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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JOSHUA MARK GILMORE,

Petitioner,

No. CIV S-04-2395 GEB KJM P

vs.

MATTHEW CATE,¹

Respondent.

ORDER

_____ /

Petitioner is a California prisoner proceeding with an application for writ of habeas corpus under 28 U.S.C. § 2254. He challenges two 2006 Sacramento County convictions for attempted murder. He is serving consecutive terms of life imprisonment with the possibility of parole along with a term of seven years.

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¹ Secretary Cate is substituted as the respondent in this case under Federal Rule of Civil Procedure 25(d).

1 I. Background

2 On direct appeal, the California Court of Appeal summarized the facts presented
3 at petitioner's trial as follows:

4 In November 1997, Clint and Alice Durkee were living in a duplex
5 in Sacramento with defendant Gilmore. Gilmore was a member of
6 the Church of the Creator (CC). Living nearby were other CC
7 members and members of a related group called the Western
8 Hammerskins. The CC and the Western Hammerskins are both
9 "Skinhead" gangs, i.e., racist organizations promoting White
supremacy and hatred of Jews and nonwhites. These gangs liked
to go "mobbing" which meant going out looking for fights. The
White Supremacist Skinheads were rivals with, and held great
animosity towards, an anti-racist Skinhead gang called the
Skinheads Against Racial Prejudice, or SHARP.

10 *The Almon Incident*

11 On July 3, 1997, 16-year-old Jeffrey Almon left his house to visit a
12 friend, when he was approached by Gilmore and Richard Molinare.
13 Desiring to avoid them, Almon walked across the street, but the
two men pursued him in a "jalopy" type car, where they confronted
him in a parking lot.

14 One of the men got out of the car and said to Almon, "What are
15 you running from, are you a SHARP?" Familiar with SHARPs and
16 Skinheads, Almon answered "No, I'm not a SHARP, I'm a human
being." The man then replied, "Well, then, why do you look like
one?" At that point, the two men assaulted him.

17 One of the men held Almon's arms while the other repeatedly
18 punched him in the chest, stomach, and face. Almon then fell to
19 the ground, and felt a "tremendous blow to the back of my skull."
20 He was kicked repeatedly until he lost consciousness. As a result
21 of the attack, Almon lapsed into a coma, suffered severe brain
injury, and incurred substantial damage to his face and neck. He
was unable to walk unassisted, had total short-term memory loss,
and suffered impaired ability to communicate.

22 In May of 2000, Almon selected Molinare's photo from a lineup
23 card, but he could not identify Gilmore. However, at the
preliminary hearing in this case, Almon positively identified
24 Gilmore as the other attacker.

25 Molinare testified for the prosecution as part of a plea agreement
26 regarding this case and other pending charges. Admitting his own
involvement in Almon's beating, he testified that Gilmore
participated with him, kicking the victim several times in the head,
throat and torso.

1 Alice Durkee testified that on the day of the Almon beating, her
2 husband Clint informed her that Gilmore and Molinare had just
3 beaten someone up. He directed her to a church parking lot, where
4 they discovered Almon lying motionless on the ground. Durkee's
5 husband called 911 from a pay phone. Later that evening, Durkee
6 overheard a conversation among Molinare, Gilmore, and an
7 unidentified third party, describing how Molinare and Gilmore had
8 chased and beat up a suspected member of SHARP, kicking the
9 victim even after he lost consciousness.

10 Stevanie Coppedge, who knew both Gilmore and the Durkees,
11 testified that Gilmore admitted to her that he had chased and beaten
12 a kid whom he thought was a SHARP member.

13 *The Cyber Café Incident*

14 On the evening of November 1, 1997, Skinheads Michael Lee
15 Underwood, Billy Johnson, and Ryan Yourkvitch were hanging
16 around the Cyber Café when they got into a fracas with Joe Bailey,
17 who was acting informally as a security guard, over Yourkvitch's
18 refusal to pick up a cigarette butt he had tossed on the ground. A
19 week before, a Skinhead had been roughed up by several SHARPs
20 at the café. During the present encounter, Yourkvitch asked a
21 patron of the café if he was SHARP. Bailey intervened, telling
22 Yourkvitch this was not the place for politics.

23 The three Skinhead youths left the café and returned to Melissa
24 Merrill's residence, where they were joined with others, including
25 Gilmore. Johnson announced that he had been "jumped" by
26 SHARPs at the Cyber Café, which angered the group. Gilmore
said if any of the guys who "started the problem" was still there,
one of them was going to die. The youths piled into three cars and
headed for the café. Gilmore carried a folding knife with a four-
inch blade.

