UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DONALD A. JORDAN, Petitioner, v. GEORGE A. NEOTTI, Warden, Respondent.	NO. CV 09-6874-ODW(E) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable Otis D. Wright, II, United States District Judge, pursuant to 28 U.S.C. section 636 and General Order 05-07 of the United States District Court for the Central District of California.

PROCEEDINGS

Petitioner filed a "Petition for Writ of Habeas Corpus By a Person in State Custody" on September 21, 2009. Respondent filed an Answer on March 18, 2010, contending that the Petition was untimely. Petitioner filed a Traverse on May 14, 2010.

On May 26, 2010, the Court issued a Memorandum and Order finding the Petition to be timely and ordering Respondent to file a Supplemental Answer addressing the merits of the Petition. Respondent filed a Supplemental Answer on September 23, 2010.

On December 8, 2010, Petitioner filed a "Motion Requesting a Stay and Abeyance." On December 8, 2010, the Court issued an order denying this Motion and sua sponte extending the time for Petitioner to file a Reply.

Petitioner did not file a timely Reply. On January 20, 2011, the Magistrate Judge issued a Report and Recommendation recommending dismissal of the action without prejudice for failure to prosecute.

On February 1, 2011, the Magistrate Judge received in chambers Petitioner's belated "Traverse, etc." On that date, the Magistrate Judge withdrew the January 20, 2011 Report and Recommendation and ordered the Traverse filed.

BACKGROUND

Following Petitioner's waiver of a jury trial, the Los Angeles County Superior Court found Petitioner guilty of four counts of committing a lewd act on a fourteen-year-old child while Petitioner was at least ten years older, in violation of California Penal Code section 288(c)(1), and one count of inducing a child under the age of sixteen to engage in a lewd act, in violation of California Penal Code section 266j (Reporter's Transcript ["R.T."] 25-26, 611-14; Clerk's

Transcript ["C.T."] 59-63, 82, 292-93).[1] The court found true the allegation that Petitioner had suffered a prior conviction qualifying as a "strike" under California's Three Strikes law, California Penal Code sections 667(b) - (i) and 1170.12(a) - (d) (R.T. 614; C.T. 293).[2] The court denied Petitioner's motion to strike the prior conviction pursuant to People v. Superior Court (Romero), 13 Cal. 4th 497, 53 Cal. Rptr. 2d 789, 917 P.2d 628 (1996) ("Romero") (R.T. 655-56; C.T. 296-301). The court sentenced Petitioner to an upper term of eight years on the section 266j count, doubled pursuant to the Three Strikes law, for a total term of sixteen years (R.T. 659-64; C.T. 318-21).[3]

The Court of Appeal affirmed the judgment (Respondent's Lodgment 6; see People v. Mitchell, 2007 WL 2774461 (Cal. App. Sept. 25, 2007)). The California Supreme Court denied Petitioner's petition for review (Respondent's Lodgment 8).

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[1] The court also found Bolton Mitchell, Petitioner's co-defendant, guilty of one count of committing a lewd act on a fourteen-year-old child while at least ten years older than the victim (R.T. 610-11; C.T. 294-95).

[2] The Three Strikes Law consists of two nearly identical statutory schemes. The earlier provision, enacted by the Legislature, was passed as an urgency measure, and is codified as California Penal Code §§ 667(b) - (i) (eff. March 7, 1994). The later provision, an initiative statute, is embodied in California Penal Code § 1170.12 (eff. Nov. 9, 1994). See generally People v. Superior Court (Romero), 13 Cal. 4th 497, 504-05, 53 Cal. Rptr. 2d 789, 917 P.2d 628 (1996). The court sentenced Petitioner under both versions (C.T. 317).

[3] The court imposed concurrent sentences on the remaining counts (R.T. 614; C.T. 318-21).

On March 21, 2008, Petitioner filed a habeas corpus petition in this Court. See Jordan v. Hernandez, CV 08-1939-SGL(E). Respondent filed an Answer contending that the 2008 petition was partially unexhausted. Thereafter, Petitioner filed a motion for voluntary dismissal of the action. On September 24, 2008, the Court entered judgment dismissing the action without prejudice.

On October 6, 2008, Petitioner filed a habeas corpus petition in the California Court of Appeal (Respondent's Lodgment 13). On November 20, 2008, the Court of Appeal denied the petition (Respondent's Lodgment 14).

On January 16, 2009, Petitioner filed a petition for habeas corpus in the California Supreme Court (Respondent's Lodgment 9). On June 24, 2009, the California Supreme Court denied this habeas petition with a citation to In re Waltreus, 62 Cal. 2d 218, 42 Cal. Rptr. 9, 397 P.2d 1001, cert. denied, 382 U.S. 853 (1965) (Respondent's Lodgment 10).[4]

SUMMARY OF TRIAL EVIDENCE

The following factual summary is taken from the opinion of the California Court of Appeal in People v. Mitchell, 2007 WL 2774461 (Cal. App. Sept. 25, 2007). See Galvan v. Alaska Dep't of

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[4] The citation to In re Waltreus signified that the California Supreme Court denied the petition on the ground that the court would not consider on habeas corpus issues previously resolved on appeal. See In re Clark, 5 Cal. 4th 750, 765, 21 Cal. Rptr. 2d 509, 855 P.2d 729 (1993).

