

JUN 13 2023

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

David W. Slayton, Executive Officer/Clerk of Court

PEOPLE OF THE STATE OF CALIFORNIA,)
v.) Case No.: BA226007
MICHAEL MARCEL ANDERSON.) (Ct. of Appeal Case No. B173982)
MEMORANDUM OF DECISION
(HABEAS CORPUS)

AFTER AN EVIDENTIARY HEARING

Petition for writ of habeas corpus by Petitioner Michael Marcel Anderson represented by Thomas Ian Graham, Esq. Respondent, the People of the State of California represented by Deputy District Attorney, Patrick Frey, Esq. **GRANTED.**

PROCEDURAL BACKGROUND

On March 19, 2003, in Los Angeles Superior Court case number BA226007, after a retrial, the Petitioner was convicted by a jury of the crime of first-degree murder (Penal Code § 187(a)). The jury also found true the special allegations that the defendant personally used a firearm during the commission of the offense (Penal Code § 12022.53 (b) through (d), and that the crime was committed for the benefit of a criminal street gang (Penal Code § 186.22 (b)(1)). On March 5th, 2004, the trial court sentenced the petitioner to a term of fifty years to life in state prison. The Court of Appeal affirmed the judgment on October 11, 2005. (People v. Anderson (Oct. 11, 2005, B173982 [unpublished opinion])). The Petitioner is currently serving his sentence in the custody of the California Department of Corrections and Rehabilitation.

On August 10, 2020, Petitioner filed a petition for a writ of habeas corpus in this court alleging that his petition be granted because 1) there was newly discovered evidence of the petitioner's actual innocence, and 2) that due to ineffective assistance of counsel (IAC) on behalf of his trial counsel he was deprived of his constitutional right to a fair trial. Specifically with

1 respect to his claim of IAC, the Petitioner alleges that his trial counsel was ineffective for his
2 failure to locate and interview a potential eyewitness to the crime at issue in this case after being
3 informed by the Petitioner of the existence of the potential eyewitness.

4 On August 2, 2022, the court determined that an evidentiary hearing must be conducted
5 solely on the issue of whether the Petitioner was provided ineffective assistance of counsel
6 during the pendency of his trial. The court conducted evidentiary hearings on that issue on
7 March 2, 2023, March 3, 2023, March 17, 2023, and May 19, 2023. The following witnesses
8 testified at the evidentiary hearings: Edgar Borne (trial counsel), Leonel Ernesto Lopez
9 (potential eyewitness), David Jones (LA District Attorney investigator), and Delbert House
10 (defense investigator). On May 19, 2023, the court heard closing arguments by the parties. The
11 court then took the matter under submission.

12 FACTUAL BACKGROUND

13 On September 19, 2001, Raymond Baker, a member of the Dirty Old Men (D.O.M.) gang
14 was shot and killed around 6:30 p.m. near the intersection Figueroa and 41st Place in Los
15 Angeles. Los Angeles Police Department (LAPD) officers found his body on the sidewalk near
16 a pay phone. He suffered a total of five gunshots, including shots to the upper chest, head, right
17 arm, and back.

18 At the scene, LAPD Officer Castillo interviewed two witnesses: Fabiola Diaz and Jose
19 Quintanilla, who were married at the time. Ms. Diaz was living in a third-floor apartment off of
20 Figueroa and 41st Place. The apartment had a view of 41st Place. At around 6:30 p.m., she heard
21 two or three gunshots. When she looked out her window, she saw a man with a gun getting into
22 the passenger seat of a car. She could not see the driver. The car was blue, was from the 80's,
23 and was an American car. It looked similar to a photograph of the Petitioner's car, but Ms. Diaz
24 wasn't certain the car she saw was the Petitioner's car. The man she saw was a "black, skinny
25 guy". She saw his face "a little bit" but could not pick him out from a photo lineup and could not
26 identify the Petitioner in court as the shooter. She was reluctant to testify because she lived in
27 the neighborhood as was scared of retaliation.
28

1 Mr. Quintanilla was in a liquor store on 41st Place and Figueroa at around 6:30 p.m. when
2 he heard four or five gunshots. He looked out the window and saw one man running to the
3 driver's side door of a car. The car was a blue four-door car, a 1984 Cutlass Supreme. Once the
4 driver got into the car, the car took off. He described the driver as a black guy, with dark skin,
5 with a short afro hairstyle, aged 22-25 years old, 5'6", and 160-170 lbs. The man was wearing a
6 thick black jacket. The man looked "kind of heavy". There was another person in the
7 passenger's side, however he could only describe the passenger as a black man.

