Argenis Hernandez v. David B Long Doc. 18 Att. 1

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ARGENIS HERNANDEZ, Petitioner, v. DAVID B. LONG, Warden, Respondent.	NO. ED CV 13-994-JAK(E) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable John A. Kronstadt, United States District Judge, pursuant to 28 U.S.C. section 636 and General Order 05-07 of the United States District Court for the Central District of California.

PROCEEDINGS

On June 3, 2013, Petitioner filed a "Petition for Writ of Habeas Corpus by a Person in State Custody" ("the Petition"). The Petition claims that the prosecutor's peremptory challenges of two African-American prospective jurors violated Batson v. Kentucky, 476 U.S. 79

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(1986) ("Batson"). On July 31, 2013, Respondent filed an Answer and a Memorandum of Points and Authorities, and also lodged certain documents. Petitioner did not file a Reply. See "Report and Recommendation of United States Magistrate Judge," filed September 30, 2013, and withdrawn by Minute Order filed October 22, 2013.

BACKGROUND

After the completion of challenges for cause during jury selection, the prospective jury panel for Petitioner's trial included at least two African-Americans: Richard Stroter and Emery Hicks (Lodgment 3 at 107, 113, 169-72). The prosecutor accepted this panel as then constituted (id. at 1169). However, Petitioner's counsel peremptorily challenged Mr. Stroter (id.). As prospective juror Michelle Pinkney, another African-American, took Mr. Stroter's place in the panel, the prosecutor peremptorily challenged Ms. Pinkney (id. at 1170). After Petitioner's counsel peremptorily challenged another prospective juror, the prosecutor again accepted the panel (id.). However, Petitioner's counsel then exercised another peremptory challenge (id.). Ultimately, the prosecution exercised nine peremptory challenges, the third of which challenged Mr. Hicks (id. at 170-76).

After the prosecutor's fourth peremptory challenge, Petitioner's counsel made a Batson motion concerning the prosecutor's challenges to Ms. Pinkney and Mr. Hicks (id. at 172). The following exchange then took place between Petitioner's counsel and the trial judge:

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[Petitioner' counsel]: I didn't see any reason to excuse Ms. Pinkney. She was actually agreeable to both myself and the District Attorney's comments, as well as Mr. Hicks, who was also agreeable to both my and the District Attorney's and didn't show any reason as to why he couldn't be fair.

The Court: Well, you kicked the first black person off. You kicked number 5 [Mr. Stroter] off. He was black; you kicked him.

[Petitioner's counsel]: Okay.

The Court: [The prosecutor] accepted those people. And it wasn't until you kicked other people and changed the mix of the jury that he kicked them off. I don't see any prima facie case here. I'll see you both at 1:30 (id.).

The Clerk of Court then inquired concerning the other 80 prospective jurors who reportedly were waiting (id. at 172-73). Petitioner's counsel indicated "I will be accepting the panel, if that will help the Court" (id. at 173). The following exchange then took place between the prosecutor and the trial judge:

[The prosecutor]: Also, Your Honor - I'm sorry - all the instructions are at my office. I assume the

Court made no prima facie finding; and I appreciate that. I'd also like to elucidate my reasons for excusing those jurors for the record.

The Court: Go ahead. You may do so.

[The prosecutor]: Thank you very much, Your Honor. I just wanted to make clear that I did, as the Court indicated, accept both of those jurors.[1] When the balance of the jury changed, I thought that each of them at a different stage became problematic for me. I spoke to them both during voir dire. I didn't feel a strong connection with either. Mr. Hicks had a son who has killed a man and is also doing time in prison. Verbally, he said he would not feel sympathy toward the defendant. I didn't feel that was a strong commitment from him. And so after the balance of the jury changed, I no longer felt comfortable with him on the jury. A similar issue with Ms. Pinkney. I spoke to her, and she seemed acceptable as a juror, but there was not - I didn't get a strong sense of her dedication to following the law when she disagreed with

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[1] [In fact, the prosecutor accepted a prospective panel that included Mr. Stroter and twice accepted prospective panels that included Mr. Hicks, but never accepted a prospective panel that included Ms. Pinkney].

it, and just her general demeanor when I spoke with her led me to believe that she would not be a suitable juror.

