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7
8 **UNITED STATES DISTRICT COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**
10 **WESTERN DIVISION**

11 **MICHAEL BANYARD,**

12 **Petitioner.**

13 **v.**

14 **ERNEST ROE, Warden,**

15 **Respondent.**

) **CV 99-11018-JSL**

) **PETITIONER'S SUPPLEMENTAL**
) **BRIEF IN SUPPORT OF SECOND**
) **AMENDED PETITION FOR WRIT OF**
) **HABEAS CORPUS**

) **Court: Hon. J. Spencer Letts**

) **Date: [TO BE SET]**

) **Time: [TO BE SET]**

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19 **Petitioner Michael Banyard, by and through his counsel of record, Gregory**
20 **Nicolaysen, hereby files Petitioner's Supplemental Brief in Support of the Second**
21 **Amended Petition for Writ of Habeas Corpus.**

22
23 **DATED: August 19, 2002**

Respectfully submitted,

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25
26 **GREGORY NICOLAYSEN**
27 **Counsel for Petitioner,**
28 **Michael Banyard**

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I

3 INTRODUCTION

4 Petitioner Michael Banyard (“Banyard”) was sentenced to 25 years to life
5 imprisonment under the California “three strikes” law. Banyard unsuccessfully challenged
6 his sentence on direct and collateral review in the California courts.

7 After exhausting his state court remedies, Banyard petitioned this Court for habeas
8 relief under 28 U.S.C. § 2254. The operative petition is Banyard’s *pro se* Second Amended
9 Petition for Writ of Habeas Corpus (“SAP”).

10 In the SAP, Banyard claimed *inter alia* that his sentence is invalid because his prior
11 assault conviction under California Penal Code § 245 (a) should not have been counted
12 under the California “three strikes” law. (SAP at 6-7)

13 After an initial round of briefing,¹ a Report and Recommendation of United States
14 Magistrate Judge (the “Report”) issued. The Report found that Banyard’s assault
15 conviction was properly determined to be a “strike” and recommended that this Court
16 dismiss Banyard’s claim with prejudice. (Report at 13) This Court deferred ruling on the
17 Report pending further briefing and appointed undersigned counsel to represent Banyard
18 in these proceedings.

19 At a July 9, 2002 status conference, the Court ordered the parties to re-brief the
20 following issue: whether Petitioner’s assault conviction under California Penal Code § 245
21 (a) properly constituted a strike under the California Three Strikes Law.

22 As demonstrated *infra*, the state court’s decision that Banyard’s conviction under
23 Penal Code § 245 (a) constituted a “strike” was contrary to, or involved an unreasonable
24 application of, clearly established federal law, and was based on an unreasonable
25 determination of the facts in light of the evidence presented in the state court proceeding.

26 _____
27 ¹ All of Banyard’s previously filed *pro se* pleadings on this matter are hereby adopted
28 and incorporated by reference. For purposes of judicial economy, Banyard’s arguments, while
preserved, are not restated herein.

1 Accordingly, the Report should not be adopted and the SAP should be granted.

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3 II
4 ARGUMENT

5
6 A. LEGAL STANDARDS

7 1. Federal Habeas Relief

8 Banyard’s federal habeas petition was filed after the enactment of the
9 Antiterrorism and Effective Death Penalty Act (“AEDPA”). Therefore, the provisions of the
10 AEDPA apply to the SAP. Lindh v. Murphy, 521 U.S. 320, 335, 117 S.Ct. 2059, 2068 (1997).

11 Under the AEDPA, federal habeas relief is available if a state court’s
12 adjudication of the claim on the merits resulted in a decision that was: (1) contrary to, or
13 involved an unreasonable application of, clearly established federal law; or (2) based on an
14 unreasonable determination of the facts in light of the evidence presented in the state court
15 proceeding. 28 U.S.C. § 2254 (d).

