

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

MICHAEL THOMAS GORMAN,)
)
 Petitioner,)
)
 v.)
)
 IVAN D. CLAY, Warden,)
)
 Respondent.)
 _____)

No. C 07-2883 SBA (PR)

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

INTRODUCTION

This matter is now before the Court for consideration of Petitioner's pro se amended petition for a writ of habeas corpus under 28 U.S.C. § 2254 challenging his 2002 conviction in Humboldt County Superior Court. Respondent Ivan Clay, Warden of the Sierra Conservation Center, opposes the petition. Although given the opportunity to do so, Petitioner has not filed a traverse. For the reasons discussed below, the petition is DENIED as to all claims.

BACKGROUND

I. Case History

On December 29, 2002, a jury in Humboldt County Superior Court convicted Petitioner of murder (Cal. Penal Code § 187 [count 1]) and second degree burglary (Cal. Penal Code §§ 459, 460(b) [count 2]). On January 10, 2003, the trial court sentenced Petitioner to state prison for a term of twenty-five years to life for the murder, and a consecutive term of three years for the burglary.

On appeal, the California Court of Appeal affirmed the conviction in an unpublished opinion on January 27, 2005, but remanded to the trial court for re-sentencing after finding error under Blakely v. Washington, 542 U.S. 296 (2004). The California Supreme Court vacated that opinion, and eventually the California Court of Appeals affirmed both the conviction and the sentence in an

United States District Court
For the Northern District of California

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

1 unpublished opinion on December 4, 2007.¹ The California Supreme Court thereafter denied a
2 petition for review.

3 The instant petition was filed on June 4, 2007, and was assigned to Judge Martin J. Jenkins.
4 On July 30, 2007, Judge Jenkins granted Petitioner's motion for a stay while Petitioner exhausted a
5 fourth claim in the state courts. On March 20, 2008, Petitioner filed an amended petition and a
6 motion to reopen the case on the grounds that the claim had been exhausted. Judge Jenkins
7 reopened the case and ordered Respondent to show cause on March 31, 2008. After the case was
8 reassigned to the undersigned, the Court issued a second order to show cause on November 3, 2008.
9 After receiving extensions of time, Respondent filed an answer and memorandum of points and
10 authorities on June 1, 2009, and lodged a number of exhibits. Petitioner did not file a traverse.

11 **II. Statement of Facts**

12 The following facts are taken from the opinion of the California Court of Appeal.

13 On April 2, 2001,² defendant and his friend Rachael Lane paid a visit to a man
14 they knew named Shawn Harrison who occasionally sold methamphetamine.
15 Troy Russell, Harrison's former brother-in-law, was also visiting Harrison at
16 the time. Harrison told his visitors that, earlier that day, he had sold some
17 methamphetamine to a man (later identified as Bruce James) who was staying
18 at a nearby motel; he added that the man appeared to have a lot of cash and
19 was interested in obtaining the services of a prostitute. Russell and Harrison
20 had committed robberies together before, and the group discussed the idea of
21 taking James's money from him. Russell was not interested in the idea, but
22 defendant asked Harrison for James's room number at the motel. According
23 to Rachael Lane, the discussion about "ripping [James] off" was just a joke,
24 and was not serious. Russell testified that he never heard defendant use the
25 word "rob."

26 Later that evening, around 7:00 or 8:00 p.m., defendant and Rachael Lane
27 went to the apartment of Amber Ladue, where they encountered Rachael
28 Lane's brother, Michael Lane,³ and his girlfriend, Florence Laurel Anderson,

24 ¹In the interim, the California Court of Appeal issued two opinions affirming the conviction
25 and sentence pursuant to the California Supreme Court's decision in People v. Black, 35 Cal. 4th 1238
26 (2005). The United States Supreme Court reversed the decision in Black, and thus the California Court
of Appeal vacated each of these two opinions, before issuing its final affirmance on December 4, 2007.

27 ²All further references to dates are to the year 2001 unless otherwise specified.

28 ³Michael Lane was also a friend of defendant's and was the actual perpetrator of the murder of
which both he and defendant were convicted. He was also a principal witness for the prosecution at
defendant's trial. For simplicity and clarity, we refer to Michael Lane as Lane and to Rachael Lane by

1 who was a friend of Ladue's. Ladue lived not far from the motel where James
2 was staying. Lane and Anderson were staying with their friend Gordon
3 Combs in another apartment in the same building, and sometimes borrowed
4 Ladue's apartment so they could have some privacy. Lane and Anderson
5 asked defendant and Rachael Lane if they had any drugs,⁴ and defendant
6 responded by suggesting that they could obtain cash from James, either by
7 fraudulently proposing to get drugs for him and keeping the money, or by
8 offering him Anderson's services as a prostitute.

9 Lane did not want to feign a drug deal with James. Anderson was willing to
10 act (or at least pose)⁵ as a prostitute to get James's money, but Lane did not
11 want her to do so. Nonetheless, Anderson and Lane agreed with defendant
12 that the three of them would go to the motel, that Anderson would offer James
13 her services as a prostitute, and that defendant would receive a share of
14 whatever money Anderson and Lane could obtain from James, or of the drugs
15 they would buy with it. Lane denied that they discussed robbing James.

16 Before going to the motel, either Lane or Anderson asked Ladue for a knife
17 with which to protect themselves, and told Ladue that defendant was "sending
18 them [Anderson and Lane] on a mission." Defendant was there when they did
19 so, but did not say anything. Ladue gave Lane a knife, and then went to
20 sleep.⁶

21 Lane, Anderson, and defendant then walked together to the motel where

22 her full name.