Corrections, 397 F.3d 1198, 1199 & n.1 (9th Cir. 2005) (taking factual summary from Court of Appeal opinion).

> At the time of the relevant events, Melissa B. was a 14-year-old child, the seventh of nine children in her family. Melissa had experienced developmental difficulties her entire life.[5] She did not talk until she was four; she was sensitive to sound and touch; she had difficulty with motor skills, reasoning and in social situations. She had received special accommodation at school since the fourth grade. As a high school freshman, Melissa had learned to mask her disability to some extent by, among other things, talking fast, but she had also become rebellious and resented that her father treated her like "a little kid."
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> A. Melissa Runs Away
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> On April 9, 2005, Melissa ran away from home. She met a boy from her neighborhood, Jeremiah. Melissa and Jeremiah took a bus to downtown Los Angeles to see a friend of Jeremiah's and to "hang out."
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> While they were downtown, Jordan, who was 46 years old, drove slowly by in a white Cadillac and attempted to get Melissa's attention. Jordan offered Jeremiah and Melissa a

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[5] Melissa's father testified that Melissa suffered from a form of autism, but no competent evidence was introduced to support that diagnosis.

ride; they accepted and got into Jordan's car. As they did so, Jeremiah told Melissa that she was to give Jordan oral sex. Melissa did not know why, but she did not object.

Once she was inside the car, Jordan asked Melissa her name and age. Melissa said, "My name's Melissa, and my age is fourteen and a half." Jordan drove Jeremiah and Melissa to a park, where Melissa went to use the restroom. When she returned to the car, Jeremiah was gone. Jordan told Melissa that Jeremiah had sold her to him, and talked to her about oral sex. Melissa was "kind of confused," but proceeded to perform oral sex on Jordan. Jordan attempted to have vaginal intercourse with Melissa, but was unable to achieve penetration.

They left the park. At some point, Jordan told Melissa that she was going to be a prostitute. He instructed Melissa to tell men that her name was Diamond and that she was 18 years old. Over the next day or two, Jordan introduced Melissa to approximately six men, with whom she proceeded to have sex in hotel rooms. She gave the money she received from these men to Jordan.

Eventually, Jordan and Melissa met Mitchell, who was 42 years old. The three of them went to the Snooty Fox Motel. Melissa told Mitchell that her name was Diamond and that she was 18. Melissa went to shower; Jordan joined her in the shower and asked her to perform oral sex on him,

which she did. Melissa also performed oral sex on Jordan on the bed in the hotel room, after which Jordan left the room.

When Melissa and Mitchell were alone together in the hotel room, Mitchell asked Melissa for her real name and age. Melissa told Mitchell that her name was Diamond and that she was 18 because she was afraid that Jordan would return and hit her or slap her in the face, as he had done once before when Melissa told someone her real name and age. Mitchell asked Melissa why she did not go home; Melissa told him she did not want to because she was angry at her father and for other reasons. Melissa and Mitchell had vaginal intercourse. Both of them fell asleep afterward, with Mitchell naked on the bed and Melissa in a T-shirt and shorts on the floor.

B. Defendants' Arrests and Mitchell's Interrogation

Melissa's father reported her missing to the police soon after she disappeared. Officer Darius Lee of the Los Angeles Police Department was assigned by his watch commander to make periodic checks on Melissa's case. Officer Lee spoke to a juvenile friend of Melissa's, who provided a description of a rust-stained white Cadillac and an African-American male approximately six feet tall, 200 pounds, 40-45 years of age, wearing all brown and a brown hat.

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At approximately 1:15 a.m. on the morning of April 12, Officer Lee saw a rust-stained white Cadillac at a gas station at the intersection of La Brea and Jefferson. A man matching the description given to Officer Lee by Melissa's friend stepped out of the Cadillac. That man was Jordan. Officer Lee and his partner, Officer Chui, approached Jordan and asked him if he had seen a girl matching Melissa's description, last seen in the area of Redondo Boulevard and 20th Street. Jordan responded that he had picked up "a couple of kids" near Redondo and Washington Boulevard (one block from Redondo and 20th), and given them a ride to Dorsey Park. Officer Lee then secretly turned on a tape recorder he carried in his shirt pocket.[6]

Jordan told Officer Lee that Melissa had asked him for a ride, that he had dropped off Melissa and her companion, and that the two of them had walked away together. He denied knowing where Melissa was. After Officer Lee persisted in his questioning, Jordan admitted that Melissa was in Room 104 at the Snooty Fox Motel, and described the man that Melissa was with. Officer Lee radioed Melissa's location and the description of the man to his dispatcher. Officer Lee showed Jordan a photograph of Melissa, and Jordan confirmed that Melissa was the girl he was speaking

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[6] Defendants were, prior to all custodial interrogations, properly advised of their Miranda rights, and they do not contend otherwise.

about.

Melissa and Mitchell were awakened by the police knocking on the door of their motel room. Melissa hid in the closet. Mitchell opened the door, and the police entered.

When Officer Lee subsequently arrived at the motel room, three officers were near the closet, speaking with Melissa. Mitchell was on the bed, covering his lower body with a sheet. Officer Lee observed two crack pipes and other drug paraphernalia in the room, as well as condoms and alcohol. Mitchell was taken into custody.

