UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

RAUL FRIDAY RAMOS, JR., Petitioner, v. KELLY HARRINGTON, Warden, Respondent.	Case No. CV 10-1322 MWF (JC) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable Michael W. Fitzgerald, United States District Judge, pursuant to the provisions of 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California.

I. SUMMARY

On February 23, 2010, Raul Friday Ramos, Jr. ("petitioner"), a state prisoner proceeding *pro se*, filed a Petition for Writ of Habeas Corpus by a Person in State Custody ("Petition") pursuant to 28 U.S.C. § 2254 with attached exhibits ("Petition Ex."). He challenges a state conviction and sentence on the following grounds: (1) his trial counsel was ineffective in failing to investigate and subpoena videotape evidence; and (2) the trial court unconstitutionally imposed an

upper term sentence based upon aggravating facts – petitioner's status as a parolee at the time of the offense and his poor performance on parole – that were not found by a jury, contrary to Cunningham v. California, 549 U.S. 270 (2007). (Petition at 5).

On July 14, 2010, respondent filed an Answer and a supporting memorandum ("Answer").[1] On September 20, 2010, petitioner filed a Traverse ("Traverse") with attached exhibits ("Traverse Ex.").

For the reasons stated below, the Petition should be denied, and this action should be dismissed with prejudice.

II. PROCEDURAL HISTORY

On May 6, 2005, a jury found petitioner guilty of assault with a deadly weapon by means of force likely to produce great bodily injury (count 1) and misdemeanor battery (a lesser included offense of count 2). (CT 97-98). The jury also found true an allegation that in the commission of the assault charged in count 1, petitioner personally inflicted great bodily injury upon the victim ("GBI Allegation"). (CT 97).

On the same date, petitioner waived his right to a jury trial on allegations that he had suffered two prior strike convictions (Cal. Penal Code §§ 667(b)-(i), 1170.12(a)-(d)) ("Strike Allegations") and two prior serious felony convictions (Cal. Penal Code § 667(a)(1)) ("Prior Serious Felony Allegations") and that he had served seven prior prison terms (Cal. Penal Code § 667.5) ("Prior Prison Term Allegations") (collectively "Prior Conviction Allegations"). (RT 156-57). On May 27, 2005, the trial judge held a court trial on the Prior Conviction Allegations during which the prosecution introduced a certified packet of petitioner's criminal

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[1]Respondent also lodged multiple documents ("Lodged Doc.") including the Clerk's Transcript ("CT"), the Reporter's Transcript ("RT"), and the under seal Augmented Clerk's Transcript ("ACT"), the latter of which includes the Early Disposition Probation Officer's Report for petitioner (ACT 1-11).

records ("969(b) packet") from the California Department of Corrections and Rehabilitation. (CT 112-32; RT 159-61). The court found true one Strike Allegation, one Prior Serious Felony Allegation, and five Prior Prison Term Allegations.[2] (RT 160).

On June 13, 2005, the trial court denied petitioner's motion to strike the remaining Strike Allegation, but ordered two of the five remaining Prior Prison Term Allegations stricken, leaving three such allegations. (CT 145-59; RT 166-67). On the same date, the court sentenced petitioner to a total of 19 years in state prison, consisting of an upper term sentence of four years on count 1, doubled to eight years due to the remaining Strike Allegation, plus three consecutive years for the GBI Allegation, plus an additional five consecutive years for the remaining Prior Serious Felony Allegation, plus three consecutive years for the three remaining Prior Prison Term Allegations (one year each). (CT 145-49; RT 166-67). The court imposed but stayed the sentence on count 2. (CT 148; RT 167-68).

Although petitioner's trial counsel did not timely file a notice of appeal, the Court of Appeal granted petitioner leave to file a late appeal, and petitioner's appellate counsel timely pursued the matter. (CT 150-51). On direct appeal, petitioner raised a single claim – that the trial court's imposition of an upper term sentence violated his federal constitutional rights under Cunningham v. California, 549 U.S. 270 (2007).

On September 11, 2007, the California Court of Appeal affirmed the judgment in a reasoned decision, rejecting petitioner's claim on procedural grounds and on the merits. (Lodged Doc. 5).

