063652No. _____
(To be supplied by the Clerk of the Court)

<u>ULICES AGUILAR</u>	
Petitioner	vs.
Respondent	

INSTRUCTIONS—READ CAREFULLY

- If you are challenging an order of commitment or a criminal conviction and are filing this petition in the Superior Court, you should file it in the county that made the order.
- If you are challenging the conditions of your confinement and are filing this petition in the Superior Court, you should file it in the county in which you are confined.
- Read the entire form *before* answering any questions.
- This petition must be clearly handwritten in ink or typed. You should exercise care to make sure all answers are true and correct. Because the petition includes a verification, the making of a statement that you know is false may result in a conviction for perjury.
- Answer all applicable questions in the proper spaces. If you need additional space, add an extra page and indicate that your answer is "continued on additional page."
- If you are filing this petition in the superior court, you only need to file the original unless local rules require additional copies. Many courts require more copies.
- If you are filing this petition in the Court of Appeal and you are an attorney, file the original and 4 copies of the petition and, if separately bound, 1 set of any supporting documents (unless the court orders otherwise by local rule or in a specific case). If you are filing this petition in the Court of Appeal and you are *not* represented by an attorney, file the original and one set of any supporting documents.
- If you are filing this petition in the California Supreme Court, file the original and 10 copies of the petition and, if separately bound, an original and 2 copies of any supporting documents.
- Notify the Clerk of the Court in writing if you change your address after filing your petition.

Approved by the Judicial Council of California for use under rule 8.380 of the California Rules of Court (as amended effective January 1, 2007). Subsequent amendments to rule 8.380 may change the number of copies to be furnished to the Supreme Court and Court of Appeal.

Prior Appeal
F57268

This petition concerns:

- ☒ A conviction
 ☐ Parole
☐ A sentence
 ☐ Credits
☐ Jail or prison conditions
 ☐ Prison discipline
☐ Other (specify): _____

1. Your name: ULICES AGUILAR
 2. Where are you incarcerated? IRONWOOD STATE PRISON
 3. Why are you in custody? ☒ Criminal conviction ☐ Civil commitment

Answer items a through i to the best of your ability.

- a. State reason for civil commitment or, if criminal conviction, state nature of offense and enhancements (for example, "robbery with use of a deadly weapon").

SECOND DEGREE MURDER WITH GUN AND GANG ENHANCEMENTS

- b. Penal or other code sections: P.C. 187, P.C. 12022.53, P.C. 186.22
 c. Name and location of sentencing or committing court: SUPERIOR COURT OF THE STATE OF CALIFORNIA,
COUNTY OF TULARE.
 d. Case number: VCF 127019E
 e. Date convicted or committed: APRIL 7, 2008
 f. Date sentenced: JANUARY 16, 2009
 g. Length of sentence: 40 YEARS TO LIFE
 h. When do you expect to be released? APRIL 2044
 i. Were you represented by counsel in the trial court? ☒ Yes ☐ No If yes, state the attorney's name and address:

CRAIG COLLINS, 221 NORTH "I" STREET,
MADERA, CA 93637

4. What was the LAST plea you entered? (Check one):

☒ Not guilty
 ☐ Guilty
 ☐ Nolo contendere
 ☐ Other: _____

5. If you pleaded not guilty, what kind of trial did you have?

☒ Jury
 ☐ Judge without a jury
 ☐ Submitted on transcript
 ☐ Awaiting trial

6. GROUNDS FOR RELIEF

Ground 1: State briefly the ground on which you base your claim for relief. For example, "The trial court imposed an illegal enhancement." (If you have additional grounds for relief, use a separate page for each ground. State ground 2 on page 4. For additional grounds, make copies of page 4 and number the additional grounds in order.)

THE TRIAL COURT COMMITTED REVERSIBLE CONSTITUTIONAL ERROR UNDER THE FOURTEENTH AMENDMENT BY DENYING PETITIONER'S MOTION FOR NEW TRIAL BECAUSE JUROR #9 COMMITTED MISCONDUCT WHEN SHE CONCEALED HER BIAS DURING VOTA DIRE, AND DEFENSE COUNSEL WAS INEFFECTIVE IN FAILING TO MOVE TO DISCHARGE THAT JUROR.

a. Supporting facts:

Tell your story briefly without citing cases or law. If you are challenging the legality of your conviction, describe the facts on which your conviction is based. If necessary, attach additional pages. CAUTION: You must state facts, not conclusions. For example, if you are claiming incompetence of counsel, you must state facts specifically setting forth what your attorney did or failed to do and how that affected your trial. Failure to allege sufficient facts will result in the denial of your petition. (See *In re Swain* (1949) 34 Cal.2d 300, 304.) A rule of thumb to follow is, who did exactly what to violate your rights at what time (when) or place (where). (If available, attach declarations, relevant records, transcripts, or other documents supporting your claim.)

DURING JURY SELECTION, PROSPECTIVE JURORS WERE QUESTIONED ABOUT THEIR FEELING ON GANGS. JUROR #9 STATED "I HAVE A FAMILY MEMBER THAT'S INVOLVED IN IT, BUT I DON'T - I STAY AWAY, IT DOESN'T BOTHER MY MIND AT ALL. I'M NOT INVOLVED, AND I DON'T CARE TO BE." (ART 140.)

DURING TRIAL, HER BIAS AGAINST PETITIONER CAME OUT ON TWO SEPARATE DAYS ON MARCH 27, 2008, SHE SENT A NOTE TO THE COURT ABOUT EVIDENCE SHE HAD SEEN DURING TRIAL. WHEN SHE WAS QUESTIONED BY THE COURT IT CAME OUT THAT SHE KNEW AND LIVED WITH SOME GUY NAMED ALEX SANCHEZ AS SHE WAS DATING HIS BROTHER. (13RT 1471-1475.) SANCHEZ WAS APPARENTLY A NORTEÑO GANG MEMBER. THE COURT ASKED HER IF THE FACT THAT SANCHEZ WAS A NORTEÑO GANG MEMBER AND PETITIONER WAS AFFILIATED WITH THE RIVAL GANG, IF THAT WAS GOING TO AFFECT HER ABILITY TO BE FAIR IN THIS CASE, SHE REVEALED HER BIAS, BUT QUICKLY BACKTRACKED FROM HER ADMISSTION OF BIAS. (SEE EX. A.)

ON THE NEXT COURT DATE OF APRIL 1, 2008, DEFENSE COUNSEL BROUGHT TO THE COURT'S ATTENTION THAT PETITIONER'S BROTHER HEARD HER LISTENING TO NORTEÑO RAP MUSIC WHICH CONTAINED DEROGATORY REFERENCES TO SUREÑOS. (14RT 1479.) DEFENSE COUNSEL ALSO TOLD THE COURT THAT HE PERSONALLY SAW A "BIG RED STAR".
(CONTINUE ON ATTACHED PAGE.)

b. Supporting cases, rules, or other authority (optional):

(Briefly discuss, or list by name and citation, the cases or other authorities that you think are relevant to your claim. If necessary, attach an extra page.)

MEMORANDUM OF POINTS AND AUTHORITIES

I PETITIONER WAS DENIED HIS FEDERAL CONSTITUTIONAL RIGHT UNDER THE FOURTEENTH AMENDMENT WHEN THE TRIAL COURT DENIED PETITIONER'S MOTION TO DISMISS THE GUN USE AND CRIMINAL STREET GANG ENHANCEMENTS.

AT THE FIRST JURY TRIAL, PETITIONER WAS FOUND NOT GUILTY OF FIRST DEGREE MURDER, AND THE FELONY MURDER SPECIAL CIRCUMSTANCE, GUN USE ENHANCEMENT, AND CRIMINAL STREET GANG ENHANCEMENT WERE FOUND "NOT TRUE" BY THE JURY. (3CT 640.) THE JURY DID NOT RETURN A VERDICT ON SECOND DEGREE MURDER AT THE FIRST TRIAL. (3CT 637-640.)

AFTER THE FIRST JURY TRIAL, ON JANUARY 18, 2008, THE COURT HELD A HEARING ON PETITIONER'S MOTION TO DISMISS THE GUN USE, AND CRIMINAL STREET GANG ENHANCEMENTS THAT WERE FOUND NOT TRUE BY THE FIRST JURY. THE TRIAL COURT DENIED PETITIONER'S MOTION TO DISMISS THOSE ENHANCEMENTS. (ART 1-14) AFTER THE SECOND JURY TRIAL, PETITIONER WAS CONVICTED OF SECOND DEGREE MURDER AND THE ENHANCEMENTS WERE FOUND TO BE TRUE. (3CT 737.)

THE TRIAL COURT COMMITTED FEDERAL CONSTITUTIONAL ERROR BY DENYING PETITIONER'S MOTION TO DISMISS THOSE ENHANCEMENTS WHEN THE DOCTRINES OF COLLATERAL AND DIRECT ESTOPPEL, ALONG WITH THE DOUBLE JEOPARDY CLAUSES OF THE STATE AND FEDERAL CONSTITUTIONS PRECLUDED THE RETRIAL OF THOSE ENHANCEMENTS AFTER THEY WERE FOUND TO BE NOT TRUE BY THE FIRST JURY.

PETITIONER WAS TRIED UNDER THE IDENTICAL THEORIES AT THE FIRST AND SECOND JURY TRIALS. THE PROSECUTOR PROCEEDED ON THE THEORY AT BOTH TRIALS THAT HE AIDED AND ABETTED CO-DEFENDANT CISNEROS IN THE MURDER OF THE DECEDENT. (7RT 873-875, 16RT 1817-1818 [PROSECUTOR'S THEORIES DURING BOTH CLOSING ARGUMENTS WERE BASICALLY IDENTICAL].)

COLLATERAL ESTOPPEL IS A WELL-ESTABLISHED LEGAL DOCTRINE THAT WAS BINDING ON THE TRIAL COURT UNDER CALIFORNIA LAW, AND THE

1 DOCTRINE OF DIRECT ESTOPPEL WAS AVAILABLE TO THE TRIAL COURT UNDER
2 FEDERAL LAW. (PEOPLE V. DAVIS (1995) 10 CAL. 4TH 463, 515; UNITED STATES
3 V. BATLIN (7TH CIR 1992) 977 F.2d 270, 276-278.) THE COLLATERAL ESTOPPEL
4 DOCTRINE SERVES TO PROMOTE JUDICIAL ECONOMY BY MINIMIZING REPETITIVE
5 LITIGATION; BY PREVENTING INCONSISTENT JUDGMENTS THAT UNDERMINE
6 THE INTEGRITY OF THE JUDICIAL SYSTEM; AND BY PREVENTING A PERSON
7 FROM BEING HARASSED BY VEXACIOUS LITIGATION. (PEOPLE V. VOGEL
8 (2007) 148 CAL. APP. 4TH 131, 136.)

9 FEDERAL CIRCUIT COURTS HAVE APPLIED THE DOCTRINE OF "DIRECT
10 ESTOPPEL" IN SIMILAR SITUATIONS TO PRECLUDE THE RELITIGATION OF A
11 FACT OR ISSUE THAT WAS ALREADY DECIDED IN THE SAME LEGAL PROCEEDING.
12 (UNITED STATES V. BATLIN, SUPRA, 977 F.2d 270, 276-280.)

13 THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT PRECLUDES
14 THE GOVERNMENT FROM RELITIGATING ANY ISSUE THAT WAS NECESSARILY DECIDED
15 BY THE JURY'S ACQUITTAL IN A PRIOR TRIAL. (YEAGER V. UNITED STATES (2009)
16 U.S. ___, 129 CT. 2360, 2365-2367; PEOPLE V. GORDON (2009) 177 CAL.
17 APP. 4TH 1550.)

18 THE TRIAL COURT'S REASONS FOR DENYING PETITIONER'S MOTION
19 TO DISMISS THE ENHANCEMENTS WERE UNPERSUASIVE AND CONTRARY TO
20 RELEVANT STATE AND FEDERAL LAW. THE COURT ACTUALLY SAID THAT THERE WAS
21 "NO WAY" TO SPECULATE ABOUT WHAT THE JURY WAS THINKING. (ART 11:21-23.)
22 THE COURT'S RULING WAS CONTRARY TO THE CLEAR AND UNEQUIVOCAL FINDINGS OF
23 THE FIRST JURY IN ITS VERDICT DATED JULY 16, 2007, WHERE IT FOUND
24 PETITIONER NOT GUILTY OF FIRST DEGREE MURDER AND THE ENHANCEMENTS
25 NOT TO BE TRUE. (3CT640.) THE TRIAL COURT DIRECTLY INTERFERED UPON THE
26 PROVINCE OF THE JURY BY SPECULATING ABOUT WHAT THE JURY WAS
27 THINKING ABOUT WHEN IT FILLED IN THE JURY VERDICTS. (SEE PENAL
28 CODE § 1161.)

1 THE COURT ALSO COMMITTED REVERSIBLE ERROR BY INVADING THE
2 JURY'S PROVINCE BY ALLOWING A SECOND JURY TO RECONSIDER THE FIRST
3 JURY'S CLEAR AND UNEQUIVOCAL FINDINGS ON THOSE TWO ENHANCEMENTS.
4 (PEOPLE V. GUERRA (2009) 176 CAL. APP. 4TH 933.) SECTION 1161 CLEARLY
5 STATES THAT THE "COURT CANNOT REQUIRE THE JURY TO RECONSIDER..."
6 A VERDICT OF ACQUITTAL.

7 II. PETITIONER WAS DENIED HIS FEDERAL CONSTITUTIONAL RIGHT
8 UNDER THE FOURTEENTH AMENDMENT WHEN THE TRIAL COURT DENIED
9 PETITIONER'S MOTION FOR NEW TRIAL BECAUSE JUROR #9
10 COMMITTED MISCONDUCT WHEN SHE CONCEALED HER BIAS DURING
11 VOIR DIRE, AND DEFENSE COUNSEL WAS INEFFECTIVE IN FAILING TO
12 MOVE TO DISCHARGE THAT JUROR.

13 JUROR #9, A YOUNG HISPANIC WOMAN WHO HAD FAMILY MEMBERS IN GANGS,
14 INTENTIONALLY CONCEALED HER BIAS DURING VOIR DIRE EXAMINATION. HER BIAS AGAINST
15 PETITIONER BECAUSE OF HIS ALLEGED SUREÑO GANG AFFILIATION CAME OUT AT TRIAL
16 ON TWO SEPARATE DAYS.

17 ON MARCH 27, 2008, SHE SENT A NOTE TO THE COURT ABOUT EVIDENCE SHE
18 HAD SEEN DURING TRIAL ABOUT A YOUNG MAN NAMED ALEX SANCHEZ, WHO HAD COMMITTED
19 SUICIDE AFTER BREAKING UP WITH HIS GIRLFRIEND. (13 RT 1471-1475) AS IT
20 TURNS OUT, SHE LIVED IN THE SAME HOUSE AS ALEX SANCHEZ, AS SHE WAS "DATING"
21 SANCHEZ'S BROTHER. (13 RT 1472) SANCHEZ WAS APPARENTLY A NORTEÑO GANG MEMBER.
22 IN RESPONSE TO THE COURT'S QUESTION ABOUT WHETHER SANCHEZ'S GANG AFFILIATION
23 WAS GOING TO AFFECT HER ABILITY TO BE FAIR, SHE SAID "MAYBE A LITTLE BIT."
24 (SEE RPT DATED 03-27-08 ATTACHED AS EXHIBIT A.) SHE THEN CAUGHT HERSELF AND
25 QUICKLY BACKTRACKED FROM HER ADMISSION OF BIAS. (EX A-4-5.)

26 ON THE NEXT COURT DATE OF APRIL 1, 2008, DEFENSE COUNSEL REPRESENTED
27 TO THE COURT THAT PETITIONER'S BROTHER LUIS AGUILAR HEARD JUROR #9 LISTENING
28 TO NORTEÑO RAP MUSIC WHILE WAITING IN THE HALLWAY IN THE COURTHOUSE. THE RAP

1 MISLEADING DEORATORY REFERENCES TO SURETIES BY CALLING THEM "SUR RATTAS."
2 (14RT 1479.) DEFENSE COUNSEL ALSO TOLD THE COURT THAT HE PERSONALLY SAW A
3 "BIG RED STAR" TATTOOED ON HER NECK. (SEE DECLARATION ATTACHED AS EXHIBIT B.)
4 IT WAS ESTABLISHED AT TRIAL THAT NORTEÑO GANG MEMBERS IDENTIFY WITH THE
5 COLOR RED AND STARS. DEFENSE COUNSEL EXPLAINED TO THE COURT THAT HER RELATIONSHIP
6 WITH NORTEÑO GANG MEMBERS WOULD MAKE HER "BIASED AGAINST MY CLIENT BECAUSE
7 HE'S IN A REVAL GANG." (14RT 1480.)

8 THE JUROR'S CONCEALMENT OF HER POTENTIAL BIAS AGAINST PETITIONER ON
9 VOIR DIRE DEPRIVED PETITIONER OF HIS STATE AND FEDERAL CONSTITUTIONAL RIGHT TO A
10 JURY TRIAL BY AN IMPARTIAL JURY. (U.S. CONST., 6TH AND 14TH AMENDS.; CAL. CONST.,
11 ART. I, § 16; PEOPLE V. WHEELER (1978) 22 CAL. 3d 258, 265; WEATHERS V.
12 KAISER FOUNDATION HOSPITALS (1971) 5 CAL. 3d 98, 110.) AS WELL AS HIS FEDERAL
13 CONSTITUTIONAL RIGHT TO DUE PROCESS AND A FAIR TRIAL. (MCDONOUGH POWER EQUIPMENT,
14 INC. V. GREENWOOD (1984) 464 U.S. 548, 554. (PLUR. OPN. OF REHNQUIST.))

15 THE IMPARTIALITY OF PROSPECTIVE JURORS IS EXPLORED AT THE PRELIMINARY
16 PROCEEDING KNOWN AS VOIR DIRE. VOIR DIRE PLAYS A CRITICAL FUNCTION IN ASSURING
17 THE CRIMINAL DEFENDANT THAT HIS SIXTH AMENDMENT RIGHT TO AN IMPARTIAL JURY
18 WILL BE HONORED. LACK OF ADEQUATE VOIR DIRE IMPAIRS THE DEFENDANT'S RIGHT
19 TO EXERCISE PEREMPTORY CHALLENGES WHERE PROVIDED BY STATUTE OR RULE. (ROSALES-
20 LOPEZ V. UNITED STATES (1981) 451 U.S. 187, 188.)

21 JUROR #9 WAS NOT COMPLETELY AND OPENLY HONEST DURING VOIR DIRE.
22 A JUROR WHO CONCEALS RELEVANT FACTS OR GIVES FALSE ANSWERS DURING VOIR DIRE
23 EXAMINATION THIS UNDERMINES THE JURY SELECTION PROCESS AND COMMITTS MISCONDUCT.
24 (PEOPLE V. CASTALDIA (1959) 51 CAL. 2d 569, 572; PEOPLE V. GALLOWAY (1927) 202
25 CAL. 92-93; PEOPLE V. BLACKWELL (1987) 191 CAL. APP. 3d 925, 929; PEOPLE V.
26 DIAZ (1984) 152 CAL. APP. 3d 926, 932; IN RE HITCHINGS (1993) 6 CAL. 4th 97,
27 199-200.)

28 DEFENSE COUNSEL WAS INEFFECTIVE BECAUSE HE FAILED TO IMMEDIATELY

1 MOVE TO DISCHARGE JUROR #9 PURSUANT TO PENAL CODE SECTION 1089 WHEN HER
2 BIAS BECAME READILY APPARENT DURING TRIAL.

3 AN ACCUSED IN A CRIMINAL PROSECUTION HAS THE RIGHT TO THE
4 EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL UNDER THE SIXTH AMENDMENT OF THE UNITED
5 STATES CONSTITUTION AND ARTICLE I, SECTION 15 OF THE CALIFORNIA CONSTITUTION.
6 (PEOPLE V. LEDESMA (1987) 43 CAL. 3D 171, 215.)

7 DEFENSE COUNSEL HERE WAS INEFFECTIVE FOR SEVERAL REASONS. FIRST, WHEN
8 JUROR #9'S BIAS BECAME APPARENT DURING THE TRIAL ON MARCH 27, AND APRIL 1, 2008,
9 DEFENSE COUNSEL SHOULD HAVE IMMEDIATELY MOVED TO DISCHARGE THAT BIASED JUROR
10 PURSUANT TO PENAL CODE SECTION 1089. DEFENSE COUNSEL HIMSELF BROUGHT TO THE COURT'S
11 ATTENTION THAT SHE HAD A RED STAR TATTOO AND WAS APPARENTLY LISTENING TO
12 NORTEÑO RAP MUSIC IN THE HALLWAY. (EXHIBIT B) RATHER THAN JUST MAKING A
13 GENERAL COMPLAINT TO THE COURT, DEFENSE COUNSEL SHOULD HAVE MADE AN ORAL MOTION
14 TO DISCHARGE THAT JUROR, AND/OR A MOTION FOR MISTRIAL BECAUSE OF THE JUROR'S
15 BIAS.

16 THE SECOND REASON DEFENSE COUNSEL WAS INEFFECTIVE IS THAT HE DID
17 NOT BRING A PROPER MOTION FOR NEW TRIAL AFTER THE JURY'S VERDICT. DEFENSE
18 COUNSEL HIMSELF SUBMITTED A DECLARATION ABOUT SEEING HER RED STAR TATTOO,
19 BUT HE DID NOT OBTAIN A DECLARATION FROM PETITIONER'S BROTHER WHO HEARD
20 HER LISTENING TO NORTEÑO RAP MUSIC IN THE HALLWAY. (14 RT 1479-1482.) A
21 REASONABLY COMPETENT ATTORNEY WOULD HAVE OBTAINED DECLARATIONS FROM THE
22 WITNESSES TO HER MISCONDUCT IN THE HALLWAY.

23 TO ESTABLISH INEFFECTIVE ASSISTANCE OF COUNSEL, A DEFENDANT MUST
24 DEMONSTRATE THAT (1) COUNSEL'S REPRESENTATION WAS DEFICIENT IN FALLING BELOW
25 AN OBJECTIVE STANDARD OF REASONABLENESS UNDER PREVAILING PROFESSIONAL NORMS,
26 AND (2) COUNSEL'S DEFICIENT REPRESENTATION PREJUDICED PETITIONER, I.E. THERE
27 IS A REASONABLE PROBABILITY THAT, BUT FOR COUNSEL'S FAILING, THE RESULT WOULD
28 HAVE BEEN MORE FAVORABLE TO THE DEFENDANT. (STRICKLAND V. WASHINGTON (1984))

1 466 U.S. 668, 687; *TN RE JONES* (1996) 13 CAL. 4TH 552, 561.) A REASONABLE
2 PROBABILITY IS A PROBABILITY SUFFICIENT TO UNDERMINE CONFIDENCE IN THE
3 OUTCOME. (T.BIN.)

4 III. THE PEOPLE COMMITTED PREJUDICIAL PROSECUTORIAL MISCONDUCT
5 WHEN THE PEOPLE MADE REPREHENSIBLE STATEMENTS TOWARD
6 THE DEFENSE COUNSEL.

7 DURING THE PROSECUTION'S CLOSING ARGUMENTS, THE PROSECUTOR
8 MADE A PERSONAL ATTACK ON DEFENSE COUNSEL. THE PROSECUTOR'S STATEMENT THAT,
9 "[MR COLLINS] DOESN'T EVEN LIKE THE LAW... [H]E DOESN'T LIKE THE WHOLE SYSTEM."
10 IS REPREHENSIBLE AND IS NOT CLOSE TO A FAIR COMMENT ON THE STATE OF THE
11 EVIDENCE. (SEE RPT 04-03-08 ATTACHED AS EXHIBIT C.) THIS STATEMENT ATTEMPTS
12 NOT ONLY TO SHIFT THE BURDEN FROM THE PEOPLE, BUT TO INFORM THE JURY THAT
13 DEFENSE COUNSEL IS A BAD ATTORNEY WHO CANNOT PROVIDE EFFECTIVE ASSISTANCE TO
14 PETITIONER. THE STATEMENT ALSO CREATES THE IMPERMISSIBLE INFERENCE THAT THE FACTS
15 MAY ONLY BE VIEWED CONSISTENTLY WITH THE THEORY OF THE PROSECUTION, BECAUSE
16 ANY ARGUMENT BY DEFENSE COUNSEL FOR PETITIONER IS BASED UPON FALSE LAW.
17 FURTHERMORE, THIS PERSONAL ATTACK FAR FROM COMMENTING ON ANY EVIDENCE AT ALL,
18 IS AN IMPERMISSIBLE STATEMENT OF THE LAW ITSELF. FOR, IF INDEED DEFENSE
19 COUNSEL MADE INCORRECT STATEMENTS OF THE LAW, THE PROSECUTOR'S REMEDY (WOULD)
20 HAVE BEEN TO OBJECT. BUT, INSTEAD OF ADHERING TO COURT RULES AND DECORUM,
21 THE PROSECUTOR MADE AN AD HOC ATTACK ON DEFENSE COUNSEL, AND THERE BY
22 PETITIONER.

