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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

BULMARIO GUTIERREZ TORRES,)	NO. CV 17-2745-R(E)
)	
Petitioner,)	
)	
v.)	REPORT AND RECOMMENDATION OF
)	
STU SHERMAN (Warden),)	UNITED STATES MAGISTRATE JUDGE
)	
Respondent.)	
)	
)	

This Report and Recommendation is submitted to the Honorable Manuel L. Real, 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 April 11, 2017. Respondent filed an Answer on June 30, 2017, and a Supplemental Answer on August 17, 2017. Petitioner filed a Reply on July 13, 2017, and a Supplemental Reply on

1 August 28, 2017.

2
3 **BACKGROUND**
4

5 In 2001, a Superior Court jury found Petitioner guilty of one
6 count of attempted murder, one count of second degree robbery and two
7 counts of attempted second degree robbery (Reporter's Transcript
8 ("R.T.") 722-76). The jury also found to be true allegations that
9 Petitioner personally used a firearm, personally inflicted great
10 bodily injury, and personally and intentionally discharged a firearm
11 proximately causing great bodily injury (R.T. 773-75).
12

13 In 2001, the Superior Court sentenced Petitioner to a prison term
14 of over 39 years (R.T. 780-82). The sentencing judge selected the
15 "high term" based on the judge's findings that Petitioner had "engaged
16 in violent conduct that indicates a serious danger to society" and
17 that Petitioner's "prior convictions . . . are . . . of increasing
18 seriousness" (*id.*; *see* Cal. Ct. R. 4.421(b)(1) and (2)).¹
19

20 Although difficult to decipher, the present Petition appears to
21 claim that the sentencing judge violated the principles established in
22 Apprendi v. New Jersey, 530 U.S. 466 (2000) ("Apprendi") and
23 Cunningham v. California, 549 U.S. 270 (2007) ("Cunningham").
24 Petitioner previously presented this claim in a habeas corpus petition
25

26
27 ¹ In 2016, the Superior Court revised Petitioner's
28 sentence for reasons unrelated to the merits of the present
Petition (*see* Lodged Document 2 at pp. 2-3; Lodged Document 5 at
pp. 26-27).

1 filed in the California Supreme Court (Lodged Document 18). On
2 December 14, 2016, the California Supreme Court denied the petition in
3 an unreasoned decision (Lodged Document 19).
4

5 STANDARD OF REVIEW 6

7 Under the "Antiterrorism and Effective Death Penalty Act of 1996"
8 ("AEDPA"), a federal court may not grant an application for writ of
9 habeas corpus on behalf of a person in state custody with respect to
10 any claim that was adjudicated on the merits in state court
11 proceedings unless the adjudication of the claim: (1) "resulted in a
12 decision that was contrary to, or involved an unreasonable application
13 of, clearly established Federal law, as determined by the Supreme
14 Court of the United States"; or (2) "resulted in a decision that was
15 based on an unreasonable determination of the facts in light of the
16 evidence presented in the State court proceeding." 28 U.S.C. §
17 2254(d); Woodford v. Visciotti, 537 U.S. 19, 24-26 (2002); Early v.
18 Packer, 537 U.S. 3, 8 (2002); Williams v. Taylor, 529 U.S. 362, 405-09
19 (2000).
20

21 "Clearly established Federal law" refers to the governing legal
22 principle or principles set forth by the Supreme Court at the time the
23 state court renders its decision on the merits. Greene v. Fisher, 565
24 U.S. 34, 38 (2011); Lockyer v. Andrade, 538 U.S. 63, 71-72 (2003). A
25 state court's decision is "contrary to" clearly established Federal
26 law if: (1) it applies a rule that contradicts governing Supreme
27 Court law; or (2) it "confronts a set of facts . . . materially
28 indistinguishable" from a decision of the Supreme Court but reaches a

1 different result. See Early v. Packer, 537 U.S. at 8 (citation
2 omitted); Williams v. Taylor, 529 U.S. at 405-06.

3
4 Under the "unreasonable application" prong of section 2254(d)(1),
5 a federal court may grant habeas relief "based on the application of a
6 governing legal principle to a set of facts different from those of
7 the case in which the principle was announced." Lockyer v. Andrade,
8 538 U.S. at 76 (citation omitted); see also Woodford v. Visciotti, 537
9 U.S. at 24-26 (state court decision "involves an unreasonable
10 application" of clearly established federal law if it identifies the
11 correct governing Supreme Court law but unreasonably applies the law
12 to the facts).