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[2]The court struck the other Strike Allegation and the other Prior Serious Felony Allegation after determining that the predicate prior assault with a deadly weapon conviction did not involve great bodily injury and thus did constitute a strike or serious felony. The court further noted that the seven Prior Prison Term Allegations actually involved only five prior prison terms. (RT 160-61).

On November 28, 2007, the California Supreme Court granted, but deferred review until it had completed its consideration and disposition of a then pending case raising a related issue, and ultimately dismissed petitioner's petition for review on August 27, 2008, in light of its decision in People v. Towne, 44 Cal. 4th 63 (2008). (Lodged Doc. 7).[3]

Petitioner thereafter sought, and was denied habeas relief in the Los Angeles County Superior Court, the California Court of Appeal, and the California Supreme Court. (Lodged Docs. 8-13).

III. FACTS

The instant case stems from the prosecution of petitioner and his co-defendant, Ysidro Rodriguez Ruiz ("Ruiz" or "co-defendant"),[4] for severely beating Wayne Trosclair ("Trosclair" or "the victim") during an altercation on a Metro Blue Line train on the evening of February 5, 2005 ("February 5 Incident").

A. Prosecution Evidence

At approximately 8:00 p.m. on February 5, 2005, Trosclair was riding the northbound Metro Blue Line train from Long Beach to his job as a security guard. (RT 22). At one point, petitioner (who was sitting nearby) got up from his seat. (RT 23). Thinking petitioner was about to leave the train, Trosclair sat in the seat petitioner left. (RT 23). When petitioner returned, however, Trosclair got out of the seat and returned to the spot where he had been standing. (RT 23).

About a minute later, an older Hispanic man (later identified as Ruiz) who had a metal cane "gave a nod like what's up" towards Trosclair, which Trosclair interpreted as an impolite gesture. (RT 24, 26). Trosclair stated out loud to

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[3]In People v. Towne, 44 Cal. 4th 63 (2008), the California Supreme Court determined that the constitutional right to a jury trial under the Sixth Amendment did not extend to findings that a defendant was on probation or parole at the time of an offense or that a defendant had served a prior prison term, upholding an upper term sentence predicated on such findings.

[4]Ruiz pleaded guilty prior to trial. (RT 2-6).

petitioner and Ruiz: "I don't understand what's going on between Hispanics and blacks because as I know they are at odds with each other." (RT 24). Trosclair and petitioner then got into an argument. (RT 25). Trosclair did not threaten petitioner at any time during the argument. (RT 25). Petitioner stated: "I think you better be quiet before I come over there." (RT 26). Trosclair responded: "Well, you have to do what you have to do." (RT 26). Trosclair thought the argument was over at that point. (RT 26).

Petitioner then walked over to Trosclair and, without any warning or additional provocation, hit Trosclair in the left eye with his fist. (RT 26, 63-64). Although Trosclair tried to strike back, petitioner quickly hit Trosclair again, and Trosclair fell to the floor of the train. (RT 27-28). While on the floor, Trosclair felt himself being repeatedly kicked and hit by a metal cane. (RT 27-28). At one point Trosclair lost consciousness for what seemed like 30 minutes. (RT 27).

When the train stopped, Jeff Bentley ("Bentley"), who had been waiting for the train, saw Trosclair walk out of one of the train cars. (RT 69-70). Trosclair was bleeding and "[h]is face looked [] real fat . . . like he couldn't see out of his eye." (RT 70). Bentley thought Trosclair "would probably lose [his eye] because it was so bad." (RT 70). Bentley helped Trosclair to the stairs of the Metro Link station outside and pushed an emergency button. (RT 28-29, 69-70). Trosclair told Bentley that he had been "jumped," and pointed to petitioner and an older man (who was carrying a metallic cane) as the attackers. (RT 29, 71-72). Bentley saw no injuries or blood on petitioner. (RT 73). Petitioner and the other man left the train station, walked into the street, and then went behind a donut shop. (RT 73). A short while later Bentley saw petitioner and the other man on the train platform again, so he notified a Metro Link supervisor who called someone on the telephone. (RT 74).

Trosclair suffered serious injuries as a result of the incident. (RT 29-32). Photographs of Trosclair taken shortly after the incident showed that his lips were

swollen, and that his left eye was "bloodshot red" and swollen "totally closed." (RT 31-32).