23 "A PROSECUTOR MAY MAKE FAIR COMMENT ON THE STATE OF THE EVIDENCE."
24 (*PEOPLE V. COOK* (2006) 39 CAL. 4TH 566, 608.) HOWEVER, "A PROSECUTOR WHO USES
25 DECEPTIVE OR REPREHENSIBLE METHODS COMMITS MISCONDUCT EVEN WHEN THOSE
26 ACTIONS DO NOT RESULT IN A FUNDAMENTALLY UNFAIR TRIAL. [CITATIONS]" (*PEOPLE V.*
27 *LOPEZ* (2008) 42 CAL. 4TH 960, 965-966.) NEVERTHELESS, TO BE PREJUDICIAL
28 REQUIRES THAT IT IS REASONABLY PROBABLE THAT A RESULT MORE FAVORABLE TO THE

1 TATTOO ON HER NECK. (SEE EX B.) DEFENSE COUNSEL EXPLAINED TO THE COURT THAT HER RELATIONSHIP
2 WITH NORTEÑO GANG MEMBERS WOULD MAKE HER "BIAS AGAINST MY CLIENT BECAUSE HE'S
3 IN A RIVAL GANG." (14 RT 1480.)

4 AT A HEARING ON PETITIONER'S MOTION FOR NEW TRIAL, THE COURT DENIED
5 PETITIONER'S MOTION ON ALL LEGAL GROUNDS. (20 RT 1926.) AT THE BEGINNING OF THE
6 SENTENCING HEARING ON JANUARY 16, 2009, THE COURT RESTATED IT'S REASONS FOR DENYING
7 THE MOTION IN MORE DETAIL. THE COURT STATED IN REGARD TO JUROR #9 "THERE WAS NO MISCONDUCT
8 BECAUSE SHE ALLEGEDLY REVEALED HER 'FAMILY GANG CONNECTIONS.' DURING TRIAL. (21 RT 2000.)

9 WHILE SHE REVEALED HER FAMILY GANG CONNECTIONS DURING JURY SELECTION SHE CLEARLY
10 STATED THAT "I STAY AWAY... I'M NOT INVOLVED." (ART 140.) SHE WAS NOT COMPLETELY AND
11 OPENLY HONEST, DURING TRIAL IT BECAME APPARENT THAT SHE DID NOT REVEAL HER NORTEÑO
12 GANG TIES. SHE EVEN HAD A "BIG RED" STAR TATTOO ON HER NECK. (SEE EX B.) THAT IS
13 AN INDICATION OF NORTEÑO GANG AFFILIATION. WHEN QUESTIONED ABOUT HER POTENTIAL
14 BIAS BECAUSE OF SANCHEZ'S GANG AFFILIATION AND PETITIONER'S ALLEGED GANG
15 AFFILIATION WITH THE RIVAL GANG, SHE STATED "MAYBE A LITTLE BIT." (SEE EX A.)

16 DEFENSE COUNSEL WAS INEFFECTIVE BECAUSE WHEN JUROR #9'S BIAS BECAME APPARENT
17 DURING TRIAL ON TWO SEPARATE DAYS, HE SHOULD HAVE TO DISCHARGE THAT BIAS JUROR
18 PURSUANT TO PENAL CODE 1089. DEFENSE COUNSEL ALSO DID NOT BRING A PROPER MOTION FOR NEW
19 TRIAL AFTER THE JURY'S VERDICT. HE SHOULD HAVE OBTAINED A DECLARATION OF ANY WITNESS
20 TO JUROR #9'S MISCONDUCT IN THE COURTHOUSE HALLWAY. HE SHOULD HAVE ALSO OBJECTED
21 ON FEDERAL CONSTITUTIONAL GROUNDS. A REASONABLE COMPETENT ATTORNEY WOULD HAVE OBJECTED
22 ON FEDERAL CONSTITUTIONAL GROUNDS SINCE DEFENSE ATTORNEY'S NOW KNOW THAT SINCE THE
23 PASSAGE OF PROPOSITION 115 AND THE ANTI-TERRORISM AND EFFECTIVE DEATH PENALTY
24 ACT (AEDPA), THEY MUST OBJECT ON FEDERAL CONSTITUTIONAL GROUNDS TO
25 PRESERVE ANY ISSUES FOR FEDERAL HABEAS REVIEW.

ALIFORNIA

JUDGE

JU47, RMR, CRR

EXHIBIT . A

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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF TULARE
DEPARTMENT 10 HON. LLOYD L. HICKS, JUDGE

THE PEOPLE OF THE STATE
OF CALIFORNIA,

Plaintiff,

vs.

ULISCES AGUILAR,

Defendant.

NO. VCF 127019 E

Visalia, California

March 27, 2008

REPORTER'S PARTIAL TRANSCRIPT

APPEARANCES:

For the Plaintiff: PHILLIP CLINE
DISTRICT ATTORNEY
BY: DANIEL UNDERWOOD, DEPUTY
County Civic Center, Rm 224
Visalia, CA 93291

For the Defendant: CHRIS COLLINS
ATTORNEY AT LAW
210 South "D" Street
Madera, CA 93638

1 March 27, 2008

2 PARTIAL TRANSCRIPT.

3 (Whereupon, the following proceedings
4 were had outside the presence of the jury, to wit:)

5 THE COURT: Still on the record out of the
6 presence of the jurors, everyone except juror number
7 nine. And you passed us a note to the effect that
8 you --

9 JUROR NO. 9: If it's the same Alex Sanchez
10 from Tulare that shot himself, that's the Alex I'm
11 talking about. I don't know if it's Alex from Pixley,
12 but I only know one Alex Sanchez, and I know he passed
13 away around that time. So that's why I thought I
14 should let you know that. I lived with him at the
15 time. I was dating his brother. He was like my little
16 brother.

17 THE COURT: Anybody know?

18 MR. COLLINS: It's the same one.

19 THE COURT: It is the same one.

20 MR. COLLINS: My impression is that what I
21 read the guy was upset at his girlfriend or something.

22 JUROR NO. 9: Right.

23 MR. COLLINS: Then he killed himself.

24 JUROR NO. 9: Right. Right.

25 THE COURT: This was just, I think I can say,

TAMMY A. WARREN, C.S.R. No. 6047, RMR, CRR

1 for the purpose of indicating will be tied together
2 later that poster that you saw.

3 JUROR NO. 9: The what?

4 THE COURT: The poster you saw that had that
5 in it.

6 JUROR NO. 9: Right, that said, "In Memory of
7 Alex".

8 THE COURT: It had to do with -- I think it's
9 going to be used later for part of the expert's
10 opinion.

11 MR. UNDERWOOD: That's what it's going
12 toward, gang enhancement, yes.

13 THE COURT: Right.

14 JUROR NO. 9: I just thought -- I felt I
15 should let you know because I didn't want to get in
16 trouble.

17 THE COURT: I appreciate it.

18 MR. COLLINS: Can I ask her?

19 THE COURT: Is that going to affect your
20 ability to sit fairly in this case in any way?

21 JUROR NO. 9: If it doesn't have nothing to
22 do with him, no.

23 THE COURT: It doesn't.

24 JUROR NO. 9: If it doesn't, then no.

25 THE COURT: Doesn't have a thing to do with

1 him.

2 MR. COLLINS: Can I ask her some questions?

3 THE COURT: Well, why don't you approach and
4 see what you want to ask.

5 (Off the record discussion.)

6 THE COURT: The fact that he was
7 Norteno-associated and defendant here may be
8 Sureno-associated, is that going to affect your ability
9 to be fair in this?

10 JUROR NO. 9: [Maybe a little bit.]

11 THE COURT: Well --

12 JUROR NO. 9: I'm not saying that -- I still
13 have to see everything, so I can't say --

14 THE COURT: That's what we're asking.

15 JUROR NO. 9: No.

16 THE COURT: You could see the evidence and
17 decide this based on the evidence?

18 JUROR NO. 9: Like, okay, put it this way.
19 Right now I can't say he's guilty or not guilty. (Just
20 because he's a Sureno,] that doesn't have nothing to do
21 with me. I don't claim. My family does, but that has
22 nothing to do with me.

23 THE COURT: What you disclosed before?

24 JUROR NO. 9: Right.

25 THE COURT: That's all we want to know.

1 You're not going to say --
2 JUROR NO. 9: Because he --
3 THE COURT: Because he's a Sureno, therefore,
4 I'm not going --
5 JUROR NO. 9: [I don't claim,] so I don't care
6 about that.
7 THE COURT: All right. Thank you very much.
8 And we'll see you back Monday.
9 THE BAILIFF: Tuesday.
10 THE COURT: Tuesday. Thank you. Have a good
11 weekend.
12 JUROR NO. 9: You too.
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TAMMY A. WARREN, C.S.R. No. 6047, RMR, CRR

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7

8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE EASTERN DISTRICT OF CALIFORNIA
10
11

12 **ULICES AGUILAR,**

1:12-cv-01547-LJO-JLT

13
14 Petitioner,

15 v.

16 **MATTHEW CATE, Secretary, CDCR,**

17 Respondent.
18

19 7. Petition for Writ of Habeas Corpus, filed May 18, 2012, in the Supreme Court of the
20 State of California, Case Number S202649.
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Supreme Court Copy

Name: ULICES AGUILARAddress: IRONWOOD STATE PRISONP.O. Box 2199BLYTHE, CA 92226CDC or ID Number: G-48827

SUPREME COURT
FILED

MAY 18 2012

Frederick K. Ohlrich Clerk

Deputy

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA
(Court)

<u>ULICES AGUILAR</u>	
Petitioner	vs.
<u>ON HABEAS CORPUS</u>	
Respondent	

PETITION FOR WRIT OF HABEAS CORPUS

S202649

No.

(To be supplied by the Clerk of the Court)

INSTRUCTIONS—READ CAREFULLY

- If you are challenging an order of commitment or a criminal conviction and are filing this petition in the Superior Court, you should file it in the county that made the order.
- If you are challenging the conditions of your confinement and are filing this petition in the Superior Court, you should file it in the county in which you are confined.
- Read the entire form *before* answering any questions.
- This petition must be clearly handwritten in ink or typed. You should exercise care to make sure all answers are true and correct. Because the petition includes a verification, the making of a statement that you know is false may result in a conviction for perjury.
- Answer all applicable questions in the proper spaces. If you need additional space, add an extra page and indicate that your answer is "continued on additional page."
- If you are filing this petition in the superior court, you only need to file the original unless local rules require additional copies. Many courts require more copies.
- If you are filing this petition in the Court of Appeal and you are an attorney, file the original and 4 copies of the petition and, if separately bound, 1 set of any supporting documents (unless the court orders otherwise by local rule or in a specific case). If you are filing this petition in the Court of Appeal and you are *not* represented by an attorney, file the original and one set of any supporting documents.
- If you are filing this petition in the California Supreme Court, file the original and 10 copies of the petition and, if separately bound, an original and 2 copies of any supporting documents.
- Notify the Clerk of the Court in writing if you change your address after filing your petition.

Approved by the Judicial Council of California for use under rule 8.380 of the California Rules of Court (as amended effective January 1, 2007). Subsequent amendments to rule 8.380 may change the number of copies to be furnished to the Supreme Court and Court of Appeal.

This petition concerns:

- ☒ A conviction
 ☐ Parole
☐ A sentence
 ☐ Credits
☐ Jail or prison conditions
 ☐ Prison discipline
☐ Other (specify): _____

1. Your name: ULICES AGUILAR
2. Where are you incarcerated? IRONWOOD STATE PRISON
3. Why are you in custody? ☒ Criminal conviction ☐ Civil commitment

Answer items a through i to the best of your ability.

- a. State reason for civil commitment or, if criminal conviction, state nature of offense and enhancements (for example, "robbery with use of a deadly weapon").

SECOND DEGREE MURDER WITH GUN AND GANG ENHANCEMENTS

- b. Penal or other code sections: PC 187, P.C. 12022.53, P.C. 186.22
- c. Name and location of sentencing or committing court: SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF TULARE
- d. Case number: VCF 127019
- e. Date convicted or committed: APRIL 7, 2008
- f. Date sentenced: JANUARY 16, 2009
- g. Length of sentence: 40 YEARS TO LIFE
- h. When do you expect to be released? EPRD 2044
- i. Were you represented by counsel in the trial court? ☒ Yes ☐ No If yes, state the attorney's name and address:

CRAIG COLLINS

221 NORTH "I" STREET, MADERA CA, 93637

4. What was the LAST plea you entered? (Check one):

☒ Not guilty ☐ Guilty ☐ Nolo contendere ☐ Other: _____

5. If you pleaded not guilty, what kind of trial did you have?

☒ Jury ☐ Judge without a jury ☐ Submitted on transcript ☐ Awaiting trial

6. GROUNDS FOR RELIEF

Ground 1: State briefly the ground on which you base your claim for relief. For example, "The trial court imposed an illegal enhancement!" (If you have additional grounds for relief, use a separate page for each ground. State ground 2 on page 4. For additional grounds, make copies of page 4 and number the additional grounds in order.)

SEE ATTACHED PETITION AND EXHIBITS

a. Supporting facts:

Tell your story briefly without citing cases or law. If you are challenging the legality of your conviction, describe the facts on which your conviction is based. If necessary, attach additional pages. CAUTION: You must state facts, not conclusions. For example, if you are claiming incompetence of counsel, you must state facts specifically setting forth what your attorney did or failed to do and how that affected your trial. Failure to allege sufficient facts will result in the denial of your petition. (See *In re Swain* (1949) 34 Cal.2d 300, 304.) A rule of thumb to follow is, who did exactly what to violate your rights at what time (when) or place (where). (If available, attach declarations, relevant records, transcripts, or other documents supporting your claim.)

SEE ATTACHED EXHIBITS AND PETITION

b. Supporting cases, rules, or other authority (optional):

(Briefly discuss, or list by name and citation, the cases or other authorities that you think are relevant to your claim. If necessary, attach an extra page.)

SEE ATTACHED PETITION AND EXHIBITS

7 Ground 2 or Ground _____ (if applicable):

SEE ATTACHED PETITION AND EXHIBITS

a. Supporting facts:

SEE ATTACHED PETITION AND EXHIBITS

b. Supporting cases, rules, or other authority:

SEE ATTACHED PETITION AND EXHIBITS

8. Did you appeal from the conviction, sentence, or commitment? ☒ Yes ☐ No If yes, give the following information:

a. Name of court ("Court of Appeal" or "Appellate Division of Superior Court"):

COURT OF APPEALS OF THE STATE OF CALIFORNIA, FIFTH APPELLATE DISTRICT

b. Result: AFFIRMED c. Date of decision: JULY 8, 2010

d. Case number or citation of opinion, if known: F057268

e. Issues raised: (1) DOUBLE JEOPARDY - RETRYING THE GUN AND GANG ENHANCEMENTS.

(2) JURY MISCONDUCT - JUROR #9 CONCEALED HER BIAS DURING VOIR DIRE.

(3) EVIDENCE IS INSUFFICIENT TO SUPPORT THE GANG ENHANCEMENTS.

f. Were you represented by counsel on appeal? ☒ Yes ☐ No If yes, state the attorney's name and address, if known:

KIM MALCHESKI, P.O. BOX 40105, SAN FRANCISCO, CA 94140

9. Did you seek review in the California Supreme Court? ☒ Yes ☐ No If yes, give the following information:

a. Result: DENIED b. Date of decision: OCTOBER 27, 2010

c. Case number or citation of opinion, if known: S 185614

d. Issues raised: (1) DOUBLE JEOPARDY - RETRYING THE GUN AND GANG ENHANCEMENTS.

(2) JURY MISCONDUCT - JUROR #9 CONCEALED HER BIAS DURING VOIR DIRE

(3) EVIDENCE IS INSUFFICIENT TO SUPPORT THE GANG ENHANCEMENTS.

10. If your petition makes a claim regarding your conviction, sentence, or commitment that you or your attorney did not make on appeal, explain why the claim was not made on appeal:

11. Administrative review:

a. If your petition concerns conditions of confinement or other claims for which there are administrative remedies, failure to exhaust administrative remedies may result in the denial of your petition, even if it is otherwise meritorious. (See *In re Muszalski* (1975) 52 Cal.App.3d 500.) Explain what administrative review you sought or explain why you did not seek such review:

b. Did you seek the highest level of administrative review available? ☐ Yes ☐ No
Attach documents that show you have exhausted your administrative remedies.

12. Other than direct appeal, have you filed any other petitions, applications, or motions with respect to this conviction, commitment, or issue in any court? ☒ Yes. If yes, continue with number 13. ☐ No. If no, skip to number 15.

13. a. (1) Name of court: SUPERIOR COURT OF THE STATE OF CALIFORNIA, TULARE COUNTY
 (2) Nature of proceeding (for example, "habeas corpus petition"): HABEAS CORPUS PETITION
 (3) Issues raised: (a) SEE ATTACHED PETITION AND EXHIBITS
 (b) _____
 (4) Result (attach order or explain why unavailable): DENIED
 (5) Date of decision: OCTOBER 27, 2011
- b. (1) Name of court: COURT OF APPEALS, FIFTH APPELLATE DISTRICT
 (2) Nature of proceeding: HABEAS CORPUS PETITION
 (3) Issues raised: (a) SEE ATTACHED PETITION AND EXHIBITS
 (b) _____
 (4) Result (attach order or explain why unavailable): DENIED WITHOUT PREJUDICE
 (5) Date of decision: MARCH 19, 2012

c. For additional prior petitions, applications, or motions, provide the same information on a separate page.

14. If any of the courts listed in number 13 held a hearing, state name of court, date of hearing, nature of hearing, and result:

15. Explain any delay in the discovery of the claimed grounds for relief and in raising the claims in this petition. (See *In re Swain* (1949) 34 Cal.2d 300, 304.)

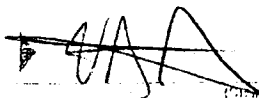
16. Are you presently represented by counsel? ☐ Yes ☒ No. If yes, state the attorney's name and address, if known.

17. Do you have any petition, appeal, or other matter pending in any court? ☐ Yes ☐ No. If yes, explain:

18. If this petition might lawfully have been made to a lower court, state the circumstances justifying an application to this court:

I, the undersigned, say: I am the petitioner in this action. I declare under penalty of perjury under the laws of the State of California that the foregoing allegations and statements are true and correct, except as to matters that are stated on my information and belief, and as to those matters I believe them to be true.

Date: MAY 15, 2012


 (SIGNATURE OF PETITIONER)

Copy

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

ULICES AGUILAR,
PETITIONER,

COURT OF APPEALS
FIFTH APPELLATE DISTRICT
NO. F063652

ON HABEAS CORPUS.

TULARE COUNTY
SUPERIOR COURT
NO. 254287

PETITION FOR HABEAS CORPUS

ULICES AGUILAR

G-48827 / AFB3-226-L

IRONWOOD STATE PRISON

P.O. Box 2199

BLYTHE, CA 92226

PETITIONER IN PRO SE

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17	CAL PENAL CODE 1089	14
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3 IN THE SUPREME COURT
4 OF THE STATE OF CALIFORNIA
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8 ULICES AGUILAR,
9 PETITIONER,

COURT OF APPEAL
FIFTH APPELLATE DISTRICT
NO. F063652

10
11 ON HABEAS CORPUS.

TULARE COUNTY
SUPERIOR COURT
NO. 259287

12 /
13
14
15 PETITION FOR HABEAS CORPUS
16
17

18 TO THE HONORABLE CHIEF JUSTICE OF CALIFORNIA AND
19 THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF CALIFORNIA:
20

21 COMES NOW ULICES AGUILAR, PETITIONER PROCEEDING
22 PRO SE, APPELLANT IN THE CALIFORNIA COURT OF APPEAL, FIFTH
23 APPELLANT DISTRICT, CASE NO. F063652, ORDER OF THE
24 COURT OF APPEAL DENIED HABEAS PETITION ON
25 PURSUANT TO CALIFORNIA RULES OF COURT, RULE 8.380 (a),
26 PETITIONER HERETIN PRESENTS A PETITION FOR WRIT OF
27 HABEAS CORPUS. BECAUSE RULE 8.380 DOES NOT SPECIFICALLY
28 STATE THAT IT IS NOT PERMITTED FOR A PRO SE PETITIONER

1 TO SEEK POST CONVICTION RELIEF REGARDING CLAIMS THAT
2 HAVE BEEN PREVIOUSLY RAISED IN THE LOWER COURTS, PETITIONER
3 HEREBY SEEKS HABEAS CORPUS RELIEF FOR THE ISSUES CONTAINED
4 HEREIN.

5
6 PURSUANT TO CALIFORNIA CONSTITUTION, ARTICLE VI,
7 §10, ANY HABEAS CORPUS PETITION MAYBE FILED IN ANY OF
8 THE STATE COURTS; HOWEVER, THE STATE SUPREME COURT HAS
9 ORIGINAL JURISDICTION IN ALL HABEAS CORPUS CASES. AS A
10 MATTER OF FEDERALISM AND COMITY, TO BE ELIGIBLE FOR
11 FEDERAL HABEAS CORPUS RELIEF, IT IS REQUIRED THAT
12 PETITIONER MUST EXHAUST STATE REMEDIES BY PRESENTING
13 ALL CLAIMS RAISED TO THE COURT OF LAST RESORT. SEE
14 28 USC § 2254 (b)-(c). THEREFORE, FOR THE PURPOSES OF
15 PROCEDURAL EXHAUSTION, PETITIONER HEREIN ALSO PRESENTS
16 FRESH CLAIMS AND SEEKS RELIEF.

17 18 19 PROCEDURAL HISTORY

20
21
22 ON OCTOBER 20, 2011, PETITIONER FILED A PETITION
23 FOR WRIT OF HABEAS CORPUS IN THE COUNTY OF TULARE, SUPERIOR
24 COURT, CASE NO. 259287. THE PETITION WAS DENIED ON
25 OCTOBER 27, 2011. (SEE EXHIBIT A.)

26
27 ON NOVEMBER 14, 2011, FOLLOWING THE DENIAL OF
28 THE SUPERIOR COURT, TULARE COUNTY, PETITIONER FILED A PETITION

1 FOR WRIT OF HABEAS CORPUS WITH THE CALIFORNIA COURT OF
2 APPEAL, FIFTH APPELLATE DISTRICT, CASE NO. F063652.
3 THE APPELLATE COURT REQUESTED AN INFORMAL RESPONSE
4 FROM TRIAL COUNSEL, CRAIG COLLINS. ON NOVEMBER
5 21, 2012, TRIAL COUNSEL FILED AN INFORMAL RESPONSE.
6 (SEE EXHIBIT B.) ON JANUARY 9, 2012 PETITIONER FILED
7 AN INFORMAL REPLY TO THE INFORMAL RESPONSE OF
8 FORMER TRIAL ATTORNEY (SEE EXHIBIT C.) ON MARCH 19, 2012,
9 THE PETITIONER WAS DENIED. (SEE EXHIBIT D.)

11 THE APPELLATE COURT ENTERED ITS JUDGMENT
12 ON MARCH 19, 2012, DENYING PETITION WITHOUT PREJUDICE.
13 HOWEVER, FOR SOME UNFORSEEN REASON, INADVERTENT OR
14 OTHERWISE, PRISON OFFICIALS DID NOT DELIVER THE
15 ORDER OF THE COURT IN A TIMELY MANNER. PETITIONER
16 RECEIVED SAID ORDER ON MAY 11, 2012, AS REFLECTED
17 ON REVERSE SIDE OF ORDER, SIGNATURE OF CORRECTIONAL
18 OFFICER WITH DATE OF DELIVERY. (SEE REVERSE SIDE
19 OF EXHIBIT D). PETITIONER MAY POTENTIALLY BE
20 GRAVELY PREJUDICED BY THE SPAN OF TIME IN
21 WHICH HE LOST IN RECEIVING THE ORDER OF THE
22 COURT. BECAUSE OF THE AFOREMENTIONED PETITIONER
23 HEREBY MOVES THIS COURT ADJUST THE TIME
24 AFFORDED IN WHICH HE MUST FILE HIS PETITION
25 FOR WRIT OF HABEAS CORPUS WITH THIS COURT. WITHOUT
26 THE COURT'S LEAVE, PETITIONER RUNS THE RISK OF
27 BEING PROCEDURALLY BARRED FOR FILING AN UNTIMELY
28 PETITION.

