

1 **I. BACKGROUND**

2 **A. Facts¹**

3 The California Court of Appeal recited the following facts, and petitioner has not
4 offered any clear and convincing evidence to rebut the presumption that these facts are correct:

5 On April 21, 2004, 15-year-old Lilly Chanthavong was
6 riding her bicycle with two friends. She noticed a red hatchback
7 automobile with three people in it. She recognized one of the
8 passengers as a person she knew as “Hum.” She also recognized
9 the driver, but she did not know his name. The car slowed down
10 and followed Lilly for a few minutes. Then the car made a U-turn
11 and went another way.

12 Lilly continued riding her bicycle. As she continued down
13 the street, Lilly saw the driver of the vehicle standing near a street
14 corner. Lilly rode past him. The man followed Lilly, grabbed her
15 by her neck, and pulled her off her bicycle. He yanked a gold
16 necklace with a jade Buddha charm off Lilly’s neck and ran away.

17 Shortly thereafter, Officer Mitchell Marquez arrived at the
18 scene. Lilly told him what happened and provided him with a
19 description of her assailant. A month and a half later, Lilly
20 identified defendant in a photographic lineup as the man who had
21 taken her necklace.

22 Before trial, defendant moved to exclude evidence of his
23 gang membership. The trial court tentatively ruled gang evidence
24 was inadmissible because it was irrelevant, but said the evidence
25 could become relevant to the victim’s state of mind, if, for
26 example, she refused to testify out of fear. The court also noted the
evidence could become probative of potential witness bias should a
witness give inconsistent statements while testifying.

At trial, Lilly cried when asked to identify her assailant and
asked to speak with her mother. Out of the jury’s presence, the
prosecutor argued that, in accordance with the court’s previous
ruling, gang evidence was now admissible to explain Lilly’s fear of
identifying defendant in court. The court decided that if Lilly could
not or would not identify anyone, the prosecutor could ask her if
she believed defendant was a member of a gang.

24 ¹ Pursuant to 28 U.S.C. § 2254(e)(1), “a determination of a factual issue made by a
25 State court shall be presumed to be correct.” Petitioner bears the burden of rebutting this
26 presumption by clear and convincing evidence. See id. These facts are, therefore, drawn from
the state court’s opinion(s), lodged in this court. Petitioner may also be referred to as
“defendant.”

1 Lilly then testified she was afraid to identify her assailant
2 and began to cry again. She identified defendant by describing
3 what he was wearing, but she never pointed to him. Later, out of
4 the jury's presence, the court noted Lilly's "extreme reluctance" in
5 identifying defendant and labeled the identification "cryptic" but
6 "sufficient." The court decided Lilly's state of mind was at issue,
7 and allowed the prosecution to introduce evidence showing Lilly
8 was afraid to identify defendant because she believed him to be a
9 member of Laos Pride Gangsters (LPG). The court gave the jury a
10 limiting instruction stating the gang evidence related only to Lilly's
11 state of mind.

12 Lilly then testified she believed defendant was a member of
13 LPG because his relatives had "LPG" tattooed on their arms, she
14 had seen defendant in the company of LPG members, with whom
15 she was familiar, and had seen defendant wear a shirt with "LPG"
16 inscribed on the pocket.

17 The prosecution introduced additional gang evidence when
18 15-year-old Andy Phonesavanh testified. Andy testified he
19 remembered telling a detective he was in the backseat of a red
20 hatchback with defendant and "Hum" on April 21, 2004. Andy
21 remembered telling the detective he saw Lilly on her bicycle and
22 defendant said he planned to take her necklace from her. He
23 remembered telling the detective that defendant left the car and
24 later returned with the necklace. Andy also testified everything he
25 told the detective was a lie and he was home all day on April 21,
26 2004.

 Further, Andy testified he knew defendant and "Hum" were
gang members, but Andy denied being a gang member. After the
prosecutor asked Andy how long he had been "hanging out with"
LPG, defense counsel objected, and the court held a sidebar
discussion. The court ruled the prosecutor could ask Andy if he
associated with LPG for the limited purpose of proving witness
bias. Andy resumed his testimony, and stated he had not associated
with LPG "that long." The court again provided the jury with a
limiting instruction telling them it could only consider the gang
evidence to "show the witness' potential bias and his state of
mind." Upon further questioning, Andy admitted he had been
associating with LPG for four years.

