UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

RICKY LYNN NEWTON, Petitioner, v. KEN CLARK, Warden, Respondent.	1:09-CV-00113 OWW GSA HC FINDINGS AND RECOMMENDATION REGARDING PETITION FOR WRIT OF HABEAS CORPUS

Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

BACKGROUND

Petitioner is currently in the custody of the California Department of Corrections pursuant to a judgment of the Superior Court of California, County of Stanislaus, following his conviction by jury trial on June 5, 2006, of various narcotics offenses for which he received a total determinate sentence of twenty years in state prison. See Petition at 2.

Petitioner appealed to the California Court of Appeals, Fifth Appellate District (hereinafter "Fifth DCA"). On February 13, 2008, the Fifth DCA affirmed the judgment in a reasoned opinion. See Appendix 1, Petition. Petitioner then filed a petition for review in the California Supreme Court. The California Supreme Court denied the petition on April 30, 2008. See Petition at 3.

On January 14, 2009, Petitioner filed the instant federal habeas petition in this Court. He presents one claim for relief: He alleges CALCRIM No. 220, which is the California instruction defining reasonable doubt, is an incorrect statement of law, or one that is reasonably likely to be applied in an unconstitutional manner so as to violate Petitioner's federal constitutional right to due process.

DISCUSSION

I. Preliminary Review of Petition

Rule 4 of the Rules Governing Section 2254 Cases provides in pertinent part:

> If it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition and direct the clerk to notify the petitioner.

The Advisory Committee Notes to Rule 8 indicate that the court may dismiss a petition for writ of habeas corpus, either on its own motion under Rule 4, pursuant to the respondent's motion to dismiss, or after an answer to the petition has been filed. A petition for habeas corpus should not be dismissed without leave to amend unless it appears that no tenable claim for relief can be pleaded were such leave granted. Jarvis v. Nelson, 440 F.2d 13, 14 (9th Cir. 1971).

II. Jurisdiction

Relief by way of a petition for writ of habeas corpus extends to a person in custody pursuant to the judgment of a state court if the custody is in violation of the Constitution or laws or treaties of the United States. 28 U.S.C. § 2254(a); 28 U.S.C. § 2241(c)(3); Williams v. Taylor, 529 U.S. 362, 375 fn.7 (2000). Petitioner asserts that he suffered violations of his rights as guaranteed by the U.S. Constitution. In addition, the conviction challenged arises out of the Stanislaus County Superior Court, which is located within the jurisdiction of this court. 28 U.S.C. § 2254(a); 2241(d). Accordingly, the Court has jurisdiction over the action.

On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which applies to all petitions for writ of habeas corpus filed after its enactment. Lindh v. Murphy, 521 U.S. 320 (1997), *cert. denied,* 522 U.S. 1008 (1997); Jeffries v. Wood, 114 F.3d 1484, 1499 (9th Cir. 1997), *quoting* Drinkard v. Johnson, 97 F.3d 751, 769 (5th Cir.1996), *cert. denied,* 520 U.S. 1107 (1997), *overruled on other grounds by* Lindh v. Murphy, 521 U.S. 320 (1997)

(holding AEDPA only applicable to cases filed after statute's enactment). The instant petition was filed after the enactment of the AEDPA; thus, it is governed by its provisions.

III. Legal Standard of Review

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 instant petition is reviewed under the provisions of the Antiterrorism and Effective Death Penalty Act which became effective on April 24, 1996. Lockyer v. Andrade, 538 U.S. 63, 70 (2003). Under the AEDPA, an application for habeas corpus will not be granted unless the adjudication of the claim "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 "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); see Lockyer, 538 U.S. at 70-71; see Williams, 529 U.S. at 413.

As a threshold matter, this Court must "first decide what constitutes 'clearly established Federal law, as determined by the Supreme Court of the United States.'" Lockyer, 538 U.S. at 71, *quoting* 28 U.S.C. § 2254(d)(1). In ascertaining what is "clearly established Federal law," this Court must look to the "holdings, as opposed to the dicta, of [the Supreme Court's] decisions as of the time of the relevant state-court decision." Id., *quoting* Williams, 592 U.S. at 412. "In other words, 'clearly established Federal law' under § 2254(d)(1) is the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision." Id.

Finally, this Court must consider whether the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law." Lockyer, 538 U.S. at 72, *quoting* 28 U.S.C. § 2254(d)(1). "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, 529 U.S. at 413; see also Lockyer, 538 U.S. at 72. "Under the 'reasonable 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." Williams, 529 U.S. at 413.

"[A] federal court may not issue the writ simply because the 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.

Petitioner has the burden of establishing that the decision of the state court is contrary to or involved an unreasonable application of United States Supreme Court precedent. Baylor v. Estelle, 94 F.3d 1321, 1325 (9th Cir. 1996). Although only Supreme Court law is binding on the states, Ninth Circuit precedent remains relevant persuasive authority in determining whether a state court decision is objectively unreasonable. See Duhaime v. Ducharme, 200 F.3d 597, 600-01 (9th Cir.1999).

AEDPA requires that we give considerable deference to state court decisions. The state court's factual findings are presumed correct, 28 U.S.C. § 2254(e)(1), and we are bound by a state's interpretation of its own laws. Souch v. Schaivo, 289 F.3d 616, 621 (9th Cir.2002), *cert. denied*, 537 U.S. 859 (2002), *rehearing denied*, 537 U.S. 1149 (2003).

IV. Review of Petition

In his sole ground for relief, Petitioner claims CALCRIM No. 220, the instruction defining reasonable doubt, is an incorrect statement of law, or one that is reasonably likely to be applied in an unconstitutional manner so as to violate Petitioner's federal constitutional right to due process.