STATEMENT OF THE CASE

PETITIONER'S FIRST JURY TRIAL BEGAN ON JULY 2, 2007, AND ENDED IN A MISTRIAL WITH PARTIAL JURY VERDICTS ON JULY 16, 2007. THE JURY RETURNED VERDICTS FINDING PETITIONER NOT GUILTY OF FIRST DEGREE MURDER, AND THE JURY SPECIFICALLY FOUND THE GANG-RELATED SPECIAL CIRCUMSTANCE, THE PERSONAL GUN USE ENHANCEMENT, AND THE CRIMINAL STREET GANG ENHANCEMENTS WERE "NOT TRUE." (3 CT 640) ON JANUARY 18, 2008, PETITIONER'S MOTION TO DISMISS THOSE THREE SPECIAL CIRCUMSTANCES AND ALLEGATION WAS DENIED BY THE TRIAL COURT. (3 CT 654.)

PETITIONER'S SECOND JURY TRIAL BEGAN ON MARCH 24, 2008, AND ENDED WITH THE JURY'S VERDICT ON APRIL 7, 2008. IN CT 1, THE JURY FOUND PETITIONER GUILTY OF SECOND DEGREE MURDER, AND FOUND THE GUN USE AND CRIMINAL STREET GANG ALLEGATIONS TO BE TRUE. (3 CT 737.)

PETITIONER'S CASE HAVING BEEN SUBMITTED TO THE JURY, HE OVERHEARS AN INMATE IN THE CELL NEXT TO HIM TALKING ABOUT HIS GIRLFRIEND'S INVOLVEMENT IN A JURY TRIAL. PETITIONER DISCOVERS THAT THE GIRLFRIEND IS JUROR #3 IN HIS TRIAL. THE INMATE, ISAAC ABEL VASQUEZ, TESTIFIED HE LIVED WITH JUROR #3, AND DISCUSSED PETITIONER'S CASE DURING A PHONE CONVERSATION.

DURING TRIAL, JUROR #9'S BIAS AGAINST

PETITIONER CAME OUT ON TWO SEPARATE DAYS. ON MARCH 27, 2008, SHE SENT A NOTE TO THE COURT ABOUT EVIDENCE SHE HAD SEEN DURING TRIAL ABOUT A YOUNG MAN NAMED ALEX SANCHEZ, AS IT TURNS OUT, SHE LIVED IN THE SAME HOUSE AS HE DID, AS SHE WAS "DATING" HIS BROTHER. (13 RT 1471-1475.) ON THE NEXT COURT DATE OF APRIL 1, 2008, DEFENSE COUNSEL PRESENTED TO THE COURT THAT PETITIONER'S BROTHER LUIS AGUILAR HEARD JUROR #9 LISTENING TO NORTEÑO RAP MUSIC. THE MUSIC CONTAINED DEROGATORY REFERENCES TOWARD SUREÑO GANG MEMBERS. (14 RT 1479.)

PETITIONER'S MOTION FOR NEW TRIAL BECAUSE OF JURY MISCONDUCT BY JUROR #3 AND JUROR #9 WAS DENIED ON JANUARY 9, 2009. (4 CT 832.)

DEFENSE COUNSEL WAS INEFFECTIVE WHEN HE FAILED TO SHOW CAUSE FOR MISTRIAL AND/OR DISCHARGE OF JUROR #3 AND #9. JUROR MISCONDUCT OF JUROR #3 FOR VIOLATING THE SEPARATION ADMONITION, AND FOR CONCEALING HER BIAS FROM VOIR DIRE TO VERDICT.

PETITIONER WAS ALLEGED TO BE A SUREÑO GANG MEMBER AND CONVICTED OF ALLEGEDLY COMMITTING A FELONY FOR THE BENEFIT OF THE GANG, AND A GUN USE ENHANCEMENT. (3 CT 737, 835.)

THE EVIDENCE IS INSUFFICIENT TO ESTABLISH THE REQUIRED LEGAL ELEMENT OF THE GANG ENHANCEMENT-S.

ARGUMENTS

1.) TRIAL COURT ERRED WHEN IT
FAILED TO DISCHARGE JUROR(S) #3
AND #9 FOR JUROR MISCONDUCT.

JUROR #3 CONCEALED HER BIAS DURING VOIR DIRE, AND
SUBSEQUENTLY VIOLATED THE SEPARATION ADMONITION ALSO THESE FACTS
WERE DISCOVERED AFTER THE FACT ON A HEARING FOR NEW TRIAL.
PETITIONER WAS PREJUDICED WHEN HE WAS DENIED HIS RIGHT
TO TRIAL BY IMPARTIAL JURY.

JUROR #9 CONCEALED HER BIAS DURING VOIR DIRE. SHE
WAS LIVING WITH A NORTEÑO GANG MEMBER, AS SHE WAS
DATING A NORTEÑO GANG MEMBER'S BROTHER. SHE HAS A BIG
RED STAR TATTOO ON HER NECK. IT WAS ESTABLISHED IN COURT
THAT NORTEÑO GANGS IDENTIFY WITH THE COLOR RED AND
STARS. IT'S CLEAR JUROR'S TIES LIE WITH NORTEÑO GANGS.
THUS MAKING HER BIASED TOWARDS PETITIONER. JUROR EXPOSED
A GLIMPSE OF HER BIAS DURING QUESTIONING BY THE COURT
ON HER ABILITY TO BE FAIR IN LIGHT OF MR. SANCHEZ'S
GANG AFFILIATION, SHE SAID, "MAYBE A LITTLE BIT."

JUROR WHO CONCEAL RELEVANT FACTS OR GIVES FALSE
ANSWERS DURING VOIR DIRE UNDERMINES THE JURY SELECTION
PROCESS AND COMMITTS MISCONDUCT. CONCEALMENT OF BIAS

1 DEPRIVED PETITIONER OF HIS CONSTITUTIONAL RIGHT TO TRIAL BY
2 IMPARTIAL JURY AND DUE PROCESS. SEE ROSALES-LOPEZ V. U.S.
3 (1981) 454 U.S. 182, 188; MCDONOUGH POWER EQUIP, INC. V. GREENWOOD
4 (1984) 464 U.S. 548, 554. THE TRIAL COURT JUDGE HAS A DUTY TO
5 ENSURE THAT THE ACCUSED IS AFFORDED A FAIR TRIAL. IN THE
6 EXERCISE OF HIS DISCRETION THE ROLE OF THE TRIAL COURT
7 JUDGE IS MORE THAN AN UMPIRE OR MODERATOR; HIS
8 RESPONSIBILITY IS TO PROVIDE A FAIR TRIAL TO ALL PARTIES.
9 SEE U.S. V. PARKER (CA 9TH 2001) 241 F.3d 1114.

10
11
12 2) JUROR MISCONDUCT VIOLATED PETITIONER'S
13 RIGHT TO AN IMPARTIAL JURY, A FAIR
14 TRIAL, AND DUE PROCESS.

15
16 A.) JUROR #3 CONCEALED HER BIAS
17 AND VIOLATED THE SEPARATION
18 ADMINISTRATION OF THE COURT.

19
20
21 JUROR #3 INTENTIONALLY CONCEALED HER BIAS AGAINST
22 PETITIONER DURING VOIR DIRE EXAMINATION. DURING JURY
23 SELECTION PROSPECTIVE JUROR'S WERE QUESTIONED CONCERNING
24 THEIR FEELINGS ON GANGS. JUROR #3 WAS DATING A MAN
25 AFFILIATED WITH A NORTEÑO GANG. SHE WAS IN FACT PREGNANT
26 WITH HIS CHILD DURING TRIAL.

27
28 A JUROR WHO CONCEALS RELEVANT FACTS OR GIVES

1 FALSE ANSWERS DURING THE VOIR DIRE EXAMINATION THUS
2 UNDERMINES THE JURY SELECTION PROCESS AND COMMITS MISCONDUCT.
3 (PEOPLE V. CASTALDEA (1959) 51 CAL. 2d 569, 572; PEOPLE V. GALLOWAY
4 (1927) 202 CAL. 92-93; PEOPLE V. BLACKWELL (1987) 191 CAL. APP. 3d 925,
5 929; PEOPLE V. DIAZ (1984) 152 CAL. APP. 3d 926, 932; IN RE
6 HITCHINGS (1993) 6 CAL. 4TH 97, 199-200.)

7
8 GIVEN IN THIS CASE THE INFLAMMATORY NATURE OF GANG
9 EVIDENCE, JUROR #3'S CONCEALMENT OF RELEVANT AND IMPORTANT
10 INFORMATION ON VOIR DIRE DEPRIVED PETITIONER OF HIS
11 CONSTITUTIONAL RIGHT TO A FAIR TRIAL BY AN IMPARTIAL
12 JURY UNDER THE SIXTH AND FOURTEENTH AMENDMENTS.
13 SEE ROSALES-LOPEZ V. U.S. (1981) 451 U.S. 182, 188. PETITIONER'S
14 RIGHT TO DUE PROCESS AND A FAIR TRIAL. SEE McDONOUGH
15 POWER EQUIP., INC. V. GREENWOOD (1984) 464 U.S. 548, 554.

16
17 PETITIONER'S CASE WAS SUBMITTED TO THE JURY ON OR
18 ABOUT APRIL 3, 2008, THAT NIGHT PETITIONER OVERHEARD
19 AN INMATE IN THE ADJACENT CELL NEXT TO HIM TALKING
20 ABOUT HIS CASE. ABEL VASQUEZ SAID JUROR #3 WAS HIS
21 GIRLFRIEND, AND SHE ASKED WHAT TO DO IN TERMS OF THE
22 VERDICT.

23
24 DURING THE MOTION FOR NEW TRIAL, JANUARY 9, 2009,
25 ABEL VASQUEZ TESTIFIED HE KNEW JUROR #3 WAS IN
26 PETITIONER'S JURY BECAUSE HE LIVED WITH HER. HE HAD
27 A TELEPHONE CONVERSATION WITH HER WHILE HE WAS
28 INCARCERATED IN THE TULARE COUNTY JAIL, DURING THE

1 CONVERSATION SHE DISCUSSED THE CASE AND ASKED WHAT
2 SHE SHOULD DO IN THE VOTING OF THE VERDICT. SHE SAID
3 THE JURY WERE ALREADY SAYING ONE THING, HE TOLD HER
4 TO GO WITH THE FLOW, WHEN HE TOLD HER HIS OPINION
5 SHE KNEW WHAT HE MEANT. (20 RT 1908-1911)

6
7 THERE IS AMPLE EVIDENCE THAT JUROR #3 VIOLATED THE
8 SEPARATION ADMINISTRATION WHICH IS SERIOUS JUROR MISCONDUCT.
9 SEE PENAL CODE § 1122; IN RE HITCHINGS (1993) 6 CAL. 4TH 97,
10 118. SHE ALSO CONSIDERED EVIDENCE NOT ADDUCED AT TRIAL
11 IN COMING TO HER VERDICT IN THIS CASE. JUROR #3 LET HER
12 BOYFRIEND INFLUENCE HER DECISION ON THE VERDICT. FURTHER
13 TO PRESERVE IMPARTIALITY THE JURY'S DELIBERATIVE PROCESS
14 IS SHIELDED FROM ALL OUTSIDE INFLUENCES. SEE PEOPLE V.
15 BRADFORD (2007) 154 CAL APP. 4TH 1390, 1413, 1414, 65 CAL. RPTR. 3D
16 548.

17
18
19 B.) JUROR #9 CONCEALED HER
20 BIAS DURING VOIR DIRE.

21
22
23 JUROR #9 CONCEALED HER BIAS DURING VOIR DIRE.
24 HER BIAS WAS EXPRESSED ON TWO SEPARATE OCCASIONS. ON
25 MARCH 27, 2008, SHE SENT A NOTE TO THE COURT ABOUT EVIDENCE
26 SHE HAD SEEN DURING TRIAL ABOUT A MAN NAMED ALEX SANCHEZ,
27 SHE WAS DATING SANCHEZ'S BROTHER. SANCHEZ WAS A NORTEÑO
28 GANG MEMBER. IN RESPONSE TO THE COURT'S QUESTION

1 WHETHER SANCHEZ'S GANG AFFILIATION WOULD AFFECT HER
2 ABILITY TO BE FAIR, SHE SAID, "MAYBE A LITTLE BIT."
3

4 ON APRIL 1, 2008, COUNSEL PRESENTED TO THE COURT
5 THAT PETITIONER'S BROTHER LUIS AGUILAR, HEARD JUROR #9
6 LISTENING TO NORTEÑO RAP MUSIC IN THE HALLWAY OF THE
7 COURTHOUSE. THE MUSIC CONTAINED DERAGATORY REFERENCES
8 TO SUREÑO GANG MEMBERS. (HRT 1479.)
9

10 JUROR #9 HAS FAMILY MEMBERS THAT ARE NORTEÑO
11 AFFILIATED GANG MEMBERS; SHE HAS A BIG RED STAR TATTOO
12 ON HER NECK, IT WAS ESTABLISHED AT TRIAL THAT NORTEÑO
13 GANG MEMBERS IDENTIFY WITH THE COLOR RED AND STARS.
14 SHE WAS DATING AND LIVING WITH A NORTEÑO AFFILIATED
15 GANG MEMBER'S BROTHER. IN SIMPLER TERMS, IT IS NOT
16 A STRETCH OF THE IMAGINATION TO SEE THAT THE COMBINATION
17 OF THESE FACTS WOULD MAKE JUROR #9 BIASED TOWARDS PETITIONER.
18

19 IMPARTIALITY OF PROSPECTIVE JURORS IS EXPLORED
20 AT PRELIMINARY PROCEEDING OF VOIR DIRE. VOIR DIRE PLAYS A
21 CRITICAL FUNCTION IN ASSURING CRIMINAL DEFENDANT HIS SIXTH
22 AMENDMENT RIGHT TO AN IMPARTIAL JURY WILL BE HONORED.
23 LACK OF ADEQUATE VOIR DIRE IMPAIRS DEFENDANT'S RIGHT
24 TO EXERCISE PEREMPTORY CHALLENGES. SEE ROSALES-LOPEZ, SUPRA.
25

26 JUROR #9 WAS NOT COMPLETELY AND OPENLY HONEST
27 DURING VOIR DIRE. A JUROR WHO CONCEALS RELEVANT FACTS
28 OR GIVES FALSE ANSWERS DURING VOIR DIRE EXAMINATION

1 THUS UNDERMINES THE JURY SELECTION PROCESS AND COMMITS
2 MISCONDUCT. IN RE HITCHINGS (1993) 6 CAL. 4TH 97, 199-200.
3 FURTHERMORE, JUROR'S CONCEALMENT OF HER BIAS AGAINST
4 PETITIONER ON VOTER DIRE ALSO DEPRIVED PETITIONER OF
5 HIS RIGHT TO DUE PROCESS AND A FAIR TRIAL. MCDONOUGH
6 POWER EQUIP, INC, SUPRA

9 3) PETITIONER WAS DEPRIVED EFFECTIVE
10 ASSISTANCE OF COUNSEL, AND DENIED
11 DUE PROCESS.

13 A.) COUNSEL'S FAILURE TO CHALLENGE
14 FOR CAUSE / DISCHARGE JUROR #3.

17 PRIOR TO CONTINUATION OF COURT PROCEEDINGS FOR THE
18 DAY, PETITIONER TRIED TO INFORM COUNSEL THAT JUROR #3 HAD
19 COMMUNICATED WITH SOMEONE IN THE ADJACENT CELL TO HIS
20 ABOUT THIS CASE. SHE HAD SOUGHT ADVICE ON HOW SHE SHOULD
21 VOTE IN PETITIONER'S CASE. HOWEVER COUNSEL WOULD HEAR NONE
22 OF IT, HE CASUALLY DISMISSED PETITIONER'S EFFORTS TO
23 SPEAK TO HIM. COUNSEL WAS CONCERNED WITH THE JURY'S
24 IMPENDING VERDICT.

26 AN ACCUSED IN A CRIMINAL PROSECUTION HAS THE RIGHT
27 TO THE EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL UNDER THE
28 SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION

1 AND ARTICLE I, SECTION 15 OF THE CALIFORNIA CONSTITU-
2 TION. (PEOPLE V. LEDESMA (1987) 43 CAL 3d 171, 215)

3
4 TO ESTABLISH INEFFECTIVE ASSISTANCE OF COUNSEL, A
5 DEFENDANT MUST DEMONSTRATE THAT (1) COUNSEL'S REPRESENTATION
6 WAS DEFICIENT IN FALLING BELOW AN OBJECTIVE STANDARD
7 OF REASONABLENESS UNDER PREVAILING PROFESSIONAL NORMS, AND
8 (2) COUNSEL'S DEFICIENT REPRESENTATION PREJUDICED

9 PETITIONER, I.E. THERE IS A REASONABLE PROBABILITY THAT
10 BUT FOR COUNSEL'S FAILING THE RESULT WOULD HAVE BEEN
11 MORE FAVORABLE TO THE DEFENDANT. SEE STRICKLAND V.
12 WASHINGTON (1984) 466 U.S. 668, 687; SEE ALSO IN RE JONES
13 (1996) 13 CAL. 4TH 552, 561.

14
15 COUNSEL'S FAILURE TO HEAR WHAT PETITIONER WAS
16 TRYING TO TELL HIM PREJUDICED HIS TRIAL, FOR IF COUNSEL
17 WOULD HAVE TAKEN THE TIME, HE WOULD HAVE BEEN ABLE
18 TO PRESENT TO THE COURT THAT THERE WAS A POTENTIAL
19 BIAS JUROR IN THE JURY PRIOR TO THE VERDICT BEING
20 READ INTO THE RECORD. IT IS NOT A FAR STRETCH OF
21 THE IMAGINATION THAT THERE IS A REASONABLE PROBABILITY
22 THAT BUT FOR COUNSEL'S FAILING TO HEAR WHAT PETITIONER
23 HAD TO SAY, THEREFORE DISCHARGING THE BIAS JUROR THE
24 RESULT WOULD HAVE BEEN MORE FAVORABLE TO THE DEFENDANT.

25
26
27 B.) COUNSEL FAILED TO STRIKE
28 JUROR #4 FOR CAUSE

JUROR #4 A 17-YEAR VETERAN AS A CORRECTIONAL OFFICER HAD EXPRESSED DOUBTS AS TO HIS ABILITY TO BE FAIR DURING VOIR DIRE. COUNSEL'S LACK OF RESPONSE OR FOLLOW-UP QUESTIONS TO DETERMINE WHETHER JUROR WOULD BE ABLE TO RENDER A FAIR AND IMPARTIAL VERDICT PREJUDICED PETITIONER. COUNSEL FAILED TO PURSUE THE MOST RUDIMENTARY INQUIRY OF JUROR TO INQUIRE FURTHER INTO STATEMENT THAT EXPRESSED DOUBTS ON ABILITY TO BE FAIR. STRICKLAND, SUPRA, 466 U.S. 668, 104 S. Ct. 2052.

AMONG MOST ESSENTIAL RESPONSIBILITIES OF DEFENSE COUNSEL IS TO PROTECT CLIENT'S CONSTITUTIONAL RIGHT TO A FAIR AND IMPARTIAL JURY BY USING VOIR DIRE TO IDENTIFY AND FERRET OUT BIASED JURORS. THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION GUARANTEES THE RIGHT TO BE TRIED BY IMPARTIAL AND UNBIASED JURORS. SEE MORGAN V. JUNGLES (1992) 504 U.S. 719, 112 S.Ct. 2222.

C.) COUNSEL'S FAILURE TO CHALLENGE FOR CAUSE/DISCHARGE JUROR #9.

JUROR #9 EXPRESSED BIAS DURING TRIAL ON TWO SEPARATE OCCASIONS. ON MARCH 27, 2008, THE COURT QUESTIONED HER ON WHETHER SANCHEZ'S GANG AFFILIATION WAS GOING TO AFFECT HER ABILITY TO BE FAIR, SHE STATED, "MAYBE A LITTLE BIT." DEFENSE COUNSEL SHOULD HAVE

1 IMMEDIATELY MOVED TO DISCHARGE JUROR #9 FOR BEING BIASED
2 TOWARD PETITIONER PURSUANT TO PENAL CODE 1089. ON APRIL
3 1, 2008, DEFENSE COUNSEL HIMSELF BROUGHT TO THE COURT'S
4 ATTENTION THAT HE PERSONALLY NOTICED A "BIG RED STAR"
5 TATTOO ON HER NECK. IT BEING ESTABLISHED AT TRIAL
6 THAT NORTEÑO GANG MEMBERS IDENTIFY WITH STARS AND
7 THE COLOR RED, IT'S REASONABLE TO INFER THAT THE JUROR
8 WOULD POTENTIALLY BE BIASED TOWARD PETITIONER. RATHER
9 THAN JUST MAKING A GENERAL COMPLAINT TO THE COURT,
10 HE SHOULD HAVE MADE AN ORAL MOTION TO DISCHARGE
11 JUROR #9 AND/OR A MOTION FOR MISTRIAL.

12
13 AN ACCUSED IN A CRIMINAL PROSECUTION HAS THE
14 RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL
15 UNDER THE SIXTH AND FOURTEENTH AMENDMENT OF THE
16 UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 15
17 OF THE CALIFORNIA CONSTITUTION. LEDESMA, SUPRA, 43
18 CAL 3d. 171, 215.

19
20 COUNSEL'S FAILURE TO DETERMINE IF JUROR
21 WOULD BE ABLE TO BE FAIR AND IMPARTIAL IN
22 THIS CASE PREJUDICED PETITIONER. COUNSEL'S EFFORTS
23 RENDERED HIS TRIAL FUNDAMENTALLY UNEATR. BUT FOR
24 COUNSEL'S DEFICIENCY A RESULT MORE FAVORABLE TO
25 PETITIONER WOULD HAVE RESULTED. STRICKLAND, SUPRA, 466
26 U.S. 668, 104 S. CT. 2052.

4.) CUMULATIVE IMPACT OF ERRORS
PREJUDICED PETITIONER'S RIGHT
TO A FAIR TRIAL AND DUE PROCESS.

TRIAL COURT ERRORS

THE TRIAL COURT ERRED IN ALLOWING PREVIOUSLY ADJUDICATED GANG AND GUN ENHANCEMENTS TO BE RETRIED. PETITIONER IS PROTECTED UNDER THE DOUBLE JEOPARDY CLAUSE OF THE CONSTITUTION'S FIFTH AMENDMENT. SEE YEAGER V. U.S. (2009) U.S., 129 S. CT. 2360, 2365-2367.

THE TRIAL COURT ERRED WHEN IT FAILED TO DISMISS JUROR(S) #3 AND/OR #9 FOR CAUSE. TRIAL COURT HAS THE RESPONSIBILITY AND AUTHORITY EITHER SUA SPONTE OR UPON COUNSEL'S MOTION TO DISMISS FOR CAUSE. SEE FRAZIER V. U.S. (1948) 335 U.S. 497, 511, 69 S. CT. 201.

THE SUPREME COURT HAS CLEARLY ESTABLISHED THAT THE COMBINED EFFECT OF MULTIPLE TRIAL COURT ERRORS VIOLATES DUE PROCESS WHERE IT RENDERS THE RESULTING CRIMINAL TRIAL FUNDAMENTALLY UNFAIR. CHAMBERS, 410 U.S. AT 298, 302-303, 93 S. CT. 1038 (COMBINED EFFECT OF INDIVIDUAL ERRORS "IDENTIFIED [CHAMBERS] A TRIAL IN ACCORD WITH TRADITIONAL AND FUNDAMENTAL STANDARDS OF DUE PROCESS" AND "DEPRIVED CHAMBERS OF A FAIR TRIAL.") THE CUMULATIVE EFFECT OF MULTIPLE ERRORS CAN VIOLATE DUE PROCESS EVEN WHERE

1 NO SINGLE ERROR RISES TO THE LEVEL OF A CONSTITUTIONAL
2 VIOLATION OR WOULD INDEPENDENTLY WARRANT REVERSAL.
3 CHAMBERS, 410 U.S. AT 290 N. 3, 93 S. CT. 1038. SEE
4 PARIE V. RUNNELS (CA 9TH 2007) 505 F.3d 922, 927 (QUOTING
5 THEREIN CHAMBERS V. MISSISSIPPI (1973) 410 U.S. 284, 93 S. CT.
6 1038.

