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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

DOUGLAS VERNELL JACKSON,
Petitioner,

v.

E. VALENZUELA, Warden,
Respondent.

Case No. 1:13-cv-01296 LJO MJS (HC)
FINDINGS AND RECOMMENDATION
REGARDING PETITION FOR WRIT OF
HABEAS CORPUS

Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Respondent is represented by William K. Kim of the office of the Attorney General.

I. PROCEDURAL BACKGROUND

Petitioner is currently in the custody of the California Department of Corrections pursuant to a judgment of the Superior Court of California, County of Fresno, following his conviction by jury trial on December 1, 2008, for attempted robbery, attempted murder of a peace officer, assault with a firearm upon a peace officer, evading a police officer, and felon in possession of a firearm. (Clerk's Tr. at 605-608.) Petitioner was sentenced to an indeterminate sentence of forty-eight (48) years to life in state prison. (Id.)

1 Petitioner filed a direct appeal with the California Court of Appeal, Fifth Appellate
2 District, which affirmed the judgment on November 7, 2011. (Answer, ECF No. 29, Ex.
3 A.) On January 25, 2012, the California Supreme Court denied review. (Lodged Doc.
4 5.)

5 Petitioner filed a petition for writ of habeas corpus with the Fresno County
6 Superior Court on February 21, 2013. (Lodged Doc. 6.) The Court denied the petition on
7 April 5, 2013. (Lodged Doc. 7.)

8 Petitioner filed the instant federal habeas petition on August 7, 2013. (Pet., ECF
9 No. 1 at 1.) Petitioner presents four claims for relief in the instant petition. Petitioner
10 alleges that (1) his due process rights were violated by an unduly suggestive
11 identification procedure where witnesses had seen Petitioner's picture in the newspaper
12 days before the identification; (2) he was denied the right to a fair trial by an impartial jury
13 because of the trial court's failure to conduct a further inquiry into juror intimidation; (3)
14 the trial court's refusal to grant a mistrial on the grounds of juror misconduct; and (4) the
15 trial court's error in allowing "a significant number of Clovis Police Officers" in the
16 courtroom while playing exhibits for the jurors. (*Id.*)

17 Respondent filed an answer on May 9, 2014, and Petitioner filed a traverse on
18 June 6, 2014. (ECF Nos. 29, 31.) The matter stands ready for adjudication.

19 **II. STATEMENT OF THE FACTS¹**

20 On August 5, 2006, [Petitioner] robbed a bank in Fresno. On
21 August 29, 2006, he and Jamal Justin Chambers attempted to rob
22 a bank in Clovis but, after finding out no one could open the vault,
fled empty-handed and shot at officers during an ensuing police
pursuit.

23 (Answer, Ex. A at 1.)

24 **III. DISCUSSION**

25 **A. Jurisdiction**

26
27 ¹The Fifth District Court of Appeal's summary of the facts in its November 7, 2011 opinion is presumed
28 correct. 28 U.S.C. § 2254(e)(1).

1 Relief by way of a petition for writ of habeas corpus extends to a person in
2 custody pursuant to the judgment of a state court if the custody is in violation of the
3 Constitution or laws or treaties of the United States. 28 U.S.C. § 2254(a); 28 U.S.C. §
4 2241(c)(3); Williams v. Taylor, 529 U.S. 362, 375 fn.7 (2000). Petitioner asserts that he
5 suffered violations of his rights as guaranteed by the U.S. Constitution. (Pet.) In
6 addition, the conviction challenged arises out of the Fresno County Superior Court,
7 which is located within the jurisdiction of this court. 28 U.S.C. § 2241(d); 2254(a).
8 Accordingly, this Court has jurisdiction over the instant action.

9 **B. Legal Standard of Review**

10 On April 24, 1996, Congress enacted the Antiterrorism and Effective Death
11 Penalty Act of 1996 ("AEDPA"), which applies to all petitions for writ of habeas corpus
12 filed after its enactment. Lindh v. Murphy, 521 U.S. 320, 326 (1997); Jeffries v. Wood,
13 114 F.3d 1484, 1499 (9th Cir. 1997). The instant petition was filed after the enactment
14 of the AEDPA and is therefore governed by AEDPA provisions.

15 Under AEDPA, a person in custody under a judgment of a state court may only be
16 granted a writ of habeas corpus for violations of the Constitution or laws of the United
17 States. 28 U.S.C. § 2254(a); Williams, 529 U.S. at 375 n. 7. Federal habeas corpus
18 relief is available for any claim decided on the merits in state court proceedings if the
19 state court's adjudication of the claim:

20 (1) resulted in a decision that was contrary to, or involved an
21 unreasonable application of, clearly established federal law, as
determined by the Supreme Court of the United States; or

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

24 28 U.S.C. § 2254(d).

25 1. **Contrary to or an Unreasonable Application of Federal Law**

26 A state court decision is "contrary to" federal law if it "applies a rule that
27 contradicts governing law set forth in [Supreme Court] cases" or "confronts a set of facts
28 that [are] materially indistinguishable from [a Supreme Court case] but reaches a

1 different result." Brown v. Payton, 544 U.S. 133, 141 (2005) (citing Williams, 529 U.S. at
2 405-06). "AEDPA does not require state and federal courts to wait for some nearly
3 identical factual pattern before a legal rule must be applied . . . The statute recognizes . .
4 . that even a general standard may be applied in an unreasonable manner." Panetti v.
5 Quarterman, 551 U.S. 930, 953 (2007) (citations and quotation marks omitted). The
6 "clearly established Federal law" requirement "does not demand more than a 'principle'
7 or 'general standard.'" Musladin v. Lamarque, 555 F.3d 830, 839 (2009). For a state
8 decision to be an unreasonable application of clearly established federal law under §
9 2254(d)(1), the Supreme Court's prior decisions must provide a governing legal principle
10 (or principles) to the issue before the state court. Lockyer v. Andrade, 538 U.S. 63, 70-
11 71 (2003). A state court decision will involve an "unreasonable application of" federal
12 law only if it is "objectively unreasonable." Id. at 75-76 (quoting Williams, 529 U.S. at
13 409-10); Woodford v. Visciotti, 537 U.S. 19, 24-25 (2002). In Harrington v. Richter, the
14 Court further stresses that "an *unreasonable* application of federal law is different from
15 an *incorrect* application of federal law." 131 S. Ct. 770, 785 (2011) (citing Williams, 529
16 U.S. at 410) (emphasis in original). "A state court's determination that a claim lacks
17 merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the
18 correctness of the state court's decision." Id. at 786 (citing Yarborough v. Alvarado, 541
19 U.S. 653, 664 (2004)). Further, "[t]he more general the rule, the more leeway courts
20 have in reading outcomes in case-by-case determinations." Id.; Renico v. Lett, 130 S.
21 Ct. 1855, 1864 (2010). "It is not an unreasonable application of clearly established
22 Federal law for a state court to decline to apply a specific legal rule that has not been
23 squarely established by this Court." Knowles v. Mirzayance, 129 S. Ct. 1411, 1419
24 (2009) (quoted by Richter, 131 S. Ct. at 786).

