

\*\*E-Filed 9/1/2009\*\*

1  
2  
3  
4  
5  
6  
7  
8 **IN THE UNITED STATES DISTRICT COURT**  
9 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**  
10 **SAN JOSE DIVISION**  
11

12 FERNANDO DOMINGUEZ,

13 Petitioner,

14 v.

15 TOM FELKER,

16 Respondent.  
17

Case Number C 07-2241 JF

ORDER<sup>1</sup> GRANTING IN PART AND  
DENYING IN PART REQUEST FOR  
A CERTIFICATE OF  
APPEALABILITY

[re: dock. no. 29]

18  
19 On August 18, 2009, this Court denied the instant petition for writ of habeas corpus.  
20 Petitioner has filed a notice of appeal from this Court's judgment and a request for a certificate of  
21 appealability with respect to six issues. *See* Docket Entry No. 29. A petitioner may not appeal a  
22 final order in a federal habeas corpus proceeding without first obtaining a certificate of  
23 appealability. *See* 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b). "Where a district court has  
24 rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is  
25 straightforward: The petitioner must demonstrate that reasonable jurists would find the district  
26 court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529  
27 U.S. 473, 484 (2000). The Court denied the instant habeas petition after careful consideration of

28 <sup>1</sup> This disposition is not designated for publication in the official reports.

1 the merits, but finds that Petitioner has demonstrated that reasonable jurists may differ with  
2 respect to issues one through three as set forth in his request. Accordingly, the request for a  
3 certificate of appealability is GRANTED IN PART with respect to the following issues:

4 1. The trial court erred by failing to instruct the jury with CALJIC  
5 No. 8.27.

6 2. The California Supreme Court violated the rule of *Bowie v. City*  
7 *of Columbia*, 378 U.S. 347 (1964) by holding that the trial court  
8 had no duty to instruct the jury that petitioner could not be found  
9 liable for Mr. Martinez's act of murder unless Mr. Martinez was an  
10 aider and abettor in the rape.

11 3. The California Supreme Court violated the rule of *Bowie* by  
12 holding that the kidnapping conviction could be upheld even if the  
13 victim was asported less than 90 feet.

14 The request otherwise is DENIED. The clerk shall forward to the Ninth Circuit Court of Appeals  
15 the case file with this order. *See* Fed. R. App. P. 22(b).

16 IT IS SO ORDERED.

17 DATED: September 1, 2009

18   
19 JEREMY FOGEL  
20 United States District Judge

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

Copies of Order served on:

Edward Dallas Sacher    [dallas@sdap.org](mailto:dallas@sdap.org)

John H. Deist    [John.Deist@doj.ca.gov](mailto:John.Deist@doj.ca.gov), [DocketingSFAWT@doj.ca.gov](mailto:DocketingSFAWT@doj.ca.gov),  
[susan.chiang@doj.ca.gov](mailto:susan.chiang@doj.ca.gov)

Peggy S. Ruffra    [peggy.ruffra@doj.ca.gov](mailto:peggy.ruffra@doj.ca.gov), [DocketingSFAWT@doj.ca.gov](mailto:DocketingSFAWT@doj.ca.gov)