FILED

JAN 19 2024

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DONTE SOLOMON,

Petitioner-Appellant,

v.

ROBERT ST. ANDRE, Acting Warden, High Desert State Prison,

Respondent-Appellee.

No. 22-56055

D.C. No. 2:22-cv-02409-ODW-MAR
Central District of California,
Los Angeles

ORDER

Before: TASHIMA and BERZON, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 9) 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.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DONTE LATHELL SOLOMON, Petitioner, v. BRIAN KIBLER, Respondent.	Case No. CV 22-02409-ODW (MAR) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable Otis D. Wright, II, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California.

I.

SUMMARY OF RECOMMENDATION

Petitioner Donte Lathell Solomon ("Petitioner"), with the assistance of counsel, has filed a Petition for Writ of Habeas Corpus by a Person in State Custody ("Petition") pursuant to 28 U.S.C. § 2254, challenging his 2019 state conviction for

second-degree murder. ECF Docket No. ("Dkt.") 1 at 2–3. Petitioner asserts one claim of instructional error.

For the reasons that follow, the Court recommends: (1) accepting this Report and Recommendation; (2) **DENYING** the Petition; (3) **DISMISSING** this action with prejudice; and (4) **DENYING** a Certificate of Appealability.

II.

PROCEDURAL HISTORY

On May 28, 2019, following a jury trial in the Los Angeles County Superior Court, Petitioner was convicted of second-degree murder, attempted murder, and being a felon in possession of a firearm. Dkt. 1 at 2–3; Lodged Document ("Lodg.")[1] 3 at 10; CT[2] at 144–48. The jury also found true that Petitioner both personally used a firearm, and personally and intentionally discharged a firearm causing death. Lodg. 6 at 2; CT at 150. Petitioner admitted he had one (1) prior serious felony conviction within the meaning of the Three Strikes Law (Cal. Pen. Code § 667(d)), and four (4) prior convictions for which prison terms were served (Id., § 667.5(b)). CT at 153–54, 166. The court sentenced Petitioner to a prison term of fifty-five (55) years to life, plus thirty-four (34) years. Id. at 177; Lodg. 6 at 2; Dkt. 1 at 3. In addition, the court

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[1] The Court's citations to Lodged Documents refer to documents lodged in support of Respondent's Answer. See Dkt. 6. Respondent identifies the documents as follows:

(1) Reporter's Transcript, six volumes, in Los Angeles County Superior Court case no. BA469798 ("RT");
(2) Clerk's Transcript, two volumes, in Los Angeles County Superior Court case no. BA469798 ("CT");
(3) Appellant's Opening Brief, filed in California Court of Appeal case no. B299423 ("Lodg. 3");
(4) Respondent's Brief, filed in California Court of Appeal case no. B299423 ("Lodg. 4");
(5) Reply Brief, filed in California Court of Appeal case no. B299423 ("Lodg. 5");
(6) Opinion, filed in California Court of Appeal case no. B299423 ("Lodg. 6");
(7) Petition for Review, filed in California Supreme Court case no. S266164 ("Lodg. 7");
(8) Order denying Petition for Review in California Supreme Court case no. S266164 ("Lodg. 8").

Dkt. 6 at 1–2.

[2] The Court's citations to the RT and CT are to the pagination in those respective transcripts. All other citations to electronically filed documents refer to the CM/ECF pagination.

imposed a $120 court facilities assessment, a $160 court operations assessment, a $300 restitution fine, and a $300 parole revocation restitution fine. Lodg. 6 at 2; Lodg. 2, CT at 176.

Petitioner appealed his conviction on the following grounds: (1) the trial court erred in failing to instruct the jury on heat of passion voluntary manslaughter as a lesser included offense to murder; (2) the trial court erred in failing to hold a hearing on Petitioner's ability to pay the assessments and fines; and (3) Petitioner's one-year prior prison term sentence enhancements should be stricken pursuant to California Senate Bill No. 136 ("S.B. 136"). Lodg. 6 at 2–3; Lodg. 3 at 17, 25, 31. The California Court of Appeal ordered that Petitioner's one-year enhancements be stricken and affirmed the judgement in all other respects. Lodg. 6 at 13.

Petitioner filed a petition for review before the California Supreme Court to review the California Court of Appeal's decision. Lodg. 7. On January 27, 2021, the state supreme court summarily denied review. Lodg. 8.

Petitioner did not seek state habeas relief.