7 8 9 JUROR MISCONDUCT

10
11 JUROR #3 CONCEALED HER BIAS DURING VOIR DIRE.
12 JURORS WERE QUESTIONED ABOUT THEIR FEELINGS ON GANGS.
13 THE INFLAMMATORY NATURE OF THE GANG EVIDENCE WAS
14 PARAMOUNT IN THIS CASE. JUROR #3'S BOYFRIEND IS
15 AFFILIATED WITH THE RIVAL NORTEÑO GANG. SHE WAS
16 ACTUALLY PREGNANT WITH HIS CHILD DURING PETITIONER'S
17 TRIAL. JUROR #3 CONCEALED RELEVANT AND IMPORTANT
18 INFORMATION. JUROR #3 ALSO BROKE THE SEPARATION
19 ADMINISTRATION WHEN SHE DISCUSSED PETITIONER'S CASE WITH
20 HER BOYFRIEND. SHE SPECIFICALLY ASKED HOW SHE
21 SHOULD VOTE. THESE FACTS WERE DISCOVERED AFTER THE
22 JURY'S VERDICT IN A HEARING FOR NEW TRIAL, JANUARY
23 9, 2009. JUROR #3'S BOYFRIEND TESTIFIED TO ALL THESE
24 FACTS STATED HEREIN.

25
26 JUROR #9 CONCEALED HER BIAS DURING VOIR
27 DIRE. JUROR #9 WAS DATING A RIVAL GANG MEMBER'S
28 BROTHER. WHEN QUESTIONED WHETHER THAT FACT WOULD

1 AFFECT HER ABILITY TO BE FAIR, SHE STATED, "MAYBE A
2 LITTLE BIT." JUROR #9'S RELATIONSHIP WITH A NORTEÑO
3 GANG MEMBERS BROTHER, HER TATTOO OF A BIG RED
4 STAR ON HER NECK MADE HER SYMPATHETIC TO NORTEÑOS
5 AND BIASED TOWARDS PETITIONER.

6
7 PETITIONER WAS PREJUDICED BY THE CONCEALMENT
8 OF RELEVANT AND IMPORTANT INFORMATION BY JUROR #9.
9 PETITIONER WAS PREJUDICED BY THE CONCEALMENT OF
10 BIAS BY JUROR #3. PETITIONER WAS DEPRIVED A TRIAL
11 BY AN IMPARTIAL JURY, AND DENIED DUE PROCESS
12 PROTECTED BY THE SIXTH AND FOURTEENTH AMENDMENTS
13 OF THE CONSTITUTION. SEE ROSALES-LOPEZ V. U.S. (1981)
14 454 U.S. 182, 188; McDONOUGH POWER EQUIP, INC. V. GREENWOOD
15 (1984) 464 U.S. 540, 554.

16 17 18 INEFFECTIVE ASSISTANCE OF COUNSEL.

19
20 DEFENSE COUNSEL WAS INEFFECTIVE WHEN HE REFUSED
21 TO ACCEPT PETITIONER'S INFORMATION OF JUROR #3'S
22 COMMUNICATION WITH HER BOYFRIEND) DISCUSSING HIS
23 CASE. PETITIONER ATTEMPTED TO INFORM COUNSEL UPON
24 ENTERING THE COURTROOM AND PRIOR TO COMMENCEMENT
25 OF PROCEEDING FOR THAT DAY. JANUARY 9, 2009, ON THE
26 MOTION FOR NEW TRIAL IT WAS DISCOVERED THAT JUROR #3
27 CONCEALED RELEVANT FACTS AND IMPORTANT INFORMATION.
28 TESTIMONY OF JUROR'S BOYFRIEND TO EXTENT OF

1 CONVERSATION AND SPECIFICS DISCUSSED WAS ESTABLISHED.

2
3 DEFENSE COUNSEL WAS INEFFECTIVE WHEN HE FAILED
4 TO STRIKE FOR CAUSE, JUROR #4. JUROR IS A 17-YEAR
5 VETERAN AS A CORRECTIONAL OFFICER WHO EXPRESSED
6 DOUBTS IN STATEMENTS MADE DURING VOIR DIRE
7 COUNSEL FAILED TO ASK FOLLOW-UP QUESTIONS TO
8 DETERMINE WHETHER JUROR (WOULD) BE ABLE TO RENDER
9 A FAIR AND IMPARTIAL VERDICT. COUNSEL FAILED TO
10 CONDUCT THE MOST RUDIMENTARY INQUIRY OF JUROR'S
11 STATEMENTS FOR CLARIFICATION.

12
13 DEFENSE COUNSEL WAS INEFFECTIVE WHEN HE FAILED
14 TO MOVE FOR DISCHARGE OF JUROR #9 THE JUROR EXPRESSED
15 BIAS UNDER QUESTIONING BY THE COURT. QUESTION OF
16 WHETHER GANG AFFILIATION WAS GOING TO AFFECT HER
17 ABILITY TO BE FAIR, SHE STATED, "MAYBE A LITTLE
18 BIT." OTHER RELEVANT EVIDENCE PRESENTED BY
19 COUNSEL HIMSELF WAS SUFFICIENT TO CHALLENGE FOR
20 CAUSE. THERE APPEARS TO BE NO REASONABLE EFFORT BY
21 COUNSEL TO HAVE JUROR #9 DISCHARGED.

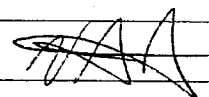
22
23 UNDER STRICKLAND V. WASHINGTON, 466 U.S. 668,
24 687, 104 S. CT. 2052 (1984), PETITIONER HAS STATISFIED
25 THE FINDING OF INEFFECTIVE ASSISTANCE OF COUNSEL,
26 COUNSEL'S PERFORMANCE WAS OBJECTIVELY UNREASONABLE
27 UNDER THE SIXTH AMENDMENT, AND COUNSEL'S DEFICIENT
28 PERFORMANCE PREJUDICED PETITIONER.

1 VERIFICATION

2
3
4 I, ULICES AGUILAR, STATE

5
6 I AM THE PETITIONER IN THIS ACTION I HAVE READ THE
7 PETITION FOR WRIT OF HABEAS CORPUS AND THE FACTS STATED
8 THEREIN ARE TRUE OF MY OWN KNOWLEDGE, EXCEPT AS TO MATTERS
9 THAT ARE THEREIN STATED ON MY OWN INFORMATION AND
10 BELIEVE, AND AS TO THOSE MATTERS I BELIEVE THEM TO
11 BE TRUE.

12
13 I DECLARE UNDER PENALTY OF PERJURY THAT THE
14 FOREGOING IS TRUE AND CORRECT AND THAT THIS DECLARATION
15 WAS EXECUTED AT BLYTHE, CA ON MAY 15, 2012

16
17 

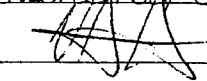
18 ULICES AGUILAR
19 PETITIONER IN PRO SE
20
21
22
23
24
25
26
27
28

CONCLUSION

FOR THE ABOVE STATED REASONS PETITIONER'S HABEAS
CORPUS RELIEF SHOULD BE GRANTED.

DATED : MAY 15, 2012

RESPECTFULLY SUBMITTED:



ULISES AGUIAR

IN PROSE

EXHIBITS

EXHIBIT “B”

EXHIBIT “B”

CRAIG COLLINS
ATTORNEY AT LAW

221 North I Street
Madera, CA 93637
(559) 674-4696
Fax: (559) 674-9631

To: Court of Appeal-Fifth Appellate District
From: Craig Collins
Attorney at Law
Re: *In re Ulices Aguilar on Habeas Corpus*
Case No. F063652

November 21, 2011

Dear Court:

This is an informal response to the issue of my representation of Mr. Aguilar and attached is a declaration regarding the same.

Issue 1.

Mr. Aguilar alleges I was ineffective for "...failing to move to discharge that juror."

On voir dire, Juror #9 indicated that she had family member(s) that were involved in gangs. I and Mr. Aguilar discussed that we felt that the juror's gang involved family member(s) were likely in the Norteno gang. Mr. Aguilar was said to be part of the rival Sureno gang. The actual shooter, as well as the victim in this case, were Nortenos. This was defense's theory of the case. The prosecution claimed the shooter to be a Norteno turned Sureno. I asked Mr. Aguilar if he felt that since juror #9 had these gang ties, would she be more apt to acquit, as the reputation of gangs is to stay out of prosecution or court proceedings. In other words, I asked if this juror would simply decline to convict based on our knowledge of gang culture. Mr. Aguilar and I discussed this, and we decided to leave her on the panel at that point as a strategic decision.

In the middle of trial, this same juror advised the court that she knew a Norteno gang member who was an ancillary subject in the people's prosecution of the alleged gang enhancement. The court inquired as to the effect of this relationship on her ability to stand as a juror in the case. I asked the judge twice on the record if I could ask her questions myself. The first time I was ignored, the second time Judge Hicks asked me to approach. I advised I wanted to ask questions, Judge Hicks responded that she could be fair and he would ask her the questions again. Based on this refusal and the court's implication, as well as the answers of the juror, I felt that a motion to dismiss this juror was futile, yet important to preserve the issue in my motion for a new trial. (And appeal)

This is also true in regards to the tattoo and the supposed gang music overheard in the hallway of the courthouse. I thought that the tattoo and the music should be brought to the court's attention, but I felt I did not have enough evidence to support this claim. Moreover, I was told initially by Luis Aguilar that he did not want to testify regarding this. It was clear that Judge Hicks saw no merit to this as I brought it to his attention. Upon the motion for a new trial, I declared under penalty of perjury that I had information that the juror was playing gang music in the hallway. The motion was denied and further testimony was not required from the judge.

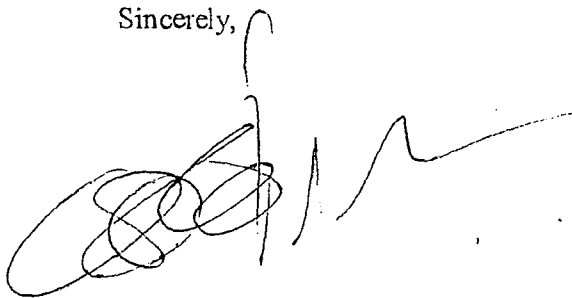
Issue 2

Mr. Aguilar further contends I was ineffective for not laying a proper foundation in terms of a timeline regarding the relationship of Abel Vasquez and juror #3 regarding Mr. Vasquez's gang ties. I alleged in my motion for a new trial that juror #3 sought advice from her boyfriend Abel Vasquez (who was incarcerated in adjacent cell of Mr. Aguilar) on what verdict to vote. At the motion, Mr. Vasquez authenticated photos of him and juror #3 wearing red clothing. Moreover, I was established that Mr. Vasquez was living in a cell adjacent to Mr. Aguilar at the time of deliberation and was asked by juror #3 (his girlfriend) whether or not to vote guilty or not guilty. I believe Vasquez also testified regarding his gang ties (Norteno). There was no evidence by the people that Vasquez was not a Norteno during the trial or otherwise. Without the transcript, the details can be difficult to recall, but I was satisfied that the specific issues regarding juror misconduct were presented the day Mr. Vasquez testified.

* It should be noted that I petitioned the court to disclose juror #3's contact information to further pursue these issues, but this was denied and I was ordered to have no contact with the juror by Judge Hicks.

Please let me know if this Court requires any additional information or clarification in this matter.

Sincerely,

A handwritten signature in black ink, appearing to be 'Craig Collins', with a stylized, cursive script.

Craig Collins

DECLARATION

I, CRAIG COLLINS, do hereby declare:

1. I was the trial attorney of record for Petitioner Ulices Aguilar in the present case F063652.
2. The decision to initially keep juror #9 was a strategic decision that was discussed beforehand with Mr. Aguilar.
3. During the trial, I was not allowed to ask juror #9 regarding her knowledge of a gang member involved in the People's case.
4. Because of this, and the answers juror #9 provided, I did not feel a motion to remove the juror would be granted.
5. The evidence presented regarding juror #3 and misconduct fulfilled strategy of showing that the juror committed misconduct.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

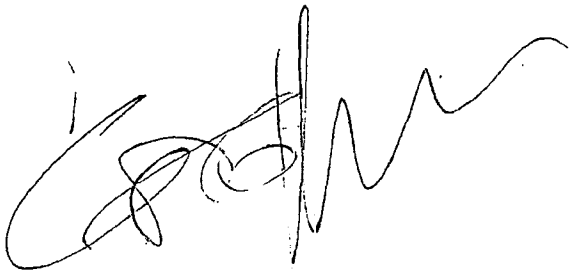
A handwritten signature in black ink, appearing to read 'Craig Collins', with a large, stylized initial 'C' and a long, sweeping horizontal stroke at the end.

EXHIBIT “C”

EXHIBIT “C”

1 ULICES AGUIAR
2 G-48827 / A-3-226L
3 IRONWOOD STATE PRISON
4 P.O. BOX 2199
5 BLYTHE, CA 92226

6 COURT OF APPEAL STATE OF CALIFORNIA
7 FIFTH APPELLATE DISTRICT
8
9

10 ULICES AGUIAR
11 APPELLANT,

CASE No. F063652

12 V.

REPLY TO COUNSEL'S
INFORMAL RESPONSE

13
14 ON HABEAS CORPUS
15 /
16
17

18 APPELLANT, ULICES AGUIAR IN PROSE HEREIN
19 RESPONDS TO THE INFORMAL DECLARATIONS MADE BY APPELLANT'S
20 FORMER DEFENSE COUNSEL, CRAIG COLLINS AS ORDERED BY THE COURT
21 IN REGARDS TO ISSUES RAISED IN APPELLANT'S BRIEF.
22
23

24 ISSUE I
25

26 IN HIS RESPONSE MR. COLLINS DECLARES THAT
27 HIS DECISION TO KEEP JUROR #9 DURING VOTR DIRE WAS
28 A STRATEGIC DECISION REACHED AFTER DISCUSSION WITH

1 APPELLANT. HOWEVER GIVEN THAT MOST CRIMINAL DEFENDANTS
2 ARE NOT FAMILIAR WITH CRIMINAL LAW AND PROCEDURE,
3 SUCH A DECISION SHOULD HAVE BEEN MADE BASED ON COMMON
4 LEGAL STRATEGY DEALING WITH POTENTIALLY BIASED JURORS.
5

6 MR COLLINS STATES NEXT THAT, IN REGARDS TO
7 HIS CONSIDERATION OF MOVE TO DISMISS THE SAME JUROR
8 AFTER FURTHER EVIDENCE OF POTENTIAL BIAS APPEARED, THE
9 PRIMARY REASONS FOR HIS DECISION NOT TO MOVE FOR DIS-
10 MISSAL OF THE JUROR IN QUESTION WERE BASED SOLELY
11 ON HIS FEELING THAT THE TRIAL JUDGE WOULD DENY THE
12 MOTION WITHOUT FURTHER INVESTIGATION. GIVEN THE
13 QUESTIONABLE NATURE OF THE SAME JUROR, IT WAS
14 UNREASONABLE NOT TO MAKE THE MOTION BOTH BECAUSE
15 MR COLLINS DOES NOT CITE IN HIS RESPONSE TO A
16 STRATEGIC REASON NOT TO MAKE THE MOTION, AND IT
17 IS NOT PROPER FOR AN ATTORNEY TO MAKE HIS STRATEGIC
18 DECISION IN DEFERENCE TO THE MOODS AND WHIMS OF
19 THE JUDGE.
20

21 FOR THESE REASONS, MR COLLINS' ACTIONS AS
22 AN ATTORNEY RESULTED IN INEFFECTIVE ASSISTANCE OF
23 COUNSEL.
24

25 26 ISSUE II

27
28 MR COLLINS IN HIS RESPONSE EFFECTIVELY

1 SUMMARIZES THE STEPS HE TOOK IN MAKING A MOTION FOR
2 NEW TRIAL BASED ON INFORMATION AND ALLEGATIONS
3 THAT JUROR #3 IN THE TRIAL HAD MADE COMMUNICATIONS
4 WHICH, BY THE NATURE OF BOTH THE RELATIONSHIP WITH
5 THE INDIVIDUAL AND THE COMMUNICATIONS THEMSELVES, SHOWED
6 STRONG EVIDENCE OF ACTUAL BIAS AND JURY MANIPULATION.

7
8 HOWEVER, MR COLLINS FAILS TO ADDRESS APPELLANT'S
9 ALLEGATION THAT HE APPROACHED MR COLLINS WITH
10 KNOWLEDGE TO THESE COMMUNICATIONS PRIOR TO THE VERDICT
11 BEING ENTERED INTO THE RECORD, AND THAT MR. COLLINS
12 DECLINED TO DISCUSS THIS INFORMATION UNTIL JUDGMENT
13 HAD BEEN RENDERED. IN THAT THE INFORMATION APPELLANT
14 SOUGHT TO GIVE MR COLLINS ABOUT POTENTIAL BIAS WAS
15 FOUND TO BE TRUE WHEN EVIDENCE OF ACTUAL BIAS
16 WAS GIVEN DURING THE MOTION FOR NEW TRIAL, THE
17 LEGAL QUESTION ARISES: BUT FOR MR. COLLINS REFUSAL
18 TO HEAR OR ENTERTAIN THIS INFORMATION, WOULD THE JURY
19 HAVE BEEN ALLOWED TO CONTINUE ITS DELIBERATION,
20 AND WOULD HAVE THE SAME VERDICT HAVE BEEN REACHED?
21 IT IS APPELLANT'S CONTENTION THAT THE ANSWER TO
22 THIS QUESTION IS NO.

23
24 THEREFORE MR COLLINS REFUSAL TO DISCUSS WITH
25 HIS CLIENT INFORMATION OF ACTUAL BIAS BY A JUROR
26 CONSTITUTES INEFFECTIVE ASSISTANCE OF COUNSEL.

CONCLUSION

IN THAT THIS INFORMAL REPLY CONSTITUTES A
CONTINUATION OF ARGUMENTS IN FAVOR OF APPELLANT'S
WRIT, APPELLANT PRAYS THAT COURT GRANT EVIDENTIARY
HEARING AND THEN ISSUE A WRIT OF HABEAS CORPUS.

DATED: JANUARY/

RESPECTFULLY SUBMITTED,

WILFRED AGUIAR

APPELLANT IN PRO SE

PROOF OF SERVICE

Declaration of Service by Mail

I, ULICES AGUILAR, declare that I am over the age of

Eighteen (18) and that I (am/am not) a party to this action. On JANUARY 9, 2012,

I deposited a copy of the following document (s):

REPLY TO COUNSEL'S INFORMAL RESPONSE

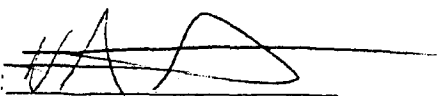
in a sealed envelope with the postage prepaid into the United States mail outlet via an authorized California Department of Corrections and Rehabilitation employee at Ironwood State Prison, in Riverside County, Blythe California, and addressed as follows:

COURT OF APPEAL
STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT
2424 VENTURA STREET
FRESNO, CA. 93721-3004

CRAIG COLLINS
ATTORNEY AT LAW
221 NORTH I STREET
MADERA, CA. 93637

I declare under penalty of perjury by the laws of the State of California that the foregoing is true and correct (pursuant to 28 USCA 1746 (2)).

Date: JANUARY 9, 2012

Signature: 

ULICES AGUILAR
APPELLANT IN PRO SE

PROOF OF SERVICE

Declaration of Service by Mail

I, ULICES AGUILAR, declare that I am over the age of
Eighteen (18) and that I (am/am not) a party to this action. On May 15, 2012,

I deposited a copy of the following document (s):

PETITION FOR WRIT OF HABEAS CORPUS
ORIGINAL PLUS ONE COPY

in a sealed envelope with the postage prepaid into the United States mail outlet via an authorized California Department of Corrections and Rehabilitation employee at Ironwood State Prison, in Riverside County, Blythe California, and addressed as follows:

SUPREME COURT OF CALIFORNIA
350 McALLISTER ST.
SAN FRANCISCO, CA 94102-7303

I declare under penalty of perjury by the laws of the State of California that the foregoing is true and correct (pursuant to 28 USCA 1746 (2)).

Date: May 15, 2012

Signature: _____

ULICES AGUILAR
PETITIONER PRO SE

APPENDIX 8

FILED

SEP 20 2012

CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
BY  DEPUTY CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

ULICES AGUILAR,
PETITIONER,

No.

1:12 CV 1547 JLT (HC)

VS

MATTHEW CATE, SEC. OF THE CDCR,
RESPONDENT,

/

PETITION FOR WRIT OF HABEAS CORPUS

~~ULICES AGUILAR~~

G-48827 / AFB 3-2261

IRONWOOD STATE PRISON

P.O. Box 2199

BLYTHE, CA 92226

IN PRO SE

RECEIVED

SEP 20 2012

CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
BY  DEPUTY CLERK

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PETITION UNDER 28 USC § 2254 FOR WRIT OF
HABEAS CORPUS BY A PERSON IN STATE CUSTODY

(If petitioner is attacking a judgment which imposed a sentence to be served in the future, petitioner must fill in the name of the state where the judgment was entered. If petitioner has a sentence to be served in the future under a federal judgment which he wishes to attack, he should file a motion under 28 U.S.C. § 2255, in the federal court which entered the judgment.)

PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

Instructions—Read Carefully

- (1) This petition must be legibly handwritten or typewritten, and signed by the petitioner under penalty of perjury. Any false statement of a material fact may serve as the basis for prosecution and conviction for perjury. All questions must be answered concisely in the proper space on the form.
- (2) If you have more than 4 grounds for relief, you may attach pages with the remaining grounds; however, the format of the attached pages must be the same as the petition and you must provide only a *brief* statement of facts. No citation to legal authority is required. A brief or memorandum in support of the petition may also be attached; however, the form petition must be complete in itself and may not simply refer to the attachments.
- (3) Upon receipt of a fee of \$5 your petition will be filed if it is in proper order.
- (4) If you do not have the necessary funds for transcripts, counsel, appeal and other costs connected with a petition of this type, you may request permission to proceed *in forma pauperis*, in which event you must execute form AO-240 or other form required by the court, setting forth information establishing your inability to pay the costs. If you wish to proceed *in forma pauperis*, you must have an authorized officer at the penal institution complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution.
- (5) Only judgments entered by one court may be challenged in a single petition. If you seek to challenge judgments entered by different courts either in the same state or in different states, you must file separate petitions as to each court.
- (6) You must include all grounds for relief and all facts supporting such grounds for relief in the petition you file seeking relief from any judgment of conviction.
- (7) When the petition is fully completed, the original and at least two copies must be mailed to the Clerk of the United States District Court whose address is

Clerk, U.S. District Court
2500 Tulare Street, Suite 1501
Fresno, California 93721

- (8) Petitions which do not conform to these instructions will be returned with a notation as to the deficiency.

(Revised 2/15/06)

(1)

AO 241 (Rev. 5/85)

PETITION UNDER 28 USC § 2254 FOR WRIT OF
HABEAS CORPUS BY A PERSON IN STATE CUSTODY

United States District Court		District <u>EASTERN</u>
Name <u>ULICES AGUILAR</u>	Prisoner No. <u>G-48827</u>	Case No.

Place of Confinement
IRONWOOD STATE PRISON
P.O. BOX 2199
BLYTHE, CA 92226

Name of Petitioner (include name under which convicted) ULICES AGUILAR Name of Respondent (authorized person having custody of petitioner) V. MATTHEW CATE, SEC. OF THE CDCR,

The Attorney General of the State of: CALIFORNIA

PETITION

- Name and location of court which entered the judgment of conviction under attack SUPERIOR COURT
OF THE STATE OF CALIFORNIA, COUNTY OF TULARE
- Date of judgment of conviction APRIL 7, 2008
- Length of sentence 40 YEARS TO LIFE
- Nature of offense involved (all counts) PC 187 MURDER IN THE 2ND DEGREE
P.C. 12022.53 GUN ENHANCEMENTS
P.C. 186.22 GANG ENHANCEMENTS

5. What was your plea? (Check one)

(a) Not guilty ☒

(b) Guilty ☐

(c) Nolo contendere ☐

If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:

6. If you pleaded not guilty, what kind of trial did you have? (Check one)

(a) Jury ☒

(b) Judge only ☐

7. Did you testify at the trial?
Yes ☐ No ☒

8. Did you appeal from the judgment of conviction?
Yes ☒ No ☐

AO 241 (Rev. 5/85)

9. If you did appeal, answer the following:

(a) Name of court COURT OF APPEALS OF THE STATE OF CALIFORNIA, FIFTH APPELLATE DISTRICT(b) Result JUDGMENT AFFIRMED(c) Date of result and citation, if known JULY 8, 2010(d) Grounds raised DOUBLE JEOPARDY, JURY MISCONDUCT, INSUFFICIENCY OF EVIDENCE

(e) If you sought further review of the decision on appeal by a higher state court, please answer the following:

(1) Name of court CALIFORNIA SUPREME COURT(2) Result DENIED(3) Date of result and citation, if known OCTOBER 27, 2010(4) Grounds raised DOUBLE JEOPARDY, JURY MISCONDUCT, INSUFFICIENCY OF EVIDENCE

(f) If you filed a petition for certiorari in the United States Supreme Court, please answer the following with respect to each direct appeal:

(1) Name of court _____

(2) Result _____

(3) Date of result and citation, if known _____

(4) Grounds raised _____

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal?

