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SOUTHERN DISTRICT OF CALIFORNIA

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7 **UNITED STATES DISTRICT COURT**  
8 **SOUTHERN DISTRICT OF CALIFORNIA**  
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10 JAMES CRAIG DARLING,  
11  
12 vs. Petitioner,  
13 MATTHEW CATE, Secretary of the  
14 California Department of Corrections and  
15 Rehabilitation,  
16 Respondent.

CASE NO. 09cv817 BEN (JMA)  
**ORDER ADOPTING REPORT  
AND RECOMMENDATION  
OVER OBJECTIONS**

17 **INTRODUCTION**

18 Petitioner James Craig Darling filed a petition for writ of habeas corpus under 28 U.S.C.  
19 § 2254 challenging his conviction in San Diego Superior Court case number SCN178962.  
20 Magistrate Judge Jan M. Adler issued a thoughtful and thorough Report and Recommendation  
21 recommending that Petitioner's motions to stay be denied and that the Petition be denied. Dkt.  
22 No. 23. Petitioner filed objections. Dkt. No. 24. Having reviewed the matter de novo and for  
23 the reasons that follow, the Report is **ADOPTED** and the petition is **DENIED**.

24 **BACKGROUND**

25 The Court adopts the Report and Recommendation's recitation of the facts from the  
26 California Court of Appeal opinion. Absent clear and convincing contrary evidence, the  
27 factual determinations of a state court are presumed correct on habeas review. 28 U.S.C. §  
28 2254(e)(1). The following brief summary of facts is drawn from the Court of Appeal opinion.

1           Petitioner lived in his van across the alley from Gary Murphy's house. Gary Murphy's  
2 son, Kyle, also lived in the Murphy house and used the garage as a bedroom. During the early  
3 hours of May 21, 2004, Gary and Kyle heard gun shots. Gary went outside, heard an engine  
4 noise, and saw Petitioner's van moving down the alley. The van stopped in front of the  
5 Murphy home. Gary approached the van, heard Petitioner yell "In the house. Stand down."  
6 Gary continued to move towards the van, thinking Petitioner was yelling at someone else.  
7 Petitioner fired two more shots at Murphy's house.

8           Petitioner claimed that he was awoken by gunshots, responded, and upon seeing a  
9 muzzle flash, fired one shot into the gravel as he yelled for anyone inside the Murphy house  
10 to stand down. Petitioner claims he then left in search of a pay phone when he encountered  
11 Deputy Sheriff James Kelly Anderson.

12           In responding to the call of shots fired, Anderson encountered Petitioner's van weaving  
13 down the center of the road. Anderson stopped the van on suspicion of drunk driving. During  
14 Anderson's attempt to obtain Petitioner's license and registration, Petitioner raised his right  
15 arm holding a Colt .45 and swung it towards Anderson. Anderson retreated, firing multiple  
16 rounds as he backed up. Petitioner drove away but was pursued and ultimately arrested. Police  
17 found a loaded semiautomatic handgun in Petitioner's van. Ballistics confirmed a bullet fired  
18 at the Murphy home was from Petitioner's gun. Petitioner claims that he only raised his gun  
19 for Anderson to see it and that he fled to find a place where witnesses would be present.

20           Petitioner was found guilty in San Diego Superior Court of assault with a semi-  
21 automatic firearm, shooting at an inhabited occupied structure, discharge of a firearm from a  
22 motor vehicle, assault on a police officer with a semi-automatic firearm, and evading an officer  
23 with reckless driving. Petitioner was sentenced to 11 years. The judgment was eventually  
24 affirmed by the California Court of Appeal, Fourth District and the California Supreme Court  
25 denied review. Petitioner then filed a petition for writ of habeas corpus in the California  
26 Supreme Court which was denied.

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1 The current petition, filed pursuant to 28 U.S.C. § 2254, followed. Respondent filed  
2 an Answer. Petitioner filed two motions for stay and abeyance and eventually filed an  
3 untimely traverse the Magistrate Judge considered.