 The court also ruled gang evidence was relevant on the
issue of the perpetrator's identity, in addition to the grounds stated
before. The court reasoned that, since Lilly was reluctant to
identify defendant in court because she believed him to be a gang
member, her initial statements to the police on the day of the
robbery were relevant to her identification of defendant as the
perpetrator. The court maintained, however, that evidence of an
unrelated alleged shooting incident in 2003, as well as the fact that
defendant was a "validated" gang member, were irrelevant and

1 inadmissible under Evidence Code section 352.

2 Officer Marquez testified Lilly told him she believed the
3 man who took her necklace was a member of LPG. Marquez said
4 Lilly gave him an address of where she believed LPG “hung out.”
5 The court provided a limiting instruction informing the jury that
6 the evidence was only relevant to Lilly's state of mind and to her
7 identification of defendant as the perpetrator.

8 (Pet. at 22-26; Resp’t Lod. Doc. 3, at 1-5.)

9 **B. Procedural History**

10 Petitioner was charged in a felony complaint, deemed an information, with
11 violating California Penal Code § 211, robbery of the second degree. (Clerk’s Tr., Lod. Doc. 1,
12 at 8). Following a jury trial, Petitioner was convicted of the charge of robbery in the second
13 degree. (Id. at 192). On October 22, 2004, Petitioner was sentenced to three years.² (Id. at 220).
14 Petitioner appealed his conviction to the California Court of Appeal. On March 23, 2006, the
15 Court of Appeal issued an order affirming the judgment. Petitioner then appealed to the
16 California Supreme Court, who denied his petition for review on June 16, 2006.

17 Following this denial, Petitioner filed his federal petition for writ of habeas corpus
18 in this court on January 16, 2007. In his petition, Petitioner claims the admission of gang
19 membership evidence violated his rights to a fair trial and due process.

20 **II. STANDARDS OF REVIEW**

21 Because this action was filed after April 26, 1996, the provisions of the
22 Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”) are presumptively
23 applicable. See Lindh v. Murphy, 521 U.S. 320, 336 (1997); Calderon v. United States Dist. Ct.
24 (Beeler), 128 F.3d 1283, 1287 (9th Cir. 1997), cert. denied, 522 U.S. 1099 (1998). The AEDPA

25 ² Petitioner was also sentenced to two years on a violation of probation, which was
26 to run concurrent to the principle charge.

1 does not, however, apply in all circumstances. When it is clear that a state court has not reached
2 the merits of a petitioner’s claim, because it was not raised in state court or because the court
3 denied it on procedural grounds, the AEDPA deference scheme does not apply and a federal
4 habeas court must review the claim de novo. See Pirtle v. Morgan, 313 F.3d 1160 (9th Cir.
5 2002) (holding that the AEDPA did not apply where Washington Supreme Court refused to reach
6 petitioner’s claim under its “re-litigation rule”); see also Killian v. Poole, 282 F.3d 1204, 1208
7 (9th Cir. 2002) (holding that, where state court denied petitioner an evidentiary hearing on
8 perjury claim, AEDPA did not apply because evidence of the perjury was adduced only at the
9 evidentiary hearing in federal court); Appel v. Horn, 250 F.3d 203, 210 (3d Cir.2001) (reviewing
10 petition de novo where state court had issued a ruling on the merits of a related claim, but not the
11 claim alleged by petitioner). When the state court does not reach the merits of a claim,
12 “concerns about comity and federalism . . . do not exist.” Pirtle, 313 F. 3d at 1167.