The Court: Okay. Thank you. Court is in recess (id.).

Following his conviction, Petitioner renewed the Batson claim on direct appeal (Lodgments 4 and 6). The California Court of Appeal rejected the claim in a reasoned decision (Lodgment 7). The California Supreme Court summarily denied Petitioner's petition for review (Lodgments 8 and 9). Petitioner did not file any habeas corpus petition in state court (Petition at 3). Petitioner never sought post-conviction discovery in state court.

STANDARD OF REVIEW

Under the "Antiterrorism and Effective Death Penalty Act of 1996" ("AEDPA"), a federal court may not grant an application for writ of habeas corpus on behalf of a person in state custody with respect to any claim that was adjudicated on the merits in state court proceedings unless the 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); Woodford v. Visciotti, 537 U.S. 19, 24-26 (2002); Early v. Packer, 537 U.S. 3, 8 (2002); Williams v. Taylor, 529 U.S. 362, 405-09 (2000).

"Clearly established Federal law" refers to the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision on the merits. Greene v. Fisher, 132 S. Ct. 38, 44 (2011); Lockyer v. Andrade, 538 U.S. 63, 71-72 (2003). A state court's decision is "contrary to" clearly established Federal law if: (1) it applies a rule that contradicts governing Supreme Court law; or (2) it "confronts a set of facts . . . materially indistinguishable" from a decision of the Supreme Court but reaches a different result. See Early v. Packer, 537 U.S. at 8 (citation omitted); Williams v. Taylor, 529 U.S. at 405-06.

Under the "unreasonable application prong" of section 2254(d)(1), a federal court may grant habeas relief "based on the application of a governing legal principle to a set of facts different from those of the case in which the principle was announced." Lockyer v. Andrade, 538 U.S. at 76 (citation omitted); see also Woodford v. Visciotti, 537 U.S. at 24-26 (state court decision "involves an unreasonable application" of clearly established federal law if it identifies the correct governing Supreme Court law but unreasonably applies the law to the facts). A state court's decision "involves an unreasonable application of [Supreme Court] precedent if the state court either unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply, or unreasonably refuses to extend that principle to a new context where it should apply." Williams v. Taylor, 529 U.S. at 407 (citation omitted).

"In order for a federal court to find a state court's application of [Supreme Court] precedent 'unreasonable,' the state court's

decision must have been more than incorrect or erroneous." Wiggins v. Smith, 539 U.S. 510, 520 (2003) (citation omitted). "The state court's application must have been 'objectively unreasonable.'" Id. at 520-21 (citation omitted); see also Waddington v. Sarausad, 555 U.S. 179, 190 (2009); Davis v. Woodford, 384 F.3d 628, 637-38 (9th Cir. 2004), cert. dism'd, 545 U.S. 1165 (2005). "Under § 2254(d), a habeas court must determine what arguments or theories supported, . . . or could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." Harrington v. Richter, 131 S. Ct. 770, 786 (2011). This is "the only question that matters under § 2254(d)(1)." Id. (citation and internal quotations omitted). Habeas relief may not issue unless "there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [the United States Supreme Court's] precedents." Id. at 786-87 ("As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.").

In applying these standards, the Court looks to the last reasoned state court decision. Delgadillo v. Woodford, 527 F.3d 919, 925 (9th Cir. 2008). In the present case, the last reasoned state court decision was the decision of the California Court of Appeal.