23 ⁴Defendant, Rachael Lane, Russell, Lane, Anderson, Ladue and Combs were all
24 methamphetamine users at the time of these events.

25 ⁵There was a conflict in the evidence as to whether Anderson had previously worked as a
26 prostitute, and as to whether the plan was that she would really offer her services as such to James, or
27 merely pretend to be willing to do so. Lane testified at trial that Anderson fairly frequently sold her
28 services for drugs or for money to buy drugs, and that he had accompanied her, for her protection, on a
few prior occasions when she had conducted such a transaction with a stranger. He had told the police
at one point during their investigation that Anderson never worked as a prostitute while she was
involved with him, but he testified at trial that this statement was true only in the sense that Anderson
prostituted herself solely to obtain drugs (or money for drugs), and not as a regular occupation. In any
event, there is substantial evidence in the record that Lane and Anderson gained entry to James's motel
room by suggesting to him – whether truthfully or not – that Anderson was available as a prostitute.
Defendant does not argue otherwise on his appeal.

29 ⁶There was a conflict in the testimony regarding whether Ladue was in her apartment when
30 defendant, Lane, and Anderson discussed their plan. Lane testified that she arrived just as they were
31 leaving. Ladue testified that she was in the apartment asleep, and they woke her up to ask for the
32 knife.

33 Ladue was, generally speaking, a problematic witness. She suffered from a number of mental
34 disorders, for which she was taking numerous medications at the time she testified against defendant.
35 She acknowledged that her recollection of the relevant events was hazy, and that she was "having
36 problems keeping things straight" in her testimony. For example, although she testified at defendant's
37 trial that she gave the knife to Lane, she admitted that when she testified at Lane and Anderson's trial,
38 she had not remembered whether she gave it to Lane or Anderson. Ladue was originally charged as an
accessory after the fact in connection with James's murder, but agreed to testify against Lane,
Anderson, and defendant in exchange for immunity.

1 James was staying. Lane and Anderson knocked on the door of James's
2 room, telling him that "Shawn sent me," while defendant (as he had told Lane
3 he planned to do) entered the room next door to James's in order to visit his
4 friend Kelly Eyerley. It is undisputed that defendant was not in James's room
5 during the ensuing events, and was not present when Lane killed James.

6 Lane testified as follows regarding the ensuing events. James appeared to be
7 drunk when he came to the door to let him and Anderson into the room.⁷ Lane
8 and Anderson were surprised and upset to learn that James was Black, a piece
9 of information that Harrison had not shared with defendant. Lane did not like
10 or trust Black people, because his grandmother had been raped by a couple of
11 Black men when she was young. Nonetheless, Anderson proceeded to offer
12 James her sexual services for money. James accepted, but was unwilling to
13 allow Lane to remain in the room to protect Anderson during the activity, so
14 Lane went into the bathroom in order to remain nearby. Shortly thereafter,
15 Lane heard Anderson scream, and emerged from the bathroom to see James
16 beating her. Lane then "freaked out," and stabbed James at least five times,
17 killing him. Lane and Anderson then left the motel without taking the only
18 money they saw in James's room, which amounted to only \$20. Anderson
19 took James's cigarettes and lighter.

20 According to Ladue, defendant returned to Ladue's apartment alone, some 20
21 minutes after he had left for the motel.⁸ Ladue testified that defendant told her
22 he was worried that something had gone wrong, because Lane and Anderson
23 had not yet returned. Shortly thereafter, Lane and Anderson arrived,
24 awakening Rachael Lane, who had been asleep on Ladue's couch. Both Lane
25 and Anderson were very upset, and Anderson was crying. Lane had a large
26 knife, which he hid under a sofa cushion. He told defendant that he had killed
27 James. Defendant appeared to be shocked upon hearing this, but he
28 nonetheless asked where James's money was; Lane replied that he did not
29 know.

30 Upon hearing that James had been killed, defendant called Harrison, at Lane's
31 request, and asked him to come and see him. Defendant and Lane had an
32 argument about whether they should return to the motel room. Rachael Lane
33 testified that it might have been defendant who wanted to do so, but she was
34 not sure. According to Lane, however, he was the one who persuaded
35 defendant to go back.⁹ Lane and Anderson were angry because they believed
36 that defendant had set them up by telling them incorrectly that James had a lot
37 of money, and by not telling them that he was Black.

38 ⁷This testimony was corroborated by a forensic analysis showing that James had a blood-
39 alcohol level of .26 percent when he died.

40 ⁸Lane also testified that he and Anderson returned to Ladue's separately from defendant.
41 Rachael Lane testified that defendant, Lane and Anderson all returned to Ladue's apartment together,
42 but she also testified (as did Lane) that she had fallen asleep, and awoke when they arrived.

43 ⁹Lane told the police shortly after James's death that it was defendant who had insisted they
44 return to the motel, claiming James had \$500 or \$600 in his possession. In his trial testimony,
45 however, Lane contended that he had been lying when he said this, in an effort to blame someone else
46 for James's death. As discussed *post*, defendant told the police he had gone back to the motel at
47 Lane's insistence because he was afraid of Lane at that point.