8 When the detectives showed Mr. Quintanilla two groups of photographs, he identified the
9 Petitioner's photograph as the driver. However, he didn't say the Petitioner "was the guy",
10 instead he said the Petitioner "looked like the guy" he had seen getting into the driver's seat.
11 The photograph of the Petitioner looked like the driver mainly because of the similar hair and
12 skin color. He also identified the Petitioner's car as looking like the car he saw, but he could not
13 be certain it was the car. At a live lineup he did not identify anyone. At trial, he did not identify
14 the Petitioner as the man driving the car. He also did not state that the Petitioner looked like the
15 man driving the car. Like Ms. Diaz, he said he did not want to be involved in the case because
16 he lived in the neighborhood and was scared of retaliation.

17 Shequina Rudolph testified at the trial. She was the victim's girlfriend. She testified that
18 the victim was associated with the gang D.O.M. Shortly before he was murdered, another
19 shooting occurred in her neighborhood. After the shooting, her boyfriend moved out of the
20 neighborhood and a couple of guys from a different gang, the Rollin 40's came to her house
21 looking for her boyfriend.

22 On the day the victim was killed, Ms. Rudolph believed he was driving with someone
23 else, but she did not know who the person was. She did know that the victim was the passenger
24 in the car. Days after the victim's death, she read a newspaper article describing the suspect's
25 vehicle. The article said the vehicle was a blue, four-door car. When she saw a similar car in the
26 neighborhood, she took down the license plate number and reported it to law enforcement. The
27 car was registered to the Petitioner's wife. Ms. Rudolph also heard rumors that someone named
28 J-Rock shot her boyfriend. One person told Ms. Rudolph that the Petitioner was the shooter.

1 LAPD Officer Matthew Jacobik testified that in September 2001, there was a feud
2 between the D.O.M. and the Rollin 40's. Officer Jacobik had come into contact with the
3 Petitioner on numerous occasions between 1998 and 2001. During that time, the Petitioner
4 admitted to membership in the Rollin 40's. Officer Jacobik opined that the shooting in the case
5 was done to benefit the Rollin 40's.

6 The Petitioner testified at his trial. He testified that he was not a gang member and
7 disassociated with the gang in 1999. He testified that on the day of the murder, he left for work,
8 dropped his co-worker Garland Brown off at home, and then drove home himself. He testified
9 that at the time the murder occurred he was at home with his family. The Petitioner's co-worker
10 Garland Brown also testified at the trial. Mr. Brown testified that he could not recall where he
11 was on the evening of the murder or whether the Petitioner dropped him off at home after work.

12 APPLICABLE LAW

13 "Under both the Sixth Amendment to the United States Constitution, and article I, section
14 15, of the California Constitution, a criminal defendant has the right to the assistance of
15 counsel." (People v. Ledesma (1987) 43 Cal.3d 171, 215 (*Ledesma*), citing Strickland v.
16 Washington (1984) 466 U.S. 668, 684-685 (*Strickland*)). "The ultimate purpose of this right is
17 to protect the defendant's fundamental right to a trial that is both fair in its conduct and reliable
18 in its result." (*Ibid.*) The defendant is therefore entitled to *effective* assistance of counsel, not just
19 bare assistance of counsel (In re Edward S. (2009) 173 Cal.App.4th 387, 406 (*Edward*) citing
20 *Strickland, supra* 466 U.S. at p. 686.)

21 To demonstrate ineffective assistance of counsel, a habeas petitioner must show that (1)
22 his counsel's performance was deficient, meaning it fell below and objective standard of
23 reasonableness, and (2) he was prejudiced, meaning there was a reasonable probability that but
24 for counsel's error the result of the proceeding would have been different. (*Strickland, supra*,
25 466 U.S. at pp.687-688, 694; In re Alvernaz (1992) 2 Cal.4th 924, 936-937; *Ledesma, supra*, 43
26 Cal.3d at pp. 216-218.)

27 First, to demonstrate that counsel's performance was deficient, the petitioner must show
28 "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed

1 the defendant by the Sixth Amendment.” (*Strickland, supra*, 466 U.S. at p. 687.) The standard
2 is objective and requires “reasonably effective assistance.” (*In re Thomas* (2006) 37 Cal.4th
3 1249, 1257 (*Thomas*), quoting *Strickland*, at p. 687; *Roe v. Flores-Ortega* (2000) 528 U.S. 470,
4 479 [“counsel [must] make objectively reasonable choices”].) The court must consider all of the
5 particular case’s circumstances from the time of counsel’s conduct and measure counsel’s
6 performance against “prevailing professional norms.” (*Strickland*, at pp. 688, 690; *Thomas*
7 *supra*, 37 Cal.4th at p. 1257.)

