

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

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

JON T. GROBMAN, F-91808,	)	
	)	
Petitioner,	)	No. C 10-03785 CRB (PR)
	)	
vs.	)	ORDER DENYING PETITION
	)	FOR A WRIT OF HABEAS
B. M. CASH, Acting Warden,	)	CORPUS
	)	
Respondent.	)	
_____	)	

Petitioner, a state prisoner incarcerated at California State Prison, Los Angeles County, seeks a writ of habeas corpus under 28 U.S.C. § 2254 challenging the constitutionality of his state sentence. For the reasons that follow, a writ is denied.

**PROCEDURAL BACKGROUND**

On November 22, 2006, Petitioner was charged in Santa Clara County Superior Court with possession of methamphetamine (count one); receiving stolen property (counts two and six); being under the influence of methamphetamine, a misdemeanor (count three); first-degree burglary (counts four, five, eleven and twelve); vehicle theft with a prior conviction (count seven); receiving a stolen vehicle with a prior conviction (count eight); hit and run driving causing property damage, a misdemeanor (count nine); and resisting, delaying or obstructing an officer, a misdemeanor (count ten). The information filed by the district attorney also alleged that Petitioner had four prior violent or serious felony convictions qualifying as strikes under California’s Three Strikes Law, two prior serious felony convictions and had served two prior prison terms.

1 On February 8, 2007, Petitioner pled guilty to all nine felony counts and admitted the  
2 four prior strike convictions listed in the information. The trial court denied Petitioner's  
3 motion to strike his prior convictions and, on September 21, 2007, sentenced him to an  
4 indeterminate prison term of 150 years to life consecutive to a determinate term of 40 years.

5 Petitioner appealed his sentence on the grounds that the trial court: (1) mis-  
6 characterized the prior strike convictions and current crimes as "violent" felonies; (2)  
7 improperly concluded that it had no discretion to dismiss the prior strike convictions; and (3)  
8 failed to consider his background as a victim of sexual abuse in determining whether to strike  
9 the prior convictions. On February 4, 2009, the California Court of Appeal affirmed the trial  
10 court's judgment and, on May 13, 2009, the California Supreme Court denied review.

11 Over a year later, Petitioner began seeking habeas corpus relief from the California  
12 courts on additional grounds and, on August 25, 2010, filed a protective federal habeas  
13 petition in this court. He then obtained a stay of his federal habeas proceedings until the  
14 California Supreme Court denied his final state petition on timeliness grounds on April 27,  
15 2011. Petitioner promptly filed an amended federal petition on May 19, 2011.

16 On May 31, 2011, this Court found that the amended petition stated cognizable federal  
17 claims for relief under 28 U.S.C. § 2254, when liberally construed, and ordered Respondent to  
18 show cause why a writ of habeas corpus should not be granted. Respondent filed an answer  
19 on July 25, 2011 and Petitioner filed a traverse on August 11, 2011.

## 20 **FACTUAL BACKGROUND**

21 The facts described in the probation officer's report are as follows:

### 22 **Counts One and Two**

23 On October 6, 2004, San Jose police officers arrived at the defendant's motel room  
24 and attempted to gain entry. Officers were able to partially open the door,  
25 however, a security bar prevented the door from opening all the way. Inside the  
26 room officers observed the defendant run towards the rear of the motel room.  
27 Once officers gained entry, they discovered .47 grams net weight of  
methamphetamine. Inside the defendant's wallet officers discovered a credit card  
belonging to the victim, William Jubb. According to William Jubb, he hired the  
defendant to complete some work around his place and noticed that some of his

1 mail had been missing. One article of mail that was missing was the credit card  
2 found in the defendant's possession. When William Jubb contacted the credit card  
3 company he was notified the card had been activated from his home telephone and  
4 charges had been made. He stated he did not give the defendant permission to  
5 activate, possess or make any transactions on the credit card.