On April 11, 2022, with the assistance of counsel, Petitioner filed the instant Petition. Dkt. 1. On June 2, 2022, Respondent filed an Answer. Dkt. 5. On June 27, 2022, Petitioner filed a Traverse. Dkt. 7. Thus, the matter stands submitted.

III.

SUMMARY OF FACTS

For a summary of the facts, this Court relies on the California Court of Appeal's opinion as those facts pertain to Petitioner's claims:

> A. Prosecution Evidence
>
> In July 2018, Donniesha Gregory lived with two of her children in an apartment on Dalton Avenue in Los Angeles. She was in a relationship with R.P. Previously, she had dated defendant, a Black P-Stone gang member. Gregory's friend C.C. had seen signs that R.P. was associated with the Rolling 60's gang.

On July 16, 2018, R.P. and C.C. visited Gregory at her home. Gregory's cousin M.S. was there. Gregory, R.P., C.C., and M.S. spoke for about an hour in Gregory's bedroom. At some point M.S. left the room.

Just after M.S. left the room, C.C. and R.P. got up to leave, but then heard a "commotion"—someone was driving a car up and down the street and honking its horn. C.C. heard defendant calling Gregory's name, trying to convince her to come outside. Gregory asked C.C. and R.P. to stay. R.P., who was armed with a nine-millimeter handgun, sat on an ottoman by the bedroom door.

At first, Gregory ignored defendant but eventually went to the window. Defendant asked Gregory to open the door. He then began yelling obscenities such as "'Fuck Naps'" and "'Fuck Crabs.'" "Naps" was a derogatory term for the Neighborhood Crips gang and "Crabs" was a derogatory term for the Crips gang. Gregory begged defendant to leave, saying that her children were in the home. Defendant responded, "I don't give a fuck."

At about 9:45 p.m., Gregory's father and his friend arrived at Gregory's home. Before they entered Gregory's home, the father heard Gregory and defendant arguing. Gregory was asking defendant to leave—"like she still [did not] want to be bothered with him." The father tried to calm defendant, telling him, "'Man, save this for another day. You can come back tomorrow.'" The father's friend described Gregory and defendant's interaction as "talking" or "arguing."

R.P. got up from the ottoman and stood beside Gregory. C.C. surmised that R.P. was also going to try to convince defendant to leave. C.C. heard Gregory tell defendant, "'I don't care about a gun,'" and then gunshots. Gregory suffered a single, fatal gunshot wound to the head.

B. Defense Evidence

Defendant testified that on July 16, 2018, he and Gregory were in an "open" relationship, which meant that they "saw" other people. At about 8:50 a.m. that morning, he went to Gregory's home to check on her—she did not have a cell phone and he had not seen her for three or four days. Gregory asked defendant for money. Defendant said he did not have money to give her, but would be able to give her some after work.

Defendant got off work at around 1:00 p.m. and went to Gregory's home to give her money, but no one was there. He then drove to a park where

he stayed for about four hours and smoked a couple of marijuana "blunts" and drank a couple of beers. At about 4:00 p.m., he drove to Gregory's home, but she was not there, so he went to a bar. He stayed at the bar for about five hours and had five or six shots of Remy.

Defendant left the bar and went to Gregory's home. He wanted to give her money and spend time with her. Although he was intoxicated, he was not so intoxicated that he could not drive or understand what was going on. Before he pulled into the driveway, he turned off his headlights. Whenever he prepared to park, he turned off his headlights.[3]

When defendant pulled onto Dalton Avenue, he saw R.P.'s Land Rover parked on the street. Defendant met R.P. through Gregory—she had been R.P.'s methamphetamine dealer when she lived with defendant. Seeing R.P.'s car made defendant feel "a little like on edge . . . a little afraid." The reason for defendant's fear was that a couple of months prior, he and R.P. had an "issue" near a gas station when R.P. jumped out of his car, pulled a silver gun, and told defendant he was going to "'bust'" on defendant—meaning he was going to shoot defendant. Defendant got into a car driven by defendant's "other girlfriend" W.M. and they drove away, chased by R.P. Due to W.M.'s "slick driving," she and defendant were able to escape.

Although defendant had not had other "issues" with R.P., it had been awkward for defendant when he was released from prison and learned that R.P. was living with Gregory. He really did not like it, but understood that "when you go to prison, sometimes, you know, things happen." Even though R.P. was staying with Gregory, defendant "didn't have a problem with [Gregory] or anything."