8 The court must assess trial counsel’s tactical decisions with great deference. (*In re Hill*
9 (2011) 198 Cal.App.4th 1108, 1016 (*Hill*), quoting *People v. Frye* (1998) 18 Cal.4th 894, 979-
10 980, disapproved on another ground by *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn.22.) The
11 court should make every effort to “eliminate the distorting effects of hindsight, to reconstruct the
12 circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s
13 perspective at the time.” (*In re Valdez* (2010) 49 Cal.4th 715, 729-730, quoting *Strickland*,
14 *supra*, 466 U.S. at p. 689.) Thus, the court “must indulge a strong presumption that counsel’s
15 conduct falls within the wide range of reasonable professional assistance...” (*Ibid.*)

16 Deference however, is “not abdication...it must never be used to insulate counsel’s
17 performance from meaningful scrutiny and thereby automatically validate challenged acts or
18 omissions.” (*In re Jones* (1996) 13 Cal.4th 552, 561-562 (*Jones*), quoting *In re Cordero* (1988)
19 46 Cal.3d 161, 180; *In re Lucas* (2004) 33 Cal.4th 682, 722 citing *In re Avena* (1996) 12 Cal 4th
20 694, 722 (*Avena*)). Without meaningful scrutiny, “the constitutional right to the effective
21 assistance of counsel would be reduced to form without substance.” (*Id.*, quoting *Ledesma*,
22 *supra*, 43 Cal.3d at p, 217.) In addition, the court “must consider the seriousness of the charges
23 against the defendant in assessing counsel’s performance.” (*Hill, supra*, 198 Cal.App.4th at p.
24 1017 citing *Jones, supra*, 13 Cal.4th at p. 407.)

25 Trial counsel should be given “wide latitude and discretion regarding trial tactics and
26 strategy...” (*Jones, supra*, 13 Cal.4th at p. 566.) A defendant, however, may “reasonably expect
27 that before counsel undertakes to act at all he will make a rational and informed decision on
28 strategy and tactics founded on adequate investigation and preparation.” (*Edward, supra*, 173

1 Cal.App.4th at p. 406 citing In re Hall (1981) 30 Cal.3d 408, 426.) If a defendant’s counsel does
2 not make a rational and informed decision on defense strategy founded upon adequate
3 investigation, then counsel’s performance is deficient. (*Id.* at pp 406-407, citing *Ledesma, supra*,
4 43 Cal.3d at p. 215.)

5 Second, even if counsel’s performance was deficient, the judgment should not be aside
6 unless the error was prejudicial to the defense. (*Strickland, supra*, 466 U.S. at pp. 691-692.)
7 “[T]he petitioner must establish “prejudice as a demonstrable reality,’ not simply speculation as
8 to the effect of the errors or omissions of counsel.” (In re Cox (2003) 30 Cal.4th 974, 1016
9 (*Cox*), quoting *Clark, supra*, 5 Cal.4th at p.766). To demonstrate prejudice to the defense, the
10 petitioner must show that “there is a reasonable probability that, but for counsel’s unprofessional
11 errors, the result of the proceeding would have been different. A reasonable probability is a
12 probability sufficient to undermine confidence in the outcome.” (In re Hardy (2007) 41 Cal.4th
13 977, 1018, quoting *Avena, supra*. 12 Cal.4th at p. 721; *Hill, supra*, 198 Cal.App.4th at p. 1028
14 quoting People v. Williams (1997) 16 Cal.4th 153, 215.) Counsel’s error must be “so serious as
15 to deprive the defendant of a fair trial, a trial whose result is reliable.” (*Strickland*, at p. 687.) To
16 determine whether a reasonable probability exists, the court “must consider the totality of the
17 evidence before the judge or jury.” (*Id.* at p. 695.)

18 DISCUSSION

19 This court finds that the Petitioner has demonstrated that there is a reasonable probability
20 that, but for counsel’s failure to properly investigate, interview and call to the witness stand an
21 eyewitness to the murder at issue in this case even after being requested by the Petitioner to do
22 so, the result of the proceeding would have been different.

23 Investigation of Eyewitness Leonel Lopez

24 The Petitioner argues that trial counsel Edgar Borne failed to properly investigate,
25 interview or call to the witness stand Leonel Lopez, a potential eyewitness to the murder at issue
26 in this case. (Petition at p. 33).

