

United States District Court
For the Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MILTON LEWIS, JR.,)	No. C 08-2337 CW (PR)
)	
Petitioner,)	ORDER DENYING PETITION FOR
)	WRIT OF HABEAS CORPUS
v.)	
)	
ROBERT HOREL, Warden,)	
)	
Respondent.)	
_____)	

INTRODUCTION

This is a federal habeas corpus action filed pursuant to 28 U.S.C. § 2254 by a pro se state prisoner. For the reasons set forth below, the petition is DENIED.

BACKGROUND

In 2003, a Humboldt County Superior Court jury convicted Petitioner of two counts of assault with a semiautomatic firearm, and found true two firearm enhancement allegations. Petitioner was sentenced to twenty-two years and four months in state prison. Petitioner sought, but was denied, relief on state direct and collateral review. This federal habeas petition followed.

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Evidence presented at trial demonstrates that Petitioner struck one person with a gun, and fired shots at others. The state appellate court summarized the facts as follows:

The assaults took place around 2:00 a.m. on December 16, 2000, in the parking lot of a Denny's restaurant in Eureka. The assailant hit David Moore in the neck with a gun (count one), and fired two shots in the direction of Keenin Ephriam, Cameron Matthews, Delvin Hudson, and Lawrence Bady (count two). Over 15 witnesses [including Timothy Hair, Keion Morgan, and Tyvonne Latimer] at the scene testified to what transpired. The issue in the case was whether [Petitioner] was the assailant.

. . . .

When they were interviewed by Parris later that night, Moore, Hair and Morgan were shown two six-photo lineups: [Petitioner] was pictured in photo two in lineup one; Latimer was shown in photo two in lineup two. Latimer testified that people often confuse him with [Petitioner], especially when their hair is braided. [Footnote removed.] Moore testified that he did not see his assailant's face. Moore identified Latimer as the assailant from the photo lineups, and told Parris that he had seen his assailant get into the white Altima at the club. Hair did not identify either [Petitioner] or Latimer from the photo lineups; he thought that the man depicted in photo six in one of the lineups resembled the assailant. Morgan identified [Petitioner] as the assailant from the lineups but declined to identify him in court. Morgan described [Petitioner] at trial as a "changed man," and testified that [Petitioner] was not the one who assaulted Moore.

(Ans., Ex. 6 at 1-2 & 3.)

As grounds for federal habeas relief, Petitioner alleges that (1) the prosecutor, by committing misconduct, violated his due process right to a fair trial; (2) he was denied his right to a fair and impartial jury; and (3) his sentence is unconstitutional.

STANDARD OF REVIEW

1
2 A federal writ of habeas corpus may not be granted with
3 respect to any claim that was adjudicated on the merits in state
4 court unless the state court's adjudication of the claims:
5 "(1) resulted in a decision that was contrary to, or involved an
6 unreasonable application of, clearly established Federal law, as
7 determined by the Supreme Court of the United States; or
8 (2) resulted in a decision that was based on an unreasonable
9 determination of the facts in light of the evidence presented in
10 the State court proceeding." 28 U.S.C. § 2254(d).
11

12 "Under the 'contrary to' clause, a federal habeas court may
13 grant the writ if the state court arrives at a conclusion
14 opposite to that reached by [the Supreme] Court on a question of
15 law or if the state court decides a case differently than [the
16 Supreme] Court has on a set of materially indistinguishable
17 facts." Williams v. Taylor, 529 U.S. 362, 412-13 (2000). "Under
18 the 'unreasonable application' clause, a federal habeas court may
19 grant the writ if the state court identifies the correct
20 governing legal principle from [the Supreme] Court's decisions
21 but unreasonably applies that principle to the facts of the
22 prisoner's case." Id. at 413. The only definitive source of
23 clearly established federal law under 28 U.S.C. § 2254(d) is in
24 the holdings of the Supreme Court as of the time of the relevant
25 state court decision. Id. at 412.
26
27
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1 If constitutional error is found, habeas relief is warranted
2 only if the error had a "'substantial and injurious effect or
3 influence in determining the jury's verdict.'" Penry v. Johnson,
4 532 U.S. 782, 795 (2001) (quoting Brecht v. Abrahamson, 507 U.S.
5 619, 638 (1993)).

