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

FRANK ALBERT FLOREZ,)	
)	
Petitioner,)	No C 06- 4141 JSW (PR)
)	
vs.)	ORDER DENYING PETITION
)	FOR A WRIT OF HABEAS
THOMAS L. CAREY, Warden,)	CORPUS
)	
Respondent.)	
_____)	

INTRODUCTION

Petitioner, a prisoner of the State of California incarcerated at the California Substance Abuse Treatment Facility in Corcoran, California, has filed a *pro se* petition for a writ of habeas corpus under 28 U.S.C. § 2254. This Court ordered Respondent to show cause why a writ should not be granted. Respondent filed an answer, memorandum and exhibits in support thereof and Petitioner filed a traverse. For the reasons stated below, the petition is denied on the merits.

PROCEDURAL BACKGROUND

On September 16, 2003, a jury convicted petitioner of shooting into an inhabited building and illegally possessing a firearm. The jury also found gang enhancements true for both charges, but deadlocked on whether petitioner was guilty of murder. The court dismissed the murder charge on the prosecution’s motion. Petitioner was sentenced to an indeterminate state prison term of 15

1 years to life for shooting into an inhabited building and a concurrent 7 year term
2 for the possession of a firearm.

3 Petitioner appealed to the California Court of Appeal. On August 30,
4 2005, that court issued a decision ordering sentence modification but otherwise
5 affirming the judgement. On October 6, 2005, Petitioner filed a petition for
6 review in the California Supreme Court. On December 15, 2005, the Supreme
7 Court denied review. On June 5, 2006, Petitioner filed the instant petition.

8 FACTUAL BACKGROUND

9 The facts underlying the charged offenses, as found by the California
10 Court of Appeal, Exhibit 5 at 2-5, are summarized in relevant part, as follows:

11 Florez was a member of the “Don’t Give A Fuck” (D.G.F.), a
12 criminal street gang. He had an ongoing rivalry with David Ruiz, a
13 member of the Campo Ramos Locos (C.R.L.), another criminal street
14 gang. Five months before the April 21, 2001 incident that was the basis of
the current charges against Florez, someone set fire to the Ruiz house. A
week later, someone set fire to the Florez house. Eight days later,
someone firebombed the Ruiz house.

15 In the early morning of April 21, 2001, according to Florez, Ruiz
16 fired several shots at petitioner’s car, breaking the rear windshield.
17 Shortly after the event, Florez called several of his fellow D.G.F members
18 on his cellular telephone. At about the same time, James “Jimbo”
19 Wooldridge, known as a D.G.F gang member, received a telephone call
20 from Melly (Melissa) Torre. Wooldridge asked Torre to meet him on
21 Ruus Road, and she agreed. Wooldridge had met Torre one or two days
earlier when April Witt, a D.G.F. gang affiliate, introduced them.
Together with April Witt and another friend, Gabriela Gonzalez, also a
D.G.F gang affiliate, Torre drove her two-door car to Ruus Road.
According to Witt, Torre had been living in the area for a few months and
she was not a gang member.

22 Arriving at Ruus Road, Torre, Witt, and Gonzalez met several men,
23 including Florez, Wooldridge, and other members of the D.G.F. gang.
24 Witt and Gonzalez saw that the windows of petitioner’s car had been shot
out. Florez was pacing and angry. He told Gonzalez that, while he was
driving, somebody shot at his car. It appeared to Witt that everyone, not
just Florez, wanted to retaliate because of what happened to Florez.

25 Florez asked Witt and then Gonzalez to drive him home in Torre’s
26 car, but they each refused. When Florez asked Torre, she agreed to take

1 him home. Witt told Torre she should not drive Florez home because of
2 what had happened to Florez's car, but Torre indicated she had no
3 problem driving Florez. Witt and Gonzalez drove away in an SUV,
4 leaving Florez and Torre at Ruus Road.¹

5 At 4:25 a.m., the police received several telephone calls reporting
6 gunfire at the Ruiz house. At that time, Ruiz was not at home; his parents
7 and younger brother were in the house. Neighbors heard several rapid
8 gunshots, followed by a pause, and then more gunshots. When the police
9 arrived, they found 14 bullet holes in the front of the Ruiz house. The
10 bullets went through a big picture window. Some of the bullets struck the
11 house frame and other bullets went through the door of the master
12 bedroom used by Ruiz's parents, hitting the back bedroom wall. The
13 police found Winchester-brand cartridge casings outside the house, and
14 corresponding bullets inside the house that had been fired from a Cobray
15 semiautomatic pistol.

16 Torre's car was in the middle of the street in front of the Ruiz
17 house. The police found Torre dead in the driver's seat. The passenger
18 door was open and the passenger's seat was not pushed forward; there was
19 a radio on the back seat. Florez's cellular telephone was on the dashboard.
20 Ballistic evidence showed someone had repeatedly shot Torre at close
21 range with an unknown firearm using Federal-brand ammunition. The
22 shooter most likely fired from the passenger side of the car.

23 About five minutes after the shooting, members of the Alarcon
24 family that lived nearby saw two unknown men beating Florez. After the
25 beating Florez collapsed outside the Alarcon house. Florez said he had
26 been shot in the leg or foot and hit on his head with a gun.

