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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

RAMON ALEJANDRE, JR.,

Petitioner,

v.

P.D. BRAZELTON, Warden,

Respondent.

No. C 11-4803 CRB (PR)

**ORDER DENYING PETITION FOR A  
WRIT OF HABEAS CORPUS;  
DENYING CERTIFICATE OF  
APPEALABILITY**

Petitioner Ramon Alejandro, Jr., a state prisoner incarcerated at the California Correctional Institution in Tehachapi, seeks a writ of habeas corpus under 28 U.S.C. § 2254 challenging a conviction and sentence from Contra Costa County Superior Court. In an order dated February 8, 2012, the Court found that the petition stated several cognizable claims for relief and ordered Respondent to show cause why a writ of habeas corpus should not be granted. Respondent has filed an answer to the order to show cause. Petitioner did not file a traverse. For the reasons set forth below, a writ of habeas corpus will be denied.

**PROCEDURAL BACKGROUND**

On June 18, 2008, a jury found Petitioner guilty of first degree murder, with enhancements for benefitting a criminal street gang and discharging a firearm causing great bodily injury (count one); being a felon in possession of a firearm (count two); and conspiracy to commit aggravated assault (count three). The court found true that Petitioner had a prior serious felony conviction, a prior strike conviction, and a prior prison term. On

1 July 16, 2008, the court sentenced Petitioner to an aggregate prison term of ninety years to  
2 life. On September 29, 2010, in a written order, the California Court of Appeal affirmed  
3 Petitioner's conviction. People v. Alejandro, 2010 WL 3772369 (Cal. App. September 29,  
4 2010) (nonpublished). On January 12, 2011, the California Supreme Court denied review.

5 On September 28, 2011, Petitioner filed a petition for a writ of habeas corpus in this  
6 Court. On February 8, 2012, the Court issued an Order to Show Cause. On July 23, 2012,  
7 the Court granted Respondent's motion to dismiss the petition as mixed, permitted Petitioner  
8 to strike the unexhausted claims, and limited its previous Order to Show Cause to the  
9 remaining exhausted claims as set out in Petitioner's state petition for review.

### 10 **FACTUAL BACKGROUND**

11 The California Court of Appeal summarized the evidence presented at trial as follows:

12 The account of the murder came largely from two accomplices, Roberto Garcia  
13 and Juan Vargas. FN2. At the time of the murder in February 2007, Garcia  
14 was 20 and Vargas was 17. They had been friends for several years.  
15 Defendant, who was 31 at the time, is Garcia's uncle. Defendant was a senior  
16 Sureño, known as an "OG," "Old Gangster" or "Original Gangster." Vargas  
17 was a Sureño but at the time of trial claimed he was no longer a member of the  
18 gang. Garcia had taken steps to become a Sureño, but at the time of trial also  
19 denied membership in the gang.

20 FN2 Garcia and Vargas were also initially charged with the murder but agreed to  
21 testify against defendant as part of a plea bargain.

22 On the evening of February 2, 2007, defendant, Vargas, and Garcia were  
23 drinking beer together. At some point after 9:00 p.m., they went to buy more  
24 beer. Vargas drove Garcia and defendant in his truck as the three continued to  
25 drink beer in the truck. As they were driving down 11th Street in San Pablo,  
26 someone pointed to a youth walking on the sidewalk wearing red clothing and  
27 said he was a "chap," a derogatory term for a Norteño, another gang. At  
28 defendant's request, Vargas pulled the car over near the corner of 11th and  
Stanton Streets. Vargas thought defendant was going to order him to fight the  
Norteño. Instead, defendant told Vargas and Garcia to wait in the truck.  
Defendant got out and walked toward the youth. Worried that defendant would  
do something to the boy and jeopardize defendant's parole status, Garcia asked  
defendant to come back. Defendant again told Garcia to wait for him at the  
truck. While they were waiting for defendant to return, Garcia took two beer  
bottles from the truck and put them on the curb across the street from the truck.  
As he was heading back to the truck, Garcia heard several gunshots coming  
from the direction in which defendant had walked. Vargas heard the shots too  
and worried that perhaps the youth had shot defendant. He kept the truck  
idling. Defendant walked calmly back to the truck and the three drove away.  
Defendant did not answer when Garcia asked him "why had he did that?"  
None of them spoke of the shooting while in the truck, but later that night  
defendant told Garcia not to talk about it. At some point during the drive,

1 defendant handed Garcia an empty ammunition clip and told Garcia to hold it  
2 for him.

3 Vargas drove to his girlfriend's house where the three men stayed until around  
4 midnight, when they returned to the truck. Around 1:00 a.m., they were  
5 stopped by the police for a traffic infraction. As the truck was being pulled  
6 over, defendant placed his gun on the floor under the bench seat where he was  
7 sitting. The officer noticed Vargas had bloodshot, watery eyes, and smelled of  
8 alcohol. Vargas admitted to the officer he did not have a driver's license. The  
9 officer asked the three men to identify themselves, ran their information, and  
10 then asked them to step out of the vehicle. As the officer was taking defendant  
11 out of the passenger seat, she noticed the butt of a gun under the seat, directly  
12 between defendant's feet. She retrieved the gun, a loaded .45 caliber  
13 Springfield semiautomatic pistol, and arrested defendant. She also took  
14 custody of the empty clip from Garcia's pocket.

15 Around 9:45 p.m., officers responding to a report of a shooting found the  
16 15-year-old victim dead on the sidewalk on 11th Street. He had multiple  
17 gunshot wounds and was lying in a large pool of blood. Numerous expended  
18 .45 caliber shell casings were found on the sidewalk near the body. A firearms  
19 expert examined the expended cartridges and concluded that all had been fired  
20 by the .45 caliber gun that had been recovered under defendant's seat. He also  
21 testified that six bullets recovered from the scene and from the victim's body  
22 matched the brand and make of expended cartridges found around the body.  
23 The police also found Garcia's fingerprints on two bottles of beer recovered  
24 from the corner of 11th and Stanton Streets.

25 Dr. Gregory Reiber, a board certified forensic examiner, described the injuries  
26 suffered by the victim and concluded that the victim died as a result of multiple  
27 gunshot wounds to his chest.

28 Following their arrests, Vargas and Garcia gave taped statements to the police  
identifying defendant as the shooter. Their taped statements were played to the  
jury.

The prosecution introduced extensive evidence of defendant's gang activity.  
One deputy sheriff recounted an incident in jail on August 11, 2007, in which  
defendant had stated, "I'm a straight Sureño. We get even." Other deputies  
described another incident in county jail on January 7, 2008, in which they  
observed defendant assaulting another inmate because, according to defendant,  
he was a Norteño.

Detective Jeff Palmieri testified as a gang expert. Based on his review of  
defendant's gang-related criminal history, his statements and actions in jail, his  
tattoos, and statements he made at prison intake, Palmieri opined that defendant  
was a Sureño. He also opined that the crime was committed for the benefit of  
the Sureño gang and was done to build defendant's status within the gang.

Defendant was found guilty of the charged offenses and the enhancements  
were found true. At a bifurcated court trial, the court found the prior  
conviction allegations true. Defendant was sentenced to an aggregate prison  
term of 90 years to life and filed a timely notice of appeal.



1 binding on the state courts and only those holdings need be “reasonably” applied. Id.

2 Even if the state court's ruling is contrary to or an unreasonable application of  
3 Supreme Court precedent, that error justifies habeas relief only if the error resulted in "actual  
4 prejudice." Brecht v. Abrahamson, 507 U.S. 619, 637 (1993). Thus, habeas relief is granted  
5 only if the state court's error had a "substantial and injurious effect or influence in  
6 determining the jury's verdict." Id.

7 When applying these standards, the federal court should review the “last reasoned  
8 decision” by the state courts. Avila v. Galaza, 297 F.3d 911, 918 n.6 (9th Cir. 2002).  
9 Because the California Supreme Court summarily denied relief on Petitioner’s claims, this  
10 Court looks to the California Court of Appeal’s September 29, 2010 decision denying  
11 Petitioner’s direct appeal.

12 With these principles in mind regarding the standard and scope of federal habeas  
13 review, the Court addresses Petitioner's claims.

## 14 **II. Claims**

### 15 **A. Confrontation Clause Claim**

16 Petitioner contends that the admission of Dr. Gregory Reiber's expert testimony  
17 regarding the autopsy of the victim violated Petitioner’s Sixth Amendment right to confront  
18 witnesses because Dr. Reiber was not the doctor who performed the autopsy. Respondent  
19 argues that this claim is procedurally defaulted and, even if it were addressed on its merits, it  
20 must be denied.

