

SEP 29 2010

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

AUGUSTINE PENA-SILVA,

Petitioner - Appellant,

v.

K. PROSPER, Warden,

Respondent - Appellee.

No. 08-17637

D.C. No. 2:06-cv-02682-ALA

MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Arthur L. Alarcón, Circuit Judge, Presiding

Submitted September 13, 2010**

Before: SILVERMAN, CALLAHAN, and N.R. SMITH, Circuit Judges.

California state prisoner Augustine Pena-Silva appeals from the district court's judgment denying his 28 U.S.C. § 2254 habeas petition. We have jurisdiction under 28 U.S.C. § 2253, and we affirm.

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Pena-Silva contends that his Sixth Amendment rights were violated pursuant to *Blakely v. Washington*, 542 U.S. 296 (2004), and *Cunningham v. California*, 549 U.S. 270 (2007), when the state trial court engaged in fact-finding to impose an upper-term sentence.

At sentencing, the trial court made the findings that Pena-Silva was on parole at the time of the crimes and that his prior adult convictions were numerous and of increasing seriousness. The California Court of Appeal's rejection of Pena-Silva's Sixth Amendment claim based on the prior conviction exception under *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), was not "contrary to, or . . . an unreasonable application of, clearly established Federal law, as determined by the Supreme Court." 28 U.S.C. § 2254(d)(1). *See Kesse v. Mendoza-Powers*, 574 F.3d 675, 678-79 (9th Cir. 2009).

Because, under *Kesse*, the state court's interpretation of the prior conviction exception "does not contravene AEDPA standards," *id.* at 678, Pena-Silva's challenge to the district court's harmless error analysis is moot.

AFFIRMED.