6
7 DISCUSSION

8 I. Alleged Prosecutorial Misconduct

9 Petitioner claims that the prosecutor committed misconduct
10 when, during questioning of an investigating officer and in his
11 closing argument, he called attention to the fact that Petitioner
12 did not ask for a "live line-up" during the investigation.
13 (Pet., Addendum to P. & A. at 3-4.) By so doing, the prosecutor,
14 according to Petitioner, called attention to Petitioner's
15 exercise of his right to remain silent, an act that violated his
16 constitutional rights as defined in Griffin v. California, 380
17 U.S. 609 (1965), and Doyle v. Ohio, 426 U.S. 610 (1976).

18 The relevant facts are as follows:

19
20 After [Detective] Parris was cross-examined on his
21 lineup procedures, the prosecutor asked him, "Now, you
22 are aware, were you not, that prior to the time of the
23 preliminary hearing, [Petitioner] is entitled to demand
24 a live lineup?" When Parris said, "yes," the
25 prosecutor asked whether [Petitioner] had made any such
26 demand. Before Parris could answer, defense counsel
27 objected that this questioning "unfairly shifts the
28 burden," and "is akin . . . to a Doyle error." (Doyle
v. Ohio (1976) 426 U.S. 610 [] [prohibiting use of
defendant's postarrest, post-Miranda silence to impeach
the defense case].) Counsel moved to strike, and asked
for the jury to be admonished "that what [Petitioner]
says or does [in his defense] is not admissible."
After the jury was excused, counsel reiterated his

1 objection that the questioning was "tantamount to Doyle
2 error." The prosecutor argued that the questioning was
3 proper because it concerned [Petitioner's] appearance,
4 rather than his testimony, and thus did not involve his
5 right to remain silent. The prosecutor submitted that
6 he could comment on [Petitioner's] failure to produce
7 relevant evidence. The objection was overruled, the
8 motion to strike was denied, and there was no further
9 examination on the subject.

10 The defense maintained in closing argument that Latimer
11 had committed the assaults, and that the
12 identifications of [Petitioner] were suspect because
13 the photo lineups were tainted. Defense counsel noted
14 that [Petitioner] was the only one in the photos who
15 matched the descriptions of the assailant as someone
16 with braids tied back. [] He argued that only one
17 lineup, with [Petitioner's] photo and a recent photo of
18 Latimer, should have been used. He also observed that
19 the defense did not "need to prove anything."

20 The prosecutor responded, without objection, that "we
21 know from Detective Parris, you know, that [Petitioner]
22 has a right to a live lineup. Bring the witnesses in,
23 see them in the flesh. You don't have to -- there's
24 some concern about the validity of the identification.
25 You have a right to that. No such lineup was ever
26 requested. Parris didn't put one on because Parris was
27 satisfied with the -- with the accuracy of the
28 identifications that he had. No need for it. This --
this kind of argument where you're saying that you've
got a tainted lineup and all of this is something that
could have been cleared up early on and wasn't, that's
akin to me -- to like the Mendes (sic) brothers who
killed their parents and then come into court and say:
'Feel sorry for me because I'm -- I'm an orphan.[']"

(Ans., Ex. 6 at 10-11.)

The state appellate court rejected Petitioner's claim on
grounds that the prosecutor's comments were reasonable responses
to the central defense theory that Petitioner was not the
perpetrator:

[Defense] [c]ounsel argued to the jury that the two
lineups Parris used were inappropriately suggestive,

1 and that witnesses should have been shown a third
2 lineup with a photo of [Petitioner] and a more recent
3 one of Latimer. The prosecution could properly respond
4 to those criticisms by showing that [Petitioner] did
5 not pursue a potential remedy: he could have requested
6 a live lineup that might have eliminated his professed
7 concerns."