#### 21 **1. Procedural Default**

22 The state appellate court determined the claim was procedurally defaulted, as follows:

23 Doctor Brian Peterson performed an autopsy of the victim and prepared a  
24 report. Peterson moved to Minnesota before defendant's trial and, to save  
25 significant costs, the prosecution did not subpoena him to testify at the trial.  
26 Instead, the prosecution secured an agreement from defendant's attorney, in  
27 advance of trial, that Dr. Reiber would review the autopsy report and testify at  
28 trial. . . . Defendant did not object to Reiber’s testimony on Sixth Amendment  
grounds.

Alejandre, 2010 WL 3772369, at \*9.

The California Court of Appeal found that this claim was procedurally defaulted

1 because Petitioner failed to object to Dr. Reiber's testimony at trial. Alejandre, 2010 WL  
2 3772369, at \*10. The court noted that, not only did defense counsel fail to object, but he  
3 expressly agreed to allow Dr. Reiber to testify as an alternate witness. Id.

4 The doctrine of procedural default bars a federal habeas court from reviewing a claim  
5 rejected by a state court “if the decision of [the state] court rests on a state law ground that is  
6 independent of the federal question and adequate to support the judgment,” Coleman v.  
7 Thompson, 501 U.S. 722, 729 (1991), unless the petitioner can show cause for the failure to  
8 properly present the claim and actual prejudice, or that the failure to consider the claim  
9 would result in a fundamental miscarriage of justice, Wainwright v. Sykes, 433 U.S. 72, 81-  
10 88 (1977). The Ninth Circuit has held that California’s failure-to-object procedural bar is an  
11 independent and adequate bar prohibiting federal habeas review of the claim at issue. Rich v.  
12 Calderon, 187 F.3d 1064, 1070 (9th Cir. 1999); Vansickel v. White, 166 F.3d 953, 957-58  
13 (9th Cir. 1999); Bonin v. Calderon, 59 F.3d 815, 842-43 (9th Cir. 1995).

14 Petitioner does not argue that counsel failed to object to Dr. Reiber’s testimony.  
15 Furthermore, he fails to show cause and prejudice for the failure to object or that failure to  
16 consider the claim will result in a fundamental miscarriage of justice. Accordingly,  
17 Petitioner’s Confrontation Clause claim is procedurally defaulted.

18 The state court also denied the claim on its merits and, as discussed below, that ruling  
19 is not unreasonable.

## 20 2. Federal Law

21 The Confrontation Clause of the Sixth Amendment provides that in criminal cases the  
22 accused has the right to “be confronted with the witnesses against him.” U.S. Const. amend.  
23 VI. The federal confrontation right applies to the states through the Fourteenth Amendment.  
24 Pointer v. Texas, 380 U.S. 400, 403 (1965).

25 The ultimate goal of the Confrontation Clause is to ensure reliability of evidence, but  
26 it is a procedural rather than a substantive guarantee. Crawford v. Washington, 541 U.S. 36,  
27 61 (2004). It commands, not that evidence be reliable, but that reliability be assessed in a  
28 particular manner: by testing in the crucible of cross-examination. Id. The Confrontation

1 Clause applies to all "testimonial" statements. Id. at 50-51. "Testimony . . . is typically a  
2 solemn declaration or affirmation made for the purpose of establishing or proving some fact."  
3 Id. at 51.

4 When the primary purpose of taking an out-of-court statement is to create an out-of-  
5 court substitute for trial testimony, the statement is testimonial hearsay and Crawford applies.  
6 Michigan v. Bryant, \_\_\_ U.S. \_\_\_, 131 S. Ct. 1143, 1155 (2011). See, e.g., Bullcoming v. New  
7 Mexico, \_\_\_ U.S. \_\_\_, 131 S. Ct. 2705, 2712-14 (2011) (concluding that forensic lab report,  
8 prepared in connection with a criminal investigation, certifying that petitioner's blood  
9 alcohol level was above limit for aggravated DUI was testimonial); Melendez-Diaz v.  
10 Massachusetts, 557 U.S. 305, 310, 329 (2009); United States v. Bustamante, 687 F.3d 1190,  
11 1194 (9th Cir. 2012) (document which in essence was an affidavit testifying to the contents  
12 of the birth records of a city is functionally identical to live, in-court testimony that an  
13 employee of city might have provided and therefore is a testimonial statement). When a  
14 substitute for trial testimony was not the primary purpose, "the admissibility of a statement is  
15 the concern of state and federal rules of evidence, not the Confrontation Clause." Bryant,  
16 131 S. Ct. at 1155. The formality of the interrogation, or the lack of it, may inform the  
17 court's inquiry as to its "primary purpose." Id. at 1160.

18 For purposes of federal habeas corpus review, the standard applicable to violations of  
19 the Confrontation Clause is whether the inadmissible evidence had an actual and prejudicial  
20 effect upon the jury. Hernandez v. Small, 282 F.3d 1132, 1144 (9th Cir. 2002) (citing  
21 Brecht, 507 U.S. at 637).

### 22 3. Merits Analysis

23 Although the state appellate court found that the Confrontation Clause claim was  
24 procedurally defaulted, it also found that the claim failed because Petitioner could not show  
25 prejudice. The relevant facts, as found by the Court of Appeal, are as follows:

26 Reiber testified that the victim died as a result of multiple gunshot wounds to  
27 his torso and extremities. He testified that some of the gunshot wounds were  
28 consistent with the victim standing and turning slightly to the right and others  
were consistent with the victim lying on the concrete. On cross-examination,  
Reiber acknowledged a few discrepancies between his opinions and Peterson's

1 opinions as expressed in the autopsy report. With respect to one of the gunshot  
2 injuries, the doctors disagreed as to which was the entry wound and which the  
exit wound. . . .

3 On appeal, defendant contends for the first time that the “introduction of the  
4 autopsy report and testimony relating to the autopsy that had been conducted  
5 by another doctor abridged [his] right to confrontation.” The Sixth  
6 Amendment to the United States Constitution, made applicable to the states  
7 provides: “In all criminal prosecutions, the accused shall enjoy the right ... to  
8 be confronted with the witnesses against him.” As indicated above, in  
9 Crawford, 541 U.S. 36, the Supreme Court held that a defendant's Sixth  
10 Amendment right of confrontation is violated by the admission of testimonial  
11 statements of a witness not subject to cross-examination at trial, unless the  
witness was unavailable to testify and the defendant had a prior opportunity for  
cross-examination. The court defined testimony as “[a] solemn declaration or  
affirmation made for the purpose of establishing or proving some fact, and  
confirmed that the 'core class' of testimonial statements includes affidavits,  
custodial examinations, prior testimony not subject to cross-examination, and  
'statements that were made under circumstances which would lead an objective  
witness reasonably to believe that the statement would be available for use at a  
later trial.’” (Id. at 51-52.)

12 . . .

13 In Melendez-Diaz v. Massachusetts (2009) 557 U.S. ---- [129 S .Ct. 2527]  
14 (Melendez-Diaz), the United States Supreme Court revisited the issue of what  
15 constitutes a “testimonial” statement. The court held that three “certificates of  
16 analysis,” which showed that seized substances contained cocaine, were  
17 testimonial statements subject to Sixth Amendment protection because they  
were made under oath and under circumstances that would lead an objective  
witness to believe that the statement would be available for use at a later trial  
(Id. at 2532) . . .

18 Alejandro, 2010 WL 3772369, at \*9-10 (footnote omitted).

19 The Court of Appeals then turned to whether the alleged Confrontation Clause  
20 violation would have caused prejudice.

21 Confrontation clause violations are subject to harmless-error analysis under  
22 Chapman v. California (1967) 386 U.S. 18, 24. (Delaware v. Van Arsdall  
23 (1986) 475 U.S. 673, 681 [“an otherwise valid conviction should not be set  
24 aside if the reviewing court may confidently say, on the whole record, that the  
25 constitutional error was harmless beyond a reasonable doubt”].) . . . Whether  
26 such an error is harmless in a particular case depends upon a host of factors, all  
readily accessible to reviewing courts. These factors include the importance of  
the witness' testimony in the prosecution's case, whether the testimony was  
cumulative, the presence or absence of evidence corroborating or contradicting  
the testimony of the witness on material points, the extent of cross-examination  
otherwise permitted, and, of course, the overall strength of the prosecution's  
case.” (Id. at 684.)

