

United States District Court
For the Northern District of California

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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

BRIAN KEATON GEORGE,
Petitioner,

v.

JOHN W HAVILAND, Warden,
Respondent.

No. 09-02076 CW
ORDER DENYING
PETITION FOR WRIT
OF HABEAS CORPUS

INTRODUCTION

Petitioner Brian Keaton George is a state prisoner incarcerated at California State Prison - Solano. On May 12, 2009, represented by counsel, Petitioner filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging convictions and a sentence imposed by the Sonoma County Superior Court. Petitioner argues that he was denied the right to a fair trial in violation of due process because of errors made by the trial court in consolidating charges from two separate incidents into a single trial and in giving the jury two erroneous instructions.¹ On July 2, 2009, in the interests of justice the Court stayed the petition,

¹The parties agree that Petitioner's claim of ineffective assistance of appellate counsel for failure to preserve the consolidation claim on appeal is moot. Accordingly, the Court does not address this claim.

1 because Petitioner's consolidation claim and ineffective assistance
2 of counsel claim were unexhausted. On November 2, 2009, after
3 exhausting these claims, Petitioner filed a motion to lift the stay
4 and filed an amended petition, in which he alleged the
5 aforementioned three claims. On November 23, 2009, the Court
6 granted Petitioner's motion to lift the stay. On February 11,
7 2010, Respondent filed an answer, and on March 15, 2010, Petitioner
8 filed a traverse. Having considered all of the papers submitted by
9 the parties, the Court DENIES the petition.

10 PROCEDURAL BACKGROUND

11 On December 29, 2005, the district attorney filed a second
12 amended consolidated information charging Petitioner with eleven
13 counts, based on two separate shootings.

14 The information alleged the following charges relating to a
15 shooting on January 20, 2005: (1) premeditated attempted murder,
16 with sentencing enhancements for personally discharging a firearm
17 and personally discharging a firearm causing personal injury;
18 (2) assault with a firearm, with enhancements for personally
19 inflicting great bodily injury and personally using a firearm;
20 (3) possession of a firearm by a felon; (4) willful discharge of a
21 firearm from a motor vehicle, with enhancements for personally
22 using a firearm, and personally discharging a firearm and causing
23 great bodily injury; and (5) willful discharge of a firearm, with
24 enhancements for personally using a firearm, personally discharging
25 a firearm, and personally discharging a firearm and causing great
26 bodily injury.

27 The information alleged the following charges relating to a
28

1 shooting on March 17, 2005: (6) willful discharge of a firearm from
2 a motor vehicle at a person; (7) willful discharge of a firearm at
3 an inhabited dwelling; (8) willful discharge of a firearm;
4 (9) willful discharge of a firearm in a grossly negligent manner;
5 (10) willful discharge of a firearm at an unoccupied motor vehicle;
6 and (11) possession of a firearm by a felon.

7 Before trial, over Petitioner's objection, the trial court
8 granted the prosecution's motion to consolidate the charges from
9 the January 20 and March 17 incidents into a single trial.

10 On January 11, 2006, after the close of evidence, the trial
11 court granted a motion to dismiss Count Seven, willful discharge of
12 a firearm at an inhabited dwelling. Petitioner requested that the
13 court instruct the jury with California jury instruction (CALJIC)
14 No. 2.21.2, an instruction relating to willfully false witness
15 testimony. The court denied the request. Additionally, Petitioner
16 objected to the jury being instructed with California jury
17 instruction (CALCRIM) No. 372, an instruction which allowed the
18 jury to infer awareness of guilt from the defendant's flight from
19 the scene of a crime. The court gave the jury the flight
20 instruction.

21 On January 13, 2006, the court declared a mistrial on Count
22 One, attempted murder. The jury found Petitioner not guilty on
23 Count Six, willful discharge of a firearm from a motor vehicle at a
24 person, and convicted him on the remaining Counts. The jury found
25 all the enhancements true. On February 2, 2006, the trial court
26 found that Petitioner had a served a prior prison term.

27 On May 5, 2006, the trial court sentenced Petitioner to an
28

1 aggregate term of thirty-one years to life in prison. On November
2 30, 2007, the California court of appeal affirmed the judgment in
3 an unpublished opinion, People v. George, No. A113829 (Cal. App.
4 Nov. 30, 2007); Pet's Ex. C. On December 19, 2007, the court of
5 appeal denied Petitioner's motion for rehearing, but ordered the
6 opinion modified to clarify the correct legal standard. On
7 February 13, 2008, the California Supreme Court denied Petitioner's
8 petition for review.

