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**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

DAVIONE M. McDOWELL,  
Petitioner,  
v.  
W.L. MONTGOMERY, Warden,  
Respondent.

Case No. CV 13-7299 DMG (JCG)

**ORDER ACCEPTING REPORT AND  
RECOMMENDATION OF UNITED  
STATES MAGISTRATE JUDGE AND  
DENYING CERTIFICATE OF  
APPEALABILITY**

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition, the Magistrate Judge’s Report and Recommendation, Petitioner’s Objections to the Report and Recommendation, and the remaining record, and has made a *de novo* determination.

Petitioner’s Objections generally reiterate the arguments made in the Petition, and lack merit for the reasons set forth in the Report and Recommendation. There is one issue, however, that warrants brief amplification here.

In his Objections, Petitioner argues that the Report and Recommendation “ignore[s] the crucial fact” that certain surveillance footage may have been taken, not near the time of the shooting, but rather a week later. (Objections at 5-6.)

Petitioner is mistaken. Instead, the record indicates that video footage was taken near the time of the shooting, and a week later, investigators sought an enhanced photo still from that footage. (Lodg. No. 2, Reporter’s Transcript (“RT”), at 681-82, 711-14,

1 901-904; Lodg. No. 6, California Court of Appeal Opinion, at 3, 7-8.)

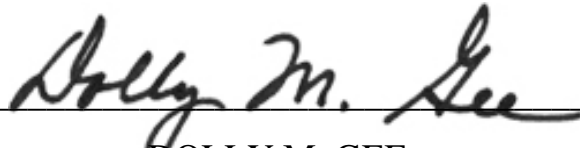
2 Moreover, Petitioner’s counsel raised doubts about the timing of this footage *at*  
3 *trial*. (RT at 901-904.) As a rule, “[i]t is the responsibility of the jury – not the court –  
4 to decide what conclusions should be drawn from evidence admitted at trial.”  
5 *Coleman v. Johnson*, 132 S. Ct. 2060, 2062 (2012) (*per curiam*) (quoting *Cavazos v.*  
6 *Smith*, 132 S. Ct. 2, 4 (2011)). Here, the jury convicted Petitioner after considering not  
7 only the footage, but also the identification testimony of *four* eyewitnesses. (Lodg.  
8 No. 1, Augmented Reporter’s Transcript, at 64-65, 71; RT at 918, 938, 1205, 1279,  
9 1294, 1297.) Hence, the Magistrate Judge correctly found that “viewing the evidence  
10 in the light most favorable to the prosecution, [a] rational trier of fact could have found  
11 the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*,  
12 443 U.S. 307, 319 (1979).

13 Accordingly, IT IS ORDERED THAT:

- 14 1. The Report and Recommendation is approved and accepted;
- 15 2. Judgment be entered denying the Petition and dismissing this action with  
16 prejudice; and
- 17 3. The Clerk serve copies of this Order on the parties.

18 Additionally, for the reasons set forth above and in the Report and  
19 Recommendation, the Court finds that Petitioner has not made a substantial showing of  
20 the denial of a constitutional right. *See* 28 U.S.C. § 2253; Fed. R. App. P. 22(b);  
21 *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). Thus, the Court declines to issue a  
22 certificate of appealability.

23  
24 DATED: November 24, 2014

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26   
27 DOLLY M. GEE  
28 UNITED STATES DISTRICT JUDGE