16 A state court decision is “contrary to” Supreme Court authority if the state court
17 (1) reached a conclusion opposite to Supreme Court rationale on a question of law or (2)
18 decided a case differently than the Supreme Court on a set of materially indistinguishable
19 facts. Williams v. Gates, 2002 U.S. Dist. Lexis 9502 (N. Dist. Cal., May 8, 2002) (citing
20 Williams v. Taylor, 529 U.S. 362, 120 S.Ct. 1495, 1518, 146 L.Ed.2d 389 (2000)).

21 A state court decision is an “unreasonable application of” Supreme Court
22 authority if it correctly identifies the legal principle from the high Court decision but
23 “unreasonably applies that principle to the facts of petitioner’s case.” Id.

24 There is a presumption of correctness to any factual determination made by a
25 state court. A petitioner may overcome this presumption with clear and convincing evidence.
26 Id.

1 **2. California “Three Strikes” Law**

2 Under Cal. Penal Code § 667 (the “three strikes” law), a defendant convicted of
3 a felony who has two qualifying prior convictions for “serious felonies” receives a minimum
4 sentence of 25 years to life. Monge v. California, 524 U.S. 721, 724, 118 S.Ct. 2246, 141 L.Ed.2d
5 615 (1998). California law provides a criminal defendant with a statutory right to have a jury
6 determine whether he has suffered convictions for prior felony offenses. California Penal Code
7 § 1025; Dillard v. Roe, 2001 U.S. App. Lexis 9730 (9th Cir. 2001).

8 “Serious” felonies for purposes of the three strikes law are enumerated in Cal.
9 Penal Code § 1192.7. Among them are Penal Code §§ 211 (robbery) and 245 (a) (assault), both
10 of which Banyard had been previously convicted. However, a violation of Penal Code § 245
11 (a) (1) or § 245 (a) (2) constitutes a “strike” only if it is proven that in the course of the offense,
12 the defendant personally inflicted great bodily injury on a person other than an accomplice
13 or personally used a firearm or a dangerous or deadly weapon. Penal Code § 1192.7.

14
15 **B. BANYARD’S CONVICTION FOR ASSAULT UNDER CALIFORNIA PENAL CODE**
16 **§ 245 (a) DID NOT CONSTITUTE A “STRIKE” UNDER THE CALIFORNIA**
17 **THREE STRIKES LAW**

18 **1. This Court Should Clarify the Record As to Whether California Penal Code**
19 **§ 245 (a) (1) or § 245 (a) (2) Applies**

20 As a threshold matter, the record is unclear whether Banyard was convicted of
21 violating subsection (1) or (2) of California Penal Code § 245 (a). This Court should
22 independently review the record and determine which subsection of the felony assault statute
23 applies.

24 The SAP maintains that Banyard’s assault conviction was for subsection (1)
25 (assault by means likely to produce great bodily injury). The Magistrate’s Report and
26 Recommendation (“Report”) was based upon the government’s position that the conviction
27 was for subsection (2) (assault with a firearm).

28 In the earlier round of briefing, the government argued the alternative

1 applicability of subsection (1). Various lower court documents lodged with this Court or
2 attached as exhibits to previous pleadings herein appear to contradict one another with regard
3 to the applicable subsection.²

4 As discussed *supra* at 4, either subsection may qualify as a “strike” if certain
5 showings are made with regard to the personal conduct of the defendant. However, there
6 was insufficient evidence that Banyard’s conduct qualified as a “strike” under either
7 subsection.

8 2. Under § 245 (a) (1), Banyard’s Assault Conviction Did Not Properly
9 Constitute a “Strike” Under the California Three Strikes Law

10 To constitute a “strike” under subsection (1) of the felony assault statute, the
11 prosecution must prove that a defendant personally inflicted great bodily injury on a
12 person other than an accomplice. There was insufficient evidence that Banyard personally
13 inflicted such injury.

