UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BODHI TREE, Petitioner-Appellant, v. JIM ROBERTSON, Respondent-Appellee.	No. 19-15683 D.C. No. 3:18-cv-01470-RS Northern District of California, San Francisco ORDER

Before: LEAVY and MILLER, Circuit Judges.

The request for a certificate of appealability (Docket Entries Nos. 3 and 6) is denied because appellant has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

FILED

MAR 20 2020

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U.S. COURT OF APPEALS

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Before: CLIFTON and NGUYEN, Circuit Judges.

Appellant's letter dated March 8, 2020 (Docket Entry No. 8) is construed as a motion for reconsideration, and is denied. *See* 9th Cir. R. 27-10.

Insofar as appellant may have intended to seek review in the United States Supreme Court, any petition for a writ of certiorari must be filed with the United States Supreme Court. The mailing address of the Supreme Court is: 1 First Street, NE, Washington, D.C. 20543.

No further filings will be entertained in this closed case.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BODHI TREE,

Petitioner,

v.

JIM ROBERTSON,

Respondent.

Case No. 18-cv-01470-RS (PR)

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

INTRODUCTION

Petitioner seeks federal habeas relief from his state convictions for murder and attempted murder. For the reasons stated herein, the petition for such relief is DENIED.

BACKGROUND

Rhett August held a party in May 2013 in Eureka, at which petitioner was beaten up after he made unwanted "sexual advances" toward a female party goer. (Ans., State Appellate Opinion, Dkt. No. 13-43 at 4.) He left the party with two black eyes. (*Id.*)

Two days later, petitioner had a friend drive him and another friend (Sean Butler-Smith) to August's house. (*Id.* at 4-5.) He rang the doorbell and then hid behind a nearby building. (*Id.* at 5.) Butler-Smith testified that when August came to the door, petitioner "popped out from behind the corner and fired four times." (*Id.*) Petitioner ran to the car and said "go" or "drive." (*Id.*) He then declared, "I got that motherfucker. I dropped him

for sure." (*Id.*) He later showed Butler-Smith the gun he had used on August. (*Id.*) No shell casings were found at the scene, which indicated that a revolver had been used to deliver the shots. (*Id.*)

The night after the Rhett August shooting, petitioner shot to death Christina Schwarz and Alan Marcet while they were sleeping on the living room floor of the Arcata boarding house petitioner shared with them. (*Id.* at 7.) The prior day, a drunk petitioner had repeatedly been aggressive toward Schwarz, several times making "inappropriate and unwelcome sexual overtures" toward her. (*Id.* at 6.) Schwarz rejected his advances — "she just kept telling him off." (*Id.*) No shell casings were found at the scene, which indicated that the shots had been fired from a revolver. (*Id.* at 7.)

Roughly a half hour after the Arcata shootings, petitioner appeared at a house where Butler-Smith was staying. (*Id.*) He said to Butler-Smith, "I got two more" and then placed a "snub-nose .38 revolver on the table." (*Id.*) He said he'd been at a party at which "some dude and his girlfriend were talking shit to him." (*Id.*) Petitioner admitted he shot them. (*Id.*)

While in jail, petitioner told fellow inmate Quentin Williams he shot Rhett August after being beaten up at a party at August's house. (*Id.* at 9.) Another inmate, Tyrel Brannon, who had been at August's party and had been involved in the fight with petitioner, started arguing with him. (*Id.*) Petitioner "yelled that he should have shot 'Rhett' in the head, and would not make the same mistake with Brannon." (*Id.*) When Brannon accused petitioner of shooting a 17-year-old girl (presumably the 18-year-old Schwarz), petitioner called him a "snitch." (*Id.*)

Another inmate, Jason Losey, heard petitioner tell Williams about "a confrontation he had with a girl in Arcata and her friend." (*Id.*) Petitioner said he "smoked" them. (*Id.*) That "motherfucker" was "up in there trying to play hero and shit and got mad because I'm up in there trying to fuck with that little bitch." (*Id.*)

Petitioner was convicted in 2014 by a Humboldt County Superior Court jury of two counts of second degree murder and one count of premeditated attempted murder. (Id. at 3.) Various sentencing enhancement allegations were found true. (*Id.*) A sentence of 105 years to life, plus life, was imposed. (*Id.*) Petitioner unsuccessfully sought relief in the state courts. This federal habeas petition followed.