1 Ultimately, Lane, Anderson, and defendant returned to the motel,
2 accompanied by Harrison. Lane entered James's room by climbing in the
3 bathroom window, and then opened the door to let in the others. Lane went
4 through James's pockets and belongings and took his necklace, shoes, wallet,
5 and a small sum in cash. Defendant did not take anything, but according to
6 Lane, he helped Lane flip over the mattress, and either took James's credit
7 card or accepted it from Lane.¹⁰

8 Later, in the early hours of the morning on April 3, Lane and Anderson went
9 to Combs's apartment. Lane testified that he told Combs a version of the
10 events that was consistent with his trial testimony, but he also admitted he
11 might have told Combs (untruthfully, according to Lane's trial testimony) that
12 they had gone to the motel to rob James. According to Combs, Lane not only
13 told him that he had just killed a man at the motel, but also averred that he and
14 Anderson had gone there to rob the man by having Anderson pose as a
15 prostitute. Lane also told Combs that he had remarked to Anderson on the
16 way to the motel that if things got out of hand, he might have to stab the
17 intended robbery victim.

18 Ladue testified that around noon on April 3, she awoke and found Lane
19 cleaning her knife, which he then wrapped in newspaper. Lane testified that
20 he told Ladue that he had killed a man at the motel with Ladue's knife. Ladue
21 testified that Lane also told her he had gone to the motel to rob the man.
22 Ladue drove Lane and Anderson to a jetty or pier, where Lane threw the knife
23 into the ocean, and then to a remote area in the woods, where Lane and
24 Anderson burned their clothes.

25 James's body was discovered in his room by the motel housekeeper shortly
26 after 10:00 a.m. on April 3. He had been stabbed four times in the back and
27 once in the elbow, and had bled to death. His room had been ransacked, and
28 there were signs of a forced entry through the bathroom window.

A day or two later, Russell encountered defendant again. By then, word of the killing
at the motel had circulated in the area, and defendant appeared to Russell to be
worried about what had happened. Russell testified that defendant told him he had
gone to the motel with Lane and Anderson, but had gone into the room next door to
visit Eyerley. Russell said defendant told him that he had heard sounds of a "loud
ruckus" from the next room, and that Lane had ended up stabbing the victim during a
struggle. Russell interpreted what defendant said as indicating that Lane and
Anderson had robbed the victim, but defendant did not actually use the word "rob."
Defendant complained to Russell that Lane and Anderson had only given him (or him
and Harrison) a credit card and a small sum of money (about \$20), and that he
believed they were "holding out on him." Russell also testified that defendant and
Harrison made racially derogatory remarks about the victim, referring to him as "just

¹⁰Lane's testimony was inconsistent regarding how, or even whether, defendant obtained James's credit card. Russell testified that defendant told him he had the card, but Russell never actually saw defendant with it. Russell did see Harrison with the credit card, however; Harrison was holding it when he told Russell that he and defendant had bought gas for Russell's truck, which Harrison had borrowed to give defendant a ride. The prosecution introduced evidence that the credit card had been used to buy gas at a nearby gas station on the morning after James's death.

1 another dead nigger, porch monkey, dead cricket, something like that.”¹¹

2 On April 10, about a week after James was killed, a police detective interviewed Lane
3 and Anderson, and learned from them that defendant had been involved in the events
4 leading up to the killing. The police spoke with defendant's family and asked them to
5 have defendant call them. On April 11, defendant voluntarily went to the police
6 station to be interviewed. Defendant was not given any Miranda¹² warnings prior to
7 the interview. A tape recording of the interview was played to the jury at defendant's
8 trial. Defendant's trial counsel did not object to the admission of the tape recording.

9 In his interview with the police, defendant initially told a story about the events that
10 the police told him they knew was not true. The police then told defendant that Lane
11 and Anderson had been arrested, and had told them defendant was not in the room
12 when James was killed. Defendant then acknowledged that he had told Lane and
13 Anderson about Harrison's report that James had a lot of money and wanted a
14 prostitute. He also admitted that he had proposed to Lane and Anderson that they
15 obtain James's money-either by promising to buy drugs with it and not returning, or
16 by stealing it while Anderson distracted James with sex-and give defendant a share of
17 the proceeds. He acknowledged going to the motel with Lane and Anderson, and
18 spending a short time in Eyerley's room before returning to Ladue's apartment. He
19 said he had not heard anything from James's room except a little bang on the wall,
20 and that he had told Eyerley that Lane and Anderson were going to get James's
21 money by pretending they would use it to buy drugs for him.

22 Defendant also acknowledged in the interview that after finding out that Lane had
23 stabbed James, he went back to the motel with Lane at Lane's insistence; he averred
24 that he was afraid Lane would stab him if he refused. Defendant explained that he
25 called Harrison to accompany them to the motel, and that when they got there, he
26 knocked on James's door but received no response. He said Lane and Anderson then
27 went in through the window and let him and Harrison in through the door. Defendant
28 contended he had only watched while Lane, Anderson, and Harrison rummaged
through James's belongings and took his money, shoes, and jacket. Defendant
vehemently denied having had any intent that the group would obtain James's money
by any means other than pretending to use it to buy drugs for James.

Defendant, Lane, and Anderson were charged with murder and burglary. Defendant's
trial was severed from that of Lane and Anderson,¹³ and did not begin until October
22, 2002. In an amended information, defendant was charged with felony murder
(Pen. Code, § 187, subd. (a)[]) and second degree burglary (§§ 459, 460, subd. (b)).
On December 9, 2002, the jury found defendant guilty on both counts.

(Amend. Pet. Ex. C at 2-9 (footnotes in original).)

¹¹Russell acknowledged at trial that he did not like defendant. Russell had an extensive criminal
record and had been granted immunity for as many as 30 uncharged robberies in exchange for his
testimony. Lane testified he had never heard defendant use the word “nigger.”