9
10 FACTUAL BACKGROUND

11 The factual background of Petitioner's conviction is
12 summarized from the court of appeal opinion, unless otherwise
13 stated.

14 I. January 20 Incident

15 On January 20, 2005, Jeremy Phillips, on felony probation for
16 a residential burglary, was sitting on a broken-down car parked in
17 the driveway of a friend's house, drinking beer. A blue car with
18 Petitioner's brother Ryan George and Duwann Walker as passengers,
19 and an unidentified driver, arrived at the house. Because Phillips
20 had recently been involved in an accident that damaged Walker's
21 car, he made sure Walker was not upset. Believing everything to be
22 fine, Phillips went back to sitting on the broken-down car.

23 Shortly thereafter, Petitioner drove up in a burgundy Mercury
24 Cougar, with an unidentified passenger sitting next to him.
25 Phillips knew Petitioner, though not well, and had seen him driving
26 the Cougar around town. Petitioner drove to within fifteen to
27 twenty-five feet of Phillips, then lowered his sun-glasses and
28 said, "Who you telling on?" Petitioner then fired at Phillips with

1 a revolver. Although his view was slightly obstructed, Phillips
2 saw Petitioner clearly and was sure that it was Petitioner who shot
3 him. The bullet entered Phillip's left leg and went into his
4 stomach.

5 At trial, Phillips testified to the above facts, but he
6 insisted that he was shot in the right leg. Dr. Abdul Harris, who
7 had treated Phillips' injuries, testified that Phillips had been
8 shot in the left leg. The trial court admitted into evidence a
9 photo showing that Phillips was shot in the left leg.

10 Other persons present at the house at the time of the January
11 20 shooting testified that they and Phillips had been using drugs
12 and alcohol. Some of them testified to hearing the gun shot, while
13 others did not. None testified that he or she saw Petitioner drive
14 up to the house or saw him shoot Phillips.

15 Phillips testified that he did not know why Petitioner asked
16 him, "Who you telling on?," before shooting, but that it might be
17 related to an incident in December, 2004 where he had encountered
18 the police. Phillips testified that he had gone to a party in Lake
19 County with Walker, Ryan George, Deandre Grinner and several other
20 friends. He was a passenger in a burgundy Cadillac owned by
21 Walker, which was being driven by a tall Caucasian man named Chad,
22 or possibly Brad.

23 Phillips testified that there was a confrontation at the party
24 with an unidentified person or persons; no blows were exchanged.
25 While he was riding back from the party in Walker's Cadillac,
26 driven by Chad, another car, which had been following them, rammed
27 the Cadillac from behind. Phillips said he heard two gunshots and
28

1 a tire blow out, and the Cadillac crashed into a barrier. Phillips
2 and Chad jumped out of the car and ran. The police, responding to
3 the scene, found Phillips nearby, but Chad was never found. After
4 examining the car, the police determined there was no evidence of a
5 collision or a blown out tire. They did find a bullet hole in the
6 back of the car. Inside the car was a citation made out to Walker,
7 and a cell phone receipt. Phillips testified that Petitioner's
8 motive for shooting him on January 20 might have been that
9 Petitioner heard that Phillips had talked to the police when they
10 investigated the December crash in Lake County.

11 II. March 17 Incident

12 On March 17, 2005, the Rogers family, along with approximately
13 fifteen guests, was celebrating the birthday of Harold Rogers, Sr.
14 at their house. Petitioner drove up in a grey Toyota Camry. From
15 his car, he spoke with John Rogers, who was standing outside the
16 house, and then fired a shot that struck the Rogerses' Cadillac,
17 which was parked nearby. The gray Toyota sped off. The police
18 arrived and investigated. Petitioner was arrested on March 28,
19 2005, in San Francisco, while driving a gray Toyota Camry. A
20 loaded .357 Smith and Wesson revolver was found under the carpet of
21 the passenger-side floorboard.

22 At trial, Santa Rosa Police Officer Michael Clark testified
23 that he was dispatched to the Rogers residence on March 17, 2005.
24 Clark spoke to Nancy Rogers, who appeared shaken and told him she
25 heard a gunshot. Clark testified that John Rogers told Clark that
26 he was standing in front of the house when Petitioner and two or
27 three passengers drove up in the gray Toyota Camry. John Rogers

1 said that Petitioner asked him who was after Petitioner's brother.
2 When John Rogers turned away, he heard Petitioner say, "This house
3 doesn't mean anything." He heard a gunshot, but did not see who
4 fired it. The car then drove away.

