UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JOSE NAJERA, Petitioner, v. STU SHERMAN, et al., Respondents.	Case No. 15-cv-02444-BAS-JLB **ORDER:** **(1) OVERRULING PETITIONER'S OBJECTIONS;** **(2) ADOPTING REPORT AND RECOMMENDATION; AND** **(3) DENYING PETITION FOR WRIT OF HABEAS CORPUS**

On October 28, 2015, Petitioner Jose Najera ("Najera"), a state prisoner proceeding *pro se* and *in forma pauperis*, filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, challenging his March 4, 2013 conviction in San Diego Superior Court for second degree murder. (ECF No. 1 at 6.) Petitioner asserts that former California Penal Code § 22(b) ("former § 22(b)")[1] violates federal due process by excluding relevant exculpatory evidence.

[1] California Penal Code § 22(b) was renumbered as § 29.4 in 2013. For consistency with other filings in this case, the Court will continue to refer to the code provision in question as "former § 22(b)".

On August 19, 2016, United States Magistrate Judge Jill L. Burkhardt issued a Report and Recommendation ("Report") recommending that this Court deny the petition. (ECF No. 10.) Petitioner filed an Objection to the Report and Recommendation ("Objection") in which he reasserts his claim that former § 22(b) violates due process, and also argues that the magistrate judge failed to properly review the record before reaching her legal conclusions. Petitioner also requests an evidentiary hearing. Respondents have not replied.

BACKGROUND

> On the morning of April 25, 2007, Najera was driving a stolen car. He had two passengers: his friend, David Lopez, and Lopez's girlfriend, Rachel Gaxiola. At approximately 9:00 a.m., San Diego County Sheriff's deputies attempted to stop Najera's car, having received a report it was stolen. Najera initially pulled the car over to the side of the road but then made a sharp U-turn and rapidly accelerated; Najera narrowly missed oncoming traffic and drove on the wrong side of a divided roadway at speeds up to 80 miles per hour[] for just under a minute. The chase finally ended when Najera collided head-on with a 76-year-old motorist, Jean Cooke. . . .
>
> All four people involved in the collision were taken to the hospital, where Lopez was pronounced dead. Gaxiola had several severe bone fractures; she spent the next two and a half months in the hospital and was still in "constant pain" at the time of the trial. Cooke also suffered several broken bones and a collapsed lung; she still experienced symptoms of her injuries, including difficulty standing, at the time of trial.
>
> Najera was treated for several fractures and lacerations. Najera admitted to doctors at the hospital that he had used methamphetamine the evening before the collision and heroin approximately five hours before the collision. These admissions were confirmed by later blood tests and consistent with the fact that a usable amount of methamphetamine was found in his pants pocket.

(ECF No. 8-7 at 3–4.)

Najera was ultimately convicted in San Diego County Superior Court of second degree murder, gross vehicular manslaughter while intoxicated, and other

charges. Najera timely filed an appeal with the California Court of Appeal on May 6, 2013. (ECF No. 8-1 at 163.) The California Court of Appeal affirmed Najera's conviction. (ECF No. 8-7 at 1–15.) Subsequently, Najera filed a petition for review in the Supreme Court of California, which summarily denied the petition on November 12, 2014. (ECF Nos. 8-8, 8-9 at 1.)

Najera timely filed the instant Petition on October 28, 2015. (ECF No. 1.)

LEGAL STANDARD

A. Review of Magistrate Judge's Report and Recommendation

The Court reviews de novo those portions of a report and recommendation to which objections are made. 28 U.S.C. § 636(b)(1)(C). The Court may "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." *Id.* But the statute makes clear that "the district judge must review the magistrate judge's findings and recommendations de novo *if objection is made*, but not otherwise." *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc) (emphasis in original); *see also Schmidt v. Johnstone*, 263 F. Supp. 2d 1219, 1226 (D. Ariz. 2003) (concluding that where no objections were filed, the district court had no obligation to review the magistrate judge's report de novo). "Neither the Constitution nor the statute requires a district judge to review, de novo, findings and recommendations that the parties themselves accept as correct." *Reyna-Tapia*, 328 F.3d at 1121. This legal rule is well-established in the Ninth Circuit and this district. *See Wang v. Masaitis*, 416 F.3d 992, 1000 n.13 (9th Cir. 2005) ("Of course, de novo review of a[n] R & R is only required when an objection is made to the R & R.").

B. Federal Habeas Review

The power of a federal court to grant habeas relief on behalf of state prisoners is governed by 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). *See Lindh v. Murphy*, 521 U.S. 320, 326–27 (1997). Under AEDPA, a habeas petition will not be granted on any claim

adjudicated on the merits in state court, unless that adjudication: (1) resulted in a decision that was contrary to or involved an unreasonable application of clearly established federal law; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented at the state court proceeding. 28 U.S.C. § 2254(d); *see also Early v. Packer*, 537 U.S. 3, 7–8 (2002).

