UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BARNEY O. LYONS,

Petitioner,

vs.

TOM CAREY, Warden,

Respondent.
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No. C 06-2860 PJH (PR)

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

This is a habeas corpus case filed pro se by a state prisoner pursuant to 28 U.S.C. § 2254. The court ordered respondent to show cause why the writ should not be granted. Respondent has filed an answer and a memorandum of points and authorities, and has lodged exhibits with the court. Petitioner has filed a traverse. For the reasons set forth below, the petition is denied.

BACKGROUND

Petitioner was charged by information with violating section 290(g)(2) of the California Penal Code by willfully failing to inform law enforcement of his new address within five days of changing his residence. The information also alleged that petitioner had suffered four prior convictions relevant under the Three Strikes law, *see* Cal. Penal Code §§ 667(b)-(I), 1170.12, and that petitioner had served three prior prison terms, *see id.* at §667.5(b).

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After a number of motions in which petitioner sought to have appointed counsel replaced ("*Marsden* motions"[1]), petitioner pled no contest and admitted the prior conviction and prior prison term allegations. After several more *Marsden* motions, sentencing was held on November 27, 2001. On motion by petitioner the court struck three of the four prior convictions. The trial court then imposed the upper term of three years for the violation of § 290(g)(2). The court doubled this sentence to six years pursuant to the Three Strikes law for the remaining prior conviction. The trial court also imposed three consecutive one-year enhancements for the three prior prison terms, for a total sentence of nine years.

Petitioner filed a timely notice of appeal, and the trial court granted his application for a certificate of probable cause challenging the validity of his plea. On appeal he raised four issues not pursued here. In a companion petition for a writ of habeas corpus he raised eight issues not pursued here. The California Court of Appeal affirmed the trial court's judgment in an unpublished opinion filed on August 7, 2003, and denied the habeas petition on the same date. The Supreme Court of California denied review of the court of appeal's decisions affirming the conviction and denying the habeas petition.

Since then, petitioner has pursued numerous habeas petitions at various levels of state court. All have been denied; the petitions relevant to the claims here are discussed below.

STANDARD OF REVIEW

A district court may not grant a petition challenging a state conviction or sentence on the basis of a claim that was reviewed on the merits in state court unless the state court's adjudication of the claim: "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court

[1] "So named after *People v. Marsden*, 2 Cal. 3d 118 (1970), it is a motion permitting a defendant to articulate why he is dissatisfied with his court-appointed counsel and why counsel should be relieved." *McNeely v. Blanas*, 336 F.3d 822, 825 n. 3 (9th Cir. 2003).

proceeding." 28 U.S.C. § 2254(d). The first prong applies both to questions of law and to mixed questions of law and fact, *Williams v. Taylor*, 529 U.S. 362, 407-09 (2000), while the second prong applies to decisions based on factual determinations, *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003).

A state court decision is "contrary to" Supreme Court authority, that is, falls under the first clause of § 2254(d)(1), only if "the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." *Williams (Terry)*, 529 U.S. at 412-13. A state court decision is an "unreasonable application of" Supreme Court authority, falling under the second clause of § 2254(d)(1), if it correctly identifies the governing legal principle from the Supreme Court's decisions but "unreasonably applies that principle to the facts of the prisoner's case." *Id*. at 413. The federal court on habeas review may not issue the writ "simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Id*. at 411. Rather, the application must be "objectively unreasonable" to support granting the writ. *Id*. at 409.

Under 28 U.S.C. § 2254(d)(2), a state court decision "based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding." *Miller-El*, 537 U.S. 322 at 340; *see also Torres v. Prunty*, 223 F.3d 1103, 1107 (9th Cir. 2000).

When there is no reasoned opinion from the highest state court to consider the petitioner's claims, the court looks to the last reasoned opinion. *See Ylst v. Nunnemaker*, 501 U.S. 797, 801-06 (1991); *Shackleford v. Hubbard*, 234 F.3d 1072, 1079, n. 2 (9th Cir.2000).

DISCUSSION

As grounds for federal habeas relief, petitioner asserts that: (1) his trial counsel was ineffective at sentencing for failing to argue that petitioner was entitled to additional credit for presentence confinement; (2) his appellate counsel was ineffective for failing to argue

that the facts did not justify an aggravated sentence and for failing to object to the dual use of a single fact in sentencing, and (3) his trial and appellate counsel were ineffective for failing to object to the judge's imposition of an aggravated sentence based on facts that were not found by a jury.

