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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

THOMAS HERNANDEZ,  
  
                                Petitioner,  
  
                                v.  
  
CHRISTIAN PFEIFFER, Warden of Kern  
Valley State Prison,  
  
                                Respondent.

No. 1:18-cv-01271-LJO-JLT (HC)  
**ORDER ADOPTING FINDINGS AND  
RECOMMENDATIONS (Doc. No. 28)**  
**ORDER DENYING PETITION FOR WRIT  
OF HABEAS CORPUS**  
**ORDER DIRECTING CLERK OF COURT  
TO ENTER JUDGMENT AND CLOSE  
CASE**  
**ORDER DECLINING TO ISSUE  
CERTIFICATE OF APPEALABILITY**

Petitioner is a state prisoner proceeding in propria persona with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. On September 17, 2019, the Magistrate Judge assigned to the case issued Findings and Recommendation to deny the petition on its merits. (Doc. No. 28.) This Findings and Recommendation was served upon all parties and contained notice that any objections were to be filed within twenty-one days from the date of service of that order. On November 8, 2019, Petitioner filed objections to the Magistrate Judge’s Findings and Recommendations. (Doc. No. 32.)

In the objections, Petitioner argues that because the federal court is bound by the highest

1 court of the state in interpreting state law, the Magistrate Judge’s recommendation that this Court  
2 find that the Fifth DCA correctly interpreted state law as to provocation is in error. (Doc. 32 at 5-  
3 6.) Petitioner additionally contends that the trial court was required to independently instruct the  
4 jury on the elements of the offense of murder, including what type of provocation would negate  
5 the malice element whether the defense requested such an instruction or not. (Doc. 32 at 6-7.)  
6 Petitioner’s arguments relate to the trial court’s instruction on provocation. However, as  
7 discussed in the Findings and Recommendations, the claim is not cognizable on federal habeas  
8 and should be rejected, and the claim is without merit. (Doc. 28 at 24-25.)

9 In accordance with the provisions of 28 U.S.C. § 636 (b)(1)(C), the Court has conducted a  
10 de novo review of the case. Having carefully reviewed the entire file, including Petitioner's  
11 objections, the Court concludes that the Magistrate Judge’s Findings and Recommendation is  
12 supported by the record and proper analysis. Petitioner's objections present no grounds for  
13 questioning the Magistrate Judge's analysis.

14 In addition, the Court declines to issue a certificate of appealability. A state prisoner  
15 seeking a writ of habeas corpus has no absolute entitlement to appeal a district court’s denial of  
16 his petition, and an appeal is only allowed in certain circumstances. *Miller-El v. Cockrell*, 537  
17 U.S. 322, 335-336 (2003). The controlling statute in determining whether to issue a certificate of  
18 appealability is 28 U.S.C. § 2253, which provides as follows:

19 (a) In a habeas corpus proceeding or a proceeding under section 2255 before a district  
20 judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit  
in which the proceeding is held.

21 (b) There shall be no right of appeal from a final order in a proceeding to test the  
22 validity of a warrant to remove to another district or place for commitment or trial a person  
23 charged with a criminal offense against the United States, or to test the validity of such person's  
detention pending removal proceedings.

24 (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may  
not be taken to the court of appeals from—

25 (A) the final order in a habeas corpus proceeding in which the detention  
26 complained of arises out of process issued by a State court; or

27 (B) the final order in a proceeding under section 2255.

28 (2) A certificate of appealability may issue under paragraph (1) only if the applicant has  
made a substantial showing of the denial of a constitutional right.

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(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

If a court denies a petitioner’s petition, the court may only issue a certificate of appealability when a petitioner makes a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). To make a substantial showing, the petitioner must establish 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, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983)).

In the present case, the Court finds that Petitioner has not made the required substantial showing of the denial of a constitutional right to justify the issuance of a certificate of appealability. Reasonable jurists would not find the Court’s determination that Petitioner is not entitled to federal habeas corpus relief debatable, wrong, or deserving of encouragement to proceed further. Thus, the Court **DECLINES** to issue a certificate of appealability.

Accordingly, the Court orders as follows:

1. The Findings and Recommendations, filed September 17, 2019 (Doc. No. 28), is **ADOPTED IN FULL**;
2. The petition for writ of habeas corpus is **DENIED WITH PREJUDICE**;
3. The Clerk of Court is **DIRECTED** to **ENTER JUDGMENT** and close the file; and,
4. The Court **DECLINES** to issue a certificate of appealability.

This order terminates the action in its entirety.

**IT IS SO ORDERED.**

Dated: **December 2, 2019**

**/s/ Lawrence J. O’Neill**  
**UNITED STATES CHIEF DISTRICT JUDGE**