27 In this case, it is undisputed that the victim was shot and died as a result of  
28 multiple gunshot wounds. Insofar as the autopsy report was admitted for the  
purpose of establishing the cause of death, the absence of cross-examination

1 clearly was harmless. Defendant argues that the “autopsy report played a much  
2 bigger role . . . than establishing the fact that the victim had been killed by  
3 gunshot.” He suggests that the prosecution used the report in closing argument  
4 to establish the identity of the shooter. Based on Reiber's testimony regarding  
5 the position of the victim at the time of the first gunshot, the prosecutor argued  
6 that the shooter must have approached from the direction of the parked truck.  
7 There is no indication, however, that Peterson and Reiber disagreed as to the  
8 victim's position and Reiber was available for cross-examination on this point.  
9 Defendant does not explain how cross-examination of Peterson would have  
10 affected the credibility of this testimony. More importantly, Reiber's testimony  
11 regarding the position of the victim was not based on conclusions in Peterson's  
12 report. Rather, his testimony was based primarily on photographs taken by a  
13 police technician, who authenticated the photographs at trial. The autopsy  
14 report was cumulative of the photographic evidence and its admission was  
15 harmless beyond a reasonable doubt.

9 Alejandre, 2010 WL 3772369, at 11.

10 In his federal petition, Petitioner argues that the autopsy report was prejudicial  
11 because it "drew several conclusions regarding the manner in which the victim was killed,  
12 which the prosecutor argued, supported its [sic] theory that [Petitioner] was the actual killer.  
13 (12 Reporter's Transcript (RT) 2187-88). As such, it is evident that the autopsy report  
14 played a much bigger role in the instant case than establishing the fact that the victim had  
15 been killed by gunshot." Pet'n. at 11.

16 The state court reasonably found that Dr. Reiber's testimony was not prejudicial under  
17 the stringent Chapman standard of analyzing prejudice. In federal habeas proceedings the  
18 Brecht prejudicial standard applies. Under this standard, which is not as stringent as  
19 Chapman, Petitioner has not shown prejudice because, as indicated by the state court, Dr.  
20 Reiber's testimony and conclusions primarily were based upon photographs taken by Police  
21 Technician Galay, who testified at trial. 5 RT 870-79. These photographs provided Dr.  
22 Reiber with the necessary information to render his opinion about the nature and orientation  
23 of the various bullet wounds and the position of the victim and the shooter. Although  
24 Petitioner cites Dr. Reiber's testimony at 8 RT 1318-19, which discusses the autopsy report,  
25 Dr. Reiber relied on Galay's photographs for his testimony about the entry and exit wounds,  
26 which he relied upon to determine the position of the shooter. 8 RT 1322, 1325-50. Because  
27 the autopsy report was cumulative to the photographic evidence, its admission did not have a  
28 substantial and injurious effect or influence in determining the jury's verdict. See Brecht, 507

1 U.S. at 637. The state appellate court’s ruling of no prejudice was not contrary to or an  
2 unreasonable application of Brecht.

3 **B. Claims Regarding Gang Expert’s Testimony**

4 Petitioner asserts that the testimony of the gang expert: (1) exceeded the scope of his  
5 expertise; (2) violated Petitioner's confrontation rights; and (3) was unduly prejudicial. The  
6 Court of Appeal summarized the relevant facts as follows:

7 Detective Palmieri testified as an expert witness on gang activity. Palmieri had  
8 been a San Pablo Police Officer for 22 years and had been working with gang  
9 activity for more than 17 years. His expertise on gangs was derived from his  
work experience, numerous training classes and interviews with over 1,000  
gang members.

10 Palmieri described the area around the shooting as turf claimed by Sureños, and  
11 explained the war between the Sureños and Norteños gangs. He explained that  
12 Sureños primary activities include homicides, assaults, and drug sales, and that  
Sureños gain turf through acts of violence and intimidation. Palmieri recounted  
several recent violent crimes committed by Sureños for the benefit of the gang.

13 Palmieri described the origination and growth of the Sureños as an affiliated  
14 arm of the Mexican Mafia prison gang. Members of the Mexican Mafia, he  
15 explained, are “more of a hard criminal” than someone who is only a Sureño.  
16 Members of the Mexican Mafia are instructed to follow orders once released  
from prison, including shooting rival gang members on sight. The Mexican  
Mafia forbids drive-by shootings and requires its members to “walk up to the  
individual you suspect as a gang member and put them down.”

17 Through photographs, Palmieri detailed the many tattoos on defendant's body.  
18 Palmieri explained the meaning of tattoos in Sureño gang culture and how the  
19 tattoos indicate status or role in the gang. The word “Richmond” across  
20 defendant's knuckles and the Roman numeral “XIII” tattooed on his hand, torso  
21 and forearm demonstrated that defendant was a Sureño. Defendant also has the  
22 letter “M” tattooed on his hand indicating “an allegiance and respect to the  
23 Mexican Mafia.” Palmieri opined that a person with such tattoos “would be a  
24 full-fledged gang member of the Sureño gang. You would not be allowed to  
25 even have these type of tattoos if you weren't.” Of particular interest to  
26 Palmieri was a tattoo on defendant's right arm that depicted a man pointing a  
gun toward the viewer. Detective Palmieri explained, “If I was to see that on  
the street that would draw my attention based on my training and people that I  
have talked to who are gang members, this type of tattoo is indicative of  
someone who has been involved in shootings. I have seen tattoos on the  
forearms of double-barreled shotguns, or looks like it's 3-D coming out at you,  
and these individuals are known and have a reputation for shooting at people.”  
Such a tattoo reflects the role of “an enforcer in the gang, someone who is  
willing to go out and do violent acts.”

27 Palmieri also described the different roles of gang members from “shot callers”  
28 and “OGs” to new members and affiliates. He explained that an OG has  
significant experience and seniority in gang society and serves as a role model  
for newer gang members by teaching them how to act and initiating new

1 members in the ways of a Sureño. Palmieri testified that members rise in the  
2 ranks by committing crimes for the benefit of the gang. “So each time they got  
3 a new job and they did well they would receive more status and then they  
4 would gain respect from the gang and they would climb through the gang  
5 ranks. It's called making your stripes.” Gangs use acts of violence to  
6 “intimidate [their] rival members and put fear into them” in order to obtain  
7 more turf. “If you show that you can basically walk up and shoot a rival gang  
8 member . . . right there on the street in front of other rival gang members they  
9 tend not to mess with you any longer. You tend to be the more violent dog on  
10 the street, so to speak, and then you can start chopping away and taking  
11 territory.” If the gang “can take somebody else's turf and turn it into a drug  
12 area where [they] can sell narcotics, or [they] can turn their turf into an area  
13 where [they] can steal cars . . . then [they] have just gained a foothold and an  
14 economic base.”

15 Palmieri testified that he learned from his review of defendant's criminal  
16 records that defendant had been an active member of the Sureño gang since he  
17 was 14. He had been convicted of a prior gang-related shooting and had served  
18 time in prison. While in prison he was involved in an altercation between  
19 Sureño and Norteño gang members. In forming his opinion, Palmieri also  
20 considered the fact that Garcia and Vargas had limited criminal histories.

21 Alejandre, 2010 WL 3772369, at \*3-4.

### 22 1. Scope of Palmieri’s Expertise

23 In his state appeal, Petitioner argued that Palmieri's testimony regarding the Mexican  
24 Mafia and the meaning of Petitioner's tattoos exceeded the area of his expertise. The Court  
25 of Appeal held that this claim was procedurally barred because, although Petitioner had  
26 objected at trial to Palmieri’s qualification as an expert on the ground that it was too broad,  
27 he had not objected to Palmieri’s specific testimony regarding the Mexican Mafia or  
28 Petitioner’s tattoos. Id. at \*4. As noted above, failure to object at trial is an adequate and  
independent procedural bar to federal habeas review. See Rich, 187 F.3d at 1070; Vansickel,  
166 F.3d at 957-58. Petitioner does not argue that counsel objected to this testimony.  
Furthermore, he does not argue cause and prejudice for the default or that failure to consider  
the claim will result in a fundamental miscarriage of justice. Id. at 958. Therefore, this claim  
is procedurally defaulted. However, the Court of Appeal also denied it on its merits. As  
discussed below, this ruling was not unreasonable.

The Court of Appeal analyzed the evidence at trial regarding Palmieri's qualifications  
to testify as an expert on gangs and concluded that, "Palmieri's special training and more than  
17 years of experience in observing gang culture and gang activities was sufficient to

1 demonstrate the special knowledge, skill, experience and training needed to qualify him as an  
2 expert on these matters." Alejandre, 2010 WL 3772369, at \*4.