27 In the area between the Ruiz and Alarcon houses, the police found
28 the Cobray semiautomatic gun that was fired at the Ruiz house. The
29 police did not recover the gun that was fired at Torre, but they did find
30 parts of another gun. Additionally, the police found a bloody sweatshirt
31 with Florez's DNA on it and a hole in it surrounded by gunpowder
32 particles, footprints consistent with Florez's shoes, a beanie hat containing
33 the DNA of three people, including Florez but excluding Ruiz, and other
34 beanie hat also containing DNA of three people, including Ruiz but
35 excluding Florez. The name "Joker" was found carved on a fence
36 adjoining the Ruiz property. Ruiz's father testified that the inscriptions
37 had been there for several years.

38 ¹At trial, Witt and Wooldridge did not stay with Florez and Torre. Gonzalez
39 told the police that Torre got into Torre's care with Torre in the driver's seat,
40 Wooldridge in the front seat, and Florez in the back seat. But at trial, Gonzalez testified
41 that she did not recall seeing Wooldridge at Ruus Road, and that she had lied to the
42 police. Gonzalez also refused to say whether she had ever been threatened by
43 Wooldridge.

1 In support of the gang allegations in the information, prosecution
2 witness Hayward Police Inspector John Mario Lage testified as an expert
3 regarding gang-related crime in southern Alameda County. In his opinion,
4 the primary activities of the D.G.F. gang included homicides, attempted
5 homicides, drive-by shootings into inhabited dwellings, stabbing, serious
6 beatings, burglaries, and the sale of drugs. In support of his opinion, Lage
7 testified that in March of 1999, petitioner and two other D.G.F. gang
8 members had been arrested and later convicted of selling drugs, and that,
9 on January 26, 2001, other D.G.F. gang members had been convicted of
10 offenses based upon an incident concerning an attempted murder and
11 shooting into an inhabited dwelling. The prosecution submitted official
12 court records regarding the convictions. After giving Lage a
13 “hypothetical” based upon the facts in this case, Lage opined that the
14 shooting into the Ruiz house was done for the benefit of, at the direction
15 of, or in association with a criminal street gang, with the specific intent to
16 promote, further or assist the criminal conduct of gang members.
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18 Lage based his opinion on the fact that the shooting at the Ruiz
19 house occurred immediately after Florez had been targeted for violence
20 that was attributed to a rival of Florez’s gang. Additionally, the shooting
21 added to the reputation of the gang’s infamy and stature, not just in the
22 rivalry against the C.R.L. gang but in the larger gang subculture. Lage
23 also opined that, as a general rule, a gang member was expected to take an
24 active part in retaliating against his rivals and not have someone else do it
25 for him. According to Lage, given the timing and the circumstances of the
26 incident, there was no innocent explanation for the presence of a D.G.F.
27 gang member in the neighborhood of a C.R.L. gang member. Lage was
28 also questioned regarding the “Joker” carving on a fence at the Ruiz
house. According to Lage, Joker was Florez’s nickname and leaving the
name on a rival gang’s territory was as sign of disrespect. Assuming
“Joker” was a rival gang member’s nickname, it was highly unlikely that
the inscription would have been left on the fence; normally, it would have
been erased very quickly.

Lage described in detail the bases of his opinions, which included:
Florez’s admissions of gang membership as recorded in field identification
cards, tattoos, symbols, nicknames, statements to the police by other gang
members, gang affiliates, and community members, the commission of
criminal activity by Florez and other D.G.F. gang members, police reports,
and items obtained in a probation search of Florez’s home two years
before the April 21, 2001, incident, including photographs of Florez in
gang attire and using gang hand signs, and a notebook that contained gang
graffiti, drawings, and writings.

STANDARD OF REVIEW

This Court may entertain a petition for a writ of habeas corpus “in behalf
of a person in custody pursuant to the judgment of a state court only on the

1 ground that he is in custody in violation of the Constitution or laws or treaties of
2 the United States.” 28 U.S.C. § 2254(a). A district court may grant a petition
3 challenging a state conviction or sentence on the basis of a claim that was
4 “adjudicated on the merits” in state court only if the state court’s adjudication of
5 the claim: “(1) resulted in a decision that was contrary to, or involved an
6 unreasonable application of, clearly established Federal law, as determined by the
7 Supreme Court of the United States; or (2) resulted in a decision that was based
8 on an unreasonable determination of the facts in light of the evidence presented
9 in the State court proceeding.” 28 U.S.C. § 2254(d).

10 Under the ‘contrary to’ clause, a federal habeas court may grant the writ if
11 a state court arrives at a conclusion opposite to that reached by the Supreme
12 Court on a question of law or if the state court decides a case differently than the
13 Supreme Court has on a set of materially indistinguishable facts. *Williams v.*
14 *Taylor*, 529 U.S. 362, 412-13 (2000). “Under the ‘unreasonable application’
15 clause, a federal habeas court may grant the writ if a state court identifies the
16 correct governing legal principle from the Supreme Court’s decisions but
17 unreasonably applies that principle to the facts of the prisoner’s case.” *Williams*,
18 529 U.S. at 413. As summarized by the Ninth Circuit: “A state court’s decision
19 can involve an ‘unreasonable application’ of federal law if it either 1) correctly
20 identifies the governing rule but then applies it to a new set of facts in a way that
21 is objectively unreasonable, or 2) extends or fails to extend a clearly established
22 legal principle to a new context in a way that is objectively unreasonable.” *Van*
23 *Tran v. Lindsey*, 212 F.3d 1143, 1150 (9th Cir. 2000) *overruled on other*
24 *grounds*; *Lockyer v. Andrade*, 538 U.S. 63, 70-73 (2003) (citing *Williams*, 529
25 U.S. at 405-07).