25 2. Review of State Decisions

26 "Where there has been one reasoned state judgment rejecting a federal claim,
27 later unexplained orders upholding that judgment or rejecting the claim rest on the same
28 grounds." See Ylst v. Nunnemaker, 501 U.S. 797, 803 (1991). This is referred to as the

1 "look through" presumption. Id. at 804; Plascencia v. Alameida, 467 F.3d 1190, 1198
2 (9th Cir. 2006). Determining whether a state court's decision resulted from an
3 unreasonable legal or factual conclusion, "does not require that there be an opinion from
4 the state court explaining the state court's reasoning." Richter, 131 S. Ct. at 784-85.
5 "Where a state court's decision is unaccompanied by an explanation, the habeas
6 petitioner's burden still must be met by showing there was no reasonable basis for the
7 state court to deny relief." Id. "This Court now holds and reconfirms that § 2254(d) does
8 not require a state court to give reasons before its decision can be deemed to have been
9 'adjudicated on the merits.'" Id.

10 Richter instructs that whether the state court decision is reasoned and explained,
11 or merely a summary denial, the approach to evaluating unreasonableness under §
12 2254(d) is the same: "Under § 2254(d), a habeas court must determine what arguments
13 or theories supported or, as here, could have supported, the state court's decision; then
14 it must ask whether it is possible fairminded jurists could disagree that those arguments
15 or theories are inconsistent with the holding in a prior decision of this Court." Id. at 786.
16 Thus, "even a strong case for relief does not mean the state court's contrary conclusion
17 was unreasonable." Id. (citing Lockyer v. Andrade, 538 U.S. at 75). AEDPA "preserves
18 authority to issue the writ in cases where there is *no possibility* fairminded jurists could
19 disagree that the state court's decision conflicts with this Court's precedents." Id.
20 (emphasis added). To put it yet another way:

21 As a condition for obtaining habeas corpus relief from a federal
22 court, a state prisoner must show that the state court's ruling on the claim
23 being presented in federal court was so lacking in justification that there
was an error well understood and comprehended in existing law beyond
any possibility for fairminded disagreement.

24 Id. at 786-87. The Court then explains the rationale for this rule, i.e., "that state courts
25 are the principal forum for asserting constitutional challenges to state convictions." Id. at
26 787. It follows from this consideration that § 2254(d) "complements the exhaustion
27 requirement and the doctrine of procedural bar to ensure that state proceedings are the
28 central process, not just a preliminary step for later federal habeas proceedings." Id.

1 (citing Wainwright v. Sykes, 433 U.S. 72, 90 (1977)).

2 3. Prejudicial Impact of Constitutional Error

3 The prejudicial impact of any constitutional error is assessed by asking whether
4 the error had "a substantial and injurious effect or influence in determining the jury's
5 verdict." Brecht v. Abrahamson, 507 U.S. 619, 623 (1993); see also Fry v. Pliler, 551
6 U.S. 112, 121-22 (2007) (holding that the Brecht standard applies whether or not the
7 state court recognized the error and reviewed it for harmlessness). Some constitutional
8 errors, however, do not require that the petitioner demonstrate prejudice. See Arizona v.
9 Fulminante, 499 U.S. 279, 310 (1991); United States v. Cronin, 466 U.S. 648, 659
10 (1984).

11 **IV. REVIEW OF PETITION**

12 **A. Claim One: Unduly Suggestive or Unreliable Identification**

13 Petitioner, in his first claim, asserts that his due process rights were violated by
14 the actions of law enforcement in relying upon unduly suggestive identification
15 techniques that rendered the witnesses identification of Petitioner as unreliable.

16 1. State Court Decision

17 Petitioner presented his claim by way of direct appeal to the California Court of
18 Appeal, Fifth Appellate District. The claim was denied in a reasoned decision by the
19 Court of Appeal (Answer, Ex. A.) and in a subsequent appeal to the California Supreme
20 Court (Lodged Doc. 5.). "[W]here there has been one reasoned state judgment rejecting
21 a federal claim, later unexplained orders upholding that judgment or rejecting the claim
22 rest on the same grounds." See Ylst v. Nunnemaker, 501 U.S. 797, 803 (1991). This is
23 referred to as the "look through" presumption. Id. at 804. Since the Court of Appeal was
24 the last court to issue a reasoned opinion on this issue, this Court "looks through" the
25 California Supreme Court decision to the reasoned analysis of the Court of Appeal. With
26 regard to the unreliable identification technique claim, the Court of Appeal said in its
27 opinion:

28 1. Identification as Perpetrator of Fresno Bank Robbery

1 Jackson argues that "the identification process was so unduly
2 suggestive and unreliable" as to require reversal of his conviction of the
3 Fresno bank robbery. The Attorney General argues that he fails to show
4 "as a demonstrable reality, not just speculation," that the identification
5 process was not fair.

6 The crux of Jackson's argument is that his conviction of the bank
7 robbery in Fresno "was obtained using an identification process in which
8 [the operations manager], and possibly [a teller], identified [him] as the
9 perpetrator only after seeing his photograph in the newspaper as the
10 suspect" of the crimes that arose from the attempted Clovis bank robbery
11 on August 29, 2006. A detective who noticed a similarity between the
12 suspects in the two crimes showed a photo lineup to the teller on that
13 date. On the basis of her observation of the robber's face at the bank, she
14 identified Jackson. Only afterward did she see any photos of suspects in
15 the newspaper. None had yet been publicized. On August 31, 2006, he
16 showed the operations manager a photo lineup with a photo of Jackson
17 that was different from the one she saw in the newspaper. He told her,
18 "When you're looking at these photographs, I want you to think about the
19 day of the robbery and the person that you saw come into the bank." On
20 the basis of her "interaction with the individual" at the bank and the "still
21 video photo" from the bank, she identified Jackson.

22 The parties agree on the governing law. With reference to "the
23 relationship between suggestiveness and misidentification," the United
24 States Supreme Court holds, "It is the likelihood of misidentification which
25 violates a defendant's right to due process." (Neil v. Biggers (1972) 409
26 U.S. 188, 198.) Citing Biggers, our Supreme Court notes that the relevant
27 considerations on whether the admission of identification evidence
28 violates due process are "(1) whether the identification procedure was
unduly suggestive and unnecessary, and, if so, (2) whether the
identification itself was nevertheless reliable under the totality of the
circumstances, taking into account such factors as the opportunity of the
witness to view the suspect at the time of the offense, the witness's
degree of attention at the time of the offense, the accuracy of his or her
prior description of the suspect, the level of certainty demonstrated at the
time of the identification, and the lapse of time between the offense and
the identification." (People v. Cunningham (2001) 25 Cal.4th 926, 989,
citing, e.g., Biggers, supra, at pp. 199-200.) On the issue of "whether a
pretrial identification procedure was unduly suggestive," our Supreme
Court holds that "the standard of independent review applies." (People v.
Kennedy (2005) 36 Cal.4th 595, 609, overruled on another ground by
People v. Williams (2010) 49 Cal.4th 405, 459.)

