

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JEREMY PAIGLY,
Petitioner,
v.
SCOTT FRAUENHEIM, Warden,
Respondent.

Case No. 15-cv-05162-HSG (PR)

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

Before the Court is the above-titled petition for a writ of habeas corpus, filed pursuant to 28 U.S.C. § 2254 by petitioner Jeremy Paigly, challenging the validity of a judgment obtained against him in state court. Respondent has filed an answer to the petition, and petitioner has filed a traverse. For the reasons set forth below, the petition will be denied.

I. PROCEDURAL HISTORY

On January 8, 2010, a Santa Clara County jury found petitioner guilty of active participation in a criminal street gang, in violation of California Penal Code section 182.22(a). 2CT 438; 16RT 3971-72.¹ Petitioner admitted four prior strike convictions, one prior serious felony conviction, and two prior prison terms. 2CT 439; 16RT 3982-87. After striking one of the prior convictions, the trial court sentenced petitioner to 25 years to life consecutive to 7 years as follows. 3CT 810-13; 18RT 4575-79. He was sentenced to 25 years to life for participating in a street gang, with an additional 5-year term pursuant to penal code section 667(a) and 2 additional

¹ All references herein to exhibits are to the exhibits submitted by respondent in support of the answer, unless otherwise indicated. 2CT 438 refers to the Clerk’s Transcript, Volume 2, page 438. The Court will use a similar citation form for other references to the Clerk’s Transcript and to the Reporter’s Transcript (“RT”).

1 years pursuant to penal code section 667.5. *Id.*²

2 On October 29, 2014, the California Court of Appeal affirmed the judgment in an
3 unpublished decision. Ex. 7. On January 28, 2015, the California Supreme Court denied review.
4 Ex. 9. Petitioner did not pursue state collateral review. The instant petition was filed on
5 November 10, 2015.

6 II. STATEMENT OF FACTS

7 The following background facts describing the crime and proceedings at trial are from the
8 October 29, 2014 opinion of the California Court of Appeal.³

9 *Expert witnesses*

10 A number of witnesses testified as experts at trial. Sergeant Dan Livingston, the
11 investigation supervisor in the special enforcement division of the Campbell Police
12 Department, testified as an expert on the organization and structure, operation, activities,
13 rules and procedures, members and associates, and culture of the Nuestra Familia (NF)
14 organization. Officer Dennis Gillotte was working for the Santa Clara County Department
15 of Correction in the intelligence unit of the classification division at the time of trial and he
16 testified as an expert with respect to the activities and organization of the NF organization
17 within the Santa Clara County jail. Criminologist John Bourke, a supervising
18 criminologist with the Santa Clara County Crime Laboratory, was recognized as an expert
19 in handwriting analysis.

20 Former members of the NF organization, members of either NF or Nuestra Raza (NR),
21 were called as witnesses by the prosecution. Witnesses Chris Klipp and Joseph Abeyta
22 each testified he was a former NR member. Sammy Ramirez testified he was a former NF
23 member, category two and John Mendoza testified he was a former NF member, category
24 three. They were recognized as experts in the organization, structure, and operation of the
25 NF organization. [FN 2]

21 ² The term was to be served consecutively to petitioner's sentence in another case, Santa Clara
22 County Case No. 211208. In that earlier case, petitioner had been convicted, following jury trial,
23 of actively participating in a criminal street gang and conspiring to sell methamphetamine for the
24 benefit of a criminal street gang. The convictions were later reversed by the California Court of
25 Appeal in part on the ground that the trial court had admitted unduly prejudicial gang evidence.
26 *See* dkt. no. 18. Specifically, the court found that the testimony of gang expert Sergeant
27 Livingston—who also served as one of the prosecution's gang experts in the underlying case—
28 was excessive and inflammatory in its discussion of the gang's violent activities, which had almost
no connection to the charges at issue. *See id.*

³ The Court has independently reviewed the record as required by AEDPA. *Nasby v. McDaniel*,
853 F.3d 1049, 1055 (9th Cir. 2017). Based on the Court's independent review, the Court finds
that it can reasonably conclude that the state court's summary of facts is supported by the record
and that this summary is therefore entitled to a presumption of correctness, *Taylor v. Maddox*, 366
F.3d 992, 999-1000 (9th Cir. 2004), unless otherwise indicated in this order.

1 FN 2: Klipp and Abeyta testified under a grant of immunity. Klipp went into
2 protective custody on November 7, 2008. Abeyta went into protective custody in
3 April 2009.

4 The evidence reviewed under the proper standard showed the following.

5 *The NF Organization*

6 NF developed as a rival Hispanic gang of the Mexican Mafia and primarily operates in
7 Northern California. The NF organization is highly structured, regimental, and
8 hierarchical. The NF organization encompasses NF members, NR, a group subordinate to
9 NF, and northerners in street regiments or gangs.

10 NF members constitute the top tier of NF organization. NR members are the second tier.
11 In more recent times, NF has referred to NR members as “Nortenos,” which means
12 northerners in Spanish, or “Hermanos,” which means brothers in Spanish. [FN 3] The
13 next tier includes the Northern California street gang members who have not reached the
14 status of NR or NF members. NF refers to them as northerners. The NF organization also
15 has associates who help it, such as by stashing weapons or drugs, laundering money, or
16 facilitating communications.

17 FN 3: For the sake of clarity, we will still refer to NR members. The word
18 “Nortenos” is sometimes used to refer to Hispanic gangs generally originating in
19 Northern California whose enemies are Sureños, Hispanic gangs generally located
20 in Southern California. The evidence at trial indicated that the NF now uses the
21 word “northerner” in English to refer to any northern Hispanic street gang member
22 and it has reserved the term “Nortenos” for the group previously known as NR and
23 prohibited common street gang members from referring to themselves as Nortenos.

24 Three generals, each with different responsibilities, are at the top of the NF organization’s
25 command structure. NF’s council includes “the generals plus some trusted advisors, high-
26 ranking NF members,” who were elected to their positions. The “inner council” advises
27 the NF generals. In 2007, it had five to seven members. The governing constitution, “a
28 very detailed document,” specifies the decisions that must go to the council for a vote and
the responsibilities of the inner council and the generals.

One NF general is in charge of the streets, a second general is in charge of prisons, and a
third general is responsible for conducting internal investigations of particular NF
members or a conflict between members. The general in charge of the streets oversees
street regiments and communicates with the regimental commanders and makes sure that
they follow the directives or policies he sets.

At the time of trial, one of the reputed generals operating out of Pelican Bay State Prison
was Antonio Guillan, an NF member from San Jose whose moniker was Chuco. Guillan
was the general in charge of street operations and regiments. Guillan oversaw San Jose’s
street regiments and controlled the NF organization in Santa Clara County. The general
was “kept apprised” of parolees being released to the streets so he could “assign manpower
to certain areas” or send parolees “to function with different street regiments.” His
authority could not be questioned and his directives had to be followed.

1 NF's current constitution basically provides that its leadership will be located in Pelican
2 Bay State Prison. Under the constitution, the organization comes before anything else;
3 family is second. Women are regarded "more like property" and they cannot be NF
4 members. There are "14 bonds" that constitute NF's policies; an NF member is required to
5 memorize them and is held accountable for them. One of those bonds mandates "no
6 cowardice [when] dealing with police officers" and no traitors. The inner council and the
7 generals constitute the top leadership of NF and NF controls NR and northerners on the
8 streets.

9 NF members are ranked by category from one to three, the highest status. Mendoza
10 estimated that, in 2007, there were perhaps 15 to 20 NF members in category three
11 statewide and 100 to 200 NF members in the lower two categories statewide. Sergeant
12 Livingston testified that there are about 20 to 30 category-three NF members at any given
13 time. He estimated there were roughly 200 to 300 NF members.

14 NF members in all categories are expected to be familiar with NF's constitution, bonds,
15 organization and structure, and activities. To become a member of NF, a person must be
16 sponsored by at least one existing NF member and voted in.

17 Category one is the entry level for NF membership but even category-one members are
18 "extremely seasoned, experienced gang members." The category-one stage of NF
19 membership is a period of "induction" and "indoctrination." It is a time to study NF's
20 constitution and gain a better understanding of a member's obligations to the organization.
21 A category-two member can educate and train other NF members. A category-three NF
22 member must have been in the NF organization for at least 10 years, be well educated in
23 NF's philosophies and principles, and be completely committed to the organization.