Detective Daryl Groce was assigned to be the investigating officer on Melissa's case. On April 12, Detective Groce and his partner, Detective Martin, recorded their interrogation of Mitchell.

During the interrogation, Mitchell admitted[7] that he had asked Melissa her age because he "didn't think she was" really 18. Mitchell was a casual acquaintance of Jordan's, who Mitchell knew as "Don Juan" and a reputed pimp. Mitchell saw Jordan at a gas station, and asked him for a ride. He thought Melissa was Jordan's girlfriend, and

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[7] The trial court did not consider Mitchell's statement in resolving the charges against Jordan.

described their relationship as "pimpish." Mitchell rode with Jordan back to Mitchell's room at the Baldwin Hills Hotel, where they met a group of people "hanging out" and "drinking, smoking, getting high[.]" They left so that Mitchell could rent a car, but because they were "feeling good" after "kicking it" their "actual goal got set aside." They decided to get another room to do more partying. Mitchell had some money, so he rented a room at the Snooty Fox. Mitchell left Jordan and Melissa alone in the room and went to get some dinner, thinking that "the little girl seemed scared[.]" "[T]hat's how I saw her initially," he told Detective Groce. "A little girl.... [¶] That's why I said I asked her her age." Mitchell told the detectives that Melissa said she was 19, to which Mitchell responded, "Is that the age he told you to say?" Mitchell admitted to having consensual sexual intercourse with Melissa. Mitchell stated that he offered to pay Jordan for his "sexual encounter" with Melissa, but Jordan declined because Mitchell had paid for the room.

C. Jordan's Testimony

Mitchell did not testify or put on any affirmative evidence. Jordan testified on his own behalf.

Jordan testified that he was in a slow-moving line at a car wash at Redondo and Washington when he saw Melissa and Jeremiah. He did not know either of them. He thought that

Melissa was Jeremiah's girlfriend, and that she was on a "ho stroll" and was a "rockstitute," meaning she exchanged sex for rock cocaine.

Jeremiah was talking to a drug dealer that Jordan had done business with in the past; the drug dealer introduced Jeremiah to Jordan as a gang member and dope dealer. Jordan gave Jeremiah a ride to a parking lot at Ranch Park, near Dorsey High School, identified by Officer Lee as a location known for drug trafficking and drug use. Jordan smoked crack cocaine in his car; he testified that Melissa did so as well, and that she had her own crack pipe. When Melissa got out of the car to use the restroom, Jeremiah left the car to make a "philly blunt cigar," a cigar wrapper containing marijuana and cocaine; he then walked away toward a group of apartment buildings known in Baldwin Hills as "the Jungles." When Melissa came back, Jordan explained that Jeremiah had gone. Just then, the "park police"[8] began patrolling the lot; nervous, Jordan pulled out of the lot with Melissa still in the car.

Jordan denied that Melissa performed oral sex on him or that they engaged in any "sexual touching" while they were in the parking lot. Jordan testified that, at some point, Melissa told him her name was Christy; when he asked Melissa's age, she said she was 18.

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[8] Presumably, the Department of Parks and Recreation Safety Police.

Jordan drove to some friends' house to get high. Melissa asked to come along, and Jordan let her. His friends, however, were not so welcoming; because they did not know Melissa, they did not want her at their house. Jordan and Melissa left the friends' house along with one of Jordan's friends and went to a gas station, where Jordan's friend bought cigarettes and "some paraphernalia." Jordan's friend wanted Jordan to take him to get some heroin, but Jordan said he did not have enough gas. They went back to Jordan's friends' house to get some money, this time leaving Melissa in the car. Jordan stayed inside for five or six hours ingesting cocaine. Jordan then took Melissa to the Baldwin Motel, which Jordan described as his "hang out." Jordan attempted to procure more crack cocaine, while Melissa smoked cocaine on the steps behind the motel. Jordan denied that he took money from Melissa or offered Melissa to others for sex.

At daylight, they left the motel. Melissa asked Jordan to take her to a friend's house at 8th Street and Union. Melissa went into a building there; Jordan waited for approximately one hour. When Melissa came out, she had more crack cocaine, and gave some to Jordan. Melissa introduced Jordan to her friend Natalie and Natalie's boyfriend, a drug dealer. After dropping off Natalie's nephew and nieces, the four of them went to "the Bottoms," an area known for drug trafficking. Natalie's boyfriend went to buy something, and then gave Jordan some gas money and some dope. The four of

them then went downtown, where Jordan again waited as Natalie and Melissa went to procure more drugs. Eventually, Natalie and Melissa invited Jordan into an upstairs apartment nearby, where the occupant was "cooking up" cocaine in the kitchen. Jordan stayed at the apartment for approximately forty-five minutes smoking cocaine, while Melissa waited for someone. When that person did not arrive, Jordan left with Melissa.[9]

They returned to the Baldwin Motel, where Melissa again went to smoke crack cocaine on the steps. Approximately one hour later, Jordan and Melissa drove to a gas station, where they bought a glass tube to use as a crack pipe. While there, Jordan met Mitchell, with whom he was acquainted. Mitchell had an open bottle of vodka and seemed to be intoxicated. Jordan gave Mitchell a ride to a bank, where Mitchell withdrew money from the ATM. Jordan, Mitchell and Melissa eventually ended up at the Snooty Fox, where Mitchell rented a room in which the three of them could get high.

