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

THOMAS RUTLEDGE,) No. C 08-5738 MMC (PR)
Petitioner,) **ORDER DENYING PETITION FOR**
v.) **WRIT OF HABEAS CORPUS;**
J.N. KATAVICH, Warden,) **DENYING CERTIFICATE OF**
Respondent.) **APPEALABILITY; DIRECTIONS TO**
CLERK

Before the Court is the above-titled petition for a writ of habeas corpus, filed pursuant to 28 U.S.C. § 2254 by petitioner Thomas Rutledge, challenging the validity of a judgment obtained against him in state court.¹ Respondent has filed an answer to the petition, and petitioner has filed a traverse.

I. PROCEDURAL HISTORY

On June 28, 2007, in Alameda County Superior Court, petitioner pled no contest to attempted robbery (Cal. Pen. Code §§ 664/211) and admitted having sustained two prior serious felony convictions (Cal. Pen. Code § 667(a)) and one prior strike conviction (Cal.

¹ Petitioner initially named R.E. Barnes, former warden of California Correctional Center – Susanville, as the respondent in this action. Petitioner later notified the Court he had been transferred to Wasco State Prison. Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, J.N. Katavich, the current warden of Wasco State Prison, is hereby SUBSTITUTED as respondent in place of petitioner's prior custodian.

1 Pen. Code § 667(e)(1)). (Ex. 1.)² The plea was entered pursuant to a negotiated plea bargain
2 with an agreed upon sixteen-year prison term. (*Id.*) The superior court sentenced petitioner
3 to sixteen years in state prison on September 10, 2007. (Pet. at 2.)

4 On September 27, 2007, petitioner filed a petition for writ of habeas corpus in
5 Alameda County Superior Court, which was denied on October 1, 2007.³ (Exs. 2-3.)

6 On October 18, 2007, petitioner filed a petition for writ of habeas corpus in Alameda
7 County Superior Court, which was denied on October 22, 2007. (Exs. 5-6.)

8 On November 1, 2007, petitioner filed a petition for writ of habeas corpus in the
9 California Court of Appeal, which was denied on November 8, 2007. (Ex. 18.)

10 On December 14, 2007, petitioner filed a petition for writ of habeas corpus in the
11 California Supreme Court, which was denied on June 11, 2008. (Exs. 23-24.)

12 On January 3, 2008, petitioner filed a petition for writ of habeas corpus in Alameda
13 County Superior Court, which was denied on January 8, 2008. (Exs. 7-8.)

14 On March 17, 2008, petitioner filed a petition for writ of habeas corpus in Alameda
15 County Superior Court, which was denied on April 3, 2008. (Ex. 9-10.)

16 On April 16, 2008, petitioner filed a petition for writ of habeas corpus in Alameda
17 County Superior Court, which was denied on May 21, 2008. (Exs. 11-12.)

18 On June 2, 2008, petitioner filed a petition for writ of habeas corpus in the California
19 Court of Appeal, which was denied on June 12, 2008. (Ex. 19.)

20 On August 7, 2008, petitioner filed a petition for writ of habeas corpus in the
21 California Supreme Court, which was denied on January 28, 2009. (Exs. 25-26.)

22 On August 28, 2008, petitioner filed a petition for writ of habeas corpus in Alameda
23

24 ² Unless otherwise specified, all references herein to exhibits are to exhibits submitted
25 by respondent in support of the Answer.

26 ³ Before entering the plea, petitioner filed a petition for a writ of habeas corpus in
27 Alameda County Superior Court, which was denied on June 25, 2007. (Ex. 4.) Before he
28 was sentenced, petitioner filed a petition for writ of habeas corpus in the California Court of
Appeal, which was denied on July 26, 2007, after which he filed a petition for a writ of
habeas corpus in the California Supreme Court, which was denied on September 12, 2007.
(Exs. 17, 21 & 22.)

1 County Superior Court, which was denied on September 25, 2008. (Exs. 13-14.)

2 On October 29, 2008, petitioner filed in the United States District Court for the
3 Eastern District of California the initial petition in the instant action. Thereafter, the petition,
4 which included both exhausted and unexhausted claims, was transferred to this district.
5 Petitioner then sought and was granted a stay while he returned to state court to exhaust his
6 unexhausted claims.

7 On November 7, 2008, petitioner filed a petition for writ of habeas corpus in the
8 California Supreme Court, which was denied on January 28, 2009. (Exs. 27-28.)