As grounds for federal habeas relief, petitioner alleges (i) the prosecutor withheld evidence from the defense; (ii) the trial court improperly admitted the testimony of a jailhouse informant; and (iii) the trial court improperly admitted DNA evidence.

STANDARD OF REVIEW

Under the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), this Court may entertain a petition for writ of habeas corpus "in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). The petition may not be granted with respect to any claim that was adjudicated on the merits in state court unless the state court's adjudication 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).

"Under the 'contrary to' clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the] Court has on a set of materially indistinguishable facts." *Williams (Terry) v. Taylor*, 529 U.S. 362, 412–13 (2000).

"Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at

413. "[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Id.* at 411. A federal habeas court making the "unreasonable application" inquiry should ask whether the state court's application of clearly established federal law was "objectively unreasonable." *Id.* at 409.

DISCUSSION

i. Brady Claim

Petitioner claims he is entitled to habeas relief because the prosecutor withheld evidence that one of the prosecution's witnesses, Stonebarger, had received poor work reviews. This allegedly violated his due process rights under *Brady v. Maryland*, 373 U.S. 83 (1963).[1]

Criminalist Deborah Stonebarger, an employee of the California Department of Justice, testified as a prosecution witness regarding the murders of Schwarz and Marcet. (Ans., State Appellate Opinion, Dkt. No. 13-43 at 8.) Her role in that investigation had been limited to examining petitioner's clothing for blood stains. (*Id.* at 13.) At trial, in response to the prosecutor's questions, she testified about blood spatter evidence. (*Id.* at 8.)

[1] To the extent petitioner makes a claim regarding the denial of his new trial motion, it is DENIED. There is no clearly established constitutional right to move for a new trial, or to have such a motion granted. "The Constitution itself, of course, makes no mention of new trials." *Herrera v. Collins*, 506 U.S. 390, 407 (1993) (declining to find that Texas's refusal to entertain a new trial motion that was untimely under state rules "transgresses a principle of fundamental fairness 'rooted in the traditions and conscience of our people.'") Rather, the right to file a new trial motion is a state statutory right, not a constitutional one. *See Gupta v. Beard*, No. CV 14-1709-CJC KK, 2015 WL 1470859, at *27 (C.D. Cal. Mar. 30, 2015) (quoting *People v. Dillard*, 168 Cal. App. 2d 158, 167 (Cal. Ct. App. 1959)) ("A 'motion for new trial in a criminal case is a [California] statutory right'"). Violations of state law are not remediable on federal habeas review, even if state law were erroneously applied or interpreted. *Swarthout v. Cooke*, 562 U.S. 216, 219 (2011); *Little v. Crawford*, 449 F.3d 1075, 1082 (9th Cir. 2006).

During jury deliberations, the prosecutor informed the defense that Stonebarger had been "removed from performing firearm analysis at the DOJ and had 'potential *Brady* issues.'" (Ans., State Appellate Opinion, Dkt. No. 13-43 at 12). The same day the prosecutor became aware of this information is the same day he informed the defense of it. (*Id.*, Clerk's Transcript, Dkt. No. 13-7 at 179.) After the guilty verdicts were returned, petitioner filed a motion for a new trial. (Ans., State Appellate Opinion, Dkt. No. 13-43 at 12.) In that motion, petitioner discussed the poor work reviews that could have been used to impeach Stonebarger:

> (1) her removal from biology casework from 2011-August 2012, based on a determination she had 'overstated findings based on the current reporting guidelines' and had failed to identify a visible bloodstain on a proficiency test item; (2) her removal from firearms-related casework in 2011 and 2013 based on concerns on [*sic*] proficiency evaluations; (3) her removal from casework regarding blood alcohol based on her failure to perform routine maintenance on equipment; and (4) her receipt of an 'Improvement Needed' rating on her August 2011/August 2012 performance appraisal based on her 'poor performance in the [*sic*] biology proficiency, issues related to the quantity and quality of her biology casework, attitude, communication, and work habits.'

(*Id.* at 12-13.)

At the hearing on the new trial motion, the prosecutor contended Stonebarger's testimony was limited in scope and cumulative of testimony offered by another witness, Cloutier; Stonebarger's "performance issues" were not related to her expertise in blood spatter evidence, but rather to her biology, alcohol, and firearms casework; and it was unlikely that the evidence of her performance reviews would have resulted in a favorable verdict, had such evidence been made available to the defense. (*Id.* at 13.) The prosecution also presented the most recent appraisals of Stonebarger's work. These reviews indicated improvement and gave her a "satisfactory" rating. (*Id.*, Clerk's Transcript, Dkt. No. 13-7 at 193-194.)