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GENERAL LAW OF BATSON

The Batson decision established a three-step process governing claims that the prosecutor used a peremptory challenge to remove a juror because of race. See Snyder v. Louisiana, 552 U.S. 472, 476-77 (2008); Miller-El v. Dretke, 545 U.S. 231, 239 (2005); Kesser v. Cambra, 465 F.3d 351, 359 (9th Cir. 2006) (en banc).[2] In the first step, the defendant must establish a prima facie case of purposeful discrimination. See Snyder v. Louisiana, 552 U.S. at 476-77; Batson, 476 U.S. at 93-95. To establish a prima facie case, the defendant must show that the prosecutor peremptorily challenged a juror or jurors of a particular race, and that, considering the totality of the circumstances, "these facts and other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race." Batson, 476 U.S. at 94-97. Once a prima facie case has been established, the burden of production shifts to the prosecution in the second step to "come forward with a race-neutral explanation" for the peremptory challenge. See Snyder v. Louisiana, 552 U.S. at 476-77; Batson, 476 U.S. at 97. If the prosecution meets this burden, the defendant then bears the burden at the third step to prove that the prosecutor's proffered reason was pretextual, and that the real reason for the peremptory challenge was racial discrimination. See Miller-El v. Cockrell, 537 U.S. 322, 338-29 (2003); Purkett v. Elem, 514 U.S. 765,

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[2] The same process also applies to a claim that a prosecutor used a peremptory challenge to remove a juror because of gender. See J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 129 (1994).

767-68 (1995); Ali v. Hickman, 584 F.3d 1174, 1180 (9th Cir. 2009), cert. denied, 559 U.S. 1045 (2010). "[T]he ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." Purkett v. Elem, 514 U.S. at 768 (citation omitted).

SUMMARY OF THE CALIFORNIA COURT OF APPEAL'S DECISION

In its decision, the California Court of Appeal accurately recited the applicable general law of Batson, quoting from Johnson v. California, 545 U.S. 162, 168 (2005) (Lodgment 7 at 7-8).[3] The Court of Appeal held that Petitioner had not shown that the relevant facts gave rise to an "inference of discriminatory purpose," and therefore failed to establish a prima facie case at the first step of the Batson analysis (Lodgment 7 at 10-11). The Court of Appeal expressly rejected Petitioner's argument that the prosecutor's volunteering of race-neutral reasons for the peremptory challenges had mooted the issue of whether Petitioner had established a prima facie case (Lodgment 7 at 8-10).

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[3] Prior to Johnson v. California, California state courts had been applying an erroneous standard in analyzing the prima facie issue, requiring that the party alleging discrimination show a "strong likelihood" of discrimination. See People v. Wheeler, 22 Cal. 3d 258, 280, 148 Cal. Rptr. 890, 583 P.2d 748 (1978); see also Wade v. Terhune, 202 F.3d 1190, 1197 (9th Cir. 2000) (holding that the "strong likelihood" standard was "impermissibly stringent" and did not comport with Batson's "reasonable inference" standard). In Johnnson v. California, 545 U.S. at 168, the United States Supreme Court disapproved the "strong likelihood" standard as inconsistent with Batson.

DISCUSSION

For the reasons discussed below, the Petition should be denied and dismissed with prejudice.

I. The California Court of Appeal's Refusal to Deem the Prima Facie Issue Moot Was Not Contrary to, or an Unreasonable Application of, Clearly Established Federal Law as Determined by the United States Supreme Court.

Petitioner argues that the prosecutor's mere volunteering of race-neutral reasons for the peremptory challenges to Ms. Pinkney and Mr. Hicks mooted the issue of whether Petitioner had established a prima facie case at the first step of the Batson analysis. As discussed below, the Court of Appeal's rejection of this argument was not unreasonable under the AEDPA standard of review.