#### 4 DISCUSSION

5 The Court need only conduct a de novo review of those issues to which Plaintiff objects.  
6 *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc), *cert denied*, 540  
7 U.S. 900 (2003) (“[t]he statute makes it clear that the district judge must review the magistrate  
8 judge’s findings and recommendations de novo *if objection is made*, but not otherwise.”); *see*  
9 *also Wang v. Masaitis*, 416 F.3d 992, 1000 n.13 (9th Cir. 2005). Petitioner objects to: (1) the  
10 Report’s finding that the evidence was sufficient to support Petitioner’s conviction for assault  
11 with a semi-automatic firearm on Kyle Murphy; (2) the Report’s finding that the evidence was  
12 sufficient to support Petitioner’s conviction for assault with a semi-automatic firearm on  
13 Deputy Anderson; and (3) the Report’s finding that Petitioner made no showing that trial  
14 counsel was objectively unreasonable for not introducing the Firearms Analysis Unit Report.

15 As accurately outlined in the Report, federal habeas relief may only be granted when  
16 State court proceedings “resulted in a decision that was contrary to, or involved an  
17 unreasonable application of, clearly established Federal law, as determined by the Supreme  
18 Court of the United States; . . . or resulted in a decision that was based on an unreasonable  
19 determination of the facts in light of the evidence presented in the State court proceeding.” 28  
20 U.S.C. § 2254(d).

#### 21 I. Sufficiency of Evidence — Assault on Kyle Murphy

22 Petitioner objects to the Report’s summary of the testimony offered in Petitioner’s trial  
23 that the Report relies on to conclude that the evidence against him was sufficient to support his  
24 conviction for assault with a semi-automatic firearm on Kyle Murphy. Specifically, he objects  
25 to the summary of Kerry Calver’s, Gary Murphy’s, and Deputy Sheriff Robert Stevenson’s  
26 testimony.

27 As to Calver’s testimony, Petitioner objects to the Report’s statement that Petitioner’s  
28 “van drove slowly near where Mr. Murphy, who lived next door, was standing.” However,

1 Calver specifically stated that “it, [the van], slowly went further over towards Mr. Murphy.”

2 As to Gary Murphy’s testimony, Petitioner objects to the Report’s statement that  
3 “Petitioner then fired two shots toward Murphy’s house.” However, Murphy testified about  
4 two shots being fired that he believed were fired by Petitioner.

5 As to Sheriff Stevenson’s testimony, Petitioner objects to the Report’s statement that  
6 “[f]ive casings were recovered from the inside of Petitioner’s van and were identified as  
7 having been fired through Petitioner’s pistol from inside the van.” However, Stevenson  
8 testified that five casings recovered from Petitioner’s van were fired from Petitioner’s gun and  
9 that for the casings to end up inside the van, the shots would likely have been fired from inside  
10 the van.

11 Petitioner’s objection to the summary of the testimony in the Report is overruled  
12 because the Report’s summary is accurate. Additionally, the Court agrees with the Report’s  
13 finding that, based on the evidence presented at trial, a rational trier of fact could have found  
14 that Petitioner committed assault with a semi-automatic firearm on Kyle Murphy, and  
15 personally used a firearm in the commission thereof, beyond a reasonable doubt.

16 **II. Sufficiency of Evidence — Assault on Deputy Anderson**

17 Petitioner objects to the Report’s summary of testimony given in Petitioner’s trial used  
18 to conclude that the evidence against him was sufficient to support his conviction for assault  
19 with a semi-automatic firearm on Anderson. Petitioner claims that, contrary to the Report’s  
20 summary, Anderson’s testimony does not support an assault, an intent to assault, or the use of  
21 a firearm. This Court disagrees. The summarized testimony accurately reflects that Petitioner:  
22 did not comply with numerous orders from Anderson to put his right hand on the steering  
23 wheel; raised his arm with a gun in his hand and moved the gun towards Anderson; brought  
24 the barrel of the gun within six to ten inches of Anderson’s face. From this testimony and  
25 Anderson’s other testimony concerning his efforts to prevent Petitioner from shooting him, a  
26 rational trier of fact could have found beyond a reasonable doubt that Petitioner committed  
27 assault with a semi-automatic firearm on Anderson.