Jordan testified that, once in the room, he stripped to his underwear in preparation for taking a shower, but sat on the bed to smoke crack before doing so. Melissa sat next to

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[9] Jordan testified that, at some point, he returned to his mother's house to sleep. He left Melissa in the car overnight. His mother objected, and ordered him to take Melissa away from her house. Jordan's testimony is unclear regarding at what point in his chronology of events this incident occurred.

him on the bed, took a "hit" on her crack pipe, and then spontaneously leaned over, took Jordan's penis out of his underwear, and put it in her mouth. Because Jordan was high, he did not become aroused; rather, he became "irritated" and told Melissa to stop after less than a minute. Jordan went into the shower; Melissa followed him and they showered together. Jordan denied that they had any sexual contact while in the shower. He left the hotel room soon thereafter, and was subsequently arrested by Officer Lee.

(see Respondent's Lodgment 6, pp. 2-8; People v. Mitchell, 2007 WL 2774461, at *1-4) (footnotes renumbered).

PETITIONER'S CONTENTIONS

Petitioner contends:

1. The trial court's imposition of an upper term sentence allegedly violated Petitioner's rights under the Sixth and Fourteenth Amendments (Ground One);

2. The trial court allegedly abused its discretion in denying Petitioner's motion to strike Petitioner's prior "strike" conviction (Ground Two); and

3. The trial court allegedly erred by refusing to consider a defense of "good faith, reasonable mistake of fact" (Ground Three).

STANDARD OF REVIEW

A federal court may not grant an application for writ of habeas corpus on behalf of a person in state custody with respect to any claim that was adjudicated on the merits in state court proceedings unless the adjudication of the claim: (1) "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States"; or (2) "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); Woodford v. Visciotti, 537 U.S. 19, 24-26 (2002); Early v. Packer, 537 U.S. 3, 8 (2002); Williams v. Taylor, 529 U.S. 362, 405-09 (2000).

"Clearly established Federal law" refers to the governing legal 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 (2003). A state court's decision is "contrary to" clearly established Federal law if: (1) it applies a rule that contradicts governing Supreme Court law; or (2) it "confronts a set of facts. . . materially indistinguishable" from a decision of the Supreme Court but reaches a different result. See Early v. Packer, 537 U.S. at 8 (citation omitted); Williams v. Taylor, 529 U.S. at 405-06.

Under the "unreasonable application prong" of section 2254(d)(1), a federal court may grant habeas relief "based on the application of a governing legal principle to a set of facts different from those of the case in which the principle was announced." Lockyer v. Andrade,

538 U.S. at 76 (citation omitted); see also Woodford v. Visciotti, 537 U.S. at 24-26 (state court decision "involves an unreasonable application" of clearly established federal law if it identifies the correct governing Supreme Court law but unreasonably applies the law to the facts).

A state court's decision "involves an unreasonable application of [Supreme Court] precedent if the state court either unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply, or unreasonably refuses to extend that principle to a new context where it should apply." Williams v. Taylor, 529 U.S. at 407 (citation omitted).

"In order for a federal court to find a state court's application of [Supreme Court] precedent 'unreasonable,' the state court's decision must have been more than incorrect or erroneous." Wiggins v. Smith, 539 U.S. 510, 520 (2003) (citation omitted). "The state court's application must have been 'objectively unreasonable.'" Id. at 520-21 (citation omitted); see also Waddington v. Sarausad, 555 U.S. 179, 129 S. Ct. 823, 831 (2009); Davis v. Woodford, 384 F.3d 628, 637-38 (9th Cir. 2004), cert. dism'd, 545 U.S. 1165 (2005). "Under § 2254(d), a habeas court must determine what arguments or theories supported, . . . or could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." Harrington v. Richter, 131 S. Ct. 770, 786 (2011). This is "the only question that matters under § 2254(d)(1)." Id. (citation and internal quotations omitted).

Habeas relief may not issue unless "there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [the United States Supreme Court's] precedents." Id. at 786-87 ("As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.").

In applying these standards, the Court looks to the last reasoned state court decision. See Delgadillo v. Woodford, 527 F.3d 919, 925 (9th Cir. 2008). "Where a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief." Harrington v. Richter, 131 S. Ct. at 784.

Additionally, federal habeas corpus relief may be granted "only on the ground that [Petitioner] is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). In conducting habeas review, a court may determine the issue of whether the petition satisfies section 2254(a) prior to, or in lieu of, applying the standard of review set forth in section 2254(d). Frantz v. Hazey, 533 F.3d 724, 736-37 (9th Cir. 2008) (en banc).

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DISCUSSION

I. Petitioner's Challenge to His Upper Term Sentence Does Not Merit Habeas Relief.

Petitioner contends the trial court violated the Sixth Amendment, as interpreted in Apprendi v. New Jersey, 530 U.S. 466 (2000) and its progeny, by assertedly imposing an upper term sentence based on facts found true by a preponderance of the evidence, rather than by proof beyond a reasonable doubt. The Court of Appeal rejected this claim on the ground that the court's determination was proper under Apprendi's prior conviction exception (see Respondent's Lodgment 6, pp. 19-21; People v. Mitchell, 2007 WL 2774461, at *11-12).