1 1230 (9th Cir. 2001); *see, e.g., Hernandez v. Small*, 282 F.3d 1132, 1141 (9th
2 Cir. 2002) (state court applied correct controlling authority when it relied on state
3 court case that quoted Supreme Court for proposition squarely in accord with
4 controlling authority). If the state court, relying on state law, correctly identified
5 the governing federal legal rules, the federal court must ask whether the state
6 court applied them unreasonably to the facts. *See Lockhart*, 250 F.3d at 1232.

7 **DISCUSSION**

8 In his petition for a writ of habeas corpus, Petitioner asserts five claims for
9 relief: (1) the trial court violated Petitioner's rights to due process and a fair trial
10 by admitting "personal notebook entries" in support of the gang allegations; (2)
11 he was subjected to prosecutorial misconduct involving the prosecutory's use of
12 the notebook evidence; (3) the trial court's use of CALJIC No. 2.21.2 violated
13 Petitioner's due process rights; (4) the trial court's response to jury requests
14 violated Petitioner's rights to due process and a fair trial; and (5) cumulative
15 error.

16 **A. Admission of the Notebook**

17 Petitioner argues that admission of his gang notebook, recovered during a
18 probation search of his house, violated due process because it was overly
19 prejudicial. The 10 page notebook included drawings, D.G.F. symbols and hand
20 signs, the word Joker (Petitioner's gang nickname) and initials of other rival gang
21 members with X's crossed over them. The notebook also contained poems
22 describing acts of violence, glorification of gang lifestyle and D.G.F.'s
23 supremacy over other gangs. One poem described an incident that was very
24 similar to a drug sale that lead to Petitioner's arrest in 1999. Exhibit 5 at 6.

25 During a pre-trial hearing, Petitioner attempted to preclude Officer Lage
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1 from testifying at trial that his expert opinion was based on the contents of the
2 notebook. Exhibit 5 at 5-6. At the hearing, Lage testified that the notebook
3 confirmed his opinion that Petitioner was a gang member but that his opinion was
4 not dependant on it. Exhibit 5 at 6.

5 The trial court concluded that the notebook was “simply additional and
6 corroborative evidence being relied upon by the expert.” The court found that
7 although the notebook was damaging it was relevant to the issues at trial,
8 especially the issue of whether Petitioner committed the charged crimes in
9 furtherance of or for the benefit of the D.G.F. gang. Exhibit 5 at 7. The jury was
10 instructed that “the notebook and other evidence that formed the basis of Officer
11 Lage’s expert opinions regarding gang psychology and sociology . . . cannot be
12 considered . . . for the truth but merely as the basis for the gang expert’s
13 opinions.” Exhibit 10 at Reporter’s Transcript (hereinafter “RT”) at 934. After
14 redacting two lines from the notebook the court denied Petitioner’s motion to
15 preclude. Exhibit 5 at 7.

16 **1. Legal Standard**

17 The admission of evidence is not subject to federal habeas review unless
18 a specific constitutional guarantee is violated or the error is of such magnitude
19 that the result is a denial of the fundamentally fair trial guaranteed by due
20 process. *See Henry v. Kernan*, 197 F.3d 1021, 1031 (9th Cir. 1999); *Colley v.*
21 *Sumner*, 784 F.2d 984, 990 (9th Cir.), *cert. denied*, 479 U.S. 839 (1986). Failure
22 to comply with state rules of evidence is neither a necessary nor a sufficient basis
23 for granting federal habeas relief on due process grounds. *See Henry*, 197 F.3d at
24 1031; *Jammal v. Van de Kamp*, 926 F.2d 918, 919 (9th Cir. 1991). While
25 adherence to state evidentiary rules suggests that the trial was conducted in a
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1 procedurally fair manner, it is certainly possible to have a fair trial even when
2 state standards are violated; conversely, state procedural and evidentiary rules
3 may countenance processes that do not comport with fundamental fairness. *See*
4 *id.* (citing *Perry v. Rushen*, 713 F.2d 1447, 1453 (9th Cir. 1983), *cert. denied*,
5 469 U.S. 838 (1984)). The due process inquiry in federal habeas review is
6 whether the admission of evidence was arbitrary or so prejudicial that it rendered
7 the trial fundamentally unfair. *See Walters v. Maass*, 45 F.3d 1355, 1357 (9th
8 Cir. 1995); *Colley*, 784 F.2d at 990.