13 Where AEDPA is applicable, federal habeas relief under 28 U.S.C. § 2254(d) is
14 not available for any claim decided on the merits in state court proceedings unless the state
15 court’s adjudication of the claim:

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

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

22 Thus, under § 2254(d), federal habeas relief is available only where the state court’s decision is
23 “contrary to” or represents an “unreasonable application of” clearly established law. Under both
24 standards, “clearly established law” means those holdings of the United States Supreme Court as
25 of the time of the relevant state court decision. See Carey v. Musladin, 549 U.S. 70, 74 (2006)
26 (citing Williams, 529 U.S. at 412) . “What matters are the holdings of the Supreme Court, not
the holdings of lower federal courts.” Plumlee v. Masto, 512 F.3d 1204 (9th Cir. 2008) (en
banc). Supreme Court precedent is not clearly established law, and therefore federal habeas

1 relief is unavailable, unless it “squarely addresses” an issue. See Moses v. Payne, 555 F.3d 742,
2 753-54 (9th Cir. 2009) (citing Wright v. Van Patten, 552 U.S. 120, 28 S. Ct. 743, 746 (2008)).

3 For federal law to be clearly established, the Supreme Court must provide a “categorical answer”
4 to the question before the state court. See id.; see also Carey, 549 U.S. at 76-77 (holding that a
5 state court’s decision that a defendant was not prejudiced by spectators’ conduct at trial was not
6 contrary to, or an unreasonable application of, the Supreme Court’s test for determining prejudice
7 created by state conduct at trial because the Court had never applied the test to spectators’
8 conduct). Circuit court precedent may not be used to fill open questions in the Supreme Court’s
9 holdings. See Carey, 549 U.S. at 74.

10 In Williams v. Taylor, 529 U.S. 362 (2000) (O’Connor, J., concurring, garnering a
11 majority of the Court), the United States Supreme Court explained these different standards. A
12 state court decision is “contrary to” Supreme Court precedent if it is opposite to that reached by
13 the Supreme Court on the same question of law, or if the state court decides the case differently
14 than the Supreme Court has on a set of materially indistinguishable facts. See id. at 405. A state
15 court decision is also “contrary to” established law if it applies a rule which contradicts the
16 governing law set forth in Supreme Court cases. See id. In sum, the petitioner must demonstrate
17 that Supreme Court precedent requires a contrary outcome because the state court applied the
18 wrong legal rules. Thus, a state court decision applying the correct legal rule from Supreme
19 Court cases to the facts of a particular case is not reviewed under the “contrary to” standard. See
20 id. at 406. If a state court decision is “contrary to” clearly established law, it is reviewed to
21 determine first whether it resulted in constitutional error. See Benn v. Lambert, 283 F.3d 1040,
22 1052 n.6 (9th Cir. 2002). If so, the next question is whether such error was structural, in which
23 case federal habeas relief is warranted. See id. If the error was not structural, the final question
24 is whether the error had a substantial and injurious effect on the verdict, or was harmless. See id.

25 State court decisions are reviewed under the far more deferential “unreasonable
26 application of” standard where it identifies the correct legal rule from Supreme Court cases, but

1 unreasonably applies the rule to the facts of a particular case. See Wiggins v. Smith, 539 U.S.
2 510, 520 (2003). While declining to rule on the issue, the Supreme Court in Williams, suggested
3 that federal habeas relief may be available under this standard where the state court either
4 unreasonably extends a legal principle to a new context where it should not apply, or
5 unreasonably refuses to extend that principle to a new context where it should apply. See
6 Williams, 529 U.S. at 408-09. The Supreme Court has, however, made it clear that a state court
7 decision is not an “unreasonable application of” controlling law simply because it is an erroneous
8 or incorrect application of federal law. See id. at 410; see also Lockyer v. Andrade, 538 U.S. 63,
9 75-76 (2003). An “unreasonable application of” controlling law cannot necessarily be found
10 even where the federal habeas court concludes that the state court decision is clearly erroneous.
11 See Lockyer, 538 U.S. at 75-76. This is because “[t]he gloss of clear error fails to give proper
12 deference to state courts by conflating error (even clear error) with unreasonableness.” Id. at 75.
13 As with state court decisions which are “contrary to” established federal law, where a state court
14 decision is an “unreasonable application of” controlling law, federal habeas relief is nonetheless
15 unavailable if the error was non-structural and harmless. See Benn, 283 F.3d at 1052 n.6.