A. Background

California's Determinate Sentencing Law generally prescribes three terms of imprisonment: an upper term, a middle term and a lower term. See Cunningham v. California, 549 U.S. 270, 277 (2007) ("Cunningham"). At the time Petitioner was sentenced, California Penal Code section 1170(b) required the sentencing court to impose the middle term "unless there [were] circumstances in aggravation or

mitigation of the crime."[10] Under California sentencing rules promulgated pursuant to California Penal Code section 1170.3, selection of the upper term was justified "only if, after a consideration of all the relevant facts, the circumstances in aggravation outweigh[ed] the circumstances in mitigation." See former Cal. Rules of Court, Rule 4.420(b).[11] "Circumstances in aggravation" meant "facts which justify the imposition of the upper term." See former Cal. Rules of Court, Rule 4.420(e). At the time of Petitioner's sentencing, Rule 4.421 of the California Rules of Court set forth a non-exhaustive list of circumstances in aggravation which included, among other things, the fact that the defendant had prior convictions which were "numerous or of increasing seriousness." See former Cal. Rules of Court, Rule 4.421(b)(2).[12]

Petitioner's prior strike was a 1978 second degree murder conviction with a firearm enhancement, arising out of Petitioner's killing of an innocent teenaged girl in an attempt to shoot rival gang members (R.T. 563, 647-48, 651; C.T. 215, 306-13). Following that

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[10] California Penal Code section 1170(b) since has been amended to provide, among other things, that where a statute specifies three possible terms of imprisonment, the choice of the appropriate term "shall rest within the sound discretion of the court." See Cal. Penal Code § 1170(b) (as amended by Cal. Stats. 2007 c. 3, § 2 (eff. March 30, 2007)), and Cal. Stats. 2007, c. 740, § 1 (eff. Oct. 14, 2007).

[11] A May 23, 2007 amendment, not pertinent to the issue presented here, substantially rewrote Rule 4.420. See Historical Notes, Cal. Rules of Court, Rule 4.420. A January 1, 2008 amendment made changes immaterial to the issue presented here. See id.

[12] Rule 4.421 also was amended in 2007. See Historical Notes, Cal. Rules of Court, Rule 4.421.

conviction, Petitioner suffered numerous drug-related felony convictions, served several prison terms, and violated parole (R.T. 647-48, 651-58; C.T. 214).[13]

In imposing the high term on the section 266j count, the court recited some of the aggravating factors enumerated in Rule 4.421, including the factor that prior crimes were "numerous or of increasing seriousness" (R.T. 659-60). The court also noted Petitioner "knew what was going on" and "took advantage of a situation" (R.T. 661). The court observed that other people were "brought in" to victimize the victim (R.T. 661). The court further indicated that an upper term was appropriate for the reasons the prosecutor had set forth in opposition to the Romero motion (R.T. 661-62). Those reasons included not only the nature of the current offense but also Petitioner's criminal history (R.T. 650-56).

The Court of Appeal construed the record to show that the sentencing court had relied, among other things, on the factor set

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[13] Although the probation report appears to have been included in the record on appeal (see C.T., "Appeal Transcript Chronological Index," pp. 2-3), it is not included in the record before this Court. It appears from the briefs on appeal that the probation report recorded Petitioner's prior convictions for possession for sale and transportation or sale of controlled substances, as well as convictions (possibly misdemeanor convictions) for attempted escape, driving with a suspended license and possession of a firearm by a felon or addict (see Respondent's Lodgment 3, at pp. 17-18; Respondent's Lodgment 4, at pp. 25-26). Petitioner does not contest the Court of Appeal's statement that Petitioner had suffered eight drug-related felonies and at least four misdemeanors since 1984 (see Respondent's Lodgment 6, p. 21; People v. Mitchell, 2007 WL 2774461, at *12).

forth in Rule 4.421(b)(2), i.e., that Petitioner's prior convictions were "numerous or of increasing seriousness" (Respondent's Lodgment 6, p. 21; see People v. Mitchell, 2007 WL 2774461, at *12).[14] While the record before this Court does not show that Petitioner's convictions were "of increasing seriousness," the record does support the conclusion that Petitioner's prior convictions were "numerous." See People v. Searle, 213 Cal. App. 3d 1091, 1098, 261 Cal. Rptr. 898 (1989) (three prior convictions "numerous" under predecessor to Rule 4.421(b)(2)).

B. Governing Legal Standards

In Apprendi, the United States Supreme Court held that, regardless of its label as a "sentencing factor," any fact other than the fact of a prior conviction that increases the penalty for a crime beyond the prescribed statutory maximum, among other things, must be "proved beyond a reasonable doubt." Apprendi, 530 U.S. at 490. In Blakely v. Washington, 542 U.S. 296 (2004) ("Blakely"), the Supreme Court held that the "statutory maximum" for Apprendi purposes "is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant . . . .*" Blakely, 542 U.S. at 303 (original emphasis). In Cunningham, the Supreme Court held that a California judge's imposition of an upper

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[14] Although Petitioner contends the sentencing court did not specify that it was imposing an upper term based on Petitioner's criminal record (see Pet. Mem., pp. 4-5), as indicated above the record shows that the court imposed the upper term for the reasons stated by the prosecutor in opposing the Romero motion, one of which was Petitioner's criminal history.

term sentence based on facts found by the judge rather than the jury violated the Constitution. Cunningham, 549 U.S. at 293.