¹²Miranda v. Arizona, 384 U.S. 436 (1966).

¹³Lane and Anderson were tried jointly, and both had been convicted by the time defendant's
trial began. Their convictions were affirmed by Division Five of this court in separate unpublished
opinions. (People v. Lane (Dec. 1, 2003, A099502); People v. Anderson (Dec. 19, 2003, A099476).)

1 **DISCUSSION**

2 **I. Legal Standard**

3 **A. Standard of Review for State Court Decisions**

4 Under the Antiterrorism and Effective Death Penalty Act (AEDPA), a district court may
5 grant a petition challenging a state conviction or sentence on the basis of a claim that was
6 "adjudicated on the merits" in state court only if the state court's adjudication of the claim:
7 "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly
8 established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in
9 a decision that was based on an unreasonable determination of the facts in light of the evidence
10 presented in the State court proceeding." 28 U.S.C. § 2254(d). A state court has "adjudicated" a
11 petitioner's constitutional claim "on the merits" for purposes of § 2254(d) when it has decided the
12 petitioner's right to post-conviction relief on the basis of the substance of the constitutional claim
13 advanced, rather than denying the claim on the basis of a procedural or other rule precluding state
14 court review on the merits. Lambert v. Blodgett, 393 F.3d 943, 969 (9th Cir. 2004). It is error for a
15 federal court to review de novo a claim that was adjudicated on the merits in state court. See Price
16 v. Vincent, 538 U.S. 634, 638-43 (2003).

17 **1. Section 2254(d)(1)**

18 Challenges to purely legal questions resolved by a state court are reviewed under
19 § 2254(d)(1), under which a state prisoner may obtain habeas relief with respect to a claim
20 adjudicated on the merits in state court only if the state court adjudication resulted in a decision that
21 was "contrary to" or "involved an unreasonable application of clearly established Federal law, as
22 determined by the Supreme Court of the United States." Williams (Terry) v. Taylor, 529 U.S. 362,
23 402-04, 409 (2000). While the "contrary to" and "unreasonable application" clauses have
24 independent meaning, see id. at 404-05, they often overlap, which may necessitate examining a
25 petitioner's allegations against both standards, see Van Tran v. Lindsey, 212 F.3d 1143, 1149-50 (9th
26 Cir. 2000), overruled on other grounds, Lockyer v. Andrade, 538 U.S. 63, 70-73 (2003).

1 prisoner's case "would not fit comfortably within § 2254(d)(1)'s 'contrary to' clause." Williams, 529
2 U.S. at 406. Such a case should be analyzed under the "unreasonable application" prong of
3 § 2254(d). See Weighall v. Middle, 215 F.3d 1058, 1062 (9th Cir. 2000).

4 **c. "Unreasonable Application"**

5 "Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the
6 state court identifies the correct governing legal principle from [the Supreme] Court's decisions but
7 unreasonably applies that principle to the facts of the prisoner's case." Williams, 529 U.S. at 412-13.
8 "[A] federal habeas court may not issue the writ simply because that court concludes in its
9 independent judgment that the relevant state-court decision applied clearly established federal law
10 erroneously or incorrectly. Rather, that application must also be unreasonable." Id. at 411; accord
11 Middleton v. McNeil, 541 U.S. 433, 436 (2004) (per curiam) (challenge to state court's application
12 of governing federal law must be not only erroneous, but objectively unreasonable); Woodford v.
13 Visciotti, 537 U.S. 19, 25 (2002) (per curiam) ("unreasonable" application of law is not equivalent to
14 "incorrect" application of law).

15 Evaluating whether a rule application was unreasonable requires considering the relevant
16 rule's specificity; if a legal rule is specific, the range of reasonable judgment may be narrow; if it is
17 more general, the state courts have more leeway. Yarborough v. Alvarado, 541 U.S. 652, 664
18 (2004). Whether the state court's decision was unreasonable must be assessed in light of the record
19 that court had before it. Holland v. Jackson, 542 U.S. 649, 651 (2004) (per curiam).

20 The objectively unreasonable standard is not a clear error standard. Andrade, 538 U.S. at 75-
21 76 (rejecting Van Tran's use of "clear error" standard); Clark, 331 F.3d at 1067-69 (acknowledging
22 the overruling of Van Tran on this point). After Andrade,

23 [t]he writ may not issue simply because, in our determination, a state court's
24 application of federal law was erroneous, clearly or otherwise. While the
25 "objectively unreasonable" standard is not self-explanatory, at a minimum it denotes
26 a greater degree of deference to the state courts than [the Ninth Circuit] ha[s]
previously afforded them.

27 Id. In examining whether the state court decision was unreasonable, the inquiry may require
28 analysis of the state court's method as well as its result. Nunes v. Mueller, 350 F.3d 1045, 1054 (9th
Cir. 2003).

