

APPENDIX A

P.I

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

MAR 4 2021

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

CHRISTIAN DIAZ,

Petitioner,

v.

SCOTT FRAUENHEIM, Warden,

Respondent-Appellee.

No. 19-56420

D.C. No. 5:19-cv-01408-PA-MAA
Central District of California,
Riverside

ORDER

Before: CANBY and VANDYKE, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 2) is denied because appellant has not shown that “jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012).

Any pending motions are denied as moot.

DENIED.

APPENDIX B

P.II

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Christian Diaz v. Scott Frauenheim Order on Petition for Certificate of Appealability Content-Type:
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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

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ORDER DENYING CERTIFICATE OF APPEALABILITY by Judge Percy Anderson. (csi)

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

CHRISTIAN DIAZ

Petitioner,

V.

SCOTT FRAUENHEIM, Warden,

Respondent.

Case No. 5:19-cv-01408-PA-MAA

**ORDER DENYING CERTIFICATE
OF APPEALABILITY**

Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts provides:

(a) **Certificate of Appealability.** The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. Before entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue. If the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2). If the court denies a certificate, a party may not appeal the denial but may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22. A motion to reconsider a denial does not extend the time to appeal.

Pursuant to 28 U.S.C. § 2253(c)(2), a certificate of appealability may issue “only if the applicant has made a substantial showing of the denial of a constitutional right.” The Supreme Court has held that this standard means a habeas petitioner must show that “reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (citation and quotation marks omitted). Moreover, “[w]hen the district court denies a habeas petition on procedural grounds without reaching the prisoner’s underlying constitutional claim, a [certificate of appealability] should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Id.*

19 After duly considering Petitioner's contentions in support of the claims
20 alleged in the Petition, the Court finds that Petitioner has not satisfied the
21 requirements for a certificate of appealability. Accordingly, a certificate of
22 appealability is **DENIED**.

24 | DATED: November 12, 2019

PERCY ANDERSON
UNITED STATES DISTRICT JUDGE

DOCUMENT

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RIALTO POLICE DEPARTMENT - 36

MARK P. KLING, CHIEF OF POLICE

128 N. WILLOW AVE.

RIALTO, CA 92376

SUPPLEMENTAL REPORT
CASE #930701808

Page 1 of 2

CRIME : Murder
SECTION: 187

ADDITIONAL OFFICER INFORMATION:

Assignment:

I am currently assigned to the Rialto Police Street Crime Attack Team (S.C.A.T.). Based on an ongoing homicide investigation, Officer J. Candias and I were directed by Sgt. D. Hardin to conduct video surveillance of a South Los Gang Member's funeral at the Hermosa Cemetery located in Colton.

This directive was given in order to gain intelligence and potentially identify the drivers/suspects of a White Chevy Silverado P/U, that was used in the homicide of Michael Mc Coy (DOB [REDACTED] at 665 S. Riverside Ave. (7-11 Market). It was believed that the suspects were members of the "South Los Criminal Street Gang" due to an ongoing gang war between South Los and the "South Side Rialto Criminal Street Gang". The description given also mentioned that the truck had a distinct white camper shell that angled in an upward fashion towards the rear.

OBSERVATIONS:

During the surveillance a White Chevy Silverado P/U Truck, which matched the description given by the victims, was seen (by Officer Candias and I) pulling into the cemetery and parking. Due to the surveillance position that we were in, I was not able to see the occupants of the potential suspect vehicle. I immediately advised Undercover Narcotics Officer J. Partida and Patrol Officer C. Guerrero of my observations. Partida and his partner C. Sandona were in unmarked vehicle positioned on the west side of the cemetery. Guerrero and his partner R. Williams were driving a marked Rialto Police Patrol Unit. During the Funeral Service; Partida was confronted by an unknown HMA and questioned regarding the photographs that were being taken. Just at that time Officer Candias and I were also spotted by several of the attendees walking towards our position. Generally, Law Enforcement Officers are not welcome at gang member's funerals and the attendees will do their best to discourage Officers from attending.

I decided to move from our position (east side) in the cemetery and drive through the south entrance/exit. While approaching the south entrance/exit, Officer Candias and I observed this same truck parked on the east side of the driveway. This White Chevy Silverado (License [REDACTED] also had the very distinct camper shell. I requested a registration check through DMV records via Rialto Dispatch. The truck came back registered to [REDACTED] in the City of Rialto. I requested Officer Partida position himself in a way that would allow him to

Officer: J. Viola

Date: 02/28/07

Rev. By :

Date :

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OTHER : AGENCY _____ ROUTED BY _____

observe any vehicles leaving the south entrance. I also requested Officers Guerrero and Williams to do the same. Within approximately ten (10) minutes this particular truck exited the south entrance/exit and drove west on "C" St. to Meridian Ave. The vehicle then was observed by Guerrero and Williams traveling northbound on Meridian. A traffic stop was initiated by Guerrero and Williams in the area of Meridian Ave. and Randall Ave. for vehicle code violations.