8 (Id. at 12.)

9 Griffin error occurs, and a defendant's privilege against
10 self-incrimination violated, where a prosecutor on his own
11 initiative asks the jury to draw an adverse inference from a
12 defendant's silence, or to treat the defendant's silence as
13 substantive evidence of guilt. Griffin, 380 U.S. at 615. While
14 it is proper for the prosecution to address the defense
15 arguments, a comment is impermissible if it is manifestly
16 intended to call attention to the defendant's failure to testify,
17 or is of such a character that the jury would naturally and
18 necessarily take it to be a comment on the failure to testify.
19 See Lincoln v. Sunn, 807 F.2d 805, 809 (9th Cir. 1987) (citing
20 United States v. Bagley, 772 F.2d 482, 494 (9th Cir. 1985).
21 Doyle error occurs when the prosecutor comments on or uses a
22 defendant's post-arrest silence after Miranda¹ warnings have been
23 given. Doyle, 426 U.S. at 611.

24 Here, Petitioner has not shown that the prosecutor committed
25 misconduct, or that his constitutional rights were violated under
26 Griffin or Doyle. The record reflects that the prosecutor made
27 permissible comments on the state of the evidence and on the
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¹ Miranda v. Arizona, 384 U.S. 436 (1966).

1 related arguments raised by the defense, rather than calling
2 attention to Petitioner's right to remain silent or declination
3 to testify. Petitioner raised the issue of the validity of his
4 identification, and thereby invited the prosecutor's response.
5 He cannot now plausibly argue that the prosecutor's comments were
6 manifestly intended to call attention to his right to remain
7 silent, or that the prosecutor was acting on his own initiative.
8 Petitioner's claim is DENIED.
9

10 II. Jury Selection

11 Petitioner claims that the trial court violated his rights
12 to Equal Protection by allowing the prosecutor to exclude the
13 sole prospective African-American juror. (Pet., Addendum to P.
14 & A. at 10.) The state appellate court rejected this claim,
15 concluding that "even assuming that a prima facie case of
16 discrimination had been established, the prosecution met the
17 burden of showing that the challenge was not predicated on group
18 bias." (Ans., Ex. 6 at 21.)
19

20 The relevant facts are as follows:

21 The juror [at issue] here, S. G., indicated that a
22 brother and cousin had been convicted of criminal
23 offenses. She did not know her brother's offense, but
24 said that he had failed to meet with his probation
25 officer. She said she had graduated from HSU with a
26 major in forestry, and had worked seasonally in the
27 Forest Service for 10 years as a file and forest
28 technician. She had worked part time as a security
guard at College of the Redwoods, and was currently a
direct care worker in a nursing home. She had some law
enforcement training at the Forest Service and College
of the Redwoods. She was trained to write citations in
areas she patrolled for the Forest Service, and wrote

1 tickets at College of the Redwoods. The training was
2 "really just the basics like, um, how to maintain your
3 appearance, your stance . . . who in the hierarchy, who
4 would you call on if the situation would rise to
5 something out of my hands." Her work had not led to
6 involvement in a criminal case; a confrontation she had
7 with someone while working at the Forest Service was
8 resolved without any charges being brought. She
9 described herself as "unbiased" and "open minded."
10 When asked by defense counsel whether she thought she
11 would be a good juror, she said, "Yes. I know I
12 would."

13 The first of the six peremptory challenges the
14 prosecutor used was against S. G. The defense brought a
15 Wheeler² motion, indicating that S. G. was the only
16 African-American "in the entire venire," and arguing
17 that she had "expressed no reservations about her
18 ability to be fair. She's got experience, family
19 related experience with the criminal justice system.
20 She's worked in a, sounds like, a quasi law enforcement
21 capacity and had some basic law enforcement training.
22 She's well educated." Defense counsel could "think of
23 no reason why a peremptory challenge ought to be
24 granted."