5 At trial, John Rogers testified that he did not remember if
6 the police had visited his parents' house on March 17, 2005. He
7 initially testified that he never spoke to an officer, but later
8 admitted that an officer had questioned him. However, he
9 maintained that he told the officer he was working underneath his
10 car, which was parked several houses down the block, and did not
11 see anything. He denied making the statements Clark testified that
12 he had made.

13 Defense investigator Carla Jacobs testified that Harold
14 Rogers, Jr. told her he had spoken to Petitioner several weeks
15 after the incident, and had informed Petitioner that he and his
16 family did not want to testify against him and that they were still
17 friends.

18 At trial, Harold Rogers, Jr. testified that he learned there
19 was a shooting and that a bullet had entered his Cadillac. He said
20 that he was good friends with Petitioner, and denied having a
21 conversation with Petitioner in which he told Petitioner he and his
22 family had no hard feelings about the shooting.

23 California Department of Justice criminalist Samantha Evans
24 testified that bullet fragments recovered from the Cadillac's
25 engine compartment by Selamawit Isaac, a guest at the party, were
26 likely fired from the revolver found in the Toyota. She also
27 testified that the bullet recovered from Phillips' body was almost
28

1 certainly not fired from the revolver found in the Toyota, because
2 it was a .38 caliber bullet and thus did not match the .357
3 revolver.

4 DISCUSSION

5 I. Standard of Review

6 Under the Antiterrorism and Effective Death Penalty Act
7 (AEDPA), a federal writ of habeas corpus may not be granted with
8 respect to any claim that was adjudicated on the merits in state
9 court unless the state court's adjudication of the claims:

10 "(1) resulted in a decision that was contrary to, or involved an
11 unreasonable application of, clearly established Federal law, as
12 determined by the Supreme Court of the United States; or
13 (2) resulted in a decision that was based on an unreasonable
14 determination of the facts in light of the evidence presented in
15 the state court proceeding." 28 U.S.C. § 2254(d).

16 "Under the 'contrary to' clause, a federal habeas court may
17 grant the writ if the state court arrives at a conclusion opposite
18 to that reached by [the Supreme] Court on a question of law or if
19 the state court decides a case differently than [the Supreme] Court
20 has on a set of materially indistinguishable facts." William v.
21 Taylor, 529 U.S. 362, 412-13 (2000). "Under the 'unreasonable
22 application' clause, a federal habeas court may grant the writ if
23 the state court identifies the correct governing legal principle
24 from the [Supreme] Court's decision but unreasonably applies that
25 principle to the facts of the prisoner's case." Id. at 413. The
26 only definitive source of clearly established federal law under 28
27 U.S.C. § 2254(d) is in the holdings of the Supreme Court as of the

1 time of the relevant state court decision. Id. at 412.

2 If the state court considered only state law, the federal
3 court must ask whether state law, as explained by the state court,
4 is "contrary to" clearly established governing federal law.
5 Lockhart v. Terhune, 250 F.3d 1223, 1230 (9th Cir. 2001). If the
6 state court, relying on state law, correctly identified the
7 governing federal legal rules, the federal court must ask whether
8 the state court applied them unreasonably to the facts. Id. at
9 1232.

10 If constitutional error is found, habeas relief is warranted
11 only if the error had a "'substantial and injurious effect or
12 influence in determining the jury's verdict.'" Penry v. Johnson,
13 532 U.S. 782, 795 (2001) (quoting Brecht v. Abrahamson, 507 U.S.
14 619, 638 (1993)).

15 When a state court reaches a decision on the merits, but
16 provides no reasoning to support its conclusion, the habeas court
17 must conduct an independent review of the record to determine
18 whether the state court clearly erred in its application of Supreme
19 Court law. Delgado v. Lewis, 223 F.3d 976, 982 (9th Cir. 2000).
20 This review is not de novo; although the court independently
21 reviews the record, it still defers to the state court's ultimate
22 conclusion. Pirtle v. Morgan, 313 F.3d 1160, 1167 (9th Cir. 2002).