Yes ☒ No ☐

11. If your answer to 10 was "yes," give the following information:

(a) (1) Name of court SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF TULARE(2) Nature of proceeding HABEAS CORPUS(3) Grounds raised DOUBLE JEOPARDY, JURY MISCONDUCT, INSUFFICIENCY OF EVIDENCE, PROSECUTORIAL MISCONDUCT, INEFFECTIVE

AO 241 (Rev. 5/85)

ASSISTANCE OF COUNSEL

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ☐ No ☒(5) Result DENIED(6) Date of result OCTOBER 27, 2011

(b) As to any second petition, application or motion give the same information:

(1) Name of court COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIFTH DISTRICT(2) Name of proceeding HABEAS CORPUS(3) Grounds raised JURY MISCONDUCT, PROSECUTORIAL MISCONDUCT,
INEFFECTIVE ASSISTANCE OF COUNSEL.

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ☐ No ☒(5) Result DENIED WITHOUT PREJUDICE(6) Date of result MARCH 19, 2012

(c) Did you appeal to the highest state court having jurisdiction the result of action taken on any petition, application or motion?

(1) First petition, etc. Yes ☒ No ☐(2) Second petition, etc. Yes ☒ No ☐(d) If you did *not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not:12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the *facts* supporting each ground. If necessary, you may attach pages stating additional grounds and *facts* supporting same.

CAUTION: In order to proceed in the federal court, you must ordinarily first exhaust your available state court remedies as to each ground on which you request action by the federal court. If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.

AO 241 (Rev. 5/85)

For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted your state court remedies with respect to them. However, *you should raise in this petition all available grounds* (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

- (a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.
- (b) Conviction obtained by use of coerced confession.
- (c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.
- (d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.
- (e) Conviction obtained by a violation of the privilege against self-incrimination.
- (f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
- (g) Conviction obtained by a violation of the protection against double jeopardy.
- (h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.
- (i) Denial of effective assistance of counsel.
- (j) Denial of right of appeal.

A. Ground one: SEE ATTACHED PETITION

Supporting FACTS (state *briefly* without citing cases or law): SEE ATTACHED PETITION

B. Ground two: SEE ATTACHED PETITION

Supporting FACTS (state *briefly* without citing cases or law): SEE ATTACHED PETITION

AO 241 (Rev. 5/85)

- (c) At trial CRAIG COLLINS,
221 NORTH "I" ST, MADERA, CA 93637
- (d) At sentencing CRAIG COLLINS
221 NORTH "I" ST, MADERA, CA 93637
- (e) On appeal KIM MALCHESKI
P.O. Box 40105, SAN FRANCISCO, CA 94140
- (f) In any post-conviction proceeding _____
- (g) On appeal from any adverse ruling in a post-conviction proceeding _____

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?

Yes ☐ No ☒

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

Yes ☐ No ☒

(a) If so, give name and location of court which imposed sentence to be served in the future: _____

(b) Give date and length of the above sentence: _____

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?

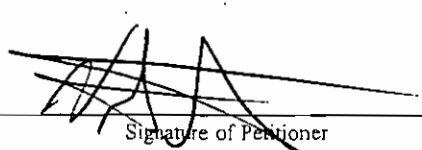
Yes ☐ No ☐

Wherefore, petitioner prays that the Court grant petitioner relief to which he may be entitled in this proceeding.

Signature of Attorney (if any)

I declare under penalty of perjury that the foregoing is true and correct. Executed on

SEPTEMBER 10, 2012
Date


Signature of Petitioner

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

ULICES AGUILAR,
PETITIONER,

VS

VS

MATTHEW CATE, SEC OF THE CDCR,
RESPONDENT,

/

PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW ULICES AGUILAR, PETITIONER HEREIN,
ACTING IN PRO SE, DOES HEREBY PETITION FOR A WRIT OF
HABEAS CORPUS FOLLOWING THE DECISION OF THE CALIFORNIA
SUPREME COURT, DATED AUGUST 29, 2012.

PROCEDURAL HISTORY
ON DIRECT APPEAL

At 149

IN THE PRESENT CASE PETITIONER HAS SHOWN THREE SEPARATE INSTANCES WHERE COURT ORDERS WERE NOT RECEIVED VIA THE USUAL LEGAL MAIL DELIVERY SYSTEM. BECAUSE COURT ORDERS ARE TIME SENSITIVE ANY IRREGULARITIES IN THEIR DELIVERY MAY BE PREJUDICIAL. AN UNTIMELY PETITION THAT RUNS AFOUL OF THE AEDPA'S FILING DEADLINE RISKS PROCEDURAL BAR. IN LIGHT OF THE AFFOREMENTIONED, PETITIONER REQUEST THE COURT CONSIDER THE UNDOE IN FILING BE ATTRIBUTED TO CIRCUMSTANCES BEYOND HIS CONTROL NOTWITHSTANDING THE UNUSAL PROBLEM'S WITH PETITIONER'S LEGAL MAIL, HE HAS EXERCISED DUE DILIGENCE IN ALL INSTANCES. THE PROCEDURAL HISTORY CLEARLY SHOWS HEREIN THAT PETITIONER'S EFFORTS HAVE BEEN REASONABLE.

STATEMENT OF THE CASE

PETITIONER'S FIRST JURY TRIAL BEGAN ON JULY 2, 2007. AND ENDED IN A MISTRIAL WITH PARTIAL JURY VERDICTS ON JULY 16, 2007, THE JURY RETURNED VERDICTS FINDING PETITIONER NOT GUILTY, OF FIRST DEGREE MURDER, AND THE JURY SPECIFICALLY FOUND THE GANG-RELATED SPECIAL CIRCUMSTANCE, THE PERSONAL GUN USE

1 ENHANCEMENT, AND THE CRIMINAL STREET GANG ALLEGATIONS WERE "NOT TRUE"
 2 (3CT 640) ON JANUARY 18, 2008, PETITIONER'S MOTION TO DISMISS THOSE
 3 THREE SPECIAL CIRCUMSTANCES AND ALLEGATIONS WAS DENIED BY THE
 4 TRIAL COURT. (3CT 654)

5
 6 PETITIONER'S SECOND JURY TRIAL BEGAN ON MARCH 24,
 7 2008, AND ENDED WITH THE JURY'S VERDICT ON APRIL 7, 2008.
 8 IN CT 1, THE JURY FOUND PETITIONER GUILTY OF SECOND DEGREE MURDER,
 9 AND FOUND THE GUN USE AND CRIMINAL STREET GANG ALLEGATIONS
 10 TO BE TRUE. (3CT 737)

11
 12 PETITIONER'S CASE HAVING BEEN SUBMITTED TO THE
 13 JURY, HE OVERHEARS AN INMATE IN THE NEXT CELL TALKING
 14 ABOUT HIS GIRLFRIEND'S INVOLVEMENT IN A JURY TRIAL. PETITIONER
 15 DISCOVERS THAT THE GIRLFRIEND IS JUROR #3 IN HIS TRIAL. THE
 16 INMATE, ISAAC ABEL VASQUEZ, TESTIFIED HE LIVED WITH JUROR
 17 #3, AND DISCUSSED PETITIONER'S CASE DURING A PHONE CONVERSATION.

18
 19 DURING TRIAL, JUROR #9'S BIAS AGAINST PETITIONER
 20 CAME OUT ON TWO SEPARATE DAYS - ON MARCH 27, 2008, SHE SENT
 21 A NOTE TO THE COURT ABOUT EVIDENCE SHE HAD SEEN DURING TRIAL
 22 ABOUT A YOUNG MAN NAMED ALEX SANCHEZ, AS IT TURNS OUT, SHE
 23 LIVED IN THE SAME HOUSE AS HE DID, AS SHE WAS "DATING" HIS
 24 BROTHER. (13RT 1471-1475.) ON THE NEXT COURT DATE OF APRIL
 25 1, 2008, DEFENSE COUNSEL REPRESENTED TO THE COURT THAT
 26 PETITIONER'S BROTHER LUIS AGUILAR HEARD JUROR #9 LISTENING
 27 TO NORTEÑO RAP MUSIC. THE MUSIC CONTAINED DEROGATORY
 28 REFERENCES TOWARD SUREÑO GANG MEMBERS. (14 RT 1479.)

PETITIONER'S MOTION FOR NEW TRIAL BECAUSE OF JURY MISCONDUCT
By JUROR #3 AND JUROR #9 WAS DENIED ON JANUARY
9, 2009. (4CT 832.)

DEFENSE COUNSEL WAS INEFFECTIVE WHEN HE FAILED TO
SHOW CAUSE FOR MISTRIAL AND/OR DISCHARGE OF JUROR
#3 AND #9. JUROR MISCONDUCT OF JUROR #3 FOR VIOLATING
THE SEPARATION ADMONITION, AND FOR CONCEALING HER BIAS
FROM VOIR DIRE TO VERDICT.

PETITIONER WAS ALLEGED TO BE A SUREÑO GANG
MEMBER AND WAS CONVICTED OF ALLEGEDLY COMMITTING A
FELONY FOR THE BENEFIT OF THE GANG, AND A GUN USE
ENHANCEMENT. (3CT 737, 835.)

THE EVIDENCE IS INSUFFICIENT TO ESTABLISH THE
REQUIRED LEGAL ELEMENTS OF THE GANG ENHANCEMENTS.

ARGUMENT

1.) TRIAL COURT ERRORS VIOLATED
PETITIONER'S RIGHT TO A FAIR
TRIAL AND DUE PROCESS.

(A) TRIAL COURT ERRED WHEN IT
ALLOWED PREVIOUSLY ADJUDICATED

GANG AND GUN ENHANCEMENTS
TO BE RETRIED.

THE TRIAL COURT COMMITTED FEDERAL CONSTITUTIONAL ERROR BY DENYING PETITIONER'S MOTION TO DISMISS THOSE ENHANCEMENTS WHEN THE DOCTRINES OF COLLATERAL AND DIRECT ESTOPPEL, ALONG WITH THE DOUBLE JEOPARDY CLAUSES OF THE STATE AND FEDERAL CONSTITUTION PRECLUDED THE RETRIAL OF THOSE ENHANCEMENTS AFTER THEY WERE FOUND TO BE NOT TRUE BY THE FIRST JURY. (3 CT 640.)

COLLATERAL ESTOPPEL IS A WELL ESTABLISHED LEGAL DOCTRINE THAT WAS BINDING ON THE TRIAL COURT UNDER CALIFORNIA LAW, AND THE DOCTRINE OF DIRECT ESTOPPEL WAS AVAILABLE TO THE TRIAL COURT UNDER FEDERAL LAW. PEOPLE V. DAVIS (1995) 10 CAL. 4TH 463, 515; U.S. V. BATLIN (CA 7, 1992) 977 F. 2d 270, 276-78. THE COLLATERAL ESTOPPEL DOCTRINE SERVES TO PROMOTE JUDICIAL ECONOMY BY MINIMIZING REPETITIVE LITIGATION; BY PREVENTING INCONSISTENT JUDGMENTS THAT UNDERMINE THE INTEGRITY OF THE JUDICIAL SYSTEM; AND BY PREVENTING A PERSON FROM BEING HARASSED BY VEXATIOUS LITIGATION. PEOPLE V. VOGEL, 148 CAL. APP. 4TH 131, 136 (2007.)

THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT PRECLUDES THE GOVERNMENT FROM LITIGATING ANY ISSUE THAT WAS NECESSARILY DECIDED BY THE JURY'S ACQUITTAL IN A PRIOR TRIAL. YEAGER V. U.S., U.S., 129 S. CT. 2360, 2365-67 (2009).

1 THE TRIAL COURT INVADED THE JURY'S PROVINCE BY ALLOW-
 2 ING A SECOND JURY TO RECONSIDER THE FIRST JURY'S CLEAR
 3 AND UNEQUIVOCAL FINDING ON THOSE TWO ENHANCEMENTS. PEOPLE
 4 V. GUERRA, 176 CAL. APP. 4TH 933 (2009). SECTION 1161 OF THE PENAL
 5 CODE CLEARLY STATES THAT THE "COURT CANNOT REQUIRE THE JURY
 6 TO RECONSIDER..." A VERDICT OF ACQUITTAL.

7
 8
 9 (B.) TRIAL COURT ERRED WHEN IT
 10 FAILED TO DISCHARGE JUROR(S) #3
 11 AND #9 FOR JUROR MISCONDUCT.

12
 13 JUROR #3 CONCEALED HER BIAS DURING VOIR DIRE, AND
 14 SUBSEQUENTLY VIOLATED THE SEPARATION ADMONITION ALSO. THESE
 15 FACTS WERE DISCOVERED AFTER THE FACT ON A HEARING FOR NEW
 16 TRIAL. PETITIONER WAS PREJUDICED WHEN HE WAS DENIED
 17 HIS RIGHT TO TRIAL BY AN IMPARTIAL JURY.

18
 19 JUROR #9 CONCEALED HER BIAS DURING VOIR DIRE.
 20 SHE WAS DATING AND LIVING WITH A NORTEÑO GANG MEMBER,
 21 SHE HAS A BIG RED STAR TATTOO ON HER NECK. IT WAS
 22 ESTABLISHED IN COURT THAT NORTEÑO GANGS IDENTIFY WITH
 23 THE COLOR RED AND STARS. IT'S CLEAR JUROR'S TIES LIE WITH
 24 NORTEÑO GANGS, THUS MAKING HER BIASED TOWARDS PETITIONER. JUROR
 25 EXPOSED A GLIMPSE OF HER BIAS DURING QUESTIONING BY THE
 26 COURT ON HER ABILITY TO BE FAIR IN LIGHT OF MR SANCHEZ'S
 27 GANG AFFILIATION, SHE SAID, "MAYBE A LITTLE BIT."

JUROR WHO CONCEAL RELEVANT FACTS OR GIVES FALSE ANSWERS DURING VOTER DERE UNDERMINES THE JURY SELECTION PROCESS AND COMMITS MISCONDUCT. CONCEALMENT OF BIAS DEPRIVED PETITIONER OF HIS CONSTITUTIONAL RIGHT TO TRIAL BY IMPARTIAL JURY AND DUE PROCESS. SEE ROSALES-LOPEZ V. U.S. (1981) 454 U.S. 182, 188; McDONOUGH POWER EQUIP. INC. V. GREENWOOD (1984) 464 U.S. 548, 554. THE TRIAL COURT JUDGE HAS A DUTY TO ENSURE THAT THE ACCUSED IS AFFORDED A FAIR TRIAL. IN THE EXERCISE OF HIS DISCRETION THE ROLE OF THE TRIAL COURT JUDGE IS MORE THAN A MODERATOR OR UMPIRE; HIS RESPONSIBILITY IS TO PROVIDE A FAIR TRIAL TO ALL PARTIES. SEE U.S. V. PARKER, 241 F.3d 1114 (CA 9, 2001).

(C) TRIAL COURT ERRED IN ALLOWING THE INSUFFICIENT EVIDENCE PRESENTED AT TRIAL, THUS VIOLATING PETITIONER'S RIGHT TO DUE PROCESS.

THE EVIDENCE RELIED UPON WAS INSUFFICIENT TO SUPPORT THE INFERENCE THAT THE CRIME WAS COMMITTED WITH THE SPECIFIC INTENT TO FURTHER CRIMINAL ACTIVITY OF GANG MEMBERS. SEE GARCIA V. CAREY, 395 F.3d 1049 (CA 9, 2005); BRISCENO V. SCRIBNER, 55 F.3d 1069 (CA 9, 2009). THE DUE PROCESS CLAUSE DOES NOT PERMIT CRIMINAL CONVICTIONS TO STAND WITHOUT SUBSTANTIAL EVIDENCE. SEE JACKSON V. VIRGINIA (1979) 443 U.S. 307, 319.

2.) JUROR MISCONDUCT VIOLATED
PETITIONER'S RIGHT TO AN
IMPARTIAL JURY, A FAIR TRIAL,
AND DUE PROCESS.

(A) JUROR #3 CONCEALED HER BIAS,
AND VIOLATED THE SEPARATION
ADMONITION OF THE COURT.

JUROR #3 INTENTIONALLY CONCEALED HER BIAS AGAINST
PETITIONER DURING VOTR DIRE EXAMINATION. DURING JURY SELECTION
PROSPECTIVE JUROR'S WERE QUESTIONED CONCERNING THEIR FEELINGS
ON GANGS. JUROR #3 WAS DATING A MAN AFFILIATED WITH
A NORTEÑO GANG. SHE WAS IN FACT PREGNANT WITH HIS
CHILD DURING TRIAL.

PETITIONER'S CASE WAS SUBMITTED TO THE JURY ON
OR ABOUT APRIL 3, 2008, THAT NIGHT PETITIONER OVERHEARD
AN INMATE IN THE ADJACENT CELL NEXT TO HIM TALKING
ABOUT HIS CASE ABEL VASQUEZ SAID, JUROR #3 WAS HIS
GIRLFRIEND, AND SHE ASKED WHAT TO DO IN TERMS OF
THE VERDICT.

DURING MOTION FOR NEW TRIAL, JANUARY 9, 2009
ABEL VASQUEZ TESTIFIED HE KNEW JUROR #3 WAS IN PETITIONER'S
JURY, THAT HE LIVED WITH HER, HE HAD A TELEPHONE
CONVERSATION WITH HER WHILE HE WAS INCARCERATED IN THE
TULARE COUNTY JAIL, DURING THE CONVERSATION SHE DISCUSSED

1 THE CASE AND ASKED WHAT SHE SHOULD DO IN THE VOTING,
 2 SHE SAID THE JURY WERE ALREADY SAYING ONE THING, HE
 3 TOLD HER TO GO WITH THE FLOW, WHEN HE TOLD HER HIS
 4 OPINION SHE KNEW WHAT HE MEANT. (20 RT 1908-11).

5
 6 GIVEN IN THIS CASE THE INFLAMMATORY NATURE OF
 7 GANG EVIDENCE, JUROR #3'S CONCEALMENT OF RELEVANT
 8 AND IMPORTANT INFORMATION ON VOIR DIRE DEPRIVED
 9 PETITIONER OF HIS CONSTITUTIONAL RIGHT TO A TRIAL BY AN
 10 IMPARTIAL JURY UNDER THE SIXTH AND FOURTEENTH AMENDMENTS.
 11 SEE ROSALES-LOPEZ V. U.S. (1981) 451 U.S. 182, 188. PETITIONER'S
 12 RIGHT TO DUE PROCESS AND A FAIR TRIAL. SEE McDONOUGH
 13 POWER EQUIP. INC. V. GREENWOOD (1984) 464 U.S. 548, 554.

14
 15 (B.) JUROR #9 CONCEALED HER
 16 BIAS DURING VOIR DIRE.

17
 18 JUROR #9 CONCEALED HER BIAS DURING VOIR DIRE.
 19 HER BIAS WAS EXPRESSED ON TWO SEPARATE OCCASIONS. ON
 20 MARCH 27, 2008, SHE SENT A NOTE TO THE COURT ABOUT EVIDENCE
 21 SHE SAW DURING TRIAL ABOUT A MAN NAMED ALEX SANCHEZ,
 22 SHE WAS DATING SANCHEZ'S BROTHER. SANCHEZ WAS A NORTEÑO
 23 GANG MEMBER. IN RESPONSE TO THE COURT'S QUESTION
 24 WHETHER SANCHEZ'S GANG AFFILIATION WOULD AFFECT HER
 25 ABILITY TO BE FAIR, SHE SAID, "MAYBE A LITTLE BIT."

26
 27 ON APRIL 1, 2008, COUNSEL PRESENTED TO THE COURT
 28 THAT PETITIONER'S BROTHER, LUIS AGUILAR, HEARD JUROR #9

1 LISTENING TO NORTEÑO RAP MUSIC. IN THE HALLWAY OF THE COURT-
 2 HOUSE, THE MUSIC CONTAINED DERAGATORY REFERENCES TO SUREÑOS.

3
 4 JUROR #9 HAS FAMILY MEMBERS THAT ARE NORTEÑO
 5 AFFILIATED GANG MEMBERS, SHE HAS A BIG RED STAR TATTOO
 6 ON HER NECK, IT WAS ESTABLISHED AT TRIAL THAT NORTEÑO GANG
 7 MEMBERS IDENTIFY WITH THE COLOR RED AND STARS. SHE WAS
 8 DATING AND LIVING WITH A NORTEÑO AFFILIATED GANG
 9 MEMBER'S BROTHER. IN SIMPLER TERMS, IT IS NO STRETCH
 10 OF THE IMAGINATION TO SEE THAT THE COMBINATION OF
 11 THESE FACTS WOULD MAKE JUROR #9 BIASED TOWARDS
 12 PETITIONER.

13
 14 IMPARTIALITY OF PROSPECTIVE JURORS IS EXPLORED
 15 AT PRELIMINARY PROCEEDING OF VOIR DIRE. VOIR DIRE PLAYS
 16 A CRITICAL FUNCTION IN ASSURING CRIMINAL DEFENDANT
 17 HIS SIXTH AMENDMENT RIGHT TO AN IMPARTIAL JURY
 18 WILL BE HONORED. LACK OF ADEQUATE VOIR DIRE IMPAIRS
 19 DEFENDANT'S RIGHT TO EXERCISE PEREMPTORY CHALLENGES. SEE
 20 ROSALES-LOPEZ, SUPRA.

21
 22
 23 3) PETITIONER WAS DEPRIVED
 24 EFFECTIVE ASSISTANCE OF COUNSEL,
 25 AND DENIED DUE PROCESS.

26
 27 A) COUNSEL'S FAILURE TO CHALLENGE
 28 FOR CAUSE / DISCHARGE JUROR #3

PRIOR TO CONTINUATION OF COURT PROCEEDINGS FOR THE DAY, PETITIONER TRIED TO INFORM COUNSEL THAT JUROR #3 HAD COMMUNICATED WITH SOMEONE IN THE ADJACENT CELL TO HER. SHE HAD SOUGHT ADVICE ON HOW SHE SHOULD VOTE IN PETITIONER'S CASE. HOWEVER, COUNSEL WOULD HEAR NONE OF IT, HE CASUALLY DISMISSED PETITIONER'S EFFORTS TO SPEAK TO HIM. COUNSEL WAS CONCERNED WITH THE JURY'S IMPENDING VERDICT.

(B) COUNSEL FAILED TO STRIKE JUROR #4 FOR CAUSE.

JUROR #4 A 17 YEAR VETERAN AS A CORRECTIONAL OFFICER HAD EXPRESSED DOUBTS AS TO HIS ABILITY TO BE FAIR DURING VOIR DIRE. COUNSEL'S LACK OF RESPONSE OR FOLLOW-UP QUESTIONS TO DETERMINE WHETHER JUROR WOULD BE ABLE TO RENDER A FAIR AND IMPARTIAL VERDICT PREJUDICED PETITIONER. COUNSEL FAILED TO PURSUE THE MOST RUDIMENTARY INQUIRY OF JUROR TO INQUIRE FURTHER INTO STATEMENT THAT EXPRESSED DOUBTS ON ABILITY TO BE FAIR. SEE STRICKLAND V. WASHINGTON, 466 U.S. 668, 104 S.Ct. 2052 (1984).

AMONG MOST ESSENTIAL RESPONSIBILITIES OF DEFENSE COUNSEL IS TO PROTECT CLIENT'S CONSTITUTIONAL RIGHT TO FAIR AND IMPARTIAL JURY BY USING VOIR DIRE TO IDENTIFY AND FERRET OUT BIASED JURORS. THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION GUARANTEE THE RIGHT TO BE TRIED BY IMPARTIAL AND UNBIASED JURORS. SEE MORGAN V. ILLINOIS, 504 U.S. 719, 112 S.Ct. 2222 (1992).