1 **2. Sections 2254(d)(2), 2254(e)(1)**

2 A federal habeas court may grant a writ if it concludes a state court's adjudication of a claim
3 "resulted in a decision that was based on an unreasonable determination of the facts in light of the
4 evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). An unreasonable
5 determination of the facts occurs where a state court fails to consider and weigh highly probative,
6 relevant evidence, central to a petitioner's claim, that was properly presented and made part of the
7 state court record. Taylor v. Maddox, 366 F.3d 992, 1005 (9th Cir. 2004). A district court must
8 presume correct any determination of a factual issue made by a state court unless a petitioner rebuts
9 the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

10 Section 2254(d)(2) applies to an intrinsic review of a state court's fact-finding process, or
11 situations in which the petitioner challenges a state court's fact-findings based entirely on the state
12 court record, whereas § 2254(e)(1) applies to challenges based on extrinsic evidence, or evidence
13 presented for the first time in federal court. See Taylor v. Maddox, 366 F.3d 992, 999-1000 (9th Cir.
14 2004). In Taylor, the Ninth Circuit established a two-part analysis under §§ 2254(d)(2) and
15 2254(e)(1). Id. First, federal courts must undertake an "intrinsic review" of a state court's fact-
16 finding process under the "unreasonable determination" clause of § 2254(d)(2). Id. at 1000. The
17 intrinsic review requires federal courts to examine the state court's fact-finding process, not its
18 findings. Id. Once a state court's fact-finding process survives this intrinsic review, the second part
19 of the analysis begins by dressing the state court finding in a presumption of correctness under
20 § 2254(e)(1). Id. According to the AEDPA, this presumption means that the state court's fact-
21 finding may be overturned based on new evidence presented by a petitioner for the first time in
22 federal court only if such new evidence amounts to clear and convincing proof a state court finding
23 is in error. See 28 U.S.C. § 2254(e)(1). "Significantly, the presumption of correctness and the
24 clear-and-convincing standard of proof only come into play once the state court's fact-findings
25 survive any intrinsic challenge; they do not apply to a challenge that is governed by the deference
26 implicit in the 'unreasonable determination' standard of section 2254(d)(2)." Taylor, 366 F.2d at
27 1000.
28

 When there is no reasoned opinion from the highest state court to consider the Petitioner's

1 claims, the Court looks to the last reasoned opinion. See Ylst v. Nunnemaker, 501 U.S. 797, 801-06
2 (1991). Here, the California Court of Appeal was the highest state court to issue an explained
3 opinion on Petitioner’s claims. (Pet. Exhs. B & C.)

4 **II. Exhaustion**

5 Prisoners in state custody who wish to challenge collaterally in federal habeas proceedings
6 either the fact or length of their confinement are required first to exhaust state judicial remedies,
7 either on direct appeal or through state collateral proceedings, by presenting the highest state court
8 available with a fair opportunity to rule on the merits of each and every claim they seek to raise in
9 federal court. See 28 U.S.C. § 2254(b), (c); Granberry v. Greer, 481 U.S. 129, 133-34 (1987). It is
10 undisputed that Petitioner exhausted his state court remedies as to the claims raised in his petition.
11 Specifically, Petitioner exhausted all four of his claims on direct appeal.

12 **III. Legal Claims**

13 Petitioner raises four claims: (1) that the jury instruction on aiding and abetting liability for
14 felony murder, pursuant to CALJIC No. 8.27, violated his right to due process; (2) that the
15 admission of evidence of Petitioner’s use of racial slurs violated his right to due process; (3) that he
16 received ineffective assistance of counsel because counsel did not object to the admission of his
17 interview with the police; and (4) that the trial court violated his Sixth Amendment rights by
18 imposing the upper term of three years on the burglary charge.

19 **1. Jury Instruction**

20 Petitioner claims that the jury instruction on aider and abettor liability for felony murder
21 violated his right to due process because it did not adequately convey that the state law requirement
22 that there be a logical nexus, beyond mere time and place, between the planned felony and the
23 homicide. The instruction challenged was issued pursuant to CALJIC No. 8.27:

24
25 If a human being is killed by any one of several persons engaged in the commission
26 or attempted commission of the crime of robbery or burglary, all persons, who either
27 directly and actively commit the act constituting that crime, or who with knowledge
28 of the unlawful purpose of the perpetrator of the crime and with the intent or purpose
of committing, encouraging, or facilitating the commission of the offense, aid,
promote, encourage, or instigate by act or advice its commission, are guilty of murder
of the first degree, whether the killing is intentional, unintentional, or accidental.

As noted by the California Supreme Court, while this case was pending on appeal, the

1 California Supreme Court held that felony-murder under California Penal Code section 189 requires
2 “proof of a logical nexus, beyond mere coincidence of time and place, between the homicidal act
3 and the underlying felony the nonkiller committed or attempted to commit.” People v. Cavitt, 33
4 Cal. 4th 187, 193 (2004). A nonkiller is not liable for “homicidal acts that are completely unrelated
5 to the felony for which the parties have combined,” but there need not be “proof that the homicidal
6 act furthered or facilitated the felony, only that a logical nexus exist between the two.” Id. at 201-
7 03.

8 Petitioner claims that CALJIC No. 8.27 violated his right to due process because it did not
9 adequately convey that in order to find Petitioner guilty of felony murder as an aider an abettor, one
10 of the elements the jury had to find was a logical connection between the underlying felony of
11 burglary or robbery and the homicide. The Due Process Clause of the Fourteenth Amendment
12 protects the accused against conviction except upon proof beyond a reasonable doubt of every fact
13 necessary to constitute the crime with which he or she is charged. In re Winship, 397 U.S. 358, 364
14 (1970).