I. Procedural Default

Respondent contends that petitioner's claims are procedurally defaulted because his state habeas petitions violated state procedural rules providing that issues must be raised without substantial delay, that issues cannot be raised in a piecemeal manner in successive petitions, and that issues cannot be raised again when they have already been raised in an earlier petition.

A federal court will not review a question of federal law decided by a state court if the decision of the state court denying the claim rests on a state law ground that is independent of the federal question and adequate to support the denial of the claim. *Coleman v. Thompson*, 501 U.S. 722, 729-30 (1991). The procedural default rule is a specific instance of the more general "adequate and independent state grounds" doctrine. *Wells v. Maass*, 38 F.3d 1005, 1008 (9th Cir. 1994). In cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice. *Id*. at 750.

To be adequate, the state procedural bar cited must be clear, consistently applied, and well-established at the time of a petitioner's purported default. *Petrocelli v. Angelone*, 248 F.3d 877, 885 (9th Cir. 2001); *Maass*, 38 F.3d at 1010. The state bears the burden of proving the adequacy of a state procedural bar:

> Once the state has adequately pled the existence of an independent and adequate state procedural ground as an affirmative defense, the burden to place that defense in issue shifts to the petitioner. The petitioner may satisfy this burden by asserting specific factual allegations that demonstrate the inadequacy of the state procedure, including citation to authority demonstrating inconsistent

> application of the rule. Once having done so, however, the ultimate burden is the state's.

Bennett v. Mueller, 322 F.3d 573, 585-86 (9th Cir. 2003). Where the procedural rule at issue has previously been found to be inadequate as a procedural bar, a petitioner simply needs to contest the adequacy of the rule to meet the burden of proof under *Bennett*. *King v. LaMarque*, 464 F.3d 963, 966-67 (9th Cir. 2006). Furthermore, a federal court must look at the actual practice of state courts in enforcing their procedural bars, and not just at the rule as stated in state court decisions. *Powell v. Lambert*, 357 F.3d 871, 879 (9th Cir. 2004).

Petitioner filed many state habeas petitions – at least fifteen. Respondent contends that petitioner's first issue, that trial counsel was ineffective in failing to argue for additional presentence credits, is barred by the California Supreme Court's denial in case number S134288. The denial read: "Petition for writ of habeas corpus is DENIED. (*See In re Clark* (1993) 5 Cal. 4th 750.)" Ex. G2.[2] The *In re Clark* citation does not have a cite to a specific page, and that case discusses at least three procedural bars, namely the successive presentation of claims presented previously, the improper presentation of claims that could have been raised in a previous petition ("piecemeal presentation"), and untimeliness. In fact, the court specifically states as to the presentation of new claims in a second petition that the bar on doing so is not the basis of its holding, but rather that Clark's new claims were barred by his unexplained delay in raising them, emphasizing the importance of the timeliness bar to the court's decision. *Clark*, 5 Cal. 4th at 782. Because there were several bars discussed in *Clark*, and because the supreme court's denial of petitioner's state habeas petition did not specify a particular page of *Clark*, it is impossible to determine from the citation to *Clark* which bar the court relied upon – piecemeal presentation, successiveness, or untimeliness.

The Ninth Circuit has determined that in the absence of a showing that the timeliness bar in California now is being consistently enforced, it is not a bar to federal

[2] Citations to "Ex." are to the exhibits lodged with the court by the respondent.

relief. *King v. LaMarque*, 464 F.3d 963, 966-67 (9th Cir. 2006) (addressing California's timeliness bar, found to be inadequate in *Morales v. Calderon*, 85 F.3d 1387 (9th Cir. 1996)). Here respondent makes no effort to demonstrate that the bar now is consistently enforced, so for purposes of this decision California's timeliness bar is not sufficient to preclude federal relief. The result is that the citation to *Clark* in S134288 could refer either to an arguably valid state procedural bar – the ban on raising new issues that could have been raised in an earlier petition or successiveness – or to an invalid one – the timeliness bar. When it is not possible to tell whether a claim was rejected in state court on a valid procedural ground, consideration of that claim in a federal petition is not barred. *See Washington v. Cambra*, 208 F.3d 832, 833-34 (9th Cir. 2000) (state court opinion that summarily denies more than one claim with a citation to more than one state procedural bar is ambiguous, and therefore there is no procedural default if any one of the state procedural bars is not adequate and independent). Respondent's procedural default argument is rejected as to petitioner's first claim.

