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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

LARRY R. LOPEZ,

Petitioner,

No. 2:07-cv-2742-MCE-JFM (HC)

vs.

T. FELKER,

Respondent.

FINDINGS AND RECOMMENDATIONS

_____/

Petitioner is a state prisoner proceeding pro se with an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges his 2004 conviction on charges of murder with discharge of a firearm and illegal possession of a firearm. This action is proceeding on petitioner’s amended petition, filed February 1, 2008. Petitioner raises two claims. First, he claims that his rights under the Sixth and Fourteenth Amendments to the United States Constitution were violated by jury intimidation and tampering.¹ Second, he claims that his right to a fair trial guaranteed by the Sixth and Fourteenth Amendments was violated by the trial court’s denial of trial counsel’s second request for a continuance to talk with an eyewitness.

¹ On May 21, 2008, petitioner filed a request to hold the instant action in abeyance to allow him to exhaust a claim of ineffective assistance of counsel arising from the same set of facts as his first claim for relief. For the reasons set forth in these findings and recommendations, petitioner’s first claim is without merit. A fortiori, counsel was not ineffective in failing to move for a mistrial based on the same set of facts. Petitioner’s request to hold these proceedings in abeyance should be denied.

1 was, he was a good fighter and proud of it. [Petitioner] fell against
2 the garage and to the ground. [Petitioner] tried to block Tolliver's
3 punches but did not hit back. According to Slade, at this point, a
4 gun [petitioner] had in the red handkerchief, fell out of
5 [petitioner]'s pocket. [Petitioner] and Tolliver looked at the gun.
6 Then Tolliver turned and ran. [Petitioner] picked up the gun,
7 started chasing Tolliver and shot Tolliver. Slade heard six rapid
8 shots. Tolliver fell to the ground, where he died.

9 An autopsy later showed Tolliver had been shot four times.
10 One bullet traveled through his back into the abdominal cavity,
11 through his liver, diaphragm, and right lung. Another bullet went
12 into Tolliver's back, struck his spine and stopped in the spinal
13 canal. A third bullet went into Tolliver's upper back and along the
14 back of his left arm. The fourth bullet hit Tolliver in the head,
15 lodging in his brain.

16 At the preliminary hearing, Slade testified the three women
17 came outside after they heard the shots. At trial Slade testified
18 Turner and St. Mary came outside in the middle of the fight. He
19 could not remember seeing Hempstad, but thought she was there.
20 He thought Turner and St. Mary saw the shooting. At trial Slade
21 testified that when he saw [petitioner] start shooting, he grabbed
22 his niece Ariana, who was standing in the doorway, and tried to
23 duck for cover. Ariana was crying. After Tolliver fell, [petitioner]
24 took off running.

25 Slade could not believe what had just happened. He did not
26 want to watch his best friend dying, so he walked off to the store.
When he came back, the police were there. Slade did not tell them
what he had witnessed. In fact, Officer John Scofield testified
Slade denied seeing anything, hearing anything, and said he had no
idea who could have done this to his friend. Slade testified he had
federal drug conspiracy charges pending against him and he feared
being taken into custody. He thought his "sisters" had enough
witnesses to handle the matter.

Hempstad testified all three women went outside when they
heard a boom like something hitting the garage door. Hempstad
saw [petitioner] and Tolliver fighting by the garage. They were
both standing wrestling. [Petitioner] was over Tolliver because of
their height difference. [Petitioner] was not on the ground being
hit by Tolliver. Turner asked Slade if he was going to do
something, but Slade said no and just stood there. Hempstad said
she then saw a gun with a red rag wrapped around it fall from
[petitioner]'s pocket onto the ground. She saw Tolliver turn and
try to run out of the yard. [Petitioner] picked up the gun and started
shooting. She thought [petitioner] fired the gun six times.
Everything happened so fast.

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1 Hempstad said she was standing on the bottom step of the porch
2 when this was happening. Turner was at the top of the porch with
3 St. Mary, although at one point St. Mary may have gone inside to
4 check on Ariana. Hempstad testified that she stayed outside the
5 entire time, but then said she went inside to check on Ariana during
6 the fighting, found her asleep, and came back outside. Hempstad
7 testified Turner ran down to Tolliver first and she followed.
8 Somebody called for an ambulance and the police.