14 Although abrasions, lacerations and extensive bruising may be evidence of
15 great bodily injury,³ the minor injuries of the woman who said Banyard assaulted her did
16 not even rise to that level. She testified that Banyard hit her on the head, resulting in
17 temporary loss of consciousness and requiring only three stitches. (Govt’s Lodged Doc. No.
18 3 at 8-9). At the time of the preliminary hearing, which was shortly after the incident, the
19 woman had occasional headaches and pain at the back of her head. (Govt’s Lodged Doc. 3
20 at 10).

21 Such minor maladies do not even approach the level of “significant” or
22 “substantial” physical injuries required for liability under § 245 (a) (1). See People v.

24
25 ² The Information charged Banyard with violating § 245 (a) (1), but the (1) appears to
26 have been delineated and replaced with a handwritten (2). The transcripts of the post-trial
27 proceedings on the drug conviction indicate that Banyard admitted having two prior convictions: one
28 for robbery (Penal Code § 211) and one for assault with a firearm § 245 (a) (2).

³ People v. Escobar, 3 Cal.4th 740, 750, 12 Cal. Rptr.2d 586 (1992); People v. Jung,
71 Cal. App.4th 1036, 1042, 84 Cal. Rptr.2d 5 (1999).

1 Escobar, 3 Cal.4th 740, 750, 12 Cal. Rptr.2d 586 (1992) (quoting CALJIC No. 17.20, which
2 defines great bodily injury as “significant or substantial bodily injury or damage . . . [not]
3 trivial or insignificant injury or moderate harm”). Three stitches and occasional
4 headaches, as complained of by the woman assaulted by Banyard, constitute at most
5 moderate harm.

6 True cases of great bodily injury involve far more serious harm. See, e.g., People v.
7 Escobar, 3 Cal. 4th at 743-745, in which the female victim was “grabbed,” “slapped,”
8 “dragged,” “pulled by the hair,” “[thrown] onto the cement ground,” and raped. The
9 victim suffered “large, bloody cuts on her knees”; “multiple abrasions to her thighs, knees,
10 hips and elbows”; and “raw and bloody asphalt burns and bruises over various parts of her
11 body.” Her neck hurt so badly that she could not move it and vaginal pain prevented her
12 from walking for more than a week.

13 In another case in which great bodily injury was proven, the victim was tortured,
14 greatly disfigured and scarred. People v. Jung, 41 Cal.App.4th 1036, 1042, 84 Cal. Rptr.2d
15 5 (1999) (pain from cigarette burns, tattooing, Ben-Gay and rubbing alcohol applications,
16 beating, kicking and biting constituted great bodily injury). Jung observed that in
17 assessing great bodily injury, the analysis should focus on the perpetrator’s actions and
18 intent rather than on the victim’s injuries. “The emphasis is rightly placed on the
19 perpetrator, one who for revenge or other prohibited purpose, inflicts great bodily injury
20 on the victim and intends to cause the victim severe pain and suffering.” People v. Jung, 41
21 Cal.App.4th at 1043.

22 Banyard’s conduct – striking the woman without more – did not evince any such
23 intent or result. Therefore, there was insufficient evidence that he personally inflicted great
24 bodily injury.

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1 **3. Under § 245 (a) (2), Banyard’s Assault Conviction Did Not Properly**
2 **Constitute a “Strike” Under the California Three Strikes Law**

3 To constitute a “strike” under subsection (2) of the felony assault statute, the
4 prosecution must prove that a defendant personally used a firearm or a dangerous or
5 deadly weapon. The only evidence that Banyard used such a weapon was the testimony of
6 the woman referenced in the preceding section. She stated that Banyard pulled out a gun
7 and struck her in the head. (Gov’t Lodged Doc. 3 at 7)

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9 **C. THE STATE COURT’S FLAWED ADJUDICATION OF THE “THREE**
10 **STRIKES” ISSUE WARRANTS FEDERAL HABEAS RELIEF**

11 **1. The State’s Adjudication of Banyard’s Claim Resulted in a Decision That**
12 **Was Based on an Unreasonable Determination of the Facts in Light of the**
13 **Evidence Presented in the State Court Proceeding**

14 Under California statutory law, “the question whether or not [a defendant]
15 has suffered [a] previous conviction must be tried to a jury, or in the case of a plea of
16 guilty, by a jury impaneled for that purpose . . .” People v. Monge, 16 Cal.4th 826, 833
17 (1997) (citing Penal Code § 1025).