Petitioner's second claim is that his appellate counsel was ineffective for failing to argue that the facts did not justify an aggravated sentence and for failing to object to the sentencing court's dual use of a single fact. Respondent contends that this claim was denied as successive in the Superior Court of California, denied without comment or citation by the California Court of Appeal, and was not presented to the California Supreme Court. Respondent asks that the court "look through" the court of appeal opinion to that of the superior court and hold that the claim is procedurally defaulted. *See Ylst v. Nunnemaker*, 501 U.S. 797, 801-06 (1991); *Martinez-Villareal v. Lewis*, 80 F.3d 1301, 1306 (9th Cir. 1996).

Respondent is correct that the court of appeal opinion in case number H029543, in which petitioner did raise this issue, was a denial without comment or citation. Ex. G9. Attached as an exhibit to the petition in H029543 is a superior court denial in case number CC066573. *Id.* at petitioner's attached ex. B. The ruling reads: "For the reasons stated in this Court's previous orders on habeas petitions from BARNEY LYONS the most recent

petition is denied. (See also the California Supreme Court order of June 22, 2005 citing *In re Clark* (1993) 5 Cal.4th 750.)" *Id.* The superior court petition is not attached, so it is impossible to know what issues petitioner raised, nor is it possible to know what reasons the court was referring to when it said "[f]or the reasons stated in this Court's previous orders . . . ." And for the reasons discussed above, the citation to *Clark*, even if it were treated as a basis for the superior court's denial, is not sufficient to show a procedural default. The state bears the burden of proving of a state procedural bar. *Bennett v. Mueller*, 322 F.3d 573, 585-86 (9th Cir. 2003). The state has not done so as to this issue.

Petitioner's third claim is that his trial and appellate counsel were ineffective for failing to object to the judge's imposition of an aggravated sentence in reliance on facts that were not found by a jury, a claim that will be referred to here as an "*Apprendi* claim." Respondent contends that this claim was denied in the California Supreme Court in case number S135670 as untimely and successive. The denial read: "Petition for writ of habeas corpus is DENIED. (See *In re Robbins* (1998) 18 Cal. 4th 770, 780; *In re Clark* (1993) 5 Cal. 4th 750; *In re Miller* (1941) 17 Cal. 2d 734.)" Ex. G3.

There were two claims in the supreme court petition, including this federal claim that counsel was ineffective in failing to object on *Apprendi* grounds. *Id.* This ruling relies on more than one ground to bar more than one claim, and one of the grounds, *Clark,* is not sufficient. The supreme court denial thus was not adequate and does not establish that petitioner procedurally defaulted this claim. *See Washington*, 208 F.3d at 833-34.

There was no procedural default as to any claim.

II. On the Merits

Petitioner contends that his attorneys, trial or appellate or both, were ineffective.

A. Standard

A claim of ineffective assistance of counsel is cognizable as a claim of denial of the Sixth Amendment right to counsel, which guarantees not only assistance, but effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so

undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result. *Id.*

First, the defendant must show that counsel's performance was deficient, that is, that counsel's representation fell below an objective standard of reasonableness. *Id*. at 688. The relevant inquiry is not what defense counsel could have done, but rather whether the choices made by defense counsel were reasonable. *Babbitt v. Calderon*, 151 F.3d 1170, 1173 (9th Cir. 1998). Judicial scrutiny of counsel's performance must be highly deferential, and a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 689.

Second, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different; a reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id*. at 694. Where the defendant is challenging his conviction, the appropriate question is "whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Id*. at 695.

The *Strickland* prejudice analysis is complete in itself. Therefore, there is no need for additional harmless error review pursuant to *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). *See Avila v. Galaza*, 297 F.3d 911, 918 n.7 (9th Cir. 2002); *Gentry v. Roe*, 320 F.3d 891, 902-03 (9th Cir. 2003) (granting habeas petition without applying *Brecht* after finding prejudice under *Strickland*). It is unnecessary for a federal court considering a habeas ineffective assistance claim to address the prejudice prong of the *Strickland* test if the petitioner cannot even establish the first prong. *Siripongs v. Calderon*, 133 F.3d 732, 737 (9th Cir. 1998).