27 Defense counsel has a duty to investigate carefully all defenses of fact and law that might
28 be available to the defendant. (In re Brown (2013) 218 Cal.App.4th 1216, 1223 (*Brown*) citing In

1 re Hill (2011) 198 Cal.App.4th 1008, 1016.) Counsel’s first duty is to investigate the facts of the
2 case. (*Brown, supra*, 218 Cal.App.4th at 1223.) “If counsel’s failure to undertake such careful
3 inquiries and investigations results in withdrawing a crucial defense from the case, the defendant
4 has not had the assistance to which he is entitled.” *Brown, supra*, 218 Cal.App.4th at 1223 citing
5 In re Saunders (1970) 2 Cal.3d 1033, 1042.) While there is a “strong presumption that counsel’s
6 conduct falls within the wide range of reasonable professional assistance,” and “[j]udicial
7 scrutiny of counsel’s performance must be highly deferential,” [citations omitted], defense
8 counsel must, “at a minimum conduct a reasonable investigation enabling him to make informed
9 decisions about how best to represent his client.” (*Sanders v. Ratelle* (9th Cir. 1994) 21 F.3d
10 1446, 1456.) Counsel has an obligation to investigate all possible defenses and should never
11 carry out a defense strategy without first carrying out an adequate investigation and preparation.
12 (In re Visciotti (1996) 14 Cal.4th 325, 334.) Counsel has an obligation to diligently pursue leads
13 indicating favorable evidence to the defense. (In re Neely (1993) 6 Cal.4th 901, 919.) A defense
14 attorney who fails to properly investigate potentially exculpatory evidence renders deficient
15 representation. (In re Edward S. (2009) 173 Cal.App.4th 387, 407.) Defense counsel’s duty to
16 investigate is never abrogated by other evidence of guilt from prosecution witnesses. (People v.
17 Jones (2010) 186 Cal.App.4th 216,238.)

18 The Petitioner argues that trial counsel Mr. Borne was ineffective for failing to both
19 interview and present a potential eyewitness Leonel Lopez, who likely would have provided
20 exculpatory evidence for the Petitioner during his trial. (Petition at p. 33). Mr. Lopez testified at
21 the evidentiary hearing in this proceeding. Mr. Lopez testified that he was present in the car at
22 the time of the murder of Mr. Baker and that a gun was placed to his temple by an unknown
23 assailant immediately prior to the shooting of Mr. Baker. (March 17, 2023 HT at p. 9). Mr.
24 Lopez further testified that he saw Mr. Baker being punched in the face and also saw him be
25 removed from the car by two unknown assailants. (March 17, 2023 HT at pp. 9-10). Mr. Lopez
26 further testified that after he saw Mr. Baker being removed from the car he heard one or two
27 gunshots and out of his peripheral vision, saw Mr. Baker lying on the ground. (March 17, 2023
28 HT at pp. 10-11). Mr. Lopez testified that at the time of the shooting he knew the Petitioner by

1 the moniker of "TG Biscuit" and later came to know that the true name of the person he knew as
2 "TG Biscuit" was Michael Anderson, the Petitioner in this case. (March 17, 2023 HT at pp 21-
3 23). Mr. Lopez was asked at the evidentiary hearing whether he was able to determine whether
4 the person who held a gun to his temple and subsequently fired shots in the direction of Mr.
5 Baker was "TG Biscuit" (the Petitioner). Mr. Lopez testified that based on the voice of the
6 person and the build of the person, it was not the Petitioner who did those actions. (March 17,
7 2023 HT at pp 25-26). Mr. Lopez was also asked at the evidentiary hearing whether he could
8 confidently testify that the person who held the gun to his temple was not the Petitioner, and his
9 testimony was that he was confident that individual was not the Petitioner. (March 17, 2023 HT
10 at p. 28). Mr. Lopez also testified that prior to the evidentiary hearing in this case he spoke with
11 the Petitioner's wife who asked him about the events surrounding the murder in this case. He
12 further testified both that he told the Petitioner's wife that the Petitioner was not the person who
13 held the gun to his head, nor was he was the person who fired the shots he heard. (March 17,
14 2023 HT at pp. 29-31). Mr. Lopez further testified that if he had been served with a subpoena,
15 he would have complied with the subpoena and come to court to testify truthfully about what he
16 observed and heard at the time of the murder of Mr. Baker. (March 17, 2023 HT at pp. 31-32).