16 The “unreasonable application of” standard also applies where the state court
17 denies a claim without providing any reasoning whatsoever. See Himes v. Thompson, 336 F.3d
18 848, 853 (9th Cir. 2003); Delgado v. Lewis, 233 F.3d 976, 982 (9th Cir. 2000). Such decisions
19 are considered adjudications on the merits and are, therefore, entitled to deference under the
20 AEDPA. See Green v. Lambert, 288 F.3d 1081 1089 (9th Cir. 2002); Delgado, 233 F.3d at 982.
21 The federal habeas court assumes that state court applied the correct law and analyzes whether
22 the state court’s summary denial was based on an objectively unreasonable application of that
23 law. See Himes, 336 F.3d at 853; Delgado, 233 F.3d at 982.

24 25 **III. DISCUSSION**

26 Plaintiff claims his rights to due process and a fair trial were violated by the trial

1 court's admission of evidence that he was a member of a gang. He claims the admission of gang
2 evidence was irrelevant to motive or identity, and the evidence was unduly prejudicial. He
3 argues the evidence of gang membership was unnecessary for the reasons it was admitted,
4 specifically that the witnesses testified that they knew Petitioner, the evidence was merely
5 cumulative, and it did not change the quality of the witness's testimony or credibility. Thus, the
6 trial court abused its discretion in allowing such highly inflammatory evidence to be admitted,
7 especially in light of the lack of physical evidence and alibi defense.

8 In affirming Petitioner's conviction, the California Court of Appeal rejected his
9 claim, reasoning as follows:

10 Gang evidence is admissible when relevant to prove some
11 fact other than the defendant's criminal propensity. (Evid. Code, §
12 1101, subd. (b); *People v. Williams* (1997) 16 Cal.4th 153, 193.)
13 However, "even where gang membership is relevant, because it
14 may have a highly inflammatory impact on the jury trial courts
15 should carefully scrutinize such evidence before admitting it.
16 [Citation.]" (*People v. Williams, supra*, at p. 193.) Because it may
17 prejudice a jury, our Supreme Court has warned against the
18 introduction of "evidence of gang membership if only tangentially
19 relevant, given its highly inflammatory impact." (*People v. Cox*
20 (1991) 53 Cal.3d 618, 660.)

21 "[T]he prejudice contemplated by this rule is not merely
22 evidence unfavorable to the [defendant]. Realistically, the majority
23 of prosecution evidence will be unfavorable to the [defendant].
24 Rather, the rule contemplates '... evidence which uniquely tends
25 to evoke an emotional bias against the defendant as an individual
26 and which has very little effect on the issues. In applying section
27 352, 'prejudicial' is not synonymous with 'damaging.' "' "'
28 (*People v. Ortiz* (1995) 38 Cal.App.4th 377, 394, citing *People v.*
29 *Karis* (1988) 46 Cal.3d 612, 638.)

30 Evidence Code section 352 provides the trial court with
31 discretion to exclude evidence if the probability that its admission
32 will create substantial danger of undue prejudice substantially
33 outweighs its probative value. The trial court has broad discretion
34 in ruling on whether evidence is substantially more prejudicial than
35 probative. (*People v. Kipp* (2001) 26 Cal.4th 1100, 1121.) An
36 appellate court reviews the trial court's ruling on the admissibility
of evidence for abuse of discretion. (*Ibid.*) "The admission of gang
evidence over an Evidence Code section 352 objection will not be
disturbed on appeal unless the trial court's decision exceeds the
bounds of reason. [Citation.]" (*People v. Olguin* (1994) 31

1 Cal.App.4th 1355, 1369.)

2 Defendant contends the trial court erred by admitting
3 evidence of defendant's gang membership. We conclude admitting
4 the evidence was proper because it was probative on the issues of
5 the perpetrator's identity and Lilly's state of mind.

6 Although gang-related evidence creates a risk the jury will
7 infer the defendant has a criminal disposition and is guilty of the
8 offense charged, the evidence is admissible if directly relevant to a
9 material issue. (*People v. Williams, supra*, 16 Cal.4th at p. 193.)
10 Evidence of gang membership is useful when identity is an issue.
11 (*People v. Contreras* (1983) 144 Cal.App.3d 749, 756.)
12 Furthermore, evidence that a witness is afraid to testify is relevant
13 to her credibility. (*People v. Avalos* (1984) 37 Cal.3d 216, 232.)
14 This may include evidence that the defendant belongs to a gang.
15 (*People v. Harris* (1985) 175 Cal.App.3d 944, 957.)