For purposes of AEDPA, the phrase "clearly established federal law" means "the governing principle or principles set forth by the Supreme Court at the time the state court renders its decision." *Lockyer v. Andrade*, 538 U.S. 63, 72 (2003). A state court decision is "contrary to" clearly established federal law if it applies a rule that contradicts governing Supreme Court law, or if it confronts a set of facts that is "materially indistinguishable" from a decision of the Supreme Court, but reaches a different result. *Brown v. Payton*, 544 U.S. 133, 141 (2005) (citing *Williams v. Taylor*, 529 U.S. 362, 405–06 (2000)). A state court decision involves an "unreasonable application" of clearly established federal law if the state court correctly identifies the governing law, but applies that law in an "objectively unreasonable" manner. *Lockyer*, 538 U.S. at 76 (citing *Williams*, 529 U.S. at 409, 413).

In assessing whether a state court decision was based on "an unreasonable determination of the facts" under AEDPA's second prong, the Court presumes factual findings made by the state court to be correct. "The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1); *see Lambert v. Blodgett*, 393 F.3d 943, 971–72 (9th Cir. 2004). Clear and convincing means that the Court "must be convinced that an appellate panel, applying the normal standards of appellate review, could not reasonably conclude that the finding is supported by the record." *Taylor v. Maddox*, 366 F.3d 992, 1000 (9th Cir. 2004).

Where there is no reasoned decision from the state's highest court, the Court

"looks through" to the last reasoned state court decision to address the claim at issue. *See Ylst v. Nunnemaker*, 501 U.S. 797, 805–06 (1991). Here, the California Supreme Court summarily denied Najera's petition for review, and so the Court "looks through" to the California Court of Appeal's unpublished written decision, *People v. Najera*, No. D063875, 2014 WL 4240581 (Cal. Ct. App. Aug. 27, 2014), as the appropriate decision for review.

ANALYSIS

A. Constitutionality of Former Section 22(b)

Former section 22(b) of the California Penal Code provides in part that where a defendant has been charged with murder "evidence of voluntary intoxication is admissible solely on the issue of whether the defendant premeditated, deliberated, or harbored *express* malice aforethought." (Cal. Penal Code § 22(b)) (1995) (emphasis added).[2] Najera's main argument is that this provision violated his due process rights by prohibiting him from providing evidence of voluntary intoxication to show he did not act with the *implied* malice needed to prove second degree murder. (ECF No. 1.)

The California Court of Appeal found that former § 22(b) was a legitimate exercise of the California Legislature's authority to redefine the mens rea requirement of particular crimes and thus did not violate Najera's right to due process. (ECF No. 8-7 at 8–10.) For her part, the magistrate judge found that the California Court of Appeal's decision was neither contrary to nor an unreasonable application of clearly established federal law. She found that the court of appeal reasonably applied clearly established law, and that the ruling was not "diametrically opposed" to clearly established federal law, as the facts of Najera's case were fundamentally identical to those in *Montana v. Egelhoff*, 518 U.S. 37, 40 (1996).

Najera fails to present specific objections to the magistrate judge's reasoning or interpretation of the law. He contends that "the Magistrate erred by denying [the

[2] As noted in footnote 1, *supra*, former § 22 was renumbered as 29.4 in 2013. The wording of the two sections remained identical.

claim], and maintains his argument that former section 22 and the amended section 29.4, also unconstitutionally excludes exculpatory evidence and prevented him from showing that . . . he was not acting with the . . . implied malice aforethought needed to prove [he] committed the act of second degree murder." (ECF No. 17 at 2.) This is not an objection sufficient to trigger de novo review. *See, e.g.*, *Goney v. Clark*, 749 F.2d 5, 7 (3d Cir. 1984) (finding that de novo review of magistrate's report was not required where appellant's objections were "general in nature" and "[t]here was no objection to a specific portion of the report"). Nevertheless, the Court will briefly consider Najera's arguments de novo.

1. 28 U.S.C. § 2254(d)(1)

To warrant habeas relief under 28 U.S.C. § 2254(d)(1), Najera must establish that there is clearly established federal law concerning his argument, and that the state court applied a legal test that is contrary to that established law. *See Williams*, 529 U.S. at 412. Najera does not dispute that *Egelhoff* is the Supreme Court decision providing the applicable clearly established federal law. However, Najera misreads what the appropriate governing law from *Egelhoff* is and how it applies to his case.