9 St. Mary testified she and Turner went outside when they heard
10 a thump. Hempstad came out behind St. Mary. St. Mary saw
11 [petitioner] and Tolliver fighting. Tolliver was on top of
12 [petitioner] punching him in the face. St. Mary turned around and
13 went back inside to check on her niece who was asleep. Three to
14 five minutes after St. Mary went inside she heard three to four
15 gunshots. St. Mary ran to the front door where she saw Turner on
16 her knees crying. Turner ran out to the yard and St. Mary ran out
17 behind her. St. Mary saw Tolliver lying on the ground. Turner
18 went to Tolliver, lifted his head, and tried to wake him. St. Mary
19 called 911.

20 At [petitioner]'s preliminary hearing, St. Mary testified she
21 thought Hempstad and Turner were in the living room when the
22 gunshots rang out, but at trial, St. Mary thought Hempstad was
23 standing in the doorway and Turner was on the porch. In the end,
24 she was not sure where they were. At the preliminary hearing, St.
25 Mary said after the shots Turner went out first, then Hempstad,
26 then she followed. At trial, she thought Turner went first, then she
followed and Hempstad came behind them.

Turner testified Tolliver went outside to tell the people on the
porch to leave. Tolliver was outside for a while. Turner checked
on Ariana, who was asleep in Turner's bedroom. Then Turner
heard some banging on her front door. She and St. Mary jumped
up to see what was happening. When Turner first came out of the
house, she saw [petitioner] by the garage and Slade by the garbage
cans, but then she focused on Tolliver who was walking really fast
down the driveway. She heard shots and saw Tolliver limp, then
turn like he was shot in the back, and then the third shot dropped
him. [Petitioner] was behind her when she heard the shots. Turner
testified it was "like something in [her] head [told her] don't turn
around, let him leave the driveway." When the shots were done,
Turner saw [petitioner] scramble to pick up a red rag on the
ground. She never saw a gun. After [petitioner] left the yard,
Turner went to Tolliver. Turner knew St. Mary was behind her
because she called for the ambulance, but Turner did not know
where Hempstad was when Tolliver was shot. Slade walked out of
the yard and Turner saw Hempstad walk behind him out to the
gate. Turner said she never saw any fighting. Her daughter was
definitely not in the doorway watching the fight.

1 Turner told the police she did not want Tolliver at her house
2 that day because Slade and the other guys would be there and they
would argue.

3 [Petitioner] testified on his own behalf. [Petitioner] testified he
4 dropped Hempstad off, went home to shower and then returned to
5 Hempstad's house, where he played dice on the front porch with
Slade. [Petitioner] was dressed entirely in red, the color of the
Blood gang.

6 [Petitioner] claimed it was Slade who was upset by Tolliver
7 coming outside and telling them to leave. [Petitioner] ignored
8 Tolliver and continued playing dice until he heard Tolliver mutter
9 "Slob," a derogatory term used by Crips for a Blood gang member.
10 Tolliver had repeatedly "disrespected" [petitioner] resulting in a
11 previous fight. [Petitioner] considered it the most important thing
12 not to be disrespected. This time, in response, [petitioner] ran up
13 to Tolliver and hit him in the back of the head. Tolliver and
14 [petitioner] started fighting and they fell off the porch. Tolliver got
up first and stood over [petitioner], hitting him. According to
[petitioner], Slade was encouraging [petitioner] and said to him,
"Get that nigger, get that nigger." Tolliver threw two punches at
[petitioner] when [petitioner] was on the ground, and then turned
to run. At that point, Slade fired a gun at Tolliver. [Petitioner]
heard three shots and saw Slade leave down the driveway.
[Petitioner] also left as he was on parole and was not supposed to
be in a gang area.

15 [Petitioner] denied having a gun and denied shooting Tolliver.
16 When [petitioner] learned he was wanted, he arranged with the
17 public defender's office to surrender because he had nothing to
hide.

18 [Petitioner] testified his relationship with Hempstad was up and
down because she had found out he had another girlfriend.

19 People v. Lopez, slip. op. at 2-9.

20 ANALYSIS

21 I. Standards for a Writ of Habeas Corpus

22 Federal habeas corpus relief is not available for any claim decided on the merits in
23 state court proceedings unless the state court's adjudication of the claim:

24 (1) resulted in a decision that was contrary to, or involved an
25 unreasonable application of, clearly established Federal law, as
determined by the Supreme Court of the United States; or

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1 (2) resulted in a decision that was based on an unreasonable
2 determination of the facts in light of the evidence presented in the
3 State court proceeding.