16 Defendant argues that because the prosecution did not file
17 any gang enhancement allegations in this case, gang evidence is
18 irrelevant. Defendant's argument ignores the reality that even
19 though gang membership is not an element of a crime or
20 enhancement, it can still be relevant to a material issue, such as
21 identity. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049.)

22 The main issue in this case was identity. Lilly's initial
23 description of the perpetrator narrowed the pool of people that
24 could have committed the crime to members of LPG. Officer
25 Marquez testified that shortly after the robbery Lilly told him her
26 assailant was a gang member and knew where the gang "hung out."
Gang evidence was highly probative of the perpetrator's identity,
and thus, relevant. Furthermore, the gang evidence was relevant
because it explained Lilly's reluctance to identify defendant in
court, despite the fact that she had previously picked him out of a
photographic lineup.

Defendant contends that, even if the evidence were relevant
to Lilly's state of mind, it was only marginally relevant because
Lilly did in fact identify defendant in court, and the trial court
found the identification sufficient. Moreover, defendant contends
Lilly's testimony was bolstered by the testimony of the police
officers who interviewed Lilly shortly after the incident and, thus,
was superfluous and unnecessary for the prosecution's case.

However, there was conflicting testimony about the
defendant's appearance and clothing, as well as the color of
defendant's vehicle during pertinent times. Because the defense
highlighted such conflicting testimony with respect to the identity
of the perpetrator, it was important for the prosecution to bolster
the credibility of Lilly's initial, cryptic identification. Thus, the
gang evidence was highly probative of the perpetrator's identity,

1 the main disputed issue before the jury.

2 When evidence of gang membership is relevant to proving
3 the identity of the perpetrator, it is admissible, subject to analysis
4 under Evidence Code section 352. (*People v. Champion* (1995) 9
5 Cal.4th 879, 922-923.) The trial court conducted an Evidence Code
6 section 352 analysis and ruled the prejudicial effect did not
7 significantly outweigh the probative value of the evidence. While
8 there may have been some danger of prejudice to defendant in
9 identifying him as a gang member, the gang evidence was
10 probative on the issues of his identity as the perpetrator and Lilly's
11 state of mind. Accordingly, we conclude the trial court did not
12 abuse its discretion in allowing the limited gang evidence.

13 Defendant also contends the trial court erred by allowing
14 admission of gang evidence to prove potential witness bias. He
15 claims it was cumulative and unduly prejudicial. We conclude the
16 trial court properly admitted the evidence.

17 Evidence of gang membership must be excluded if the
18 evidence is only relevant to prove a defendant's criminal
19 disposition. (Evid. Code, § 1101, subd. (a); *People v. Sam* (1969)
20 71 Cal.2d 194, 203.) However, "[e]vidence of a relationship
21 between a witness and a party is logically relevant to show bias.
22 [Citation.] One such relationship is common membership in an
23 organization.... [Citation.]" (*People v. Ruiz* (1998) 62 Cal.App.4th
24 234, 240.) For example, a witness's common gang membership
25 with a defendant on whose behalf he testifies is relevant to
26 establish the witness's bias. (*In re Wing Y.* (1977) 67 Cal.App.3d
69, 76-77; *United States v. Abel* (1984) 469 U.S. 45, 49, 52 [83
L.Ed.2d 450, 455, 457].) However, "when other evidence has
established such a 'relationship' then common membership
evidence is cumulative and, if prejudicial, inadmissible.
[Citations.]" (*People v. Maestas* (1993) 20 Cal.App.4th 1482,
1495.)

19 The cases finding that the admission of gang evidence to
20 prove bias was cumulative and prejudicial are distinguishable from
21 this case. In *People v. Cardenas* (1982) 31 Cal.3d 897, 904-905,³
22 the plurality opinion found the trial court abused its discretion by
23 allowing the prosecution to introduce evidence that defendant and
24 his witnesses associated in the same gang. The court reasoned that
25 since other evidence established the fact that defendant and the
26 witnesses " 'lived in the same neighborhood' " and " 'had the same
circle of friends,' " the probative value of the gang evidence was
"minimal at best," and created a substantial danger of prejudice

25 ³ In *People v. Cardenas*, *supra*, 31 Cal.3d 897, only three justices concluded the
26 admission of gang evidence was error and thus this conclusion lacks precedential authority.
(*People v. Harris* (1985) 157 Cal.App.3d 944, 957-958.)

