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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
10

11 VEGAS BRAY,

12 Petitioner,

13 v.

14 J. ESPINOZA, Warden, et al.,

15 Respondents.
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Case No.: 18-CV-1169 JLS (MBS)

**ORDER (1) ADOPTING REPORT
AND RECOMMENDATION,
(2) DENYING PETITION FOR WRIT
OF HABEAS CORPUS, AND
(3) DENYING CERTIFICATE OF
APPEALABILITY**

(ECF Nos. 1, 11)

18 Presently before the Court is Magistrate Judge Michael S. Berg's Report and
19 Recommendation ("R&R," ECF No. 11), recommending that the Court dismiss Petitioner
20 Vegas Bray's Petition for Writ of Habeas Corpus ("Pet.," ECF No. 1). Petitioner did not
21 file any objections to the R&R. Having considered the Petition, Magistrate Judge Berg's
22 R&R, the state court record, and the law, the Court **ADOPTS** Magistrate Judge Berg's
23 R&R in its entirety, **DENIES** the Petition, and **DENIES** Petitioner a certificate of
24 appealability ("COA").

25 **BACKGROUND**

26 Magistrate Judge Berg's R&R contains a thorough and accurate recitation of the
27 factual and procedural history underlying the instant Petition. *See* R&R at 2–5. This Order
28 incorporates by reference the background as set forth therein.

1 **LEGAL STANDARD**

2 Federal Rule of Civil Procedure 72(b) and 28 U.S.C. § 636(b)(1) set forth a district
3 court’s duties in connection with a magistrate judge’s report and recommendation. The
4 district court must “make a de novo determination of those portions of the report or
5 specified proposed findings or recommendations to which objection is made,” and “may
6 accept, reject, or modify, in whole or in part, the findings or recommendations made by the
7 magistrate judge.” 28 U.S.C. § 636(b)(1); *see also United States v. Raddatz*, 447 U.S. 667,
8 673–76 (1980); *United States v. Remsing*, 874 F.2d 614, 617 (9th Cir. 1989). In the absence
9 of timely objection, however, the Court “need only satisfy itself that there is no clear error
10 on the face of the record in order to accept the recommendation.” Fed. R. Civ. P. 72
11 advisory committee’s note (citing *Campbell v. U.S. Dist. Court*, 501 F.2d 196, 206 (9th
12 Cir. 1974)).

13 **ANALYSIS**

14 Petitioner, who was convicted of first-degree murder, *see* R&R at 4 (citing ECF No.
15 8-9 at 996), raises a single ground for relief in her Petition, namely, that the trial court
16 committed prejudicial error by failing properly to instruct the jury on the lesser included
17 offense of involuntary manslaughter. *See id.* at 7 (citing Pet. at 2, 6, 25–41).

18 Magistrate Judge Berg concludes that “the California Court of Appeal’s denial of
19 the Petitioner’s jury instruction claim was neither contrary to, nor an unreasonable
20 application of, clearly established federal law” and, “[f]urther, based on review of the entire
21 record, the state court’s decision was not based on an unreasonable determination of the
22 facts in light of the evidence presented at the state court proceeding.” *Id.* at 17 (citing 28
23 U.S.C. §§ 2254(d)(1)–(2)). He therefore recommends that the Court deny the Petition on
24 several grounds. *See id.* at 9–17.

25 First, Magistrate Judge Berg concludes that, “[t]o the extent that Petitioner claims
26 that the state trial court violated state law when it did not properly instruct the jury on the
27 lesser included offense of involuntary manslaughter, the claim is not subject to federal
28 habeas review.” *Id.* at 9 (citing *Estelle v. Maguire*, 502 U.S. 62, 67–68 (1991)).

1 Second, “[t]o the extent that Petitioner contends that the trial court’s alleged failure
2 to properly instruct the jury on the lesser included offense of involuntary manslaughter
3 violated her federal constitutional rights, . . . [t]here is no clearly established federal law
4 . . . because the United States Supreme Court expressly declined to rule on whether a trial
5 court’s failure to instruct on a lesser included offense in a non-capital case violates the
6 federal constitution.” *Id.* at 10 (citing *Beck v. Alabama*, 447 U.S. 625, 638 n.14 (1980);
7 *Powell v. Hatcher*, 407 F. App’x. 226, 227 (9th Cir. 2011); *United States v. Rivera-Alonzo*,
8 584 F.3d 829, 834 n.3 (9th Cir. 2009)). Accordingly, Magistrate Judge Berg finds that
9 “[h]abeas relief is not available . . . because the Court cannot find that the state appellate
10 court ‘unreasonabl[y] appli[ed] . . . clearly established Federal law, as determined by the
11 Supreme Court of the United States.’” *Id.* (citing 28 U.S.C. § 2254(d); *Beck*, 447 U.S. at
12 638 n.14).