B. Defense Evidence

Petitioner presented a defense of self-defense, and testified in his own defense to the following: On February 5, 2005, at about 8:00 p.m., petitioner and Ruiz (who was 56 years old) were on board the Metro Blue Line train heading northbound from Long Beach. (RT 79). Petitioner was sitting in the first row of seats in the middle of the last train car near a door. (RT 80). Ruiz was sitting across from petitioner. (RT 80).

At one point, petitioner got out of his seat to speak with Ruiz, and when petitioner returned, Trosclair had taken the seat. (RT 81). Petitioner said nothing, and Trosclair got out of the seat and walked away. (RT 81-82).

Petitioner then saw Ruiz motion "what's up," and Ruiz and Trosclair began arguing. (RT 82-83). Petitioner went to speak with Trosclair. (RT 83). When petitioner got within arms reach, Trosclair swung his fist at petitioner but missed. (RT 83-84). Trosclair had not said anything threatening to petitioner before he swung. (RT 87). Petitioner swung back, punching Trosclair in the eye. (RT 84-85). Petitioner punched Trosclair a total of three times in quick succession, and Trosclair fell to the floor of the train. (RT 84-86). While Trosclair was lying "on his belly" and covering his head with his hand to protect himself, petitioner kicked Trosclair two or three times. (RT 86-87).

When the Metro doors opened, petitioner and Ruiz exited the train and walked to the donut shop down the street. (RT 88-89).

Petitioner admitted that he had previously been convicted of two felonies – a 1992 burglary and a 2003 assault. (RT 89, 102).

IV. STANDARD OF REVIEW

This Court may entertain a petition for writ of habeas corpus on "behalf of a person in custody pursuant to the judgment of a State court only on the ground that

he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). 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) ("Section 2254(d)").

In applying the foregoing standards, federal courts look to the last reasoned state court decision. See Davis v. Grigas, 443 F.3d 1155, 1158 (9th Cir. 2006) (citation and quotations omitted). "Where there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground." Ylst v. Nunnemaker, 501 U.S. 797, 803 (1991); see also Gill v. Ayers, 342 F.3d 911, 917 n.5 (9th Cir. 2003) (federal courts "look through" unexplained rulings of higher state courts to the last reasoned decision). However, to the extent no such reasoned opinion exists, courts must conduct an independent review of the record to determine whether the state court clearly erred in its application of controlling federal law, and consequently, whether the state court's decision was objectively unreasonable. Delgado v. Lewis, 223 F.3d 976, 982 (9th Cir. 2000), abrogated on other grounds, Lockyer v. Andrade, 538 U.S. 63, 75-76 (2003); see also Harrison v. Richter, 131 S. Ct. 770, 784 (2011) ("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."); Cullen v. Pinholster, 131 S. Ct. 1388, 1402 (2011) ("Section 2254(d) applies even where there has been a summary denial.") (citation omitted).

When a state court's adjudication of a claim on the merits results in a decision contrary to or involving an unreasonable application of clearly established federal law or is based on an unreasonable determination of the facts, review is *de novo*. Panetti v. Quarterman, 551 U.S. 930, 953 (2007); Hurles v. Ryan, 706 F.3d 1021, 1030 (9th Cir. 2013). When a claim presented in a federal habeas petition is unexhausted, a federal habeas court may deny relief when it is perfectly clear that the applicant does not raise even a colorable federal claim. See Cassett v. Stewart, 406 F.3d 614, 623-24 (9th Cir. 2005), cert. denied, 546 U.S. 1172 (2006).

V. DISCUSSION

A. Petitioner's Ineffective Assistance of Counsel Claim Does Not Merit Habeas Relief

Petitioner contends that his trial counsel was ineffective in failing to investigate and subpoena a videotape of the February 5 Incident. (Petition at 5; Petition Ex. C at 4-5; Traverse at 1). As the California Supreme Court rejected this claim without comment on habeas review – a determination which is presumed to be on the merits[5] – and as there is no reasoned state court decision to look to, this Court has conducted an independent review of the record to determine whether the California Supreme Court's decision was objectively unreasonable. Petitioner is not entitled to federal habeas relief on this claim.