4 28 U.S.C. § 2254(d).

5 Under section 2254(d)(1), a state court decision is “contrary to” clearly
6 established United States Supreme Court precedents if it applies a rule that contradicts the
7 governing law set forth in Supreme Court cases, or if it confronts a set of facts that are materially
8 indistinguishable from a decision of the Supreme Court and nevertheless arrives at different
9 result. Early v. Packer, 537 U.S. 3, 7 (2002) (citing Williams v. Taylor, 529 U.S. 362, 405-406
10 (2000)).

11 Under the “unreasonable application” clause of section 2254(d)(1), a federal
12 habeas court may grant the writ if the state court identifies the correct governing legal principle
13 from the Supreme Court’s decisions, but unreasonably applies that principle to the facts of the
14 prisoner’s case. Williams, 529 U.S. at 413. A federal habeas court “may not issue the writ
15 simply because that court concludes in its independent judgment that the relevant state-court
16 decision applied clearly established federal law erroneously or incorrectly. Rather, that
17 application must also be unreasonable.” Id. at 412; see also Lockyer v. Andrade, 538 U.S. 63,
18 123 S.Ct. 1166, 1175 (2003) (it is “not enough that a federal habeas court, in its independent
19 review of the legal question, is left with a ‘firm conviction’ that the state court was ‘erroneous.’”)

20 The court looks to the last reasoned state court decision as the basis for the state
21 court judgment. Avila v. Galaza, 297 F.3d 911, 918 (9th Cir. 2002).

22 II. Petitioner’s Claims

23 A. Jury Intimidation and Tampering

24 Petitioner’s first claim is that his rights under the Sixth and Fourteenth
25 Amendments were violated by jury tampering and intimidation. Petitioner exhausted this claim
26 in petitions for writ of habeas corpus filed in the San Joaquin County Superior Court, the
California Court of Appeal for the Third Appellate District, and the California Supreme Court.

1 See Lodged Documents 10, 13-18. The last reasoned rejection of this claim is the decision of the
2 San Joaquin County Superior Court, which denied the claim as follows:

3 Petitioner contends that the jury in his murder case was
4 intimidated by the victim's family. He bases this contention on
5 correspondence from his defense attorney which states: "The jury
6 sent the judge a note indicating that they had a verdict. This note
7 also referenced a desire to be protected from the victim's family.
8 This note should be part of the Court File." The court has
9 reviewed all of the jury's verdicts and questions to the court. The
10 note to which counsel refers contains no mention of a desire to be
11 protected from anyone. [It should be noted that counsel's
12 correspondence is dated more than two years post-trial. It therefore
13 appears likely that counsel was simply mistaken.]

14 Lodged Document 10, In the Matter of the Petition of Larry R. Lopez for Writ of Habeas Corpus,
15 Case No. SF091998 (May 7, 2007), slip op. at 1.

16 The state court's factual findings are fully supported by the record. It contains
17 three notes from the jury, two of which read "We, the jury, have reached a verdict."³ Clerk's
18 Transcript on Appeal (CT) at 196-199. The third note reads "We would like to see the transcript
19 of the pathologist's report (We are intere [...] in entry and [unclear] (trajectory) of bullet)." Id. at
20 198. None of the jury notes refer in any way to the victim's family. Moreover, the letter from
21 counsel to petitioner is dated December 15, 2006⁴, more than two years after the October 28,
22 2004 verdict. Ex. A to Amended Petition. The state court's determination that there was no
23 factual basis for petitioner's claim and its rejection of the claim are fully supported by the record.

24 The claim should be denied.

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23 ³ Both of these notes are dated October 28, 2004; one bears the time 1:45 p.m. and the
24 other 2:05 p.m. CT at 197, 199. It appears that after the jury returned a verdict on counts 1 and 2
25 and accompanying enhancements it was instructed on a prior, retired to deliberate, and returned
26 with a verdict on the prior. Id. at 205-206.

⁴ The letter is actually dated 15 diciembre 2006. See Ex. to Amended Petition, filed Feb.
1, 2008.