24 NR is a subsidiary group and is subordinate to NF; NR members number in the thousands.
25 Although NF reasserted itself over NR some time ago and stripped its name, many NR
26 members were still identifying themselves by that name in 2007. To become an NR
27 member, a person must be sponsored by an NF member.

28 NF and NR members are well-educated about the NF organization's history and its
activities and their responsibilities to the organization. A member goes through many
months or years of training. The former NF or NR members who testified at trial had gone
through an indoctrination process and moved up in the NF organization while in prison.

In prison, NF members are segregated from the general population in higher security
housing. NR members in a prison's main line (the general inmate population) are NF's
eyes, ears, and arms. NR members try to be placed in the main line of Pelican Bay so that
NR can reach a broader prison population and bring more people into the NF organization.

When a person becomes a member of NF or NR, the person understands that he may have
to kill for the organization. The NF phrase "blood in," "blood out" means that an NF or
NR member must be willing to spill the blood of anyone who is an enemy of the
organization and may be required to spill his own blood.

NF's street regiments are supposed to generate money for NF. The NF general in charge

1 of street operations and regiments might assign a parolee being released to a street
2 regiment. When Mendoza was released on parole in 1999, he left with instructions to
establish a regiment in Mendocino County, where he was being released.

3 But not all northerner street gangs, especially first generation gangs, are involved with NF
4 on the streets. Once a northerner gang member is taken into custody, however, he is under
5 NF's umbrella. Someone without any former gang association who goes into custody and
6 chooses to align with the NF organization and act on its behalf will be considered a
northerner as well. In a county jail or prison, northerners are educated by members of the
NF organization.

7 NF holds power in jails and prisons. Generally, a northerner in custody must "function
8 with" the NF organization or go into protective custody to avoid "removal," which is a
targeted assault.

9 While in prison and before becoming an NR member, Klipp began assisting the NF
10 organization by doing such things as holding contraband or performing assaults of persons
11 not in good standing. A removal order would reach him through the chain of command,
12 either verbally or in writing. Klipp executed three removal orders. He accomplished two
removals with his hands and the third time he cut the victim's face with a razor blade. A
gang member who refuses to obey a removal order is removed himself.

13 While he was an NR member in prison, Abeyta received a removal order to remove or
14 assault his own cellmate. Even though Abeyta liked his cellmate and they were "pretty
15 tight," Abeyta did it because he had to.

16 Even the testifying defense expert acknowledged the discipline within the NF organization
17 was top-down. In his opinion, a subordinate had no right to decline to perform an
18 instruction given by a superior. He indicated that if a subordinate did not comply with a
superior's order, the subordinate risked his life. He stated that discipline in the NF
organization was "everything."

19 *Santa Clara County Jail*

20 The NF organization has a structured chain of command in the Santa Clara County jail (the
21 jail). The NF organization refers to the top NF authority in the jail as the overall authority
(OA) or, sometimes, the "regimental commander." The jail's OA sets the policies for the
22 jail. He decides who is in charge of a particular section of the jail and whether there
should be a change of command. The jail's OA decides whether a "hit" or "removal"
23 should be done. Lorenzo Guzman, an NF member whose moniker is Lencho, was the
jail's OA at the time of trial and he had been the OA since 2007.

24 Usually, there is a second in command, another NF member or seasoned NR member who
25 handles lesser, day-to-day decisions and serves as a "buffer" to protect the identity of the
26 jail's OA. Underneath the jail's OA in the command structure are the individuals in each
section or unit of the jail, variously called the "building channel" or "block channel" (BC)
27 or the "overall authority" of that area. Ordinarily, an NR member in custody in a particular
area of the jail will have authority over the northerners housed there. If an NF member is
28 also present in that area, typically the NF member would enjoy greater authority than any

1 NR member.

2 Each pod within a unit of the jail generally has an inmate serving as “tier security,” who
3 handles day-to-day matters and sensitive paperwork, and reports to the BC. A “pod” is a
4 block of cells. The jail’s fourth floor has three units, 4A, 4B, and 4C. 4B and 4C are each
5 divided into three pods, each containing 16 cells. 4A of the jail is a less secure area than
6 4B and 4C, which are maximum security areas. 4A is not divided into pods and contains
7 48 cells. Inmates in 4B and 4C are allowed out of their cells one at a time for one hour
8 every other day. In contrast, an inmate in 4A is allowed out of his cell at various times
9 each day and may interact with other inmates in an open environment.

7 The person holding the position of tier security initiates contact with a new inmate entering
8 his area of the jail. Another function of tier security is to inventory weapons, including
9 razor blades, which would be used for removals and assaults. Tier security keeps track of
10 scheduled court dates for inmates in his pod.

10 While Klipp was the tier security of 4C following his arrest in August 2008, his job
11 included noting suspicious activities, making sure other inmates carried out their
12 responsibilities, and collecting inmates’ written reports. For example, Klipp would report
13 any suspicious inmate communications with officers and any information provided by
14 inmates who went out of the pod for any reason and were required to report to him
15 whatever they saw. Klipp made his reports on “kites.” A “kite” is a communication
16 written in very tiny letters, “micro writing,” on a small piece or strip of paper. Kites were
17 also passed through Klipp and he was responsible for holding them and passing them on,
18 along with his weekly reports, to his BC, who in turn would pass them on to OA Guzman.
19 It was Klipp’s responsibility to be familiar with the reports coming from inmates in his pod
20 but it was not his business to look at kites not intended for him.

17 In general, information of concern to the NF organization is passed up the chain of
18 command to the jail’s OA. Directives are sent down the chain.

19 If there is not a qualified NR member, a northerner may be asked to act as the tier security
20 or a BC.

20 *Kites*

21 On a kite, as many as five handwritten lines fit within the space of a single line of lined,
22 yellow paper. A kite is sometimes called a “filter.” Messages are sent and conversations
23 are carried on in kites; code words are used.

23 Kites are generally rolled up and covered in something like plastic wrap so that they can be
24 concealed on a person’s body or in clothing. Kites are secreted in a person’s mouth, nose,
25 or rectum.

26 Secretive communications are passed on kites up and down the chain of command in the
27 jail hierarchy. Kites are “used heavily” within county jails and prisons and kites are passed
28 between those institutions and out to the NF organization’s leadership in the streets.
Messages may move indirectly through different jail units until the messages reach their
destination in the jail, which may take some time, perhaps days or months.

1 The person in the position of tier security is responsible for possession of kites. Klipp
2 explained that kites are passed on a “personal basis” to individuals believed to be
3 trustworthy. They are usually passed when someone goes to court but sometimes through
4 jail visits. A kite is transferred in the court’s holding tank and the recipient either puts it in
5 his mouth or “keester[s] it,” which means putting it in his rectum.

6 *New Arrivals*

7 Upon entering custody in a particular area of the jail, a Hispanic new arrival (NA) is
8 required by the NF organization to provide specific information and all his paperwork,
9 including police reports. The pagination of the police report may be checked to make sure
10 the NA is not withholding any pages. The police report discloses the circumstances of
11 arrest and whether the suspect cooperated with law enforcement or made negative or
12 incriminating statements against fellow gang members. The NA is thoroughly questioned
13 and information is also gathered from others to identify the individual and decide whether
14 he should be cleared and allowed to participate in the organization. The NF organization
15 wants to make sure important information is not disclosed to traitors or informants.

16 An NA is asked for basic information, including, for example, his name, his date of birth,
17 his aka, where he is coming from, his PFN (personal filing number), his booking number
18 (CEN), his neighborhood, and his street gang. Information, good or bad, about the
19 newcomer is gathered by filter from the “manpower,” persons in the NF organization. A
20 person acting as tier security may conduct in-depth questioning to find out more
21 information, such as any CDC number, prison history, and status in the NF organization.

22 Officer Gillotte had found kites containing written questions on multiple occasions, either
23 hidden in personal belongings in a jail dorm or on an inmate. The questionnaires asked for
24 general information, including name, PFN, booking number, current charges, prison
25 history, tattoos, gang affiliation and neighborhood. If an NA does not comply with such a
26 questionnaire, the inmate will be viewed as going against gang rules and put himself in
27 danger of being assaulted.