18 The transcripts⁴ of the post-trial proceedings on the drug conviction indicate
19 that Banyard admitted having two prior convictions: one for robbery (Penal Code § 211)
20 and one for assault with a firearm § 245 (a) (2).

21 The California Court of Appeal rejected Banyard’s claim that his admissions
22 were insufficient to support the allegations that he had two prior convictions for serious or
23 violent felonies under the “three strikes” law. (Return to SAP, Exh. B at 22-23) The
24 Supreme Court of California affirmed that ruling in what is known in state court parlance
25 as “postcard denial” (a terse ruling on the merits without addressing the issues).

26 _____
27 ⁴ Relevant pages of the reporter’s transcripts (hereinafter “R.T.”) of Banyard’s drug
28 trial (the alleged third strike) were previously lodged with this Court.

1 _____ Because the state Supreme Court provided no additional enlightenment, this
2 Court on federal habeas review must assess the validity of the California Court of Appeal
3 decision. _____

4 2. The State’s Adjudication of Banyard’s Claim Resulted in a Decision That
5 Was Contrary to, or Involved an Unreasonable Application of, Clearly
6 Established Federal Law, as Determined by the U.S. Supreme Court

7 Banyard was convicted of a felony drug count at trial, which was allegedly
8 his third “strike.” He then admitted two prior serious felony convictions, one of them the
9 Section 245(a) (2) count (assault with a firearm) at issue herein. The trial court’s reliance
10 on that admission violated Banyard’s right to due process of law.

11 The Magistrate’s Report relied upon United States v. Broce, 488 U.S. 563,
12 569, 109 S.Ct. 757, 762 (1989) for the proposition that a guilty plea “comprehend(s) all of
13 the factual and legal elements necessary to sustain a binding, final judgment of guilt and a
14 lawful sentence.” (Report at 13) _

15 _____ In so quoting Broce, the Report unreasonably applied clearly established
16 Supreme Court law. Broce and its progeny addressed guilty pleas to substantive offenses.
17 That was not the scenario here. Banyard’s admission was to having been convicted of two
18 prior serious felonies. He did not admit that those priors legally constituted “strikes.”

19 Therefore, Banyard’s mere admission of the fact of his prior conviction was
20 insufficient evidence to prove that his assault conviction under § 245 (a) legally constituted
21 a “strike.” The latter is a legal determination reserved for the courts and, more specifically,
22 for the jury.

23 In affirming the trial judge’s determination that Banyard’s § 245 (a) prior
24 was a “strike,” the California appellate court ignored clearly established U.S. Supreme
25 Court law. The Sixth Amendment to the United States Constitution provides that “in all
26 criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an
27 impartial jury.” The Fourteenth Amendment states that no one shall be deprived of life or
28 liberty without “due process of law.”

1 Taken together, these amendments require criminal convictions to rest upon
2 a jury determination that the defendant is guilty of every element of the crime with which
3 he is charged, beyond a reasonable doubt. Consequently, if the trial judge, rather than the
4 jury, makes the finding as to one of the elements of the charged crime, the defendant’s
5 constitutional rights have been violated.” United States v. Gaudin, 515 U.S. 506, 509-510,
6 115 S.Ct. 2310, 132 L.Ed.2d 444 (1970) (citations omitted).