25 . . . [In response to the Wheeler motion] [t]he
26 prosecutor noted that S. G.'s brother and cousin had
27 been convicted of crimes, and "found [it] highly
28 unusual" that she was unaware of the charges against
29 the brother. He admitted that the potential jurors
30 were not "excited about the voir dire process," but
31 noticed that S. G. had her arms crossed before any
32 questions were asked and "appeared to be especially
33 bored." He saw that S. G. sat apart from the rest of
34 the jurors during a break; that behavior and the
35 confrontation she reported having at the Forest Service
36 made him worried that she would not get along with the
37 other jurors. He found S.G.'s claim to law enforcement
38 training somewhat "self-inflating," and suspected that
39 she had been fired from the Forest Service because she
40 no longer worked there despite having a forestry
41 degree. He thought that defense counsel had a rapport
42 with S. G. and that she was "overly impressed" with

2 In California, a party who believes his opponent is using his peremptory challenges to strike jurors on grounds of group bias alone may raise the point by way of a timely motion under People v. Wheeler, 22 Cal. 3d 258, 280 (1978).

1 defense counsel; he worried that he might "have
2 offended [S. G.] in some fashion." He pointed out that
3 many prosecution witnesses, as well as [Petitioner],
4 were African-Americans.

5 Defense counsel replied that he had not observed
6 anything suggesting that S. G. would be unfit to serve
7 on the jury. Counsel thought much of what the
8 prosecutor said was "sheer speculation"; S. G., for
9 example, might have left the Forest Service voluntarily
10 and not been fired. Counsel submitted that S. G. was
11 attentive, honest, and articulate in voir dire. It was
12 "transparent" to him that the prosecutor did not want
13 an African-American juror in a case against an
14 African-American defendant.

15 The court ruled that the defense had not made a prima
16 facie case that S. G. was excused because of her race,
17 and that the prosecutor had in any event given valid
18 neutral reasons for the challenge. The court found the
19 defense reasoning on the matter "conclusory," and
20 thought it not at all unusual that the prosecution
21 would want to remove someone, regardless of race, whose
22 brother was having problems on probation. The court
23 also observed that it did not find the prosecutor's
24 voir dire of S. G. "in any way disproportionate to the
25 other people. He didn't have it already set up."

26 (Id. at 20-21.)

27 The use of peremptory challenges by either the prosecution
28 or defendant to exclude cognizable groups from a petit jury may
violate the Equal Protection Clause. See Georgia v. McCollum,
505 U.S. 42, 55-56 (1992). In particular, the Equal Protection
Clause forbids the challenging of potential jurors solely on
account of their race. See Batson v. Kentucky, 476 U.S. 79, 89
(1986). Batson permits prompt rulings on objections to
peremptory challenges pursuant to a three-step process. First,
the defendant must make out a prima facie case that the
prosecutor has exercised peremptory challenges on the basis of

1 race "by showing that the totality of the relevant facts gives
2 rise to an inference of discriminatory purpose." Id. at 93-94.
3 Second, if the requisite showing has been made, the burden shifts
4 to the prosecutor to articulate a race-neutral explanation for
5 striking the jurors in question. Id. at 97; Wade v. Terhune, 202
6 F.3d 1190, 1195 (9th Cir. 2000). Finally, the trial court must
7 determine whether the defendant has carried his burden of proving
8 purposeful discrimination. Batson, 476 U.S. at 98; Wade, 202
9 F.3d at 1195. A federal habeas court need not dwell on the first
10 step of the Batson analysis if the matter has proceeded to the
11 second or third step. "Once a prosecutor has offered a
12 race-neutral explanation for the peremptory challenges and the
13 trial court has ruled on the ultimate question of intentional
14 discrimination, the preliminary issue of whether the defendant
15 has made a prima facie showing becomes moot." Hernandez v. New
16 York, 500 U.S. 352, 359 (1991).