3 On habeas review, a state court's evidentiary rulings are not cognizable. See 28  
4 U.S.C. § 2254(a). Therefore, to the extent Petitioner attacks the Court of Appeal's affirming  
5 the trial court's evidentiary rulings, the claim fails. Furthermore, the Supreme Court case  
6 addressing qualifying expert witnesses in federal court, Daubert v. Merrell Dow  
7 Pharmaceuticals, Inc., 509 U.S. 579 (1993), is based on a federal rule of evidence, not the  
8 Constitution. Id. at 594-95; Moses v. Payne, 555 F.3d 742, 757-58 (9th Cir. 2009) (Supreme  
9 Court has not ruled on whether state evidentiary rules governing qualifications of experts  
10 implicates federal due process). For that reason, California courts are not required to apply  
11 it, and in fact do not. See People v. Leahy, 8 Cal. 4th 587, 594 (1994). Therefore,  
12 Petitioner's claim, to the extent it is based on the assertion that his due process rights were  
13 violated by Palmieri's qualifying as an expert, also fails because no Supreme Court case  
14 addresses whether a state court's decision to qualify a person as an expert can violate a  
15 defendant's due process rights. Accordingly, the state court's denial of this claim was not  
16 contrary to or an unreasonable application of established federal authority.

## 17 2. Confrontation Rights

18 The Court of Appeal denied this claim as follows:

19 Palmieri acknowledged that much of his knowledge and expertise about the  
20 meaning of gang tattoos was drawn from conversations with gang members  
21 over the course of his career. Defendant raised a hearsay objection and at  
22 defendant's request the court admonished the jury as follows: "Ladies and  
23 gentlemen, much of what Detective Palmieri is describing to you is [what] he  
24 has been told by people on the street and interview[s][of] a number of gang  
25 members and so forth. The statements that those people made to Detective  
26 Palmieri are hearsay because they are not witnesses here in court, but I'm  
27 allowing Detective Palmieri to describe those to you so that you can understand  
28 the basis of his expert opinion, what they are founded on so you can make a  
judgment as to credibility and reliability and give to the opinions that Detective  
Palmieri is giving you, you need to understand the basis of the opinions, but  
because the statements are out-of-court statements they can't be considered for  
the truth of the matters asserted because those people aren't witnesses here  
today."

Defendant contends that Palmieri's opinion concerning the meaning of his  
tattoos violated his right to confrontation because it was based "in large part on  
hearsay statements from undisclosed parolees following release from prison."

1 Defendant acknowledges that an expert witness may rely on inadmissible  
2 evidence, including hearsay, in formulating an opinion and may testify as to the  
3 basis of his or her opinion. He argues, however, that under Crawford v.  
Washington (2004), 541 U.S. 36, an expert's reliance on testimonial hearsay  
violates his Sixth Amendment right to confrontation.

4 . . .

5 Defendant argues that statements made in the course of Palmieri's interviews  
6 with gang members were testimonial because the purpose of Palmieri's "inquiry  
7 of gang members [is] not sociological or curious inquiry, but rather to gather  
8 information that is potentially relevant to criminal prosecutions. Further, the  
9 gang hearsay statements are accepted as true by Palmieri and are not tested  
10 with statistical or empirical inquiry. Thus, Palmieri is simply adopting the  
11 gang hearsay statements as true, and simply reiterating them in his capacity as a  
12 "gang expert." The Attorney General disagrees with this characterization,  
13 asserting that Palmieri's "street contacts are designed to develop a better  
14 understanding of gangs and gang behavior within the community and are not  
15 out-of-court analogs of testimony, gleaned for use in a particular trial. They  
16 are obtained to develop an understanding of gangs and to develop and refine  
17 expertise." We agree with the Attorney General's characterization, particularly  
18 in this instance. Palmieri did not conduct any interviews for the purpose of  
19 gathering information for defendant's trial. Nor did he obtain information  
20 specifically about defendant's tattoos. Because the statements made by gang  
21 members in conversation with Palmieri were not testimonial, defendant's  
22 confrontation rights were not infringed by Palmieri's testimony.

23 Moreover, even if the statements could be considered testimonial, their  
24 admission did not implicate defendant's confrontation rights. In U.S. v. Johnson  
25 (4th Cir.2009) 587 F.3d 625, 635 the court held that while "Crawford forbids  
26 the introduction of testimonial hearsay as evidence in itself, . . . it in no way  
27 prevents expert witnesses from offering their independent judgments merely  
28 because those judgments were in some part informed by their exposure to  
otherwise inadmissible evidence." (See also People v. Thomas (2005) 130 Cal.  
App. 4th 1202, 1210 ["Crawford does not undermine the established rule that  
experts can testify to their opinions on relevant matters, and relate the  
information and sources upon which they rely in forming those opinions. This  
is so because an expert is subject to cross-examination about his or her  
opinions and additionally, the materials on which the expert bases his or her  
opinion are not elicited for the truth of their contents; they are examined to  
assess the weight of the expert's opinion."]; . . . The court in Johnson explained,  
"An expert witness's reliance on evidence that Crawford would bar if offered  
directly only becomes a problem where the witness is used as little more than a  
conduit or transmitter for testimonial hearsay, rather than as a true expert  
whose considered opinion sheds light on some specialized factual situation.  
Allowing a witness simply to parrot 'out-of-court testimonial statements of  
cooperating witnesses and confidential informants directly to the jury in the  
guise of expert opinion' would provide an end run around Crawford. [Citation.]  
For this reason, an expert's use of testimonial hearsay is a matter of degree.  
[Citations.] The question is whether the expert is, in essence, giving an  
independent judgment or merely acting as a transmitter for testimonial hearsay.  
As long as he is applying his training and experience to the sources before him  
and reaching an independent judgment, there will typically be no Crawford  
problem. The expert's opinion will be an original product that can be tested  
through cross-examination." (U.S. v. Johnson 587 F.3d. at 635).

1 In this case, Palmieri was not merely a transmitter of testimonial hearsay. He  
2 offered an interpretation of defendant's tattoos based on information he had  
3 gathered through numerous conversations with gang members over the course  
4 of his career. Defendant was able to cross-examine Palmieri regarding his  
5 opinion and the jury was able to judge the credibility of his opinion in light of  
6 source of his foundational information.

7 Alejandre, 2010 WL 3772369, at \*5-6.

8 The statements Palmieri was told by gang members do not qualify as testimonial  
9 under Crawford and its progeny. As indicated by the state court, Palmieri's job was to learn  
10 about gang culture, structure and sociology and, as part of that job, he spoke to many gang  
11 members. 9 RT 1623-26; 1637-40. No evidence indicated that Palmieri gathered these  
12 statements as part of a specific investigation or that any of the individuals to whom Palmieri  
13 spoke had the purpose of establishing or proving a fact for possible use in a criminal trial. As  
14 further indicated by the state appellate court, Palmieri did not merely transmit the  
15 information he gathered; he interpreted the evidence based on information gathered from  
16 numerous conversations with gang members over the seventeen years of his career. See e.g.,  
17 10 RT 1708-15. Therefore, the state court's conclusion that Crawford did not apply was not  
18 contrary to or an unreasonable application of clearly established federal authority or an  
19 unreasonable determination of the facts in light of the state court record.

### 20 **3. Palmieri's Testimony About Petitioner's Tattoos**

21 Petitioner contends that the trial court erred in allowing Palmieri to testify about the  
22 significance of Petitioner's gang tattoos and his connection to the Mexican Mafia. He argues  
23 that this evidence should not have been admitted because it was improper profile evidence  
24 and because it had an inflammatory impact on the jury.

#### 25 **a. Federal Law**

26 The Due Process Clause guarantees the fundamental elements of fairness in a criminal  
27 trial. Estelle v. McGuire, 502 U.S. 62, 70 (1991). However, the admission of evidence that  
28 is relevant to prove an issue in the case does not violate due process. Id. The admission of  
evidence is not subject to federal habeas review unless a specific constitutional guarantee is  
violated or the error is of such magnitude that the result is a denial of the fundamentally fair

1 trial guaranteed by due process. Henry v. Kernan, 197 F.3d 1021, 1031 (9th Cir. 1999). The  
2 Supreme Court “has not yet made a clear ruling that admission of irrelevant or overtly  
3 prejudicial evidence constitutes a due process violation sufficient to warrant issuance of the  
4 writ.” Holley v. Yarborough, 568 F.3d 1091, 1101 (9th Cir. 2009) (finding that trial court’s  
5 admission of irrelevant pornographic materials was “fundamentally unfair” under Ninth  
6 Circuit precedent but not contrary to, or an unreasonable application of, clearly established  
7 Federal law under § 2254(d)).

8 Failure to comply with state rules of evidence is neither a necessary nor a sufficient  
9 basis for granting federal habeas relief on due process grounds. Henry, 197 F.3d at 1031;  
10 Jammal v. Van de Kamp, 926 F.2d 918, 919 (9th Cir. 1991). While adherence to state  
11 evidentiary rules suggests that the trial was conducted in a procedurally fair manner, it is  
12 certainly possible to have a fair trial even when state standards are violated; conversely, state  
13 procedural and evidentiary rules may countenance processes that do not comport with  
14 fundamental fairness. Id. The due process inquiry in federal habeas review is whether the  
15 admission of evidence was arbitrary or so prejudicial that it rendered the trial fundamentally  
16 unfair. Walters v. Maass, 45 F.3d 1355, 1357 (9th Cir. 1995). But only if there are no  
17 permissible inferences that the jury may draw from the evidence can its admission violate  
18 due process. Jammal, 926 F.2d at 920.