The trial court denied the motion for a new trial. "[T]he role of Ms. Stonebarger in this matter is — fairly limited given . . . the testimony of Mr. Cloutier [the primary prosecution witness on forensics] on the broad issues that are being discussed here." (*Id.*, State Appellate Opinion, Dkt. No. 13-43 at 13.)

Three parts of Stonebarger's testimony are worth pointing out. First, in response to the prosecutor's question, she explained why none of the victims' blood was found on petitioner's clothing. (*Id.* at 8.) Stonebarger testified that any blood would be projected away from the shooter by the force of the bullets, considering the "the physical dynamics of the shooting, with the victims lying on the floor." (*Id.*) Second, Stonebarger testified she did not collect gunshot residue (GSR) from the clothing as she had not been asked to do so. (*Id.*) She also testified that GSR evidence is of limited value. (*Id.*) Third, she testified that "four drops of possible blood" in crime scene photographs were likely "castoff" blood, rather than back spatter. (*Id.*) This response came after the prosecutor asked her to look at photographs of the crime scene. (*Id.*)

Her opinion was shared by another DOJ criminalist, Dale Cloutier, who testified as the prosecution's primary forensics expert. He said a lack of blood spatter on a suspect's clothing is not exonerating because there are "a million reasons" a suspect may not have the victim's blood on him. "[T]he absence of the blood does not mean that the suspect did not shoot the victim. It's beneficial if you can find it. You have a positive link. But the negative is not really helpful to answering any questions." (*Id.* at 11.) Cloutier also testified that GSR evidence is "of limited use." (*Id.* at 12.)

The defense forensics expert, Jacobus Swanepoel, also testified regarding blood spatter and GSR evidence. He averred that he would expect the shooter to have blood spatter on his clothes and he disagreed that GSR evidence is obsolete. (*Id.* at 10-11.)

Petitioner's *Brady* claim was rejected on appeal. First, the evidence was not material. "This was not a case in which Stonebarger supplied the only evidence linking appellant to the Arcata murders, as several lay witnesses placed him inside the home

armed with a revolver." (*Id.* at 15.)

Second, her testimony was cumulative. Cloutier, the primary prosecution forensics expert, had "made the similar point that the absence of blood did not mean [petitioner] had been absent from the scene." (*Id.*) In fact, both Cloutier and Swanepoel gave "extensive and detailed testimony . . . on the subject of blood spatter." (*Id.*) Cloutier had also given "greater detail" in his testimony regarding the limited value of GSR than Stonebarger had given in hers. (*Id.*)

Third, her role in the investigation was narrow. In the words of the state appellate court, Stonebarger "had not gathered any evidence, visited the [crime] scene, or been tasked with any analysis of any blood spatter that may have been present." (*Id.*) Only after being asked by the prosecutor did she give her opinion on the blood drops in the photographs. (*Id.*) Fourth, none of the performance reviews directly related to blood spatter evidence or were likely to have significant impeachment value on that topic. (*Id.*)

The prosecution must disclose material evidence "favorable to an accused." *Brady*, 373 U.S. at 87. In order to establish a *Brady* violation, a federal habeas petitioner must show that: (i) the evidence at issue was favorable to the accused, either because it is exculpatory or impeaching; (ii) the evidence had been suppressed by the prosecution, either willfully or inadvertently; and (iii) prejudice ensued. *Banks v. Dretke*, 540 U.S. 668, 691 (2004).

Petitioner's claim lacks merit. The state appellate court reasonably determined that the evidence was not material and its late disclosure not prejudicial. There was other strong evidence of petitioner's guilt: witnesses placed him in the Arcata residence with a revolver and he admitted to Butler-Smith that he "smoked" a man and a woman. Also, Stonebarger's poor reviews had nothing to say about her ability to analyze blood spatter. Furthermore, Stonebarger's testimony was cumulative of Cloutier's. Under such facts, the state court's rejection of this claim was reasonable and is entitled to AEDPA deference. This claim is DENIED.

ii. Admission of Testimony of Jailhouse Informants

Petitioner claims the trial court violated his due process right to a fair trial when it admitted the testimony of the three jailhouse informants, Brannon, Losey, and Williams. Each provided testimony inculpatory of petitioner, as described above in the factual background of this order. The jury was informed about the witnesses' criminal history and that Williams and Losey received benefits in exchange for their testimony. (Ans., State Appellate Opinion, Dkt. No. 13-43 at 20.)[2] The informants' testimony, petitioner claims, lacked probative value, was prejudicial and unreliable.