9 On February 23, 2009, petitioner filed a petition for writ of habeas corpus in Alameda
10 County Superior Court, which was denied on April 6, 2009. (See Ex. 16.)

11 On April 3, 2009, petitioner filed a petition for writ of habeas corpus in Alameda
12 County Superior Court, which was denied on May 22, 2009. (Exs. 15-16.)

13 On April 24, 2009, petitioner filed a petition for writ of habeas corpus in the
14 California Court of Appeal, which was denied on April 30, 2009. (Ex. 20.)

15 On May 8, 2009, petitioner filed a petition for review in the California Supreme
16 Court, which was denied on June 10, 2009. (Exs. 29-30.)

17 Thereafter, this Court, by order filed October 19, 2010, granted petitioner's request to
18 reopen the instant action, on the ground his claims were now exhausted. By that same order,
19 the Court directed petitioner to file an amended petition that contained all of his exhausted
20 claims. Petitioner then filed an amended petition ("Pet."), after which respondent filed an
21 answer and petitioner filed a traverse.

22 II. DISCUSSION

23 A. Standard of Review

24 This Court may entertain a petition for a writ of habeas corpus "in behalf of a person
25 in custody pursuant to the judgment of a State court only on the ground that he is in custody
26 in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a);
27 Rose v. Hedges, 423 U.S. 19, 21 (1975).

28 A district court may not grant a petition challenging a state conviction or sentence on

1 the basis of a claim that was reviewed on the merits in state court unless the state court's
2 adjudication of the claim: "(1) resulted in a decision that was contrary to, or involved an
3 unreasonable application of, clearly established Federal law, as determined by the Supreme
4 Court of the United States; or (2) resulted in a decision that was based on an unreasonable
5 determination of the facts in light of the evidence presented in the State court proceeding."
6 28 U.S.C. § 2254(d); *Williams v. Taylor*, 529 U.S. 362, 412-13 (2000). Additionally, habeas
7 relief is warranted only if the constitutional error at issue had a "substantial and injurious
8 effect on the verdict." *Penry v. Johnson*, 532 U.S. 782, 796 (2001) (internal quotation and
9 citation omitted).

10 A state court decision is "contrary to" clearly established Supreme Court precedent if
11 it "applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases"
12 or if it "confronts a set of facts that are materially indistinguishable from a decision of [the
13 Supreme] Court and nevertheless arrives at a result different from [its] precedent." *Williams*,
14 529 U.S. at 405-06. "Under the 'unreasonable application' clause, a federal habeas court
15 may grant the writ if the state court identifies the correct governing legal principle from [the
16 Supreme] Court's decisions but unreasonably applies that principle to the facts of the
17 prisoner's case." *Id.* at 413. "[A] federal habeas court may not issue the writ simply because
18 that court concludes in its independent judgment that the relevant state-court decision applied
19 clearly established federal law erroneously or incorrectly. Rather, that application must also
20 be unreasonable." *Id.* at 411.

21 Section 2254(d)(1) restricts the source of clearly established law to the Supreme
22 Court's jurisprudence. "[C]learly established Federal law, as determined by the Supreme
23 Court of the United States" refers to "the holdings, as opposed to the dicta, of [the Supreme]
24 Court's decisions as of the time of the relevant state-court decision." *Id.* at 412. "A federal
25 court may not overrule a state court for simply holding a view different from its own, when
26 the precedent from [the Supreme Court] is, at best, ambiguous." *Mitchell v. Esparza*, 540
27 U.S. 12, 17 (2003).

28

1 B. Petitioner's Claims

2 Petitioner asserts the following grounds for relief: (1) violation of petitioner's right to
3 a jury, based on imposition of an upper term sentence; (2) ineffective assistance of counsel;
4 (3) violation of the Ex Post Facto Clause, based on reduced sentencing credits; and
5 (4) violation of the Ex Post Facto Clause, based on sentencing enhancements for prior
6 convictions. The Court addresses each claim in turn.

7 1. Imposition of Upper Term and Right to Trial by Jury

8 As part of his negotiated plea, petitioner agreed that he would receive the upper term
9 of three years for the attempted robbery and that, pursuant to California Penal Code section
10 667(e)(1), one of his prior convictions would be used to double the term from three to six
11 years. (Ex. 1 at 2.)⁴ Citing Cunningham v. California, 549 U.S. 270 (2007), petitioner
12 claims imposition of the upper term violated his right to a jury trial. (Pet. at 6, 8-10.)