The *Strickland* framework for analyzing ineffective assistance of counsel claims is "clearly established Federal law, as determined by the Supreme Court of the United States" for the purposes of 28 U.S.C. § 2254(d) analysis. *Williams v. Taylor*, 529 U.S. 362, 405-07 (2000).

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Because the supreme court did not reach the merits of petitioner's claims, review is de novo. *See Pirtle v. Morgan*, 313 F.3d 1160, 1167-68 (9th Cir. 2002) (after concluding that procedural bars invoked by state supreme court did not mean that petitioner had procedurally defaulted federal claims, conducting de novo review because state supreme court never reached merits of the claim).

A. Presentence Credits

Petitioner contends that his trial counsel was ineffective at sentencing for failing to argue that under California law petitioner was entitled to additional credits for presentence confinement. This claim is without merit.

Several state courts, though not the supreme court, considered this issue. They concluded that petitioner's presentence credits were properly calculated. *See* Exs. G1, G5, G6, G7. This was because petitioner's "parole violation and incarceration were not *solely* for the conduct for which he was convicted and he is therefore not entitled to the additional credits he seeks." *See, e.g.,* G7 at 9 (ruling on state habeas petition by Santa Clara Superior Court) (emphasis in original). A state court's interpretation of state law binds a federal court sitting in habeas corpus. *Bradshaw v. Richey*, 546 U.S. 74, 76 (2005); *Hicks v. Feiock*, 485 U.S. 624, 629 (1988). Accordingly, for the purposes of this petition, the sentencing court's calculation of presentence credits was correct.

Failure to make a meritless motion or objection is objectively reasonable. *See Strickland*, 466 U.S. at 488. Furthermore, because such a motion or objection would have been denied, counsel's failure to make it could not have had any effect on the conviction or sentence. *See id*. at 694. Because petitioner has not shown that his trial counsel's failure to request more presentence credits was deficient performance or that he was prejudiced by the absence of such a motion, his Sixth Amendment right to effective assistance of counsel was not violated and he is not entitled to relief on this claim.

B. Aggravated Sentence and Dual Use of a Single Fact

Petitioner contends that his appellate counsel was ineffective for failing to raise as issues on appeal contentions that the facts did not justify an aggravated sentence and that

the sentencing court had made dual use of facts in determining the sentence.

The Due Process Clause of the Fourteenth Amendment guarantees a criminal defendant the effective assistance of counsel on his first appeal as of right. *See Evitts v. Lucey*, 469 U.S. 387, 391-405 (1985). Claims of ineffective assistance of appellate counsel are reviewed according to the standard set out in *Strickland*. *Miller v. Keeney*, 882 F.2d 1428, 1433 (9th Cir. 1989); *United States v. Birtle*, 792 F.2d 846, 847 (9th Cir. 1986). A defendant therefore must show that counsel's advice fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's unprofessional errors, he would have prevailed on appeal. *Miller*, 882 F.2d at 1434 & n.9 (citing *Strickland*, 466 U.S. at 688, 694; *Birtle*, 792 F.2d at 849).

Under California law, a single factor in aggravation suffices to support an upper term. *People v. Osband*, 13 Cal. 4th 622, 730 (1996). Petitioner does not dispute that he was on parole when he failed to register as a sex offender. A defendant's having been on parole when the crime was committed is a statutory aggravating factor, *see* Cal. Rules of Court, rule 4.421(b)(4), so raising this issue on appeal would have been futile. Counsel's failure to raise it was not deficient performance and did not prejudice petitioner.

"Dual use" of facts in sentencing is generally forbidden under California law. *See* Cal. Penal Code § 1170(b) ("The court may not impose an upper term by using the fact of any enhancement upon which sentence is imposed under any provision of law."). Petitioner asserts that appellate counsel should have contended on appeal that it was a forbidden dual use of the fact of his earlier conviction for the sentencing court to use it both (1) to enhance his sentence and (2) as a reason for imposing the upper term.