17 Trial counsel Edgar Borne also testified at the evidentiary hearing in this case. Mr. Borne
18 testified that during the preparation for trial in the Petitioner's case, the Petitioner maintained his
19 innocence of the crime at issue in this case, and that he was not present at the scene when the
20 murder occurred. (March 2, 2023 HT at pp. 24-25). Mr. Borne further testified that the
21 Petitioner told him before the trial that there was an eyewitness to the murder who could provide
22 exculpatory evidence about the Petitioner's lack of involvement in the murder. (March 2, 2023
23 HT at p. 25). Mr. Borne also testified that the Petitioner gave him the first and last name of the
24 witness who could provide exculpatory evidence in his case, and that he was adamant that the
25 witness needed to be located to assist in the defense of his case. (March 2, 2023 HT at pp. 25-
26 26). In 2017, Mr. Borne submitted a signed declaration in this case in which he acknowledged
27 that he failed to locate Mr. Lopez prior to the Petitioner's trial and that such failure may have
28 contributed to the Petitioner being convicted of the crime alleged against him if the witness could

1 have excluded the Petitioner as the shooter in this case (Petitioner's Exhibit 15). Mr. Borne
2 testified that at the time of the Petitioner's trial he was a solo practitioner juggling several cases
3 and that he felt his case load was unmanageable and was simply not ready to proceed in the
4 Petitioner's trial. (March 2, 2023 HT at pp. 36-38). Mr. Borne also testified that he did not recall
5 whether he made a motion for a continuance of the Petitioner's case. (March 2, 2023 HT at p.
6 37). Mr. Borne testified that prior to the first trial of the Petitioner's case he was eighty percent
7 certain that he had the full name of Leonel Lopez, the person who the Petitioner asserted could
8 provide exculpatory evidence regarding the Petitioner not being present at the scene of the
9 murder. (March 2, 2023 HT at p. 48).

10 Mr. Borne testified that during the time he represented the Petitioner during both of his
11 trials, he was abusing alcohol and that such abuse was largely responsible for him being
12 subsequently disbarred as a practicing attorney in the State of California. (March 2, 2023 HT at
13 pp 48-52). Mr. Borne also testified that there were several steps he could have taken to locate
14 the witness Leonel Lopez such as acquiring information about the status of the gangs in the area
15 around the time of murder, that he could have pursued either through the prosecution or through
16 the police department, but that he simply did not pursue either avenue in his representation of the
17 Petitioner in this case. (March 3, 2023 HT at p. 33).

18 At the evidentiary hearing in this case, Mr. Borne gave no reason for his failure to fully
19 investigate or interview the potential witness Leonel Lopez. Mr. Borne did not indicate it was a
20 tactical decision, rather he simply acknowledged that due to his perception that he was being
21 rushed to trial, the appropriate investigation of this witness did not occur. (March 2, 2023 HT
22 36-39).

23 Mr. Borne's decision to not fully investigate the potential witness Leonel Lopez was not
24 reasonable. "In assessing the reasonableness of an attorney's investigation...a court must
25 consider not only the quantum of evidence already known to counsel, but also whether the
26 known evidence would lead a reasonable attorney to investigate further." (Wiggins v. Smith
27 (2003) 539 U.S. 510, 527. Here, Mr. Borne knew the evidence against the Petitioner was made
28 up primarily of two eyewitnesses Fabiola Diaz (March 2, 2023 HT at pp. 13-18), and Jose

1 Quintanilla (March 2, 2023 HT at pp. 18-22). The sole issue at the Petitioner's trial was whether
2 he was the individual who shot Mr. Baker. (See Howard v. Clark (9th Cir. 2010) 608 F.3d 563).
3 In a case that relied heavily on eyewitness testimony, where the sole issue was the identity of the
4 shooter, the testimony of a potential witness who could exclude the Petitioner as the shooter was
5 crucial to the defense of the Petitioner's case. The failure to investigate or interview such a
6 crucial witness rendered counsel's defense of the Petitioner ineffective. Moreover, the failure to
7 conduct an adequate investigation of such a potentially exculpatory witness prejudiced the
8 Petitioner's case.

9 Based on the foregoing, the court concludes that Mr. Borne's performance was deficient
10 because he failed to investigate or interview the potential witness Leonel Lopez, who likely
11 would have testified in a manner that would have exculpated the Petitioner. But for Mr. Borne's
12 deficient performance, there is a reasonable probability that the Petitioner would have been
13 acquitted of the murder charge in this case.

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


DISPOSITION

Therefore, the Order to Show Cause, having served its purpose, is DISCHARGED, the petition is GRANTED, and the judgment of conviction is vacated and set aside. The People have sixty days to re-try the Petitioner, or enter into a disposition, and advise this court accordingly.

The Clerk is ordered to serve a copy of this decision upon Thomas Ian Graham, Esq., as counsel for the Petitioner, and upon Deputy District Attorney Patrick Frey, as counsel for the Respondent.

June 13, 2023




DREW E. EDWARDS
Judge of the Superior Court

The clerk is to give notice.