13 In Cunningham v. California, 549 U.S. 270, 288-89 (2007), the Supreme Court held
14 California's determinate sentencing law ("DSL"), which authorized a judge, rather than a
15 jury, to find facts exposing a defendant to an enhanced sentence, violated a defendant's Sixth
16 Amendment right to trial by jury.⁵ In so concluding, the Supreme Court relied on its previous
17 decision in Apprendi v. New Jersey, 530 U.S. 466 (2000). Id. In Apprendi, the Supreme
18 Court held, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for
19 a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved

21 ⁴ Pursuant to California Penal Code section 667(a)(1), petitioner also agreed to two
22 five-year enhancements for the two prior convictions, to be served consecutive to the six-
year term, for a total of 16 years in state prison. (Ex. 1 at 2.)

23 ⁵ At the time Cunningham was decided, the California DSL, pursuant to former
24 California Penal Code section 1170, provided for a determinate sentencing scheme
25 comprised of a lower, middle and upper term, with a required imposition of the middle term
unless the trial court found aggravating or mitigating factors. On March 30, 2007, in
26 response to the Supreme Court's suggestion in Cunningham that California could cure any
constitutional defect in section 1170(b) by leaving the selection of an appropriate sentence to
the judge's discretion, Cunningham, 549 U.S. at 293-94, the California Legislature enacted
Senate Bill 40, which amended section 1170(b). See Cal. Stats. 2007, ch. 3 (S.B. 40), § 3,
eff. Mar. 30, 2007; Butler v. Curry, 528 F.3d 624, 630 n.5 (9th Cir. 2008) (acknowledging
section 1170(b)'s amendment). Under amended section 1170(b), a trial court still exercises
its discretion in selecting among the upper, middle or lower terms, but no additional
factfinding is required to impose an upper or lower term. See Butler, 528 F.3d at 652 n.20.

1 beyond a reasonable doubt.” 530 U.S. at 490.

2 In this case, however, petitioner, in his plea agreement, explicitly waived any right to
3 a jury trial on such aggravating factors. Specifically, paragraphs six and seven of the
4 agreement, each of which petitioner initialled, state:

5 6. I understand that I have the right to a jury or court trial as to
6 any sentencing factors that may be used to increase my sentence on
any count, sentencing enhancement, or allegation to the upper or
maximum term provided by law.

7 7. I hereby waive and give up my right to a jury or court trial on
8 any sentencing factors and consent to the judge determining the
9 existence of any sentencing factors within the judge’s discretion as
allowed by existing statutes and Rules of Court. I also agree this
10 waiver will apply to any future sentence imposed following the
revocation of probation.

11 (Ex. 2, Attachment at 2.) By agreeing to waive a jury trial on “any sentencing factors that
12 may be used to increase [his] sentence” (*ibid.*), petitioner waived his right to a jury
13 determination of the factual underpinnings for the upper term. “[N]othing prevents a
14 defendant from waiving his Apprendi rights.” Blakely v. Washington, 542 U.S. 296, 310
15 (2004). “When a defendant pleads guilty, the State is free to seek judicial sentence
16 enhancements so long as the defendant either stipulates to the relevant facts or consents to
17 judicial factfinding.” Id.

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

19 2. Ineffective Assistance of Counsel

20 Petitioner claims he received ineffective assistance of counsel because his appointed
21 attorneys variously failed to “investigate” an intoxication defense, failed to “confer” with
22 him, allowed him to plead guilty “under duress and under the influence of narcotics,” and
23 failed to convey a “counteroffer” to the prosecution. (Pet. at 6, 11-18.) Respondent argues
24 petitioner defaulted such claim because the state courts denied petitioner relief based on a
25 state procedural bar against successive habeas petitions.

26 Petitioner filed many state petitions – at least seventeen. In its May 21, 2008 order
27 denying one of his petitions, the Alameda County Superior Court summarized petitioner’s
28 previous habeas proceedings in the superior court and ordered as follows:

1 The Petition is DENIED as it is barred by the rule against repetitive and
2 successive petitions, and for abuse of writ. (*In re Miller* (1941) 17 Cal. 2d 734,
735, and *In re Clark* (1993) 5 Cal. 4th 750, 797.)