23 In determining whether the state court's decision is contrary
24 to, or involved an unreasonable application of, clearly established
25 federal law, a federal court looks to the decision of the highest
26 state court to address the merits of a petitioner's claim in a
27 reasoned decision. Lajoie v. Thompson, 217 F.3d 663, 669 n.7 (9th
28

1 Cir. 2000). Here, the highest state court to issue a reasoned
2 opinion is the California court of appeal.

3 II. Jury Instruction on Willfully False Witnesses

4 Petitioner argues that the trial court's failure to instruct
5 the jury with CALJIC No. 2.12.2, that it could disregard all of the
6 testimony of a witness whose testimony was willfully false,
7 rendered his trial fundamentally unfair in violation of his right
8 to due process under the federal Constitution.

9 CALJIC No. 2.21.2 provides: "A witness, who is willfully false
10 in one material part of his or her testimony, is to be distrusted
11 in others. You may reject the whole testimony of a witness who
12 willfully has testified falsely as to a material point, unless,
13 from all the evidence, you believe the probability of truth favors
14 his or her testimony in other particulars." The inference provided
15 in CALJIC No. 2.21.2 is permissive, not mandatory, and "does
16 nothing more than explain to a jury one of the tests they may
17 employ in resolving a credibility dispute." People v. Blasingill,
18 199 Cal. App. 3d 1413, 1419 (1988).

19 The court of appeal concluded that the trial judge erred under
20 state law in refusing to give the instruction based on the fact
21 that Phillips' testimony about being rammed by a car on the way
22 back from Lake County was contradicted by reports of the officers
23 who investigated the crash, and that his testimony that he was shot
24 in the right leg was contradicted by the medical evidence. Pet's
25 Ex. C, at 11. The court reasoned that, although Phillips'
26 testimony might have simply been the product of honest mistakes in
27 memory, the contradictions warranted the instruction. Id.

28

1 Although the court held that the trial judge erred in not
2 giving the instruction, it found the error harmless. Pet's Ex. C,
3 at 11. The court noted that the absence of the instruction did not
4 prohibit the jurors from discrediting Phillips' testimony if they
5 so chose. Id. It also relied on the fact that other instructions
6 allowed the jury to discredit Phillips' testimony: the judge
7 instructed the jury with portions of CALCRIM No. 226, an
8 instruction including language that jurors may believe all, some or
9 none of the testimony of a witness, with CalCRIM No. 302, an
10 instruction relating to conflicting evidence, and with CALCRIM No.
11 315, an instruction regarding the credibility of eyewitness
12 testimony. Id. at 12-13.

13 Even if a jury instruction is in error under state law it does
14 not create a claim cognizable in federal habeas corpus proceedings.
15 Estelle v. McGuire, 502 U.S. 62, 71-72 (1991). To obtain federal
16 collateral relief for errors in the jury charge, a petitioner must
17 show that the ailing instruction by itself so infected the entire
18 trial that the resulting conviction violates due process. See id.
19 at 72; Cupp v. Naughten, 414 U.S. 141, 147 (1973). The instruction
20 may not be judged in artificial isolation, but must be considered
21 in the context of the instructions as a whole and the trial record.
22 Estelle, 502 U.S. at 72.

23 Here, the other jury instructions given by the judge made
24 clear that the jury could disregard any portion of a witness's
25 testimony if they found the witness not credible. Accordingly, the
26 judge's state law error did not render Petitioner's trial
27 fundamentally unfair.

1 Furthermore, even if the trial court’s state law error had
2 violated Petitioner’s constitutional rights, habeas relief would
3 not be warranted because the error did not have a "'substantial and
4 injurious effect or influence in determining the jury's verdict.'"
5 See Penry, 532 U.S. at 795. As explained above, based on
6 instructions the trial court did give, the jury must have been
7 aware that it need not credit any portion of the testimony given by
8 a willfully false witness. Indeed, during the course of the trial
9 two jurors sent notes to the judge expressing skepticism about the
10 reliability of Phillips’ testimony; one indicated that he or she
11 was inclined to disbelieve his testimony. See 2 Court Transcript
12 345-346. In such circumstances, the failure to give the willfully
13 false witness instruction could not have substantially altered the
14 outcome of the trial.

15 Neither the trial court’s failure to give the requested
16 instruction, nor the court of appeal’s finding that its failure was
17 harmless error, was contrary to, or an unreasonable application of,
18 clearly established federal law, and habeas relief on this ground
19 is denied.