23 The parties disagree, however, on the outcome of an application of
24 the governing law to the facts before us. Jackson argues that the
25 operations manager, having seen his photo in the newspaper and having
26 acknowledged paying closer attention to the robber who was holding the
27 handgun than to him, made a flawed identification. He argues that the
28 teller's equivocation about whether he was wearing sunglasses and the
lapse of time between the robbery and the photo lineup made her
identification troublesome as well.

The Attorney General, on the other hand, emphasizes that the
detective did not show Jackson's photo from the newspaper to the

1 operations manager, who identified him on the basis of her interaction with
2 the robber at the bank and the robber's photo from the bank's security
3 system. Even a questionable identification, if based on factors other than
4 impermissibly suggestive procedures, is an issue of credibility properly
5 decided by a jury. (People v. Contreras (1993) 17 Cal.App.4th 813, 822-
6 823.) Any risk of misidentification of Jackson by the operations manager
7 or the teller was "substantially lessened by a course of cross-examination
8 at trial." (Simmons v. United States (1968) 390 U.S. 377, 384.) By the
9 standard of independent review, he fails to persuade us that the
10 identification process here was so suggestive as to require reversal.

11 People v. Jackson, 2011 Cal. App. Unpub. LEXIS 8520, 5-9 (Cal. App. 5th Dist., Nov. 7,
12 2011).

13 **C. Analysis**

14 The Supreme Court has recently emphasized in a case involving an allegedly
15 suggestive pretrial identification that "[t]he Constitution, our decisions indicate, protects a
16 defendant against a conviction based on evidence of questionable reliability, not by
17 prohibiting introduction of the evidence, but by affording the defendant means to
18 persuade the jury that the evidence should be discounted as unworthy of credit." Perry v.
19 New Hampshire, U.S. , , 132 S. Ct. 716, 723, 181 L. Ed. 2d 694 (2012). Aside
20 from the Sixth Amendment rights to counsel, compulsory process, examination of
21 witnesses, and confrontation/cross-examination, "state and federal statutes and rules
22 ordinarily govern the admissibility of evidence, and juries are assigned the task of
23 determining the reliability of the evidence presented at trial." Id. Consequently, a trial
24 court's admission of evidence violates due process only when the evidence "is so
25 extremely unfair that its admission violates fundamental conceptions of justice." Id.
26 (quoting Dowling v. United States, 493 U.S. 342, 352, 110 S. Ct. 668, 107 L. Ed. 2d 708
27 (1990)).

28 Consistent with these principles, "[w]hen a witness identifies the defendant in a
police-organized photo lineup, . . . the identification should be suppressed only where
'the photographic identification procedure was so [unnecessarily] suggestive as to give
rise to a very substantial likelihood of irreparable misidentification.'" Id. at 724 (brackets
in original) (quoting Simmons v. United States, 390 U.S. 377, 384-85, 88 S. Ct. 967, 19
L. Ed. 2d 1247 (1968)).

1 To determine if an identification procedure was unduly suggestive, the court must
2 examine the totality of the surrounding circumstances. United States v. Carr, 761 F.3d
3 1068, 1074 (9th Cir. 2014) (citing United States v. Bagley, 772 F.2d 482, 492 (9th Cir.
4 1985). For example, "[p]hotographic procedures which emphasize the focus upon a
5 single individual increase the danger of misidentification." Bagley, 772 F.2d at 493; see
6 also Simmons, 390 U.S. at 383 ("[The danger of an incorrect identification] will be
7 increased if the police display to the witness only the picture of a single individual who
8 generally resembles the person he saw, or if they show him the pictures of several
9 persons among which the photograph of a single such individual recurs or is in some
10 way emphasized.").

11 Here, Petitioner has not established that the identification procedure presented to
12 the witnesses was suggestive or that the witnesses' identifications were overly
13 unreliable. First, Petitioner has not claimed that the photo lineup presented to the
14 witnesses emphasized his photo or caused him to stand out in any way. See Bagley,
15 772 F.2d at 493. Nor has Petitioner claimed that the law enforcement officers that
16 administered the lineups used coercive techniques in an attempt to have the witnesses
17 identify Petitioner.

18 With regard to the teller, Ray Ana Perez, Petitioner claims that her identification
19 was unreliable based on the fact that stress and fear can distort perception, and that she
20 was distracted and focused on the gun during the robbery. (Pet. at 16.) During trial Perez
21 testified that she was provided the lineup prior to seeing any other photos of Petitioner,
22 including newspaper articles regarding the robbery. (Rep. Tr. at 1544, 1548-49.) Perez
23 admitted that she was not able to see Petitioner's eyes during the robbery because he
24 was wearing sunglasses. (Id. at 1548.) While Perez's view of the robber's face was
25 obscured by sunglasses, her ability to observe the robber's face was a factor for the jury
26 to take into account in determining the reliability of her testimony. Further, her ability to
27 observe the robber does not implicate that the identification techniques were suggestive.
28 Based the evidence presented at trial, Petitioner has not shown that the identification

1 procedure was unduly suggestive.

2 Petitioner's arguments erroneously focus on the second step in the analysis,
3 involving whether under the totality of the circumstances, under the five factors
4 articulated in Biggers, the witness's identification was reliable. See Manson, 432 U.S. at
5 114; see also Biggers, 409 U.S. at 199-200. But, those factors are analyzed where the
6 challenged pretrial identification procedure is first found to be impermissibly suggestive.
7 If the procedure was not impermissibly suggestive, and it was not here, the due process
8 inquiry ends. See Perry, 132 S. Ct. at 724 ("[D]ue process concerns arise only when law
9 enforcement officers use an identification procedure that is both suggestive and
10 unnecessary."); see also Bagley, 772 F.2d at 492 ("If we find that a challenged
11 procedure is not impermissibly suggestive, our inquiry into the due process claim
12 ends."). The Court notes that while stress and fear might distort a witness' memory or
13 perception, Petitioner has not presented any evidence in this case that Perez's
14 identification suffered from irreparable unreliability. Regardless, Petitioner has not shown
15 that the state court's review of his federal due process claim regarding the bank teller's
16 identification was unreasonable.

17 With regard to the identification of Petitioner by Deborah Patterson, the bank
18 manager, she noted that she had read a news article which included a photograph of
19 Petitioner in the newspaper prior to her identification. (Rep. Tr. 1365.) As the state court
20 noted in its decision, the source of the potential unreliability of the witness' identification
21 was the publication of Petitioner's photo in the newspaper, not actions on behalf of law
22 enforcement making the lineup unduly suggestive. Despite Petitioner's attempts to limit
23 such testimony, the Supreme Court specifically explained that the situation presented
24 does not violate Petitioner's due process rights. See, Perry, 132 S. Ct. at 727-728 ("Most
25 eyewitness identifications involve some element of suggestion. Indeed, all in-court
26 identifications do. Out-of-court identifications volunteered by witnesses are also likely to
27 involve suggestive circumstances. For example, suppose a witness identifies the
28 defendant to police officers after seeing a photograph of the defendant in the press

1 captioned "theft suspect," or hearing a radio report implicating the defendant in the
2 crime."). Rather Petitioner must rely upon other procedural safeguards, such as jury
3 instructions regarding limitations on reliability of witness identifications, and on the cross-
4 examination of the witness by defense counsel.) (Id. at 729-30.) Petitioner has not
5 shown that such safeguards were not in place. The trial court instructed the jury
6 regarding factors that influence the reliability of eyewitness testimony. (Rep. Tr. at 3940-
7 41.) Finally, Petitioner has not shown that he lacked the opportunity to cross-examine
8 the witness or present arguments at closing challenging the reliability of the witness'
9 identification.