1 because the jury could infer defendant had a criminal disposition
2 because gangs commit crimes. (*Ibid.*) Here, the only evidence
3 connecting Andy with defendant was that he had known defendant
4 for four years, he knew Hum, he knew defendant's wife, and
5 defendant had known Andy's older brother for "a long time."
6 Thus, the gang membership evidence was not cumulative to any
7 other evidence tending to establish a relationship between
8 defendant and Andy, other than the fact that they knew each other.
9 (Cf. *People v. Maestas*, *supra*, 20 Cal.App.4th at p. 1495 [because
10 of compelling and overwhelming evidence of codefendants' close
11 relationship and affinity for one another, evidence they allegedly
12 belonged to the same criminal street gang was cumulative and
13 prejudicial].)

14 In light of this record, it was not an abuse of discretion to
15 permit Andy to testify defendant was a member of LPG. The
16 evidence explained Andy's conflicting testimony and his prior
17 statements to the detective, which corroborated Lilly's account of
18 the robbery. Given these several probative features, as well as the
19 already existing references in the evidence to defendant's gang
20 membership, any prejudicial effect did not substantially outweigh
21 the probative value of this portion of Andy's testimony.

22 Defendant asserts the prosecutor exacerbated the prejudice
23 during his closing argument. The prosecutor did not dwell on gang
24 evidence in his closing argument. He discussed Lilly's belief that
25 defendant was a gang member and her fear of retaliation. The
26 prosecutor then explained Andy's refusal to cooperate with the
prosecution because of his "deep ties" with defendant and the gang.
He reiterated that Andy, as well as Lilly, have to go back to the
same gang neighborhood, thus implying fear of the gang influenced
their testimony. Most of the prosecutor's closing argument,
however, was devoted to the strength of the prosecution's evidence
and the weaknesses in the defense's case.

27 In sum, the gang membership evidence in this case was
28 probative not only on the issue of Andy's bias, but also on the
29 issues of Lilly's identification and state of mind. While gang
30 evidence may be prejudicial, its prejudicial impact was
31 considerably lessened in this case. While any gang evidence is
32 potentially inflammatory, here the evidence was limited to gang
33 membership and did not include the more inflammatory evidence
34 of gang criminal activity. Argument was similarly limited to
35 Lilly's fear of retaliation based on her belief defendant was a gang
36 member, Andy's association with LPG, and the likelihood this
relationship was Andy's probable motive to give false evidence to
protect defendant. This limitation distinguishes this case from
People v. Bojorquez (2002) 104 Cal.App.4th 335, 343-345, in
which the court found evidence of gang membership was
admissible to show witness bias but the admission of evidence of
criminal activities of gangs, and specifically criminal activity

1 attributed to defendant's gang, was prejudicial error because it
2 tended to imply criminal disposition or actual culpability.
3 Additionally, the court here gave a limiting instruction after the
4 introduction of each piece of gang evidence to further minimize the
5 risk of prejudice.

6 Finally, defendant contends even though the trial court
7 instructed the jury several times about the limited purpose of the
8 evidence, it was virtually impossible to ignore the implication that
9 defendant was guilty of this crime because he was a gang member.
10 However, absent contrary indications, we presume the jury
11 followed the court's instructions. (*People v. Pinholster* (1992) 1
12 Cal.4th 865, 919.)

13 The court did not abuse its discretion under Evidence Code
14 section 352 when it determined that evidence of defendant's
15 membership in the gang was relevant to Lilly's state of mind, the
16 perpetrator's identity, and Andy's bias, and that the probative value
17 of the evidence outweighed the prejudicial effect.

18 (Pet. at 26-33; Resp't Lod. Doc. 3, at 5-12.)