(C) COUNSEL'S FAILURE TO CHALLENGE
FOR CAUSE: DISCHARGE JUROR #9

JUROR #9 EXPRESSED BIAS DURING VOTR DIRE IN RESPONSE
TO THE COURT'S QUESTION OF WHETHER GANG AFFILIATION WAS GOING
TO AFFECT HER ABILITY TO BE FAIR, SHE STATED, "MAYBE A LITTLE BIT."
COUNSEL HIMSELF TOLD THE COURT THAT HE PERSONALLY NOTICED A "BIG
RED STAR" TATTOOED ON HER NECK. IT BEING ESTABLISHED AT
TRIAL THAT NORTEÑOS IN GANGS IDENTIFY WITH STARS AND THE
COLOR RED, IT'S REASONABLE TO INFER THAT THE JUROR WOULD
POTENTIALLY BE BIASED TOWARDS PETITIONER.

COUNSEL'S FAILURE TO DETERMINE IF JUROR WOULD BE
ABLE TO BE FAIR AND IMPARTIAL IN THIS CASE PREJUDICED
PETITIONER. COUNSEL'S EFFORTS RENDERED HIS TRIAL FUNDAMENTALLY
UNFAIR. BUT FOR COUNSEL'S INEFFICIENCY A RESULT MORE FAVORABLE
TO PETITIONER WOULD HAVE RESULTED. STRICKLAND, SUPRA, 466 U.S.
668, 104 S. CT. 2052

4.) EVIDENCE WAS INSUFFICIENT TO
SUPPORT PETITIONER'S CONVICTION
THUSLY VIOLATING HIS DUE PROCESS.

PROSECUTION'S GANG EXPERT'S TESTIMONY WAS HIGHLY
SPECULATIVE AND CONSISTED OF HIS SUBJECTIVE PERSONAL
OPINIONS WITH NO EVIDENCE OF FACTS IN SUPPORT THEREOF.
THE EVIDENCE INTRODUCED WAS INSUFFICIENT TO SUPPORT

1 INFERENCE THAT CRIME WAS COMMITTED) WITH SPECIFIC INTENT TO FURTHER
2 CRIMINAL ACTIVITY BY GANG. SEE GARCIA V. CAREY, 395 F.3d
3 1099 (CA 9 2005); BRISCENO V. SKEBNER, 55 F.3d 1069 (CA 9 2009).

4
5 DUE PROCESS CLAUSE OF THE CONSTITUTION DOES NOT
6 PERMIT CRIMINAL CONVICTIONS TO STAND WITHOUT SUBSTANTIAL
7 EVIDENCE. SEE JACKSON V. VIRGINIA (1979) 443 U.S. 307, 319.

8
9
10 5.) CUMULATIVE IMPACT OF ERRORS
11 PREJUDICED PETITIONER'S RIGHT
12 TO A FAIR TRIAL AND DUE PROCESS.

13
14 TRIAL COURT ERRORS

15
16 THE TRIAL COURT ERRED IN ALLOWING PREVIOUSLY ADJUDI-
17 CATED GANG AND GUN ENHANCEMENTS TO BE RETRIED. PETITIONER
18 IS PROTECTED UNDER THE DOUBLE JEOPARDY CLAUSE OF THE CONSTITU-
19 TION'S FIFTH AMENDMENT. SEE YEAGER V. U.S. (2009) — U.S. —,
20 129 S.Ct. 2360, 2365--2367.

21
22 THE TRIAL COURT ERRED WHEN IT FAILED TO DISMISS
23 JUROR(S) #3 AND/OR #9 FOR CAUSE. TRIAL COURT HAS THE RESPONS-
24 IBILITY AND AUTHORITY EITHER SUA SPONTE OR UPON COUNSEL'S
25 MOTION, TO DISMISS FOR CAUSE. SEE FRAZIER V. U.S., 335 U.S.
26 497, 511, 69 S.Ct. 201 (1948).

27
28 THE SUPREME COURT HAS CLEARLY ESTABLISHED THAT THE

1 COMBINED EFFECT OF MULTIPLE TRIAL COURT ERRORS VIOLATES DUE
 2 PROCESS WHERE IT RENDERS THE RESULTING CRIMINAL TRIAL
 3 FUNDAMENTALLY UNFAIR. CHAMBERS, 410 U.S. AT 298, 302-03, 93 S. CT.
 4 1038 (COMBINED EFFECT OF INDIVIDUAL ERRORS "DENIED [CHAMBERS]
 5 A TRIAL IN ACCORD WITH TRADITIONAL AND FUNDAMENTAL
 6 STANDARDS OF DUE PROCESS" AND "DEPRIVED CHAMBERS OF A
 7 FAIR TRIAL"). THE CUMULATIVE EFFECT OF MULTIPLE ERRORS CAN
 8 VIOLATE DUE PROCESS EVEN WHERE NO SINGLE ERROR RISES
 9 TO THE LEVEL OF A CONSTITUTIONAL VIOLATION OR WOULD
 10 INDEPENDENTLY WARRANT REVERSAL. CHAMBERS, 410 U.S. AT 290
 11 N. 3, 93 S. CT. 1038. SEE PARIE V. RUNNELS, 505 F.3d 922, 927
 12 (CA 9, 2007) (QUOTING THEREIN CHAMBERS V. MISSISSIPPI,
 13 410 U.S. 284, 93 S. CT. 1038 (1973)).

14 JUROR MISCONDUCT

15
 16
 17
 18 JUROR #3 CONCEALED HER BIAS DURING VOIR DIRE.
 19 JURORS WERE QUESTIONED ABOUT THEIR FEELINGS ON GANGS. THE
 20 INFLAMMATORY NATURE OF THE GANG EVIDENCE WAS PARAMOUNT IN
 21 THIS CASE. JUROR #3'S BOYFRIEND IS AFFILIATED WITH RIVAL
 22 NORTEÑO GANG. SHE WAS ACTUALLY PREGNANT WITH HIS CHILD
 23 DURING PETITIONER'S TRIAL. JUROR #3 CONCEALED RELEVANT AND
 24 IMPORTANT INFORMATION. JUROR #3 ALSO BROKE THE SEPARATION
 25 ADMONITION WHEN SHE DISCUSSED PETITIONER'S CASE WITH HER
 26 BOYFRIEND. SHE SPECIFICALLY ASKED HOW SHE SHOULD VOTE? THESE
 27 FACTS WERE DISCOVERED AFTER THE JURY'S VERDICT IN A HEARING
 28 FOR NEW TRIAL, JANUARY 9, 2009. JUROR #3'S BOYFRIEND TESTIFIED

1 TO ALL THE FACTS STATED HEREIN.

2
3 JUROR #9 CONCEALED HER BIAS DURING VOIR DIRE.
4 JUROR #9 WAS DATING A RIVAL NORTEÑO GANG MEMBERS BROTHER.
5 WHEN QUESTIONED WHETHER THAT FACT WOULD AFFECT HER
6 ABILITY TO BE FAIR, SHE STATED, "MAYBE A LITTLE BIT."
7 JUROR #9'S RELATIONSHIP WITH A NORTEÑO GANG MEMBERS
8 BROTHER, HER TATTOO OF A BIG RED STAR ON HER NECK MADE
9 HER SYMPATHETIC TO NORTEÑOS AND BIASED TOWARDS PETITIONER.

10
11 PETITIONER WAS PREJUDICED BY THE CONCEALMENT
12 OF RELEVANT AND IMPORTANT INFORMATION BY JUROR #9.
13 PETITIONER WAS PREJUDICED BY THE CONCEALMENT OF BIAS
14 BY JUROR #3. PETITIONER WAS DEPRIVED A TRIAL
15 BY AN IMPARTIAL JURY, AND DENIED DUE PROCESS PROTECTED
16 BY THE SIXTH AND FOURTEENTH AMENDMENTS OF THE
17 CONSTITUTION. SEE ROSALES-LOPEZ V. U.S. (1981) 454 U.S.
18 182, 188; MCDONOUGH POWER EQUIP. INC. V. GREENWOOD (1984)
19 464 U.S. 548, 554.

20 21 22 INEFFECTIVE ASSISTANCE OF COUNSEL

23
24 DEFENSE COUNSEL WAS INEFFECTIVE WHEN HE REFUSED TO
25 ACCEPT PETITIONER'S INFORMATION OF JUROR #3'S COMMUNICATION
26 WITH HER BOYFRIEND DISCUSSING HIS CASE. PETITIONER ATTEMPT-
27 ED TO INFORM COUNSEL UPON ENTERING THE COURTROOM AND
28 PRIOR TO COMMENCEMENT OF PROCEEDINGS FOR THAT DAY.

1 JANUARY 9, 2009, ON MOTION FOR NEW TRIAL IT WAS DISCOVERED
 2 THAT JUROR #3 CONCEALED RELEVANT FACTS AND IMPORTANT
 3 INFORMATION. TESTIMONY OF JUROR'S BOYFRIEND TO EXTENT
 4 OF CONVERSATION AND SPECIFICS DISCUSSED WAS ESTABLISHED.

5
 6 DEFENSE COUNSEL WAS INEFFECTIVE WHEN HE FAILED TO
 7 STRIKE FOR CAUSE JUROR #4. JUROR IS A 17-YEAR VETERAN AS A
 8 CORRECTIONAL OFFICER WHO EXPRESSED DOUBTS IN STATEMENTS
 9 MADE DURING VOIR DIRE. COUNSEL FAILED TO ASK FOLLOW-UP
 10 QUESTIONS TO DETERMINE WHETHER JUROR WOULD BE ABLE TO
 11 RENDER A FAIR AND IMPARTIAL VERDICT. COUNSEL FAILED TO
 12 CONDUCT THE MOST RUDIMENTARY INQUIRY OF JUROR'S STATEMENTS
 13 FOR CLARIFICATION.

14
 15 DEFENSE COUNSEL WAS INEFFECTIVE WHEN HE FAILED
 16 TO MOVE FOR DISCHARGE OF JUROR #9. THE JUROR EXPRESSED
 17 BIAS UNDER QUESTIONING BY THE COURT. QUESTION OF WHETHER
 18 GANG AFFILIATION WAS GOING TO AFFECT HER ABILITY TO BE
 19 FAIR, SHE STATED, "MAYBE A LITTLE BIT." OTHER RELEVANT
 20 EVIDENCE PRESENTED BY COUNSEL HIMSELF WAS SUFFICIENT TO
 21 CHALLENGE FOR CAUSE. THERE APPEARS TO BE NO REASONABLE
 22 EFFORT BY COUNSEL TO HAVE JUROR #9 DISCHARGED.

23
 24 UNDER STRICKLAND V. WASHINGTON, 466 U.S. 668, 687,
 25 104 S. CT. 2052 (1984), PETITIONER HAS STATISFIED THE FINDING
 26 OF INEFFECTIVE ASSISTANCE OF COUNSEL, COUNSEL'S PERFORMANCE
 27 WAS OBJECTIVELY UNREASONABLE UNDER THE SIXTH AMENDMENT,
 28 AND COUNSEL'S DEFECTIVE PERFORMANCE PREJUDICED PETITIONER.

INSUFFICIENT EVIDENCE

THE EVIDENCE RELIED UPON AT TRIAL WAS INSUFFICIENT TO SUPPORT PETITIONER'S CONVICTION. GANG EXPERT TESTIMONY (IF PROSECUTION WAS SPECULATIVE AND UNSUPPORTED) BY FACTUAL EVIDENCE.

PETITIONER HAS A CONSTITUTIONAL RIGHT TO DUE PROCESS PROTECTED BY THE FOURTEENTH AMENDMENT. IN THAT RIGHT, CRIMINAL CONVICTIONS CANNOT STAND WITHOUT SUBSTANTIAL EVIDENCE. SEE JACKSON V. VIRGINIA (1979) 443 U.S. 307, 319.

CUMULATIVE ERROR

FOR THE REASONS ILLUSTRATED ABOVE, PETITIONER WAS PREJUDICED BY THE ERRORS BOTH SEPARATELY AND CUMULATIVELY. SEE U.S. V. BERRY, 627 F.2d 193 (CA.9. 1980). THE COURT THERE FOLLOWED THE THREE-STEP ANALYSIS OUTLINED IN UNITED STATES V. ROBERTS, 618 F.2d 530 (CA.9. 1980). QUESTIONS ADDRESSED: (1) DID ANY ERROR OCCUR? (2) WERE THE ISSUES PRESERVED FOR APPEAL? (3) WAS THE DEFENDANT PREJUDICED? IF ALL ARE ANSWERED AFFIRMATIVELY, REVERSAL REQUIRED. U.S. V. BERRY, SUPRA, 627 F.2d AT 196-197.

IN SOME CASES, TRIAL ERRORS EXAMINED IN ISOLATION ARE NOT NECESSARILY PREJUDICIAL, HOWEVER, THE CUMULATIVE EFFECT OF ERRORS MAY PREJUDICE A DEFENDANT.

1 SEE U.S. V. GREEN, 648 F.2d 587 (CA 9, 1981). A SOLITARY
 2 ERROR MAY NOT BE SUFFICIENT TO WARRANT REVERSAL, THE
 3 EFFECT OF MULTIPLE ERRORS HELD PREJUDICIAL. SEE U.S.
 4 V. FREDERICK, 78 F.3d 1370 (CA 9, 1996). WHERE, THERE
 5 ARE A NUMBER OF ERRORS, AN "ISSUE-BY-ISSUE
 6 HARMLESS ERROR REVIEW" MAY BE LESS EFFECTIVE THAN
 7 AN OVERALL ANALYSIS OF THE CUMULATIVE EFFECT FOR
 8 PREJUDICE. SEE U.S. V. WALLACE, 848 F.2d 1464 (CA 9, 1988).

9
 10 UNDER THE PRINCIPLES OF DUE PROCESS,
 11 CUMULATIVE ERROR WARRANTS HABEAS RELIEF WHERE
 12 ERRORS "SO INFECTED THE TRIAL WITH UNEAIRNESS AS
 13 TO MAKE THE RESULTING CONVICTION A DENIAL OF DUE
 14 PROCESS." DONNELLY V. DECHRISTOFORD, 416 U.S. 637, 643,
 15 94 S. CT. 1868 (1974). "INFECTION" OCCURS WHERE (COMBINED)
 16 EFFECT OF ERRORS HAD A "SUBSTANTIAL AND INJURIOUS
 17 EFFECT OR INFLUENCE ON THE JURY'S VERDICT." BRECHT
 18 V. ABRAHAMSON, 507 U.S. 619, 637, 113 S. CT. 1710 (1993); SEE
 19 ALSO THOMAS V. HUBBARD, 273 F.3d 1164, 1179-81 (CA 9, 2002) (NOTING
 20 SIMILARITY BETWEEN DONNELLY AND BRECHT STANDARDS
 21 AND CONCLUDING THAT "A DONNELLY VIOLATION NECESSARILY
 22 MEETS THE REQUIREMENTS OF BRECHT"). (COMBINED) EFFECT OF
 23 INDIVIDUALLY HARMLESS ERRORS RENDERS CRIMINAL DEFENSE
 24 "FAR LESS PERSUASIVE THAN IT MIGHT [OTHERWISE] HAVE
 25 BEEN." RESULTING CONVICTION VIOLATES DUE PROCESS. SEE
 26 CHAMBERS, 410 U.S. AT 294, 307-03, 93 S. CT. 1038; PARLE
 27 V. RUNNELS, 505 F.3d 922, 927 (CA 9, 2007) (CASES
 28 CITED THEREIN).

1 VERIFICATION

2
3 I, ULICES AGUILAR, STATE:

4
5 I AM THE PETITIONER IN THIS ACTION. I
6 HAVE READ THE FOREGOING WRIT OF HABEAS CORPUS AND
7 THE FACTS STATED THEREIN ARE TRUE OF MY OWN KNOWLEDGE,
8 EXCEPT AS TO MATTERS THAT ARE THEREIN STATED ON MY
9 OWN INFORMATION AND BELIEF, AND AS TO THOSE MATTERS
10 I BELIEVE THEM TO BE TRUE.

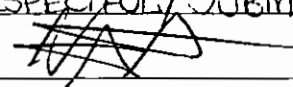
11
12 I DECLARE UNDER PENALTY OF PERJURY THAT THE
13 FOREGOING IS TRUE AND CORRECT AND THAT THIS DECLARA-
14 TION WAS EXECUTED AT BLYTHE, CALIFORNIA ON
15 SEPTEMBER 10, 2012.

16
17
18 CONCLUSION

19
20 FOR ABOVE STATED REASONS PETITIONER'S
21 WRIT FOR HABEAS CORPUS RELIEF SHOULD BE
22 GRANTED

23
24 DATED: 9-10-12

25 RESPECTFULLY SUBMITTED,

26 
27 ULICES AGUILAR,
28 IN PRO SE

EXHIBITS

EXHIBIT “B”

EXHIBIT “B”

**CRAIG COLLINS
ATTORNEY AT LAW**

221 North I Street
Madera, CA 93637
(559) 674-4696
Fax: (559) 674-9631

To: Court of Appeal-Fifth Appellate District
From: Craig Collins
Attorney at Law
Re: *In re Ulices Aguilar on Habeas Corpus*
Case No. F063652

November 21, 2011

Dear Court:

This is an informal response to the issue of my representation of Mr. Aguilar and attached is a declaration regarding the same.

Issue 1.

Mr. Aguilar alleges I was ineffective for "...failing to move to discharge that juror."

On voir dire, Juror #9 indicated that she had family member(s) that were involved in gangs. I and Mr. Aguilar discussed that we felt that the juror's gang involved family member(s) were likely in the Norteno gang. Mr. Aguilar was said to be part of the rival Sureno gang. The actual shooter, as well as the victim in this case, were Nortenos. This was defense's theory of the case. The prosecution claimed the shooter to be a Norteno turned Sureno. I asked Mr. Aguilar if he felt that since juror #9 had these gang ties, would she be more apt to acquit, as the reputation of gangs is to stay out of prosecution or court proceedings. In other words, I asked if this juror would simply decline to convict based on our knowledge of gang culture. Mr. Aguilar and I discussed this, and we decided to leave her on the panel at that point as a strategic decision.

In the middle of trial, this same juror advised the court that she knew a Norteno gang member who was an ancillary subject in the people's prosecution of the alleged gang enhancement. The court inquired as to the effect of this relationship on her ability to stand as a juror in the case. I asked the judge twice on the record if I could ask her questions myself. The first time I was ignored, the second time Judge Hicks asked me to approach. I advised I wanted to ask questions, Judge Hicks responded that she could be fair and he would ask her the questions again. Based on this refusal and the court's implication, as well as the answers of the juror, I felt that a motion to dismiss this juror was futile, yet important to preserve the issue in my motion for a new trial. (And appeal)

This is also true in regards to the tattoo and the supposed gang music overheard in the hallway of the courthouse. I thought that the tattoo and the music should be brought to the court's attention, but I felt I did not have enough evidence to support this claim. Moreover, I was told initially by Luis Aguilar that he did not want to testify regarding this. It was clear that Judge Hicks saw no merit to this as I brought it to his attention. Upon the motion for a new trial, I declared under penalty of perjury that I had information that the juror was playing gang music in the hallway. The motion was denied and further testimony was not required from the judge.

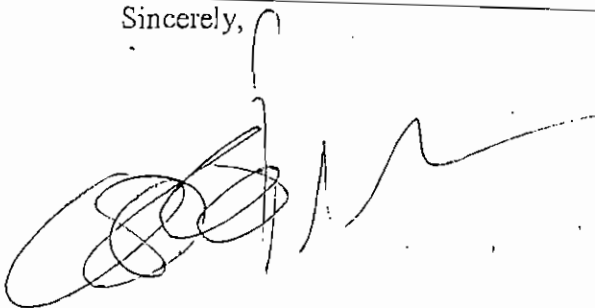
Issue 2

Mr. Aguilar further contends I was ineffective for not laying a proper foundation in terms of a timeline regarding the relationship of Abel Vasquez and juror #3 regarding Mr. Vasquez's gang ties. I alleged in my motion for a new trial that juror #3 sought advice from her boyfriend Abel Vasquez (who was incarcerated in adjacent cell of Mr. Aguilar) on what verdict to vote. At the motion, Mr. Vasquez authenticated photos of him and juror #3 wearing red clothing. Moreover, I was established that Mr. Vasquez was living in a cell adjacent to Mr. Aguilar at the time of deliberation and was asked by juror #3 (his girlfriend) whether or not to vote guilty or not guilty. I believe Vasquez also testified regarding his gang ties (Norteno). There was no evidence by the people that Vasquez was not a Norteno during the trial or otherwise. Without the transcript, the details can be difficult to recall, but I was satisfied that the specific issues regarding juror misconduct were presented the day Mr. Vasquez testified.

* It should be noted that I petitioned the court to disclose juror #3's contact information to further pursue these issues, but this was denied and I was ordered to have no contact with the juror by Judge Hicks.

Please let me know if this Court requires any additional information or clarification in this matter.

Sincerely,

A handwritten signature in black ink, appearing to read 'Craig Collins', with a stylized flourish extending to the right.

Craig Collins

DECLARATION

I, CRAIG COLLINS, do hereby declare:

1. I was the trial attorney of record for Petitioner Ulices Aguilar in the present case F063652.
2. The decision to initially keep juror #9 was a strategic decision that was discussed beforehand with Mr. Aguilar.
3. During the trial, I was not allowed to ask juror #9 regarding her knowledge of a gang member involved in the People's case.
4. Because of this, and the answers juror #9 provided, I did not feel a motion to remove the juror would be granted.
5. The evidence presented regarding juror #3 and misconduct fulfilled strategy of showing that the juror committed misconduct.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

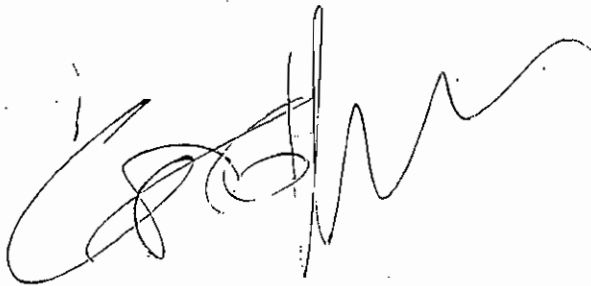
A handwritten signature in black ink, appearing to read 'Craig Collins', with a large, stylized initial 'C' and a long, sweeping horizontal stroke at the end.

EXHIBIT “C”

EXHIBIT “C”

1/14 RECEIVED ON 1-5-12
do [signature] PHERNERA

F063652

Ulices Aguilar
CDC #: G-48827
Ironwood State Prison
P. O. Box 2199
Blythe, CA 92226

IN THE
COURT OF APPEAL OF THE STATE OF CALIFORNIA
IN AND FOR THE
FIFTH APPELLATE DISTRICT

COURT OF APPEAL
FIFTH APPELLATE DISTRICT
SEP 20 2011

In re ULICES AGUILAR,

On Habeas Corpus.

By _____
F063652

Deputy

(Tulare Super. Ct. No. 259287)

ORDER

BY THE COURT:

Petitioner is granted leave to file on or before 30 days from the date of this order a reply to counsel's "informal response" filed on November 29, 2011.

The Clerk/Administrator of this court is authorized to send a copy of the informal response to petitioner.

hm

Presiding Justice

EXHIBIT “D”

EXHIBIT “D”

1 ULICES AGUILAR
2 G. 48827 / A-3. 226L
3 IRONWOOD STATE PRISON
4 P.O. BOX 2199
5 BLYTHE, CA 92226

6 COURT OF APPEAL STATE OF CALIFORNIA
7 FIFTH APPELLATE DISTRICT

10 ULICES AGUILAR
11 APPELLANT,

CASE No. F063652

12 V.

REPLY TO COUNSEL'S
INFORMAL RESPONSE

14 ON HABEAS CORPUS

15 /

18 APPELLANT, ULICES AGUILAR IN PROSE HERETIN
19 RESPONDS TO THE INFORMAL DECLARATIONS MADE BY APPELLANT'S
20 FORMER DEFENSE COUNSEL, CRAIG COLLINS AS ORDERED BY THE COURT
21 IN REGARDS TO ISSUES RAISED IN APPELLANT'S BRIEF.

24 ISSUE I

26 IN HIS RESPONSE MR. COLLINS DECLARES THAT
27 HIS DECISION TO KEEP JUROR #9 DURING VOTE DIRE WAS
28 A STRATEGIC DECISION REACHED AFTER DISCUSSION WITH

1 APPELLANT. HOWEVER GIVEN THAT MOST CRIMINAL DEFENDANTS
 2 ARE NOT FAMILIAR WITH CRIMINAL LAW AND PROCEDURE,
 3 SUCH A DECISION SHOULD HAVE BEEN MADE BASED ON COMMON
 4 LEGAL STRATEGY DEALING WITH POTENTIALLY BIASED JURORS.