10 For the foregoing reasons, Petitioner is not entitled to federal habeas relief for his
11 challenge to the witnesses' pretrial photographic identification of him as the bank robber.
12 Specifically, he has failed to satisfy the "unreasonable application" prong of § 2254(d)(1)
13 by showing that there was no reasonable basis for the state courts' denial of that claim.
14 Pinholster, 131 S. Ct. at 1402. Petitioner is not entitled to habeas relief with regard to
15 claim one.

16 **B. Claims Two through Four: Intimidation of and Prejudgment of the**
17 **Case by Jurors**

18 Petitioner contends that he was deprived of the right to a fair trial and an impartial
19 jury because the court failed to adequately investigate the possible intimidation of jurors
20 and the possibility that jurors had prejudged the case. (Pet. at 15-20.) The Court shall
21 address each claim in turn.

22 1. State Court Decision

23 Petitioner presented his claims by way of direct appeal to the California Court of
24 Appeal, Fifth Appellate District. The claims were denied in a reasoned decision by the
25 Court of Appeal (Answer, Ex. A.) and in a subsequent appeal to the California Supreme
26 Court (Lodged Doc. 5.) As stated earlier, "where there has been one reasoned state
27 judgment rejecting a federal claim, later unexplained orders upholding that judgment or
28 rejecting the claim rest on the same grounds." See Ylst v. Nunnemaker, 501 U.S. 797,

1 803 (1991). This is referred to as the "look through" presumption. Id. at 804. Since the
2 Court of Appeal was the last court to issue a reasoned opinion on these issues, this
3 Court "looks through" the California Supreme Court decision to the reasoned analysis of
4 the Court of Appeal. With regard to the jury intimidation claims, the Court of Appeal said
5 in its opinion:

6 *1. Claim of Juror Intimidation During Testimony*

7 Jackson argues that the court's failure to conduct an adequate inquiry into
8 possible juror intimidation by spectators violated his constitutional rights to
an impartial jury and a fair trial. The Attorney General argues the contrary.

9 On the 11th day of trial, juror number 3 submitted a letter to the court
10 expressing "concern" about two men in the courtroom who made
Jackson's former girlfriend "very nervous" as she testified. The letter
11 referred to a comment about "Lo Boys" in Jackson's fiancé's testimony
and to a comment overheard during a break about how the two men were
12 Jackson's cousins. The letter mentioned that several jurors had to step
around the two men in the hall. Juror number 3 said she was no "stranger
13 to the Lo Boys and their reputation: but admitted she was not "very
comfortable" about their presence and thought other jurors might "feel the
14 same." She wrote, "Please give me the assurance that I will be safe here
and there will not be any intimidation from visitors in the courtroom."

15 In chambers, the court and counsel conferred with juror number 3, who
16 said that other jurors made comments about how the two men made the
witness nervous. Hearing Jackson's fiancé refer on stand to Jackson as
17 "Chain or Shane," which "was his Lo[] Boy name." "freaked [her] out a little
bit," after which she took off her juror badge. She reported that juror
18 number 5 mentioned leaving her wedding ring at home and feeling
nervous about walking to her car. Later, juror number 3 acknowledged "I
19 don't know if I heard Lo[] Boy or not." The court asked, "Has anybody
done anything that in any way obviously or subjectively, made you feel
20 personally intimidated?" She answered, "No," adding that she "just...felt
uneasy." The court asked, "And you were uneasy because?" She
21 answered, "They were just right there." The court asked, "But they did not
look at you? Threaten?" She said, "No." The court asked, "Mouth
22 comments?" She answered, "Absolutely not, no." The court noted that
"things like that" are "not unusual for a jury trial. You may have a
23 courtroom full of people on both sides." She said she knew about Fresno
gangs only because her "spouse worked for a criminal defense attorney
24 for years." The court asked if any of the jurors mentioned the Lo Boys.
She said, "No." Asked if she had formed an opinion about guilt or
25 innocence, she replied, "No." To the question, "And is there anything
about what you've heard, seen, or observed inside or outside the
26 courtroom that would impact your ability to be fair and impartial?," she
likewise replied, "No."

27 The court called juror number 5 into chambers and told that her [sic]
28 someone had mentioned she was not wearing her wedding ring because
she was nervous. She was just "kidding around," she said. Her wedding

1 ring no longer fits because she gained weight after having her baby.
2 "Anything about any of the local characters or anything else?," the court
3 probed. "Oh, no," she replied, adding that she just gets "nervous around
4 people" and walks "everywhere" in groups.

5 Out of the presence of juror number 5, the defense asked the court to
6 question the jurors. The court declined the request, noting that it was
7 "extremely reticent to engage in questions of a jury, either before or during
8 deliberations," about the "subjective analysis of the evidence," which
9 included asking jurors about how to analyze "the testimony of a particular
10 witness." The court observed too, that "to carry it further would create
11 actual potential issues that are not present." The court pointed out that the
12 jury was to receive instruction not to consider for any purpose anything
13 that was not evidence, including the activities of others in the courtroom.
14 The court asked the court reporter "what she wrote down" about a
15 possible witness reference to "Lo Boys."

16 After the noon recess that day, the court, in the presence of counsel and
17 juror number 3 but outside the presence of the rest of the jury, had the
18 court reporter read the portion of Jackson's former girlfriend's testimony
19 that juror number 3 mistakenly thought referred to the Lo Boys. "The
20 testimony was," the court reporter read, "Chain, like chain?" and the
21 answer, she read, was, "No. It is like an old cowboy movie, a long time
22 ago. And his name was Chain, and that's his name they gave him as a
23 little boy."

24 "The decision whether to investigate possible juror bias, incompetence, or
25 misconduct, as well as the ultimate decision whether to retain or discharge
26 a juror, rests within the sound discretion of the trial court. [Citation.] If any
27 substantial evidence to support the trial court's exercise of its discretion,
28 the court's action will be upheld on appeal." (*People v. Maury* (2003) 30
Cal.4th 342, 434.) As our Supreme Court notes, "a hearing is required
only where the court possesses information which, if proven to be true,
would constitute 'good cause' to doubt a juror's ability to perform his [or
her] duties and would justify his [or her] removal from the case." (*people v.*
Ray (1996) 13 Cal.4th 313, 343.)