9 The admission of prejudicial evidence violates due process only if there
10 were no permissible inferences the jury could have drawn from the evidence (in
11 other words, no inference other than conduct in conformity therewith). *See*
12 *McKinney v. Rees*, 993 F.2d 1378, 1384 (9th Cir. 1993); *Jammal*, 926 F.2d at
13 920. Furthermore, the evidence must be of such highly inflammatory or
14 emotionally charged quality as necessarily prevents a fair trial. *See McKinney*,
15 993 F.2d at 1384-85; *Jammal*, 926 F.2d at 920-21.

16 **2. Analysis**

17 The appeals court found that there was no abuse of discretion in the trial
18 court admitting Petitioner's notebook at trial. Exhibit 5 at 8. The Court of
19 Appeal reasoned that because an expert can reveal the information on which he
20 or she has relied on in forming his or her expert opinion, including matters that
21 are ordinarily inadmissible, Officer Lage could reveal Petitioner's notebook as a
22 basis of his opinion. Exhibit 5 at 8. The court held that the prejudicial value of
23 the notebook did not outweigh its probative value, especially in light of the
24 limiting instruction given by the judge. Exhibit 5 at 9-10. In a footnote the court
25 rejected any due process arguments that Petitioner might raise for the same
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1 reasons it rejected his state law claims. Exhibit 5 at 10 n.4.

2 Petitioner is entitled to relief on this claim “[o]nly if there are *no*
3 permissible inferences the jury may draw from the evidence.” *Jammal*, 926 F.2d
4 at 920 (italics in original). Petitioner argues that there were no permissible
5 inferences that the jury could draw from the notebook, but this is not the case.
6 Petitioner’s notebook was written in red ink and had the number 14 inscribed on
7 it, which Officer Lage testified were indicators of membership in a Norteno
8 affiliated gang. Exhibit 10 at RT 597, 610. Descriptions of gang hand signs, the
9 letters “D.G.F.” and references to “Joker” (Petitioner’s gang nickname) were also
10 present in Petitioner’s notebook. Upon viewing this evidence, a reasonable jury
11 could draw permissible inferences about Petitioner’s membership in or
12 association with the D.G.F gang, which provided evidentiary support for the gang
13 enhancement charges against Petitioner. In addition to the gang references,
14 Petitioner’s notebook also contained derogatory references to gang rivals and
15 descriptions of gang confrontations. Exhibit 10 at RT 610-32. This evidence
16 would support permissible inferences related to Petitioner’s motive and whether
17 he committed the charged crimes for the benefit of the D.G.F. gang, which was
18 an essential element of the gang enhancements charged under CA Penal Code
19 §§186.22(b)(1)(A) and 186.22(b)(4).

20 In *Windham v. Merkle*, 163 F.3d 1092 (9th Cir.1998), the Ninth Circuit
21 found that the trial court’s admission of evidence of petitioner’s association with
22 the Crips gang, including a photo album linking a co-defendant to the gang and
23 “gang expert” police officer testimony, while prejudicial, was important evidence
24 of his motive to commit murder and therefore did not violate petitioner’s right to
25 due process. *Id.* at 1103-04. The court held that the gang related evidence “was
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1 admissible to demonstrate Windham's motive for participating in the alleged
2 crimes [and] did not violate Windham's right to due process.” *Id.* at 1104. The
3 evidence of gang affiliation in Petitioner’s notebook, relied on by the expert
4 witness, was also prejudicial, but this court does not find that there are “no
5 permissible inferences” that the jury could draw from Petitioner’s notebook, and
6 therefore Petitioner’s right to due process was not violated. *Jammal*, 926 F.2d at
7 920 (italics in original).

8 Even assuming that Petitioner’s notebook did not give raise any
9 permissible inferences, admission of the notebook was not so “highly
10 inflammatory” that it prevented Petitioner from receiving a fair trial. *Jammal*,
11 926 F.2d at 920. The number “187,” which was a reference to the penal code
12 section for murder, and the phrase “live by the gun, die by the gun,” were
13 redacted from Petitioner’s notebook by the trial judge for being too prejudicial.
14 Exhibit 5 at 7 n.3. The Court of Appeal correctly pointed out that there is no
15 reason to think that the jury could not follow the trial court’s instruction limiting
16 the use of the rest of the notebook. Exhibit 5 at 10. The gang references in
17 Petitioner’s notebook, while damaging, were not so “highly inflammatory” that
18 the jury would disregard the limiting instruction and used the evidence for an
19 improper purpose. *Jammal*, 926 F.2d at 920.

20 Petitioner relies upon *U.S. ex rel. Clemons v. Walls*, 202 F.Supp.2d 767
21 (N.D.Ill., 2002) *rev’d* 58 Fed.Appx. 657 (7th Cir. 2003), in support of his
22 argument that his due process rights were denied by the admission of this
23 evidence. In *Clemons*, the Seventh Circuit found that the trial court erred by
24 allowing the prosecution to use evidence of the defendant’s gang tattoos and
25 inflammatory evidence from a gang expert to bolster an otherwise weak murder
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1 case where the other evidence involved a series of biased witnesses. *Id.* at 777-
2 78. This Court does not find Petitioner’s reliance on *Clemons* persuasive. The
3 case against Petitioner was much stronger than the one presented in *Clemons* and
4 admitting into evidence excerpts from Petitioner’s notebook does not involve the
5 same level of prejudice as that suffered by the defendant in *Clemens*, which
6 included his disrobing and displaying his gang tattoos for the jury. Notably, there
7 was also no charged gang enhancement in *Clemens*, so the evidence was not
8 offered to prove an essential element of the crimes charged against him.
9 Therefore, the Court of Appeal’s determination was not contrary to or an
10 unreasonable application of established Supreme Court precedent and this claim
11 is denied.