Despite his fear of R.P., defendant pulled into Gregory's driveway and got out of his car. Defendant was a little disappointed and felt disregarded when he saw R.P.'s car. He thought Gregory was disloyal for allowing R.P. into her home after R.P. had pulled a gun on him and also on Gregory and her family members, but he was not mad at her. Defendant wanted Gregory to come outside and tell him when her company was leaving and when he could see her. Because she did not have a telephone, he had been unable to speak with her—he really cared about her and loved her.

[3] On cross-examination, defendant admitted that a surveillance video of his car pulling up to Gregory's home showed his headlights were turned off down the street.

> Gregory came to the window, and defendant expressed his displeasure that R.P. was in her home. Out of jealousy and fear, he said foolish things like "'Fuck Crabs.'" Defendant was holding a nine-millimeter, semiautomatic handgun because he knew R.P. was there and he was afraid. He had the handgun with him because he had been shot, stabbed, jumped, and threatened by people with guns in the past.
>
> At some point, R.P. appeared in the window with a silver object in his hand. Because R.P. had previously pulled a silver gun on defendant, defendant believed the object was a gun. R.P. was pointing the gun out of the window at defendant. Defendant was afraid.
>
> When defendant saw R.P. pointing the gun at him, he fired a shot "up towards the air," not trying to hurt anyone, but as a warning to R.P. to move away from the window. Defendant's finger remained on the trigger, and when he leaned toward his car because he was in danger, he fired a second shot by accident—his handgun was a semiautomatic and "sometimes, they just shoot on their own." He did not shoot at the window or to kill anyone when he fired the two shots. Instead, he fired his gun because he was concerned for his own safety.
>
> Defendant got into his car and drove away. He returned because he heard a shot after his second shot and then heard Gregory scream. As he drove up, however, he saw someone running down the driveway and he heard a couple of shots, so he drove away.

Lodg. 6 at 3–7.

IV.

PETITIONER'S CLAIM FOR RELIEF

Petitioner presents a single claim, that he was denied his federal constitutional right to due process under the Fifth, Sixth, and Fourteenth Amendments because the trial court failed to instruct the jury on heat of passion voluntary manslaughter as a lesser included offense of murder (Dkt. 1 at 9) or as a defense (Dkt. 7 at 6).

Respondent contends Petitioner's claim is not cognizable on habeas review, fails on the merits, and is barred by Teague v. Lane, 489 U.S. 228 (1989) (habeas corpus cannot be used as a vehicle to create new constitutional rules of criminal procedure barring certain exceptions). Dkt. 5 at 2–3, 12, 15–18.

V.

STANDARD OF REVIEW

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a federal court may not grant habeas relief on a claim adjudicated on its merits in state court unless the adjudication:

> (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).

"Clearly established Federal law" for purposes of § 2254(d)(1) consists of "the holdings, as opposed to the dicta, of th[e] [United States Supreme] Court's decisions" in existence at the time of the state court adjudication. Williams v. Taylor, 529 U.S. 362, 412 (2000). However, "circuit court precedent may be 'persuasive' in demonstrating what law is 'clearly established' and whether a state court applied that law unreasonably." Maxwell v. Roe, 628 F.3d 486, 494 (9th Cir. 2010).

A state court decision rests on an "unreasonable application" of federal law for purposes of § 2254(d)(1) where a state court identifies the correct governing rule, but unreasonably applies that rule to the facts of the particular case. Andrews v. Davis, 944 F.3d 1092, 1107 (9th Cir. 2019) (citing Williams, 529 U.S. at 407–08). "It is not enough that a federal habeas court concludes 'in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly.'" Id. (citing Lockyer v. Andrade, 538 U.S. 63, 76 (2003)). "The state court's application of clearly established law must be objectively unreasonable." Lockyer, 538 U.S. at 75.

Overall, AEDPA established "a difficult to meet . . . and highly deferential standard for evaluating state-court rulings, which demands that state-court decisions

be given the benefit of the doubt." Cullen v. Pinholster, 563 U.S. 170, 181 (2011) (internal citation and quotation marks omitted). "That deference, however, 'does not by definition preclude relief.'" Andrews, 944 F.3d at 1107 (citing Miller-El v. Cockrell, 537 U.S. 322, 340 (2003)).

Where the last state court disposition of a claim is a summary denial, this Court must review the last reasoned state court decision addressing the merits of the claim under AEDPA's deferential standard of review. Maxwell, 628 F.3d at 495; see also Berghuis v. Thompkins, 560 U.S. 370, 380 (2010); Ylst v. Nunnemaker, 501 U.S. 797, 803–04 (1991).

