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CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

EMILIANO T. LOPEZ, Petitioner, v. STEVEN CAMBRA, Warden, et al., Respondents.	NO. CV. 96-8863-TJH(CT) MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION ON A PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

This report and recommendation is submitted to the Honorable Terry J. Hatter, United States District Judge, pursuant to the provisions of 28 U.S.C. § 636 and General Order 194 of the United States District Court for the Central District of California. For the reasons discussed below, it is recommended that the petition be denied and dismissed with prejudice.

SUMMARY OF PROCEEDINGS

On March 4, 1997, petitioner filed a first amended petition for writ of habeas corpus. On April 7, 1997, respondents filed a return.

On April 18, 1997, respondents filed a supplemental return, pursuant to this court's order. On May 16, 1997, petitioner filed a traverse.

BACKGROUND

Petitioner was found guilty by a jury in Los Angeles County Superior Court of murder, multiple robberies and attempted robberies, and gun use allegations in connection with the robbery of a restaurant and the killing of a victim under California law on December 19, 1988. The court found true a prior serious felony. (CT 641-64; Return, exh. D at 130).[1] Petitioner was sentenced to a total term in state prison of 23 years plus 27 years to life without the possibility of parole. The sentence included enhancements. (CT 746-55; Return, exh. D at 130-31).

Petitioner thereafter filed an appeal with the California Court of Appeal. (Return, exh. A; CT 756-58). On August 29, 1990, the California Court of Appeal affirmed petitioner's conviction, but modified his sentence as to the murder count to reflect a term of life with the possibility of parole, rather than life without the possibility of parole, and stayed the sentence enhancements imposed on certain counts. (Return, exh. D; Petition, exh. B).

Petitioner next filed a petition for review to the California Supreme Court, raising the following two grounds: (1) a severance should be granted when a co-defendant's confession does not expressly incriminate the defendant but does so when linked with other evidence in the case; and, (2) insufficient evidence to support petitioner's conviction. The California Supreme Court denied the petition on

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November 14, 1990, without citation to authority. (Return, exh. E; Petition, exh. C).

On February 5, 1991, petitioner filed a petition for writ of habeas corpus with this court, case number CV 91-0660-TJH, after transfer by the United States District Court for the Northern District of California, raising four grounds: (1) the trial court erred by not severing petitioner's trial from that of the co-defendant; (2) there is insufficient evidence in support of the conviction; (3) the prosecutor improperly commented on petitioner's failure to testify in his closing argument; and, (4) the trial court erroneously sentenced petitioner for multiple use of a firearm. The petition was denied and dismissed without prejudice on June 11, 1991, for failure to exhaust state remedies with respect to his third and fourth grounds. (Return, exh. F).

On March 17, 1992, petitioner filed a petition for writ of habeas corpus with the California Supreme Court, raising the following claims: (1) the trial court erred in denying petitioner's motion for a severance of his case from that of the co-defendant; (2) petitioner was denied his constitutional right to confrontation of the principal witness against him; (3) there was insufficient evidence to convict the petitioner; (4) intentional suppression of material evidence favorable to the petitioner by the prosecution violated his due process rights; (5) the prosecutor engaged in misconduct in final argument; and, (6) the trial court erred in sentencing petitioner to more than one use of firearm enhancement pursuant to California Penal Code § 12022.5. (Return, exh. G). On May 27, 1992, the California Supreme Court denied the petition with citations to In re Waltreus, 62

Cal.2d 218, cert. denied 382 U.S. 853 (1965) (Waltreus), and In re Lindley, 29 Cal.2d 709, 723 (1947) (Lindley). (Return, exh. G; Petition, exh. E).

Petitioner thereafter apparently filed a petition for writ of habeas corpus with the California Court of Appeal on June 26, 1992, which was denied on July 26, 1992, for raising by petition for writ of habeas corpus a contention previously rejected on appeal. (Petition, exh. F).

On August 11, 1992, petitioner filed a second petition for writ of habeas corpus with the California Supreme Court, alleging that the court erred in sentencing petitioner to more than one use of a firearm enhancement pursuant to California Penal Code § 12022.5. (Return, exh. H). On October 28, 1992, the California Supreme Court denied the petition with a citation to Waltreus. (Return, exh. H at 213; Petition, exh. G).