5
 6 MR COLLINS STATES NEXT THAT, IN REGARDS TO
 7 HIS CONSIDERATION OF MOVE TO DISMISS THE SAME JUROR
 8 AFTER FURTHER EVIDENCE OF POTENTIAL BIAS APPEARED, THE
 9 PRIMARY REASONS FOR HIS DECISION NOT TO MOVE FOR DIS-
 10 MISSAL OF THE JUROR IN QUESTION WERE BASED SOLELY
 11 ON HIS FEELING THAT THE TRIAL JUDGE WOULD DENY THE
 12 MOTION WITHOUT FURTHER INVESTIGATION. GIVEN THE
 13 QUESTIONABLE NATURE OF THE SAME JUROR, IT WAS
 14 UNREASONABLE NOT TO MAKE THE MOTION BOTH BECAUSE
 15 MR COLLINS DOES NOT CITE IN HIS RESPONSE TO A
 16 STRATEGIC REASON NOT TO MAKE THE MOTION, AND IT
 17 IS NOT PROPER FOR AN ATTORNEY TO MAKE HIS STRATEGIC
 18 DECISION IN DEFERENCE TO THE MOODS AND WHIMS OF
 19 THE JUDGE.

20
 21 FOR THESE REASONS, MR COLLINS' ACTIONS AS
 22 AN ATTORNEY RESULTED IN INEFFECTIVE ASSISTANCE OF
 23 COUNSEL.

24 25 26 ISSUE II

27
 28 MR COLLINS IN HIS RESPONSE EFFECTIVELY

SUMMARIZES THE STEPS HE TOOK IN MAKING A MOTION FOR NEW TRIAL BASED ON INFORMATION AND ALLEGATIONS THAT JUROR #3 IN THE TRIAL HAD MADE COMMUNICATIONS WHICH, BY THE NATURE OF BOTH THE RELATIONSHIP WITH THE INDIVIDUAL AND THE COMMUNICATIONS THEMSELVES, SHOWED STRONG EVIDENCE OF ACTUAL BIAS AND JURY MANIPULATION.

HOWEVER, MR COLLINS FAILS TO ADDRESS APPELLANT'S ALLEGATION THAT HE APPROACHED MR COLLINS WITH KNOWLEDGE TO THESE COMMUNICATIONS PRIOR TO THE VERDICT BEING ENTERED INTO THE RECORD, AND THAT MR. COLLINS DECLINED TO DISCUSS THIS INFORMATION UNTIL JUDGMENT HAD BEEN RENDERED. IN THAT THE INFORMATION APPELLANT SOUGHT TO GIVE MR COLLINS ABOUT POTENTIAL BIAS WAS FOUND TO BE TRUE WHEN EVIDENCE OF ACTUAL BIAS WAS GIVEN DURING THE MOTION FOR NEW TRIAL, THE LEGAL QUESTION ARISES: BUT FOR MR. COLLINS REFUSAL TO HEAR OR ENTERTAIN THIS INFORMATION, WOULD THE JURY HAVE BEEN ALLOWED TO CONTINUE ITS DELIBERATION, AND WOULD HAVE THE SAME VERDICT HAVE BEEN REACHED? IT IS APPELLANT'S CONTENTION THAT THE ANSWER TO THIS QUESTION IS NO.

THEREFORE MR COLLINS REFUSAL TO DISCUSS WITH HIS CLIENT INFORMATION OF ACTUAL BIAS BY A JUROR CONSTITUTES INEFFECTIVE ASSISTANCE OF COUNSEL.

A P P E N D I X 9

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Supervising Deputy Attorney General
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Attorneys for Respondent
7

8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE EASTERN DISTRICT OF CALIFORNIA
10
11

12 **ULICES AGUILAR,**

1:12-cv-01547-LJO-JLT

13
14 Petitioner,

15 v.

16 **MATTHEW CATE, Secretary, CDCR,**

17 Respondent.
18

19 30. Reporter's Transcript on Appeal, Vol. I, dated January 8, 2008 and March 24-
20 25, 2008, pp. 1-213.
21
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27
28

JUL 29 2009

SA2009310808

[illegible]

Superior Court
No. VCF 127019-E

5 Criminal
No. F057268

5 Criminal
No. F057268

A286

1 ring a bell about this particular case? A lot of the
2 witnesses in here are going to be police officers,
3 sheriff's department generally. And I'm going to
4 instruct you that police officers' credibility, it's
5 called, or believability, is governed by exactly the
6 same standards as any other witness. And I'll give a
7 jury instruction about how you judge the credibility of
8 witnesses.

9 Is there any of you who because of some
10 feelings for or against police officers would not be
11 able to judge their testimony by the same standard as
12 anybody else's? Okay. No responses to that.

13 And you've heard from the opening
14 statements that the underlying offense here was
15 committed with a gun. Some people have very strong
16 feelings about that. Even though Mr. Aguilar is not --
17 there's no dispute, there's no claim that he pulled the
18 trigger. That's not the issue.

19 But is there anybody here that just
20 because this involved the use of a gun has such strong
21 feelings that they would be unable to follow the law as
22 I give it to you? No response to that.

23 Another issue up here. You heard that
24 there's an allegation that this was, I'll say,
25 gang-related. There's some technical requirements for
26 that, which you'll hear more about that later. Is

1 there anybody here who -- and I'm going to get right
2 down to it. And don't be ashamed. We had people this
3 morning admitted they had been in gangs. Is there
4 anybody here, either yourself or close friends or
5 relatives have been or are in a street gang? Okay.
6 Ms. Rodriguez.

7 PROSPECTIVE JUROR NO. 16: Uh huh?

8 THE COURT: How close is this person to you?

9 PROSPECTIVE JUROR NO. 16: Cousin.

10 THE COURT: Cousin. And is this in Tulare
11 County?

12 PROSPECTIVE JUROR NO. 16: Yes.

13 THE COURT: Is there anything about that that
14 would make it difficult for you to be impartial to both
15 sides here?

16 PROSPECTIVE JUROR NO. 16: Not necessarily
17 impartial, no.

18 THE COURT: Beg your pardon.

19 PROSPECTIVE JUROR NO. 16: Not impartial, no.
20 I wouldn't be impartial. I'd just have some -- I'm
21 aware of some background knowledge of what goes on in
22 some particular gangs.

23 THE COURT: All right. Now you're going to
24 find one thing. This was in Pixley. And the gangs in
25 question are north and south, Norteno, Sureno. And I'm
26 going to tell you that the evidence is going to be that

1 they're not necessarily the same structure and
2 otherwise as Norteno and Sureno, for instance, gangs in
3 Visalia and around the area. Does that make a
4 difference to you?

5 PROSPECTIVE JUROR NO. 16: A little.

6 THE COURT: Because the real question is, to
7 tie back to what I said before, what we don't want is
8 somebody who goes into the jury room and says, well, I
9 know some stuff that they didn't tell and I'm gonna use
10 that to decide the case. We want somebody who, if they
11 do know that, is going to wall it off and decide the
12 case just based on what you heard on the witness stand.
13 Will you be able to wall it off and decide it based
14 just on what was heard on the witness stand?

15 PROSPECTIVE JUROR NO. 16: Probably not.

16 THE COURT: Probably not. Okay. Counsel,
17 any problem?

18 MR. UNDERWOOD: No, Your Honor.

19 MR. COLLINS: Submit it.

20 THE COURT: Okay. I'll go ahead and excuse
21 you. You need to go back to the Jury Assembly Room for
22 possible reassignment. Call the next one please.

23 THE CLERK: Badge number 773832, Barbara Joan
24 Melton, MELTON.

25 THE COURT: Ms. Melton, any of the questions
26 we've asked so far that you'd like to respond to?

1 PROSPECTIVE JUROR NO. 16: No.

2 THE COURT: Anybody else with -- on the gang
3 question?

4 PROSPECTIVE JUROR NO. 9: I have a family
5 member that's involved in it, but I don't -- I stay
6 away. It doesn't bother my mind at all. I'm not
7 involved, and I don't care to be. So I just wanted to
8 let you know that I do have family members.

9 THE COURT: That's what we're trying to find
10 out. So you'll be able to decide this case on the
11 evidence in this case?

12 PROSPECTIVE JUROR NO. 9: Yes. It doesn't
13 bother me.

14 THE COURT: Thank you. That's (Juror No. 9),
15 juror number nine. Anybody else on that issue?

16 Has anybody been, yourselves or close
17 friends or relatives, been the victim of a violent
18 crime? Okay. Mr. Arechiga?

19 PROSPECTIVE JUROR NO. 17: Yes, sir. My
20 nephew was beat up by gang members.

21 THE COURT: How long ago was that?

22 PROSPECTIVE JUROR NO. 17: About 20 years
23 ago.

24 THE COURT: 20 years ago. Will you be able
25 to put that aside and decide this case on the facts of
26 this case?

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10
11

12 **ULICES AGUILAR,**

1:12-cv-01547-LJO-JLT

13
14 Petitioner,

15 v.

16 **MATTHEW CATE, Secretary, CDCR,**

17 Respondent.
18

19 36. 1st Supplemental Clerk's Transcript on Appeal, Vol. I of I, pp. 1-4.
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COPY

COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

APPEAL FROM THE SUPERIOR COURT OF TULARE COUNTY

CASE NO. VCF127019E DEPT. NO. 10 JUDGE LLOYD HICKS

THE PEOPLE OF THE STATE OF CALIFORNIA)

PLAINTIFF/RESPONDENT)

VS.)

ULISES AGUILAR,)

DEFENDANT/APPELLANT)

VOLUME I OF I
(1-4)

1ST SUPPLEMENTAL CLERK'S TRANSCRIPT ON APPEAL

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ATTORNEY GENERAL
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Read during test.

TULARE COUNTY SUPERIOR COURT
VISALIA DIVISION

27

LARSON CREEK, CLERK

Glodia Lopez

I [REDACTED] no Alex Sanchez
lived in the same House when
he died. Don't know if that is OK!

See #9

004

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11

12 **ULICES AGUILAR,**

1:12-cv-01547-LJO-JLT

13
14 Petitioner,

15 v.

16 **MATTHEW CATE, Secretary, CDCR,**

17 Respondent.
18

19 21. Reporter's Transcript on Appeal, Vol. XIII, dated March 27, 2008, pp. 1273-1477.
20
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A295

1 And (Juror No. 9), can you just hang
2 around for a second.

3 (Whereupon, the following proceedings
4 were had outside the presence of the jury, to wit:)

5 THE COURT: Still on the record out of the
6 presence of the jurors, everyone except juror number
7 nine. And you passed us a note to the effect that
8 you --

9 JUROR NO. 9: If it's the same Alex Sanchez
10 from Tulare that shot himself, that's the Alex I'm
11 talking about. I don't know if it's Alex from Pixley,
12 but I only know one Alex Sanchez, and I know he passed
13 away around that time. So that's why I thought I
14 should let you know that. I lived with him at the
15 time. I was dating his brother. He was like my little
16 brother.

17 THE COURT: Anybody know?

18 MR. COLLINS: It's the same one.

19 THE COURT: It is the same one.

20 MR. COLLINS: My impression is that what I
21 read the guy was upset at his girlfriend or something.

22 JUROR NO. 9: Right.

23 MR. COLLINS: Then he killed himself.

24 JUROR NO. 9: Right. Right.

25 THE COURT: This was just, I think I can say,
26 for the purpose of indicating will be tied together

1 later that poster that you saw.

2 JUROR NO. 9: The what?

3 THE COURT: The poster you saw that had that
4 in it.

5 JUROR NO. 9: Right, that said, "In Memory of
6 Alex".

7 THE COURT: It had to do with -- I think it's
8 going to be used later for part of the expert's
9 opinion.

10 MR. UNDERWOOD: That's what it's going
11 toward, gang enhancement, yes.

12 THE COURT: Right.

13 JUROR NO. 9: I just thought -- I felt I
14 should let you know because I didn't want to get in
15 trouble.

16 THE COURT: I appreciate it.

17 MR. COLLINS: Can I ask her?

18 THE COURT: Is that going to affect your
19 ability to sit fairly in this case in any way?

20 JUROR NO. 9: If it doesn't have nothing to
21 do with him, no.

22 THE COURT: It doesn't.

23 JUROR NO. 9: If it doesn't, then no.

24 THE COURT: Doesn't have a thing to do with
25 him.

26 MR. COLLINS: Can I ask her some questions?

1 THE COURT: Well, why don't you approach and
2 see what you want to ask.

3 (Off the record discussion.)

4 THE COURT: The fact that he was
5 Norteno-associated and defendant here may be
6 Sureno-associated, is that going to affect your ability
7 to be fair in this?

8 JUROR NO. 9: Maybe a little bit.

9 THE COURT: Well --

10 JUROR NO. 9: I'm not saying that -- I still
11 have to see everything, so I can't say --

12 THE COURT: That's what we're asking.

13 JUROR NO. 9: No.

14 THE COURT: You could see the evidence and
15 decide this based on the evidence?

16 JUROR NO. 9: Like, okay, put it this way.
17 Right now I can't say he's guilty or not guilty. Just
18 because he's a Sureno, that doesn't have nothing to do
19 with me. I don't claim. My family does, but that has
20 nothing to do with me.

21 THE COURT: What you disclosed before.

22 JUROR NO. 9: Right.

23 THE COURT: That's all we want to know.
24 You're not going to say --

25 JUROR NO. 9: Because he --

26 THE COURT: Because he's a Sureno, therefore,

1 I'm not going --

2 JUROR NO. 9: I don't claim, so I don't care
3 about that.

4 THE COURT: All right. Thank you very much.
5 And we'll see you back Monday.

6 THE BAILIFF: Tuesday.

7 THE COURT: Tuesday. Thank you. Have a good
8 weekend.

9 JUROR NO. 9: You too.

10 THE COURT: Anything we need to cover before
11 Tuesday?

12 MR. UNDERWOOD: Not from the People.

13 THE COURT: At some point I'm going to need
14 to get jury instructions because, remember, I make you
15 do the work on those. You do have a set from the last
16 time. Do you have an extra set from last time?

17 MR. UNDERWOOD: You want a fresh one, because
18 they're in an envelope in one of the boxes I saw. I
19 can do a fresh one.

20 THE COURT: Yeah. We need to do a fresh one.
21 But I mean in terms of getting the same ones and
22 adapting them. The only difference --

23 MR. UNDERWOOD: It's never easy. We change
24 software every six months because every one we try is a
25 mess to work with. But I'll just -- it's not a
26 problem.

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12 **ULICES AGUILAR,**

1:12-cv-01547-LJO-JLT

13
14 Petitioner,

15 v.

16 **MATTHEW CATE, Secretary, CDCR,**

17 Respondent.
18

19 22. Reporter's Transcript on Appeal, Vol. XIV, dated April 1, 2008, pp. 1478-1587.
20
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A301

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF TULARE
DEPARTMENT 10 HON. LLOYD L. HICKS, JUDGE

THE PEOPLE OF THE STATE
OF CALIFORNIA,

Plaintiff,

vs.

ULISES AGUILAR,

Defendant.

NO. VCF 127019-E

Visalia, California

April 1, 2008

REPORTER'S TRANSCRIPT
(Pages 1478 through 1587)

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FRANK ARNOLD

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1 April 1, 2008

2 THE COURT: We're on the record in chambers,
3 out of the presence of the other jurors, except for
4 Juror Number Five, (Juror No. 5) who gave us a note
5 that basically says that leaving court on Thursday he
6 recognized a gentleman coming into the courtroom. "Put
7 two and two together, recalled where I had seen him. I
8 went to school with Gary Hunt. Didn't recognize the
9 name. He was a year ahead of me. We hung out a little
10 at school only. Haven't seen him since graduated in
11 1994." Does know his brother Pat. Hung out together
12 and worked together through the early '90's.

13 I think Detective Hunt, if I recall, is
14 just going to testify to statements that he took.
15 Those statements were all recorded.

16 MR. UNDERWOOD: Really just one.

17 THE COURT: It was recorded?

18 MR. UNDERWOOD: (Nods head.)

19 THE COURT: Is this going to affect your
20 ability to judge his testimony by the same standards as
21 anybody else?

22 JUROR NO. 9: No.

23 THE COURT: That's all we need to know.

24 JUROR NO. 9: I just didn't want any problems

25 THE COURT: Very good.

26 MR. COLLINS: Judge, I can I bring up

1 something.

2 THE COURT: Yeah. Go ahead. Yes, sir.

3 MR. COLLINS: I don't want to sound
4 complaining or anything, but --

5 THE COURT: Oh, go ahead.

6 MR. COLLINS: I'm not complaining about
7 anybody. Luis Aguilar, who is Ulises'' brother,
8 advised me that the female juror who knew the Norteno
9 in the Memorial thing has like a gang tattoo and was in
10 the hallway playing on her phone rap music that was
11 Norteno rap music, making derogatory terms to Surenos
12 calling them Sur rattas or whatever.

13 THE COURT: The rap music was or she was?

14 MR. COLLINS: The music she was listening to.
15 And I heard her playing music, but I wasn't paying
16 attention to it. And I myself did see that she has a
17 big red star tattooed on her neck. And I just wanted
18 to bring it to Court's attention so that the Court
19 could deal with it how he sees proper.

20 THE COURT: Well, what do you suggest? We've
21 already talked to her.

22 MR. COLLINS: Yeah. And I remember what she
23 said. I just -- I wanted to just maybe follow-up. I
24 don't know if it's too late in the game to just ask her
25 if, you know, if she sides one side or anything like
26 that. She had mentioned that she has family that were

1 gangs, and that she knew that person. But it was never
2 really brought up that if her family's, you know -- if
3 she would tend to side with a gang or be biased against
4 my client because he's in a rival gang.

5 THE COURT: I think I asked her that
6 directly.

7 MR. COLLINS: Okay.

8 THE COURT: At the last session. I'll get
9 the court reporter to check that over lunch.

10 MR. COLLINS: Okay.

11 THE COURT: Look at it.

12 MR. COLLINS: However you see proper. I'm
13 not trying to --

14 THE COURT: No. That's appropriate. What's
15 a red star? That's a new one on me.

16 MR. COLLINS: It's a North Star. It's called
17 like the North Star, and it's in red.

18 MR. UNDERWOOD: Dilbeck talked about it at
19 the last trial when he was looking at some of those
20 things about the stars. It's in the transcript of the
21 last trial. That north, North Star, I don't know.

22 MR. COLLINS: Yeah.

23 MR. UNDERWOOD: The constellation they're
24 referring to.

25 MR. COLLINS: Something like that. But
26 basically North Star, and it's in red. Apparently his

1 witness Ramon Pulido had seen that underneath it. It
2 had some writing with a big N on it, something like
3 that.

4 THE COURT: Okay.

5 MR. UNDERWOOD: On her?

6 MR. COLLINS: Yeah.

7 MR. UNDERWOOD: When are these guys seeing
8 this stuff?

9 MR. COLLINS: Apparently in the hallway.
10 Because I saw her when I was -- I distanced myself --

11 THE COURT: I got one question. What are
12 they doing close enough to the jurors to be able to see
13 that?

14 MR. COLLINS: I think if they were -- I don't
15 know -- I didn't talk to Mr. Pulido who noticed that.
16 I saw the star on the neck. But earlier I distanced
17 myself way on the far end, and she was blasting the
18 music on her phone, rap music. And I wasn't paying
19 attention. I was reading. But --

20 THE COURT: Well, maybe you can check after
21 we adjourn. It shouldn't be that hard to find. It was
22 the time when we were questioning her after she had
23 passed us the note to the effect that she was living in
24 the same household with the fellow that was the subject
25 of the memorial service. I think I asked her a direct
26 question about would one -- north versus south cause

1 you to --

2 MR. COLLINS: Okay.

3 THE COURT: I think we got a direct answer to
4 the question. So let's check that out and then we'll
5 take it up after that.

6 MR. COLLINS: Okay. Thank you.

7 THE COURT: Okay.

8 (Whereupon, the following proceedings
9 were had in open court, to wit:)

10 THE COURT: Good morning. Everybody made it
11 over the holidays. The twelve jurors are present. The
12 three alternates are present. You may proceed.

13 MR. UNDERWOOD: People will call Guillermo
14 Maldonado.

15 GUILLERMO MALDONADO,

16 Produced as a witness on behalf of
17 the People, having been first duly
18 sworn, testified as follows:

19 THE COURT: Good morning.

20 THE WITNESS: Morning.

21 THE COURT: Tell us your name please and
22 spell your last name for the record.

23 THE WITNESS: Guillermo Maldonado.
24 MALDONADO.

25 THE COURT: Thank you. Go ahead.

26

1 MR. COLLINS: I can't take a court ex
2 and go to the -- make a copy of it.

3 THE COURT: That's the problem. If y
4 to play a tape, you gotta give the jurors a transcript.

5 MR. COLLINS: I have one and I can make
6 copies. It's what I used last time.

7 THE COURT: Okay. And will Counsel approach.

8 (Off the record discussion.)

9 THE COURT: I want to make sure to the
10 members of Mr. Aguilar's family, you are not to -- and
11 I'm making this a court order. You're not to talk to
12 any of the witnesses in this case. You're to stay away
13 from them. You're not to talk to any of the jurors.
14 You're to stay away from them. You all understand
15 that? And tell other members who are here too. Okay.

16 (Recess taken.)

17 (Whereupon, the following proceedings
18 were had outside the presence of the jury, to wit:)

19 THE COURT: She was directly asked, "Just
20 because he was Sureno that doesn't have nothing to do
21 with me. I don't claim."

22 MR. COLLINS: Okay.

23 THE COURT: "The family does." And I asked
24 specifically, "The fact that he's a Norteno, is that
25 going to affect your ability?" At first she said,
26 "Maybe a little bit." Then she backs off and says,

1 "I'm not saying that. I still have to see everything."
2 "That's what we're asking. You could see the evidence,
3 decide it based on the evidence?" "I don't claim."
4 Then she says later, "Because he's a Sureno,
5 therefore --" "I don't claim so I don't care about
6 that."

7 MR. COLLINS: Okay.

8 THE COURT: So I think that's covered. Okay.
9 Let's bring the jury in.

10 (Whereupon, the following proceedings were
11 had in open court, to wit:)

12 THE COURT: Good afternoon. We're back in
13 session. All 12 members of the jury are present.
14 Three alternates are present. You may proceed.

15 BY MR. UNDERWOOD:

16 Q. Sergeant Hunt, just a couple follow-ups.
17 Somewhere in the cross-examination the subject of Larry
18 having seen the rifle before came up. Was it your
19 understanding that he had seen it that night or
20 sometime previously was why you were asking him?

21 A. My understanding was that Larry saw it
22 that night.

23 Q. Showing you a couple of --

24 MR. COLLINS: Judge, before he asks the next
25 question, I'd ask for a admonishment that that's
26 obviously not offered for the truth of the matter

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12 **ULICES AGUILAR,**

1:12-cv-01547-LJO-JLT

13
14 Petitioner,

15 v.

16 **MATTHEW CATE, Secretary, CDCR,**

17 Respondent.
18

19 34. Clerk's Transcript on Appeal, Vol. IV of IV, pp. 783-960.
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COPY

COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

APPEAL FROM THE SUPERIOR COURT OF TULARE COUNTY

CASE NO. VCF127019E DEPT. NO 10 JUDGE LLOYD HICKS

THE PEOPLE OF THE STATE OF CALIFORNIA)

PLAINTIFF/RESPONDENT)

VS.)

ULISES AGUILAR,)

DEFENDANT/APPELLANT)

VOLUME IV OF IV
(783-960)

CLERK'S TRANSCRIPT ON APPEAL

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TULARE COUNTY SUPERIOR COURT
VISALIA DIVISION

NOV 03 2008

LARAYNE CLEEK, CLERK

BY: *Browning*

6
7 SUPERIOR COURT OF CALIFORNIA
8 COUNTY OF TULARE

9
10 THE PEOPLE OF THE STATE OF
11 CALIFORNIA,

12 Plaintiff,

13 vs.

14 ULISES AGUILAR,

15 Defendant

Case No.: No. VCF127019

NOTICE OF MOTION AND MOTION
FOR NEW TRIAL

Date: November¹⁴, 2008

Time: 1:30 p.m.