Here, the California Court of Appeal's November 2020 opinion on direct review stands as the last reasoned decision. Lodg. 6. Thus, Petitioner's claim will be reviewed under AEDPA's deferential standard of review for claims "adjudicated on the merits." 28 U.S.C. § 2254(d); Harrington v. Richter, 562 U.S. 86, 99 (2011).

VI.

DISCUSSION

A. INSTRUCTIONAL ERROR CLAIM

1. Applicable law

The Supreme Court has never held that a petitioner in a noncapital case is entitled to a lesser included offense instruction; in fact, the Supreme Court has expressly left the question open. See Beck v. Alabama, 447 U.S. 625, 638 n.14 (1980) (overturning conviction for failure to provide instruction on lesser included offense in a capital case, but declining to decide whether the due process clause requires a lesser included offense instruction in a noncapital case). Furthermore, the Ninth Circuit has held that a state court's failure to instruct on a lesser included offense does not present a federal constitutional question cognizable in a federal habeas proceeding. See Solis v. Garcia, 219 F.3d 922, 929 (9th Cir. 2000); United States v. Rivera-Alonzo, 584 F.3d 829, 834 n.3 (9th Cir. 2009) ("[W]e have not resolved whether there is a constitutional right to a lesser included instruction in noncapital cases"). Additionally,

the Ninth Circuit has indicated that such a holding may be Teague-barred. See Solis, 219 F.3d at 929; Turner v. Marshall, 63 F.3d 807, 819 (9th Cir. 1995) (noting that the Ninth Circuit has declined to find constitutional error arising from failure to give lesser included instructions in noncapital cases and stating such a holding would create a new rule in violation of Teague), overruled on other grounds by Tolbert v. Page, 182 F.3d 677 (9th Cir. 1999); see also Teague, 489 U.S. at 316 (1989) (habeas corpus cannot be used as a vehicle to create new constitutional rules of criminal procedure barring certain exceptions).

In contrast, the Ninth Circuit has found a violation of clearly established federal law where the trial court failed to instruct the jury on a defense that was reasonably supported by the evidence. See Bradley v. Duncan, 315 F.3d 1091, 1098–1100 (9th Cir. 2002) (citing Conde v. Henry, 198 F.3d 734, 739 (9th Cir. 1999)). However, failure to instruct on a defense theory only rises to the level of constitutional error if "the theory is legally sound and the evidence in the case makes [the theory] applicable." Clark v. Brown, 450 F.3d 898, 904–05 (9th Cir. 2006) (citation omitted).

In California, heat of passion voluntary manslaughter is a lesser included offense of murder. People v. Cole, 22 Cal.4th 1158, 1215 (2004). To prevail on a claim of heat of passion voluntary manslaughter both an objective and a subjective element must be met. People v. Moye, 47 Cal.4th 537, 549 (2009). The objective element requires "sufficient provocation that would cause an ordinary person . . . to act rashly or without due deliberation and reflection." Id. at 550. The subjective element requires that the Petitioner "killed while 'under the influence of a strong passion' induced by such provocation. [Citation omitted.]." Id.

Where there is alleged instructional error, the claim must be considered in the context of the instructions as a whole and the trial record. Estelle v. McGuire, 502 U.S. 62, 72 (1991); Cupp v. Naughten, 414 U.S. 141, 147 (1973). "Where the alleged error is the failure to give an instruction the burden on Petitioner is 'especially

heavy,'" Hendricks v. Vasquez, 974 F.2d 1099, 1106 (9th Cir. 1992) (as amended) (quoting Henderson v. Kibbe, 431 U.S. 145, 155 (1977)), because "[a]n omission, or an incomplete instruction, is less likely to be prejudicial than a misstatement of the law." Kibbe, 431 U.S. at 155. Additionally, habeas relief is warranted only where the error had "substantial and injurious effect or influence in determining the jury's verdict." Hedgpeth v. Pulido, 555 U.S. 57, 58, 61–62 (2008) (per curiam) (quoting Brecht v. Abrahamson, 507 U.S. 619, 623 (1993)); see also Clark v. Brown, 450 F.3d 898, 905 (9th Cir. 2006) (as amended).