Petitioner received a one-year recidivism enhancement for his prior prison term, and the court imposed the upper term of his sentence due to the fact that petitioner was on parole when he committed this offense. It is well established in California law that it is not a prohibited dual use of facts to enhance a sentence for the fact of a prior conviction and to aggravate the sentence because the crime was committed by a parolee, even where the parole period follows the prison term imposed for the prior conviction. *See, e.g., People v.*

Whitten, 22 Cal.App.4th 1761, 1767-68 (1994)*; People v. Jerome* 160 Cal.App. 3d 1087, 1098-99 (1984). Thus raising this issue on appeal would have been futile, and counsel's failure to raise the issue both was not deficient performance and did not prejudice petitioner. Appellate counsel was not ineffective for choosing not to raise the issue.

Because petitioner has not shown that his appellate counsel's actions were below an objective standard of competence and has not shown prejudice, he is not entitled to relief on this claim.

C. Use in Sentencing of Facts Not Determined by a Jury

Petitioner contends that trial counsel was ineffective for failing to object to the judge's relying on a fact that was not found by a jury to impose the upper term sentence, and that appellate counsel was ineffective in not raising this issue on appeal.

In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id*. at 490. In *Blakely v. Washington*, 542 U.S. 296 (2004), the Court held that *Apprendi*'s "statutory maximum" meant the maximum sentence a judge could impose based solely on the facts reflected in the jury verdict or admitted by the defendant; that is, the relevant "statutory maximum" is not the sentence the judge could impose after finding additional facts, but rather is the maximum he or she could impose without any additional findings. *Id.* at 303-04. In *Cunningham v. California*, 549 U.S. 270 (2007), the Court held that California's determinate sentencing law violates the Sixth Amendment to the extent it authorizes the judge, not the jury, to find the facts permitting an upper term sentence. *Id.* at 273.

At the time petitioner's conviction became final upon completion of direct review only *Apprendi* had been decided. *Blakely* announced a new constitutional rule of criminal procedure that does not apply retroactively on habeas review, so it does not apply here. *Schardt v. Payne*, 414 F.3d 1025, 1038 (9th Cir. 2005); *see also Teague v. Lane*, 489 U.S. 288, 310 (1989). *Cunningham* did not announce a new rule and thus applies retroactively

on collateral review, but only to convictions that became final on direct review after the decision in *Blakely* on June 24, 2004 – that is, it also does not apply here. *See Butler v. Curry*, 528 F.3d 624, 639 (9th Cir. 2008); *cf. In re Gomez*, 45 Cal. 4th 650, 660 (Cal. 2009) (*Cunningham* applies to any California case in which the judgment was not final at the time the decision in Blakely was issued).

The sentencing court used the fact that petitioner was on parole when he failed to register as a sex offender as grounds to impose the upper term sentence. Ex. B at 233. In his statement before sentencing petitioner referred to having gone to his parole officer at the time of the offence, a reference which amounts to an admission that he was on parole when he committed it, *id.* at 230, as are his other references to his parole status in the course of his statements, *see id.* at 219-21. And to whatever extent petitioner's claim may be directed to the sentencing court's enhancements, petitioner also admitted those during his plea. Ex. B at 160.

Apprendi is satisfied if the defendant admits a sentencing fact. *See Blakely*, 542 U.S. at 303-04 ("statutory maximum" for *Apprendi* purposes is the maximum sentence a judge could impose based solely on the facts reflected in the jury verdict or admitted by the defendant). Because of petitioner's admissions there was no *Apprendi* violation and, under the principles discussed above regarding counsel's failure to raise meritless argument, neither trial counsel nor appellate counsel were ineffective.

Alternatively, as the Ninth Circuit has recognized, all the courts of appeals that had considered *Apprendi* before *Blakely* had concluded that it meant what it said – only sentences that exceeded the statutory maximum on the books for the particular crime of which the defendant was convicted were subject to the *Apprendi* requirements. *See Schardt*, 414 F.3d 1015 at 1035. Given the unanimity of professional opinion at the time, trial counsel's failure to make an *Apprendi* objection to imposition of the upper term, a sentence that clearly was within the statutory maximum, in the sense of the maximum period of incarceration provided for in the statute, could not have been deficient performance.

Petitioner's trial and appellate counsel were not ineffective for choosing not to raise the issue.

CONCLUSION

For the foregoing reasons, the petition for a writ of habeas corpus is **DENIED**. The clerk shall close the file.

IT IS SO ORDERED.

Dated: August 26, 2009.

PHYLLIS J. HAMILTON
United States District Judge