1 B. Denial of Request for Second Continuance

2 Petitioner’s second claim is that his right to a fair trial, guaranteed by the Sixth
3 and Fourteenth Amendments, was violated when the trial court denied his trial counsel’s request
4 for a second continuance to interview an eyewitness to the shooting. Petitioner exhausted this
5 claim in petitions for writ of habeas corpus filed in the San Joaquin County Superior Court, the
6 California Court of Appeal for the Third Appellate District, and the California Supreme Court.
7 See Lodged Documents 10, 13-18. The last reasoned rejection of this claim is the decision of the
8 San Joaquin County Superior Court, which denied the claim as follows:

9 Petitioner’s second contention is that the trial court erred in
10 refusing a continuance of the sentencing hearing to allow counsel
11 to locate a potential witness regarding the identity of the shooter.
12 The transcript reveals that the hearing took place more than two
13 months after the trial, having already been continued over a month
14 at defense counsel’s request. There is no evidence that the trial
15 court erred in denying a second continuance to re-visit the guilt
16 phase of the trial, nor is there any evidence that petitioner was
17 prejudiced by the failure to receive this unnamed witness’
18 testimony.

19 Lodged Document 10, In the Matter of the Petition of Larry R. Lopez for Writ of Habeas Corpus,
20 slip op. at 1.

21 The United States Supreme Court has held that “[t]he matter of continuance is
22 traditionally within the discretion of the trial judge” and “not every denial of a request for more
23 time . . . violates due process.” Ungar v. Sarafite, 376 U.S. 575, 589 (1964). “There are no
24 mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due
25 process. The answer must be found in the circumstances present in every case, particularly in the
26 reasons presented to the trial judge at the time the request is denied.” Id.

 The instant claim arises from the following exchange on January 10, 2005, at the
time set for petitioner’s sentencing:

 THE COURT: Mr. Lopez. People versus Larry Lopes. Mr.
Himmelblau is here, Mr. Arthur is here. We put this matter on today
for sentencing/possible motion.

1 I didn't receive any motion papers. I did ask the clerk to contact
2 to see if something was coming our way. We did not receive
anything.

3 With regard to the issue with sentencing, are the People ready?

4 MR. HIMELBLAU: The People are ready.

5 THE COURT: Mr. Arthur, you indicated you had some comments
6 on that issue.

7 MR. ARTHUR: I have stated that I'm not ready. I'm just going to
8 request a two-week continuance to talk to a witness in this case.

9 The court remembers this case involved the testimony against
10 Mr. Lopez, essentially, of the person that we accused to be the
perpetrator.

11 THE COURT: Ms. Slate for the record.

12 MR. ARTHUR: Yeah, the three young women. One of whom was
13 heavily doped up on prescription pain medications. Another of
14 whom admitted she can't really see anything except the sequel
because she was in the back taking care of the baby. And the third
one, Sky Turner, although her testimony was consistent at least
with itself, was basically inconsistent in terms of where, and when,
and who was doing what with all of the other women who testified.

15 Basically when the jury came out with the verdict, I thought it
16 was going to be not guilty. I just didn't see how any jury can
possibly convict on evidence like that.

17 Eventually they found something in there, but the court gave me
18 a continuance – usually because I have heard a lot of talk from
19 sources that there were witnesses out there who had not been
willing to come forward because they were, you know, frightened
of getting involved with the system but were not happy to find out
20 their assistance would be useful.

21 I tracked them down and quite a few of them referred me farther
22 down the line until finally I came up with a gentleman who claims
to be an eyewitness.

23 My investigator only talked to him and made her report last
24 Friday. I got it about 11 o'clock. It wasn't time enough for me to
25 schedule an in-person visit, because it takes a 24-hour notice. And
26 obviously I want to talk to this guy and find out if he appears to be
an honest witness telling the truth as best he proceeds [sic] it,
because if he wasn't I would just give him the back of my hand and
move on.

1 If he is telling the truth, he appears to be an eyewitness and I
2 read to the court and counsel in chambers it's a kind of prestige of
3 his information. And he claims to have been sitting there in his car
4 having some lunch and waited to visit with some people there. He
5 was to have seen the whole thing, and he describes Jackie Slate as
6 the shooter.

7 I think this is information which we clearly did not have the
8 opportunity to present. It's clearly relevant and germane, and
9 would substantially or had potential to substantially alter the jury
10 verdict.

11 I think we should have a chance to investigate that and put that
12 before the court in the form of a motion for a new trial.