After the cigarette encounter, Bailey went to a 7-Eleven store
where he bought food and drink with William Harris. They
noticed two cars driving by. Bailey recognized three of the men in
the car as those with whom he had the hostile encounter and told
someone to call the police.

As Bailey and Harris headed toward the café, they were
approached by a large group of Skinheads emerging from their
vehicles. One of the Skinheads said "who is it?" Another
answered, "That's him" and pointed at Harris. At that point "all
hell broke loose." Several Skinheads attacked Bailey, while the
rest attacked Harris. Bailey was hit and kicked multiple times.
Harris was hit on the head, and stabbed repeatedly by Gilmore.
Harris's wife began screaming, and the assailants fled.

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1 After the attack, witnesses observed Gilmore with a bloody knife
2 in his hand, saying “I shanked that fool 17 times,” and “I shouldn’t
3 have shanked that motherfucker.” Gilmore was subsequently
4 overheard saying he drove Johnson’s car to San Francisco
5 immediately after the Cyber Café attack so he would not be
6 associated with the incident.

Emergency personnel responding to the scene counted 10 separate
stab wounds on Harris’s body. He was hospitalized for five days
with a collapsed lung. At the time of trial, he had more than a
dozen knife-wound scars.

7 *Defense*

8 Juliann Cosgrove-Orr, who was at the Cyber Café that night,
9 admitted that she identified Billy Johnson as “the man with the
10 knife” at his preliminary hearing. However, she also identified
11 Gilmore as one of the five assailants. Ryan Fleming testified that
12 he saw Johnson hitting the victim Harris with thrusting motions
13 indicative of stabbing, although he could not see a knife in
14 Johnson’s hand. Psychiatrist Martin Blinder testified as to the
15 inherent unreliability of eyewitness testimony. Addressing a
16 hypothetical containing facts based on the Almon case, Blinder
17 opined that there were several factors which would cause him to
18 question a victim’s identification testimony three years after the
19 attack.

20 Resp’t’s Lodged Doc. No. 1 at 2-4 (footnote omitted).

21 II. Habeas Relief In General

22 An application for a writ of habeas corpus by a person in custody under a
23 judgment of a state court can be granted only for violations of the Constitution or laws of the
24 United States. 28 U.S.C. § 2254(a). Also, federal habeas corpus relief is not available for any
25 claim decided on the merits in state court proceedings unless the state court’s adjudication of the
26 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

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1 (2) resulted in a decision that was based on an unreasonable
2 determination of the facts in light of the evidence presented in the
State court proceeding.

3 28 U.S.C. § 2254(d) (referenced herein in as “§ 2254(d)” or “AEDPA”).² It is the habeas
4 petitioner’s burden to show he is not precluded from obtaining relief by § 2254(d). See
5 Woodford v. Visciotti, 537 U.S. 19, 25 (2002).

6 The “contrary to” and “unreasonable application” clauses of § 2254(d)(1) are
7 different. As the Supreme Court has explained:

8 A federal habeas court may issue the writ under the “contrary to”
9 clause if the state court applies a rule different from the governing
10 law set forth in our cases, or if it decides a case differently than we
11 have done on a set of materially indistinguishable facts. The court
12 may grant relief under the “unreasonable application” clause if the
13 state court correctly identifies the governing legal principle from
our decisions but unreasonably applies it to the facts of the
particular case. The focus of the latter inquiry is on whether the
state court’s application of clearly established federal law is
objectively unreasonable, and we stressed in Williams [v. Taylor],
529 U.S. 362 (2000)] that an unreasonable application is different
14 from an incorrect one.

15 Bell v. Cone, 535 U.S. 685, 694 (2002). A state court does not apply a rule different from the
16 law set forth in Supreme Court cases, or unreasonably apply such law, if the state court simply
17 fails to cite or fails to indicate an awareness of federal law. Early v. Packer, 537 U.S. 3, 8
18 (2002).

19 The court will look to the last reasoned state court decision in determining
20 whether the law applied to a particular claim by the state courts was contrary to the law set forth
21 in the cases of the United States Supreme Court or whether an unreasonable application of such
22 law has occurred. Avila v. Galaza, 297 F.3d 911, 918 (9th Cir. 2002), cert. dismissed, 538 U.S.
23 919 (2003). Where the state court fails to give any reasoning whatsoever in support of the denial
24 of a claim arising under Constitutional or federal law, the Ninth Circuit has held that this court

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26 ² Title 28 U.S.C. § 2254(d) establishes a precondition to federal habeas relief, not
grounds for entitlement to habeas relief. Fry v. Pliler, 551 U.S. 112, 118-19 (2007).

