

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAY 29 2014

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

MOISES HERNANDEZ,

Petitioner - Appellant,

v.

GERALD J. JANDA, Warden,

Respondent - Appellee.

No. 11-55581

D.C. No. 2:10-cv-02812-JHN-
DTB

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Jacqueline H. Nguyen, District Judge, Presiding

Argued and Submitted May 12, 2014
Pasadena, California

Before: NOONAN, WARDLAW, and FISHER, Circuit Judges.

Moises Hernandez appeals the district court's denial of his petition for a writ of habeas corpus. We have jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253.

The district court did not err in denying the petition. The California Court of Appeal adjudicated Hernandez's federal constitutional claim on the merits. Its

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

decision was not contrary to, or an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States. 28 U.S.C. § 2254(d)(1). Neither *Hicks v. Oklahoma*, 447 U.S. 343 (1980), nor any other Supreme Court decision clearly establishes that Hernandez has a constitutionally protected liberty interest in the state law instruction that the jury deliberate anew after an alternate juror is seated during deliberations. Though Cal. Penal Code § 1089 requires such an instruction as a matter of state law, the federal Due Process Clause “safeguards not the meticulous observance of state procedural prescriptions, but the fundamental elements of fairness in a criminal trial.” *Rivera v. Illinois*, 556 U.S. 148, 158 (2009) (internal quotation marks omitted).

AFFIRMED.