2. State court decision

The California Court of Appeal rejected Petitioner's claim as follows:

> Heat of passion voluntary manslaughter has an objective element and a subjective element. (People v. Moye (2009) 47 Cal.4th 537, 549 (Moye).) The objective element is satisfied when the victim engaged in conduct "sufficiently provocative that it would cause an ordinary person of average disposition to act rashly or without due deliberation and reflection." (Id. at p. 550; People v. Lee (1999) 20 Cal.4th 47, 60 ["The provocation must be such that an average, sober person would be so inflamed that he or she would lose reason and judgment"].) The subjective element is satisfied when the defendant "killed while under 'the actual influence of a strong passion' induced by such provocation. [Citation.]" (Moye, supra, 47 Cal.4th at p. 550.)
>
> Defendant contends the elements of heat of passion voluntary manslaughter were present because he was in a romantic relationship with Gregory; he went to Gregory's home where he found his rival, R.P.; and he exchanged angry words with Gregory when she would not let him in the house. Further, he yelled obscenities at R.P. and fired his gun only when R.P. came to the window. According to defendant, "there was strong evidence that [defendant] was provoked by seeing his love interest with his rival and was overcome with jealousy and anger."
>
> There was not substantial evidence of the subjective element of heat of passion voluntary manslaughter to require a sua sponte jury instruction. Defendant testified that he and Gregory were in an "open" relationship—they dated other persons. He knew before he went to Gregory's home that Gregory was dating R.P. and, although he did not like that they were

> dating, he understood that things sometimes happen when you go to prison. Defendant was not mad at Gregory when he saw R.P.'s car at her home. He fired the first shot in the air, and not at the window, to warn R.P. to move away from the window. He fired the second shot accidentally. Given the evidence and "defendant's own testimony, no reasonable juror could conclude defendant acted ""rashly or without due deliberation and reflection, and from this passion rather than from judgment . . .'" [citations]' [citation] . . . ." (Moye, supra, 47 Cal.4th at p. 554.)

Lodg. 6 at 8–9.

3. Analysis

Under 28 U.S.C. § 2254(d)(1), a claim is only cognizable under AEDPA if it "was contrary to, or involved an unreasonable application of, clearly established Federal law as determined by the Supreme Court of the United States."

a. Lesser included offense

Here, the trial court's failure to sua sponte instruct the jury on lesser included offenses is not cognizable on federal habeas review because Petitioner was convicted of a noncapital offense. See, e.g., Solis, 219 F.3d at 929 ("the failure of a state court to instruct on a lesser offense in a noncapital case fails to present a federal constitutional question and will not be considered in a federal habeas corpus proceeding"); see also Walker v. Evans, No. EDCV 06-985 JSL FFM, 2011 WL 2669223 (C.D. Cal. Apr. 19, 2011), report and recommendation adopted, No. EDCV 06-985 JSL FFM, 2011 WL 2669218 (C.D. Cal. July 7, 2011) (holding that, in the Ninth Circuit, the failure to give lesser included offense instructions in non-capital cases presents no federal question.) (citations omitted.). As such, on this theory, the lack of clearly established federal law precludes relief under AEDPA.[4]

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///

[4] Because the claim is not cognizable, it is not necessary to reach Respondent's argument that the claim is Teague-barred.

b. Any reasonably supported defense

Petitioner also contends the trial court's failure to sua sponte instruct the jury on heat of passion voluntary manslaughter violated his Sixth Amendment right to be given an instruction on any reasonably supported defense. Dkt. 7 at 6; see Mathews v. United States, 485 U.S. 58, 63 (1988) ("A [Petitioner] is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor."). For the purposes of determining "clearly established Federal law" under AEDPA, Mathews and its progeny stand for the propositions that a defendant is entitled to a complete and meaningful defense and that failure to instruct on the defense theory can violate due process. See Bradley, 315 F.3d at 1098–1100 (applying Mathews in the context of a trial court's failure to instruct the jury on the defense theory and holding that the state court violated clearly established federal law under AEDPA by rejecting the petitioner's due process claim). However, for the failure to instruct to violate due process, the instruction must, at least, be applicable to the theory of defense. See Clark, 450 F.3d at 904–05. Here, Petitioner has not shown the heat of passion instruction was applicable to the defense theory presented at trial, nor has Petitioner shown the trial court's failure to give the instruction was prejudicial.

Here, Petitioner claims that because a self-defense instruction was given at trial the same evidence necessarily implied a heat of passion, and thus, a heat of passion voluntary manslaughter instruction should have been given as well. Dkt. 1 at 26, 28. Petitioner contends at the time of the shooting he was jealous and enraged after finding Donniesha Gregory ("Gregory"), his partner and the victim, in bed with his rival, R.P. Dkt. 1 at 28.