19 **b. State Court Analysis**

20 The Court of Appeal addressed this claim as follows. It explained that profile  
21 evidence, which is a collection of conduct and characteristics commonly displayed by those  
22 who commit a certain crime, is generally inadmissible to prove guilt because it has the  
23 potential of including innocent people as well as the guilty within the profile. Alejandre,  
24 2010 WL 3772369, at \*7. In other words, profile evidence improperly invites the jury to  
25 conclude that, because the defendant manifested certain characteristics, he committed a  
26 crime. Id. However, profile evidence is only inadmissible when the conduct or matter that  
27 fits the profile is as consistent with innocence as with guilt. Id. The court noted that  
28 evidence of a gang’s territory, membership, signs, symbols, beliefs, practices, criminal

1 enterprises, rivalries and other such gang characteristics is relevant to proving identity,  
2 motive, modus operandi, intent, means of applying force or fear and other issues pertinent to  
3 whether the defendant is guilty of the charged crime. Id. at \*8.

4 Under this standard, the court found that “Defendant’s tattoos are a public statement  
5 that he is willing to commit extreme violence on behalf of his gang and is relevant to show  
6 defendant’s motive. Defendant’s tattoo of the letter ‘M,’ especially in light of his exposure  
7 to the Mexican Mafia in prison, supports a reasonable inference that he was affiliated with  
8 that arm of the gang as well. Thus, Palmieri’s testimony regarding the Mexican Mafia also  
9 was probative of defendant’s motive and the specific intent to benefit the gang.” Id. The  
10 court also found that it was

11 unlikely the testimony regarding the meaning of defendant’s tattoos or his  
12 potential connection to the Mexican Mafia would have evoked an improper  
13 emotional reaction from the jury. Defendant’s gang affiliation was established  
14 through other substantial admissible evidence. In light of the other evidence,  
15 the evidence to which defendant objects is not particularly inflammatory. As  
16 the court observed in People v. Leon, (2009) 181 Cal. App. 4th 452, 462, “A  
17 defendant charged with committing a crime for the benefit of a criminal street  
18 gang has no entitlement to an antiseptic portrayal of himself. If he elects to  
19 portray himself as a killer before he commits a murder, he should not be able to  
20 have what is tantamount to a ‘name change’ thereafter.”

21 Id.

22 Palmieri’s testimony regarding Petitioner’s tattoos and association with the Mexican  
23 Mafia was relevant to show Petitioner’s gang involvement for purposes of proving the gang  
24 enhancement. Thus, under established federal law, its admission did not violate Petitioner’s  
25 due process rights. See Jammal, 926 F.2d at 920 (“only if there are no permissible inferences  
26 the jury may draw from the evidence can its admission violate due process”). The Court of  
27 Appeal’s denial of this claim was not contrary to or an unreasonable application of Estelle,  
28 502 U.S. at 67.

### 29 **C. Petitioner’s Prior Criminal History**

30 Petitioner argues that the trial court erred, under California Code of Evidence section  
31 1101(b), in admitting his prior criminal history to show motive and intent because it was

1 improperly used to establish Petitioner’s identity as the shooter.<sup>1</sup>

2       The Court of Appeal provided the relevant facts to this claim and noted that the trial  
3 court gave a limiting instruction to the jury on the use of this evidence.

4       Prior to trial, the prosecution filed a motion requesting admission of defendant's  
5 prior conviction for assault with a firearm for the limited purpose of proving  
6 motive, intent, or gang purpose with respect to the current offense. According  
7 to the police reports of the prior incident, several Norteño gang members were  
8 standing in a store when someone yelled “Norte, Norte.” Defendant, who was  
9 in the driver's seat of a car outside the store, pulled out a gun and began firing  
10 from the car into the store, hitting one of the individuals inside. Defendant  
11 plead guilty to assault with a firearm, and admitted an enhancement that the  
12 shooting was for a gang related purpose.

13       The court agreed that the prior was admissible to demonstrate defendant's  
14 motive, intent, and the specific intent to benefit the criminal street gang. The  
15 court found the prior incident to be very similar to the current offense in  
16 showing motive and gang intent, given that defendant shot at a group of  
17 individuals for no reason other than that they belonged to the rival gang. The  
18 court found that the evidence was probative because the prior conviction  
19 resulted from defendant's guilty plea and the passage of time between the  
20 offenses was not significant given that defendant spent nearly all the  
21 intervening time in custody and committed the current offenses soon after his  
22 release from prison. The court noted the potential for undue prejudice was  
23 minimal because the jury would learn independently that defendant was a  
24 convicted felon and that he was a member of a gang. To reduce the potential  
25 prejudice, the court directed that evidence of the prior crime be admitted  
26 through the testimony of the expert witness rather than by the testimony of the  
27 victim. Consistent with the court's ruling, testimony was offered that defendant  
28 “and another gang member were involved in a shooting of a rival gang member  
in order to benefit and further the Sureño criminal street gang, and that the  
victim in that case did not die.”

At the close of trial, the court instructed the jury that “[e]vidence has been  
introduced for the purpose of showing that the defendant committed crimes  
other than those for which he is on trial. . . . This evidence, if believed, may not  
be considered by you to prove that defendant is a person of bad character or  
that he has a disposition to commit crimes. It may be considered by you only  
for the limited purpose of determining if it tends to show the existence of the  
intent which is a necessary element of the crime charged, a motive for the  
commission of the crime charged, that the crime or crimes charged were  
committed for the benefit of, at the direction of, or in association with a  
criminal street gang, with the specific intent to promote, further, or assist in any  
criminal conduct by gang members.”

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<sup>1</sup>California Evidence Code section 1101(a) prohibits the admission of “evidence of a person’s  
character or a trait of his or her character . . . when offered to prove his or her conduct on a specified  
occasion.” Subsection (b) provides, “[n]othing in this section prohibits the admission of evidence that  
a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive,  
opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . .) other  
than his or her disposition to commit such an act.”

1 Defendant contends that despite the court's admonition, his prior conviction  
2 was improperly used to prove identity. He suggests that identity, rather than  
3 motive or intent, was "the primary issue in this case" and that the evidence of  
4 his prior conviction was "a thinly-veiled directive to the jury that [defendant]  
5 was the likely shooter because he had the more likely propensity to commit the  
6 instant crime." Defendant suggests that the admission of this evidence was  
7 particularly prejudicial because the jury was also presented with evidence that  
8 Vargas and Garcia did not have a record of involvement in prior gang-related  
9 shootings. However, the danger that the jury considered the evidence for an  
10 improper purpose is no different here than in any other case in which evidence  
11 is admitted for a limited purpose. Moreover, that risk was reduced by the  
12 court's admonition regarding the proper uses for the evidence and we must  
13 presume the jury followed that instruction. . . .

8 Defendant's suggestion that his prior criminal conviction was irrelevant if not  
9 admitted to establish identity goes too far. The evidence was clearly relevant to  
10 show defendant's motive for the crime and that the crime was committed for the  
11 benefit of the gang.

11 Defendant also contends that even if this evidence was not inadmissible under  
12 Evidence Code section 1101, the court abused its discretion in failing to  
13 exclude it under Evidence Code section 352. . . . Defendant argues that the  
14 evidence was of limited probative value because defendant's alleged motive  
15 could have been ascertained from other gang evidence and that the potential for  
16 prejudice was great because "there was the very high risk that the jury would  
17 use this evidence to discern [defendant's] identity as the perpetrator because of  
18 what amounts to propensity evidence." As set forth above, the court  
19 recognized the potential prejudice and attempted to minimize that risk by  
20 admitting a sanitized version of the events and by admonishing the jury. We  
21 cannot say that under these circumstances the court abused its discretion in  
22 admitting this evidence.

17 Alejandre, 2010 WL 3772369, at 12-13.

18 As noted above, under federal law, due process is violated by the improper admission  
19 of evidence only if there are no permissible inferences the jury may draw from the evidence.  
20 Jammal, 926 F.2d at 920. Here, the admission of Petitioner's prior crime was relevant to  
21 proving intent and motive. Furthermore, the limiting instruction that the trial court gave the  
22 jury obviated any concern that the evidence would be improperly used to establish identity.  
23 See Weeks v. Angelone, 528 U.S. 225, 234 (2000); Richardson v. Marsh, 481 U.S. 200, 206  
24 (1987) (jury is presumed to follow its instructions); Doe v. Busby, 661 F.3d 1001, 1017 (9th  
25 Cir. 2011) (habeas court must presume that jury follows instructions it was given.)