12 **B. Prosecutorial Misconduct**

13 Petitioner argues that the prosecutor’s statements during closing
14 argument about Petitioner’s notebook constituted prosecutorial misconduct and
15 denied him a fair trial. During closing argument the prosecutor referred to
16 Petitioner’s notebook several times:

17 Remember, what do [D.G.F.] worship? They worship guns and violence
18 and death. [¶] And think about the [Petitioner’s] knowledge of gang
19 culture that is shown by the notebook he has. [¶] First of all, he’s down
20 for D.G.F. I mean, he’s got Joker tattooed on him . . . What about the
21 worship of guns that is shown to be a part of D.G.F. that shows the
22 defendant used a gun that night?

23 Exhibit 10 RT 968-69

24 At this point Petitioner’s counsel objected. The trial judge responded to
25 Petitioner’s objection by overruling it and then reminding the jury that the
26 prosecutor’s remarks were only argument and not evidence in the case. The
27 prosecutor continued during rebuttal:

28 “Last, I want to talk about the notebook. The defense characterizes that

1 notebook as stupid little rap songs . . . but . . . those aren't just some
2 stupid little rap songs that some little dilettante penned in his bedroom
3 for fun. That thing's a manifesto. It describes his gang life and the way
4 he was steeped in this gang culture. [¶] [O]ne of these stupid little poems
5 talks at length about [an event similar to Petitioner's prior arrest.] [¶] So
6 are these just scribbles of an innocent, nonviolent, friendly little gang
7 guy[?] They're not.

8 Exhibit 10 at RT 1029.

9 Petitioner's counsel reminded the jury of the limited purpose of this
10 evidence during his closing argument:

11 You were instructed that [the notebook] cannot be considered by you for
12 the truth, but merely as the basis for the gang expert's opinions. Do not
13 consider this evidence for any other – I'm sorry, for any purpose except
14 this limited purpose. [¶] Thank goodness the law recognizes that that
15 evidence . . . has nothing to do with whether [Petitioner] fired the shots
16 into the house in this case.

17 Exhibit 10 at RT 1013.

18 Just before closing arguments the judge also warned the jury that they
19 were not to consider the notebook for the truth, but only as a basis for the gang
20 expert's opinions. Exhibit 10 at RT 934.

21 Petitioner claims that the prosecutor was arguing that the contents of the
22 notebook should be considered as evidence of Petitioner's propensity for
23 violence, which is outside the limited scope for which the notebook was
24 admitted. Petitioner maintains that this impermissible use as character evidence
25 deprived him of due process and a fair trial.

26 **1. Legal Standard**

27 Prosecutorial misconduct is cognizable in federal habeas corpus. The
28 appropriate standard of review is the narrow one of due process and not the broad
exercise of supervisory power. *See Darden v. Wainwright*, 477 U.S. 168, 181
(1986). A defendant's due process rights are violated when a prosecutor's

1 misconduct renders a trial "fundamentally unfair." *See id.*; *Smith v. Phillips*, 455
2 U.S. 209, 219 (1982) ("the touchstone of due process analysis in cases of alleged
3 prosecutorial misconduct is the fairness of the trial, not the culpability of the
4 prosecutor"). Under *Darden*, the first issue is whether the prosecutor's remarks
5 were improper; if so, the next question is whether such conduct infected the trial
6 with unfairness. *Tan v. Runnels*, 413 F.3d 1101, 1112 (9th Cir. 2005). A
7 prosecutorial misconduct claim is decided "“on the merits, examining the entire
8 proceedings to determine whether the prosecutor's remarks so infected the trial
9 with unfairness as to make the resulting conviction a denial of due process.”"
10 *Johnson v. Sublett*, 63 F.3d 926, 929 (9th Cir.) (citation omitted), *cert. denied*,
11 516 U.S. 1017 (1995).

12 This analysis often is conducted according to factors laid out by the
13 *Darden* court: "(1) whether the prosecutor's comments manipulated or misstated
14 the evidence; (2) whether the trial court gave a curative instruction; and (3) the
15 weight of the evidence against the accused." *Tan* 413 F.3d at 1115 (*quoting*
16 *Darden*, 477 U.S. at 181-82).

17 **2. Analysis**

18 In discussing Petitioner's prosecutorial misconduct claim, the Court of
19 Appeal noted that "[a]lthough somewhat inarticulate at one point, the import of
20 the prosecutor's references to the notebook was that the document was evidence,
21 as interpreted by the gang expert, that [Petitioner's] shooting in to the Ruiz house
22 was gang related." Exhibit 5 at 10. Later the court concluded that Petitioner's
23 "challenges to . . . the prosecutor's closing remarks, are either without merit or do
24 not warrant reversal." Exhibit 5 at 19.