13
14 "In order for a federal court to find a state court's application
15 of [Supreme Court] precedent 'unreasonable,' the state court's
16 decision must have been more than incorrect or erroneous." Wiggins v.
17 Smith, 539 U.S. 510, 520 (2003) (citation omitted). "The state
18 court's application must have been 'objectively unreasonable.'" Id.
19 at 520-21 (citation omitted); see also Waddington v. Sarausad, 555
20 U.S. 179, 190 (2009); Davis v. Woodford, 384 F.3d 628, 637-38 (9th
21 Cir. 2004), cert. dismiss'd, 545 U.S. 1165 (2005). "Under § 2254(d), a
22 habeas court must determine what arguments or theories supported,
23 . . . or could have supported, the state court's decision; and then it
24 must ask whether it is possible fairminded jurists could disagree that
25 those arguments or theories are inconsistent with the holding in a
26 prior decision of this Court." Harrington v. Richter, 562 U.S. 86,
27 101 (2011). This is "the only question that matters under §
28 2254(d)(1)." Id. at 102 (citation and internal quotations omitted).

1 Habeas relief may not issue unless "there is no possibility fairminded
2 jurists could disagree that the state court's decision conflicts with
3 [the United States Supreme Court's] precedents." Id. "As a condition
4 for obtaining habeas corpus from a federal court, a state prisoner
5 must show that the state court's ruling on the claim being presented
6 in federal court was so lacking in justification that there was an
7 error well understood and comprehended in existing law beyond any
8 possibility for fairminded disagreement." Id. at 103.

9
10 In applying these standards, the Court ordinarily looks to the
11 last reasoned state court decision. See Delgadillo v. Woodford, 527
12 F.3d 919, 925 (9th Cir. 2008). Where, as here, the state court denied
13 the petitioner's claim in an unreasoned decision, "[a] habeas court
14 must determine what arguments or theories . . . could have supported
15 the state court's decision; and then it must ask whether it is
16 possible fairminded jurists could disagree that those arguments or
17 theories are inconsistent with the holding in a prior decision of this
18 Court." Harrington v. Richter, 562 U.S. at 102; see also Cullen v.
19 Pinholster, 563 U.S. 170, 188 (2011).

20
21 Additionally, federal habeas corpus relief may be granted "only
22 on the ground that [Petitioner] is in custody in violation of the
23 Constitution or laws or treaties of the United States." 28 U.S.C. §
24 2254(a). In conducting habeas review, a court may determine the issue
25 of whether the petition satisfies section 2254(a) prior to, or in lieu
26 of, applying the standard of review set forth in section 2254(d).
27 Frantz v. Hazey, 533 F.3d 724, 736-37 (9th Cir. 2008) (en banc).

28 ///

1 beyond a reasonable doubt standard. See Cunningham, 549 U.S. at 288-
2 89; Blakely, 542 U.S. at 301; see also Butler v. Curry, 528 F.3d 624,
3 643-44 (9th Cir.), cert. denied, 555 U.S. 1089 (2008) (“we have
4 repeatedly recognized our obligation to apply the Almendarez-Torres
5 exception”).

6
7 Accordingly, Apprendi and its progeny do not prohibit a
8 sentencing court’s application of a preponderance of the evidence
9 standard in imposing sentence based on prior convictions. See United
10 States v. Keese, 358 F.3d 1217, 1220 (9th Cir. 2004) (“the
11 Constitution does not require prior convictions that increase a
12 statutory penalty to be charged in the indictment and proved before a
13 jury beyond a reasonable doubt”) (internal quotations and footnote
14 omitted); United States v. Delaney, 427 F.3d 1224, 1226 (9th Cir.
15 2005) (“The Supreme Court has made clear that the fact of a prior
16 conviction need not be proved to a jury beyond a reasonable doubt or
17 admitted by the defendant to satisfy the Sixth Amendment.”) (citation
18 omitted); United States v. Martin, 278 F.3d 988, 1006 (9th Cir. 2002)
19 (“Apprendi expressly excludes recidivism from its scope. Defendant’s
20 criminal history need not be proved to a jury beyond a reasonable
21 doubt. [citations].”).