20 III. Jury Instruction on Flight

21 Petitioner argues his due process right to a fair trial was
22 violated when the trial court instructed the jury with CALCRIM No.
23 372, which explained the relationship between the flight of a
24 defendant and his or her awareness of guilt.

25 CALCRIM No. 372, as given to the jury, provides: "If the
26 defendant fled or tried to flee immediately after the crime was
27 committed, that conduct may show that he was aware of his guilt.
28

1 If you conclude that the defendant fled or tried to flee, it is up
2 to you to decide the meaning and importance of that conduct.
3 However, evidence that the defendant fled or tried to flee cannot
4 prove guilt by itself."

5 Under California law, a flight instruction "is appropriate
6 where there is substantial evidence of flight by the defendant
7 apart from his identification as the perpetrator, from which the
8 jury could reasonably infer a consciousness of guilt." People v.
9 Rhodes, 209 Cal. App. 3d 1471, 1476 (1989) (emphasis in original).

10 The court of appeal found that the flight instruction was
11 proper in light of John Rogers' out-of-court statements, which were
12 testified to in court by Officer Clark, and admitted into evidence
13 as prior inconsistent statements. Pet's Ex. C, at 19; see 4
14 Reporter's Transcript (RT) 558-559. On the day of the shooting,
15 John Rogers saw Petitioner drive up to his parents' house in a gray
16 Toyota Camry. 4 RT 558. Petitioner asked him a question and then
17 said that "this home doesn't mean anything," before Rogers turned
18 away. 4 RT 559. He heard a gunshot as he turned away from the
19 vehicle, and turned back to see the car driving away quickly. 4 RT
20 559. The court of appeal found that this statement provided a
21 basis for the flight instruction because it was not connected to an
22 identification of Petitioner as the perpetrator of the crime. Ex.
23 C, at 19.

24 Petitioner argues that the evidence showed only that he drove
25 past the Rogers residence at the time of the shooting, not that he
26 fled the scene, and thus did not support the flight instruction.
27 However, John Rogers told Clark that, after Petitioner spoke to
28

1 him, he heard a shot, but did not see who fired the shot. He then
2 saw the gray Camry "flee eastbound on Mohawk street, away from the
3 residence." 4 RT 559. A reasonable jury could have inferred from
4 this testimony that Petitioner stopped his car, asked a question,
5 made a statement, and fled from the scene of the crime after the
6 shot was fired. The jury could have found this flight probative of
7 the charge that it was Petitioner who fired the shot. Thus, the
8 court of appeal's determination that the flight instruction was
9 appropriate was reasonable. Moreover, as stated previously, even
10 if the instruction had been wrongfully given, an erroneous jury
11 instruction does not itself violate due process unless it was so
12 prejudicial that it infected the entire trial. Estelle v. McGuire,
13 502 U.S. at 71-72. Here, the flight instruction by itself, even if
14 improperly given, would not have rendered the entire trial so
15 fundamentally unfair as to violate Petitioner's due process rights.

16 The court of appeal's denial of this claim was not contrary
17 to, or an unreasonable application of, clearly established federal
18 law, and habeas relief on this ground is not warranted.

19 IV. Consolidation

20 Petitioner argues that the consolidation of the charges
21 against him arising from the January 20 and March 17 incidents into
22 a single trial deprived him of his due process rights. Petitioner
23 concedes that the state law statutory requirements for joinder were
24 met, but argues that, because of weaknesses in Phillips' testimony
25 that were revealed only at trial, joinder resulted in a
26 fundamentally unfair trial.

27 Improper joinder does not itself violate the federal
28

1 Constitution. United States v. Lane, 474 U.S. 438, 446 n.8 (1986).
2 To rise to the level of a constitutional violation, joinder must
3 result in prejudice so great as to deny a defendant his
4 constitutional right to a fair trial. Id. When a case is
5 consolidated, the due process concern is whether the jury was able
6 properly to compartmentalize and consider separately the evidence
7 relating to each incident. United States v. Sherlock, 962 F.2d
8 1349, 1360 (9th Cir. 1989). When a very strong case is
9 consolidated with a very weak case, due process is potentially
10 implicated. United States v. Lewis, 787 F.2d 1318, 1322 (9th Cir.
11 1986). The failure of the jury to convict on all counts is "the
12 best evidence of the jury's ability to compartmentalize the
13 evidence." Park v. California, 202 F.3d 1146, 1150 (9th Cir.
14 2000).