26 Therefore, the Court of Appeal's conclusion that the jury was not likely to misapply  
27 the evidence of Petitioner's prior crime, in light of the limiting instruction, is not an  
28 unreasonable application of Weeks and Richardson and its conclusion of no due process

1 violation is not an unreasonable application of Estelle, 502 U.S. at 67.

2 **D. Accomplice Testimony**

3 Petitioner contends that there was insufficient evidence to support his conviction of  
4 first degree murder or of conspiracy to commit an assault because Vargas and Garcia are  
5 accomplices to the murder and, as such, under California Penal Code section 1111, there was  
6 insufficient evidence to corroborate their testimony.

7 Section 1111 provides, in relevant part: “A conviction can not be had upon the  
8 testimony of an accomplice unless it be corroborated by such other evidence as shall tend to  
9 connect the defendant with the commission of the offense. . . .”

10 The Court of Appeal denied this claim as follows:

11 Garcia and Vargas testified that defendant put the gun under his seat and the  
12 arresting officer confirmed that when she asked defendant to step out of the car  
13 she noticed the gun protruding from under the seat in which defendant had  
14 been sitting. Defendant argues that the officer's testimony is insufficient  
15 corroboration because it “suggests at a minimum, joint possession with both  
16 Vargas, the owner of the truck, and Garcia, within easy hand's reach of the  
17 weapon” and “does nothing to eliminate [Vargas or Garcia] as the possible  
18 shooters.” Section 1111 does not require, however, that the corroborating  
19 evidence eliminate the accomplice's potential guilt, but only that it tend to  
20 connect the defendant to the crime. . . . The officer's testimony in this case  
21 sufficiently meets this standard.

22 Alejandre, 2010 WL 3772369, at \*14.

23 The Due Process Clause “protects the accused against conviction except upon proof  
24 beyond a reasonable doubt of every fact necessary to constitute the crime with which he is  
25 charged.” In re Winship, 397 U.S. 358, 364 (1970). A state prisoner who alleges that the  
26 evidence in support of his state conviction cannot be fairly characterized as sufficient to have  
27 led a rational trier of fact to find guilt beyond a reasonable doubt therefore states a  
28 constitutional claim, see Jackson v. Virginia, 443 U.S. 307, 321 (1979), which, if proven,  
entitles him to federal habeas relief, see id. at 324. However, “Jackson claims face a high bar  
in federal habeas proceedings . . .” Coleman v. Johnson, 132 S. Ct. 2060, 2062 (2012) (per  
curiam).

A federal court reviewing collaterally a state court conviction does not determine  
whether it is satisfied that the evidence established guilt beyond a reasonable doubt. Payne v.

1 Borg, 982 F.2d 335, 338 (9th Cir. 1993). The federal court “determines only whether, ‘after  
2 viewing the evidence in the light most favorable to the prosecution, any rational trier of fact  
3 could have found the essential elements of the crime beyond a reasonable doubt.’” Id. at 338  
4 (quoting Jackson, 443 U.S. at 319). Only if no rational trier of fact could have found proof of  
5 guilt beyond a reasonable doubt, has there been a due process violation. Jackson, 443 U.S. at  
6 324; Payne, 982 F.2d at 338.

7 The Ninth Circuit has specifically addressed section 1111 in the context of habeas  
8 proceedings and has held that it is “a state statutory rule, and to the extent that the  
9 uncorroborated testimony is not ‘incredible or insubstantial on its face,’ the rule is not  
10 required by the Constitution or federal law.” Laboa v. Calderon, 224 F.3d 972, 979 (9th Cir.  
11 2000) (citation omitted).

12 Thus, under federal law, to the extent that the testimony of Vargas and Garcia was not  
13 incredible or insubstantial on its face, it must be considered whether or not it is corroborated.

14 Vargas testified that, on the night of February 2, 2007, he was driving a truck with  
15 Petitioner and Garcia as passengers, when they saw a “chap,” that is, a person who was in the  
16 rival Sureno gang. 6 RT at 960. Petitioner told him to “stop right here. I’ll be right back.”  
17 6 RT at 960. Vargas pulled over to the corner and Petitioner got out of the car and walked in  
18 the direction where they had seen the “chap.” 6 RT at 961, 964. When Petitioner did not  
19 come back right away, Vargas asked Garcia to see what happened to Petitioner, but before  
20 Garcia could respond, they heard gunshots. 6 RT at 965-66. Then Garcia grabbed two beer  
21 bottles and went in the direction Petitioner had gone. 6 RT at 965. When Garcia got to the  
22 corner, he threw the bottles and started screaming, saying, “Uncle, what happened, what  
23 happened?” 6 RT at 967. Garcia and Petitioner walked back to the truck together and told  
24 Vargas to drive toward Hercules. 6 RT at 970. Later that evening, the three were driving in  
25 Hercules and Vargas got pulled over by the police. 6 RT at 974. Petitioner “threw the gun on  
26 the floor,” when the police were asking Vargas for his registration. 6 RT at 975.

27 Garcia testified that, on the evening of February 2, 2007, he and Petitioner were  
28 passengers in a truck driven by Vargas. 6 RT at 1097-98. When they got to Broadway and

1 11th Street, they saw “a kid walking toward that street and Juan said . . . there was a kid  
2 wearing red.” 6 RT at 1098. Then Petitioner told Vargas to make a U-turn. 6 RT at 1102.  
3 Vargas made a U-turn and parked the truck. 6 RT at 1103. Petitioner got out of the truck,  
4 walked toward the kid in red and then Garcia heard gunshots. 6 RT at 1107. When they  
5 were back in the truck, Garcia asked Petitioner “why you did that?” but Petitioner did not  
6 answer. 6 RT at 1112. Petitioner gave Garcia an empty magazine. 6 RT at 1113. Later that  
7 night, when they were driving again, they were stopped by the police and Petitioner put the  
8 gun on the floor, next to Garcia’s feet. 7 RT at 1149. After Garcia was arrested, he took the  
9 police to the scene of the crime and described where the truck had parked and where  
10 Petitioner had walked from the truck. 7 RT at 1130-31. Garcia’s description to the police  
11 was video-taped and the tape was played during his testimony. 7 RT at 1130-35

12 The testimony of Vargas and Garcia clearly was not incredible or insubstantial on its  
13 face. Therefore, it must be considered in evaluating the sufficiency of the evidence. Under  
14 Jackson, the testimony identifying Petitioner as the shooter, when viewed in the light most  
15 favorable to the prosecution, is more than sufficient to support the conclusion that any  
16 rational trier of fact would have found beyond a reasonable doubt the essential elements of  
17 the crimes of first degree murder and conspiracy to commit an assault.

18 Therefore, the Court of Appeal’s denial of this claim was not contrary to or an  
19 unreasonable application of Supreme Court precedent or an unreasonable determination of  
20 the facts in light of the state court record.

21 **E. Sufficiency of Evidence to Support Gang Enhancement**

22 Petitioner claims that, under California Penal Code section 186.22(b)(1), the evidence  
23 was insufficient to support the gang enhancement. Section 186.22(b)(1) provides a sentence  
24 enhancement for “any person who is convicted of a felony committed for the benefit of, at  
25 the direction of, or in association with any criminal street gang, with the specific intent to  
26 promote, further, or assist in any criminal conduct by gang members.” Petitioner contends  
27 that the only evidence that his crime was gang-related is Palmieri’s testimony that a gang  
28 gains turf through street terrorism, and killing in front of one’s own gang members earns the

1 killer respect and status in the gang. He argues this is insufficient to show that he committed  
2 the crime for the benefit of the gang. The state court record shows this claim must be denied.

3 At trial, the gang expert testified about the gang purpose underlying a gang member's  
4 commission of a murder, which is to intimidate and eliminate rivals, control turf and educate  
5 and indoctrinate younger members in the gang culture. It also establishes the murderer as a  
6 hardcore gang member and increases his status in the gang. 9 RT at 1665-66; 1672-74;  
7 1678-79; 1681; 10 RT 1088-89. Palmieri explained that killing a rival Norteno gang member  
8 in front of other Surenos increased the killer's status as a Sureno, is a means to moving up  
9 quickly in the ranks and keeps fellow gang members in line. 9 RT 1681-83. He stated that  
10 Surenos are at war with Nortenos and a Sureno gang member is obligated to attack a Norteno  
11 who is alone on the street. 9 RT 1660-61; 10 RT 1694, 1722-26; 1746-47; 1888-89.  
12 Palmieri opined that a shooting, under the circumstances of this case, would be for the  
13 benefit of the Sureno gang. 10 RT 1888-89.