The issue in *Egelhoff* was whether Mont. Code Ann. § 45–5–102 (1995) violated respondent's due process by limiting the jury's ability to consider his intoxicated state when determining whether he had the requisite mens rea for deliberate homicide under Montana law. *Egelhoff*, 518 U.S. at 41. The Supreme Court explained that certain evidence may be restricted from being introduced, as the Due Process Clause does not guarantee the right to introduce all relevant evidence. However, the Court explained that such restrictions may violate due process if they "offend[] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Egelhoff*, 518 U.S. at 43 (quoting *Patterson v. New York*, 432 U.S. 197, 201–02 (1977)). In a fractured decision, the Court concluded that the Montana statute did not offend a "fundamental principle of justice," and thus did not violate Egelhoff's due process rights. Thus, the clearly

established federal law from *Egelhoff* is that there is generally no due process violation where a state defines a criminal offense in a way that excludes certain relevant evidence. *Egelhoff*, 518 U.S. at 58 (Ginsburg, J., concurring) (quoting *Patterson v. New York*, 432 U.S. 197, 201–02 (1977)).

Najera incorrectly focuses on a test proposed by Justice Ginsburg in her concurring opinion—that a "rule designed to keep out 'relevant, exculpatory evidence'" is unconstitutional. *Egelhoff*, 518 U.S. at 57 (Ginsburg, J., concurring). This test is not clearly established federal law for purposes of habeas review, because it was not the narrowest ground concurred upon by five Justices.[3] However, even if the Court applied Justice Ginsburg's test, it would not be satisfied here. Both the magistrate judge and the California Court of Appeal reasonably concluded that former § 22(b) was designed to redefine the mental-state element of particular crimes rather than to exclude relevant, exculpatory evidence.[4] Accordingly, the Court agrees with the magistrate judge that former § 22(b) does not infringe Najera's due process rights. Najera is not entitled to habeas relief on this ground.

2. 28 U.S.C. § 2254(d)(2)

To analyze AEDPA's second prong, the Court considers whether the state court made an unreasonable determination of the facts in light of the record before it.

---

[3] The Supreme Court provided guidance on how to determine the holding of a fractured Supreme Court decision in the seminal case *Marks v. United States*, 430 U.S. 188 (1997). *Marks*, 430 U.S. at 193–94 ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.").

[4] The California Court of Appeal cited several rationales for its conclusion. First, the court of appeal noted that former § 22(b), like the Montana statute in *Egelhoff*, is located not in the Evidence Code but in the Penal Code "with statutes defining and setting forth the kinds and degrees of crimes and their punishment." (ECF No. 8-7 at 9.) Second, the court pointed out that former § 22(b) affirms California's public policy that intoxicated persons and sober persons shoulder the same criminal responsibility for the same conduct. Finally, the State court explained that former § 22(b) establishes, and limits, the exculpatory effect of voluntary intoxication on the required mental state for particular crimes, and that there is no exception for introducing evidence of voluntary intoxication for defensive purposes. This reasoning is entirely consistent with clearly established federal law in *Egelhoff*.

See 28 U.S.C. § 2254(d)(2). The Court must presume the factual findings made by the state court are correct, while Najera has the burden of rebutting the presumption of correctness by clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1).

In his Objection, Najera seeks to contrast the facts of *Egelhoff* with the facts of his case, asserting:

> *Egelhoff*'s decision was used to bar voluntary intoxication in Petitioner's case just because they're similar, even though they're completely different, because *Egelhoff* was in the back seat of the same car where two individuals was [sic] murdered as to [sic] [Egelhoff], where Petitioner was under the influence in a high speed pursuit chase and crashed causing death to the passenger of the same vehicle he was driving.
>
> (ECF No. 17 at 3.)

Najera's objection is misplaced. The test under § 2254(d)(2) is not whether the facts of Najera's case are in some way different from the facts of another case, but whether the state court's determination of the facts was "objectively unreasonable." *Lockyer*, 538 U.S. at 76. Here, Najera does not provide any evidence to rebut the presumption of correctness accorded to the state court's factual findings. In fact, Najera raises no objection at all to these findings. Accordingly, the Court finds that the state court's decision was not based on an unreasonable determination of the facts in light of the record before it. Najera is not entitled to habeas relief on this ground.

B. Objection to Magistrate Judge's Review of the Record

Najera also appears to argue that the magistrate judge failed to properly review the record before finding he was not entitled to habeas relief. Najera contends:

> [T]he Magistrate did not review the relevant portions of the record based on the facts within Petitioner's case, but biasly [sic] agreeing with the Respondent and it shows when the Magistrate did not Review [sic] and did not address the Review [sic] . . . When committing the error of denying Petitioner's claim, the Magistrate failed to review and apply section 20 when making an allege [sic] independent decision of Petitioner's habeas claim on the specific intent . . . the Magistrate just decided to agree with the State court's determination, rather than apply

> an extraordinarily differential [sic] review of the actual record, the fact [sic] and statute, inquiring only whether the State court's decision was objectively unreasonable.
>
> (ECF No. 17 at 4.)