28 *“On Freeze”*

An NA, regardless of status within the NF organization, is placed “on freeze,” which
means he is on hold and has no right to intervene in the NF organization’s business until he
is cleared. Ordinarily, an NA has no access to any NF information, such as who in the
organization currently holds authority in the jail or whom is going to be “hit.”

A person on freeze ordinarily cannot hold any position of authority within the organization
in the jail, such as tier security, BC, or OA. An NF member who is on freeze might
nevertheless hold a lot of weight in a section of the jail if he is the most experienced gang
member and other northerners might rely on him and he might “step up and do things that
he thinks he’s supposed to do.”

An inmate on freeze may still be asked to assist the NF organization. If an inmate on
freeze is assigned to an area out of communication with the jail’s OA, he has an obligation
to initiate contact with the OA, especially if the person is an NF or NR member. An
inmate on freeze in such an area may still take the initiative and try to get his section “in

1 line with the OA.”

2 *Rosters*

3 Every part of the jail is required to submit weekly rosters and file incident reports with the
4 jail’s OA. A basic roster contains personal information regarding the manpower housed in
5 a specific area of the jail. It provides complete identifying information regarding those
6 individuals and permits the NF organization to keep tabs on them. Rosters generally
7 contain inmates’ court dates, which are important for passing information from one inmate
8 to another.

9 Rosters are sent up the chain of command to the jail’s OA. Rosters enable secretive
10 communications by the NF organization within the jail, which assist in the commission of
11 felonies within the jail. A roster plays an important role in creating a strong and effective
12 organization in all parts of jail, which in turn makes it easier to do removals and extort
13 money. Sergeant Livingston confirmed that, in general, rosters “facilitate, promote,
14 further, [and] assist” in the NF organization’s “felonious criminal conduct.”

15 Individuals listed on a manpower roster may be compared to a “bad news list” (BNL),
16 which is a list of people in bad standing with the NF organization. The jail’s OA decides
17 whether action will be taken against anyone listed on a roster.

18 A roster may be used to select someone for a position of authority in the NF organization
19 within the jail or to make an assignment, including the job of doing a removal. A roster is
20 essential to accomplishing a removal. If the jail’s OA determines that an individual must
21 be removed, he knows, based on the roster, where that individual is located and where the
22 removal order should be sent within the jail. Birthdays are included in rosters and the
23 master BNL to make sure the correct person is identified, otherwise someone innocent
24 with the same name might be “hit” by mistake. The roster’s personal information allows
25 the OA to correctly identify and target the person in bad standing. Knowledge of inmates’
26 next court dates, which are reported in a manpower roster, facilitate the passing of a
27 removal order.

28 An “educated person” who participates in the chain of command of the NF organization in
the jail understands why rosters are needed.

Bad News List

A person may be on a BNL because he is an informant, he owes a fine to NF, or he is
otherwise “deemed no good.” A person who drops out of the NF organization and
cooperates with law enforcement becomes an enemy of the organization. Dropouts may be
put on a BNL. If someone goes into protective custody, he is going to be put on a BNL.

The punishment for being on the BNL ranges from physical assault to murder. Dropouts
are sometimes attacked and severely injured or killed. In Sergeant Livingston’s opinion,
there is an ongoing effort to commit crimes against incoming inmates who are in bad
standing with the NF organization.

Even if a NA has been cleared within his unit and his name is on a roster, he may still be
checked against the names on the OA’s BNL. When Mendoza was the jail’s OA, it was

1 his responsibility to compare rosters to a master BNL on a weekly basis. A BNL is
2 regularly updated. The BNL available in the NA's section of the jail might be out of date.
3 An updated BNL may leave a state prison with an inmate who secrets it in his rectum and
4 goes to court or is released on parole and then may make its way to a county jail.

5 *Removals*

6 A person may be ordered removed because he was on a BNL, he owed money to NF, or he
7 committed some other wrongdoing, such as child molesting. It is part of the responsibility
8 of an OA of a facility, either a jail or a prison, to order removals. The jail's OA does not
9 need to obtain the approval from higher-ups in Pelican Bay before ordering the removal of
10 a person who is not on a BNL. Persons active in, or associates of, the NF organization
11 housed in the unit of a targeted person are selected to carry out a removal directive. A
12 removal order from the jail's OA controls even if the targeted individual was previously
13 cleared.

14 Removals are an ongoing activity required to keep the NF organization's structure strong
15 in the county jail. "[T]aking care of security" in the NF organization is "synonymous with
16 doing removals."

17 When Mendoza was the jail's OA from about 2004 until late 2005, Mendoza's policy was
18 that removals were done with weapons because that was NF's way to do it. [FN 4] A
19 removal takes a person permanently out of the NF organization and identifies the person as
20 a traitor.

21 FN 4: Under Abeyta, who was very briefly the jail's OA, removals were done with
22 hands.

23 In 2007, Guzman took over as the jail's OA. Guzman's established policy was that
24 removals had to be done with a weapon, ordinarily a razor blade. A removal ordered by
25 the NF organization in the jail is typically orchestrated so that an initial assailant quickly
26 slices the targeted victim's face with a razor blade, cutting him from the corner of the
27 mouth, across the cheek, and up toward the ear. Immediately other attackers assault the
28 victim with hands and feet, which allows the initial assailant time to dispose of his weapon.
If an officer notices the altercation, he sees only a fist fight. The resulting scar of such a
removal is called a zipper, a smiling face, or a "puto mark," which means the person is
marked as a piece of trash.

The parties stipulated that members of the NF organization "authorized and committed an
assault using a razor blade against Joel Madrigal in 2007 and Isaac Lastra in 2008."
Madrigal's face was sliced in about February 2007. Isaac Lastra's face was sliced in about
September 2008; his injury ran from his ear to his mouth. Their injuries were the type
typically inflicted by the NF organization on individuals in bad standing.

At the time of trial, Abeyta had been in the jail continuously since 2003. An order from
OA Guzman requiring the removal of the Lastra brothers, David and Isaac, was delivered
to Abeyta through somebody else in Abeyta's pod. By the time the removal order was
received by Abeyta, David Lastra had already been moved from the pod across from
Abeyta to the seventh floor so Abeyta "sent word to the seventh floor," through a filter

1 passed at court, that David Lastra was to be removed. Abeyta also ordered the removal of
2 Isaac Lastra. Abeyta did as he was told because otherwise he would be in trouble himself.
3 At some point later, Abeyta heard that the removals were ordered because David Lastra
4 had “messed with” the underage stepdaughter of an NF member and Isaac Lastra was
5 behind in paying money. When Abeyta was an NR member, he followed orders whether
6 he liked them or not because not following orders had serious consequences.

7 Even northerners can be asked to do removals. If a person in the NF organization receives
8 an order to remove someone, he has no right to refuse to follow it. A person who fails to
9 comply with a removal order may be stabbed, sliced or stomped.

10 If an inmate is assaulted in the jail, he will be moved out of his housing unit for his own
11 protection.

12 *Extortion*

13 An inmate on a roster might owe a fine, he might have been in trouble and “owe clean-up,”
14 or he might owe a debt to NF for drugs, such as methamphetamine, supplied to him.
15 Threats of removal or force may be used to get an inmate to pay money owed to NF.

16 While the jail’s OA, Abeyta had telephone contact with Mendoza, whom Abeyta knew
17 from Pelican Bay. Abeyta asked Mendoza, who was an NF member, for help clearing a
18 northerner in custody from the BNL. The inmate was still trying to function with the NF
19 organization and Abeyta believed the inmate should be removed from the BNL because he
20 had never been to prison and learned the bonds and he had been misled by others into
21 stabbing an NR member. Even as the jail’s OA, Abeyta did not have the authority within
22 the NF organization to take someone off the BNL. The NF organization determined that
23 the inmate would be charged \$3,000 to be cleared from the BNL. His choice was to pay or
24 be assaulted. The inmate paid and he was taken off the BNL. Abeyta sent out “a filter to
25 all sections” to leave the inmate alone.

26 Mendoza testified that, when he was the jail’s OA, he tried, through a BC or tier security,
27 to get debtors to pay up. He would require a report explaining why the money had not
28 been paid and try to obtain arrangements for payment. The debtor would be told that if he
did not pay by the deadline, he would be removed and there would be “serious
repercussions.”