1 must perform an independent review of the record to ascertain whether the state court decision
2 was objectively unreasonable. Himes v. Thompson, 336 F.3d 848, 853 (9th Cir. 2003). In other
3 words, the court assumes the state court applied the correct law, and analyzes whether the
4 decision of the state court was based on an objectively unreasonable application of that law.

5 “Clearly established” federal law is that determined by the Supreme Court.
6 Arredondo v. Ortiz, 365 F.3d 778, 782-83 (9th Cir. 2004). At the same time, it is appropriate to
7 look to lower federal court decisions as persuasive authority in determining what law has been
8 “clearly established” and the reasonableness of a particular application of that law. Duhaime v.
9 Ducharme, 200 F.3d 597, 598 (9th Cir. 1999); Clark v. Murphy, 331 F.3d 1062 (9th Cir. 2003),
10 overruled on other grounds, Lockyer v. Andrade, 538 U.S. 63 (2003); cf. Arredondo, 365 F.3d at
11 782-83 (noting that reliance on Ninth Circuit or other authority outside bounds of Supreme Court
12 precedent is misplaced).

13 III. Arguments And Analysis

14 A. Ineffective Assistance Of Counsel

15 Petitioner’s first claim is that he was denied his Sixth Amendment right to
16 effective assistance of counsel because his trial counsel failed to move to suppress the in-court
17 identification by Jeffrey Almon of petitioner as one of his attackers. Am. Pet. at 2-4.

18 The Supreme Court has enunciated the standards for judging ineffective assistance
19 of counsel claims. See Strickland v. Washington, 466 U.S. 668 (1984). First, a petitioner must
20 show that, considering all the circumstances, counsel's performance fell below an objective
21 standard of reasonableness. Id. at 688. To this end, the petitioner must identify the acts or
22 omissions that are alleged not to have been the result of reasonable professional judgment. Id. at
23 690. The court must then determine whether in light of all the circumstances, the identified acts
24 or omissions were outside the wide range of professional competent assistance. Id. Second, a
25 petitioner must affirmatively prove prejudice. Id. at 693. Prejudice is found where “there is a
26 reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding

1 would have been different.” Id. at 694. A reasonable probability is “a probability sufficient to
2 undermine confidence in the outcome.” Id.

3 On direct appeal, the California Court of Appeal, which was the only court to
4 issue a reasoned decision with respect to petitioner’s claim, found as follows:

5 When first asked to identify his assailants from a police
6 photographic lineup card the victim Almon did not select
7 Gilmore’s photo. During the preliminary hearing in which
8 Gilmore and Molinare were codefendants, Almon immediately
9 identified Molinare as one of the attackers, but failed to identify
10 Gilmore. However, Almon became emotional while speaking with
11 a police detective in the restroom during a break. Breaking into
12 tears, he told the detective he was now sure the two codefendants
13 were the ones who savagely beat him. He repeated this
14 identification in the courtroom. While conceding the obvious
15 suggestibility in the fact that Gilmore was seated at the defense
16 table in an orange jumpsuit, Almon insisted he was “completely
17 certain” Gilmore was the second assailant.

18 Almon repeated his identification at trial, explaining the
19 circumstances of his epiphany at the preliminary hearing, and
20 adding that he had “no doubt” Gilmore was the second man who
21 attacked him.

22 Gilmore now faults his attorney for failing to move to exclude
23 Almon’s trial identification on the basis that it was tainted by an
24 impermissibly suggestive pre-trial identification procedure, to wit:
25 Gilmore’s presence at the preliminary hearing. He asserts that
26 there is no tactical explanation for counsel having failed to make
such a motion, and that had the motion been made, it would have
been meritorious.

“A pretrial identification procedure violates a defendant’s due
process rights if it is so impermissibly suggestive that it creates a
very substantial likelihood of irreparable misidentification. The
defendant bears the burden of proving unfairness as a
‘demonstrable reality,’ not just speculation. [Citations.]” (*People*
v. Contreras (1993) 17 Cal.App.4th 813, 819, 21 Cal.Rptr.2d 496
(*Contreras*); see also *Simmons v. United States* (1968) 390 U.S.
377, 384 [19 L.Ed.2d 1247, 1253].) “Merely concluding that the
pretrial procedures were suggestive does not end the analysis. . . .”
(*Contreras, supra*, at p. 820, 21 Cal.Rptr.2d 496.) The court must
look at the “totality of the circumstances” in assessing whether the
pretrial procedure was so unfair as to render the subsequent in-
court identification inadmissible. (*People v. Cunningham* (2001)
25 Cal.4th 926, 989, 108 Cal.Rptr.2d 291, 25 P.3d 519, citing inter
alia *Manson v. Brathwaite* (1977) 432 U.S. 98, 104-107 [53
L.Ed.2d 140].)