#### 6 **Count Four**

7 On December 13, 2005, sheriff's deputies were dispatched to the residence of  
8 victim Isabel Brown on a report of a prior burglary. Upon arrival the victim stated  
9 she was out Christmas shopping when she received a telephone call from her  
10 husband stating they had been burglarized. Their computer printer was on the  
11 ground and several pieces of the victim's jewelry had been taken. Much of the  
12 jewelry taken was from Peru and had been inherited from the victim's  
13 grandmother. The approximate value of the jewelry was \$80,000. It was later  
14 determined that the fingerprints taken from the scene matched those of the  
15 defendant. Items taken during the burglary included: 1 diamond ring, 2 Topaz  
16 stone rings, 1 wedding ring with a 5 diamond set, a bracelet set with earrings, a red  
17 ring, 3 sapphire rings, 5 pairs of gold earrings, 8 gold necklaces, 20 gold rings  
18 containing diamonds, a gold man's watch with a chain, a Garnet rock, 5 sterling  
19 silver chains, a diamond ring, a gold chain and cross and 30 silver rings.

#### 20 **Count Five**

21 On December 16, 2005, sheriff's deputies were dispatched to victim, Kenneth  
22 Louth's residence on a report of a residential burglary. Upon arrival, the victim  
23 stated he had been out of town for three weeks and upon his return to his residence  
24 he realized it had been burglarized. The rear door had been pried open and a large  
25 portion of the wood framing had also been removed. The dead bolt on the door  
26 was also broken. Items taken from the residence included three computer monitors,  
27 one computer keyboard and one computer mouse. The total value of the property  
28 was \$1,700. The defendant was later, in Count Six, found to be in possession of  
items taken during the burglary.

#### 29 **Counts Six, Seven and Eight and Nine**

30 On December 30, 2005, at approximately 8:50 p.m. the defendant fled from a DUI  
31 checkpoint and eventually crashed through a cyclone fence. He was eventually  
32 arrested following a foot pursuit. It was determined the vehicle being driven by the  
33 defendant had previously been reported stolen. According to John Serrano, the  
34 owner of the stolen vehicle, the defendant was doing work for him around his  
35 house. The victim loaned his vehicle to the defendant to run an errand and the  
36 defendant disappeared. The victim loaned the defendant his vehicle five months  
37 prior to the instant offense.

38 A search of the vehicle revealed a driver's license and medical insurance card  
39 belonging to victim, Kenneth Louth as well as a check in the amount of \$804.36  
40 issued to the victim. Other items found in the vehicle included a check with the  
41 name of Larry Bonham, a social security card issued to Ethan Fernandez, a  
42 passport belonging to Larry Buckmaster and a passport belonging to Gil  
43 Fernandez.



1        application of, clearly established Federal law, as determined by the Supreme  
2        Court of the United States; or

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

5        28 U.S.C. § 2254(d) (emphases added).

6        The Supreme Court elaborated on § 2254(d) in Williams v. Taylor, 529 U.S. 362  
7        (2000). “Under the ‘contrary to’ clause, a federal habeas court may grant the writ if the state  
8        court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of  
9        law or if the state court decides a case differently than [the] Court has on a set of materially  
10       indistinguishable facts.” Id. at 412-13 (emphasis added). “Under the ‘reasonable application  
11       clause,’ a federal habeas court may grant the writ if the state court identifies the correct  
12       governing legal principle from [the] Court’s decisions but unreasonably applies that principle  
13       to the facts of the prisoner’s case.” Id. at 413 (emphasis added). “[A] federal habeas court  
14       may not issue the writ simply because the court concludes in its independent judgment that  
15       the relevant state-court decision applied clearly established federal law erroneously or  
16       incorrectly.” Id. at 411. Rather, the state court’s application of the law must also be  
17       objectively unreasonable. Id. at 409.

18       A federal court will not review questions of federal law decided by a state court if the  
19       state decision “rests on a state law ground that is independent of the federal question and  
20       adequate to support the judgment.” Coleman v. Thompson, 501 U.S. 722, 729-30 (1991). A  
21       procedural default rule is an example of an “adequate and independent state ground” for  
22       denying habeas corpus relief. Wells v. Maass, 28 F.3d 1005, 1008 (9th Cir. 1994). If a  
23       federal court chooses to analyze the merits of a federal claim that a state court denied on  
24       grounds of procedural default, it must apply a de novo standard of review rather than the  
25       deferential standard of § 2254(d). See Pirtle v. Morgan, 313 F.3d 1160, 1167-68 (9th Cir.  
26       2002) (holding that deferential AEDPA standard of review does not apply where state courts  
27       never reached merits of habeas claim).