On February 23, 1993, petitioner filed another petition for writ of habeas corpus in federal court, case number CV 93-1048-TJH, raising three grounds for relief: (1) petitioner was denied his rights to confrontation by introduction of the co-defendant's extrajudicial statement; (2) the prosecutor engaged in misconduct in his argument; and, (3) the evidence was insufficient because it was not credible and was based on testimony of a witness who lied to the police. On June 2, 1993, the court denied and dismissed the petition without prejudice for failure to exhaust state remedies. (Return, exh. I).

Petitioner thereafter apparently filed a third petition for writ of habeas corpus with the California Supreme Court, raising three grounds: (1) petitioner's fundamental rights were violated in the

denial of his right to confrontation; (2) the prosecutor engaged in misconduct in argument; and, (3) there is not sufficient evidence to convict petitioner. (Petition at 5(a)). The petition was denied on March 30, 1995, with citations to Waltreus and Lindley. (Petition, exh. I).[2]

This first amended petition follows.

FACTS

At approximately 10:00 p.m. on November 5, 1987, petitioner and two armed men, wearing gloves and halloween-type masks, entered the bar at Felipe's Restaurant in Downey, California, and announced in part: "this is a holdup". (RT 72-76, 87, 105-08; Return, exh. D at 131). The men asked for and took wallets from numerous people in the bar. (RT 76-77, 108, 203-04; Return, exh. D at 131).

One of the men entered the kitchen with a pellet gun, and told everyone to lie down. (RT 432; Return, exh. D at 131). The kitchen employees did not cooperate, and one employee was shot with pellets after approaching the armed man. (RT 432; Return, exh. D at 131). The employee thereafter went after the armed man, running out of the kitchen with a two-by-four piece of wood and direction of the bar. (RT 78-81, 175-76, 189; Return, exh. D at 131). A witness saw the employee and one of the armed men scuffling near the front door, heard shots fired, and heard a car start and then pull away. (RT 108-11; Return, exh. D at 132). Another witness who lived in a nearby apartment had heard gunshots, looked out his window, and saw a green or gold colored Plymouth driving out of the restaurant parking lot, with the same employee chasing and beating on the car with a stick.

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[2] Respondents failed to provide the court with these documents.

detective, Ibanez identified the black corduroy hat and halloween-type mask as what he had been wearing during the robbery. (RT 285-87, 291). Ibanez also stated he had went into the kitchen at the restaurant, ordered the employees to get down, and had fired his pellet gun more than once at one employee who tried to run out of the kitchen. (RT 288).

It was also demonstrated by testimony at trial that at approximately 7:30 p.m. on November 5, 1987, two and one-half hours before the crimes, petitioner had picked up Ibanez in the car which was used in the robbery. (Return, exh. D at 133).

PETITIONER'S CONTENTIONS

Petitioner raises the following grounds in his first amended petition:

1. Petitioner's fundamental constitutional rights have been violated in the denial of his right to confrontation with respect to a post-arrest, extrajudicial statement made by a co-defendant;

2. There was insufficient evidence to convict the petitioner; and,

3. The prosecutor engaged in misconduct in argument, in violation of Griffin v. California, 380 U.S. 609 (1965) (Griffin).

STANDARD OF REVIEW

An application for a writ of habeas corpus on behalf of a person in custody pursuant to a state court judgment shall not be granted with respect to any claim that was adjudicated on the merits in state court proceedings unless the adjudication of the claim either: (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as

RECOMMENDATION

For all of the foregoing reasons, it is recommended that the court issue an order: (1) approving and adopting this report and recommendation; and, (2) directing that judgment be entered denying and dismissing the first amended petition with prejudice.

Date: June 2, 1997

CAROLYN TURCHIN
UNITED STATES MAGISTRATE JUDGE

NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but may be subject to the right of any party to file objections as provided in the Local Rules Governing the Duties of Magistrate Judges and review by the District Judge who initials appear in the docket number. No notice of appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the judgment of the District Court.