19 A writ of habeas corpus is available under 28 U.S.C. § 2254 only on the basis of a
20 transgression of federal law binding on the state courts. See Middleton v. Cupp, 768 F.2d 1083,
21 1085 (9th Cir. 1985); Gutierrez v. Griggs, 695 F.2d 1195, 1197 (9th Cir. 1983). It is not
22 available for alleged error in the interpretation or application of state law. Middleton, 768 F.2d at
23 1085; see also Lincoln v. Sunn, 807 F.2d 805, 814 (9th Cir. 1987); Givens v. Housewright, 786
24 F.2d 1378, 1381 (9th Cir. 1986). Habeas corpus cannot be utilized to try state issues de novo.
25 See Milton v. Wainwright, 407 U.S. 371, 377 (1972).

26 However, a "claim of error based upon a right not specifically guaranteed by the
Constitution may nonetheless form a ground for federal habeas corpus relief where its impact so
infects the entire trial that the resulting conviction violates the defendant's right to due process."
Hines v. Enomoto, 658 F.2d 667, 673 (9th Cir. 1981) (citing Quigg v. Crist, 616 F.2d 1107 (9th
Cir. 1980)); see also Lisenba v. California, 314 U.S. 219, 236 (1941). Because federal habeas
relief does not lie for state law errors, a state court's evidentiary ruling is grounds for federal
habeas relief only if it renders the state proceedings so fundamentally unfair as to violate due
process. See Drayden v. White, 232 F.3d 704, 710 (9th Cir. 2000); Spivey v. Rocha, 194 F.3d

1 971, 977-78 (9th Cir. 1999); Jammal v. Van de Kamp, 926 F.2d 918, 919 (9th Cir. 1991); see
2 also Hamilton v. Vasquez, 17 F.3d 1149, 1159 (9th Cir. 1994). To raise such a claim in a
3 federal habeas corpus petition, the “error alleged must have resulted in a complete miscarriage of
4 justice.” Hill v. United States, 368 U.S. 424, 428 (1962); Crisafi v. Oliver, 396 F.2d 293, 294-95
5 (9th Cir. 1968); Chavez v. Dickson, 280 F.2d 727, 736 (9th Cir. 1960). In any event, an
6 evidentiary error is considered harmless if it did not have a substantial and injurious effect in
7 determining the jury’s verdict. See Padilla v. Terhune, 309 F.3d 614, 621 (9th Cir. 2002); see
8 also Laboa v. Calderon, 224 F.3d 972, 976 (9th Cir. 2001).

9 Here, the evidence that Petitioner was a member of a gang was admitted for the
10 limited purpose of establishing identity, witness credibility, and witness bias. The trial court
11 allowed the evidence to be admitted as it related to the victim’s credibility, as well as explaining
12 her cryptic in court identification. In addition, the trial court allowed the prosecution to question
13 a witness as to Petitioner’s gang membership due to the witness’s prior inconsistent statements
14 and to show possible bias as the witness was a member of the same gang.

15 Because the gang evidence in this case was admitted to establish identity, witness
16 credibility, and witness bias, all of which were material issues in this case, the state court did not
17 err in finding the evidence admissible. See United States v. Abel, 469 U.S. 45, 49 (1984)
18 (deciding that gang membership was “sufficiently probative of ... possible bias ... to warrant its
19 admission into evidence.”); United States v. Santiago, 46 F.3d 885, 890 (9th Cir. 1995)
20 (recognizing that gang evidence is admissible on the issue of witness credibility). Because the
21 jury at Petitioner’s trial could draw permissible inferences from the gang membership evidence,
22 admission of that evidence did not violate petitioner’s right to due process. See Jammal, 926
23 F.2d at 920. Accordingly, petitioner is not entitled to relief.

24 25 **IV. CONCLUSION**

26 Based on the foregoing, the undersigned recommends that Petitioner’s application

1 for a writ of habeas corpus be denied.

2 These findings and recommendations are submitted to the United States District
3 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within 20 days
4 after being served with these findings and recommendations, any party may file written
5 objections with the court. The document should be captioned “Objections to Magistrate Judge's
6 Findings and Recommendations.” Failure to file objections within the specified time may waive
7 the right to appeal. See Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

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9 DATED: June 3, 2010

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11 **CRAIG M. KELLISON**
12 UNITED STATES MAGISTRATE JUDGE
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