

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JUL 03 2012

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

DAMION DAVIS,

Petitioner - Appellant,

v.

DOMINGO URIBE, Jr., Warden and
BILL LOCKYER,

Respondents - Appellees.

No. 11-55747

D.C. No. 2:06-cv-07315-VBF

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Valerie Baker Fairbank, District Judge, Presiding

Submitted June 26, 2012**

Before: SCHROEDER, HAWKINS, and GOULD, Circuit Judges.

California state prisoner Damion Davis 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).

Davis contends that the state court's selection of an upper-term sentence on the basis of a fact not found by the jury, namely, that he was on parole at the time of the burglary in this case, was not rendered harmless by the probation report's uncontested representation that Davis was on parole at the time of the crime. This contention fails. Upon review of the record, we are not left in grave doubt that a jury would have found beyond a reasonable doubt that Davis was on parole at the time that he committed the crime in this case; thus, the district court correctly determined that the *Apprendi* error was harmless. *See Estrella v. Ollison*, 668 F.3d 593, 598-600 (9th Cir. 2011).

AFFIRMED.