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1 **III. Ineffective Assistance of Counsel**

2 Petitioner objects to the Report's citation of *Robinson v. Kramer*, 588 F.3d 1212, 1215  
3 n.2 (9th Cir. 2009). Petitioner argues that the case does not apply because he never sought to  
4 represent himself as the petitioner in that case did. The Report cites *Robinson v. Kramer* for  
5 its explanation of a *Marsden* motion — that a judge must permit a criminal defendant  
6 requesting substitute counsel the opportunity to present his reasons for the request. *Id.* (citing  
7 *People v. Marsden*, 2 Cal. 3d 118, 123-24 (1970)). The citation is appropriate for this purpose.  
8 Accordingly, the objection is overruled.

9 Petitioner also objects to the Report's finding that Petitioner failed to show that trial  
10 counsel was objectively unreasonable for not introducing the Firearms Analysis Unit Report.  
11 *See Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). Petitioner claims that the  
12 Firearms Report was clear and convincing evidence that could have helped him at trial. This  
13 Court disagrees. As noted in the Magistrate Judge's Report, the Firearms Report contains no  
14 information about gunshot residue or fingerprints as Petitioner suggests; and to the extent it  
15 indicates that none of the bullets found in the Murphy garage positively matched his gun, the  
16 prosecutor's criminalist acknowledges this fact in his testimony. Accordingly, Petitioner's  
17 objection is overruled.

18 Having conducted a de novo review and considered Petitioner's objections, the Court  
19 **ADOPTS** the Report and Recommendation in its entirety. The Petitioner is **DENIED** with  
20 prejudice.

21 **IV. Certificate of Appealability**

22 "The district court must issue or deny a certificate of appealability when it enters a final  
23 order adverse to the applicant." Rule 11 foll. 28 U.S.C. § 2254. A certificate of appealability  
24 is authorized "if the applicant has made a substantial showing of the denial of a constitutional  
25 right." 28 U.S.C. § 2253(c)(2).

26 When a petitioner's claims have been denied on their merits, as here, a petitioner can  
27 meet the threshold "substantial showing of the denial of a constitutional right," by  
28 demonstrating that: (1) the issues are debatable among jurists of reason; or (2) that a court

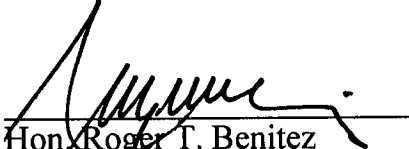
1 could resolve the issues in a different manner; or (3) that the questions are adequate to deserve  
2 encouragement to proceed further. *Lambright v. Stewart*, 220 F.3d 1022, 1024-25 (9th Cir.  
3 2000) (citing *Slack v. McDaniel*, 529 U.S. 473 (2000) and *Barefoot v. Estelle*, 463 U.S. 880  
4 (1983)). The Court **DENIES** a certificate of appealability because the issues are not debatable  
5 among jurists of reason, the Court could not resolve the issues in a different manner, and there  
6 are no questions adequate to deserve encouragement.

7  
8 **CONCLUSION**

9 After a de novo review, the Court fully **ADOPTS** Judge Adler's Report. Petitioner  
10 is not entitled to habeas relief and his Petition is **DENIED**. Petitioner's requests for Stay  
11 and Abeyance are **DENIED** as moot. The Clerk shall close the file.

12 **IT IS SO ORDERED.**

13  
14 DATED: February 21, 2011

  
15 Hon. Roger T. Benitez  
16 United States District Judge

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