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19 To fulfill its duty, the court must evaluate the
20 prosecutor's proffered reasons and credibility in light of the
21 totality of the relevant facts, using all the available tools
22 including its own observations and the assistance of counsel.
23 Mitleider v. Hall, 391 F.3d 1039, 1047 (9th Cir. 2004). In
24 evaluating an explanation of racial neutrality, the court
25 must keep in mind that proof of discriminatory intent or purpose
26 is required to show a violation of the Equal Protection Clause.
27
28 See Hernandez, 500 U.S. at 355-62. It also should keep

1 in mind that a finding of discriminatory intent turns largely on
2 the trial court's evaluation of the prosecutor's credibility.
3 Rice v. Collins, 546 U.S. 333, 340-42 (2006).

4 The findings of the state trial court on the issue of
5 discriminatory intent are findings of fact entitled to the
6 presumption of correctness in federal habeas review, see Purkett
7 v. Elem, 514 U.S. 765, 769 (1995), as are the findings of the
8 state appellate court. See Mitleider, 391 F.3d at 1050; Williams
9 v. Rhoades, 354 F.3d 1101, 1108 (9th Cir. 2004). Under AEDPA,
10 this means that a state court's findings of discriminatory intent
11 are presumed sound unless a Petitioner rebuts the presumption by
12 clear and convincing evidence. Miller-El, 545 U.S. at 240. A
13 federal habeas court may grant habeas relief only "if it was
14 unreasonable to credit the prosecutor's race-neutral explanations
15 for the Batson challenge." Rice, 546 U.S. at 338-41.

16 Applying these legal principles to the instant matter, the
17 Court concludes that Petitioner has not rebutted the presumption
18 that the state court's conclusion was a reasonable one, as an
19 analysis under Batson and other relevant case law demonstrates.
20 The Court need not consider the first step of the Batson analysis
21 because (a) the prosecutor offered the racially-neutral reasons
22 of S. G.'s brother's conviction and his problems with probation
23 and her physical gesture of lack of interest, and (b) the trial
24 court ruled on the ultimate question of intentional
25 discrimination. With respect to the second Batson step, the
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1 Court finds nothing in the record to disprove the prosecutor's
2 stated reasons. As the state appellate court found, the
3 prosecutor's stated reasons were based on statements made by S.
4 G., and on the prosecutor's observations of the juror's physical
5 demeanor in court. Because the transcript contains only the
6 words spoken in court, this Court must defer to the prosecutor's
7 description of S. G.'s physical behavior. As to the third Batson
8 step which queries whether there was intentional discrimination,
9 Petitioner has not shown clear and convincing evidence to rebut
10 the presumption that the trial court's determination was correct,
11 or shown why this Court should favor Petitioner's interpretation
12 of the record over the trial court's credibility determination.
13

14 A comparative juror analysis, a review required by Green v.
15 Lamarque, 532 F.3d 1028, 1031 (9th Cir. 2008) where, as here, the
16 trial and appellate courts did not engage in such a review, does
17 not change this conclusion. The prosecutor relied not only on
18 S. G.'s answers regarding her life experiences, her brother, and
19 her experience in law enforcement, but also on her physical
20 demeanor. On that last point, the transcript contains only the
21 verbal responses of the jurors, not any description of the other
22 jurors' demeanor, let alone whether their demeanor was similar to
23 S. G.'s. Also, Petitioner does not dispute the prosecutor's
24 description of S. G.'s demeanor. Furthermore, Petitioner does
25 not point to any other juror who was similarly situated to S. G.
26 in responses and demeanor, let alone one that was treated
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1 differently, nor does a review of the record disclose such a
2 juror. Taking these facts into consideration, the Court
3 concludes that Petitioner has not shown evidence that
4 non-African-American jurors who were similar to S. G. in their
5 demeanor, and in their responses, were treated differently.
6 Accordingly, Petitioner's claim is DENIED.

7
8 III. Sentencing

9 Petitioner claims that the trial court violated his
10 rights under the Sixth Amendment when it imposed (1) the
11 aggravated sentence for the assault conviction, and (2) the
12 aggravated sentence enhancement for the personal use of a firearm
13 finding. (Pet., P. & A. at 26-28.) The state appellate court
14 did not address these claims in its written opinion.