In endorsing a "prior conviction exception," the Apprendi Court cited the Court's earlier decision in Almendarez-Torres v. United States, 523 U.S. 224 (1998) ("Almendarez-Torres"). Apprendi, 530 U.S. at 487-90. In Almendarez-Torres, the Court ruled that an indictment was not defective for failure to charge the fact of a prior conviction used as a sentence enhancement, on the ground that the prior conviction was not an element of the offense. Almendarez-Torres, 523 U.S. at 238-47. Both Cunningham and Blakely reaffirm the holding in Apprendi that "[o]ther than the fact of a prior conviction," a jury must decide any fact that increases punishment beyond the statutory maximum using a beyond a reasonable doubt standard. See Cunningham, 549 U.S. at 288-89; Blakely, 542 U.S. at 301; see also Butler v. Curry, 528 F.3d at 643-44 ("we have repeatedly recognized our obligation to apply the Almendarez-Torres exception"); United States v. Martin, 278 F.3d 988, 1006 (9th Cir. 2002) ("Apprendi expressly excludes recidivism from its scope. Defendant's criminal history need not be proved to a jury beyond a reasonable doubt. [citations].").

Accordingly, Apprendi and its progeny do not prohibit a sentencing court's application of a preponderance of the evidence standard in imposing sentence based on prior convictions. See United States v. Keesee, 358 F.3d 1217, 1220 (9th Cir. 2004) ("the Constitution does not require prior convictions that increase a statutory penalty to be charged in the indictment and proved before a jury beyond a reasonable doubt") (internal quotations and footnote

omitted); United States v. Delaney, 427 F.3d 1224, 1226 (9th Cir. 2005) ("The Supreme Court has made clear that the fact of a prior conviction need not be proved to a jury beyond a reasonable doubt or admitted by the defendant to satisfy the Sixth Amendment.") (citation omitted); United States v. Martin, 278 F.3d 988, 1006 (9th Cir. 2002) ("Apprendi expressly excludes recidivism from its scope. Defendant's criminal history need not be proved to a jury beyond a reasonable doubt. [citations].").

C. Discussion

In California "the existence of a single aggravating circumstance is legally sufficient to make the defendant eligible for the upper term." People v. Black, 41 Cal. 4th 799, 813, 62 Cal. Rptr. 3d 569, 161 P.3d 1130 (2007), cert. denied, 552 U.S. 1144 (2008); People v. Osband, 13 Cal. 4th 622, 728, 55 Cal. Rptr. 2d 26, 919 P.2d 640 (1996), cert. denied, 519 U.S. 1061 (1997); see also Butler v. Curry, 528 F.3d 624, 642-43 (9th Cir.), cert. denied, 129 S. Ct. 767 (2008). This Court must defer to this principle of state law. See Butler v. Curry, 528 F.3d at 642. Therefore, "if at least one of the aggravating factors on which the judge relied in sentencing [Petitioner] was established in a manner consistent with the Sixth Amendment, [Petitioner]'s sentence does not violate the Constitution." See Butler v. Curry, 528 F.3d at 643. "Any additional factfinding was relevant only to selection of a sentence within the statutory range." Id.

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Here the sentencing court relied, among other things, on the factor of the numerosity of Petitioner's prior convictions. The Supreme Court itself has not clarified the scope of Apprendi's prior conviction exception. See Kessee v. Mendoza-Powers, 574 F.3d 675, 676-77 & n.2 (9th Cir. 2009); Butler v. Curry, 528 F.3d at 643-54 & n.13. The Ninth Circuit has cautioned that the prior conviction exception is a "narrow" one. See Butler v. Curry, 528 F.3d at 644-45; United States v. Kortgaard, 425 F.3d 602, 609-10 (9th Cir. 2005) (citations omitted). The exception "does not extend to qualitative evaluations of the nature or seriousness of past crimes, because such determinations cannot be made solely by looking to the documents of conviction." Butler v. Curry, 528 F.3d at 644 (citation omitted; holding that prior conviction exception did not encompass a defendant's status as a parolee at the time of the offense or the defendant's performance on parole); see also Wilson v. Knowles, ___ F.3d ___, 2011 WL 383961 (9th Cir. Feb. 8, 2011) (finding that the issue of whether, in a prior case, the petitioner personally inflicted great bodily harm on a non-accomplice victim did not fall within Apprendi's prior conviction exception).