15 The court of appeal determined that, based on California law,
16 joinder was not improper at the time the cases were consolidated.
17 Pet.'s Ex. C, at 16. In a footnote, the court noted that "a
18 pretrial ruling that was correct when made can be reversed on
19 appeal only if joinder was so grossly unfair as to deny due
20 process." Id. at 18, n. 6. The court found that "appellant does
21 not assert on appeal that joinder denied him due process, and the
22 record does not support such a conclusion." Id.

23 Petitioner argues that he did present the due process claim on
24 appeal, and that the appellate court's statement that "the record
25 does not support such a conclusion" does not constitute a reasoned
26 opinion. He asserts that this warrants de novo habeas review under
27 Pirtle, 313 F.3d at 1167. Respondent argues that the opinion was
28

1 reasoned and deference is warranted.

2 The court of appeal correctly identified the governing federal
3 law, and made a reasoned determination that Petitioner was not
4 unduly prejudiced by consolidation. Accordingly, the Court will
5 review the court of appeal's determination to determine whether it
6 was an unreasonable application of Supreme Court precedent.

7 Here, the jury did not convict Petitioner of the attempted
8 murder of Phillips, and found him not guilty of shooting at John
9 Rogers. This constitutes strong evidence that the jury was able to
10 compartmentalize the evidence and that Petitioner's due process
11 rights were not violated.

12 Petitioner's argument that the jury convicted him on charges
13 relating to the January 20 incident only because of the much
14 stronger evidence relating to the March 17 incident is not
15 convincing. The prosecution's evidence relating to both incidents
16 was dependent on testimony from witnesses who appeared unreliable:
17 Phillips because of errors in his testimony and the Rogers family
18 and their friends because of their contrary statements on and off
19 the witness stand.

20 The evidence relating to the March 17 incident was made
21 marginally stronger by testimony that the bullet recovered from the
22 Rogerses' Cadillac matched the model of the gun found in the gray
23 Toyota Camry that Petitioner was seen driving on the day of the
24 shooting and later when he was arrested. However, Petitioner was
25 only connected to the March 17 incident through the out-of-court
26 statements made by the Rogers family and their friends; unless the
27 jury believed those statements, the recovered bullet would not have

28

1 been probative of Petitioner's guilt. Moreover, at trial, the
2 witnesses to the March 17 incident denied having made the
3 inculpatory out-of-court statements. In contrast, although
4 Phillips' testimony was inaccurate in part, he did not disavow any
5 inculpatory out-of-court statements. Thus, the strength of the
6 evidence relating to the two incidents was roughly comparable.

7 Furthermore, the jury's verdict does not support Petitioner's
8 argument that the evidence relating to the March 17 incident was
9 stronger. The jury could not reach a verdict on the charge of the
10 attempted murder of Phillips on January 20, but acquitted
11 Petitioner on the charge of shooting at John Rogers on March 17.
12 If the evidence relating to the March 17 incident was much
13 stronger, presumably the jury would have convicted Petitioner on
14 all the charges relating to that incident. See Park, 202 F.3d at
15 1150 (noting that if the evidence pertaining to one incident was
16 stronger than the evidence pertaining to the other, presumably the
17 jury would convict on more charges for the stronger incident and on
18 fewer charges for the weaker incident, not the opposite).

19 Having reviewed the record, the Court finds that the court of
20 appeal's determination that Petitioner's trial was not rendered
21 fundamentally unfair was not contrary to or an unreasonable
22 application of Supreme Court precedent. Therefore, this claim for
23 habeas relief is denied.

24 CONCLUSION

25 For the foregoing reasons, the petition for writ of habeas
26 corpus is DENIED. The Court must rule on appealability. See Rule
27 11(a) of the Rules Governing § 2254 Cases, 28 U.S.C. foll. § 2254

1 (requiring district court to rule on certificate of appealability
2 in same order that denies petition). A certificate of
3 appealability should be granted "only if the applicant has made a
4 substantial showing of the denial of a constitutional right." 28
5 U.S.C. § 2253(c)(2). The Court finds that Petitioner has not made
6 a sufficient showing of the denial of a constitutional right to
7 justify a certificate of appealability. The Clerk of the Court
8 shall enter judgment, terminate all pending motions, and close the
9 file.

10 IT IS SO ORDERED.

11
12 Dated: July 30, 2010



13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CLAUDIA WILKEN
United States District Judge