AEDPA imposes a "highly deferential" standard of review that "demands that state-court decisions be given the benefit of the doubt." *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam) (internal citation omitted). Factual determinations made by the state court are presumed correct, and it is the habeas petitioner, not the magistrate judge, who has the burden of rebutting the presumption of correctness by clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1).

Having reviewed the California Court of Appeal's opinion and the magistrate judge's reasoning, analysis, and conclusions, the Court finds no support for Najera's claim that the magistrate judge did not properly review the record in accordance with AEDPA. Najera apparently believes that the magistrate judge was required to conduct a de novo review of his claims, but AEDPA imposes no such obligation so long as Najera's claims were "adjudicated on the merits" in state court. *Amado v. Gonzalez*, 758 F.3d 1119, 1130 (9th Cir. 2014). There is no dispute that the state court adjudicated Najera's claims on the merits. Thus, the magistrate judge's task was to assess whether the state's decision was contrary to, or involved an unreasonable application of, clearly established federal law, or was based on an unreasonable determination of the facts.

Having reviewed the Report and Recommendation, the Court finds that the magistrate judge considered the record properly and thoroughly. The magistrate judge's reasoning is sound and her conclusions well-grounded in law. Accordingly, Najera's objection on this point fails.

C. Evidentiary Hearing Request

Finally, Najera requests an evidentiary hearing. (ECF No. 17 at 3–4.) "In deciding whether to grant an evidentiary hearing, a federal court must consider whether such a hearing could enable an applicant to prove the petition's factual

allegations, which, if true, would entitle the applicant to federal habeas relief." *Schriro v. Landrigan,* 550 U.S. 465, 474 (2007). A district court is not required to hold an evidentiary hearing where "the record refutes the applicant's factual allegations or otherwise precludes habeas relief[.]" *Id*.; *see also Hibbler v. Benedetti*, 693 F.3d 1140, 1147 (9th Cir. 2012) ("An evidentiary hearing is not required on issues that can be resolved by reference to the state court record.") (citation omitted).

Najera argues that an evidentiary hearing is required so he can offer evidence of his voluntary intoxication as a mitigating factor for the charge of murder. (ECF No. 17 at 4–5.)[5] But the issue is not whether Najera was voluntarily intoxicated at the time of the accident. There is no factual dispute that he was. The issue is whether this fact should have been excluded on legal grounds under former § 22(b). The state court found it should be excluded. Specifically, the state court noted that the California Legislature chose to make "voluntary intoxication . . . irrelevant to proof of the mental state of implied malice or conscious disregard." *Najera*, 2014 WL 4240581, at *4. Thus, an evidentiary hearing is unnecessary because the evidence Najera seeks to introduce is irrelevant to the elements of the criminal offense at issue. *Cf. Schriro*, 550 U.S. at 475 (finding that the district court was well within its discretion to deny an evidentiary hearing where further development of the factual record would not have entitled respondent to habeas relief). Accordingly, Najera's request for an evidentiary hearing is denied.

CONCLUSION

After considering Najera's objections and conducting a de novo review where appropriate, the Court finds that Magistrate Judge Burkhardt's reasoning is sound and her conclusions well-grounded in the governing law. Accordingly, the Court

[5] Najera was charged and convicted of various offenses indicating his intoxicated state including: gross vehicular manslaughter while intoxicated in violation of California Penal Code § 191.5(c)(1); driving under the influence causing injury in violation of California Vehicle Code § 23153(a); and possession of a controlled substance in violation of California Health and Safety Code § 11377(a). (ECF No. 8-1 at 19–24.) Thus, the jury was aware of Najera's intoxication as this fact was part of the record.

OVERRULES Petitioner's Objections (ECF No. 17), **APPROVES** and **ADOPTS** the Report (ECF No. 10) in its entirety, **DENIES** the request for an evidentiary hearing, and **DENIES** the Petition (ECF No. 1).

Under 28 U.S.C. § 2253(c)(1), a petitioner may not appeal a final order in a federal habeas proceeding without first obtaining a certificate of appealability ("COA"). A COA may issue only if the applicant makes a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). A COA is not a definitive inquiry into the merits of a case, but rather a separate proceeding distinct from the merits, with the question bearing on the debatability of the claim, not its resolution. *See Miller-El v. Cockrell*, 537 U.S. 322, 342 (2003). Under this standard, "a petitioner 'must show that reasonable jurists could debate whether the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.'" *Id.* at 336 (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

Here, Najera has not made the requisite substantial showing. Because reasonable jurists could not find the Court's assessment of the claims in the Petition debatable or erroneous, the Court **DECLINES** to issue a certificate of appealability. *See Slack*, 529 U.S. at 484.

IT IS SO ORDERED.

DATED: April 7, 2017

Hon. Cynthia Bashant
United States District Judge