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UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF CALIFORNIA

ARMANDO SAMUEL CORDOVA,

Petitioner,

VS.

DOMINGO URIBE, JR., Warden, et al.,

Respondent.

CASE NO. 10cv799-LAB (AJB)

ORDER DENYING MOTION TO RECONSIDER DENIAL OF CERTIFICATE OF APPEALABILITY; AND

ORDER DENYING MOTION TO PROCEED IN FORMA PAUPERIS ON APPEAL

On March 20, 2013, the Court issued an order denying Petitioner Armando Samuel Cordova's petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. That same order denied a certificate of appealability (COA).

Cordova has now filed an application for COA, asking this Court to reconsider its denial of the COA, as well as a motion to proceed *in forma pauperis* (IFP) on appeal. The IFP motion is properly before the Ninth Circuit, not this Court. Furthermore, this Court has granted Cordova leave to proceed IFP and has not revoked it. The motion to proceed IFP is therefore **DENIED AS MOOT**.

In his objections to the report and recommendation, Cordova attempted to argue claims not raised in the petition, none of which Cordova had exhausted. Cordova's argument that the Court wrongly refused to consider these is incorrect. Cordova argues that his mental ///

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limitations prevent him from exhausting those claims, but his litigation of his claims in this Court belies that.

Cordova also argues exhaustion would be futile, because there is no state or federal precedent that deals with the situation he faced. In those circumstances, however, exhaustion would not be futile; a petitioner must give the state courts a chance to pass on what, for them, is a novel question of law. *Compare Lynce v. Mathis*, 519 U.S. 433, 436 n.4 (1997) (petitioner was excused from presenting his claim to the highest state court, because that court had already decided the same question of law adversely to him in another case).

Cordova next argues that, because his claims are completely novel and not based on any state or federal precedent, they are debatable among reasonable jurists, and a COA should therefore issue. Assuming, *arguendo*, there is no precedent, federal habeas relief would be unavailable. Cordova's claims depend on legal determinations, and in the absence of any precedent those determinations would not be contrary to U.S. law as determined by the U.S. Supreme Court. See 28 U.S.C. § 2254(d)(1). In reality, even if the fact pattern of Cordova's case is unique, the legal principles underlying the Court's denial of Cordova's petition are based on established law (notably, AEDPA), and on decisions of the U.S. Supreme Court.

The state courts determined that the jury in Cordova's criminal trial was correctly instructed about state law. That decision is unreviewable by this Court. See Estelle v. McGuire, 502 U.S. 62, 67–68 (1991) ("[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions.") In the course of making their ruling, the state courts made various factual determinations that were not central to their ruling, such as what evidence was presented at trial, but Cordova made no meaningful attempt to rebut those. They are therefore presumed correct. 28 U.S.C. § 2254(e)(1). The only quibble he has is with the dates the jury returned its verdicts, but this argument is contradicted by the record and furthermore does not serve as a basis for habeas relief.

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For these reasons, and for the reasons set forth in the Court's order of March 20, 2013 (Docket no. 30), the COA is **DENIED**, without prejudice to the Ninth Circuit's granting it.

IT IS SO ORDERED.

DATED: April 16, 2013

HONORABLE LARRY ALAN BURNS United States District Judge

Lawy A. Burn

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