1. Applicable Law

The Sixth Amendment of the United States Constitution as applied to the states through the Fourteenth Amendment guarantees a state criminal defendant

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[5] See Richter, 131 S. Ct. at 784-85 (when federal claim has been presented to state court and state court has denied relief, it may be presumed that state court adjudicated claim on merits in absence of any indication or state-law procedural principles to the contrary); Hunter v. Aispuro, 982 F.2d 344, 347-48 (9th Cir. 1992) (California Supreme Court's unexplained denial of habeas petition constitutes decision on the merits of federal claims subjecting such claims to review in federal habeas proceedings), cert. denied, 510 U.S. 887 (1993).

the right to effective assistance of counsel at trial. Evitts v. Lucey, 469 U.S. 387 (1985). To warrant habeas relief due to ineffective assistance of counsel, a petitioner must demonstrate that: (1) counsel's performance was deficient; and (2) the deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687-93 (1984). As both prongs of the Strickland test must be satisfied in order to establish a constitutional violation, failure to satisfy either prong requires that a petitioner's ineffective assistance of counsel claim be denied. Strickland, 466 U.S. at 687, 697 (no need to address deficiency of performance if lack of prejudice is obvious); Hein v. Sullivan, 601 F.3d 897, 918 (9th Cir. 2010) (a court can deny a Strickland claim if either part of the test is not satisfied), cert. denied, 131 S. Ct. 2093 (2011). Further where, as here, there has been a state court decision rejecting a Strickland claim, review is "doubly deferential." Richter, 131 S. Ct. at 788 (citing Knowles v. Mirzayance, 556 U.S. 111, 123-24 (2009)). "The pivotal question is whether the state court's application of the Strickland standard was unreasonable." Richter, 131 S. Ct. at 785; 28 U.S.C. § 2254(d). "[E]ven a strong case for relief does not mean the state court's contrary conclusion was unreasonable." Richter, 131 S. Ct. at 786. The range of reasonable Strickland applications is "substantial." Id. at 788.

2. Discussion

Petitioner asserts that (i) on an unspecified date he told his trial attorney that because there were numerous video cameras on the train there should be videotape evidence of the February 5 Incident; (ii) his attorney did not investigate the matter or subpoena the recordings; and (iii) when petitioner himself, on an unspecified date, requested that Metro supply him with a copy of videotapes from February 5, 2005, he was advised in a December 2008 letter ("Metro Letter") that Metro had not retained video recordings from the date in issue, and that, in any event, its video tapes were not public, but could be subpoenaed by an attorney. (Petition

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Ex. C at 4; Traverse at 6; Traverse Ex. D).[6] Based on the foregoing, petitioner contends that his counsel was deficient in failing to investigate and subpoena Metro Blue Line train surveillance camera video recordings of the February 5 Incident, and that he was prejudiced because such evidence would have corroborated his defense of self-defense. (Petition at 5; Traverse at 6). Petitioner fails to demonstrate that the California Supreme Court's rejection of this claim involved an unreasonable application of Strickland.

The failure adequately to investigate a case may constitute ineffective assistance of counsel. See Strickland, 466 U.S. at 691; Kimmelman v. Morrison, 477 U.S. 365, 384-85 (1986). Courts assess the reasonableness of an attorney's decisions made during her investigation in light of the circumstances of a particular case, but begin with the presumption that "counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689, 691. In this case, petitioner does not demonstrate that defense counsel's performance was deficient or, if it was, that petitioner was prejudiced thereby.

First, neither the Metro Letter, nor anything else in the record reflects that (1) a Metro surveillance camera was actually in the train car in which the February 5 Incident occurred; or (2) if it was, that it was positioned in a manner to capture the February 5 Incident on tape; or (3) even assuming the February 5 Incident was recorded, that such recording still existed and was available when defense counsel began representing petitioner. Petitioner's conclusory assertion that the surveillance video "would have corroborated petitioner's testimony" is speculative and insufficient to demonstrate either deficient performance or prejudice. See Gonzalez v. Knowles, 515 F.3d 1006, 1014-16 (9th Cir. 2008) (claims "grounded in speculation" do not establish prejudice under Strickland);

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[6]As petitioner presented the Metro Letter to the Court of Appeal and the California Supreme Court on habeas review (Lodged Docs. 10, 12), it may properly be considered by this Court.