A. Review by State Courts

The claim was first presented on direct appeal to the Fifth DCA. On February 13, 2008, the Fifth DCA denied the claim in a reasoned opinion. See Appendix 1, Petition. Petitioner then petitioned for review in the California Supreme Court. See Petition at 3. The petition was denied on April 30, 2008. Id. The California Supreme Court is presumed to have denied the claims presented for the same reasons stated in the opinion of the Fifth DCA. Ylst v. Nunnemaker, 501 U.S. 797, 803 (1991).

The appellate court analyzed and rejected the claim as follows:

> CALCRIM No. 220, as instructed by the trial court, provided:
>
> > A defendant in [a] criminal case is presumed to be innocent. This presumption requires that the People [prove] each element of the crime beyond a reasonable doubt. Whenever I tell [you] the People must prove something, I mean they must prove it beyond a reasonable doubt.
> >
> > *Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true.* The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt. [Italics added.]
> >
> > In deciding whether the People proved their case beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received throughout the entire trial. Unless the evidence proves the defendant guilty beyond a reasonable doubt, he is entitled to an acquittal and you must find him not guilty.
>
> The government must prove beyond a reasonable doubt every element of a charged offense. (*In re Winship* (1970) 397 U.S. 358, 361-368.) There is no standard formula for instructing on the meaning of reasonable doubt. (*Victor v. Nebraska* (1994) 511 U.S. 1, 5.) "[S]o long as the court instructs the jury on the necessity that the defendant's guilt be proved beyond a reasonable doubt [citation], the Constitution does not require that any particular form of words be used in advising the jury of the government's burden of proof. [Citation.] Rather, 'taken as a whole, the instructions [must] correctly conve[y] the concept of reasonable doubt to the jury.'" (*Ibid.; People v. Mayo* (2006) 140 Cal.App.4th 535, 542.) Section 1096a provides that a court "may" instruct with the reasonable doubt instruction of section 1096, but it does not require that precise language. (*People v. Freeman* (1994) 8 Cal.4th 450, 503.)
>
> CALCRIM No. 220 plainly required the prosecutor to prove the defendant guilty beyond a reasonable doubt. Indeed, the final sentence of the instruction stated: "Unless the evidence proves the defendant guilty beyond a reasonable doubt, he is entitled to an acquittal and you must find him not guilty." The trial court also instructed with CALCRIM No. 103 regarding the presumption of innocence and the prosecution's burden of proving every element of the crimes beyond a reasonable doubt and with CALCRIM Nos. 224 and 225 regarding circumstantial evidence and proof beyond a reasonable doubt. These instructions reiterated the prosecution's burden of proof.
>
> Furthermore, we do not believe the jurors, when instructed simply to reach an "abiding conviction"-without being informed that an abiding conviction is a *feeling,* as stated in section 1096-failed to give the case the grave consideration necessary or failed to recognize the need for "subjective certitude." An abiding conviction, even without further explanation, connotes the weighty nature of the judgment and the importance of the decision. (See, e.g., *People v. Barillas* (1996) 49 Cal.App.4th 1012, 1022 [use of term "abiding conviction" *without* "moral certainty" is adequate instruction].) Employing plain language, CALCRIM Nos. 103 and 220 correctly conveyed the concept of reasonable doubt in the instant case.
>
> Accordingly, we conclude there is no reasonable likelihood that the jurors understood the instructions as diminishing the seriousness of the task and thereby diluting either the presumption of innocence or the reasonable doubt standard. In other words, there is no reasonable likelihood that the jurors applied the challenged instruction in a way that violates the Constitution. (*Estelle v. McGuire* (1991) 502 U.S. 62, 72-73: *People v. Cain* (1995) 10

Cal.4th 1, 36.) FN3

> FN3. CALCRIM No. 220 has survived other constitutional challenges as well. (E.g., *People v. Guerrero* (2007) 155 Cal.App.4th 1264; *People v. Westbrooks* (2007) 151 Cal.App.4th 1500; *People v. Rios* (2007) 151 Cal.App.4th 1154; *People v. Flores* (2007) 153 Cal.App.4th 1088.)

People v. Newton, 2008 WL 375993 (Cal. Ct. App. 5 Dist. 2008).

B. Review of Claim

As noted by the appellate court, the Due Process Clause of the Fourteenth Amendment "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358, 364 (1970). The United States Supreme Court has held that "the Constitution does not require that any particular form of words be used in advising the jury of the government's burden of proof. Rather, taken as a whole, the instructions must correctly convey the concept of reasonable doubt to the jury." Victor v. Nebraska, 511 U.S. 1, 5 (1994). The Victor Court further held that an instruction cast in terms of an "abiding conviction" as to guilt, without reference to "moral certainty," correctly stated the state's burden of proof." Id. at 14-15. That being so, Petitioner fails to demonstrate that the state court rejection of his claim "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." 28 U.S.C. § 2254(d). The petition should be summarily denied.

RECOMMENDATION

Accordingly, the Court RECOMMENDS that the petition for writ of habeas corpus be SUMMARILY DENIED. It is FURTHER RECOMMENDED that the Clerk of Court be DIRECTED to enter judgment for Respondent.

This Findings and Recommendation is submitted to the Honorable Oliver W. Wanger, United States District Court Judge, pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and Rule 72-304 of the Local Rules of Practice for the United States District Court, Eastern District of California. Within thirty (30) days (plus three days if served by mail) after being served with a copy, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendation." Replies to the

objections shall be served and filed within ten (10) court days (plus three days if served by mail) after service of the objections. The Court will then review the Magistrate Judge's ruling pursuant to 28 U.S.C. § 636(b)(1)(C). The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

IT IS SO ORDERED.

Dated: February 4, 2009 **/s/ Gary S. Austin**
UNITED STATES MAGISTRATE JUDGE