While courts have found sufficient provocation for a heat of passion instruction in cases where a Petitioner finds a partner in bed with another person, see, e.g., People v. Borcehrs, 50 Cal.2d 321, 329 (1958); People v. Bridgehouse, 47 Cal.2d 406, 407-408 (1965), here, Petitioner unequivocally testified he was not upset or mad

at the time of the shooting. RT at 1922, 1924, 1926, 1935, 1950, 1952, 1954. He testified he was in an open relationship with Gregory and knew about her relationship with R.P. Id. at 144. Petitioner claimed only to be scared for his safety because of altercations he and R.P. had engaged in previously. Id. at 1922, 1924, 1926, 1935, 1950, 1952, 1954. As such, there was no evidence presented that the shot that killed Gregory was due to Petitioner being "under the influence of a strong passion."

On the contrary, Petitioner testified he was not angry or upset, and claimed the gun accidently misfired, because "sometimes, they just shoot on their own." Id. at 1927–28, 1934–35. Therefore, the trial court's failure to sua sponte instruct the jury on heat of passion voluntary manslaughter as a defense could not have violated Petitioner's right to a complete defense because the instructions were unrelated to the defense theory and contrary to Petitioner's testimony.

Additionally, trial counsel's failure to argue for heat of passion voluntary manslaughter also makes it difficult for Petitioner to establish that any alleged error by the court would have been prejudicial. To the contrary, any instruction on heat of passion would likely have had little to no impact on the jury's determination where the defense never argued that theory and Petitioner's own testimony refuted the defense.

As such, the trial court in not giving the heat of passion instruction sua sponte and the California Court of Appeal decision denying relief were not "contrary to" nor "involved an unreasonable application of, clearly established Federal law as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d). Thus, on this record Petitioner's claim fails.

VII.

CERTIFICATE OF APPEALABILITY

Under 28 U.S.C. § 2253(c)(2), a Certificate of Appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." The Supreme Court has held that this standard means a showing that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have

been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" Slack v. McDaniel, 529 U.S. 473, 483–84 (2000). The Court finds that Petitioner has not met the requisite standard. Thus, it is recommended that a certificate of appealability be **DENIED**.

VIII.

RECOMMENDATION

IT IS THEREFORE RECOMMENDED that the District Court issue an Order:

(1) accepting this Report and Recommendation;

(2) **DENYING** the Petition;

(3) **DISMISSING** this action with prejudice; and

(4) **DENYING** a Certificate of Appealability.

Dated: September 14, 2022

HONORABLE MARGO A. ROCCONI
United States Magistrate Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DONTE LATHELL SOLOMON, Petitioner, v. BRIAN KIBLER, Respondent.	Case No. 2:22-CV-02409-ODW (MAR) ORDER ACCEPTING FINDINGS AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition, the records on file, and the Report and Recommendation of the United States Magistrate Judge. The Court has engaged in de novo review of those portions of the Report to which Plaintiff has objected. The Court accepts the findings and recommendation of the Magistrate Judge.

IT IS THEREFORE ORDERED that Judgment be entered (1) denying the Petition for a Writ of Habeas Corpus; and (2) dismissing this action with prejudice.

Dated: October 19, 2022

HONORABLE OTIS D. WRIGHT, II
United States District Judge

JS-6

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DONTE LATHELL SOLOMON, Petitioner, v. BRIAN KIBLER, Respondent.	Case No. 2:22-CV-02409-ODW (MAR) JUDGMENT

Pursuant to the Order Accepting Findings and Recommendation of United States Magistrate Judge,

IT IS HEREBY ADJUDGED that this action is dismissed with prejudice.

Dated: October 19, 2022

HONORABLE OTIS D. WRIGHT, II
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAR 1 2024

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

DONTE SOLOMON,

Petitioner-Appellant,

v.

ROBERT ST. ANDRE, Acting Warden, High Desert State Prison,

Respondent-Appellee.

No. 22-56055

D.C. No. 2:22-cv-02409-ODW-MAR
Central District of California,
Los Angeles

ORDER

Before: OWENS and COLLINS, Circuit Judges.

Appellant's motion for reconsideration (Docket Entry No. 11) is denied. *See* 9th Cir. R. 27-10.

No further filings will be entertained in this closed case.

22-56055

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