Lessie v. Virga Doc. 17

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

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Petitioner,

TIM VIRGA, Warden,

TONY LESSIE,

VS.

Respondent.

CASE NO. 10-CV-2065 - IEG (RBB)

ORDER:

(1) ADOPTING IN FULL REPORT AND RECOMMENDATION;

[Doc. No. 16]

(2) DENYING AMENDED PETITION FOR WRIT OF HABEAS CORPUS; AND

[Doc. No. 4]

(3) DENYING CERTIFICATE OF APPEALABILITY

Currently before the Court is Tony Lessie ("Petitioner")'s Amended Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 ("the Petition"). [Doc. No. 4.] Petitioner was convicted of second degree murder following a jury trial. [Id. at 2.] The jury made a true finding that Petitioner used a firearm in connection with the murder, and Petitioner was sentenced to 40 years to life in state prison. [Id. at 1-2.] Petitioner claims that his conviction: (1) was in violation of his Fifth Amendment rights under Miranda v. Arizona; and (2) in violation of his statutory rights to have two completed phone calls within an hour of confinement. [Id. at 6, 8.]

On January 10, 2012, Respondent Tim Virga ("Respondent") filed an amended answer to the Petition. [Doc. No. 15.] In his amended answer, Respondent concedes that the Petition was

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timely filed but argues that Petitioner is not entitled to habeas relief. [Id.] Petitioner did not file a traverse to his Petition.

The Court referred the matter to Magistrate Judge Ruben B. Brooks, who issued a Report and Recommendation ("R & R") recommending that the Petition be denied. [Doc. No. 16.] The R & R concluded that ground one of the Petition should be denied because the California Supreme Court's decision comported with controlling U.S. Supreme Court authority, and the state court reasonably found that Petitioner's custodial admissions and confession were made voluntarily after he had been properly advised of his Miranda rights, which he understood and validly waived. [Id. at 19.] The R & R also concluded that ground two of the Petition should be denied because it alleges a violation of state law, which is not cognizable on federal habeas review. [Id. at 21.] The time for filing objections to the R & R passed on July 6, 2012 without Petitioner filing any objections.

DISCUSSION

The Court reviews *de novo* those portions of the Report and Recommendation to which objections are made. 28 U.S.C. § 636(b)(1). The Court may "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." <u>Id.</u> However, "[t]he statute makes it clear that the district judge must review the magistrate judge's findings and recommendations de novo <u>if objection is made</u>, but not otherwise." <u>United States v. Reyna-Tapia</u>, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc) (emphasis in original). "Neither the Constitution nor the statute requires a district judge to review, de novo, findings and recommendations that the parties themselves accept as correct." <u>Id.</u>

In this case, the time for filing objections to the R & R passed a month ago and Petitioner has not to this date filed any objections. Accordingly, the Court may adopt the R & R on that basis alone. See id. Having reviewed the Petition, Respondent's answer, the relevant portions of the state record lodged by Respondent, and the R & R, the Court hereby approves and **ADOPTS IN FULL** the Report and Recommendation. See 28 U.S.C. § 636(b)(1).

- 2 - 10cv2065

CONCLUSION

Having reviewed the Report and Recommendation and there being no objections, the Court **ADOPTS IN FULL** the Report and Recommendation and **DENIES** the Petition. The Court also **DENIES** a certificate of appealability because Petitioner has not "made a substantial showing of the denial of a constitutional right." <u>See</u> 28 U.S.C. § 2253(c)(2).

IT IS SO ORDERED.

DATED: August 2, 2012

IRMA E. GONZALEZ United States District Judge

- 3 -