19 Here, by questioning juror number 3 at length, questioning juror number 5
20 briefly, and having the court reporter read back part of Jackson's former
21 girlfriend's testimony, the court found that juror number 3 was mistaken in
22 her recollection that the witness said "Lo Boy" (when, in fact, she said
23 cowboy") and that juror number 5's comment about not wearing her
24 wedding ring because she was nervous was only a joke. [Petitioner]
25 agrees the court resolved juror number 3's initial concern but argues that
26 the discussion of the case by the jurors violated section 1122 and that the
27 court should have conducted a further inquiry. [FN5]

28 **FN5.** In Part, section 1122 provides, "(a) After the jury has
been sworn . . . the court shall instruct the jury generally
concerning its basic functions, duties, and conduct. The
instructions shall include, among other matters, admonitions
that the jurors shall not converse among themselves, or with
anyone else, on any subject connected with the trial; . . . and
that they shall promptly report to the court any incident within
their knowledge involving an attempt by any person to
improperly influence any member of the jury. (b) The jury

1 shall also, at each adjournment of the court before the
2 submission of the cause to the jury, whether permitted to
3 separate or kept in charge of officers, be admonished by the
4 court that it is their duty not to converse among themselves,
5 of with anyone else, on any subject connected with the trial,
6 or to form or express any opinion thereon until the cause is
7 finally submitted to them.” (§ 1122.)

8 The Attorney General argues that the juror comments at issue here,
9 though a breach of the court’s section 1122 admonitions, showed no
10 prejudgment of the case. We agree. “Trivial violations that do not prejudice
11 the parties do not require removal of a sitting juror.” (*People v. Wilson*
12 (2008) 44 Cal.4th 758, 839 (*Wilson*.) The comments here neither suggest
13 prejudgment of guilt nor cast doubt on the impartiality of the jurors or the
14 fairness of the trial. Juror comments like those are “certainly not as
15 serious as questions designed to obtain extrinsic evidence regarding the
16 case itself.” (*Ibid.*) “No trials are perfect –evidentiary or procedural errors
17 are bound to occur.” (*People v. Garcia* (2005) 36 Cal.4th 777, 808 (conc.
18 & dis. opn. of Chin, J.)) [Petitioner] fails to persuade us that the court
19 should have conducted further inquiry.

2. Claim of Juror Prejudgment of Case

20 Jackson argues that the court’s denial of his motion for a mistrial on the
21 ground that jurors prejudged the case violated his constitutional rights to
22 an impartial jury and a fair trial. The Attorney General argues the contrary.

23 On the 17th day of trial, juror number 1 submitted a note to the court
24 stating, “A comment was made this week that the prosecutor has not done
25 his job so there’s no need for a long defense. I am concerned that an
26 attempt was made to taint the jury.” Once the court brought her into
27 chambers, she elaborated, “And in my mind I thought why would she say
28 something like that. We are not supposed to make a decision at all until
we have heard both sides.” She identified the juror who made the
comment as juror number 5 and said that juror number 10 responded with
something like “yeah, right” but said she did not know whether he was
agreeing or being facetious because “those two kind of buddy up with
each other” She said, “I heard it, and I just let it go,” but agreed to write the
note after some other jurors at lunch said the court should be informed.

After juror number 1 left, the court brought juror number 5 into chambers
and asked her about her comment. She said some jurors said things like
“they’re guilty” and “DNA doesn’t lie” and that afterward she said “the DA
hasn’t done his job yet.” She denied saying “there’s no need for a long
defense.” She might have said the “defense is not getting that much
longer because [she] heard it’s only a few days or a week for [the]
defense.”

After juror number 5 left, the court brought juror number 10 into chambers
and asked him about his “yeah, or right, or something” comment in
response to the comment juror number 5 made. Juror number 10 said he
did not recall making that statement but did say “there has been a lot of
talking of everybody in there about the case.” Asked by the court to
elaborate, he said everyone was “giving some point of view or input about
how they feel about the case, but not into specific of guilty verdict or no[t]
guilty verdict.” For example, “that witness didn’t help anybody or things like

1 that." He said that he had his "own belief of things that may have
2 happened or may not have happened" but still did not "have a completed
3 verdict of not guilty or guilty." Although he was "leaning towards one way,"
4 he said he was "still being very fair."

5 After juror number 10 left, the defense made a motion to interview each
6 juror and made a motion for a mistrial. The prosecutor made a motion to
7 dismiss juror number 5. The court granted the motion to interview each
8 juror – individually, in chambers, in the presence of counsel, and out of the
9 presence of the defendants – and deferred rulings on the other motions.

10 The court asked juror number 2 if he had heard anything "that has
11 troubled you about anyone having the ability to have a fair trial either side,
12 prosecution, or defense." He said most of the comments were "trivial" like
13 "that witness was funny" and "more like kind of killing time." He said that
14 "everyone has been really careful" not to talk "about the case itself or the
15 evidence or like the believability of the witnesses or the lawyers." The "one
16 comment" he had heard "over the last two weeks that shouldn't have been
17 made" was "the problematic one" by juror number 5 about "they don't need
18 to do anything because the DA hasn't shown enough or something like
19 that." He said "nothing at all" had happened to make him other than a fair
20 and impartial juror.

21 The court asked juror number 3 if "any conversations or comments" had
22 led her to believe she "could not be fair and impartial." She replied, "No."
23 Other than flip remarks jurors made to get to know each other, the only
24 comment she thought was inappropriate was juror number 5's comment
25 that "the prosecution's not doing their job," a comment that made her
26 think, "when we go into deliberations, she might be a problem." That was
27 the only time "anybody has said anything" that led her to believe "that
28 maybe an opinion had already been formed. And that's why I thought it
was out of line."

The court asked juror number 4 if she had heard anything, "just listening to
other jurors, that they've made inappropriate statements or have formed
opinions about the case that would make them less than impartial." He
replied, "No," and said he had not "heard anybody saying anything about
the case at all."

The court asked juror number 6 if he had "heard anything from anyone"
that would lead him to believe "somebody has made up their mind, not
made up their mind, not listening, not following the [] rules." He replied,
"No," adding he talks to few people and keeps to himself. Asked by the
court if "some discussion, apparently somebody was in the courtroom,"
that led to "an interchange or something," gave him "any pause for
concern" about "being fair and impartial or intimidated or anything like
that," he replied, "No, it probably won't be." Asked by the court if he had
"heard anyone speak about like they've made up their mind or something
like that," he shook his head.

The court asked juror number 7 if there had been any conversations that
would lead her "to think that any jurors made up their mind or are speaking
inappropriately about things they shouldn't be speaking about." There had
been "comments practically by everybody," she replied, not "about the
case" or "anything to do with innocent, guilty," but about things like how
one of the witnesses "should have zipped up her jacket. Just things like

1 that.”

2 The court asked juror number 8 if he had heard “any comments about this
3 case from jurors that gave [him] any pause for concern.” Replying in the
4 affirmative, he said that a juror made a comment about how “the defense
5 didn’t need much time because the prosecution case was so weak.” Her
6 comment bothered him. “She shouldn’t be saying anything like that one
7 way or the other.” He said that nobody made a comment to her at the time
8 but that there was some discussion afterward. “She laughs all the time,”
9 he said, and “doesn’t seem to be taking this very seriously like a lot of us.”