Kites Written by Paigly

On November 7, 2008, Klipp was placed into protective custody in the jail. That day, two
bindles of kites wrapped in plastic were retrieved from Klipp, who had been concealing
them in his rectum or “keester.” On a subsequent day, Klipp retrieved a third bindle of
kites and gave it to an officer.

Klipp, who had been serving as tier security of pod one of section 4C, had been
responsible for holding kites and providing a weekly report in a kite to his BC. Klipp was
supposed to have given the kites in his possession to his BC.

Two of the kites recovered from Klipp had been written by Paigly. One kite was clearly
the kind of roster that was expected to be provided to the OA on a weekly basis and

1 identified the manpower. This kite contained inmates' names and all the vital personal
information commonly provided in a roster ("roster kite").

2 The roster kite listed the "overall manpower" in section 4A of the jail. It contained 27
3 inmates' names. The official housing records of inmates housed in section 4A show that,
4 on November 1, 2008, approximately 57 persons were housed in 4A and all 27 of the
5 names on the roster were inmates housed in section 4A. The balance, approximately 30
inmates, were not affiliated with the NF organization.

6 Each name on the roster was accompanied by identifying information. The roster specified
7 an inmate's moniker or aka, his gang affiliation, his birth date, any CDC number, his PFN
(personal filing number), booking number (CEN), criminal charges, tier name (new
8 moniker), type of housing (such as "GP," which stands for general population), and his
next court date (abbreviated to "NCD"). The roster referenced multiple street gangs.

9 Paigly included himself on the roster, which reported his moniker as "Lil Locs." Paigly
10 has "Lil Locs" tattooed above his right eye and he has a "Locs" tattoo on his right wrist.
11 The roster also included Felix Medina, whose moniker was reported as "Shorty."

12 The other kite written by Paigly was a message concerning the running of unit 4A in the
jail ("message kite"). It read as follows:

13 "To: Capolli....[FN 5]

14 FN 5: Dots are in original and do not indicate an omission of words.

15 "Fr. Coatl....

16 "Re: 4A. Concern/Breif [sic] Report ...

17 "DT: 11.1.08....

18 "Saludos ... First and foremost allow us to extend our utmost love and profound respect
19 with a warriors embrace

20 "Sir today I come before you to address the current status of his house hold [sic] and its
activities here in

21 "This missive is made in duplicate as to have a better chance in succeeding in touching
22 down for as you stated you have not heard from this unit in 6 months ...

23 "I concur with it being unacceptable

24 "Thus explaining the necessity of this missive....

25 "Now sir I 'Jeremy Paigly' 'Lil Locs' D/WSSJ was appointed 'B.C.' by 'Chino' D/VSJ in
26 early Oct. upon Paul Elemen 'Huero' D/EHP departure to the pitts ...

27 "And during my tenure this casa has been running smoothly.... All H.H.M.s are abiding
and honering [sic] to all rules/regulations/policies etc....

28 "With the exception of minor issues that were resolved in the form of D/P/Correction and

1 enlightenment as to be expected

2 “There was one major issue that delt [sic] with ‘Chino’ relieving ‘Mikio’ Micheal [sic]
3 Washington of the O.A. position for abuse of authority that occurred before ‘Chino’s’
4 departure to 7.C ... To which I/Rs have been written in which we still possess and with the
5 failed attempt to get to you we still try along with a bundle that was left by ‘Huero’

6 “Now Sir ... Im [sic] not here to question you or your decisions ... but the appointment of
7 Felix Medina ‘Shorty’ as the authority here is unbecoming for the following....

8 “Not only does he lack the education and experience and training ... his conduct and
9 actions are not that of a[n] authority figure we ask for the authority to make the
10 appropriate change to someone with more experience ... in order to better facilitate the
11 functions here in

12 “I write this missive after approval and after Mr. ‘Shorty’ review

13 “If your decision/wishes remain then we will strive forward as always and I will give my
14 all to aid and assist. So now on that note allow me to humbly excuse myself with honor,
15 loyalty and carnalismo ...

16 “Con mucho respects

17 “F.N. Also enclosed is a current and updated roster as of 11 1 08

18 “Forever Forward“

19 F.N. Due to present & resent [sic] circumstances it is to our understanding .. Callpoli has
20 been relocated .. Please advise as to where to direct our mail ... Gracias ...”

21 The message kite was addressed to “Capolli” and dated November 1, 2008. “Capolli” was
22 a code name that referred to section 4B of the jail. The code was deduced based partially
23 on the volume of kites going into the area, the fact that Guzman was housed in 4B, and
24 Guzman’s status within the NF organization. In the latter part of 2008, Guzman was the
25 reported OA for the NF organization in the jail and he was housed in 4B. Guzman was
26 moved out of 4B in early November of 2008.

27 In Sergeant Livingston’s opinion, although the message kite was dated November 1, 2008,
28 the footnote, inquiring where to send mail since “Callpoli” had been relocated, was a
postscript added after Guzman was moved and before Klipp possessed it on November 7,
2008. In the sergeant’s opinion, the reference to “Callpoli” was to Guzman.

The message kite was purportedly from “Coatl.” Sergeant Livingston testified that the
Aztec language is sometimes used in kites. Also, code names are used for the sender as
well as the recipient of a kite. In the body of the message, Paigly identified himself as the
author by his name and moniker. It could reasonably be inferred from the evidence,
including the content of the message kite and the testimony of the handwriting expert, that
Paigly had written both kites.

The message kite’s opening salutation and introduction were very common. “First and
foremost” was a phrase that was almost always used.

1 In the kite, Paigly claimed to have been appointed to the position of “BC,” an abbreviation
2 used for building or block channel, after someone’s “departure to the pits.” An area of the
3 old jail is called the “snake pits.” The appointing and departing parties were identified by
4 name, moniker, and gang abbreviation. “D/VSJ” means from Varrio San Jose and
5 “D/EHP” means from El Hoya Palmas.

6 The term “household” or casa, a Spanish word for house, refers to an area of the jail, such
7 as 4A. The term “HHM’s” refers to household members. “D/P” means discipline. When
8 a northerner is disciplined for a minor infraction, he may be forced to do a rigorous
9 physical workout, such as burpees, or required to write a 5,000 word essay.

10 The abbreviation “I/Rs” means incident reports. Every part of the jail is supposed to
11 submit incident reports in addition to weekly rosters. The message kite indicated that
12 Paigly was enclosing “a current and updated roster as of 11 1 08.” A “bundle” refers to a
13 bundle of kites.

14 The jail’s OA would expect to occasionally see a report from someone who wants to
15 address the activities occurring in a particular section of the jail. A duplicate kite might be
16 written and sent in different ways if there had been trouble delivering reports.

17 “Carnal” means brother in Spanish. “C’s” or “carnals” refers to NF organization members.
18 The term “carnalismo” is commonly used among NR members and means something like
19 brotherhood. “Forever forward” is a common phrase meaning pushing forward and
20 staying loyal.

21 In the message kite, Paigly criticized “Shorty” and reported that he had written the kite
22 “after approval and after Mr. ‘Shorty’ review...” The jail’s OA was the only person with
23 the authority to remove someone from his organizational position within the jail.

24 The kite conveyed that Paigly would abide by the decision of the jail’s OA and expressed
25 his continued commitment to the NF organization.

26 *Paigly’s Interaction with Ramirez*

27 After Paigly was moved from 4A to Ramirez’s pod in 4C, Ramirez came into contact with
28 Paigly. Although Ramirez was on freeze, Paigly and he had a conversation about the NF
organization. It was Ramirez’s assessment that Paigly’s “heart was in the right place but
he still needed a lot of work,” “seasoning,” and education. Ramirez’s opinion was based
on experience recruiting NF and NR members “into the struggle” while he was in Pelican
Bay.

During a conversation, Paigly admitted to Ramirez that he had passed kites to Klipp.
Paigly believed he had been moved from 4A to 4C because he was going to be charged
with a gang enhancement related to the kites that had been turned over to authorities by
Klipp. It was common knowledge in 4C that Klipp had “locked it up” or was under
protective custody. Ramirez received photocopies of the kites during discovery in his own
criminal case and he showed them to Paigly.