Bragg v. Galaza, 242 F.3d 1082, 1088-89 (9th Cir.) (mere speculation that further investigation might lead to evidence helpful to petitioner was insufficient to demonstrate ineffective assistance due to failure to investigate), as amended on denial of reh'g, 253 F.3d 1150 (9th Cir. 2001); see also Cooks v. Spalding, 660 F.2d 738, 740 (9th Cir. 1981) (petitioner not entitled to habeas relief where claim of prejudice from attorney's action "amounts to mere speculation"), cert. denied, 455 U.S. 1026 (1982); Lopes v. Campbell, 408 Fed. Appx. 13, 16 (9th Cir. 2010) (state court's application of Strickland was not unreasonable when it decided that petitioner's speculation as to the importance of discovery counsel failed to obtain did not demonstrate reasonable probability that, but for counsel's unprofessional errors, result of proceeding would have been different), cert. denied, 132 S. Ct. 297 (2011).

Second, even assuming a surveillance video depicting petitioner's version of the February 5, 2005 Incident existed and was available to defense counsel, petitioner's claim still fails because it would not have been unreasonable for the California courts to find that petitioner's counsel could reasonably conclude that a visual depiction of the February 5 Incident would have been more damaging, then helpful to petitioner's defense. Petitioner testified: (1) Trosclair swung first, but missed petitioner (RT 83-84); (2) Trosclair had not said anything threatening to petitioner (RT 87); (3) petitioner responded by punching Trosclair a total of three times in quick succession (once in the eye), which knocked Trosclair to the floor of the train (RT 84-86); and (4) although Trosclair was lying "on his belly" and covering his head to protect himself, petitioner kicked Trosclair two or three times (RT 87). Photographs of Trosclair introduced at trial showed that petitioner's attack left Trosclair with serious injuries. (RT 31-32). Defense counsel could reasonably have decided that a surveillance video of the February 5 Incident would have been damaging to petitioner's claim of self-defense since, even according to petitioner's version, the tape would have depicted petitioner beating

Trosclair while he was lying face down on the floor covering his head, posing no threat to petitioner. See Iaea v. Sunn, 800 F.2d 861, 865 n.4 (9th Cir. 1986) (counsel did not have duty to pursue every possible line of defense where she reasonably did not believe petitioner's interests would be advanced); see also Bell v. Cone, 535 U.S. 685, 700 (2002) (defense counsel "had sound tactical reasons for deciding against . . . [presenting testimony] which could have only alienated [defendant] in the eyes of the jury").

Third, again assuming a surveillance video depicting petitioner's version of the February 5, 2005 Incident existed and was available to defense counsel, petitioner's claim still fails because it would not have been unreasonable for the California courts to conclude that there was not a reasonable probability that the verdict would have been different had such a video been subpoenaed and shown to the jury. As noted above, petitioner's defense was self-defense. A person who is being assaulted and defends himself from attack may use all force and means which he believes to be reasonably necessary *and which would appear to a reasonable person, in the same or similar circumstances, to be necessary to prevent the injury which appears to be imminent*. See People v. Jefferson, 119 Cal. App. 4th 508, 518 (2004); CALJIC 5.30. It is not reasonably probable that the jury would have concluded that a reasonable person in petitioner's circumstances would believe that three punches to the face and two or three kicks to the body while the victim was lying on his belly, covering his head for protection, were necessary to prevent imminent injury. Nor would it have been unreasonable for the California courts to so find and to conclude that petitioner was not prejudiced by his counsel's asserted failure to investigate and subpoena any such videotape.

In light of the foregoing, the California courts' rejection of petitioner's ineffective assistance of counsel claim was not contrary to, or an unreasonable application of clearly established federal law. Nor was it an unreasonable

determination of the facts in light of the evidence presented. Accordingly, petitioner is not entitled to habeas relief on this ground.[7]

B. Petitioner's Sentencing Claim Does Not Merit Habeas Relief

Petitioner contends that the trial court unconstitutionally imposed an upper term sentence based upon aggravating facts – petitioner's status as a parolee at the time of the offense and his poor performance on parole – that were not found by a jury, contrary to Cunningham v. California, 549 U.S. 270 (2007). (Petition at 5).[8] (CT 145-46, 162, 166). The California Court of Appeal – the last state court to issue a reasoned opinion on the issue – rejected this claim on direct appeal on procedural grounds and on the merits. (Lodged Doc. 5 at 2-3). Petitioner is not entitled to federal habeas relief on this claim.