25 Contrary to Petitioner's claims, the prosecutor at Petitioner's trial did not
26 manipulate or misstate the limited purpose for which Petitioner's notebook had

1 been admitted into evidence. Through a limiting instruction the judge made it
2 clear to the jury that the notebook was not to “be considered by [the jury] for the
3 truth but merely as the basis for the gang expert’s opinions.” Exhibit 10 at RT
4 934. Although the prosecutor referred to Petitioner’s notebook several times
5 during closing argument, he did not refer to the notebook other than as the basis
6 of support for Officer Lage’s opinions about Petitioner’s gang status, mentality
7 and motive. Exhibit 10 at RT 969-70. All the things the prosecutor mentioned
8 during closing argument, Petitioner’s gang nickname (“Joker”), Petitioner’s
9 enthusiasm for guns, and the glorification of the gang lifestyle portrayed in the
10 notebook, were discussed during Officer Lage’s testimony. Exhibit 10 at RT
11 590-640. The prosecutor’s discussion of these parts of Officer Lage’s testimony
12 was a permissible use of the notebook, as the prosecutor did not ask the jury to
13 consider the contents of Petitioner’s notebook for the truth of what it contained.

14 Even if this court were to find that the prosecutor used Petitioner’s
15 notebook as impermissible character evidence, the jury in Petitioner’s case was
16 well instructed on the permissible uses of this evidence. The jury empaneled for
17 Petitioner’s trial received a limiting instruction from the judge and was reminded
18 of the notebook’s limited use by Petitioner’s counsel during closing argument.
19 The instructions limiting the use of the notebook outweighed any possibility of
20 prejudice from the prosecutor’s comments. Furthermore, “we presume jurors
21 follow the court's instructions absent extraordinary situations.” *Tan*, 413 F.3d
22 1101, 1115. Petitioner has presented no convincing argument that his situation
23 was “extraordinary.” *Id.* at 1115.

24 Finally, the weight of the evidence against Petitioner was not so close
25 that misconduct on the part of the prosecutor would have been given
26 determinative weight by the jury. The case against Petitioner was strong, and
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1 included evidence of Petitioner’s footprints, cellular phone, nickname and DNA
2 found at the scene of the crime. Any error committed by the prosecution during
3 closing argument was not so egregious as to prevent Petitioner from receiving a
4 fair trial. In light of these facts this court cannot agree with Petitioner that the
5 “prosecutor's remarks so infected the trial with unfairness as to make
6 [Petitioner’s] conviction a denial of due process.” *Johnson v. Sublett*, 63 F.3d
7 926, 929 (9th Cir.) (citation omitted). Therefore, this Court finds that the state
8 court’s decision was not contrary to or an unreasonable application of federal
9 law.

10 **C. Improper Jury Instruction**

11 Petitioner argues that instructing the jury with CALJIC No. 2.21.2
12 deprived him of due process because it lessened the prosecution’s burden of
13 proof. CALJIC No. 2.21.2 instructed the jury as follows:

14 A witness who is willfully false in one material part of his or her
15 testimony, is to be distrusted in others. You may reject the whole
16 testimony of a witness who willfully has testified falsely as to a material
point unless from all of the evidence you believe the probability of truth
favors his or her testimony in other particulars.

17 Exhibit 10 at RT 936

18 Petitioner claims that the instruction incorrectly allowed the jury to
19 consider the evidence by a preponderance standard rather than findings facts
20 beyond a reasonable doubt.

21 **1. Legal Standard**

22 To obtain federal collateral relief for errors in the jury charge, a
23 petitioner must show that the ailing instruction by itself so infected the entire trial
24 that the resulting conviction violates due process. *See Estelle v. McGuire*, 502
25 U.S. at 72; *Cupp v. Naughten*, 414 U.S. 141, 147 (1973); *see also Donnelly v.*
26 *DeChristoforo*, 416 U.S. 637, 643 (1974) (“[I]t must be established not merely

1 that the instruction is undesirable, erroneous or even "universally condemned,"
2 but that it violated some [constitutional right]."). The instruction may not be
3 judged in artificial isolation, but must be considered in the context of the
4 instructions as a whole and the trial record. *See Estelle*, 502 U.S. at 72. In other
5 words, the court must evaluate jury instructions in the context of the overall
6 charge to the jury as a component of the entire trial process. *United States v.*
7 *Fradley*, 456 U.S. 152, 169 (1982) (citing *Henderson v. Kibbe*, 431 U.S. 145, 154
8 (1977)).

9 Finally, the defined category of infractions that violate fundamental
10 fairness is very narrow: "Beyond the specific guarantees enumerated in the Bill
11 of Rights, the Due Process Clause has limited operation." *Estelle v. McGuire*,
12 502 U.S. at 73.

13 **2. Analysis**

14 The Court of Appeal dismissed Petitioner's claim that CALJIC No.
15 2.21.2 reduced the prosecution's burden of proof by citing *People v. Riel*, 22
16 Cal.4th 1153 (2000). Exhibit 5 at 13. In *Riel*, the California Supreme Court
17 clearly stated that CALJIC No. 2.21.2 does not reduce the prosecution's burden
18 of proof. *Riel*, 22 Cal.4th at 1200. CALJIC No. 2.21.2 applies to witnesses from
19 both the prosecution and the defense. It leaves the ultimate issue of witness
20 credibility to the jury and does not require jurors to disregard testimony unless
21 they believe it is untrustworthy.