22
23 Alleged errors under Apprendi and its progeny may be harmless.
24 See Washington v. Recueto, 548 U.S. 212, 222 (2006) (Apprendi error
25 is non-structural and therefore is subject to harmless error
26 analysis); Butler v. Curry, 528 F.3d at 648 (Cunningham error is
27 subject to harmless error analysis). Under the harmless error
28 standard applicable to non-structural errors in federal habeas cases,

1 the federal court analyzes whether the alleged Apprendi/Cunningham
2 error had a "substantial and injurious effect" on the petitioner's
3 sentence. See Brecht v. Abrahamson, 507 U.S. 619, 637-38 (1993);
4 Butler v. Curry, 528 F.3d at 648. The court will deem the error to
5 have had such an effect if the court is "in 'grave doubt' as to
6 whether a jury would have found the relevant aggravating factors
7 beyond a reasonable doubt." Butler v. Curry, 528 F.3d at 648.

8

9 DISCUSSION

10

11 For the reasons discussed below, the Petition should be denied
12 and dismissed with prejudice. Petitioner has failed to demonstrate a
13 material violation of clearly established United States Supreme Court
14 law.

15

16 As of the time of the California Supreme Court's decision in the
17 present case, no clearly established United States Supreme Court law
18 prevented a state court judge from basing a sentence on the judge's
19 findings concerning the nature of prior convictions, such as the prior
20 convictions' increasing seriousness. As previously indicated, there
21 exists a "prior conviction exception" to the principles of Apprendi
22 and Cunningham. The United States Supreme Court has not yet
23 determined "the precise contours of that exception." Kessee v.
24 Mendoza-Powers, 574 F.3d 675, 677 (9th Cir. 2009). Circuit decisions
25 are in conflict regarding the proper scope of the exception. Compare
26 Wilson v. Knowles, 638 F.3d 1213, 1215 (9th Cir. 2011) ("it isn't
27 clearly established whether a judge may find that a defendant was on
28 probation at the time of an earlier conviction . . . [but] it would be

1 unreasonable to read Apprendi as allowing a sentencing judge to find
2 . . . the extent of the victim's injuries and how the accident
3 occurred") and Butler, 528 F.3d at 644 ("We have been hesitant to
4 broaden the scope of the prior conviction exception") with United
5 States v. Santiago, 268 F.3d 151, 156 (2d Cir. 2001), cert. denied,
6 535 U.S. 1070 (2002) ("We read Apprendi as leaving to the judge,
7 consistent with due process, the task of finding not only the mere
8 fact of previous convictions but other related issues as well . . .
9 [including] the who, what, when and where of a prior conviction")
10 (quotations omitted); United States v. Kempis Bonola, 287 F.3d 699,
11 703 (8th Cir.), cert. denied, 537 U.S. 914 (2002) ("the sentencing-
12 related circumstances of recidivism are facts that may be found by the
13 sentencing judge and are not within the scope of Apprendi's holding").
14 Given the lack of clearly established United States Supreme Court law
15 regarding the scope of the prior conviction exception, courts within
16 the Ninth Circuit have denied habeas relief in cases legally
17 indistinguishable from the present case. See, e.g. Johnson v. Ayers,
18 434 Fed. App'x 642, 643-44 (9th Cir.), cert. denied, 565 U.S. 909
19 (2011) (habeas relief denied where the state sentencing court imposed
20 the high term in reliance on the "increasing seriousness" of the prior
21 convictions); Pena-Silva v. Prosper, 397 Fed. App'x 394 (9th Cir.
22 2010) (same); Sanford v. Scribner, 2011 WL 4020831, at *8 (C.D. Cal.
23 Aug. 4, 2011), adopted, 2011 WL 4020815 (C.D. Cal. Sept. 9, 2011)
24 (same); Blackwell v. Felker, 2011 WL 6000884, at *25 (C.D. Cal.
25 June 3, 2011), adopted, 2011 WL 6000877 (C.D. Cal. Nov. 30, 2011)
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1 (same).²

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3 In California, "the existence of a single aggravating
4 circumstance is legally sufficient to make the defendant eligible for
5 the upper term." See People v. Black, 41 Cal. 4th 799, 813, 62 Cal.
6 Rptr. 3d 569, 161 P.3d 1130 (2007), cert. denied, 552 U.S. 1144
7 (2008); People v. Osband, 13 Cal. 4th 622, 728, 55 Cal. Rptr. 2d 26,
8 919 P.2d 640 (1996), cert. denied, 519 U.S. 1061 (1997); see also
9 Rosenblum v. Yates, 489 Fed. App'x 165, 166 (9th Cir. 2012); Butler v.
10 Curry, 528 F.3d at 642-43. This Court must defer to this principle of
11 state law. See Butler v. Curry, 528 F.3d at 642. Therefore, "if at
12 least one of the aggravating factors on which the judge relied in
13 sentencing [Petitioner] was established in a manner consistent with
14 the Sixth Amendment, [Petitioner]'s sentence does not violate the
15 Constitution." See id. at 643. Here, because clearly established
16 United States Supreme Court law did not forbid the sentencing court
17 from imposing the high term based in part on Petitioner's prior
18 convictions, Petitioner's Apprendi/Cunningham claim must be rejected.