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[7]Petitioner also appears to argue that his trial counsel was ineffective in failing timely to file a notice of appeal. (Petition at 5; Traverse at 6). Petitioner did not present this claim to the California Supreme Court either on direct appeal or habeas review (Lodged Docs. 6, 12), and accordingly the claim is unexhausted. The Court nonetheless exercises its discretion to consider the merits of such claim as it is perfectly clear that the claim is not colorable. See Cassett, 406 F.3d at 623-24. As noted in Part II, supra, despite the fact that petitioner's trial counsel did not timely file a notice of appeal, petitioner was granted leave from such default, was permitted to proceed with his appeal, and did in fact pursue his appeal with different counsel. Accordingly, petitioner cannot demonstrate that his trial counsel's failure to file a notice of appeal prejudiced him in any way and, therefore, he is not entitled to federal habeas relief on this basis.

[8]To the extent petitioner argues in the Traverse – for the first time in this federal action – that trial counsel was ineffective in failing to object to the trial court's imposition of an upper term sentence based on a finding that petitioner's performance on parole for two years was "awful" (Traverse at 6), this claim should be rejected both because a traverse is not the proper pleading to raise additional grounds for relief, Cacoperdo v. Demosthenes, 37 F.3d 504, 507 (9th Cir. 1994), cert. denied, 514 U.S. 1026 (1995), and because petitioner cannot demonstrate that counsel's omission prejudiced petitioner. As discussed in Part VB2, infra, any error by the trial court in predicating an upper term sentence on petitioner's poor performance on parole is harmless as the other predicate for imposing an upper term sentence – petitioner's status as a parolee when he committed the offense in issue – is undisputed and amply supported by the record. The Court likewise finds no reasonable probability that anything other than an upper term sentence would have been imposed had petitioner's counsel objected to the trial court's determination that petitioner's performance on parole was awful.

1. Pertinent Law

In Apprendi v. New Jersey, 530 U.S. 466, 490 (2000), the United States Supreme Court held as a matter of constitutional law that *other than the fact of a prior conviction*, "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." In Blakely v. Washington, 542 U.S. 296 (2004) 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 (emphasis in original, citation omitted). On January 22, 2007, the United States Supreme Court issued Cunningham, in which it held that a California judge's imposition of an upper term sentence based on facts found by the judge, other than the fact of a prior conviction, violated the constitutional principles set forth in Apprendi and Blakely. 549 U.S. at 291-93.

The California Supreme Court and the Ninth Circuit have determined that a single aggravating factor is sufficient to authorize an upper term sentence under California law. People v. Black, 41 Cal. 4th 799, 813-15 (2007), cert. denied, 552 U.S. 1144 (2008); Butler v. Curry, 528 F.3d 624, 643 (9th Cir.), cert. denied, 555 U.S. 1089 (2008). Therefore, if at least one of the aggravating factors on which a judge relies in sentencing a defendant to an upper term sentence is established in a manner consistent with the Sixth Amendment, the sentence does not violate the Constitution. Butler, 528 F.3d at 643.

Even if, however, none of the aggravating factors on which a judge relies in sentencing a defendant to an upper term sentence is established in a manner consistent with the Sixth Amendment, habeas relief would not be warranted if the error was harmless. Washington v. Recuenco, 548 U.S. 212, 221-22 (2006) (sentencing errors subject to harmless error analysis); see also Butler, 528 F.3d at 648 (harmless error standard under Brecht v. Abrahamson, 507 U.S. 619 (1993)

will prevent relief unless the error had a "substantial and injurious effect" on a defendant's sentence). To grant habeas relief in a case involving a constitutional error in the imposition of an upper term sentence, the court must have "grave doubt" as to whether a jury would have found the relevant aggravating factor beyond a reasonable doubt. Butler, 528 F.3d at 648. "Grave doubt" is unusual; it exists when, "in the judge's mind, the matter is so evenly balanced that he feels himself in virtual equipoise as to the harmlessness of the error." O'Neal v. McAninch, 513 U.S. 432, 435 (1995); Butler, 528 F.3d at 648.