10 The court asked juror number 9 if he had heard anyone make “comments
11 that they shouldn’t have made” that would lead him to think “maybe they
12 formed an opinion.” He said he had not “really been talking with the other
13 jurors,” had “just been paying attention to the trial,” and had not “heard
14 anything actually.” Asked by the court if anything had “happened that
15 would give [him] any cause to think [he] could not continue to be fair and
16 impartial,” he replied, “No, nothing.”

17 The court asked juror number 11 if she had heard “any comments about
18 this case from anybody, anything from any of [her] fellow jurors that gives
19 [her] any pause.” **FN6** She replied, “No,” adding that she had heard some
20 comments but “nothing trying to persuade anyone.” Nothing came to mind
21 that would cause her to think she could not be fair and impartial.

22 **FN6.** By stipulation, the court previously had excused
23 original juror number 11 for hardship and had seated original
24 alternate juror 2 as new juror number 11.

25 The court asked juror number 12 if he had heard “anything, any comments
26 by any juror that would give [him] any pause for concern about being fair
27 and impartial.” He replied, “No.”

28 The court asked juror number 3 if she had heard “any comments by any
juror that would give [her] pause for concern.” She replied, “Yes.” Asked
for details, she said that after one of the jurors said the defense was “only
going to be a day” juror number 5 said “something to the effect we don’t
even need a defense because the prosecution didn’t do their job.” She
added, “And it was kind of quiet after that. Everybody looked at each
other.” That was the first time anyone said something “that should not
have been said.”

At that juncture, the court, having interviewed each juror individually,
brought juror number 5 back into chambers to “follow-up on a couple of
things.” Asked by the court about the DNA comment, she said she
remembered “someone saying DNA doesn’t lie.” She said she was “not
sure” if that person “said we might as well vote guilty” but that is “what
[she] got from that.” She had “the feeling that people are choosing sides
already.” Asked by the court if she had chosen sides, she replied,
“Honestly, I haven’t.” She said she had a feeling “a few jurors don’t like
[her]” because she is “blunt” and “outspoken” but she insisted she could
“listen to everybody” during deliberations.

Back in the courtroom, the court admonished all of the jurors together not
to “talk about the case or about any of the people or any subject involved
in the case” until “after the evidence has been presented, the attorneys

1 have completed their arguments,” the court has instructed on the law, and
2 deliberations have begun. The court the excused the jury for the day,
denied the defense motion for a mistrial, and denied the prosecutor’s
motion to dismiss juror number 5.

3 “Undeniably, the juror’s comments were a breach of the court’s [section
4 1122] admonitions,” the Attorney General acknowledges. Not every
insignificant infraction of the rules by a juror calls for a new trial, however.
5 “Where the misconduct is of such trifling nature that it could not in the
nature of things have prevented either party from having a fair trial, the
6 verdict should not be set aside.” (*Enyart v. City of Los Angeles* (1999) 76
Cal.App.4th 499, 507.)

7 A court should grant a motion for a mistrial only when a party’s chances of
receiving a fair trial have been irreparably damaged by prejudice that is
8 incurable by admonition or instruction. (*People v. Avila* (2006) 38 Cal.4th
491, 573 (*Avila*)). Since the determination whether an incident is incurably
9 prejudicial is intrinsically speculative, a court has considerable discretion
in ruling on a motion for mistrial. (*Ibid.*) The standard of review of a court’s
10 ruling on a motion for a mistrial is abuse of discretion. (*Ibid.*)

11 Here, the record shows no abuse of discretion. As the court’s interviews
with all of the jurors show, some perceptions differed, some recollections
12 diverged, and some jurors might have formed some opinions about the
case. Yet the record affirmatively shows that not even one juror had
13 already made up his or her mind about the case. Although “jurors are told
not to discuss the case until all the evidence has been presented and
14 instructions given, they are not precluded from thinking about the case,
nor would that be humanly possible.” (*Wilson, supra*, 44 Cal.4th at p. 840.)
15 [Petitioner] claims that the denial of his motion violated his constitutional
rights to an impartial jury and a fair trial, but since the premise of his
16 constitutional claims is that the denial of his motion was prejudicial, his
constitutional claims likewise fail. (*People v. Sanders* (1995) 11 Cal.4th
17 475, 510, fn. 3 (*Sanders*)).

18 *3. Claim of Juror Intimidation During Deliberations*

19 [Petitioner] argues that the court’s denial of his motions for a mistrial and a
new trial on the ground of the presence of police officers in the audience
20 during replays of audio and video exhibits in open court violated his
constitutional rights to an impartial jury and a fair trial. The Attorney
21 General argues the contrary.

22 During deliberations, the jury asked for replays of audio and video
exhibits, clarification of instructions, and readback of witness testimony.
23 Noting that “setting up all the equipment” makes a replay “different than a
readback,” the court had the replays in open court, not in the jury room.
24 The court clarified the instructions in open court, too, but had the court
reporter do the readback in the jury room.

25
26 After the jury retired to the jury room for readback, the defense objected to
replays of the audio and video exhibits of the police pursuit in open court
27 when about 10 police officers, some of whom were victims or witnesses,
were in the audience. Analogizing a replay to readback, the defense
28 urged, “This should be done in the jury room,” arguing that “police and
witnesses are never present during read back” and that a replay in open

1 court "taints any type of deliberations." The court replied, "It is an open
2 courtroom. This is not testimony," noting that technological difficulties of
3 replays made putting those burdens on a bailiff in the jury room
4 inappropriate. The court noted the importance of counsel being "able to
observe what is being observed and how it's being [set] forth. This is a
public courtroom nonetheless, and I do not believe there is any legal basis
to close the courtroom."

5 The defense made an oral motion for a mistrial on the basis of a due
6 process violation of the right to an impartial jury. Counsel argued that the
7 prosecutor invited the officers to come to open court during the replays "to
8 prejudice the jury" and pointed out that every juror looked at the officers
9 wearing badges and weapons in open court. In the alternative, the
10 defense requested an admonishment to the jury that the presence of the
11 officers should not taint the deliberations. The court acknowledged "a
12 number of people in the courtroom," some of whom, the defense
interjected, were "police officers" and "victims." On the basis of having
13 watched the audience "very carefully," the court noted, there were no "signs,
14 symbols, nonverbal communication, facial expressions by anyone." The
15 prosecution said he invited the officers, who had "every right to be here."
16 The court found no indication of any misbehavior by anyone, declined to
17 "insult any folks that are here" by "admonishing them as to their conduct,"
18 and denied the motion.

19 After the replays in open court, the defense filed a written motion for a
20 mistrial. The court cautioned the jury that "the only evidence you're to
21 consider is what happens from the witness stand or evidence that is put
22 on the record in some fashion during the course of trial." The court added,
23 "What we're doing or people in the audience that may be here throughout,
24 including yesterday, are not to be considered for any purpose." After
25 hearing argument, the court observed that when "these jurors were in this
26 courtroom, they were not deliberating" and that the spectators showed no
27 "intent to influence the jurors in any way" and did nothing to indicate their
28 presence was "other than as members of the public." The court
commented, too, that after admonishing the jury the court "made eye
contact with each of the 12" jurors in the period of silence that followed
and perceived "tacit agreement" with the admonishment. The court denied
the motion.