The defense objected to the admission of their testimony as unreliable and unduly time consuming. (*Id.* at 17.) The trial court denied the motion to exclude. (*Id.* at 18.) The testimony was relevant and the credibility of the witnesses was a matter for the jury to decide. (*Id.*)

The trial court instructed the jury (i) to view with caution any statement by petitioner tending to show his guilt unless the statement was written or recorded; (ii) to view with caution and close scrutiny the testimony of in-custody informants; (iii) that it could not convict based solely on the testimony of such informants, that corroborating evidence was required; and (iv) should not consider the fact that petitioner was in custody or under what conditions he was being held. (*Id.* at 18-19.)

On appeal petitioner's claim regarding the admission of the informants' testimony was rejected. Their testimony was "extremely probative" because it recounted petitioner's clear admissions that he committed the shootings. (*Id.* at 20.) Also, given their significance, the presentation of the informants' testimony was not unduly time consuming. (*Id.*)

[2] Williams received a jail sentence rather than a prison term in another case. (Ans., State Appellate Opinion, Dkt. No. 13-43 at 18.) Losey's release date was accelerated by two months. (*Id.*)

The appellate court also noted that the jury was instructed to view with caution the informants' testimony, and that the testimony had to be corroborated. (*Id.*) The jury was also informed of the informants' criminal histories and the "accommodations provided to Williams and Losey in exchange for their testimony." (*Id.*)

The admission of evidence is not subject to federal review unless a specific constitutional guarantee is violated or the error is of such magnitude that the result is a denial of the fair trial guaranteed by due process. *Henry v. Kernan*, 197 F.3d 1021, 1031 (9th Cir. 1999). Only if there are no permissible inferences that the jury may draw from the evidence can its admission violate due process. *Jammal v. Van De Kamp*, 926 F.2d 918, 920 (9th Cir. 1991). Also, the Supreme Court "has not yet made a clear ruling that admission of irrelevant or overtly prejudicial evidence constitutes a due process violation sufficient to warrant issuance of the writ." *Holley v. Yarborough*, 568 F.3d 1091, 1101 (9th Cir. 2009).

Petitioner's claim fails. The jury could make permissible inferences from the witnesses' statements. Such testimony contained clear admissions of guilt. According to Williams, petitioner admitted to him that he shot Rhett August after being beaten up at a party. Brannon testified he had an argument with petitioner while they were in jail together. During this argument, petitioner said he should have shot "Rhett" in the head and would not make that same mistake with Brannon. When Brannon accused petitioner of shooting a 17-year-old girl (presumably the 18-year-old Schwarz), petitioner called him a "snitch." According to Losey, he heard petitioner tell Williams that he had "smoked" a man and a woman in Arcata. The man "got mad because I'm up in there trying to fuck with that little bitch." From these admissions, the jury could infer that petitioner admitted being the perpetrator of the crimes against August, Marcet, and Schwarz. Because there are permissible inferences the jury could draw from the witnesses' testimony, federal habeas relief is not available on petitioner's claim. *Jammal*, 926 F.2d at 920.

Petitioner's contentions that the witnesses were unreliable is unavailing. The jury decides credibility and this jury was instructed to consider the testimony with care and to subject it to corroboration.

The state appellate court's rejection of this claim was reasonable and is entitled to AEDPA deference. This claim is DENIED.

iii. DNA Evidence

Petitioner claims the trial court violated his due process rights by admitting DNA evidence. Petitioner's DNA signature was detected on a Mickey's Malt Liquor bottle found at the Arcata crime scene. (Ans., State Appellate Opinion, Dkt. No. 13-43 at 23.) He was one of two DNA contributors to the sample, petitioner being "the major contributor." (*Id.*) The other contributor was never discovered. The prosecutor provided a report on this evidence to the defense two days before jury selection and one month before trial. (*Id.*)

The defense moved to exclude. (*Id.*) The grounds were that the prosecutor had failed to adhere to the trial court's pretrial discovery orders and had violated petitioner's rights. (*Id.*) The defense also asserted that the evidence caused "irreparable prejudice" to petitioner's case. (*Id.*) This was so because the entire sample had been consumed during testing, preventing the defense from retesting the sample and analyzing the DNA of the other contributor. (*Id.* at 23-24.)

