

APR 15 2010

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MELVIN JAMES THOMAS,

Petitioner - Appellant,

v.

D. K. SISTO, Warden,

Respondent - Appellee.

No. 07-56085

D.C. No. 2:06-cv-04307-ER

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Edward Rafeedie, District Judge, Presiding

Submitted April 5, 2010**

Before: RYMER, McKEOWN, and PAEZ, Circuit Judges.

California state prisoner Melvin James Thomas appeals from the district court's judgment denying his 28 U.S.C. § 2254 habeas petition. We have

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

jurisdiction pursuant to 28 U.S.C. § 2253, and we affirm.

Thomas contends that the trial court violated his due process rights by declining to instruct the jury on the defense of unconsciousness. As a preliminary matter, the State has waived its argument that Thomas' claim is barred by *Teague v. Lane*, 489 U.S. 288 (1989). See *Jordan v. Ducharme*, 983 F.2d 933, 936 (9th Cir. 1993). Our independent review of the record, see *Himes v. Thompson*, 336 F.3d 848, 853 (9th Cir. 2003), indicates that the state courts' rejection of Thomas' due process claim was not objectively unreasonable. See 28 U.S.C. § 2254(d)(1); see also *Estelle v. McGuire*, 502 U.S. 62, 72-73 (1991); *Duckett v. Godinez*, 67 F.3d 734, 743-44 (9th Cir. 1995).

Finally, we construe Thomas' additional arguments as a motion to expand the certificate of appealability. So construed, the motion is denied. See 9th Cir. R. 22-1(e); see also *Hiivala v. Wood*, 195 F.3d 1098, 1104-05 (9th Cir. 1999) (per curiam).

AFFIRMED.