7 _____ Personal use of a firearm – the prong of the “three strikes” law under which
8 Banyard was purportedly sentenced with regard to the § 245 (a) prior – is an element of the
9 offense, not merely a sentencing factor. See Dillard v. Roe, 2001 U.S. App. Lexis 9730 (9th
10 Cir. 2001). As the Ninth Circuit stated in Dillard, the provisions of California Penal Code
11 § 667 “mandate[] the precise type of ‘finding’ that the [U.S. Supreme Court] indicated
12 should be classified as an ‘element’ rather than a ‘sentencing factor’ . . . the finding that
13 the defendant ‘personally used a firearm’ in the commission of the underlying offense [] is a
14 fact that ‘alters the maximum penalty for the crime committed’” (citing McMillan v.
15 Pennsylvania, 477 U.S. 79, 84, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986)).

16 Under that rationale, the Ninth Circuit ruled that a finding that a defendant
17 “personally used a firearm” in the commission of the offense “creates a separate offense
18 calling for a separate penalty.” Because that additional fact (use of a firearm)
19 “transform(s) the offense . . . into a different, more serious offense that exposes [the
20 defendant] to greater and additional punishment,” the Court ruled that Dillard’s
21 fundamental constitutional rights were violated and granted him habeas relief.

22 Just as the defendant’s substantial rights were violated in Dillard, so were they in
23 the case at bar. Therefore, Banyard’s constitutional rights were violated and habeas relief
24 is warranted.

1 **D. THE VIOLATIONS OF BANYARD’S SIXTH AND FOURTEENTH**
2 **AMENDMENT RIGHTS WERE NOT HARMLESS ERROR**

3 **Because Banyard litigates this federal constitutional rights violation in a habeas**
4 **proceeding, it is subject to a harmless error analysis under Brecht v. Abrahamson, 507 U.S.**
5 **619, 637, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993). See Bains v. Cambra, 204 F.3d 964, 977**
6 **(Brecht standard should apply uniformly in all federal habeas corpus cases under § 2254).**
7 **Clearly the state court’s determination that Banyard’s prior conviction for § 245 (a)**
8 **constituted a “strike” had a “harmful and injurious result” on the outcome of his case:**
9 **Banyard received a harsh sentence of 25 years to life imprisonment.**

10 **Therefore, under Brecht, the error was not harmless. Rather, the constitutional**
11 **error resulted in actual prejudice to Banyard and rendered his sentence fundamentally**
12 **unfair. See, e.g., Dillard v. Roe, 2001 U.S. App. Lexis 9730 (9th Cir. 2001) (affirming habeas**
13 **relief because a jury did not find beyond a reasonable doubt that defendant convicted of**
14 **Penal Code 245 (a) (2) “personally used” a firearm; trial judge’s finding violated due**
15 **process).**

16 **III**

17 **CONCLUSION**

18 **Based on the foregoing, Banyard’s assault conviction did not properly constitute a**
19 **“strike” under the California Three Strikes law. Therefore, the Magistrate’s Report and**
20 **Recommendation should not be adopted and the SAP should be granted.**

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23 **DATED: August 19, 2002**

Respectfully submitted,

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26 **GREGORY NICOLAYSEN**
27 **Counsel for Petitioner,**
28 **Michael Banyard**

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PROOF OF SERVICE

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

I am employed in the county of Los Angeles, State of California. I am over the age of eighteen and not a party to the within action. My business address is 16000 Ventura Blvd., Suite 500, Encino, CA 91436.

On August 19, 2002, I served the foregoing document described as PETITIONER’S SUPPLEMENTAL BRIEF IN SUPPORT OF SECOND AMENDED PETITION FOR WRIT OF HABEAS CORPUS, by mailing a true copy to:

**Ms. Stephanie Miyoshi
Office of the Attorney General, State of California
300 South Spring St
Los Angeles, CA 90013**

I also faxed a copy of the brief to Ms. Miyoshi.

Executed on August 19, 2002, at Encino, California. I declare under penalty of perjury under the laws of the United States that the above is true and correct.

GREGORY NICOLAYSEN