1 Paigly explained to Ramirez that he wrote the kites to Guzman because of the chaos in 4A.
2 Paigly indicated that he was trying to get 4A organized and “trying to do his best to
3 hopefully get the manpower on track.” Paigly was asking for permission from Guzman to
4 “correct some wrongs” that were occurring in 4A and attempting to become the overall
5 authority for 4A. Paigly indicated that he had thought he could do a better job than the
6 person currently in charge. Paigly indicated that he had been attempting to help the NF
7 organization by sending the kites.

8 *Paigly’s Status and Participation in the NF Organization*

9 Sergeant Livingston testified that Paigly had been the second in command of the street
10 regiment run by James Cramer, an NF member. The principal activity of the regiment was
11 sales of methamphetamine. By September 2007, a number of that regiment’s members had
12 been arrested and the regiment was essentially defunct. In about November 2007, Paigly
13 was taken into custody.

14 On October 2, 2008, in case No. 211208, Paigly was convicted of a number of crimes,
15 including (1) conspiring to violate Health and Safety Code section 11379 (sale of
16 methamphetamine) on or about and between September 1, 2006 through October 30, 2007,
17 (2) active participation in a criminal street gang (§ 186.22, subd. (a)) on or about and
18 between October 1, 2006 and October 30, 2007, (3) violating Health and Safety Code
19 section 11378 (possession for sale of methamphetamine) on or about January 26, 2007, and
20 (4) violating Health and Safety Code section 11379 (transportation of methamphetamine)
21 on or about January 26, 2007. [FN 6] Gang enhancement allegations attached to the
22 conspiracy conviction and the Health and Safety Code violations were found true (see
23 § 186.22, subd. (b)(1)(A)).

24 FN 6: The indictment in that case named many defendants, including Cramer and
25 Paigly.

26 Sergeant Livingston testified that, in case No. 211208, he had testified as an expert and
27 described in great detail the criminal activities of the NF organization in state prison and
28 the jail. He testified that his prior testimony covered removals done by the NF
organization and the means and methods of such removals, the use of kites, and rosters.
Livingston testified that Mendoza had previously testified in case No. 211208 regarding
NF’s extortion of inmates and NF’s use of weapons in removals. According to Livingston,
Mendoza testified regarding NF’s methods of communication, including kites, and he
testified in detail how kites facilitate the criminal conduct of the NF organization. Paigly
was present for all that testimony.

Sergeant Livingston had testified in that prior case that Paigly was a member of NR. It
was still Sergeant Livingston’s opinion that Paigly was an NR member during the period
of September 2006 through October 30, 2007.

In the present case, Sergeant Livingston testified to his opinion that Paigly was still an NR
member. Livingston based his belief partly on the investigations in both the present and
prior cases and on Paigly’s tattoos. Sergeant Livingston had no information that defendant
Paigly dropped out of NR during the prior prosecution or after return of the verdict in that
case.

1 Sergeant Livingston had heard that NF had put Paigly on freeze and stripped his status. If
2 section 4A were out of communication with the jail's OA, even an NR or NF member "on
3 freeze" in 4A would remain obligated to communicate with the OA.

4 When an NF member is "stripped of status," it means the person has gotten into "some
5 type of trouble" and he cannot function as a full member or hold a position of authority
6 while the matter is investigated and until he is cleared. In the sergeant's opinion, Paigly
7 did not accept any such decision to strip him of status and Paigly "tried to step up" because
8 he is very motivated and "always tries to get actively involved...."

9 It was Livingston's opinion that Paigly was actively involved in the NF organization in
10 November 2008. In Livingston's opinion, Paigly chose to actively participate in the NF
11 organization in jail by compiling a roster of 27 names and sending two kites to the jail's
12 OA. Livingston found it significant that, in the message kite, Paigly identified himself as
13 the BC and expressed his allegiance to the organization.

14 In Ramirez's opinion, sending a kite, holding a position of authority like BC, and sending
15 requests up the chain of command concerning the performance of others in the structure
16 were consistent with a person actively involved in the NF organization. As far as Ramirez
17 knew, Paigly had never sought protective custody while in the jail.

18 *People v. Paigly*, No. H035692, 2014 WL 5468944, at *3-14 (Cal. Ct. App. Oct. 29, 2014).

19 **III. DISCUSSION**

20 **A. Standard of Review**

21 A petition for a writ of habeas corpus is governed by the Antiterrorism and Effective Death
22 Penalty Act of 1996 ("AEDPA"). This Court may entertain a petition for a writ of habeas corpus
23 "in behalf of a person in custody pursuant to the judgment of a State court only on the ground that
24 he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C.
25 § 2254(a).

26 A district court may not grant a petition challenging a state conviction or sentence on the
27 basis of a claim that was reviewed on the merits in state court unless the state courts adjudication
28 of the claim: "(1) resulted in a decision that was contrary to, or involved an unreasonable
application of, clearly established Federal law, as determined by the Supreme Court of the United
States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in
light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); *Williams v.*
Taylor, 529 U.S. 362, 412-13 (2000). Additionally, habeas relief is warranted only if the
constitutional error at issue "had substantial and injurious effect or influence in determining the

1 jury’s verdict.” *Penry v. Johnson*, 532 U.S. 782, 795 (2001) (quoting *Brecht v. Abrahamson*, 507
2 U.S. 619, 637 (1993)).

3 A state court decision is “contrary to” clearly established Supreme Court precedent if it
4 “applies a rule that contradicts the governing law set forth in [the Supreme Court’s] cases,” or if it
5 “confronts a set of facts that are materially indistinguishable from a decision of [the Supreme]
6 Court and nevertheless arrives at a result different from [its] precedent.” *Williams*, 529 U.S. at
7 405-06. “Under the ‘unreasonable application’ clause, a federal habeas court may grant the writ if
8 the state court identifies the correct governing legal principle from [the Supreme] Court’s
9 decisions but unreasonably applies that principle to the facts of the prisoner’s case.” *Id.* at 413.
10 “[A] federal habeas court may not issue the writ simply because that court concludes in its
11 independent judgment that the relevant state-court decision applied clearly established federal law
12 erroneously or incorrectly. Rather, that application must also be unreasonable.” *Id.* at 411.

13 Section 2254(d)(1) restricts the source of clearly established law to the Supreme Court’s
14 jurisprudence. “[C]learly established Federal law, as determined by the Supreme Court of the
15 United States” refers to “the holdings, as opposed to the dicta, of [the Supreme] Court’s decisions
16 as of the time of the relevant state-court decision.” *Williams*, 529 U.S. at 412. “A federal court
17 may not overrule a state court for simply holding a view different from its own, when the
18 precedent from [the Supreme Court] is, at best, ambiguous.” *Mitchell v. Esparza*, 540 U.S. 12, 17
19 (2003).

20 Here, as noted, the California Supreme Court summarily denied petitioner’s petition for
21 review. The California Court of Appeal, in its opinion on direct review, addressed the claim
22 petitioner raises in the instant petition. The court of appeal thus was the highest state court to have
23 reviewed petitioner’s claims in a reasoned decision, and it is the court of appeal’s decision that this
24 Court reviews herein. *See Ylst v. Nunnemaker*, 501 U.S. 797, 803-04 (1991); *Barker v. Fleming*,
25 423 F.3d 1085, 1091-92 (9th Cir. 2005).