15 In Cavitt, the California Supreme Court held that CALJIC No. 8.27 “adequately apprise[s]
16 the jury of the need for a logical nexus between the felonies and the homicide.” Id. at 203. The
17 court reasoned that “the jury necessarily found that the ‘killing occurred during the commission or
18 attempted commission of robbery or burglary’ by ‘one of several persons engaged in the
19 commission’ of these crimes. The first of these described a temporal connection between the
20 crimes; the second described the logical nexus.” Id. Pursuant to Cavitt, the California Court of
21 Appeal also found that CALJIC No. 8.27 properly conveyed the state law requirement that in order
22 to convict Petitioner of felony murder the jury would have to find a logical nexus between the
23 homicide and the underlying felony. (Amend Pet. Ex. C at 10-11.) The reasoning set forth in Cavitt
24 as to why the instruction adequately conveyed the logical nexus requirement constitutes a reasonable
25 basis for the California Court of Appeal to find that the instruction did not violate due process.
26

27 The California Court of Appeal went on to conclude that even if the instruction were
28 ambiguous, there was no “reasonable likelihood” that the jury applied the instruction in an
unconstitutional manner. (Id. at 11-12 (citing Boyde v. California, 494 U.S. 370, 380 (1990).) If an

1 instruction is ambiguous, the due process inquiry is not how reasonable jurors could or would have
2 understood the instruction as a whole; rather, the court must inquire whether there is a "reasonable
3 likelihood" that the jury has applied the challenged instruction in a way that violates the
4 Constitution. See Estelle, 502 U.S. at 72 & n.4; Boyde, 494 U.S. at 380. As correctly explained by
5 the Court of Appeal:

6 There was strong evidence of a causal connection, "beyond mere coincidence of time
7 and place" (Cavitt, supra, 33 Cal.4th at p. 213 (conc. opn. of Chin, J.)), between the
8 robbery or burglary [] that defendant helped to plan, and the killing of James-who
9 was the target of that felony-during the course of that crime. Among other facts
10 supporting this connection, perhaps the most telling is that defendant was present
11 when Lane borrowed Ladue's knife to take with him to the motel, and raised no
12 objection to his doing so. The overall record simply does not permit us to discern a
13 reasonable likelihood that the jury found James was killed solely because of Lane's
14 racial animus, rather than because of any causal connection with the robbery or
15 burglary, but nonetheless was misled by the instructions into finding defendant guilty
16 of felony murder.

17 (Amend. Pet. Ex. C at 11-12 (footnote omitted).) In addition to citing the correct federal standard
18 from Boyde, the California Court of Appeal reasonably applied that standard to the evidence in
19 finding that there was a causal connection between the homicide and the underlying felony.
20 Consequently, there state court's rejection of Petitioner's claim was neither contrary to nor an
21 unreasonable application of federal law, and Petitioner is not entitled to habeas relief on this claim.

22 **2. Admission of Evidence**

23 Petitioner claims that the trial court violated his right to due process by admitting evidence of
24 his use of racial slurs to refer to the victim. Petitioner refers to the testimony by Troy Russell that
25 after James was murdered, Petitioner referred to James as "just another dead nigger, porch monkey,
26 dead cricket, something like that." (Pet. Ex. C at 7.) At trial, the defense moved to exclude the
27 evidence as more prejudicial than probative, but the trial court denied the motion because the
28 statement was made during a conversation in which Petitioner admitted to Russell that he had helped
set up the robbery and showed that Petitioner knew who the victim was. (Id. at 12.) The trial court
also found that Petitioner's isolated statement of racial slurs was not so prejudicial as to prevent the
jury from being able to decide the case fairly. (Id.) Petitioner argued on appeal, as he does here,
that the evidence was irrelevant and highly prejudicial. The California Court of Appeal found the
admission of the evidence proper and, in any event, harmless because it of the overall strength of the

1 case against Petitioner. (Id. at 14.)

2 The United States Supreme Court “has not yet made a clear ruling that admission of
3 irrelevant or overtly prejudicial evidence constitutes a due process violation sufficient to warrant
4 issuance of the writ.” Holley v. Yarborough, 568 F.3d 1091, 1101 (9th Cir. 2009). Absent such a
5 ruling from the United States Supreme Court, a federal habeas court cannot find the state court's
6 ruling was an “unreasonable application” of “clearly established federal law” under 28 U.S.C.
7 § 2254(d)(1). Id. (citing Carey v. Musladin, 549 U.S. 70, 77 (2006)). Under Holley, therefore, this
8 Court cannot grant habeas relief under § 2254(d)(1) on Petitioner’s claim that the admission of
9 irrelevant and overly prejudicial evidence violated his right to due process. See id. at 1101 n.2
10 (finding that although trial court’s admission of irrelevant and prejudicial evidence violated due
11 process under Ninth Circuit precedent, such admission was not contrary to, or an unreasonable
12 application of, “clearly established Federal law” under § 2254(d)(1) and therefore not grounds for
13 granting federal habeas relief).

14 Moreover, even if federal habeas relief were available on this grounds, the admission of the
15 evidence in this case did not violate due process. The due process inquiry is whether the admission
16 of evidence was arbitrary or so prejudicial that it rendered the trial fundamentally unfair. See
17 Walters v. Maass, 45 F.3d 1355, 1357 (9th Cir. 1995). Only if there are no permissible inferences
18 that the jury may draw from the evidence can its admission violate due process. Jammal v. Van de
19 Kamp, 926 F.2d 918, 919-20 (9th Cir. 1991). Petitioner’s statement about the victim was relevant
20 because it showed that Petitioner knew the victim’s race, and was present in the room, during the
21 second burglary after the victim was dead. The prejudicial impact of the words Petitioner chose to
22 impart this admission was reduced by the fact that it was a single isolated statement in the context of
23 the overall evidence at trial. Thus, the jury could draw a permissible inference from the evidence,
24 and the state court could reasonably conclude that its admission did not violate Petitioner’s right to
25 due process.
26

27 Consequently, Petitioner is not entitled to habeas relief on this claim.

28 **3 Ineffective Assistance of Counsel**

Petitioner claims that counsel was ineffective because he failed to object to the admission of

1 his statement to the police on the grounds that he was deprived of his rights under Miranda v.
2 Arizona, 384 U.S. 436 (1966). Approximately one week after the murder, Petitioner voluntarily went
3 to the police station to be interviewed, and was not given Miranda warnings. (Resp't. Ex.19 at 282-
4 86, 342-43.) A recording of the interview was played for the jury without objection from defense
5 counsel. (Id. at 284-336.) During the interview, Petitioner initially lied by saying that the extent of
6 his involvement ended when he informed Lane about the victim wanting to buy drugs. (Id. at 288-
7 91.) Later, petitioner admitted to suggesting to Lane that they steal the victim's money and possibly
8 find him a prostitute. (Id. at 294-97.)