3 Prior to his plea in this case, Petitioner had filed a habeas petition on June 12,
4 2007 alleging ineffective assistance of counsel, which this court denied for
failure to exhaust of [sic] remedies available to him, as well as for failing to
5 demonstrate counsel's performance failed to conform to an objective standard
of reasonable competence, and failed to show any prejudice.

6 Since his plea of guilty to attempted robbery, with admission of two prior
7 convictions, Petitioner had filed *five* habeas petitions in this court attacking the
conviction and 16 years state prison sentence.

8 The first post plea habeas petition was filed on September 27, 2007 and
9 Petitioner claimed an error in sentencing, and this court denied that petition.
This court also denied the next habeas petition filed on October 18, 2007,
10 which was identical to the one filed in September. This court denied the
October habeas petition for failure to state a *prima facie* case for relief, as well
11 as for abuse of writ. On January 3, 2008 Petitioner filed another habeas
12 petition that claimed ineffective assistance of counsel on various grounds. This
13 court denied the January habeas petition for abuse of writ. Petitioner again
14 filed another habeas petition on March 17, 2008, which was almost identical to
the January petition, except that it added two additional "grounds" in which his
15 counsels rendered ineffective assistance. This court reviewed the March
habeas petition on the merits and denied it for failure to show that counsels'
conduct failed to conform to an objective standard of reasonable competence,
and failed to demonstrate prejudice.

16 The Petition is almost identical to the habeas petition that petitioner filed in
17 March. Petitioner's attempts to relitigate the same claims constitute an abuse
of the writ. (*Clark, supra*, 5 Cal.4th at p. 797.)

18 (Ex. 12 at 1-2 (emphasis in original).)

19 On June 12, 2008, the California Court of Appeal denied petitioner's June 2, 2008
20 petition for a writ of habeas corpus, on the stated ground that it "will not consider repetitious
and piecemeal applications for habeas corpus." (Ex. 19 (citing *Clark*, 5 Cal. 4th at 767-68).)

21 On August 7, 2008, petitioner filed his third petition for a writ of habeas corpus in the
22 California Supreme Court. (Ex. 25.) Said petition raised the same claims of ineffective
23 assistance of counsel raised in the instant petition. (See id.) The California Supreme Court
24 denied the petition on January 28, 2009, citing *In re Clark*, 5 Cal. 4th 750 (1993) (Ex. 26.)

25 A federal court will not review questions of federal law decided by a state court "if the
26 decision of that court rests on a state law ground that is independent of the federal question
27 and adequate to support the judgment." Coleman v. Thompson, 501 U.S. 722, 729 (1991).
28 Before following the procedural default doctrine, a federal court must determine that the state

1 court explicitly invoked a state procedural bar as an independent basis for its decision. See
2 id. To be adequate, the state procedural bar must be “clear, consistently applied and well-
3 established at the time of the petitioner’s purported default.” Calderon v. United States
4 District Court (Bean), 96 F.3d 1126, 1129 (9th Cir. 1996) (internal quotation and citation
5 omitted). Unless a prisoner can “demonstrate cause for the default and actual prejudice as a
6 result of the alleged violation of federal law, or demonstrate that failure to consider the
7 claims will result in a fundamental miscarriage of justice,” federal habeas review of the
8 procedurally defaulted claims is barred. Coleman, 501 U.S. at 750.

9 When a state procedural bar is applied by a state trial court and relief is summarily
10 denied by the state’s higher courts, a federal court looks to the last reasoned state court
11 decision as the basis for the state court judgment. Ylst v. Nunnemaker, 501 U.S. 797, 803
12 (1991) (“Where, as here, the last reasoned opinion on the claim explicitly imposes a
13 procedural default, we will presume that a later decision rejecting the claim did not silently
14 disregard that bar and consider the merits.”).

15 Here, the state superior court, state court of appeal, and state supreme court all
16 rejected petitioner’s ineffective assistance of counsel claims for the reason that they were
17 successive and petitioner had failed to justify the piecemeal presentation of his habeas
18 claims. (Exs. 12, 19, 26.) The state courts’ rejection of the claims for a procedural reason
19 requires this Court to determine whether California’s procedural bar against successive
20 habeas petitions should be honored. As discussed above, the Court, to make that
21 determination, considers whether the procedural bar is independent and adequate, and if so,
22 whether there is any reason why it should not be deemed dispositive. See Coleman, 501 U.S.
23 at 729, 750.