Although a court may not "consider new admissions made at sentencing in [a] harmless error inquiry," evidence presented at the sentencing proceeding may be considered "insofar as [it] would help . . . adduce what other evidence might have been produced at trial, had the question been properly before the jury." United States v. Salazar-Lopez, 506 F.3d 748, 755 (9th Cir. 2007), cert. denied, 553 U.S. 1074 (2008); see also Estrella v. Ollison, 68 F.3d 593, 599 (9th Cir. 2011) (federal court may consider probation report in evaluating an Apprendi error for harmlessness); Rodriguez v. Malfi, 2009 WL 3088322, at *7 (N.D. Cal. Sept. 21, 2009) (court can consider evidence presented at sentencing hearing to determine what "evidence might have been produced at trial, had the question been properly put before the jury[]"; relying upon contents of probation officer's report presented at sentencing in concluding that jury would have found aggravating sentencing factor (*i.e.*, petitioner's parolee status) beyond reasonable doubt) (quoting Salazar-Lopez, 506 F.3d at 755).

2. Analysis

As noted above, the California Court of Appeal rejected petitioner's sentencing claim on the merits, as well as on procedural grounds. With respect to the merits, the Court of Appeal found that one of the aggravating factors on which the trial court relied to impose the upper term sentence – petitioner's status as a parolee at the time of the commission of the offense – fell within the prior

conviction exception, such that it could permissibly be determined by the court and was, by itself, sufficient to support the court's choice of an upper term sentence. (Lodged Doc. 5 at 3). Petitioner fails to demonstrate that the Court of Appeal's rejection of this claim was contrary to, or an unreasonable application of clearly established United States Supreme Court law, or that it was based on an unreasonable determination of the facts. Moreover, even assuming petitioner could so demonstrate, his claim would still fail because any error was harmless.

First, the Court of Appeal's determination that petitioner's status as a parolee when he committed the offense in issue fell within the prior conviction exception (Lodged Doc. 5 at 2-3), is not contrary to or an unreasonable application of clearly established Supreme Court law. The United States Supreme Court has not resolved the precise contours of the prior conviction exception to the general rule that a sentencing judge may not make factual findings that increase the statutory maximum criminal penalty. See Kessee v. Mendoza-Powers, 574 F.3d 675, 677 (9th Cir. 2009). Since the Supreme Court has not clearly established whether a defendant's parolee status at the time of an offense falls within the prior conviction exception, this Court cannot deem objectively unreasonable the Court of Appeal's determination that a judicial finding as to such aggravating fact was constitutionally sufficient to support the trial court's upper term sentence. See Kessee, 574 F.3d at 678 ("[A]lthough [under Ninth Circuit precedent] a defendant's probationary status does not fall within the "prior conviction" exception, a state court's interpretation to the contrary does not contravene [Section 2254(d)'s] standards."); Rankins v. Adams, 349 Fed. Appx. 127, 128 (9th Cir. 2009) (claim that trial court violated Sixth Amendment by citing to fact that petitioner was on parole at time of offense as aggravating factor supporting upper term sentence did not merit habeas relief since issue of whether a defendant's probationary status falls within prior conviction exception is not clearly established United States Supreme Court law) (citations omitted), cert. denied, 130

S. Ct. 1296 (2010); Frize v. Hernandez, 2010 WL 1329591, *20 (C.D. Cal. Feb. 9, 2010) (because United States Supreme Court has not specifically addressed whether finding that, at time of crime, petitioner was on probation or parole falls within prior conviction exception, and in light of Ninth Circuit's holding in Kessee, trial court's reliance on petitioner's parole status as aggravating factor to impose upper term sentence cannot constitute basis for federal habeas relief) (citations omitted), report and recommendation adopted, 2010 WL 1329533 (C.D. Cal. Mar. 26, 2010).[9]