15
16 The trial court sentenced Petitioner as follows. It imposed
17 the upper term of nine years for the second count of assault on
18 grounds that the circumstances in aggravation outweighed those in
19 mitigation -- in fact, the trial court found no circumstances in
20 mitigation. (Ans., Ex. 2, Vol. 6 at 1990-91.) The circumstances
21 cited in aggravation were: the crime involved great violence and
22 threat of great bodily harm, Petitioner was on probation at the
23 time the offense occurred, Petitioner's performance on parole had
24 been unsatisfactory, and Petitioner had not accepted
25 responsibility for his crime. (Id. at 1991.) The trial court
26 also imposed the upper term of ten years for the personal use of
27 a firearm enhancement, which was attached to the second count of
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1 assault, also on grounds that the aggravating circumstances
2 outweighed the mitigating ones. (Id.) The firearm enhancement
3 allegation had been found true by the jury. (Id.)

4 The Sixth Amendment requires that "[o]ther than the fact of
5 a prior conviction, any fact that increases the penalty for a
6 crime beyond the prescribed statutory maximum must be submitted
7 to a jury, and proved beyond a reasonable doubt." Apprendi v.
8 New Jersey, 530 U.S. 466, 490 (2000). The "statutory maximum"
9 discussed in Apprendi is the maximum sentence a judge could
10 impose based solely on the facts reflected in the jury verdict or
11 admitted by the defendant; in other words, the relevant
12 "statutory maximum" is not the sentence the judge could impose
13 after finding additional facts, but rather the maximum that could
14 be imposed without any additional findings. Blakely v.
15 Washington, 542 U. S. 296, 303-04 (2004). In California, the
16 middle term is deemed the statutory maximum, and thus the
17 imposition of the upper term, such as in the instant case, can
18 implicate a criminal defendant's Apprendi rights. See Cunningham
19 v. California, 549 U.S. 270, 293 (2007).

20 In California, sentencing courts are to consider various
21 aggravating and mitigating factors in determining whether to
22 impose an upper term. See Cal. Rules of Court 4.421 & 4.423. A
23 single aggravating factor is sufficient to authorize a California
24 trial court to impose the upper term. People v. Osband, 13 Cal.
25 4th 622, 728 (1996). Aggravating factors include: the crime
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1 involved great violence or threat of great bodily harm, see Cal.
2 Rules of Court 4.421(a)(1), the defendant was on probation or
3 parole when the crime was committed, and the defendant's
4 performance on parole was unsatisfactory, see id. at (b)(3)-(4).

5 Petitioner's upper term sentence for the assault conviction
6 appears to be erroneous under Cunningham. Specifically, the
7 factors used by the trial court were not based on facts admitted
8 by Petitioner or reflected in the jury's verdict, but rather on
9 the trial court's independent findings. The imposition of the
10 upper term, increasing Petitioner's sentence beyond the statutory
11 maximum, was based on these factors. However, Blakely and
12 Apprendi sentencing errors are subject to a harmless error
13 analysis. Washington v. Recuenco, 548 U.S. 212, 221 (2006).
14 Applying Brecht v. Abrahamson, 507 U.S. 619 (1993), the Court
15 must determine whether "the error had a substantial and injurious
16 effect" on Petitioner's sentence. Hoffman v. Arave, 236 F.3d
17 523, 540 (9th Cir. 2001) (internal quotation marks omitted).
18 Under that standard, the Court must grant relief if it is in
19 "grave doubt" as to whether a jury would have found the relevant
20 aggravating factors beyond a reasonable doubt. O'Neal v.
21 McAninch, 513 U.S. 432, 436 (1995). Grave doubt exists when, "in
22 the judge's mind, the matter is so evenly balanced that he feels
23 himself in virtual equipoise as to the harmlessness of the
24 error." Id. at 435.

