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

LUIS ALBERTO MARTINEZ,

Petitioner,

No. CIV S-02-0159 JAM GGH P

vs.

JOSEPH McGRATH, et al.,

Respondents.

ORDER

_____/

Petitioner is a state prisoner proceeding with appointed counsel with a petition for writ of habeas corpus pursuant 28 U.S.C. § 2254. On July 21, 2008, the district judge assigned to this case adopted the findings and recommendations and petitioner’s writ was denied. Petitioner brought three claims: 1) juror misconduct; 2) prosecutorial misconduct; and 3) ineffective assistance of counsel. The ineffective assistance of counsel claim concerned counsel’s failure to object to the alleged prosecutorial misconduct and to properly investigate the alleged juror misconduct, both claims which are the substance of the remainder of the petition.

The prosecutorial misconduct claim was denied on the merits by the court as was the ineffective assistance of counsel claim related the prosecutorial misconduct. The court held that the ineffective assistance of counsel claim related to failure to investigate the juror misconduct was barred by the statute of limitations. While respondent argued that the separate juror misconduct claim was procedurally defaulted, the court addressed the procedural default

1 issue but looked to the merits of the juror misconduct claim and denied the claim in its entirety.¹
2 Regarding one component of the juror misconduct claim, where a juror later stated in a
3 declaration that jurors considered sentencing while deliberating, the court found that nothing in
4 the record suggested that the information regarding possible sentences came from an outside
5 source. Rather, the jurors were speculating about what sentence petitioner might receive.
6 Therefore, the juror's declaration was inadmissible, and the claim was denied.

7 Petitioner appealed and on August 3, 2010, the Ninth Circuit reversed in part,
8 affirmed in part and remanded the case back to the district court.² The Ninth Circuit found that
9 the district court erred in finding the ineffective assistance of counsel claim based on the failure
10 to investigate jury misconduct was barred by the statute of limitations. The Ninth Circuit held
11 that the claim was timely.

12 The Ninth Circuit also stated that the jury misconduct claim that there was
13 speculation about petitioner's sentence and related ineffective assistance of counsel claim still
14 may be procedurally barred from federal habeas review, which must be briefed and addressed.
15 The Ninth Circuit held that if the claims are not procedurally barred, 'some' of the evidence
16 about what members of the jury heard about sentencing from other members of the jury is
17 extrinsic and is therefore admissible.

18 The Ninth Circuit then stated that the district court properly denied on the merits
19 the juror misconduct claim concerning discussion of petitioner's incarceration and the remaining

20
21 ¹ The juror misconduct claim contained five components and the court denied each on the
22 merits: 1) the jury considered the fact that petitioner was incarcerated; 2) the jury disregarded
23 instructions regarding the presumption of innocence and presumed that petitioner was guilty
24 based on his attorney's less than vigorous defense; 3) the jury showed bias against petitioner
because he used a translator during the trial; 4) jurors impermissibly considered sentencing while
deliberating; 5) jurors discussed the case amongst themselves during recesses and prior to the
close of evidence.

25 ² The Ninth Circuit mandate issued on August 12, 2010. Doc. 65. The mandate was
26 recalled on August 30, 2010. Doc. 66. The mandate was reissued on September 3, 2010,
however, due to an oversight in the district court clerk's office, the reissued mandate was not
docketed and the undersigned was unaware of the reissue until November 22, 2010. Doc. 67.