Dept.: 10

16
17 TO THE HONORABLE COURT, AND THE DISTRICT ATTORNEY OF
18 THE COUNTY OF TULARE, PLEASE TAKE NOTICE that on November¹⁴,
19 2008 at 1:30 p.m., in Department 10 of the above entitled court, or as soon
20 thereafter as the matter may be heard, the Defendant ULISES AGUILAR will, and
21 hereby does, petition the Court to for a new trial in this matter.

22 The defendant seeks a new trial on the grounds of juror misconduct and
23 prosecutorial misconduct.

24 ///

25 ///

26 ///

27
28
783

MOTION FOR NEW TRIAL - 1

1 a. *Juror #9 Committed Misconduct by Failing to Disclose Facts Known*
2 *to Her Before Trial, and by Violating the Presumption of Innocence*

3 Any time during a trial, if a sitting juror loses the ability to render a fair and
4 unbiased verdict, she can be dismissed from the case. (*People v. Thomas* (2d Dist.
5 1990) 218 Cal.App.3d 1477, 1484-1485.) In *People v. Thomas, supra*, 218
6 Cal.App.3d at p. 1485, a juror was found not truthful during voir dire with regard
7 to her prejudice against police officers and was dismissed for cause.

8 Here, Juror number 9, sent a note to the court stating that she had knowledge
9 of Alex Sanchez, whose death and funeral were used in proving gang affiliation.
10 (RTA, pp. 1-2.) Counsel for the defense attempted to *voir dire* the Juror number 9,
11 but was denied the request. (RTA, pp. 2-3.) During the Court's *voir dire*, Juror
12 number 9 stated, "[r]ight now I can't say he's guilty or not guilty . . . [j]ust because
13 he's a Sureno" (RTA, p. 3, Ins. 18-22.)

14 Juror number 9 demonstrated her bias against Mr. Aguilar because of
15 alleged gang affiliation. She denied the presumption of innocence because of the
16 gang affiliation. Furthermore, and most damaging, Juror number 9 failed to
17 disclose the Court that she herself had a gang affiliation, and despite evidence to
18 the contrary, continued to deny gang affiliation upon the Court's subsequent *voir*
19 *dire*. (See RTA, p. 3, Ins. 19-22.) Juror number 9 harbored an obvious bias toward
20 Mr. Aguilar, that in light of all circumstances, merited her dismissal from the jury
21 at the time she sent the note to the Court. Finally, counsel for Mr. Aguilar was
22 denied an opportunity to question the juror on her possible bias.

23
24 b. *Juror #9 Violated The Separation Admonition And Considered*
25 *Evidence Not Heard During Trial*

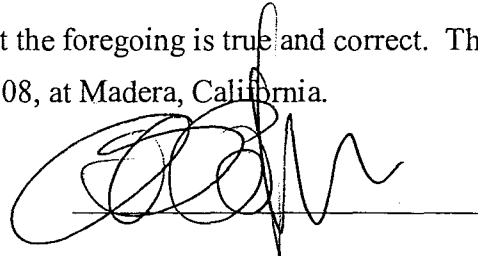
26 Violating the separation admonition is serious juror misconduct. (Pen.
27 Code, § 1122; *In re Hitchings* (1993) 6 Cal.4th 97, 118.) Communicating with a
28 third party about the case is misconduct. (*People v. Lee* (1974) 38 Cal.App.3d 749,

DECLARATION OF CRAIG COLLINS

I, Craig Collins, am the attorney for ULISES AGUILAR in this matter and if called upon to testify, I could and would testify to the following:

1. During trial on this matter, juror number 9, [REDACTED] played Norteno rap in front of fellow jurors and the defendant's family in the courthouse hallway.
2. Juror number 9 had a red star tattoo and wore stars throughout trial indicative of Norteno gang affiliation.
3. Juror number 9 stated she lived with a deceased Norteno gang member Alex Sanchez.
4. The defendant is Sureno affiliated and the victim was a Norteno gang member.
5. On or about October 16, 2008, my investigator located Abel Vasquez.
6. I have an appointment to interview him where he is incarcerated.

I declare under penalty of perjury that the foregoing is true and correct. This declaration was executed on October 24, 2008, at Madera, California.



DECLARATION OF CRAIG COLLINS

I, Craig Collins, am the attorney for ULISES AGUILAR in this matter and if called upon to testify, I could and would testify to the following:

1. During trial on this matter, juror number 9, [REDACTED] played Norteno rap in front of fellow jurors and the defendant's family in the courthouse hallway.
2. Juror number 9 had a red star tattoo and wore stars throughout trial indicative of Norteno gang affiliation.
3. Juror number 9 stated she lived with a deceased Norteno gang member Alex Sanchez.
4. The defendant is Sureno affiliated and the victim was a Norteno gang member.
5. On or about October 16, 2008, my investigator located Abel Vasquez.
6. I have an appointment to interview him where he is incarcerated.

I declare under penalty of perjury that the foregoing is true and correct. This declaration was executed on October 24, 2008, at Madera, California.

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EXHIBIT A

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MOTION FOR NEW TRIAL - 11

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF TULARE
DEPARTMENT 10 HON. LLOYD L. HICKS, JUDGE

THE PEOPLE OF THE STATE
OF CALIFORNIA,

Plaintiff,

vs.

ULISCES AGUILAR,

Defendant.

NO. VCF 127019 E

Visalia, California

March 27, 2008

REPORTER'S PARTIAL TRANSCRIPT

APPEARANCES:

For the Plaintiff: PHILLIP CLINE
DISTRICT ATTORNEY
BY: DANIEL UNDERWOOD, DEPUTY
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Visalia, CA 93291

For the Defendant: CHRIS COLLINS
ATTORNEY AT LAW
210 South "D" Street
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TAMMY A. WARREN, C.S.R. No. 6047, RMR, CRR

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March 27, 2008

PARTIAL TRANSCRIPT.

(Whereupon, the following proceedings
were had outside the presence of the jury, to wit:)

THE COURT: Still on the record out of the
presence of the jurors, everyone except juror number
nine. And you passed us a note to the effect that
you --

JUROR NO. 9: If it's the same Alex Sanchez
from Tulare that shot himself, that's the Alex I'm
talking about. I don't know if it's Alex from Pixley,
but I only know one Alex Sanchez, and I know he passed
away around that time. So that's why I thought I
should let you know that. I lived with him at the
time. I was dating his brother. He was like my little
brother.

THE COURT: Anybody know?

MR. COLLINS: It's the same one.

THE COURT: It is the same one.

MR. COLLINS: My impression is that what I
read the guy was upset at his girlfriend or something.

JUROR NO. 9: Right.

MR. COLLINS: Then he killed himself.

JUROR NO. 9: Right. Right.

THE COURT: This was just, I think I can say,

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TAMMY A. WARREN, C.S.R. No. 6047, RMR, CRR

1 for the purpose of indicating will be tied together
2 later that poster that you saw.

3 JUROR NO. 9: The what?

4 THE COURT: The poster you saw that had that
5 in it.

6 JUROR NO. 9: Right, that said, "In Memory of
7 Alex".

8 THE COURT: It had to do with -- I think it's
9 going to be used later for part of the expert's
10 opinion.

11 MR. UNDERWOOD: That's what it's going
12 toward, gang enhancement, yes.

13 THE COURT: Right.

14 JUROR NO. 9: I just thought -- I felt I
15 should let you know because I didn't want to get in
16 trouble.

17 THE COURT: I appreciate it.

18 MR. COLLINS: Can I ask her?

19 THE COURT: Is that going to affect your
20 ability to sit fairly in this case in any way?

21 JUROR NO. 9: If it doesn't have nothing to
22 do with him, no.

23 THE COURT: It doesn't.

24 JUROR NO. 9: If it doesn't, then no.

25 THE COURT: Doesn't have a thing to do with

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1 him.

2 MR. COLLINS: Can I ask her some questions?

3 THE COURT: Well, why don't you approach and
4 see what you want to ask.

5 (Off the record discussion.)

6 THE COURT: The fact that he was
7 Norteno-associated and defendant here may be
8 Sureno-associated, is that going to affect your ability
9 to be fair in this?

10 JUROR NO. 9: Maybe a little bit.

11 THE COURT: Well --

12 JUROR NO. 9: I'm not saying that -- I still
13 have to see everything, so I can't say --

14 THE COURT: That's what we're asking.

15 JUROR NO. 9: No.

16 THE COURT: You could see the evidence and
17 decide this based on the evidence?

18 JUROR NO. 9: Like, okay, put it this way.
19 Right now I can't say he's guilty or not guilty. Just
20 because he's a Sureno, that doesn't have nothing to do
21 with me. I don't claim. My family does, but that has
22 nothing to do with me.

23 THE COURT: What you disclosed before?

24 JUROR NO. 9: Right.

25 THE COURT: That's all we want to know.

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TAMMY A. WARREN, C.S.R. No. 6047, RMR, CRR

1 You're not going to say --

2 JUROR NO. 9: Because he --

3 THE COURT: Because he's a Sureno, therefore,
4 I'm not going --

5 JUROR NO. 9: I don't claim, so I don't care
6 about that.

7 THE COURT: All right. Thank you very much.
8 And we'll see you back Monday.

9 THE BAILIFF: Tuesday.

10 THE COURT: Tuesday. Thank you. Have a good
11 weekend.

12 JUROR NO. 9: You too.

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TAMMY A. WARREN, C.S.R. No. 6047, RMR, CRR

1 | STATE OF CALIFORNIA.)

2 |) ss.

3 | COUNTY OF TULARE)

4 |

5 | I, TAMMY A. WARREN, an Official
6 | Certified Shorthand Reporter of the Superior Court of
7 | the State of California, do hereby certify:

8 | That the foregoing action was taken down
9 | in stenographic shorthand writing and thereafter
10 | transcribed into typewriting, pages 1 through 5, and
11 | that the foregoing transcript constitutes a full, true,
12 | and correct transcript of said proceedings.

13 | Dated: 08/05/2008.

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TAMMY A. WARREN, CSR #6047
Official, RPR, RMR-CRR

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TAMMY A. WARREN, C.S.R. No. 6047, RMR, CRR

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8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE EASTERN DISTRICT OF CALIFORNIA
10
11

12 **ULICES AGUILAR,**

1:12-cv-01547-LJO-JLT

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14 Petitioner,

15 v.

16 **MATTHEW CATE, Secretary, CDCR,**

17 Respondent.
18

19 28. Reporter's Transcript on Appeal, Vol. XX, dated January 9, 2009, pp. 1896-1931.
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COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

THE PEOPLE OF THE STATE OF	)	
CALIFORNIA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Superior Court
	)	No. VCF127019
ULISES AGUILAR,	)	
	)	5th Case
Defendant.	)	No.
	)	

---o0o---

APPEAL FROM THE SUPERIOR COURT OF TULARE COUNTY
HONORABLE LLOYD HICKS, JUDGE PRESIDING

---o0o---

REPORTER'S TRANSCRIPT ON APPEAL

JANUARY 9, 2009

VOLUME 20

(Pages 1896 - 1931)

APPEARANCES:

For Plaintiff/Respondent: EDMUND G. BROWN, JR.
STATE ATTORNEY GENERAL
1515 "K" Street
Sacramento, Calif.

For Defendant/Appellant: In Pro Per

COPY

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF TULARE
HON. LLOYD HICKS, JUDGE
DEPARTMENT 10

THE PEOPLE OF THE STATE	)	
OF CALIFORNIA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	NO. VCF127019
	)	
ULISES AGUILAR,	)	
	)	
Defendant.	)	

Visalia, California

January 9, 2009

REPORTER'S TRANSCRIPT OF
MOTION FOR NEW TRIAL HEARING

APPEARANCES:

For the Plaintiff: PHILLIP CLINE
DISTRICT ATTORNEY
BY: DAN UNDERWOOD, Deputy
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For the Defendant: ATTORNEY AT LAW
BY: CRAIG COLLINS, Esq.
221 North "I" Street
Madera, CA 93637

1 why I say "misled," perhaps if it was Miguel Cisneros'
2 trial, or something of that nature, the threat
3 wouldn't be as bad, but when you're talking about a
4 case -- and I think Mr. Underwood will agree about
5 this -- that's not a clear-cut case, we learned that
6 the first time we tried it, is that all this whole
7 trial with everything on both trials is whether
8 or not -- two things, he knew that Maloney was going
9 to get shot, and, two, he intended and actually in
10 fact helped him do it. And when you start saying that
11 and saying, "Well, Collins didn't do anything to the
12 evidence," then it's putting the burden on me.

13 I think the other points in term of the
14 other juror and things like that, I'm going to submit
15 on that. I requested -- Juror Number 9, I believe, it
16 was a Hispanic female juror, she said that -- there's
17 an exhibit of a rest in piece, Nortenos unite, wear
18 red and where black, and she lived with a guy, I
19 asked -- and it's on the record, too -- I said, "Can I
20 ask her, and you said -- you, meaning the Court, asked
21 me to approach and asked what I was going to say and
22 then the Court asked.

23 Finally, again, I think we need to look
24 at this in term of what the risk is. I mean,
25 basically my client is about to get 40 years to life,
26 which means he's going to spend the rest of his life

1 in jail. When we hear this testimony of a guy I never
2 met before says "I was here from April 2nd," so it had
3 to have been from April 2nd, because then he served a
4 parole violation, and the juror called him asking his
5 opinion and he says basically, "Well, it's like a
6 rivalry type thing. I'm not affiliated now, but it's
7 like a rivalry. I said, 'fuck it. Go with the
8 flow.'"

9 I know that we are not supposed to --
10 the fact that we are not to look into a juror's state
11 of mind of why they voted in a particular way does not
12 absolve anybody from juror misconduct, and moreover it
13 doesn't allow the Court to just say, "Okay, well, we
14 can't look at her reasoning, she would have voted
15 guilty anyway, so since we can't do that there's no
16 way that you can get a new trial." But it's for
17 reasons like this. It's for reasons when a juror who
18 takes an oath and violates that oath and asks a loved
19 one an opinion about how she should vote and that
20 person says that she should vote guilty -- I mean, to
21 me that is a fundamental -- I mean Mr. Underwood talks
22 about the halls of justice, but I mean if this is the
23 hall of the justice and one of the jurors is calling a
24 Norteno guy in the jail and asking him how to vote,
25 and he says, "Well, it's a rivalry between me and the
26 south, so vote guilty."

1 THE COURT: Wait a minute, let's be accurate.
2 He didn't say he said that.

3 MR. COLLINS: Okay. His exact words were
4 "It's a rivalry type thing."

5 THE COURT: He told her, "I don't know."
6 Then he said he told her, "Go with the flow." And
7 then he said, "If it was me," those are the three
8 things that I have.

9 MR. COLLINS: The Court has the record, but I
10 thought at one point he said when he was explaining to
11 the Court about when he said to "F" it and go with the
12 flow, I thought that's when he brought up the rivalry
13 type of thing.

14 THE COURT: He did not say that he told her
15 to vote guilty.

16 Anything else?

17 MR. COLLINS: Well, I believe he did. I
18 believe that he did tell her to vote guilty.

19 THE COURT: Mr. Underwood?

20 MR. UNDERWOOD: Just with respect to the
21 motion for a new trial, I don't think I put it in my
22 pleadings, I am basically going to submit on the
23 pleadings filed on November 6th. I don't believe I
24 elaborated on the standard. As I read it it's
25 basically sixth Witkin criminal law, third edition,
26 page 149, section 119, a, the Court first determines

1 if the supporting affidavits, which we have a couple
2 of those here and also some testimony, contains
3 admissible evidence. B, if the evidence is admissible
4 the Court considers whether the facts established
5 misconduct. C, if they do, the Court determines
6 whether the misconduct was prejudicial. I kind of
7 left that broad standard out and moved forward into a
8 more specific standard in my pleadings in looking to
9 whether or not some type of substantial likelihood of
10 bias is shown with respect to juror misconduct.

11 Our position is that in this case it
12 doesn't -- to even ask Mr. Vasquez, "Did you know
13 anything about this case?" If anything if it was a
14 north-south rivalry situation that he was referring
15 to, which I believe the juror was specifically asked
16 about by the Court in the middle of trial, and when
17 she didn't show the Court that it would not affect her
18 position that --

19 THE COURT: That was a different juror.

20 MR. UNDERWOOD: Oh, I'm mistaken.

21 THE COURT: Ms. Huerta is Number 3, and the
22 other one was Number 9.

23 MR. UNDERWOOD: That's right. With respect
24 to the Norteno bias, I would notice also that the
25 pictures that have been admitted are -- at least that
26 I can see on my black and white copy -- are they with

1 the clerk?

2 THE COURT: They are right here.

3 MR. UNDERWOOD: I note there's a date of
4 1/8/09, and I assume that's when counsel printed the
5 copy of this photo.

6 THE COURT: But that's not when they were
7 taken?

8 MR. UNDERWOOD: Right. The date of these
9 photos, et cetera, I don't know when these photos were
10 taken. The witness did identify them as being of him
11 and Ms. Huerta, but when they were taken we don't
12 know.

13 With respect to the prosecutorial
14 misconduct, the main thrust of my argument is that --
15 I did not order the transcript, and I don't know how
16 well the Court remembers?

17 THE COURT: There is a copy of it right here.

18 MR. UNDERWOOD: I mean the entire argument?

19 THE COURT: No.

20 MR. UNDERWOOD: The argument was directed
21 at -- it was in rebuttal to counsel's entire
22 argument -- and I'm just going on memory -- was really
23 an indictment of the investigation, and then he did
24 express displeasure from the law, so I don't think
25 that was anywhere near misconduct, that was just
26 rebuttal to his argument which was constant attack on

1 the detectives, their methods, what they did, how they
2 treated people, so it was simply argument in response
3 to that. With those comments, we'll submit it.

4 THE COURT: First of all, let's take up the
5 issue of the prosecutorial misconduct.

6 MR. COLLINS: Judge, I apologize, but I am
7 not sure if Mr. Underwood -- apparently he didn't
8 write his own brief and had someone write it because
9 that's not what his brief says.

10 THE COURT: What's the brief say?

11 MR. COLLINS: His brief says that it was in
12 response to my not going after the cops or anything
13 like that. It was in response to the flight
14 instruction. But if the Court remembers, the first
15 time, yes, I was hard on Arnold and all of those guys,
16 but the second trial I wasn't doing that. It was a
17 total change and shift in focus on my part on the
18 second trial. So for him to say that, that's not
19 true, because I didn't do that on this case on the
20 second trial.

21 Besides that, Judge, I just wanted to
22 note that I let Mr. Underwood say those comments and I
23 don't know if it got typed down by the court reporter,
24 but immediately when he was done, I approached and I
25 said I object to his comments about me hating the law
26 or not liking the law, and you said that that's noted

1 for the record and overruled. I'm just trying to
2 preserve my client's rights here.

3 THE COURT: Yes, and the problem with that
4 was there wasn't an objection during the argument. In
5 other words, you waited too long to make it. In
6 essence the context was it appears from both my
7 recollection and the transcript that what
8 Mr. Underwood was responding to what he took as your
9 accusation that he was misrepresenting the evidence
10 because he says, "I'm accused of giving you unreliable
11 evidence." He says, "No, what I'm saying is
12 undisputable." He's not saying it isn't true, he's
13 not saying it doesn't make him guilty, he is saying
14 that you can't believe Mr. Underwood, you can't
15 believe Mr. Arnold. He doesn't like the law, that
16 related to the flight. What he says is the jury
17 instructions are the law, they don't come from me,
18 they don't come from the police, they are the law.
19 Well, he wants to dispute the law. He doesn't like
20 the whole system. I suppose you could say him saying,
21 he, Mr. Collins doesn't like the whole system is not
22 really an appropriate comment. The question is
23 whether it arises to the level of what can be deemed
24 prosecutorial misconduct. In context, I find that it
25 does not because he's not attacking you personally or
26 impugning your integrity; he's responding to your

1 arguments related to the state of the evidence. It
2 also doesn't appear that what he said is attempting to
3 shift the burden of proof to you. He's entitled to
4 comment on what you say about the evidence in terms of
5 what he says about the evidence, so now there's the
6 context. So I don't see that, first of all, that it
7 wasn't misconduct, and secondly that whatever there
8 was from his comment that he doesn't like the system
9 is not prejudicial and didn't change the outcome of
10 the case.

11 Regarding Juror Number 9 issue and your
12 argument that you weren't allowed to ask any
13 questions, I did go back over that, and you had
14 started out wanting to ask questions and I said, "No,
15 I'll ask them," which I did. But then there was an
16 opportunity for follow-up after I asked, and nobody
17 requested that. So you weren't precluded from asking
18 them, so there's no basis for a new trial there.

19 Now, the issue of Ms. Huerta. It is
20 misconduct for a juror to contact somebody else, and
21 in essence ask that other person's opinion, but that's
22 not the end of the story. The real question here is
23 and I think the biggest problem from the defendant's
24 standpoint is this was not ever reported to the Court
25 until after the verdict. This was something -- and
26 now we've talked about this before, Mr. Collins, you

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8 IN THE UNITED STATES DISTRICT COURT
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12 **ULICES AGUILAR,**

1:12-cv-01547-LJO-JLT

13
14 Petitioner,

15 v.

16 **MATTHEW CATE, Secretary, CDCR,**

17 Respondent.
18

19 29. Reporter's Transcript on Appeal, Vol. XXI, dated January 16, 2009, pp. 2000-2009.
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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF TULARE
DEPARTMENT 10 HON. LLOYD L. HICKS, JUDGE

THE PEOPLE OF THE STATE
OF CALIFORNIA,

Plaintiff,

vs.

ULISES AGUILAR,

Defendant.

NO. VCF 127019-E

Visalia, California

January 16, 2009

REPORTER'S TRANSCRIPT

(Pages 2000 through 2009)

APPEARANCES:

For the Plaintiff: PHILLIP CLINE
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For the Defendant: CRAIG COLLINS
ATTORNEY AT LAW
221 North "I" STREET
Madera, CA 93637

1 January 16, 2009

2 THE COURT: Good afternoon.

3 MR. UNDERWOOD: Afternoon.

4 THE COURT: We're on the record in People
5 versus Ulises Aguilar, case number 127019. And this is
6 the time and place for the sentencing.

7 Before that I did want to better state
8 my basis for the ruling on the motion for new trial.
9 In reviewing that, it wasn't really coherent. I'll
10 take another stab at it.

11 Essentially a three-step process in
12 reviewing a motion for new trial based on juror
13 misconduct, which is the part I want to go over.

14 The first is determining the
15 admissibility of evidence of it. The second is to
16 determine whether facts established misconduct. And
17 third is determine whether it was prejudicial.

18 And here there were three allegations of
19 misconduct. The first was as to juror number nine,
20 allegations relating to playing Norteno rap music in
21 the hallway. And as to that, there really was no
22 admissible evidence that, in fact, it was Norteno rap
23 music. There's no foundation to prove that it was.

24 But even if it were, it didn't establish
25 misconduct, because juror number nine was the one who
26 very frankly revealed her family gang connections. She

1 disclosed a connection with a person in a photo. She
2 was questioned about that and stated that she felt she
3 could be fair.

4 The second allegation is as to juror
5 number three. The first part of that was a failure to
6 reveal a relationship with Mr. Vasquez, who at least at
7 some point in the past, pursuant to photographs and his
8 own testimony, was affiliated with a Norteno gang.

9 All we know from the evidence was that
10 at some point there was such a relationship. We don't
11 know when the photos were taken. His testimony stated
12 that he was no longer gang-affiliated.

13 So there's no basis for a finding that
14 at the time the jury was selected that he was
15 gang-affiliated, and, therefore, no basis for finding
16 an intentional concealment of such a relationship.

17 Even if there were a failure to
18 disclose, it wasn't prejudicial. The question there is
19 whether there's a substantial likelihood of juror bias
20 based on the failure to disclose. And based on a
21 consideration of the entire case, I cannot so find. In
22 fact, if she were biased, it doesn't seem likely that
23 she would be even calling to talk to Mr. Vasquez about
24 any indecision regarding deliberations.

25 Second issue is the discussion of the
26 case with a nonjuror, Mr. Vasquez. The evidence did,

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ULICES AGUILAR, PETITIONER,
vs.
WARREN MONTGOMERY, RESPONDENT.

CERTIFICATE OF SERVICE

I, Carlton F. Gunn, hereby certify that on this 12th day of December, 2017, a copy of the Petitioner's Joint Appendix, Volume 2 of 2, was mailed postage prepaid, to counsel for the Respondent, Deputy Attorney General Justain Riley, at 1300 I Street, Suite 215, P.O. Box 944255, Sacramento, CA 94244-2550.

Respectfully submitted,

December 12, 2017

s/ Carlton F. Gunn
CARLTON F. GUNN
Attorney at Law