1 We have not found, nor does Gilmore refer us to, any case in which
2 the pretrial identification procedure claimed to have been unfair
3 was the suggestive appearance of the defendant at a preliminary
4 hearing. However, the facts of *Contreras* are so strikingly similar,
5 that it may be viewed as dispositive on the issue of whether a
6 motion to exclude Almon's in court identification would have been
7 meritorious.

8 In *Contreras*, as here, the victim (Lopez) was subjected to a
9 vicious beating by multiple assailants. While still recuperating
10 from his injuries, Lopez failed to identify Contreras from a
11 photographic lineup, or even after having been shown a single
12 photograph of Contreras. However, at the preliminary hearing,
13 Lopez identified Contreras, who was sitting at the counsel table
14 next to a codefendant, as one of the assailants. (17 Cal.App.4th at
15 p. 817, 21 Cal.Rptr.2d 496.)

16 Prior to trial, Contreras made a motion to suppress the victim's
17 identification testimony, contending that the pretrial identification
18 procedures used by the law enforcement (the lineup card and single
19 photo) were impermissibly suggestive. In denying the motion, the
20 trial court first concluded that Lopez's identification was "highly
21 suspect, but not because of the procedures used by the police."
22 Instead, the court believed the identification "*was based solely on
23 the fact that both suspects were seated at counsel table*" during the
24 preliminary hearing, and Lopez already knew the codefendant was
25 one of his assailants. (*Contreras, supra*, 17 Cal.App.4th at p. 819,
26 21 Cal.Rptr.2d 496, italics added.) Nevertheless, the court denied
the motion ruling that its own doubts about Lopez's veracity were
not sufficient to suppress his in-court identification. It reasoned
that the jury should be allowed to consider the identification in the
context of the surrounding circumstances. (*Ibid.*)

17 The appellate court upheld this ruling, even though it accepted, as
18 supported by substantial evidence, the trial court's opinion that the
19 victim was lying about his ability to identify Contreras.
20 (*Contreras, supra*, 17 Cal.App.4th at p. 823, 21 Cal.Rptr.2d 496.)
21 Stated the court: "We do not see any unfairness, certainly none
22 offending constitutional standards, in the court's decision to allow
23 the identification evidence. The jury was made fully aware of the
24 circumstances leading to Lopez's ultimate, in-court identification.
25 The jury heard that Lopez was unable to identify Contreras until
26 seeing him at the preliminary hearing, even though shown pictures
of him earlier. The jury saw the photograph of Contreras and could
draw its own conclusions about its clarity. It could decide whether
Lopez should have been able to identify [Contreras] if he indeed
had been the assailant." (*Ibid.*)

25 The facts of this case are much stronger in favor of permitting the
26 jury to hear Almon's in-court identification than those in
Contreras. First, there can be no serious claim that Almon was

1 being untruthful when he identified Gilmore at the preliminary
2 hearing. Had he intended to lie, Almon would not have hesitated
3 to make the identification during the initial part of his direct
4 examination. His turnabout after a bathroom break was
5 spontaneous and bore an aura of verisimilitude.

6 Second, unlike the victim Lopez, Almon had not been subjected to
7 an arguably biased police procedure (such as a single-person
8 photograph) before making his identification at the preliminary
9 hearing. Finally, Almon's identification of his assailant for the
10 first time at the preliminary hearing was accompanied by a credible
11 explanation—that his memory and vision of events were gradually
12 returning to him after having suffered a traumatic brain injury.

13 The conclusion is inevitable that any attempt to suppress Almon's
14 in-court identification testimony would have been futile. "The
15 mere fact that a witness is unable to identify a defendant from
16 photographs shown him does not render a subsequent in-court
17 identification inadmissible [Citations.]" (*Contreras, supra*, 17
18 Cal.App.4th at p. 822, 21 Cal.Rptr.2d 496.) Here, despite Almon's
19 initial inability to identify Gilmore and the suggestibility of
20 Gilmore's presence at the preliminary hearing, there were so many
21 factors weighing in favor of the reliability of Almon's
22 identification that the ultimate question was one for the jury to
23 decide, after considering all the surrounding circumstances.
24 Almon's in-court identification testimony was clearly admissible.
25 Accordingly, Gilmore's trial counsel was not ineffective for failing
26 to make the motion.