1 **DISCUSSION**

2 Petitioner seeks federal habeas corpus relief under § 2254 on the ground that his state  
3 sentence violates the Sixth and Fourteenth Amendments. Specifically, he claims that his  
4 sentence violates clearly established federal law as determined by the Supreme Court in  
5 Cunningham v. California, 549 U.S. 270 (2007), and Buford v. United States, 532 U.S. 59  
6 (2001). Petitioner’s claims are procedurally defaulted and, in any event, lack merit.

7 **A. Procedural Default**

8 The California Supreme Court summarily denied Petitioner habeas relief on April 27,  
9 2011, citing to In re Robbins, 18 Cal. 4th 770, 780 (1998). In Robbins, the California  
10 Supreme Court held that a California state court may dismiss a habeas petition as untimely if  
11 the petitioner substantially delayed in filing it. 18 Cal. 4th at 780. It retains discretion,  
12 however, to ignore the untimeliness of a petition and reach the merits. Id. at 778 n.1.

13 The record shows that Petitioner waited over a year after the California Supreme Court  
14 denied his direct appeal to seek habeas relief from the state courts. See Dkt. # 8-2, Exs. H-I.  
15 By citing to Robbins in its summary dismissal of Petitioner’s state habeas petition, the  
16 California Supreme Court indicated that it was rejecting the petition as untimely. Respondent  
17 properly notes that this renders Petitioner’s claims procedurally defaulted in federal court.

18 The Supreme Court of the United States has established rules governing the application  
19 of state procedural bars to federal habeas petitions: “[A] state procedural bar may count as an  
20 adequate and independent ground for denying a federal habeas petition even if the state court  
21 has discretion to reach the merits despite the default.” Walker v. Martin, 131 S. Ct. 1120,  
22 1125 (2011). In Walker, the Supreme Court specifically upheld California’s timeliness rule  
23 announced in Robbins as a proper procedural bar for federal habeas petitions. Id. at 1127-31.

24 A petitioner may surmount a proper procedural bar by showing either cause and  
25 prejudice or a fundamental miscarriage of justice. Coleman, 501 U.S. at 750. “[T]he  
26 existence of cause for a procedural default must ordinarily turn on whether the prisoner can  
27

1 show that some objective factor external to the defense impeded . . . efforts to comply with  
2 the State’s procedural rule.” Murray v. Carrier, 477 U.S. 478, 488 (1986). “To establish  
3 prejudice resulting from a procedural default, a habeas petitioner bears ‘the burden of  
4 showing not merely that the errors at his trial constituted a possibility of prejudice, but that  
5 they worked to his actual and substantial disadvantage, infecting his entire trial with errors of  
6 constitutional dimension.’” White v. Lewis, 874 F.2d 599, 603 (9th Cir. 1989) (citing United  
7 States v. Frady, 456 U.S. 152, 170 (1982)). To show that a failure to consider the merits of a  
8 claim would result in a fundamental miscarriage of justice, a petitioner must establish factual  
9 innocence. See Gandarela v. Johnson, 286 F.3d 1080, 1085-86 (9th Cir. 2002); Wildman v.  
10 Johnson, 261 F.3d 832, 842-43 (9th Cir. 2001). The burden of establishing cause and  
11 prejudice or a fundamental miscarriage of justice always rests with the petitioner. White, 874  
12 F.2d at 603; Wildman, 261 F.3d at 842-43.

13 Because California’s timeliness rule is a valid procedural ground for precluding federal  
14 review of Petitioner’s claims, this Court may only reach the merits of the claims if Petitioner  
15 shows cause and prejudice or that failure to consider the claims will result in a fundamental  
16 miscarriage of justice. See Coleman, 501 U.S. at 750. Petitioner has made no such showing.  
17 The claims are procedurally defaulted and barred from federal review.