13 Finally, to the extent Petitioner contends that the failure to provide a proper
14 involuntary manslaughter instruction violated her due process rights by denying her “a
15 meaningful opportunity to present a full defense,” *see id.* at 11 (quoting *Bradley v. Duncan*,
16 315 F.3d 1091, 1098–99 (9th Cir. 2002)), Magistrate Judge Berg concludes that, “[u]nder
17 the facts presented here, the modified jury instruction given by the trial judge did not ‘so
18 infect[] the entire trial that the resulting conviction violates due process.’” *Id.* at 17
19 (quoting *Estelle*, 502 U.S. at 72). As an initial matter, “Petitioner’s theory that she
20 dissociated as a result of her mental illness and therefore lacked the necessary capacity to
21 commit murder appears to be explicitly addressed in the modified[, allegedly deficient]
22 instruction’s language.” *Id.* at 15. Further, “even if the trial court erred by omitting a
23 portion of the involuntary manslaughter jury instruction, the error was harmless[] because
24 there was no substantial or injurious influence on the jury’s verdict” in light of “the
25 California Court of Appeal[’s] determin[ation that] there is no reasonable basis for
26 assuming that . . . the verdict would have been different[] given that the jury found that
27 Petitioner premeditated the killing and acted with express malice.” *Id.* at 1516 (citing *Barao*
28 *v. Frauenheim*, No. 2:15-cv-00098-JKS, 2016 WL 146235, at *8–9 (E.D. Cal. Jan. 13,

1 2016); *Williams-Cook v. Yates*, No. 09-CV-2643-H (AJB), 2010 WL 3768113, at *5–7
2 (S.D. Cal. Sept. 21, 2010)).

3 Because Petitioner failed timely to object to Magistrate Judge Berg’s R&R, *see* R&R
4 at 17 (directing that any objections be filed by February 28, 2020), the Court reviews the
5 R&R for clear error. Having reviewed the R&R, the Court finds that it is well reasoned
6 and contains no clear error. Accordingly, the Court **ADOPTS** in its entirety Magistrate
7 Judge Bergs’s R&R (ECF No. 11) and **DENIES** the Petition (ECF No. 1).

8 **CERTIFICATE OF APPEALABILITY**

9 The Court also is obliged to determine whether to issue a COA in this proceeding.
10 A COA is authorized “if the applicant has made a substantial showing of the denial of a
11 constitutional right.” 28 U.S.C. § 2253(c)(2). “Where a district court has rejected the
12 constitutional claims on the merits, . . . [t]he petitioner must demonstrate that reasonable
13 jurists would find the district court’s assessment of the constitutional claims debatable or
14 wrong.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). When “the district court denies a
15 habeas petition on procedural grounds without reaching the prisoner’s underlying
16 constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of
17 reason would find it debatable whether the petition states a valid claim of the denial of a
18 constitutional right and that jurists of reason would find it debatable whether the district
19 court was correct in its procedural ruling.” *Id.*

20 Because the Court finds that no reasonable jurist would find it debatable whether the
21 Court was correct in its determination that Petitioner is not entitled to federal habeas corpus
22 relief, the questions presented by the Petition do not warrant further proceedings.
23 Accordingly, the Court **DENIES** a COA.

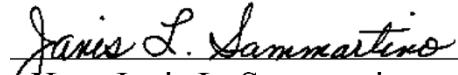
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1 **CONCLUSION**

2 In light of the foregoing, the Court **ADOPTS** Magistrate Judge Berg’s R&R in its
3 entirety (ECF No. 11), **DENIES** the Petition (ECF No. 1), and **DENIES** a certificate of
4 appealability. Accordingly, the Clerk of Court **SHALL ENTER** Judgment denying the
5 Petition and **SHALL CLOSE** the file.

6 **IT IS SO ORDERED.**

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8 Dated: June 26, 2020


9 Hon. Janis L. Sammartino
10 United States District Judge
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