In Hernandez v. New York, 500 U.S. 352 (1991), a plurality of the United States Supreme Court held that "[o]nce a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot." Id. at 359; see also Stubbs v. Gomez, 189 F.3d 1099, 1104 (9th Cir. 1999), cert. denied, 531 U.S. 832 (2000) (applying this rule of mootness where the ruling on the ultimate question of intentional discrimination came from the district court after an evidentiary hearing, rather than from the trial

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court).[4]

The present case is materially distinguishable from Hernandez v. New York because Petitioner's trial court never "ruled on the ultimate question of intentional discrimination." See Lodgment 3 at 172-73; Lodgment 7 at 9. The prosecutor volunteered the race-neutral explanations after the trial court expressly had ruled there was no prima facie case. Id. Petitioner's counsel did not contest the race-neutral explanations given, and the trial court never proceeded to the third step of the Batson analysis. Id. Similarly, the California Court of Appeal rejected Petitioner's Batson claim solely because of Petitioner's failure to carry his burden of demonstrating a prima facie case (Lodgment 7 at 8-11).

No United States Supreme Court decision has clearly established the proposition that the prima facie issue is moot, where, as here: (1) the trial court expressly found no prima facie case; (2) the prosecutor then stated race-neutral reasons for the peremptory challenges; and (3) the trial court never evaluated those reasons or otherwise reached the third step in the Batson analysis. In fact, many courts have held that the prima facie issue is not moot under these circumstances. See, e.g., United States v. Ervin, 266 Fed. App'x 428, 433 (6th Cir.), cert. denied, 554 U.S. 926 (2008); Melvin

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[4] The Stubbs v. Gomez decision predated the United States Supreme Court's decision in Cullen v. Pinholster, 131 S. Ct. 1388, 1400 (2011) (precluding the district court from going beyond the evidence that was before the state court when reviewing a state court's ruling on the merits of a petitioner's claim).

v. Clark, 2012 WL 4482038, at *11 n.10 (E.D. Cal. Sept. 28, 2012); Dixon v. United States, 2012 WL 3263981, at *4 n.5 (N.D. Ga. July 18, 2012); adopted, 2012 WL 3263970 (N.D. Ga. Aug. 9, 2012); People v. Howard, 42 Cal. 4th 1000, 1018, 71 Cal. Rptr. 3d 264, 175 P.3d 13, cert. denied, 555 U.S. 946 (2008); Moxley v. Bennett, 291 F. Supp. 2d 212, 218 (W.D.N.Y. Aug. 27, 2003); People v. Welch, 20 Cal. 4th 701, 746, 85 Cal. Rptr. 2d 203, 976 P.2d 754 (1999), cert. denied, 528 U.S. 1154 (2000); People v. Ocasio, 253 A.D.2d 720, 678 N.Y.S.2d 257 (N.Y.A.D. 1998); State v. Ross, 674 So.2d 489, 493 n.4 (La. App. 1996).

Therefore, the Court of Appeal's refusal to deem the prima facie issue moot under the circumstances of Petitioner's case was not contrary to, or an objectively unreasonable application of, any clearly established Federal law as determined by the United States Supreme Court. See 28 U.S.C. § 2254(d); Harrington v. Richter, 131 S. Ct. at 785-87.

II. The California Court of Appeal's Determination that Petitioner Failed to Carry His Burden of Establishing a Prima Facie Case of Discrimination was not Unreasonable.

To establish a prima facie case, a party must show that: (1) the prospective juror was a member of a cognizable racial group; (2) the prosecutor used a peremptory challenge to remove the juror; and (3) the totality of the circumstances raises an inference that the challenge was motivated by race. Boyd v. Newland, 467 F.3d 1139, 1143 (9th Cir. 2006) (as amended), cert. denied, 550 U.S. 933 (2007).

Here, it is undisputed that Ms. Pinkney and Mr. Hicks were African-Americans and that the prosecutor used peremptory challenges to remove them. The only disputed issue is whether the "totality of the circumstances" raises an inference that either challenge was motivated by race.