After the jury's verdicts, the defense filed a motion for a new trial on the
ground that the court's "allowing the prosecutor to fill the courtroom with
police officers during jury deliberations at a time when the jury had
presented a question to the court regarding the attempted murder charge"
intimidated the jury into returning a guilty verdict on that charge. The
prosecutor filed an opposition. After hearing argument, the court denied
the motion.

"Every person charged with a criminal offense has a constitutional right to
a public trial, that is, a trial which is open to the general public at all times.
(See U.S. Const., amends. VI, XIV; Cal. Const., art. I, § 15; see also [] §
686, subd. 1.)" (*People v. Woodward* (1992) 4 Cal.4th 376 382
(*Woodward*)). "Given the importance of public trials to both the accused
and the public, there is a ""presumption of openness"" in the courtroom
that ""may be overcome only by an overriding interest based on findings
that closure is essential to preserve higher values and is narrowly tailored
to serve that interest."" (*People v. Baldwin* (2006) 142 Cal.App.4th 1416,

1 1421, quoting *Waller v. Georgia* (1984) 467 U.S. 39, 45 (*Waller*.) Public
2 trials not only “provide an opportunity for spectators to observe the judicial
3 system” but also “prompt judges, lawyers, witnesses and jurors to perform
4 their duties more conscientiously.” (*Baldwin, supra*, at p. 1421.)

5 Relying primarily on *People v. Feagin* (1995) 34 Cal.App.4th 1427,
6 [Petitioner] argues that proceedings during deliberations are generally
7 outside the scope of the public trial right. The issue in *Feagin* was whether
8 a court denies that right by holding a hearing on juror misconduct in
9 chambers. (*Id.* at p. 1438.) On that issue, *Feagin* held that the
10 presumption of openness was rebutted by showing that the exclusion of
11 the public was necessary to protect the sensitive nature of juror
12 disclosures. (*Id.* at p. 1439.) *Feagin* is inapposite. Citing no persuasive
13 authority and suggesting no plausible justification for excepting the
14 proceedings at issue from the public trial right, [Petitioner] fails to make
15 the requisite showing of a “higher value such as the defendant’s right to a
16 fair trial or the government’s interest in preserving the confidentiality of the
17 proceedings.” (*Ibid.*, citing *Woodward, supra*, 4 Cal.4th at p. 383.) On the
18 record before us, we conclude that the proceedings at issue were within
19 the scope of the public trial right.

20 The standard for review of a court’s ruling on a motion for a mistrial is
21 abuse of discretion (*Avila, supra*, 38 Cal.4th at p. 573), as is the standard
22 for review of a court’s ruling on a motion for a new trial (*People v. Coffman
23 and Marlow* (2004) 34 Cal.4th 1, 127). Here the record shows no abuse of
24 discretion. The court’s thorough observations of the demeanor of the
25 persons in the courtroom during the proceeding at issue refute the entirely
26 speculative nature of [Petitioner’s] argument. [Petitioner] contends the
27 denial of his motion violated his constitutional rights to an impartial jury
28 and a fair trial, but since the premise of his constitutional claims is that the
denial of his motions was prejudicial, his constitutional claims likewise fail.
(*Sanders, supra*, 11 Cal.4th at p. 510, fn. 3.)

(Answer, Ex. A.)

2. Claim Two: Right to an Impartial Jury

The Sixth Amendment right to a jury trial “guarantees to the criminally accused a
fair trial by a panel of impartial, ‘indifferent’ jurors.” *Irvin v. Dowd*, 366 U.S. 717, 722
(1961). A defendant is denied a fair trial if even a single juror is prejudiced or biased.
Fields v. Woodford, 281 F.3d 963, 972 (9th Cir. 2002).

A hearing is usually held to determine if a juror has become partial due to
circumstances. *See Smith v. Phillips*, 455 U.S. 209, 215 (1982) “This Court has long
held that the remedy for allegations of juror partiality is a hearing in which the defendant
has the opportunity to prove actual bias.” *Id.* When a trial court finds after a hearing that
a juror is not biased, that finding is presumed to be correct. *Dyer v. Calderon*, 151 F.3d
970, 973 (9th Cir. 1998).

1 Here, providing the state court decision with appropriate deference for each of
2 Petitioner's three contentions regarding juror misconduct, there is at least a possibility
3 that fair-minded jurists could agree with the state court decision that the jurors were
4 impartial and Petitioner was not deprived of his right to a fair trial.

5 Petitioner contends that he was deprived of the right to a fair trial and an impartial
6 jury because the court failed to adequately investigate the possible intimidation of jurors.
7 (Pet. at 15-18.) Petitioner states that "the court should have conducted a detailed inquiry
8 to determine whether any of the other jurors were affected by the two men and the
9 comments made by members of the jury, whether they felt intimidated, and whether they
10 could still be impartial." (Id.) Petitioner further claims that the jury discussion of the two
11 men "was also jury misconduct and a violation of [California] Penal Code section 1122,
12 subdivision (b), to discuss the case." (Id.) However, as the Court of Appeal stated in its
13 reasoned opinion:

14 The Attorney General argues that the juror comments at issue here,
15 though a breach of the court's section 1122 admonitions, showed no
16 prejudice of the case. We agree. "Trivial violations that do not prejudice
17 the parties do not require removal of a sitting juror." (*People v. Wilson*
18 (2008) 44 Cal.4th 758, 839 (*Wilson*)). The comments here neither suggest
19 prejudice of guilt nor cast doubt on the impartiality of the jurors or the
20 fairness of the trial. Juror comments like those are "certainly not as
21 serious as questions designed to obtain extrinsic evidence regarding the
22 case itself." (*Ibid.*) "No trials are perfect –evidentiary or procedural errors
23 are bound to occur." (*People v. Garcia* (2005) 36 Cal.4th 777, 808 (conc.
24 & dis. opn. of Chin, J.)) [Petitioner] fails to persuade us that the court
25 should have conducted further inquiry.

26 (Answer, Ex. A.)

27 Petitioner also argues that juror misconduct raises a presumption of prejudice.
28 (Pet. at 18.) However, the Court of Appeal also found that the California Penal Code
section 1122 violation of the admonition not to discuss the case did not prejudice the
parties. (Answer, Ex. A.) As stated in Bradshaw v. Richey, "a state court's interpretation
of state law, including one announced on direct appeal of the challenged conviction,
binds a federal court sitting in habeas corpus." 546 U.S. 74, 76 (2005). This Court
cannot question the state court's ruling on whether prejudice could be found due to the

1 violation of a state law.