14 Additionally, the testimony of Garcia and Vargas demonstrates that the victim was  
15 targeted solely because he wore the color red and, thus, was thought to be a Norteno gang  
16 member. Vargas testified that someone pointed out that the victim was a "chap," which, he  
17 explained, is somebody that "bangs red," and these people are enemies of Surenos. 6 RT  
18 959-60; 1005. Vargas also described the victim as "flamed up," which means wearing red  
19 Norteno gang colors. 6 RT 962, 1009. As discussed previously, Vargas and Garcia both  
20 recounted that, after they noticed the victim, Petitioner told Vargas to make a U-turn in the  
21 direction of the victim, Petitioner got out of the car and walked in the direction of the victim,  
22 and then Garcia and Vargas heard shots fired.

23 The Court of Appeal found this evidence sufficient to show that Petitioner committed  
24 the murder for the benefit of his gang.

25 [S]ubstantial evidence establishes that defendant committed this crime for the  
26 benefit of the gang and for the specific intent of promoting this and other  
27 criminal conduct. In People v. Vazquez, 178 Cal. App. 4th at 353, the court  
28 held that a reasonable jury could infer, based on expert testimony, that "violent  
crimes such as this murder increase 'respect' for the gang and facilitate its  
criminal activities by intimidating members of rival gangs and law-abiding  
neighborhood residents . . . and other evidence in the record, that appellant

1 intended for the Lopez murder to have the predicted effect of intimidating rival  
2 gang members and neighborhood residents, thus facilitating future crimes  
3 committed by himself and his fellow gang members.” The same inference  
4 could reasonably be made in the present case based on Palmieri's testimony and  
5 the testimony of Vargas and Garcia that the victim was a “chap” and should be  
6 shot because he was wearing the color red.

7 Alejandre, 2010 WL 3772369, at \*15.

8 The Court of Appeal’s ruling that this evidence was sufficient to support the gang  
9 enhancement was not contrary to or an unreasonable application of Jackson, 443 U.S. at 319.

#### 10 **F. Griffin Error**

11 Petitioner argues that the trial court erred in allowing admission of evidence that he  
12 had been arrested on the night of the murder because this suggested that he should have  
13 remembered where he was at the time of the murder and should have been able to provide an  
14 alibi. Petitioner contends that the prosecutor’s use of this evidence in his closing argument to  
15 question Petitioner’s lack of an alibi constitutes a violation of Griffin v. California, 380 U.S.  
16 609, 614 (1965).

#### 17 **1. Federal Law**

18 Griffin error occurs, and a defendant’s privilege against self-incrimination is violated,  
19 where a prosecutor asks the jury to draw an adverse inference from a defendant’s silence or  
20 to treat the defendant’s silence as substantive evidence of guilt. Griffin, 380 U.S. at 615.  
21 Although it is proper for the prosecution to address the defense arguments, a comment is  
22 impermissible if it is manifestly intended to call attention to the defendant’s failure to testify,  
23 or is of such a character that the jury would naturally and necessarily take it to be a comment  
24 on the failure to testify. Lincoln v. Sunn, 807 F.2d 805, 809 (9th Cir. 1987) (citing United  
25 States v. Bagley, 772 F.2d 482, 494 (9th Cir. 1985)). Even if the prosecutor’s statements  
26 violate Griffin, “[r]eversal is warranted only where such comment is extensive, where an  
27 inference of guilt from silence is stressed to the jury as a basis for the conviction, and where  
28 there is evidence that could have supported acquittal.” Hovey v. Ayers, 458 F.3d 892, 912  
(9th Cir. 2006) (quotation and citation omitted).



1 The defense attorney said why didn't Mr. DeFerrari call witnesses to say, oh, I  
2 saw Robert Garcia and Juan Vargas and Mr. Alejandro at the party or I saw  
3 them at the party before or any of those things? That's the least of his  
concerns. Why didn't he call alibi witnesses, or a witness to say where his  
client was. Because they don't exist.

4 12 RT 2190-92.

5 The Court of Appeal held that the prosecutor's argument was proper rebuttal to the  
6 defense counsel's explanation for the absence of an alibi witness and, thus, did not infringe  
7 on Petitioner's right to remain silent. Alejandro, 2010 WL 3772369, at \*16.

### 8 3. Analysis

9 The state appellate court's decision was reasonable. In his closing argument, defense  
10 counsel raised the issue of Petitioner's lack of an alibi, thereby inviting the prosecutor to  
11 respond. See Bagley, 772 F.2d at 494 (prosecutor may properly respond to arguments made  
12 by defense counsel so long as his remarks are not manifestly intended to call attention to  
13 defendant's failure to testify). The prosecutor's comments were directed at the absence of  
14 alibi witnesses as a rebuttal to the defense argument; the remarks did not manifestly call  
15 attention to Petitioner's failure to testify. Furthermore, there was no prejudice because the  
16 prosecutor's comments were brief and Petitioner points to no evidence that could support  
17 acquittal. See Hovey, 458 F.3d at 912. Additionally, any error was minimized by the trial  
18 court's instructions to the jury that the prosecutor's comments are not evidence, that the  
19 defendant has a right not to testify and that the jury must not draw any inference from the fact  
20 that the defendant did not testify. 11 RT at 2016, 2025. Accordingly, Petitioner's claim does  
21 not warrant habeas relief.

### 22 G. Exclusion of Inflammatory Photograph

#### 23 1. Relevant Facts

24 Petitioner contends that the trial court violated his right to present a defense and to  
25 confront witnesses when it prevented him from introducing a photograph of Vargas's baby  
26 wearing a gang rag on his head and a gun placed into the top of his diaper. The defense  
27 argued that this and other photographs of Vargas making gang signs were relevant to  
28 impeach Vargas's testimony that he had ended his affiliation with the Sureno gang. 6 RT

1 1055-56. The prosecutor objected to the photograph of Vargas’s baby as unduly  
2 inflammatory and more prejudicial than probative. 6 RT 1055-56. The court excluded the  
3 photograph of the baby, explaining that it “has nothing to do with Vargas’s credibility. It is  
4 likely to cause the jury to be inflamed by the fact that the baby has a gun in his diaper. The  
5 diaper has nothing to do with his testimony or his credibility and it is, in my opinion, unfairly  
6 prejudicial and doesn’t have any probative value. So, I’m going to exclude B and permit you  
7 to cross him with A through E, excluding B, which amply show . . . apparent gang signs and  
8 tattoos and other evidence that is contrary to his actual testimony that he is not a member of  
9 the Surenos.” 6 RT 1061. In addition to the photographs, Petitioner was allowed to  
10 introduce evidence that Vargas had “tagged” the interior of a shed on his property with gang  
11 signs and symbols in blue paint, 10 RT 1864-66, and a blue belt and blue bandana the police  
12 had seized from Vargas’s bedroom during a search, 10 RT 1856-59. The defense also  
13 introduced, by way of stipulation, evidence that, after Vargas testified at Petitioner’s  
14 preliminary hearing, he received a plea deal reducing his murder charge to a charge of being  
15 an accessory after the fact and dismissing pending misdemeanor charges of receiving stolen  
16 property and driving a stolen vehicle. 10 RT 1885.

17 The Court of Appeal held that the trial court’s evidentiary ruling “did not interfere  
18 with [Petitioner’s] constitutional rights to present a defense or confront the witnesses against  
19 him. As the court noted, the other photographs . . . provided ample opportunity to impeach  
20 Vargas’s testimony.” Alejandre, 2010 WL 3772369, at \*16.

## 21 2. Analysis

### 22 a. Due Process Claim

23 “[S]tate and federal rulemakers have broad latitude under the Constitution to establish  
24 rules excluding evidence from criminal trials.” Holmes v. South Carolina, 547 U.S. 319, 324  
25 (2006) (citations omitted); see also Montana v. Egelhoff, 518 U.S. 37, 42 (1996) (due process  
26 does not guarantee a defendant the right to present all relevant evidence). But this latitude is  
27 limited by a defendant’s constitutional rights to due process and to present a defense, rights  
28 originating in the Sixth and Fourteenth Amendments. Holmes, 547 U.S. at 324. Due process

1 is violated only where the excluded evidence had “persuasive assurances of trustworthiness”  
2 and was critical to the defense. Chambers v. Mississippi, 410 U.S. 284, 302 (1973).

3 Here, Petitioner was not offering the photograph in support of his defense, but to  
4 impeach a prosecution witness. Because this evidence was not “critical to the defense,”  
5 Petitioner’s due process right was not violated when the court excluded it. Most importantly,  
6 the one excluded photograph was cumulative to the other photographs that were admitted.  
7 Therefore, even if impeachment of Vargas was critical, the exclusion of one photograph out  
8 of many did not affect Petitioner’s ability adequately to impeach him. The Court of Appeal’s  
9 rejection of Petitioner’s due process claim was not unreasonable.