In determining this issue, the court ordinarily may engage in a statistical analysis comparing the number of minority prospective jurors challenged to the number of non-minority prospective jurors challenged. See id. at 1147. The court also ordinarily conducts a comparative analysis, comparing the circumstances of the excluded juror(s) with the circumstances of non-minority jurors whom the prosecutor did not exclude. Id. at 1148-49. The court may consider the issue in light of the facts at the time of the Batson motion and also in light of subsequent voir dire proceedings. Id. at 1151; Wade v. Terhune, 202 F.3d at 1198.

On habeas corpus, the court reviews deferentially the state court's determination of whether a prima facie case of discrimination under Batson was established. Tolbert v. Page, 182 F.3d 677, 685 (9th Cir. 1999) (en banc). The state court's determination is "presumed to be correct" and the petitioner has "the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e); see Tolbert v. Page, 182 F.3d at 685.

In order to establish a prima facie case, a defendant must show more than the mere fact that the prosecutor removed "one or more [African-Americans] from the jury." United States v. Vasquez-Lopez,

22 F.3d 900, 902 (9th Cir.), cert. denied, 513 U.S. 891 (1994); see also Williams v. Woodford, 384 F.3d 567, 584 (9th Cir. 2002), cert. denied, 546 U.S. 934 (2005) ("Although a pattern of strikes against African-Americans provides support for an inference of discrimination," the petitioner "must point to more facts than the number of African-Americans struck to establish such a pattern"). Thus, the mere fact that the prosecutor peremptorily challenged Ms. Pinkney and Mr. Hicks did not establish a prima facie case.

In some circumstances, a statistical disparity between minority prospective jurors and non-minority prospective jurors may suffice to establish a prima facie case. See, e.g., Williams v. Runnels, 432 F.3d 1102, 1107 (9th Cir. 2006). Here, however, the statistical evidence is almost non-existent. Petitioner does not allege, and the record does not reflect, the race of any prospective juror other than Mr. Stroter, Ms. Pinkney and Mr. Hicks. The California Court of Appeal reasonably observed the inadequacy of the record in this regard (Lodgment 7 at 10). The strictures of the AEDPA prevent the federal court from attempting to augment this meager factual record, even if augmentation were feasible. See Cullen v. Pinholster, 131 S. Ct. at 1400; Gulbrandson v, Ryan, 711 F.3d 1026, 1042 n.5 (9th Cir. 2013) (Pinholster's preclusion of a federal evidentiary hearing applies to section 2254(d)(2) claims as well as to section 2254(d)(1) claims).[5]

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[5] The record's failure to identify the race of prospective jurors other than Mr. Stroter, Ms. Pinkney and Mr. Hicks also frustrates any attempt to engage in a comparative analysis of the prospective jurors.

In the trial court, counsel for Petitioner did little to attempt to establish a prima facie case. Counsel merely pointed out the race of Ms. Pinkney and Mr. Hicks and claimed that both of these prospective jurors' answers to voir dire questioning had been "agreeable" (Lodgment 7 at 172). Such a showing typically falls short of establishing a prima facie case. See, e.g., United States v. Ponce, 51 F.3d 820, 830 (9th Cir. 1995) (where the prosecutor challenged a white juror, then an African-American juror, and three African-Americans remained on the jury, the defendant's argument that the African-American juror was "totally unobjectionable" held insufficient to establish a prima facie case); United States v. Young-Bey, 893 F.2d 178, 180 (8th Cir. 1990) ("To establish a prima facie case under Batson the defendant must point to more than the bare fact of the removal of certain venirepersons and the absence of an obvious valid reason for the removal").