26 **B. Petitioner’s Claim**

27 Petitioner claims that the evidence was insufficient to establish the intent element of
28 conspiracy and, consequently, the third requirement of the substantive gang offense pursuant to

1 California Penal Code section 186.22(a). Petitioner does not deny that he authored the kites and
2 does not challenge the sufficiency of the evidence as to the other elements of the substantive gang
3 offense. The court of appeal set forth the applicable legal principles underlying the criminal street
4 gang statute as follows:

5 At the time of the offense charged in this case, section 186.22, subdivision (a), stated:
6 “Any person who actively participates in any criminal street gang with knowledge that its
7 members engage in or have engaged in a pattern of criminal gang activity, and who
8 *willfully promotes, furthers, or assists in any felonious criminal conduct by members of*
9 *that gang, shall be punished....*” (Stats. 2006, ch. 596, § 1, p. 4929, italics added.) The
10 crime of active gang participation has three elements: “(1) active participation in a criminal
11 street gang, in the sense of participation that is more than nominal or passive; (2)
12 knowledge that the gang’s members engage in or have engaged in a pattern of criminal
13 gang activity; and (3) the willful promotion, furtherance, or assistance in any felonious
14 criminal conduct by members of that gang. (*People v. Lamas* (2007) 42 Cal.4th 516, 523
15 [67 Cal.Rptr.3d 179, 169 P.3d 102].)” (*People v. Albillar* (2010) 51 Cal.4th 47, 56
16 (*Albillar*)). As emphasized by defendant, “[m]ere active and knowing participation in a
17 criminal street gang is not a crime.” (*People v. Rodriguez* (2012) 55 Cal.4th 1125, 1130
18 (*Rodriguez*)). “Applying the third element of section 186.22[, subdivision] (a), a defendant
19 may be convicted of the crime of gang participation only if he also willfully does an act
20 that ‘promotes, furthers, or assists in any felonious criminal conduct by members of that
21 gang.’ (§ 186.22[, subd.] (a).)” (*Ibid.*)

22 “As [the Supreme Court] observed in *Albillar*, ... section 186.22 [, subdivision] (a), unlike
23 the gang enhancement in section 186.22 [, subdivision] (b)(1), does not require a specific
24 intent to further or promote the gang (only knowledge of the gang’s pattern of criminal
25 activity). (*Albillar, supra*, 51 Cal.4th at p. 56....)” (*Rodriguez, supra*, 55 Cal.4th at pp.
26 1134-1135.) “It is established ... that one need not have the specific intent to promote,
27 further, or benefit the gang to violate section 186.22[, subdivision] (a), nor must one
28 commit a gang-related felony.” (*Id.* at p. 1135.)

In *Rodriguez, supra*, 55 Cal.4th 1125, the Supreme Court observed: “Nothing in the
language of section 186.22[, subdivision] (a) would suggest that one may not promote,
further, or assist ‘in any felonious criminal conduct by members of that gang’ by either
aiding and abetting other gang members in committing a felony or by directly committing
a felony with other gang members.” (*Id.* at pp. 1135-1136.) In this case, the prosecutor
contended that Paigly directly committed a felony, namely conspiracy, with other gang
members.

Under section 182, subdivision (a)(1), “[a] conviction of conspiracy requires proof that
the defendant and another person had the specific intent to agree or conspire to commit an
offense, as well as the specific intent to commit the elements of that offense, together with
proof of the commission of an overt act “by one or more of the parties to such agreement”
in furtherance of the conspiracy.’ (*People v. Morante* (1999) 20 Cal.4th 403, 416 ...; see
§ 184; see also *People v. Homick* (2012) 55 Cal.4th 816, 870....)” (*People v. Johnson*
(2013) 57 Cal.4th 250, 257.) In other words, “a conspiracy requires an intentional

1 agreement to commit the offense, a specific intent that one or more conspirators will
2 commit the elements of that offense, and an overt act in furtherance of the conspiracy.
3 ([People v.] Morante, supra, 20 Cal.4th at p. 416....)” (Id. at p. 266.) Thus, to prove in
4 this case that Paigly committed the crime of conspiracy, the People were required to prove
5 that Paigly had the specific intent to agree to commit an offense, either extortion or assault
6 with a deadly weapon or by force likely to produce great bodily injury, and the specific
7 intent to commit the elements of the offense that was the object of the conspiracy.

8 “ ‘Evidence is sufficient to prove a conspiracy to commit a crime “if it supports an
9 inference that the parties positively or tacitly came to a mutual understanding to commit a
10 crime. [Citation.] The existence of a conspiracy may be inferred from the conduct,
11 relationship, interests, and activities of the alleged conspirators before and during the
12 alleged conspiracy.” ’ (People v. Rodrigues (1994) 8 Cal.4th 1060, 1135 ...; see People v.
13 Homick (2012) 55 Cal.4th 816, 870 ... [the element of agreeing to commit a crime ‘must
14 often be proved circumstantially’].)” (People v. Maciel (2013) 57 Cal.4th 482, 515-516.)
15 The intent elements “may be established through circumstantial evidence. (People v.
16 Herrera (2000) 83 Cal.App.4th 46, 64....)” (People v. Bogan (2007) 152 Cal.App.4th
17 1070, 1074.)

18 *People v. Paigly*, 2014 WL 5468944, at *2.

19 The court of appeal proceeded to reject petitioner’s claim as follows:

20 “A conspiracy can generally be established only by circumstantial evidence.” (People v.
21 Robinson (1954) 43 Cal.2d 132, 136.) “Evidence is sufficient to prove a conspiracy to
22 commit a crime ‘if it supports an inference that the parties positively or tacitly came to a
23 mutual understanding to commit a crime. [Citation.] The existence of a conspiracy may
24 be inferred from the conduct, relationship, interests, and activities of the alleged
25 conspirators before and during the alleged conspiracy. [Citations.]’ (People v. Cooks,
26 supra, 141 Cal.App.3d at p. 311....)” (People v. Rodrigues (1994) 8 Cal.4th 1060, 1135.)
27 “[T]he existence and nature of the relationship among the conspirators is undoubtedly
28 relevant to whether such agreement [to commit a crime] was formed, particularly since
such agreement must often be proved circumstantially.” (People v. Homick (2012) 55
Cal.4th 816, 870.)

“Regarding a specific intent element of a crime, [the Supreme Court has] explained that
‘[e]vidence of a defendant’s state of mind is almost inevitably circumstantial, but
circumstantial evidence is as sufficient as direct evidence to support a conviction.’ (People
v. Bloom (1989) 48 Cal.3d 1194, 1208....)” (People v. Manibusan (2013) 58 Cal.4th 40,
87.) “The jury may infer a defendant’s specific intent to commit a crime from all of the
facts and circumstances shown by the evidence. [Citation.]” (People v. Lindberg (2008)
45 Cal.4th 1, 27.)

In this case, the evidence was sufficient to show that Paigly authored and hand-wrote the
message kite and the roster kite. The inference that Paigly was an experienced gang
member could be drawn from the evidence that he held the number two position in
Cramer’s street regiment and he had reached the level of an NR member within the NF
organization. A trier of fact could reasonably infer from Paigly’s writing and sending of
those kites and their contents, considered in the light of the other evidence regarding his
status in the NF organization, that Paigly was intimately familiar with the structure,

1 organization, operation, procedures and protocols of the NF organization in the jail and
2 Paigly chose to be an active participant in the organization.

3 It may be inferred from the language of the message kite and the sending of the roster of
4 northerners in 4A that Paigly was fully aware of the structure and operation of the NF
5 organization in the jail and he was willing to obey the directives and orders handed down
6 by the higher authority of the NF organization within the jail. Once he was moved to a pod
7 in 4C after the authorities had obtained the kites, Paigly sought the advice of Ramirez, who
8 had advanced to a category-two NF member and also had been an NR member. This
9 evidence buttresses the inference that Paigly was actively seeking to be an active
10 participant in the NF organization.

11 A trier of fact could reasonably infer that, when Paigly authored the kites and when he
12 passed them on, Paigly had a special interest in protecting the jail's NF organization of
13 which he was a part. The evidence supported the inferences that removal was a standard
14 practice of the NF organization, the NF organization maintained its hegemony by
15 removing persons in bad standing within the organization, and, under OA Guzman,
16 removals were performed by slicing the victim's face with a razor and then assaulting the
17 victim with hands and feet.

18 The evidence was sufficient to show that an ongoing purpose of rosters was to facilitate
19 removals by the NF organization. The personal information contained in a manpower
20 roster enables the jail's OA to confirm the identities of listed persons who are determined
21 to be in bad standing or who are found to be on a BNL and to locate them within the jail.
22 If the OA decides a removal order is necessary, he can use a manpower roster to determine
23 where and to whom to send the order within the jail and when the order can be passed at
24 court.

25 Further, the evidence as a whole supported an inference that Paigly was a sufficiently
26 knowledgeable and committed member of the NF organization to be fully aware that
27 rosters were used to facilitate removals, a removal was an assault with a razor blade, a
28 removal was a standard consequence imposed on members in bad standing with the
organization, and any member of the NF organization in the jail, including himself, could
be ordered to execute a removal. Based on circumstantial evidence and the reasonable
inferences drawn from that evidence, a trier of fact could reasonably infer from the kites
and other evidence that Paigly tacitly agreed with other members of the NF organization to
commit "removals" of persons in bad standing with the organization. Further, a trier of
fact could reasonably find that Paigly and one or more of the members of the NF
organization had the specific intent to agree to commit assault with a deadly weapon or by
force likely to produce great bodily injury and, at the time of the agreement, specifically
intended to commit the elements of that offense. In light of our conclusion, we need not
decide whether the evidence was also sufficient to prove the intent elements of a
conspiracy to commit extortion.