Unlike a determination of the seriousness of a prior conviction, however, the determination of the number of Petitioner's prior convictions did not involve any qualitative evaluation of Petitioner's prior convictions. Hence, the sentencing court properly could rely on the numerosity of Petitioner's prior convictions in imposing an upper term sentence. See United States v. Grisel, 488 F.3d 844, 847 (9th Cir.) (en banc), cert. denied, 552 U.S. 970 (2007) (under prior conviction exception in Almendarez and Apprendi, district court

properly determined sequence of dates of prior convictions); United States v. Hernandez-Castro, 473 F.3d 1004, 1007 (9th Cir. 2007) (in calculating number of criminal history points under federal Sentencing Guidelines based on prior convictions, district court "is simply ascertaining prior convictions, a determination that passes constitutional scrutiny under [Almendarez Torres], as reaffirmed in [Apprendi]"); United States v. Johnson, 440 F.3d 832, 848-49 (6th Cir.), cert. denied, 549 U.S. 829 (2006) (judge may determine, inter alia, date of offense and date of conviction); United States v. Thompson, 421 F.3d 278, 285 (4th Cir. 2005), cert. denied, 547 U.S. 1005 (2006) (whether defendant's prior felony convictions were committed on different occasions so as to qualify him for sentencing under 18 U.S.C. section 924(e) was "inherent in the fact of the prior convictions"); Stokes v. Sisko, 2010 WL 5670908, at *5 (C.D. Cal. Dec. 21, 2010), 2011 WL 318512 (C.D. Cal. Jan. 27, 2011) (imposition of upper term based on number of prior convictions "falls squarely within the prior conviction exception").

The existence and number of Petitioner's prior convictions rendered the upper term the "statutory maximum" under California law. See People v. Black, 41 Cal. 4th at 813; Butler v. Curry, 528 F.3d at 643. The sentencing court's consideration of other factors went only to a selection of a sentence within the statutory range. See Butler v. Curry, 528 F.3d at 643. For these reasons, this Court finds reasonable the Court of Appeal's conclusion that Petitioner's upper term sentence did not run afoul of Apprendi, Blakely or Cunningham. See Pena-Silva v. Prosper, 397 Fed. App'x 394 (9th Cir. 2010) (California Court of Appeal's rejection of Apprendi claim based on

findings that petitioner's prior convictions were numerous and of increasing seriousness was not an unreasonable application of clearly established Federal law under AEDPA standard of review); Kessee v. Mendoza-Powers, 574 F.3d at 678-79 (state court's application of prior conviction exception not unreasonable under AEDPA standard of review).

For the foregoing reasons, the Court of Appeal's rejection of Petitioner's Sixth Amendment challenge to his sentence was not contrary to, or an objectively unreasonable application of, any clearly established Federal law as determined by the United States Supreme Court. See 28 U.S.C. § 2254(d); Harrington v. Richter, 131 S. Ct. at 785-87. Petitioner is not entitled to habeas relief on Ground One of the Petition.

II. The Trial Court's Denial of Petitioner's Romero Motion Does Not Merit Habeas Relief.

Matters relating to sentencing and serving of a sentence generally are governed by state law and do not raise a federal constitutional question. See Miller v. Vasquez, 868 F.2d 1116, 1118-19 (9th Cir. 1989), cert. denied, 499 U.S. 963 (1991); Middleton v. Cupp, 768 F.2d 1083, 1085 (9th Cir. 1985), cert. denied, 478 U.S. 1021 (1986); Sturm v. California Adult Authority, 395 F.2d 446, 448 (9th Cir. 1967), cert. denied, 395 U.S. 947 (1969). Petitioner's contention that the trial court improperly refused to strike Petitioner's prior conviction under Romero does not allege any claim for federal habeas relief. See Brown v. Mayle, 283 F.3d 1019, 1040 (9th Cir. 2002), vacated on other grounds, 538 U.S. 901 (2003);

Blakely v. Att'y General of State of Calif., 2009 WL 256274, at *3-4 (E.D. Cal. Feb. 4, 2009); Edwards v. Ollison, 2008 WL 5158727, at *15 (C.D. Cal. Dec. 8, 2008); Belgarde v. Hubbard, 2007 WL 2701717, at *1 (N.D. Cal. Sept. 13, 2007).

Under narrow circumstances, however, the misapplication of state sentencing law may violate due process. See Richmond v. Lewis, 506 U.S. 40, 50 (1992). "[T]he federal, constitutional question is whether [the error] is so arbitrary or capricious as to constitute an independent due process" violation. Id. (internal quotation and citation omitted); see also Christian v. Rhode, 41 F.3d 461, 469 (9th Cir. 1994) ("Absent a showing of fundamental unfairness, a state court's misapplication of its own sentencing laws does not justify federal habeas relief."). Petitioner has shown no such fundamental unfairness.

In People v. Williams, 17 Cal. 4th 148, 69 Cal. Rptr. 2d 917, 948 P.2d 429 (1998), the California Supreme Court held that, in determining whether to exercise its discretion to strike a prior conviction allegation under Romero, "the court in question must consider whether, in light of the nature and circumstances of [the defendant's] present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the [Three Strikes Law's] spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." Id. at 161. "[T]he circumstances must be 'extraordinary . . . by which a career criminal can be deemed to fall

outside the spirit of the very statutory scheme within which he squarely falls since he commits a strike as part of a long and continuous criminal record, the continuation of which the law was meant to attack.'" People v. Carmony, 33 Cal. 4th 367, 378, 14 Cal. Rptr. 3d 880, 92 P.3d 369 (2004) (quoting People v. Strong, 87 Cal. App. 4th 328, 338, 104 Cal. Rptr. 2d 490 (2001)).