13 THE COURT: Any thoughts you have on that request, Mr.
14 Himelblau?

15 MR. HIMELBLAU: We would object on the following grounds.
16 My understanding is this motion is not written or made orally as
17 based on discovery of new evidence and not sufficient of the
18 evidence.

19 Mr. Arthur is relitigating the facts of the case, notwithstanding
20 we have had this case in the system for approximately six to eight
21 months. The trial occurred two months ago. Mr. Arthur had been
22 given an extra month to investigate the claims.

23 I didn't think there would be a single witness brought forward
24 today when the original motion was made. There are no other
25 witnesses out there. There is no person who saw it. This
26 individual that Mr. Arthur is speaking about was sitting in the jail.
There has been plenty of time to get ahold of this person.

 Mr. Arthur and his client had the opportunity to present this
witness, because they have had the time to find him. And
everybody in the neighborhood knows what happened because
everybody in the neighborhood was either a witness to what had
happened or saw the aftermath of what had happened.

 THE COURT: I'd be inclined to rule on the request.

 I'm going to deny the request for the following: This case had a
lengthy discovery period. The trial ended on or around late
October 28th, 29th. We put the sentencing over to December 6th,
meaning there was time in there to investigate these additional
matters.

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1 On December 6th we were in the same posture, Mr. Arthur
2 requesting time because there may be additional exculpatory
3 witnesses. To the DA objecting, I allowed the continuance over
4 until today, so that's an additional month and a few more days, and
5 I'm going to find sufficient time has been given to investigate all
6 these matters.

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10 Ex. B to Amended Petition, Reporter's Transcript of Proceedings (RT) at 502-505. Following
11 imposition of sentence, the court made the following observation:

12 I know you can test the jury's decision in this case, Mr. Lopez. It
13 was apparent throughout the whole trial, neither side knew the
14 shooter in this case. You do have a right to appeal, you know that,
15 and you have a right to file a writ on this issue of possible new
16 evidence.

17 RT at 515.

18 The trial court's decision not to continue the sentencing hearing further did not
19 violate petitioner's federal constitutional rights. As the trial court noted and the state superior
20 court found, the trial court initially set the sentencing hearing for more than a month after the end
21 of trial, and then continued it for an additional month at defense counsel's request. At the
22 sentencing hearing, trial counsel explained what the potential witness claimed to have seen but
23 also stated that he had to determine whether the witness was credible. Id. at 503. Moreover, the
24 trial court advised petitioner that he had the right to "file a writ on this issue of possible new
25 evidence." Id. There is no evidence in the record of any further interview with the potential
26 witness nor has petitioner tendered an affidavit from that witness. For both of these reasons,
there is no evidence that petitioner was prejudiced by the denial of the continuance. For all of the
foregoing reasons, this court finds that the trial court's denial of the request for continuance did
not violate petitioner's constitutional rights and the state superior court's rejection of this claim

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1 was neither contrary to nor an unreasonable application of clearly established federal law.⁵ This
2 claim should be denied.

3 Finally, on July 31, 2009, petitioner filed a document styled as a motion for entry
4 of judgment by which he seeks clarification of the status of the instant action. The motion is
5 mooted by these findings and recommendations and will be denied.

6 In accordance with the above, IT IS HEREBY ORDERED that petitioner’s July
7 31, 2009 motion is denied; and

8 IT IS HEREBY RECOMMENDED that:

9 1. Petitioner’s May 21, 2008 request to hold this action in abeyance be denied;
10 and

11 2. Petitioner’s application for a writ of habeas corpus be denied.

12 These findings and recommendations are submitted to the United States District
13 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty
14 days after being served with these findings and recommendations, any party may file written
15 objections with the court and serve a copy on all parties. Such a document should be captioned
16 “Objections to Magistrate Judge’s Findings and Recommendations.” The parties are advised that

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24 ⁵ In the answer, respondent contends, *inter alia*, that there is no clearly established
25 precedent from the United States Supreme Court concerning the right to a post-trial continuance
26 and that this claim “is foreclosed by the non-retroactivity principle set forth in *Teague v. Lane*,
489 U.S. 288 (1989)” because at the time petitioner’s conviction became final there was no “rule
requiring a court to grant a post-trial continuance to enable the defense to locate a potential
witness.” The court does not reach either of these arguments

1 failure to file objections within the specified time may waive the right to appeal the District
2 Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

3 DATED: August 18, 2009.

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6 UNITED STATES MAGISTRATE JUDGE

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