Paigly argues that the prosecutor's theory at trial was flawed because "there were many
reasons for creating a roster beside conducting removals or committing extortion" but the
prosecutor's position was that rosters are prepared for only the purpose of conducting
removals or committing extortion. The prosecutor did not argue that the exclusive purpose
of a roster was to facilitate the commission of removals and extortions. Regardless, a trier

1 of fact could reasonably infer that Paigly intended the roster to be used for all the usual
2 purposes, including removals.

3 Paigly points out that “there was no evidence that any of the people on the list committed a
4 removal or an extortion.” Such proof is not required. “Conspiracy is an inchoate crime.
5 [Citation.] It does not require the commission of the substantive offense that is the object
6 of the conspiracy. [Citation.]” (*People v. Swain* (1996) 12 Cal.4th 593, 599.) “Criminal
7 conspiracy is an offense distinct from the actual commission of a criminal offense that is
8 the object of the conspiracy. [Citations.]” (*People v. Morante, supra*, 20 Cal.4th at p. 416,
9 fn. omitted.)

10 Paigly suggests that his purpose in writing the roster “could have been simply to inform the
11 OA of the identity of the ‘manpower’ on 4–A without having any idea what eventual use
12 would be made of the list.” Paigly asserts that it was “pure speculation to know what [he]
13 intended when he prepared the roster.” While we acknowledge there was no direct
14 evidence of Paigly’s intent, that is not unusual.

15 “ ‘Substantial evidence includes circumstantial evidence and any reasonable inferences
16 drawn from that evidence. [Citation.]’ [Citation.]” (*People v. Clark* (2011) 52 Cal.4th
17 856, 943.) In assessing the sufficiency of the evidence, “[a]n appellate court must accept
18 logical inferences that the jury might have drawn from the circumstantial evidence.
19 [Citation.]” (*People v. Maury* (2003) 30 Cal.4th 342, 396.)

20 In this case, circumstantial evidence and the reasonable inferences drawn from that
21 evidence were sufficient to prove the specific intent elements of a conspiracy to commit a
22 violation of former section 245, subdivision (a)(1), and support the jury’s finding that
23 Paigly violated section 186.22, subdivision (a). “Where the circumstances reasonably
24 justify the trier of fact’s findings, a reviewing court’s conclusion the circumstances might
25 also reasonably be reconciled with a contrary finding does not warrant the judgment’s
26 reversal. [Citation.]” (*People v. Zamudio* (2008) 43 Cal.4th 327, 358.)

27 *People v. Paigly*, 2014 WL 5468944, at *16-18.

28 **1. Sufficiency of the Evidence**

The Due Process Clause “protects the accused against conviction “except upon proof
beyond a reasonable doubt of every fact necessary to constitute the crime with which he is
charged.” *In re Winship*, 397 U.S. 358, 364 (1970). A court reviewing a conviction does not
determine whether it is satisfied that the evidence established guilt beyond a reasonable doubt, but
rather determines whether, “after viewing the evidence in the light most favorable to the
prosecution, any rational trier of fact could have found the essential elements of the crime beyond
a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). Only if no rational trier of
fact could have found proof of guilt beyond a reasonable doubt may a court conclude that the

1 evidence is insufficient. *See id.* at 324. The “prosecution need not affirmatively ‘rule out every
2 hypothesis except that of guilt,’” and the reviewing federal court “‘faced with a record of historical
3 facts that supports conflicting inferences must presume—even if it does not affirmatively appear
4 in the record—that the trier of fact resolved any such conflicts in favor of the prosecution, and
5 must defer to that resolution.” *Wright v. West*, 505 U.S. 277, 296-97 (1992) (quoting *Jackson*,
6 443 U.S. at 326).

7 After the enactment of AEDPA, a federal habeas court must apply the standards of *Jackson*
8 with an additional layer of deference. *Juan H. v. Allen*, 408 F.3d 1262, 1274 (9th Cir. 2005).
9 Generally, a federal habeas court must ask whether the operative state court decision reflected an
10 unreasonable application of *Jackson* and *Winship* to the facts of the case. *Id.* at 1275.

11 “*Jackson* leaves juries broad discretion in deciding what inferences to draw from the
12 evidence presented at trial, requiring only that jurors ‘draw reasonable inferences from basic facts
13 to ultimate facts.’” *Coleman v. Johnson*, 132 S. Ct. 2060, 2064 (2012) (per curiam) (citing
14 *Jackson*, 443 U.S. at 319). “[O]n habeas review, a federal court may not overturn a state court
15 decision rejecting a sufficiency of the evidence challenge” unless “the state court decision was
16 objectively unreasonable.” *Id.* at 2062 (internal quotation marks omitted). The *Jackson* standard
17 is applied to a crime as that crime is defined by state law. *Jackson*, 443 U.S. at 324 n.16.

18 **2. Analysis**

19 Applying these legal principles to petitioner’s current allegations, the state court’s rejection
20 of this claim was not contrary to, and did not involve an unreasonable application of, Supreme
21 Court precedent, and was not based on an unreasonable determination of the facts in light of the
22 evidence presented in the State court proceeding. 28 U.S.C. § 2254(d). Petitioner argues that the
23 roster kite “never reached the leader, but was instead turned over to law enforcement by Chris
24 Klipp.” Petition at 6. As noted by the California Court of Appeal, however, under California law,
25 “[c]onspiracy is an inchoate crime.” *People v. Swain*, 12 Cal. 4th 593, 599 (1996). “It does not
26 require the commission of the substantive offense that is the object of the conspiracy.” *Id.* The
27 prosecution needed only to show that petitioner had the specific intent to conspire to commit an
28 offense. *See People v. Jurado*, 38 Cal. 4th 72, 120 (2006). Here, there was sufficient evidence for

1 a jury to reasonably conclude that petitioner intended for the kites to reach the OA, regardless of
2 whether they actually did.

3 Petitioner also argues that the evidence showed that the roster he prepared was merely a
4 “‘manpower’ roster of members who had already been cleared, and thus were not potential targets
5 for either extortion or assault.” Petition at 7. Petitioner appears to be relying on the following
6 testimony by Chris Klipp:

7 Q: All right. So a roster of all manpower. In your experience, will those types of rosters
8 be sent up the chain of command?

9 A: Yes.

10 Q: And why are they sent up the chain of command?

11 A: To let them know who’s placed in that house too, so he knows for himself.

12 Q: And will those rosters be compared against the BNL?

13 A: No, those are already cleared members, household members.

14 Q: And can you tell us, how can you be sure that those names have already been cleared?

15 A: Because if they wasn’t, they put something—they wouldn’t put their name on there
16 until they’re fully cleared. And if they did something else, then it would say something
17 next to it. It’d say “deemed” or “on freeze,” you know.

18 8RT 2019-20. Petitioner also points to the letter kite itself, which he asserts made clear that “there
19 were no pending situations in Petitioner’s unit that would call for assault or extortion.” Petition at
20 7.

21 Petitioner’s argument assumes that he could only have intended to conspire to commit an
22 extortion or removal if one of the people listed on the roster was the target of an extortion or
23 removal. However, there was ample evidence showing that one of the purposes of a manpower
24 roster was to determine who was available to be appointed to positions and assigned tasks,
25 including performing a removal or extorting a gang member. Klipp’s testimony confirmed this:

26 Q: What will that manpower be used for?

27 A: Well—it could be used—I mean, it could be used for different things. I mean, if [the
28 OA] decides to say “Okay. You know what? I like this dude ‘cause this dude’s been
around. He has a lot of hands-on experience,” so on so forth. “I want him to hold this. I
want him to hold the position.” Or you know, “This dude right here, he owes a little bit of

1 clean-up,” or whatever, “Okay. Let’s have him do the next removal,” so on so forth. So it
could be different things.

2 Q: So that’s important information to have to make assignments.

3 A: Exactly.

4 Q: Including sometimes to do removals?

5 A: Exactly.

6 8RT 2020-21.