25 The Ninth Circuit has held that a sentencing court's
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1 determination that an offense was committed while the defendant
2 was on probation does not come within the prior offense
3 exception, Butler v. Curry, 528 F.3d 624, 641 (9th Cir. 2008),
4 but also has concluded that the Butler holding is not clearly
5 established Supreme Court law, so cannot be the basis for federal
6 habeas relief, Kessee v. Mendoza-Powers, 574 F.3d 675, 679 (9th
7 Cir. 2009).

8
9 Applying these legal principles to the instant matter, the
10 Court concludes that the error was harmless. In sum, sufficient
11 evidence exists in the record to support a conclusion that a jury
12 would have found the relevant aggravating factors beyond a
13 reasonable doubt. Petitioner beat one victim with a gun, and
14 shot at a crowd of persons. On such evidence, the Court does not
15 have "grave doubts" whether the jury would have found the
16 aggravating factor that the crime involved great violence and
17 great bodily harm. Furthermore, Petitioner has never disputed
18 the trial court's assertion that he was on probation at the time
19 of the offense. Again, on such evidence, the Court does not have
20 "grave doubts" as to whether a jury would have found that
21 Petitioner was on probation at the time of the offense true
22 beyond a reasonable doubt. Accordingly, the Court must deny
23 Petitioner habeas relief on his sentencing claim regarding his
24 assault conviction.
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27 Petitioner's claim as to his sentencing enhancement is
28 without merit. The trial court imposed the upper term of ten

1 years based on undisputed facts in the record which comport with
2 the relevant aggravating factor in Cal. Rule of Court
3 4.421(b)(1), which states: "defendant has engaged in violent
4 conduct that indicates a danger to society." More specifically,
5 the trial court relied on Petitioner's age, his history of
6 engaging in violent conduct, which indicated that he was a
7 serious danger to others, his substantial juvenile criminal
8 history, his commitment to the California Youth Authority, his
9 possession of loaded pistol, and his felony conviction for
10 discharging a firearm at an occupied vehicle. (Ans., Ex. 2, Vol.
11 6 at 1991.) On such a record of serious and increasing
12 criminality, the Court does not have "grave doubts" that a jury
13 would have found the aggravating factor that Petitioner posed a
14 danger to society true beyond a reasonable doubt. Accordingly,
15 Petitioner's Apprendi rights were not violated.

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18 Petitioner's sentencing claims are DENIED.

19 CONCLUSION

20 The state court's denial of Petitioner's claims did not
21 result in a decision that was contrary to, or involved an
22 unreasonable application of, clearly established federal law, nor
23 did it result in a decision that was based on an unreasonable
24 determination of the facts in light of the evidence presented in
25 the state court proceeding. Accordingly, the petition is DENIED.

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27 A certificate of appealability will not issue. Reasonable
28 jurists would not "find the district court's assessment of the

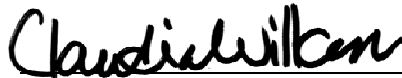
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constitutional claims debatable or wrong." Slack v. McDaniel,
529 U.S. 473, 484 (2000). Petitioner may seek a certificate of
appealability from the Court of Appeals.

The Clerk shall enter judgment in favor of Respondent, and
close the file.

IT IS SO ORDERED.

DATED: 3/28/2011



CLAUDIA WILKEN
United States District Judge

1 UNITED STATES DISTRICT COURT
2 FOR THE
3 NORTHERN DISTRICT OF CALIFORNIA
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7 MILTON LEWIS JR,

Case Number: CV08-02337 CW

8 Plaintiff,

CERTIFICATE OF SERVICE

9 v.

10 ROBERT HOREL et al,

11 Defendant.
12 _____/

13
14 I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District
15 Court, Northern District of California.

16 That on March 28, 2011, I SERVED a true and correct copy(ies) of the attached, by placing said
17 copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing
18 said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery
19 receptacle located in the Clerk's office.
20

21 Milton J. Lewis T48953
22 Pelican Bay State Prison
23 P.O. Box 7500
24 Crescent City, CA 95531

25 Dated: March 28, 2011

26 Richard W. Wieking, Clerk
27 By: Nikki Riley, Deputy Clerk
28