10 **b. Confrontation Clause Claim**

11 The Confrontation Clause guarantees an opportunity for effective cross-examination,  
12 not cross-examination that is effective in whatever way, and to whatever extent, the defense  
13 might wish. Delaware v. Fensterer, 474 U.S. 15, 20 (1985) (per curiam). Accordingly, "trial  
14 judges retain wide latitude insofar as the Confrontation Clause is concerned to impose  
15 reasonable limits on such cross-examination based on concerns about, among other things,  
16 harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is  
17 repetitive or only marginally relevant." Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986).  
18 Generally speaking, a court violates the Confrontation Clause only when it prevents a  
19 defendant from examining a particular and relevant topic. Fenenbock v. Director of  
20 Corrections, 692 F.3d 910, 919 (9th Cir. 2012). Such limitations are proper as long as the  
21 cross-examination is sufficient to allow the jury to evaluate “the biases and motivations of  
22 the witness.” Evans v. Lewis, 855 F.2d 631, 633-34 (9th Cir. 1988) (citation omitted).

23 The trial court excluded only one photograph while permitting the defense to  
24 introduce four other photographs as well as substantial additional evidence that demonstrated  
25 Vargas’s potential gang membership for impeachment purposes. The excluded photograph  
26 was repetitive of the other impeachment evidence and the remaining impeachment evidence  
27 was sufficient to allow the jury to evaluate Vargas’s biases and motivations. Thus, under  
28 established federal authority, there was no Confrontation Clause violation and the Court of

1 Appeal's rejection of this claim was not unreasonable.

2 **H. Flight Instruction**

3 Petitioner challenges the trial court's decision to give CALJIC No. 2.52 which  
4 instructs the jury that "The flight of a person immediately after the commission of a crime, or  
5 after he is accused of a crime, is not sufficient in itself to establish his guilt, but is a fact  
6 which, if proved, may be considered by you in the light of all other proved facts in deciding  
7 whether a defendant is guilty or not guilty." He argues that this instruction lowered the  
8 prosecution's burden of proof because it created a presumption of guilt for which there was  
9 an inadequate factual basis.

10 The California Court of Appeal analyzed this claim as follows:

11 "In general, a flight instruction 'is proper where the evidence shows that the  
12 defendant departed the crime scene under circumstances suggesting that his  
13 movement was motivated by a consciousness of guilt.' [Citation.] "[F]light  
14 requires neither the physical act of running nor the reaching of a far-away  
15 haven. [Citation.] Flight manifestly does require, however, a purpose to avoid  
16 being observed or arrested." [Citations.] "Mere return to familiar environs  
17 from the scene of an alleged crime does not warrant an inference of  
18 consciousness of guilt [citations], but the circumstances of departure from the  
19 crime scene may sometimes do so." (People v. Bradford (1997) 14 Cal.4th  
20 1005, 1055.) "To obtain the instruction, the prosecution need not prove the  
21 defendant in fact fled, i.e., departed the scene to avoid arrest, only that a jury  
22 could find the defendant fled and permissibly infer a consciousness of guilt  
23 from the evidence." (People v. Bonilla (2007) 41 Cal.4th 313, 328.)

18 At trial, one witness testified that she heard a truck idling outside her window  
19 prior to the shooting and immediately after the gunshots heard someone yell  
20 "hurry up, hurry up." Then she heard the truck drive away "fast." A second  
21 witness confirmed that she also heard someone say "hurry up" and that the  
22 truck left the area "faster than usual." This evidence is sufficient to support the  
23 instruction.

22 Alejandre, 2010 WL 3772369, at \*17.

23 The formulation of jury instructions is a question of state law and is not cognizable in  
24 habeas proceedings. Estelle, 502 U.S. at 67-68. A faulty jury instruction will constitute a  
25 violation of due process only where the instruction by itself infects the entire trial to such an  
26 extent that the resulting conviction violates due process. Hendricks v. Vasquez, 974 F.2d  
27 1099, 1106 (9th Cir.1992) (citing Cupp v. Naughten, 414 U.S. 141, 147 (1973)). Whether a  
28 constitutional violation has occurred will depend upon the evidence in the case and the

1 overall instructions given to the jury. Duckett v. Godinez, 67 F.3d 734, 745 (9th Cir. 1995).

2 Under this federal authority, the California Court of Appeal's rejection of this claim  
3 was not unreasonable. As noted by the Court of Appeal, there was evidence that a witness  
4 heard a truck idling outside her window and, after she heard shots fired, she heard someone  
5 say "hurry up, hurry up," before the truck left the area faster than usual. 5 RT 801-02. There  
6 was also evidence that, after the shooting, Vargas drove to Hercules instead of continuing on  
7 the quest to buy beer at a nearby market, 6 RT 1030; 1113-14 and that Petitioner, Vargas and  
8 Garcia remained in Hercules where they were arrested three hours after the murder, 6 RT  
9 1035-39; 7 RT 1043-45. This evidence is sufficient for the jury to find that Petitioner fled  
10 the scene and to infer consciousness of guilt from this action. Because the instruction was  
11 not improper, no due process violation occurred. Even if it were improper, there is no  
12 evidence that it infected the trial to such an extent that due process was violated.

13 Furthermore, other district courts have considered and rejected Petitioner's argument  
14 that this flight instruction lowered the prosecution's burden of proof by creating a  
15 presumption of guilt. See Toledo v. Adams, 2010 WL 1813785, \*9 (C.D. Cal. Feb. 9, 2010);  
16 Delgado v. Yates, 622 F. Supp. 2d 854, 860 (N.D. Cal. 2008). The California Supreme Court  
17 has also held that this instruction does not lower the prosecution's burden of proof. People v.  
18 Boyette, 29 Cal. 4th 381, 438-39 (2002). Thus, the California Court of Appeal's rejection of  
19 this claim was not unreasonable.

### 20 **III. Prejudice**

21 Respondent argues that, even if there were constitutional errors, Petitioner has failed  
22 to prove prejudice. Under established Supreme Court authority, a habeas petitioner is not  
23 entitled to relief unless the trial error "'had substantial and injurious effect or influence in  
24 determining the jury's verdict.'" Brecht, 507 U.S. at 637-38. In other words, state prisoners  
25 seeking federal habeas relief may obtain plenary review of constitutional claims of trial error,  
26 but are not entitled to habeas relief unless the error resulted in "actual prejudice." Id.

27 Here, overwhelming evidence pointed to Petitioner's guilt. First, forensic evidence  
28 established that the gun found under Petitioner's seat in the truck was the gun used to shoot

1 the victim. 9 RT at 1492-98; 1505-07. Second, the testimony of Garcia and Vargas placed  
2 them and Petitioner at the scene of the crime at the time of the shooting. 6 RT at 958-60;  
3 1093-98. Third, they testified that, after they spotted the victim who was identified as a  
4 Sureno, Petitioner ordered Vargas to turn the truck around to go toward the victim, that  
5 Vargas followed Petitioner's order and then parked the truck, that Petitioner got out of the  
6 truck, walked in the direction of the victim, and after a few minutes they heard a series of  
7 shots. 6 RT at 959-67; 1098-1113. Fourth, gang expert Palmieri testified that Petitioner's  
8 tattoos indicated that he was a member of the Sureno gang, 10 RT at 1700-15, and that  
9 Sureno gang culture encouraged the shooting of rival gang members. RT at 1722-25; 1728-  
10 39. Fifth, the defense case, which primarily consisted of discrediting the testimony of Vargas  
11 and Garcia, was weak. 12 RT 2137-53 (defense closing argument).

12 As discussed above, the Court has found that there were no constitutional violations  
13 and that the Court of Appeal reasonably denied Petitioner's claims. However, because the  
14 prosecution's case against Petitioner was strong, with overwhelming evidence pointing to  
15 Petitioner's guilt, even had there been constitutional violations, they would not have had a  
16 substantial or injurious effect or influence on the jury's verdict. For this reason also,  
17 Petitioner's claims for habeas relief are denied.

## 18 CONCLUSION

19 For the reasons set out above, the Court of Appeal's denial of Petitioner's claims was  
20 not contrary to or an unreasonable application of established federal authority or an  
21 unreasonable determination of the facts in light of the state court record. Accordingly, the  
22 petition is DENIED.

23 A certificate of appealability is DENIED because petitioner has not demonstrated that  
24 "reasonable jurists would find the district court's assessment of the constitutional claims  
25 debatable or wrong." See Slack v. McDaniel, 529 U.S. 473, 484 (2000).

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The clerk shall enter judgment in favor of Respondent and close the file.  
IT IS SO ORDERED.

DATED: April 18, 2013

  
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CHARLES R. BREYER  
United States District Judge