24 a. California’s Bar on Successive Petitions

25 The California Supreme Court bars the repetitious presentation of claims already
26 presented in an earlier adjudicated petition where there has been “no change in the facts or
27 the law substantially affecting the rights of the petitioner.” In re Clark, 5 Cal. 4th 750, 769-
28 70 (1993); Ex parte Miller, 17 Cal. 2d 734, 735 (1941). The California Supreme Court also

1 bars “newly presented grounds for relief which were known to the petitioner at the time of a
2 prior collateral attack on the judgment.” In re Clark, 5 Cal. 4th at 768.

3 b. Independence and Adequacy of Bar on Successive Petitions

4 In Coleman, the United States Supreme Court created a conclusive presumption that
5 “there is no independent and adequate state ground for a state court decision when the
6 decision fairly appears to rest primarily on federal law, or to be interwoven with the federal
7 law, and when the adequacy and independence of any possible state law ground is not clear
8 from the face of the opinion.” Coleman, 501 U.S. at 734-35 (internal quotation and citation
9 omitted). In other words, “if the decision of the last state court to which the petitioner
10 presented his federal claims fairly appeared to rest primarily on resolution of those claims, or
11 to be interwoven with those claims, and did not clearly and expressly rely on an independent
12 and adequate state ground, a federal court may address the petition.” Id. at 735.

13 The question of whether the application of a procedural rule is independent of federal
14 law is assessed as of the time the state court rejects a claim as procedurally defaulted. See
15 Park v. California, 202 F.3d 1146, 1153 (9th Cir. 2000); see also Bennett v. Mueller, 322
16 F.3d 573, 582 (9th Cir. 2003) (assessing independence of procedural rule at time California
17 Supreme Court rejected state habeas petition).

18 Here, the date the Court considers in determining the independence of the procedural
19 rule is May 21, 2008, the date on which the state superior court imposed the procedural bar
20 against successive petitions by denying petitioner’s sixth habeas petition in that court. Said
21 denial was not based on federal law; rather, it exclusively relied on a state procedural bar and
22 did not address the merits of the claims presented. (See Ex. 12.) Thus, in the present case,
23 the procedural bar against successive petitions constituted an independent state ground for
24 the decision. See Coleman, 501 U.S. at 734-35.

25 The Court also must determine whether said procedural bar qualified as an adequate
26 state ground for the state court’s decision. To be adequate, the state procedural bar cited
27 must be “clear, consistently applied, and well-established at the time of the petitioner’s
28 purported default.” Calderon, 96 F.3d at 1129 (internal quotation and citation omitted). In

1 that regard, as explained in Bennett, 322 F.3d at 585-86, there is a burden-shifting sequence,
2 with the state bearing the ultimate burden of proving the adequacy of the asserted state
3 procedural bar:

4 Once the state has adequately pled the existence of an independent and
5 adequate state procedural ground as an affirmative defense, the burden to place
6 that defense in issue shifts to the petitioner. The petitioner may satisfy this
7 burden by asserting specific factual allegations that demonstrate the inadequacy
8 of the state procedure, including citation to authority demonstrating
9 inconsistent application of the rule. Once having done so, however, the
10 ultimate burden is the state's.

8 Id. at 586. In evaluating adequacy, “any review should be limited to the language of the state
9 court opinions” and should not be “based on a *post hoc* examination of the pleadings and
10 record.” Id. at 584.

11 Here, respondent, in its Answer, has identified petitioner's multiple state habeas
12 petitions, pled the existence of an independent and adequate procedural bar, and provided the
13 California Superior Court's May 21, 2008 denial, the California Court of Appeals June 12,
14 2008 denial, and the California Supreme Court's January 28, 2009 denial, all of which cite to
15 In re Clark. Respondent thus has “adequately pled the existence of an independent and
16 adequate state procedural ground as an affirmative defense” and shifted the burden to
17 petitioner “to place that defense in issue.” Bennett, 322 F.3d at 586; see, e.g., Dennis v.
18 Brown, 361 F. Supp. 2d 1124, 1129 (N.D. Cal. 2005) (holding respondent, asserting and
19 alleging procedural default in answer to petition, “adequately pled the existence of an
20 independent and adequate state procedural ground as an affirmative defense.”). Petitioner
21 offers no response whatsoever to respondent's showing, and thus fails to satisfy his burden.
22 Consequently, absent an exception, California's procedural bar against successive petitions
23 will be imposed against petitioner's instant claims alleging ineffective assistance of counsel.