16 Resp't's Lodged Doc. No. 1 at 9-11.

17 Petitioner does not argue that the Court of Appeal used the incorrect federal legal
18 standards in addressing petitioner's ineffective assistance of counsel claim. Rather, petitioner
19 asserts his claim is not barred by 28 U.S.C. § 2254(d) because the Court of Appeal ignored
20 certain facts relative to whether pretrial identification procedures were overly suggestive, namely:
21 1) the assault on Jeffrey Almon lasted only one minute; 2) Almon did not initially remember
22 being attacked; 3) Almon could not identify petitioner in a photographic lineup; 4) at one point,
23 Almon identified Clint Durkee as one of his assailants rather than petitioner; 5) Almon did not
24 identify petitioner as one of his assailants until over three years had passed since the attack;
25 6) Almon did not identify petitioner until he was standing next to Molinare in court; 7) Almon
26 was emotional when he identified petitioner; and 8) Almon believed identifying petitioner gave

1 him closure. Am. Pet. at 17-19. Assuming all of these facts were before the appellate court,
2 nothing suggests they were not considered. The court simply did not mention them in the court's
3 opinion which the court was not required to do. See Miller-El v. Cockrell, 537 U.S. 322, 347
4 (2003) (state court need not make detailed findings addressing all of the evidence before it).
5 Petitioner has not met his burden of showing that he is not precluded by 28 U.S.C. § 2254(d)
6 from obtaining habeas relief as to his ineffective assistance of counsel claim. Therefore, the
7 claim must be rejected.

8 B. Guilty Pleas Of Co-Defendants

9 Petitioner asserts the trial court violated his right to a fair trial when the court
10 failed, sua sponte, to instruct jurors that the guilty pleas of witnesses Billy (William) Johnson,
11 Clint Durkee, James Merrill and Richard Molinare acknowledging their part in the two incidents
12 at issue could not be considered as evidence of petitioner's guilt. Am. Pet. at 5-12. It does not
13 appear that any California court has issued a reasoned decision with respect to this claim. On
14 collateral review, the California Supreme Court rejected the claim without comment. Resp't's
15 Lodged Docs. Nos. 7 & 8.

16 Petitioner fails to point to any Supreme Court authority supporting his argument
17 that his right to a fair trial was violated. Petitioner is correct that when a co-conspirator or co-
18 defendant does not testify, a violation of the Confrontation Clause of the Sixth Amendment
19 might occur if an out of court statement made by the co-defendant or conspirator is admitted to
20 prove guilt. See, e.g., Lee v. Illinois, 476 U.S. 530, 546 (1986). But all of the witnesses
21 petitioner identifies in connection with this claim testified at petitioner's trial. See RT 489-510,
22 546-673, 844-1043, 1327-1418; RST³ 25-93.

23 The Ninth Circuit has held that a guilty plea of a testifying co-defendant may not
24 be offered by the government and received over objection as substantive evidence of guilt.

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³ RST refers to "Reporter's Supplemental Transcript."

1 United States v. Halbert, 640 F.2d 1000, 1004 (9th Cir. 1981). However, petitioner did not
2 object to the use of the guilty pleas of Johnson, Durkee, Merrill and Molinare in any manner.
3 See RT 569-570, 844-845, 1396; RST 66-67. Even if he had objected, he still has not overcome
4 the high hurdle erected by 28 U.S.C. § 2254(d), given the lack of any Supreme Court precedent
5 supporting his claim.

6 C. Cumulative Error

7 Finally, petitioner claims he is entitled to relief based on cumulative error. Am.
8 Pet. at 12. If more than one error is committed but no single error prejudiced the petitioner
9 enough to warrant habeas relief, a habeas petitioner may be entitled to relief if the cumulative
10 effect of the errors resulted in sufficient prejudice. Manusco v. Olivarez, 292 F.3d 939, 957 (9th
11 Cir. 2002). Because petitioner has not established any constitutional errors occurred at his trial,
12 the “cumulative error” basis for relief is not applicable.

13 IV. Conclusion

14 For the foregoing reasons, the court will recommend that petitioner’s application
15 for writ of habeas corpus be denied.

16 Accordingly, IT IS HEREBY RECOMMENDED that petitioner's application for a
17 writ of habeas corpus be denied.

18 These findings and recommendations are submitted to the United States District
19 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty
20 days after being served with these findings and recommendations, any party may file written
21 objections with the court and serve a copy on all parties. Such a document should be captioned
22 “Objections to Magistrate Judge’s Findings and Recommendations.” Any reply to the objections
23 shall be served and filed within ten days after service of the objections. The parties are advised

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1 that failure to file objections within the specified time may waive the right to appeal the District
2 Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

3 DATED: September 8, 2009.

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6 U.S. MAGISTRATE JUDGE

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