2 Here, the California Court of Appeal found that there was no support in the record
3 for Petitioner's claim that the jury panel had been tainted. The state appellate court
4 conducted an exhaustive examination of the juror's responses to questions from the trial
5 court regarding being intimidated by observers in the courtroom. As none of the
6 comments made by juror number 3 gave any reason to suspect that the other jurors
7 (other than juror number 5, who was questioned) were feeling intimidated, there would
8 be no reason to conduct a further inquiry into the partiality of the other jurors. The
9 responses of jurors 3 and 5 indicated that they would reach a decision based solely on
10 the evidence rather than any fears or prejudice; thereby indicating a lack of actual bias.
11 The fundamental and applicable principle here is that due process "means a jury
12 capable and willing to decide the case solely on the evidence before it, and a trial judge
13 ever watchful to prevent prejudicial occurrences and to determine the effect of such
14 occurrences when they happen." Phillips, 455 U.S. at 217. It appears that the trial court
15 undertook appropriate action to ensure that the jury was not swayed by potential
16 intimidation.

17 Petitioner has not presented any evidence to rebut the presumption of
18 correctness attached to the appellate court's finding that there was no jury intimidation.
19 The Court finds the state court's decision, that Petitioner's constitutional right to an
20 impartial jury was not violated by the trial court's refusal to discharge the jury panel, was
21 not "contrary to, nor involved an unreasonable application of, clearly established Federal
22 law, as determined by the Supreme Court of the United States; nor resulted in a decision
23 that was based on an unreasonable determination of the facts in light of the evidence
24 presented in the State court proceeding." 28 U.S.C. § 2254(d). For these reasons, it is
25 recommended that the claim be denied.

26 3. Claim Three: Improper Juror Conduct Necessitating Mistrial

27 Petitioner contends that the "jurors were talking about the case...in direct violation
28 of [California] Penal Code section 1122." (Pet. at 19.) Petitioner further asserts that

1 “some jurors had made up their minds” due to comments like “DNA doesn’t lie.” (Id.)

2 However, the state court denied this claim in a reasoned decision stating:

3 A court should grant a motion for a mistrial only when a party’s chances of
4 receiving a fair trial have been irreparably damaged by prejudice that is
5 incurable by admonition or instruction. (*People v. Avila* (2006) 38 Cal.4th
6 491, 573 (*Avila*)). Since the determination whether an incident is incurably
7 prejudicial is intrinsically speculative, a court has considerable discretion
8 in ruling on a motion for mistrial. (*Ibid.*) The standard of review of a court’s
9 ruling on a motion for a mistrial is abuse of discretion. (*Ibid.*)

7 Here, the record shows no abuse of discretion. As the court’s interviews
8 with all of the jurors show, some perceptions differed, some recollections
9 diverged, and some jurors might have formed some opinions about the
10 case. Yet the record affirmatively shows that not even one juror had
11 already made up his or her mind about the case. Although “jurors are told
12 not to discuss the case until all the evidence has been presented and
13 instructions given, they are not precluded from thinking about the case,
14 nor would that be humanly possible.” (*Wilson, supra*, 44 Cal.4th at p. 840.)
15 [Petitioner] claims that the denial of his motion violated his constitutional
16 rights to an impartial jury and a fair trial, but since the premise of his
17 constitutional claims is that the denial of his motion was prejudicial, his
18 constitutional claims likewise fail. (*People v. Sanders* (1995) 11 Cal.4th
19 475, 510, fn. 3 (*Sanders*)).

14 (Answer, Ex. A.)

15 This Court cannot review a state court’s application of the standard for granting a
16 mistrial as that is a question of state law. Bradshaw v. Richey, 546 U.S. 74, 76 (2005).
17 Petitioner’s underlying claim that some or all of the jurors had prejudged the case was
18 also denied by the Court of Appeal. As stated above, the jurors were interviewed
19 individually and affirmatively stated that they had not made up their minds as to a
20 guilty/not guilty verdict. (Answer, Ex. A at 7.) Unconstitutional prejudgment only occurs
21 if one of the jurors would not render a verdict based on all of the evidence presented.
22 Davis v. Woodford, 384 F.3d 628, 653 (9th Cir. 2004). On the word of the jurors, the
23 state court made the reasonable determination that the jurors had not foreclosed their
24 opinions and would hear all of the evidence presented. Fairminded jurists could agree
25 with this state court decision, and Petitioner is therefore not entitled to relief with regard
26 to this claim.

27 4. Claim Four: Intimidation by the Presence of Police Officers

1 Petitioner contends that he was deprived of his right to a fair trial and an impartial
2 jury due to the presence of police officers in the courtroom while the jury was
3 deliberating and watching video exhibits. (Pet. at 21-25.) Petitioner states “10 to 15
4 police officers were in the courtroom” who “were undoubtedly sending the message that
5 they wanted convictions.” (Id. at 23.) Petitioner also points to two aggravating factors,
6 “the display and resultant message were made during deliberations... [and] it was a
7 deliberate attempt by the prosecution to affect the verdicts.” (Id.) As evidence of the
8 second factor, Petitioner asserts that the prosecutor called at least one of the officers
9 and asked him to be present during the showing of the video. (Id. at 25.)

10 To the extent that Petitioner challenges claims of state law, again, this Court
11 cannot disturb such decisions on habeas review. Bradshaw v. Richey, 546 U.S. at 76.
12 However, the Court shall determine whether underlying prejudice, which may have
13 resulted from the presence of police spectators, violated Petitioner’s federal rights.

14 As previously stated, in order for a state decision to be an unreasonable
15 application of federal law under § 2254(d)(1), the Supreme Court’s prior decisions must
16 provide a governing legal principle to the issue before the state court. Lockyer v.
17 Andrade, 538 U.S. 63, 70-71 (2003). In this case, as Respondent points out, there is no
18 governing legal principle as to spectator conduct. (Answer at 28-29.)

19 In contrast to state-sponsored courtroom practices, the effect on a
20 defendant’s fair-trial rights of the spectator conduct...is an open question
21 in our jurisprudence. This Court has never addressed a claim that such
private-actor courtroom conduct was so inherently prejudicial that it
deprived a defendant of a fair trial.

22 Carey v. Musladin, 549 U.S. 70, 76 (2006).

23 As such, the state court’s decision as to the police presence was not an
24 unreasonable application of any principle previously established by the Supreme Court.
25 Fair minded jurists could agree with the correctness of the state court decision that the
26 presence of the police officers during deliberation did not create a partial jury or deprive
27 Petitioner of his right to a fair trial. Petitioner is therefore not entitled to relief with regard
28 to this claim.

1 **IV. RECOMMENDATION**

2 Accordingly, it is hereby recommended that the petition for a writ of habeas
3 corpus be DENIED with prejudice.

4 This Findings and Recommendation is submitted to the assigned District Judge,
5 pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within thirty (30) days after
6 being served with the Findings and Recommendation, any party may file written
7 objections with the Court and serve a copy on all parties. Such a document should be
8 captioned "Objections to Magistrate Judge's Findings and Recommendation." Any reply
9 to the objections shall be served and filed within fourteen (14) days after service of the
10 objections. The parties are advised that failure to file objections within the specified time
11 may waive the right to appeal the District Court's order. Wilkerson v. Wheeler, 772 F.3d
12 834, 839 (9th Cir. 2014).

13
14 IT IS SO ORDERED.

15 Dated: April 29, 2015

/s/ Michael J. Seng
16 UNITED STATES MAGISTRATE JUDGE

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