Second, even assuming that the California courts' rejection of petitioner's sentencing claim contravened clearly established Supreme Court law, thereby triggering a *de novo* review (see Panetti, 551 U.S. at 953; Hurles, 706 F.3d at 1030), petitioner would not be entitled to federal habeas relief because any error was harmless. During trial, petitioner admitted that he had been convicted of assault in 2003. (RT 89, 102). Petitioner also waived his right to have a jury determine whether he had previously been convicted of, among other things, assault with a deadly weapon (Cal. Penal Code § 245(a)(1)). (RT 156-57). When the trial court imposed an upper term sentence, the record also contained (1) a certified copy of an abstract of judgment (which was part of the 969(b) packet

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[9]The Ninth Circuit's decision in Estrella, 668 F.3d 593 (finding a Sixth Amendment violation where the trial court imposed the upper term based in part on the petitioner's parolee status when he committed the crime), does not compel a different conclusion. In Estrella, the state appellate court had not determined that the petitioner's status as a parolee fell within the prior conviction exception. See Estrella v. Ollison, 2010 WL 2851878, at *5 n.7 (C.D. Cal. June 11, 2010), report and recommendation adopted, 2010 WL 2851868 (C.D. Cal. July 13, 2010), aff'd, 668 F.3d 593 (9th Cir. 2011). Accordingly, the federal court considered whether status as a parolee fell within the prior conviction exception *de novo*. See id. The district court and the Ninth Circuit both held that parolee status did not fall within the prior conviction exception. See id.; 668 F.3d at 598. The district court explicitly distinguished the case from Kessee on such basis. See 2010 WL 2851878, at *5 n.7. Here, however, the state court held that status as a parolee fell within the prior conviction exception. (Lodged Doc. 5 at 3). Accordingly, Kessee, and not Estrella, applies.

admitted into evidence at the court trial on the Prior Conviction Allegations), which reflects that on June 18, 2003, petitioner was convicted of violating California Penal Code section 245(a)(1) and was sentenced to two years in state prison (CT 121); (2) a certified copy of petitioner's CDC Chronological Movement History (also part of the 969(b) packet) which reflects that on October 5, 2004 (*i.e.,* four months before petitioner committed the offense in issue) petitioner was "retain[ed] on parole" (CT 115); (3) the Early Disposition Probation Officer's Report which reflects that (a) petitioner was convicted of assault with a deadly weapon in June 2003 and sentenced to two years in prison; and (b) on February 16, 2005, the Probation Officer discontinued its investigation of petitioner's application for release on his own recognizance in the instant case due to a parole hold (ACT 7, 10-11); and (4) a declaration filed in support of petitioner's motion to strike the remaining Strike Allegation, in which petitioner's trial counsel attested that on May 27, 2005, when she spoke with "Supervising Parole Agent Larry Johnson regarding [petitioner's] performance on parole," Agent Johnson stated that petitioner had "no violations of parole prior to his arrest on the instant case" (CT 138).[10] In light of the foregoing information which was in the record when the trial court sentenced petitioner, this Court has no "grave doubt" that the jury would have found beyond a reasonable doubt at least one of the aggravating factors which supported the trial court's upper term sentence (*i.e.*, that petitioner was on parole when he committed the offense). See, e.g., Estrella, 668 F.3d at 600 (finding harmless Sixth Amendment violation where trial court imposed upper term sentence based in part on petitioner's parolee status when he

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[10]Although this Court does not consider any "new admissions" made at sentencing by petitioner's trial counsel, the declaration is properly considered to the extent it reflects that Agent Johnson could have been called to testify at trial as to petitioner's parole status at the time of the February 5 Incident. See Salazar-Lopez, 506 F.3d at 755. In any event, even without such declaration, the record amply supports that petitioner was on parole at the time he committed the offense in issue, and that any error in failing to submit such issue to the jury was harmless.

committed crime in issue as probation report left little room for any conclusion but that petitioner was on parole from his assault conviction at time of offense in issue).

Accordingly, petitioner is not entitled to habeas relief on this claim.

VI. RECOMMENDATION

IT IS THEREFORE RECOMMENDED that the District Judge issue an Order: (1) approving and accepting this Report and Recommendation; and (2) directing that Judgment be entered denying the Petition and dismissing this action with prejudice.

DATED: March 22, 2013

/s/

Honorable Jacqueline Chooljian
UNITED STATES MAGISTRATE JUDGE