22 Furthermore, in addition to CALJIC No. 2.21.2, the jury in Petitioner's
23 case was properly instructed on circumstantial evidence, the presumption of
24 innocence, the prosecution's burden of proof, and on reasonable doubt. Exhibit
25 10 at RT 931, 933-34, 939-40. The jury also was told to regard each jury
26 instruction in light of the others. Exhibit 10 at RT 931.

27 The Ninth Circuit has previously found that CALJIC No. 2.21.2 did not
28

1 violate due process in *Turner v. Calderon*, 281 F.3d 851 (9th Cir. 2002). In
2 *Turner*, the court held that because the jury “remained free to exercise its
3 collective judgment to reject what it did not find trustworthy or plausible” that
4 CALJIC No. 2.21.2 “could not be applied in a way that challenged the
5 Constitution” and declined to grant a certificate of appealability on a claim that
6 the use of the instruction violated due process. *Id.* at 865-66 (citing *Cupp v.*
7 *Naughton*, 414 U.S. 141, 149 (1973)). Other federal district courts have reached
8 the same conclusion. *Fleeman v. Castro*, No. CIV S-06-0652-FCD-CMK-P,
9 2009 WL 33241, at *8 (E.D.Cal. 2009) (holding that CALJIC No. 2.21.2 “does
10 not impermissibly alter the burden of proof as to any particular charged
11 offense”); *Hernandez v. Evans*, No. C 05-4364 WHA (PR), 2009 WL 111689, at
12 *6 (N.D.Cal. 2009) (“CALJIC [No.] 2.21.2 relates to the assessment of a
13 witness's credibility, which is not based on a reasonable-doubt standard, nor is it
14 constitutionally required to be.”). Instructing the jury with CALJIC No. 2.21.2
15 did not violate Petitioner’s right to due process and therefore the state court’s
16 decision was not a contrary to or an unreasonable application of federal law.

17 **D. Trial Court’s Responses to Jury’s Questions**

18 Petitioner argues that the trial court’s responses to jury questions were
19 inadequate and denied him due process and a fair trial. Petitioner also claims that
20 the reasonable doubt instruction contained in CALJIC No. 2.90 was confusing
21 and unhelpful to the jury.

22 The jury’s first question to the judge was, “[i]n order to reach an alternate
23 interpretation of circumstantial evidence must the alternative interpretation have
24 equal weight?” Exhibit 1 at 265; Exhibit 10 at RT 1046-47. The court answered
25 the question and then informed the jury that additional questions might help the
26 court focus on what was confusing the jury. Exhibit 10 at RT 1050-51.

27 The next day the jury asked for clarifying instructions on reasonable
28

1 doubt and the “interplay between circumstantial evidence and reasonable doubt.”
2 Exhibit 1 at 262; Exhibit 10 at RT 1062. Upon questioning by the judge, the jury
3 foreman clarified by asking specifically about “a possibility of an inference
4 versus an evidentiary trail.” Exhibit 10 at RT 1063. The court answered by re-
5 reading the CALJIC instruction for reasonable doubt and the first two paragraphs
6 of the circumstantial evidence instruction. Exhibit 10 at RT 1063-65.² The judge
7 continued by asking whether the jury needed “further instruction as to any of the
8 rest of that particular instruction on circumstantial evidence.” Exhibit 10 at RT
9 1066. The foreman answered, “[T]he only question that arises is you mentioned
10 that the reason must be based on something in evidence, is that correct?” Exhibit
11 10 at RT 1066. The judge answered by instructing the foreman that “your
12 determinations must be based upon the evidence in this case and not from any
13 other source” and “you must apply the law to the facts as you determine them . . .
14 You have to accept the evidence as it was presented in this case.” Exhibit 10 at
15 RT 1066-67

17 ²CALJIC No. 2.90 states: “A defendant in a criminal action is presumed to be
18 innocent until the contrary is proved, and in case of a reasonable doubt whether [his]
19 [her] guilt is satisfactorily shown, [he] [she] is entitled to a verdict of not guilty. This
20 presumption places upon the People the burden of proving [him] [her] guilty beyond a
21 reasonable doubt. [¶] Reasonable doubt is defined as follows: It is not a mere possible
22 doubt; because everything relating to human affairs is open to some possible or
imaginary doubt. It is that state of the case which, after the entire comparison and
consideration of all the evidence, leaves the minds of the jurors in that condition that
they cannot say they feel an abiding conviction of the truth of the charge.”

23 The first two paragraphs of the circumstantial evidence instruction (CALJIC No.
24 2.01) state: “However, a finding of guilt as to any crime may not be based on
25 circumstantial evidence unless the proved circumstances are not only (1) consistent
26 with the theory that the defendant is guilty of the crime, but (2) cannot be reconciled
27 with any other rational conclusion. Further, each fact which is essential to complete a
28 set of circumstances necessary to establish the defendant's guilt must be proved beyond
a reasonable doubt. In other words, before an inference essential to establish guilt may
be found to have been proved beyond a reasonable doubt, each fact or circumstance on
which the inference necessarily rests must be proved beyond a reasonable doubt.”