9 A claim of ineffective assistance of counsel is cognizable as a claim of denial of the Sixth
10 Amendment right to counsel, which guarantees not only assistance, but effective assistance of
11 counsel. Strickland v. Washington, 466 U.S. 668, 686 (1984). The benchmark for judging any
12 claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of
13 the adversarial process that the trial cannot be relied upon as having produced a just result. Id. In
14 order to prevail on a Sixth Amendment ineffectiveness of counsel claim, petitioner must establish
15 two things. First, he must establish that counsel's performance was deficient, i.e., that it fell below
16 an "objective standard of reasonableness" under professional norms. Id. at 687-88. Second, he must
17 establish that he was prejudiced by counsel's deficient performance, i.e., that "there is a reasonable
18 probability that, but for counsel's unprofessional errors, the result of the proceeding would have
19 been different. Id. at 694. Where the defendant is challenging his conviction, the appropriate
20 question in determining prejudice is "'whether there is a reasonable probability that, absent the
21 errors, the fact-finder would have had a reasonable doubt respecting guilt.'" Luna v. Cambra, 306
22 F.3d 954, 961 (9th Cir. 2002) (quoting Strickland, 466 U.S. at 695). A court need not determine
23 whether counsel's performance was deficient before examining the prejudice suffered by the
24 defendant as the result of the alleged deficiencies. Strickland, 466 U.S. at 697; Williams v.
25 Calderon, 52 F.3d 1465, 1470, n.3 (9th Cir. 1995) (applauding district court's refusal to consider
26 whether counsel's conduct was deficient after determining that petitioner could not establish
27 prejudice).

28 The California Court of Appeal found that it was reasonable for counsel not to object to the

1 admission of Petitioner's interview on because an objection on Miranda grounds would have been
2 without merit. (Amend. Pet. Ex. B at 15.)¹⁴ Trial counsel cannot have been ineffective for failing to
3 make a meritless objection. See Juan H. v. Allen, 408 F.3d 1262, 1273 (9th Cir. 2005); Rupe v.
4 Wood, 93 F.3d 1434, 1445 (9th Cir. 1996).

5 The California Court of Appeal reasoned that a Miranda objection would be meritless
6 because Petitioner was not in custody during the interview, and thus the Miranda warnings were not
7 required. Miranda protections are triggered "'only where there has been such a restriction on a
8 person's freedom as to render him 'in custody.'" Stansbury v. California, 511 U.S. 318, 322 (1994)
9 (quoting Oregon v. Mathiason, 429 U.S. at 495); Maryland v. Shatzer, --- S.Ct. ---, 2010 WL 624042
10 at *9 (Feb. 24, 2010). "[I]n custody" means "'formal arrest or restraint on freedom of movement' of
11 the degree associated with a formal arrest." California v. Beheler, 463 U.S. 1121, 1125 (1983)
12 (quoting Oregon v. Mathiason, 429 U.S. 492, 495 (1977)). It requires that "a reasonable person have
13 felt he or she was not at liberty to terminate the interrogation and leave," as judged by the totality of
14 the circumstances. Thompson v. Keohane, 516 U.S. 99, 112 (1995). Petitioner was not under arrest,
15 handcuffed, restrained or threatened during the interview, and he went to the police station and
16 spoke to the police voluntarily. (Amend. Pet. Ex. B at 15.) Under these circumstances, the state
17 court reasonably concluded that the interrogation was not custodial and that the Miranda warnings
18 were not required. Therefore, counsel acted reasonably in not making what would have been a
19 meritless objection to admitting Petitioner's interview into evidence.

20
21 The California Court of Appeal also found that the record supported tactical reasons for not
22 objecting to the admission of the interview. Specifically, trial counsel used Petitioner's statements
23 in the interview to present his side of the story to the jury without having to call Petitioner to testify
24 at trial. (Id.) By not testifying, Petitioner did not have to waive his right against self-incrimination
25 and was not subject to cross examination about, among other things, his "numerous" and "serious"
26 prior convictions. (Amend. Pet. Ex. C at 19.) Moreover, there was going to be other evidence
27 coming in at trial anyway that Petitioner had participated in the crimes and admitted to doing so.

28 ¹⁴Petitioner's Exhibit B is the California Court of Appeal opinion on Petitioner's first appeal, dated January 27, 2005, which is the opinion that denies Petitioner's ineffective assistance of counsel.

1 Under such circumstances, even if a meritorious Miranda objection could be made, counsel could
2 reasonably decide to opt for the tactical advantages of not objecting to admitting the interview into
3 evidence.

4 For the foregoing reasons, trial counsel’s failure to object to the admission of the interview
5 with Petitioner did not violate Petitioner’s constitutional right to the effective assistance of counsel.
6 The state court’s denial of this claim was neither contrary to nor an unreasonable application of
7 federal law, and Petitioner is not entitled to habeas relief on this claim.