24 c. Exceptions to the Procedural Bar

25 Where, as here, the Court finds an independent and adequate state procedural ground
26 supporting the state court denial of a habeas petition, federal habeas review is barred unless
27 the prisoner can “demonstrate cause for the default and actual prejudice as a result of the
28 alleged violation of federal law, or demonstrate that failure to consider the claims will result

1 in a fundamental miscarriage of justice.” Coleman, 501 U.S. at 750.

2 The “cause standard” requires the petitioner to show that ““some objective factor
3 external to the defense impeded counsel’s efforts’ to raise the claim.” McCleskey v. Zant,
4 499 U.S. 467, 493 (1991) (quoting Murray v. Carrier, 477 U.S. 478, 488 (1986)). “Without
5 attempting an exhaustive catalog of such objective impediments to compliance with a
6 procedural rule,” the Supreme Court has noted that “a showing that the factual or legal basis
7 for a claim was not reasonably available to counsel, or that some interference by officials
8 made compliance impracticable, would constitute cause under this standard.” Murray, 477
9 U.S. at 488 (internal quotation and citations omitted).

10 Next, with respect to the “prejudice” prong, petitioner bears the burden of showing,
11 “not merely that the errors at his trial created a *possibility* of prejudice, but that they worked
12 to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional
13 dimensions.” United States v. Frady, 456 U.S. 152, 170 (1982) (emphasis in original). “To
14 ascertain the level to which such errors taint the constitutional sufficiency of the trial, they
15 must ‘be evaluated in the total context of the events at trial.’” See Paradis v. Arave, 130 F.3d
16 385, 393 (9th Cir. 1997) (quoting Frady, 456 U.S. at 169).

17 Lastly, the “miscarriage of justice ” exception is limited to habeas petitioners who can
18 show, based on “new reliable evidence,” that ““a constitutional violation has probably
19 resulted in the conviction of one who is actually innocent.”” Schlup v. Delo, 513 U.S. 298,
20 324-27 (1995) (quoting Murray, 477 U.S. at 496); see, e.g., Wildman v. Johnson, 261 F.3d
21 832, 842-43 (9th Cir. 2001) (holding petitioner must establish “factual innocence” in order to
22 show fundamental miscarriage of justice would result from application of procedural
23 default). In particular, petitioner must show “it is more likely than not that no reasonable
24 juror would have convicted him in the light of [such] new evidence.” Schlup, 513 U.S. at
25 327.

26 Again, petitioner does not even attempt to show cause and prejudice or a fundamental
27 miscarriage of justice. Nor is there anything in the record to suggest he could make the
28 requisite showing.

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

2 3. Limitation on Conduct Credits

3 Petitioner states he received “reduced goodtime-worktime credits” as a result of his
4 two prior convictions, both of which occurred prior to the passage of California’s Three
5 Strikes Law. (Pet. at 6, 19-26.) Under California’s Three Strikes Law, “[t]he total amount of
6 credits . . . shall not exceed one-fifth of the total term of imprisonment imposed.” Cal. Penal
7 Code § 667(c)(5). Because the instant offense was charged as a second strike, petitioner has
8 been required to serve 80 percent of his sentence, including that part of his sentence
9 attributable to the two five-year enhancements, which, as discussed, were predicated on the
10 prior convictions. (Ex. 1 at 2-3.) Petitioner claims such a sentence violates the Ex Post Facto
11 Clause. U.S. Const., Art. I, § 10, cl. 1. (Pet. at 6, 19-26.)

12 Petitioner first raised this claim in state court in connection with his fourth petition for
13 habeas corpus to the California Supreme Court, filed November 7, 2008. (Ex. 27 at 3-3G.)
14 The California Supreme Court denied the petition, citing In re Clark. (Ex. 28.) As discussed
15 above, In re Clark stands for the proposition that, absent justification for a failure to present
16 all known claims in a single, timely habeas petition, a successive petition will be denied.
17 Petitioner again fails to demonstrate cause for the procedural default and actual prejudice, or
18 that the failure to consider his claims will result in a fundamental miscarriage of justice. See
19 Coleman, 501 U.S. at 750. Nor is there anything in the record to suggest he could make the
20 requisite showing.