7 Ramirez testified that removals were a “constant occurrence” in the organization. 9RT
8 2322. Abeyta testified that having a roster was essential to ordering a removal because rosters
9 indicated who was in a specific area and provided information about the individuals listed. 9RT
10 2227. Rosters had to be updated continually as information came in about members that could
11 affect their status. 9RT 2208-11, 2224-25, 2260-61.

12 Mendoza testified that, during his time as OA, he would routinely check a manpower
13 roster against the BNL.

14 Q: So let’s go to the third type of reports, you mentioned incident report, you mentioned
15 NA reports, you mentioned rosters. Would you get those when you were an OA?

16 A: Yeah.

17 Q: What function do they serve?

18 A: A roster, basically it’s like a security, it’s a security net. It let me know who’s in the
19 jail, you know, these OA or the building channels they’re acting as my eyes and ears
20 throughout the jail. Without them submitting these rosters, there’s no way I’m gonna
21 know who’s in the jail, and the purpose for that is, you know, when these rosters are
22 filtered up, um, I usually have a master BNL, which is a bad news list or a list of
individuals that have fell out of good standing, um, with us. And I would screen ‘em
through that BNL to make sure they weren’t on that list.

23 So, I mean, if I didn’t have these names coming in there would be no way of me finding,
24 you know, locating people that might slip through, informants, people that have been
deemed no good. People that might owe fines or things like that.

25 Q: Why don’t the new arrival reports take care of that problem for you? Aren’t these
26 individuals already being screened section by section?

27 A: They do.

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Q: All right. Well, why do you need a roster then after that process to prepare against a BNL if there's been some kind of a screening?

A: Well, because they might—might not be on a master BNL in that part of the jail. I have the master BNL. Being the OA it's my job to run 'em through the screening process. Also, um, you know, there's a lot -- there's a lot of, you know, individuals that are always coming and going. So that's why it's done weekly.

Q: Can a BNL list change from week to week, too?

A: It can.

11RT 2632-33.

Q: All right. So even if these people had been cleared by the manpower in their sections as new arrivals, you would still expect this information, so you could check it against BNL's?

A: Right.

Q: Why is that important?

A: Because they're always being updated, they are never going to stay the same. People are always in transit from week to week, it changes, and it might be individuals in my part of the jail that are back there with me that, you know, when I filter it out they might see somebody on there that slipped through before, you know, somebody new where I'm at, you know, it's happened before.

Q: And why is it important for you to know what section of the jail a person is on a roster?

A: Well, because if I identify somebody that—that's a target or somebody that's in bad standing, I know where to send my filter to have that individual removed.

Q: Okay. Have you ordered removals?

A: Yeah.

Q: And when you were the overall authority how were they typically done?

A: Um, I would tell my buffer, my OA, Pony at that time, um, he would draft up—he would draft up a filter depending on what part of the jail it was going to. It would be concealed, we had different ways where were getting it out. We were kinda restricted in that area, but however it was going out it would be sent out. More than likely on a court date.

Q: Okay, So when you use the term filter you're referring to the same thing as kite or membership in writing?

A: Right.

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Q: And you would have one drawn up ordering the removal?

A: Right.

Q: And, um, you mentioned it would be on a—sent out on a court date?

A: Correct.

Q: Why is that?

A: That's the purpose of the court dates that—being documented on there. I mean, if, you know, hypothetically if I'm building channel I want to know everybody's court dates, because these are my target dates to where I can get, you know, filters going out. If I got—in some these areas you're confined to within that area so you don't have access to the rest of the jail, but if I look on my roster and I see, well, this guy's got a court date coming up in four days, this gives me a four day window to draft that up and have it ready to give to him the night before so when he does go to court he runs into somebody in another part of the jail, it can be, you know, passed on in the court tunnels and the court things. That's how it gets moved.

Q: Okay. So that roster serves not only the purpose of allowing you to compare names against the BNL, bad news list, but also provides you with information on how to get your order to do a removal back to this section where it needs to be done?

A: Right.

11RT 2645-47.

Mendoza also testified that manpower rosters provided location information for gang members and associates so that people who owed “clean-up” could be found. 11RT 2672. According to Mendoza, the rosters indicated who was in the jail for the purpose of providing security to members in general. 11RT 2672-73. The “number one objective of the organization” was to “provide security to its membership.” 11RT 2673. Taking care of security was synonymous with performing removals. 11RT 2675-76. Mendoza testified that rosters were important to ensuring a strong, effective organization in all parts of the jail, which in turn made it easier to perform removals and extort money. 11RT 2679-80. In short, not only was there some evidence that petitioner's roster could have been checked against the BNL such that someone listed on the roster could have become the target of an extortion or removal, but there was significant evidence that such a roster could be used to assign someone associated with NF to the task of committing an extortion or removal.

1 Mendoza also testified that an active member, educated in the organization, would
2 understand why rosters are needed. 11RT 2676. Here, there was overwhelming evidence that
3 petitioner was an active NF participant and educated in the organization. Petitioner named himself
4 as the author of the kite to “Capolli” to which he had attached the roster. 9RT 2133-35. Therein,
5 he said he had been appointed the block channel and indicated knowledge that the OA had not
6 received a report from his section in six months. *Id.* The kite made reference to the OA’s
7 relocation. *Id.* Petitioner urged the OA to make changes to his section, while pledging continued
8 loyalty. *Id.*; 9RT 2141-42. He indicated that he still had incident reports that he had been unable
9 to send up the chain of command. 9RT 2138-39. The kite used language and terminology that
10 was specific to the gang. *See* 9RT 2135-42. Petitioner’s closing lines, including “With honor,
11 loyalty, and carnalismo” and “Forever forward,” expressed his commitment to and support of the
12 NF organization. 11RT 2643-44. Livingston testified regarding petitioner’s prior gang
13 convictions and petitioner’s affiliation with the organization going back to at least 2006. 6RT
14 1601-05, 1677-84. Petitioner told Ramirez he had written the kites because of the “chaos” in unit
15 4A and said he was trying to “get the manpower on track.” 9RT 2320. Petitioner indicated to
16 Ramirez that he thought he could do a better job as authority for unit 4A and asked for Ramirez’s
17 advice. 9RT 2322-23. Given this record, there was sufficient evidence for the jury to reasonably
18 infer that petitioner knew how rosters were used by the organization and that petitioner intended
19 for his roster to be used for the usual purposes, including facilitating removals and extortions.

20 After viewing the evidence presented at trial in the light most favorable to the prosecution
21 and presuming that the jury resolved all conflicting inferences from the evidence against
22 petitioner, the Court finds that a rational juror “could reasonably have found beyond a reasonable
23 doubt” that petitioner entered into a conspiracy with the specific intent to commit removals or
24 extortions. *Jackson*, 443 U.S. at 325-26. Mindful of the “sharply limited nature of constitutional
25 sufficiency review” and applying the “additional layer of deference” required by AEDPA, this
26 Court is unable to find that the California court’s rejection of this claim was objectively
27 unreasonable. *Juan H.*, 408 F.3d at 1274-75; *see also Jackson*, 443 U.S. at 319, 326.
28 Accordingly, petitioner is not entitled to habeas relief.

1 **C. Certificate of Appealability**

2 The federal rules governing habeas cases brought by state prisoners require a district court
3 that issues an order denying a habeas petition to either grant or deny therein a certificate of
4 appealability. *See* Rules Governing § 2254 Case, Rule 11(a).

5 A judge shall grant a certificate of appealability “only if the applicant has made a
6 substantial showing of the denial of a constitutional right,” 28 U.S.C. § 2253(c)(2), and the
7 certificate must indicate which issues satisfy this standard. *Id.* § 2253(c)(3). “Where a district
8 court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c)
9 is straightforward: [t]he petitioner must demonstrate that reasonable jurists would find the district
10 court’s assessment of the constitutional claims debatable or wrong.” *Slack v. McDaniel*, 529 U.S.
11 473, 484 (2000).

12 Here, petitioner has not made such a showing, and, accordingly, a certificate of
13 appealability will be denied.

14 **IV. CONCLUSION**

15 For the reasons stated above, the petition for a writ of habeas corpus is DENIED, and a
16 certificate of appealability is DENIED.

17 The Clerk shall enter judgment in favor of respondent and close the file.

18 **IT IS SO ORDERED.**

19 Dated: 7/13/2017

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HAYWOOD S. GILLIAM, JR.
United States District Judge