The prosecutor countered that (i) the delay occurred because of a laboratory policy of testing only three items per case, with exceptions entertained on a case-by-case basis; and (ii) the entire sample was consumed entirely because that was the only way to obtain decent results, the first test of the sample having yielded only a partial profile. (*Id.* at 24.)

The trial court admitted the evidence but instructed the jury that in evaluating it to consider the prosecution's failure to disclose the information timely to the defense. (*Id.*) The jury was also instructed it could consider the fact that the prosecution consumed the entire sample, thereby depriving the defense of an opportunity to test it. (*Id.*)

Petitioner claims the admission of the evidence violated his due process right to a fair trial and his rights under *California v. Trombetta*, 467 U.S. 479 (1984), a case which discusses the constitutional duty of states to preserve evidence that "might be expected to play a significant role in the suspect's defense." *Id.* at 488. These claims were rejected on appeal. There was no due process violation. "The defense was not prejudiced by the delay because it was made aware of the DNA evidence during jury selection and the trial did not commence until more than a month later." (Ans., State Appellate Opinion, Dkt. No. 13-43 at 25.)

The appellate court similarly found no *Trombetta* violation. First, the DNA sample was "not apparently exculpatory." (*Id.* at 26.) If the defense had been allowed to test the sample, petitioner might have been eliminated as a contributor or another possible contributor may have been discovered. (*Id.* at 26-27.) All this was judged immaterial. "[W]hile [petitioner's] presence in the house was (further) confirmed by the presence of his DNA on the bottle, the converse would not have been true: if the bottle did not contain [petitioner's] DNA, or if tested positive for another individual's, that would not establish [petitioner] was not present." (*Id.* at 27.) The beer bottle was not "a 'smoking gun' that tied whoever had been drinking from it to the murder of Schwarz and Marcet." (*Id.*)

Second, no prejudice ensued, according to the state appellate court. "Considerable evidence" established petitioner's presence at the Arcata house, including petitioner's own admissions. (*Id.*) Furthermore, he was tied to the beer bottle itself by other evidence. (*Id.*) Security camera footage from a nearby store showed petitioner buying a Mickey's before the shooting. (*Id.*) Butler-Smith testified that petitioner referred to the beer bottle during his description of the shooting. (*Id.*)

Because the state court's conclusions are reasonable, petitioner is not entitled to federal habeas relief. First, the due process claim was reasonably rejected. Simply put, there was no prejudice. Petitioner's presence at the Arcata house was established by considerable evidence apart from his DNA on the beer bottle, including by his own

statements.

Second, the state court's rejection of the *Trombetta* claim was reasonable. The government has a duty under due process to preserve material evidence, i.e., evidence whose exculpatory value was apparent before it was destroyed and that is of such a nature that the defendant cannot obtain comparable evidence by other reasonably available means. *Trombetta*, 467 U.S. at 489. The exculpatory value of the evidence must be "apparent"; the possibility that evidence could have exculpated a defendant if preserved and tested is insufficient to satisfy the standard of constitutional materiality in *Trombetta*. *Arizona v. Youngblood*, 488 U.S. 51, 56 n.* (1988). In addition, a petitioner must show bad faith on the part of the police in destroying the evidence. "Unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." *Id.* at 58. "The presence or absence of bad faith by the police for purposes of the Due Process Clause must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed." *Id.* at 56 n.* (citations removed).

No *Trombetta* violation occurred. The evidence was not apparently exculpatory. Petitioner's DNA was found in the sample. Even if further testing had eliminated him as the contributor, it would not exculpate him. His own admissions and other evidence placed him at the Arcata house. Furthermore, he has not shown the state acted in bad faith. The record indicates the first test provided no valuable results, a fact that required the state to use the entire sample for further testing.

The state court's rejection of petitioner's claims was reasonable and is entitled to AEDPA deference. Petitioner's claims are DENIED.

CONCLUSION

The state court's denial of petitioner's claims did not result in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, nor did it result in a decision that was based on an unreasonable determination of the facts in

light of the evidence presented in the state court proceeding. Accordingly, the petition is DENIED.

A certificate of appealability will not issue. Reasonable jurists would not "find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Petitioner may seek a certificate of appealability from the Ninth Circuit Court of Appeals.

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

IT IS SO ORDERED.

Dated: March 20, 2019

RICHARD SEEBORG
United States District Judge

United States District Court
Northern District of California