19
20 Petitioner's Apprendi/Cunningham claim also fails because any
21 such error was harmless. From more than ample trial evidence that
22 Petitioner intentionally shot one of the victims at point blank range,
23 the jury found beyond a reasonable doubt, inter alia, that Petitioner
24 committed attempted murder with a firearm, thereby personally

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27 ² Petitioner's Apprendi/Cunningham claim does not impugn
28 the accuracy of the sentencing judge's finding of "increasing
seriousness," only the judge's constitutional authority to make
such a finding in the absence of jury involvement.

1 inflicting great bodily injury on the victim. The same jury also
2 undoubtedly would have found beyond a reasonable doubt that Petitioner
3 "engaged in violent conduct that indicates a serious danger to
4 society." Accordingly, any Apprendi/Cunningham error was harmless.
5 See Baker v. Cate, 2010 WL 4579293, at *5 (C.D. Cal. July 20, 2010),
6 adopted, 2010 WL 4578674 (C.D. Cal. Nov. 2, 2010) ("clear" that
7 attempted murder with a firearm which resulted in great bodily injury
8 indicated that the petitioner was a "serious danger to society";
9 Apprendi/Cunningham error deemed harmless); Randell v. Carey, 2013 WL
10 450280, at *11 (N.D. Cal. Feb. 5, 2013), aff'd, 585 Fed. App'x 456
11 (9th Cir. 2014), cert. denied, 135 S. Ct. 1707 (2015) (defendant's
12 participation in a shooting in public which caused the death of an
13 innocent victim "would have led the jury to find beyond a reasonable
14 doubt that he engaged in violent conduct posing a serious danger to
15 society"; Apprendi/Cunningham error deemed harmless); Zelaya v.
16 Jacquez, 2012 WL 4107847, at *15-16 (C.D. Cal. Aug. 9, 2012), adopted,
17 2012 WL 4107832 (C.D. Cal. Sept. 17, 2012) (trial evidence of multiple
18 armed robberies and vehicle thefts, including the infliction of
19 gunshot wounds on a victim, rendered it "clear that the jury would
20 have at least found the aggravating fact that petitioner posed a
21 danger to the community by proof beyond a reasonable doubt";
22 Apprendi/Cunningham error deemed harmless).

23
24 To the extent Petitioner also claims that the Superior Court
25 committed errors of California state law, such claims do not merit
26 federal habeas relief. Federal habeas relief may be granted "only on
27 the ground that [Petitioner] is in custody in violation of the
28 Constitution or laws or treaties of the United States." 28 U.S.C. §

1 2254(a); Estelle v. McGuire, 502 U.S. 62, 67-68 (1991); see also
2 Wilson v. Corcoran, 562 U.S. 1, 5 (2010) (per curiam) ("it is only
3 noncompliance with *federal* law that renders a State's criminal
4 judgment susceptible to collateral attack in the federal courts")
5 (original emphasis); Hendricks v. Vasquez, 974 F.2d 1099, 1105 (9th
6 Cir. 1992) ("Federal habeas will not lie for errors of state law").
7 Thus, any alleged errors in the interpretation and application of
8 California state sentencing law cannot justify habeas relief. See id.
9 The federal habeas court may not properly question the correctness of
10 state courts' rulings on issues of state law. See Waddington v.
11 Sarausad, 555 U.S. 179, 192 n.5 (2009); Bradshaw v. Richey, 546 U.S.
12 74, 76 (2005); see also Mullaney v. Wilbur, 421 U.S. 684, 691 (1975)
13 ("state courts are the ultimate expositors of state law").

14
15 Although the Petition is unclear, Petitioner also may challenge
16 the persuasiveness of some of the prosecution's trial evidence. Given
17 the trial record (which this Court has reviewed), any challenge to the
18 constitutional sufficiency of the trial evidence necessarily would
19 fail (R.T. 322-702). See Jackson v. Virginia, 443 U.S. 307, 317
20 (1979) (evidence is constitutionally sufficient unless, after
21 resolving all conflicts in the evidence in favor of the prosecution,
22 no rational trier of fact so viewing the evidence could have found
23 guilt beyond a reasonable doubt); accord United States v. Nevils, 598
24 F.3d 1158, 1164 (9th Cir. 2010).

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1 **NOTICE**

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

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

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