8 **4. Sentence**

9 Petitioner claims that by imposing the upper term of three years for the burglary conviction,
10 the trial court violated his Sixth Amendment right to trial by jury as set out in Cunningham v.
11 California, 549 U.S. 270 (2007). The trial court based its imposition of the upper term upon finding
12 numerous aggravating factors and no mitigating factors under California Rule of Court, rule 4.42.
13 The trial court relied on three factors “in particular:” that Petitioner had “numerous” and “quite
14 serious” prior convictions as an adult; that Petitioner was on felony probation when he committed
15 the crimes; and that his prior performance on probation was unsatisfactory. (Resp’t. Ex. 12 at 1788-
16 89 (citing Cal. Rule of Court, rules 4.42(b)(2),(b)(4); 4.21.5(b).) Petitioner claims that this sentence
17 violates his Sixth and Fourteenth Amendment rights to a jury because the aggravating circumstances
18 were found by the trial judge and not the jury.

19
20 In Apprendi v. New Jersey, 530 U.S. 466 (2000), the Supreme Court held that any fact that
21 increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a
22 jury and proved beyond a reasonable doubt. Id. at 488-90. In Blakely v. Washington, 542 U.S. 296
23 (2004), the Supreme Court explained that “the statutory maximum for Apprendi purposes is the
24 maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict
25 or admitted by the defendant.” Id. at 303. This meant that the “the middle term prescribed in
26 California’s statutes, not the upper term, is the relevant statutory maximum.” Cunningham, 549
27 U.S. at 273. In Cunningham, the Supreme Court, citing Apprendi and Blakely, held that
28 California’s Determinate Sentencing Law violates a defendant’s right to a jury trial to the extent that
it contravenes “Apprendi’s bright-line rule: Except for a prior conviction, ‘any fact that increases the

1 penalty for a crime beyond the statutory maximum must be submitted to a jury, and proven beyond a
2 reasonable doubt.” Id. (quoting Apprendi, 530 U.S. at 490).

3 There is no constitutional error in this case because of the prior conviction exception to the
4 general rule in Apprendi, which provides that the fact of a prior conviction need not be pleaded in an
5 indictment or proved to a jury beyond a reasonable doubt. Butler, 538 F.3d at 643 (citing Apprendi,
6 530 U.S. at 490, and Almendarez-Torres v. United States, 523 U.S. 224, 244 (1998)). “[O]ur
7 reexamination of our cases in this area, and of the history upon which they rely confirms” that the
8 right to a jury applies to all sentencing factors, “[o]ther than the fact of a prior conviction.”
9 Apprendi, 530 U.S. at 490. The Ninth Circuit has recognized that “the Supreme Court has not
10 overruled the Almendarez-Torres exception for prior convictions” and therefore the “obligation to
11 apply the Almendarez-Torres exception [remains] unless and until it is rejected by the Supreme
12 Court.” Butler, 528 F.3d at 643-44.

13 Here, Petitioner was sentenced to the upper term of three years based on several aggravating
14 factors – one of which is that he had numerous serious prior convictions. Petitioner has “at least a
15 dozen felony and misdemeanor convictions.” (Amend. Pet. Ex. C at 19.) Petitioner’s prior
16 convictions clearly fall into the “prior conviction” exception from Almendarez-Torres and Apprendi.
17 As such, Petitioner was not entitled to a jury determination of that aggravating circumstance.
18 Therefore, consistent with the Sixth Amendment, Petitioner’s prior convictions could be considered
19 by the trial court in imposing the upper term sentence on his burglary conviction without a jury
20 determination beyond a reasonable doubt.

21 The fact that the trial court also found additional aggravating circumstances – such as
22 Petitioner’s being on parole at the time of the offense and his poor performance on parole in the past
23 – does not alter this conclusion. “[U]nder California law, only one aggravating factor is necessary to
24 set the upper term as the maximum sentence.” Butler, 528 F.3d at 641. “[I]f at least one of the
25 aggravating factors on which the judge relied in sentencing [petitioner] was established in a manner
26 consistent with the Sixth Amendment, [petitioner’s] sentence does not violate the Constitution.” Id.
27 at 643. The trial court could, consistent with the Sixth Amendment, rely on Petitioner’s prior
28 convictions to increase the sentence without a jury determination beyond a reasonable doubt.

1 Consequently, Petitioner’s sentence is constitutional irrespective of “[a]ny additional factfinding”
2 with respect to additional aggravating circumstances. Id.¹⁵


3 Petitioner is not entitled to habeas relief on this claim.

4 **CONCLUSION**

5 For the foregoing reasons, the petition for a writ of habeas corpus is DENIED. The Clerk of
6 the Court shall enter judgment and close the file.

7 IT IS SO ORDERED.

8 DATED: 2/8/10


SAUNDRA BROWN ARMSTRONG
United States District Judge

9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

¹⁵As there was no error, the court need not reach respondent’s additional argument that any error was harmless.

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

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

GORMAN et al,
Plaintiff,

v.

KRAMER et al,
Defendant.

Case Number: CV07-02883 SBA
CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on March 8, 2010, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Michael Thomas Gorman Prisoner Id T80924
Sierra Conservation Center
5150 O'Byrnes Ferry Road
Jamestown, CA 95327

Dated: March 8, 2010

Richard W. Wieking, Clerk
By: LISA R CLARK, Deputy Clerk

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