21 Further, a law violates the Ex Post Facto Clause only if it “punishes as a crime an act
22 previously committed, which was innocent when done,” “makes more burdensome the
23 punishment for a crime, after its commission,” or “deprives one charged with crime of any
24 defense available according to law at the time when the act was committed.” Collins v.
25 Youngblood, 497 U.S. 37, 42 (1990) (internal quotation and citation omitted). The
26 application of an enhancement based on a prior conviction is not a violation of the Ex Post
27 Facto Clause. See McDonald v. Massachusetts, 180 U.S. 311, 312-13 (1901) (finding
28 habitual offender statute imposing heavier penalty for habitual criminal goes to “the

1 punishment . . . for the new crime only”; stating “[t]he statute, imposing punishment on
2 none but future crimes, is not *ex post facto*”); *Nichols v. United States*, 511 U.S. 738, 747
3 (1994) (noting Supreme Court “consistently has sustained repeat-offender laws as penalizing
4 only the last offense committed by the defendant” (internal quotation and citation omitted));
5 *United States v. Kaluna*, 192 F.3d 1188, 1199 (9th Cir. 1999) (holding recidivist statute does
6 not violate *Ex Post Facto* Clause if it is “on the books at the time the [present] offense was
7 committed” (alteration in original; internal quotation and citation omitted)).

8 Petitioner’s new offense was committed in 2006, several years after the enactment of
9 California’s Three Strikes Law in 1994. (Pet. at 11.) Petitioner was charged with two prior
10 convictions, arising, respectively, from a 1983 robbery and a 1994 voluntary manslaughter.
11 (Ex. 1 at 2-3.)⁶ His prior convictions would have had no further consequences had he not
12 committed a new offense in 2006. The Three Strikes Law does not alter the punishment for
13 petitioner’s prior convictions, but, rather, imposes a harsher penalty for the present offense
14 because petitioner is a recidivist. See McDonald, 180 U.S. at 312-13.

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

16 4. Imposition of Enhancements for Prior Convictions

17 Petitioner claims that, because California Penal Code section 667(a) “did not exist and
18 was not law” when he committed his prior offenses, imposition of the sentencing
19 enhancements under said law violated the *Ex Post Facto* Clause. (Pet. at 6A, 27.) Petitioner
20 is incorrect. California Penal Code section 667(a) was enacted in June 1982, prior to the time
21 petitioner committed his prior offenses. California Penal Code sections 667(b)-667(i), which
22 comprise California’s Three Strikes Law, went into effect in 1994. See People v. Green, 36
23 Cal. App. 4th 280, 282 (1995). Further, as discussed above, recidivist statutes do not violate
24 the *Ex Post Facto* Clause.

25
26 ⁶ According to the record, petitioner’s 1994 conviction occurred on March 24, 1994
27 (Ex. 1 at 3), a date 17 days after California’s Three Strikes Law was enacted. See Cal. Stats.
28 1994, ch. 12 (A.B. 971), § 1, eff. Mar. 7, 1994. The record does not indicate when petitioner
committed the crime leading to said conviction.

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

2 C. Certificate of Appealability

3 The federal rules governing habeas cases brought by state prisoners require a district
4 court that issues an order denying a habeas petition to either grant or deny therein a
5 certificate of appealability. See Rules Governing § 2254 Cases, Rule 11(a).

6 A judge shall grant a certificate of appealability “only if the applicant has made a
7 substantial showing of the denial of a constitutional right,” 28 U.S.C. § 2253(c)(2), and the
8 certificate must indicate which issues satisfy this standard, id. § 2253(c)(3). “Where a
9 district court has rejected the constitutional claims on the merits, the showing required to
10 satisfy § 2253(c) is straightforward: [t]he petitioner must demonstrate that reasonable
11 jurists would find the district court’s assessment of the constitutional claims debatable or
12 wrong.” Slack v. McDaniel, 529 U.S. 473, 484 (2000).

13 Here, petitioner has not made such a showing, and, accordingly, a certificate of
14 appealability will be denied.

15 **III. CONCLUSION**

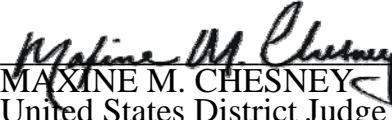
16 For the reasons stated above, the petition for a writ of habeas corpus is hereby
17 DENIED, and a certificate of appealability is hereby DENIED.

18 The Clerk shall enter judgment in favor of respondent and close the file.

19 Additionally, the Clerk is directed to substitute Warden J.N. Katavich on the docket as
20 the respondent in this action.

21 **IT IS SO ORDERED.**

22 DATED: June 5, 2012


23 MAXINE M. CHESNEY
24 United States District Judge

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