1 The next day, after the judge answered another jury question about the
2 scheduling of future deliberations, the judge reminded the jury that “if you need
3 anything further let us know and we will try to assist.” Exhibit 10 at RT 1089-91.
4 After returning verdicts on two of the three counts, the jury informed the judge
5 that it was deadlocked on the murder charge and additional instructions would
6 not be of any help. Exhibit 10 at RT 1092-93.

7 **1. Legal Standard**

8 “When a jury makes explicit its difficulties, a trial judge should clear
9 them away with concrete accuracy.” *Bollenbach v. United States*, 326 U.S. 607,
10 612-13 (1946). The trial judge has a duty to respond to the jury’s request for
11 clarification with sufficient specificity to eliminate the jury’s confusion. *See*
12 *Beardslee v. Woodford*, 358 F.3d 560, 574-75 (9th Cir. 2004) (harmless due
13 process violation occurred when, in responding to request for clarification, court
14 refused to give clarification and informed jury that no clarifying instructions
15 would be given); *United States v. Frega*, 179 F.3d 793, 808-11.
16 (9th Cir. 1999) (trial judge’s confusing response to jury’s questions raised
17 possibility that verdict was based on conduct legally inadequate to support
18 conviction); *McDowell v. Calderon*, 130 F.3d 833, 839 (9th Cir. 1997) (same in
19 state capital case).

20 However, the trial judge has wide discretion in charging the jury, a
21 discretion which carries over to the judge’s response to a question from the jury.
22 *Arizona v. Johnson*, 351 F.3d 988, 994 (9th Cir. 2003). Also, just as a jury is
23 presumed to follow its instructions, it is presumed to understand a judge’s answer
24 to a question. *Weeks v. Angelone*, 528 U.S. 225, 234 (2000).

25 **2. Analysis**

26 The Court of Appeal found that the trial court had not abused its
27 discretion in determining the best answers to the jury’s questions. Exhibit 5 at
28

1 18. The court held that “[i]n the absence of any further requests from the jury,
2 [after the trial judge’s offer to help,] we assume that the court’s responses
3 dispelled any confusion on the jury’s part regarding the law to be applied in this
4 case.” Exhibit 5 at 19.

5 Despite the multiple questions posed by the jury, there is nothing in the
6 record to indicate that the judge’s answers were constitutionally infirm. The trial
7 judge answered each question with an accurate statement of the law, either taken
8 directly from CALJIC or in the form of an explanation. More than once, the
9 judge asked the jury whether further clarification would help. On the last of
10 these instances the jury firmly responded that no additional questions would help
11 break the deadlock. Since a jury “is presumed to understand a judge’s answer to
12 a question,” *Weeks*, 528 U.S. at 234, and the jury in Petitioner’s case declined to
13 ask any follow up questions, there is no indication that the jury did not
14 understand its duty. The Supreme Court examined an analogous situation in
15 *Weeks*:

16 Given that petitioner's jury was adequately instructed, and given that the
17 trial judge responded to the jury's question by directing its attention to the
18 precise paragraph of the constitutionally adequate instruction that
19 answers its inquiry, the question becomes whether the Constitution
20 requires anything more. We hold that it does not.

21 *Weeks*, 528 U.S. at 234

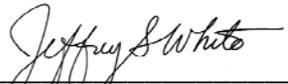
22 Petitioner’s argument that CALJIC No. 2.90 was archaic and unhelpful is
23 also unconvincing. In *Lisenbee v. Henry*, 166 F.3d 997, 990-1000 (9th Cir.
24 1999), the court considered the instruction and held that CALJIC No. 2.90 is
25 constitutional and its use does not constitute a violation of due process.

26 Petitioner received a fair trial and his right to due process was not
27 violated. Therefore, the state court’s decision was not contrary to or an
28 unreasonably application of federal law.

1 be DENIED. The Clerk shall enter judgment and close the file.

2 IT IS SO ORDERED.

3 DATED: March 2, 2009

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5 _____
6 JEFFREY S. WHITE
7 United States District Judge
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1 UNITED STATES DISTRICT COURT
2 FOR THE
3 NORTHERN DISTRICT OF CALIFORNIA
4

5 FRANK ALBERT FLOREZ,
6 Plaintiff,

Case Number: CV06-04141 JSW

CERTIFICATE OF SERVICE

7 v.

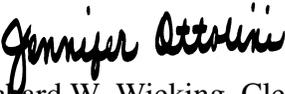
8 TOM CAREY et al,
9 Defendant.
10 _____/

11 I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District
12 Court, Northern District of California.

13 That on March 2, 2009, I SERVED a true and correct copy(ies) of the attached, by placing said
14 copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing
15 said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery
16 receptacle located in the Clerk's office.

17 Frank Albert Florez
18 V18804
19 P.O. Box 5246
20 Corcoran, CA 93212

21 Dated: March 2, 2009


Richard W. Wieking, Clerk
By: Jennifer Ottolini, Deputy Clerk