Certain circumstances in the present case tend to refute Petitioner's suggestion of a discriminatory motivation in the prosecutor's exercise of peremptory challenges. Notably, the prosecutor repeatedly accepted panels comprised in part of African-American prospective jurors, including Mr. Hicks. Although not necessarily dispositive, such acceptances carry significant weight. See, e.g., Aleman v. Uribe, 723 F.3d 976, 983 (9th Cir. 2013), pet. for cert. filed (Sept. 12, 2013) (No. 13-6391); Gonzalez v. Brown, 585 F.3d 1202, 1210 (9th Cir. 2009); United States v. Cruz-Escoto, 476 F.3d 1081, 1090 (9th Cir. 2007); see also United States v. Chinchilla, 874 F.2d 695, 698 n.4 (9th Cir. 1989) ("the willingness of a prosecutor to accept minority jurors weighs against the findings of a

prima facie case"). The prosecutor questioned both of the African-American jurors later challenged (Lodgment 7 at 160, 164). The questioning was brief, but counsel's questioning of all of the prospective jurors was relatively brief, because the trial court limited attorney voir dire to 20 minutes per side (Lodgment 7 at 145-68). Additionally, Petitioner's case was not in any sense "racially charged." Neither Petitioner nor the victim was African-American. Under the totality of the circumstances discernible from the record, the Court of Appeal's failure to find a prima facie case was not unreasonable. There is no "clear and convincing" evidence to rebut the presumed correctness of the Court of Appeal's determination.

The applicable standard of whether the "totality of the circumstances" "raises an inference" of discrimination is admittedly an imprecise standard, the application of which might yield different outcomes by different reviewing courts. A federal court applying such an imprecise standard on habeas corpus review should be extremely circumspect before concluding that a state court's ruling "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair-minded disagreement." See Harrington v. Richter, 131 S. Ct. at 786-87. As the United States Supreme Court has stated:

> [T]he range of reasonable judgment [within the meaning of 28 U.S.C. section 2254(d)] can depend in part on the nature of the relevant rule. If the legal rule is specific, the range may be narrow. Applications of the rule may be plainly correct or incorrect. Other rules are more general, and

> their meaning must emerge in application over the course of time. Applying a general standard to a specific case can demand a substantial element of judgment. As a result, evaluating whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations.

Yarborough v. Alvarado, 541 U.S. 652, 664 (2004) ("Yarborough") (emphasis added). The standard for evaluating the existence of a prima facie case under Batson is a "general" rule within the meaning of Yarborough, and thus the standard affords state courts "more leeway" in their "case-by-case determinations." See Rhodes v. Varano, 2011 WL 3290360, at *9 (E.D. Pa. July 29, 2011), aff'd 472 Fed. App'x 146 (3d Cir. 2012), cert. denied, 133 S. Ct. 863 (2013) (the principle of Yarborough has necessary application to the habeas review of a state court's Batson analysis); Wiggins v. Jackson, 2009 WL 484668, at *10 (W.D.N.C. Feb. 25, 2009), aff'd, 635 F.3d 116 (4th Cir.), cert. denied, 132 S. Ct. 214 (2011) (citing Yarborough in denying a Batson habeas claim).

For all of the foregoing reasons, the California Court of Appeal's rejection of Petitioner's Batson claim was not contrary to, or an objectively unreasonably application of, any clearly established Federal law as determined by the United States Supreme Court. See 28 U.S. § 2254(d). Accordingly, Petitioner is not entitled to federal habeas relief.

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RECOMMENDATION

IT IS RECOMMENDED that the Court issue an Order: (1) accepting and adopting this Report and Recommendation; and (2) directing that Judgment be entered denying and dismissing the Petition with prejudice.

DATED: October 29, 2013.

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CHARLES F. EICK
UNITED STATES MAGISTRATE JUDGE

NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but may be subject to the right of any party to file objections as provided in the Local Rules Governing the Duties of Magistrate Judges and review by the District Judge whose initials appear in the docket number. No notice of appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the judgment of the District Court.

If the District Judge enters judgment adverse to Petitioner, the District Judge will, at the same time, issue or deny a certificate of appealability. Within twenty (20) days of the filing of this Report and Recommendation, the parties may file written arguments regarding whether a certificate of appealability should issue.