## 18 **B. Merits**

19 Even if Petitioner’s claims were not procedurally defaulted, they would fail on the  
20 merits. Petitioner claims that the state trial court unconstitutionally: (1) enhanced his sentence  
21 based on aggravating facts as determined by the court, depriving him of his right to a jury;  
22 and (2) failed to count three of the prior strike offenses as only one strike. Petitioner’s first  
23 claim fails because the trial court enhanced Petitioner’s sentence not based on aggravating  
24 facts as determined by the judge, but rather based on prior jury-trial convictions. Petitioner’s  
25 second claim fails because each one of the prior strike offenses could be considered separate  
26 strikes without violating federal law.





1 court made no other factual findings that otherwise increased Petitioner’s sentence.  
2 Petitioner’s enhanced sentence does not violate Cunningham because it falls under the prior  
3 conviction exception. See Cunningham, 549 U.S. at 288-89; Apprendi, 530 U.S. at 490;  
4 Kessee, 574 F.3d at 676-77. Petitioner is not entitled to federal habeas relief on his  
5 Cunningham claim.

6 **2. Consolidation of Priors & Buford**

7 Petitioner claims that clearly established federal law, as determined by the Supreme  
8 Court in Buford v. United States, 532 U.S. 59 (2001), prohibited the state trial court from  
9 counting three of the four prior strike convictions listed in the information as separate strikes.  
10 Again, Petitioner’s reliance on Supreme Court precedent is misplaced.

11 In Buford, the Supreme Court considered the United States Sentencing Guidelines’  
12 treatment of career offenders. The guidelines define a “career offender” as a person with “at  
13 least two prior felony convictions” for violent or drug-related crimes. 532 U.S. at 60. If two  
14 or more prior convictions are “related” to one another, then the guidelines require a federal  
15 sentencing court to consider them as a single conviction. Id. at 60-61. Buford further  
16 established that federal appellate courts must review district courts’ “relatedness”  
17 determinations deferentially. Id. at 66.

18 Petitioner’s reliance on Buford is misplaced because Buford only applies to federal  
19 sentencing; Buford does not address whether multiple prior convictions consolidated into one  
20 information for sentencing can be treated as separate “strikes” under California state law.

21 Under California law, each prior conviction that properly qualifies as a “strike” under  
22 the Three Strikes Law may be treated as such; whether it was consolidated with other offenses  
23 for sentencing is irrelevant. See People v. Cline, 60 Cal. App. 4th 1327, 1338-39 (1998). For  
24 example, in Cline, a California appellate court upheld a trial court’s determination that twelve  
25 burglaries that were consolidated into one sentencing proceeding constituted twelve separate  
26 strikes. Id. at 1338-39. The court rejected the defendant’s contention that they should count  
27

1 as only one strike because they were charged in a single information; California Supreme  
2 Court precedent firmly establishes that “prior strike felonies need not have been brought and  
3 tried separately.” Id. (citing People v. Fuhrman, 16 Cal. 4th 930, 937-940 (1997)).

4 Here, the state trial court properly considered Petitioner’s four prior strike convictions  
5 as separate strikes under California law and did not consider Buford because it was not bound  
6 by Buford. Petitioner is not entitled to federal habeas relief on his Buford claim.<sup>1</sup>

7 **CONCLUSION**

8 For the foregoing reasons, the petition for a writ of habeas corpus is DENIED.

9 Pursuant to Rule 11 of the Rules Governing Section 2254 Cases, a certificate of  
10 appealability under 28 U.S.C. § 2253(c) is DENIED because Petitioner has not demonstrated  
11 that “reasonable jurists would find the district court’s assessment of the constitutional claims  
12 debatable or wrong.” Slack v. McDaniel, 529 U.S. 473, 484 (2000).

13 The clerk shall enter judgment in favor of Respondent and close the file.

14 IT IS SO ORDERED.

15 DATED: Nov. 14, 2011

16   
17 \_\_\_\_\_  
18 CHARLES R. BREYER  
19 United States District Judge

20  
21  
22  
23 G:\PRO-SE\CRB\HC.10\Grobman, J1.denial.wpd

24  
25 \_\_\_\_\_  
26 <sup>1</sup> Even if the state trial court had counted three of the four prior strike  
27 convictions as one strike, Petitioner would have had two qualifying strikes and been  
28 subjected to the same enhanced sentence he received under the Three Strikes Law. See  
Cal. Penal Code § 667(e)(2).