As previously indicated, Petitioner's criminal history included a second degree murder conviction arising out of a gang-related shooting of an innocent bystander, numerous subsequent drug-related convictions, a parole violation, and the service of multiple prison terms (R.T. 563, 647-48, 651; C.T. 214-15, 306-13). Under these circumstances, the court acted well within the confines of California law in refusing to strike Petitioner's prior conviction. See In re Large, 41 Cal. 4th 538, 552, 61 Cal. Rptr. 3d 2, 160 P.3d 662 (2007) (upholding Three Strikes sentence for petty theft with a prior and false identification to a police officer, where petitioner had two prior strikes and an aggravated assault conviction; although petitioner's more recent offenses were "far less serious," his criminal history "suggest[ed] either an inability or an unwillingness to follow the law"); People v. Eribarne, 124 Cal. App. 4th 1463, 1469, 22 Cal. Rptr. 3d 417 (2004) (affirming denial of Romero motion where defendant had numerous prior convictions and had been "continuously in trouble with the law" except for a brief three-year period); People v. Philpot, 122 Cal. App. 4th 893, 904-07, 19 Cal. Rptr. 3d 280 (2004) (affirming sentence where defendant's criminal history spanned a period of 20 years, and involved numerous parole and probation

violations and state prison terms).[15]

Because Petitioner received a sentence within the confines of California law, Petitioner is not entitled to habeas relief on this claim. See Walker v. Endell, 850 F.2d 470, 476 (9th Cir. 1987), cert. denied, 488 U.S. 926 (1988), and 488 U.S. 981 (1988) ("Generally, a federal appellate court may not review a state sentence that is within statutory limits"); Sturm v. California Adult Authority, 395 F.2d at 448. Petitioner has failed to demonstrate an error of California law, much less a constitutional violation.

It follows that the Court of Appeal's rejection of this claim was not contrary to, or an objectively unreasonable application of, any clearly established Federal law as determined by the United States Supreme Court. See 28 U.S.C. § 2254(d); Harrington v. Richter, 131 S. Ct. at 785-87. Petitioner is not entitled to habeas relief on Ground Two of the Petition.

III. The Trial Court's Failure to Consider a Mistake-of-Age Defense Does Not Merit Habeas Relief.

Petitioner contends the trial court erred in failing to consider "good faith, reasonable mistake of fact," i.e., an alleged mistake as to the victim's age, as a defense to the counts alleging violations of

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[15] Contrary to Petitioner's assertion (see Traverse, p. 5), the court did not "defer" to the prosecutor, but rather agreed with the prosecutor that striking the prior conviction was inappropriate under the circumstances (see R.T. 660-62).

California Penal Code section 288(c)(1). The Court of Appeal rejected this assertion, following People v. Paz, 80 Cal. App. 4th 293, 95 Cal. Rptr. 2d 166 (2000), which held that a mistake as to the victim's age was not a defense to a section 288(c)(1) charge (Respondent's Lodgment 6, pp. 9-15; see People v. Mitchell, 2007 WL 2774461, at *4-8). The Court of Appeal ruled that "section (c)(1) does not permit a mistake-of-age defense, regardless of what age the victim pretended to be" (Respondent's Lodgment 6, p. 15; People v. Mitchell, 2007 WL 2774461, at *8) (footnote omitted).

Petitioner asserts only an alleged state law error, for which federal habeas relief is not available. See Wilson v. Corcoran, 131 S. Ct. 13, 16 (2010) ("it is only noncompliance with *federal* law that renders a State's criminal judgment susceptible to collateral attack in the federal courts") (original emphasis); Estelle v. McGuire, 502 U.S. 62, 67-68 (1991) (mere errors in the application of state law are not cognizable on federal habeas review); see also United States v. Brooks, 841 F.2d 268, 269-70 (9th Cir.), cert. denied, 487 U.S. 1227 (1988) (the federal constitution does not require that a statutory rape defendant be afforded a defense of reasonable mistake of fact as to the victim's age). This Court cannot redetermine an issue of state law. See Waddington v. Sarausad, 129 S. Ct. 823, 832 n.5 (2009) ("we have repeatedly held that it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions") (citation and internal quotations omitted); Bradshaw v. Richey, 546 U.S. at 76; Mullaney v. Wilbur, 421 U.S. 684, 691 (1975) ("state courts are the ultimate expositors of state law") (citations

omitted).[16] Because Petitioner has failed to show a violation of federal law, Petitioner is not entitled to habeas relief. See Frantz v. Hazey, 533 F.3d at 736-37.

RECOMMENDATION

For the foregoing reasons, IT IS RECOMMENDED that the Court issue an Order: (1) approving and adopting this Report and Recommendation; and (2) denying and dismissing the Petition with prejudice.

DATED: March 10, 2011.

/S/
CHARLES F. EICK
UNITED STATES MAGISTRATE JUDGE

[16] Petitioner does not contend, and the record does not show, that the present case is the "highly unusual case" in which the Court of Appeal's interpretation of state law was "clearly untenable and a subterfuge to avoid federal review of a constitutional violation." See Butler v. Curry, 528 F.3d at 642 (citations and internal quotations omitted).

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 whose 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.

If the District Judge enters judgment adverse to Petitioner, the District Judge will, at the same time, issue or deny a certificate of appealability. Within twenty (20) days of the filing of this Report and Recommendation, the parties may file written arguments regarding whether a certificate of appealability should issue.