The vehicle was occupied by two HMA's and one HFA. The three were later identified as Jesus Sanchez (DOB [REDACTED]), Vanessa Quezada (DOB [REDACTED]), and Christian Diaz (DOB 02/23/86). Diaz initially had given the name of Michael Heraldez (DOB [REDACTED]) to Guerrero and Williams in order to avoid going back to prison because of being a Parolee-At-Large. All three subjects were determined to be active members/associates of the South Los Criminal Street Gang. This determination was made through self admission, gang apparel, and gang signs/symbols.

Officer Candias and I arrived at Meridian and Randall to take photographs of the Chevy Silverado. Corporal C. Hice also arrived on scene to assist Guerrero and Williams. I began to take photographs of the vehicle and as I walked to the right side of the truck, I saw, in plain view, a spent 12 gauge red shotgun shell on the rear passenger floorboard. Coincidentally a pistol gripped shotgun was the murder weapon and several spent shotgun shell casing were recovered from the original scene. In order to preserve the evidence located inside the truck, I notified Detective J. Massey and advised that the truck would be towed and stored at Rialto Property for evidence.

ARREST:

All three subjects were arrested for further investigation and transported to the Rialto Police Station for Detective Massey to conduct interviews.

VEHICLE DISPOSITION:

The 2001 Chevy Silverado pickup (license [REDACTED]) was towed by J and K Towing from the scene for evidence. Officer R. Williams followed the tow driver back to the City of Rialto, keeping constant observation of the vehicle in order to maintain the chain of evidence. Once back in the City of Rialto, the vehicle was off loaded at Rialto Property behind a secured gate per CVC 22655.5 – Evidence Hold.

RECOMMENDATIONS:

Please attach a copy to the original report written by Detective J. Massey and forward to D.A.'s Office for filing of PC 187.

DOCUMENT

2

1 BY MR. SMITH:

2 Q All right. Now, at the time were you able to
3 determine what person was driving the pickup truck?

4 A Yes.

5 Q Who was that?

6 A That was Mr. Sanchez.

7 Q Okay. Now, while the vehicle was there present at
8 the scene, did you have an opportunity to look into it?

9 A Yes.

10 Q All right. Did you identify anything of interest
11 to this particular investigation?

12 A Yes, I did.

13 Q What was that?

14 → A At least one spent shell -- excuse me -- shotgun
15 shell casing.

16 Q I'd like to show you what's been marked as Exhibit
17 No. 15. Do you recognize what's depicted in that
18 photograph?

19 A Yes.

20 Q What is that?

21 → A A spent shell -- shotgun shell casing I referred to
22 a few moments ago.

23 Q Okay. And where was that located? In the rear
24 area?

25 A In the rear floorboard area behind -- directly
26 behind the right front passenger's seat.

27 Q All right. And that particular shotgun shell red
28 in color?

1 be on the passenger's side. It looks like this is a vehicle
2 that has either four doors on it or some sort of an extra
3 cab-type situation, correct?

4 A Yes, sir.

5 Q This particular shotgun shell was found to the side
6 of the right rear passenger, fair?

7 A I think that would be fair.

8 Q Would not necessarily be inside of the driver
9 unless the driver happened to open up the back door, fair?

10 A Correct.

11 Q What brand of shotgun shell was that?

12 A I can't recall.

13 → Q Did you take it in as evidence?

14 → A I didn't. But it was taken in.

15 Q I'm assuming you don't know what gauge it was?

16 A It was 12.

17 Q You know whether it was for birdshot, buckshot,
18 slug?

19 A No, sir.

20 Q And do you know whether or not it matched up with
21 potentially with any other shells found in this case?

22 A No, I do not.

23 Q You know how long it had been -- is there any way
24 of determining how long it had been at that particular
25 location in the truck?

26 A No idea, sir.

27 Q Was it taken in a manner in which fingerprints can
28 be taken off?

DOCUMENT

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Agency Name: Rialto Police Department	ORI #: CA0360900	Report Date/Time: 02/01/2010 09:33	STA #: 930701808
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930701808

ASSIGNMENT

On 02/01/10 I was assigned to investigations as a detective. At approximately 0930 hrs, I conducted a follow up investigation for DA K. Smith reference a 2007 homicide case. The request was to compare the unspent shell casing located in the suspect's truck, 2001 Chevy 1500 pickup, Ca. Lic# [REDACTED] to the spent shell casings located at the homicide scene.

INVESTIGATION

I requested the assistance of LET Gilbert who advised me that she would collect the unspent shell casing from the pick up truck listed above. At approximately 0935 hrs, I met with LET Gilbert at the Rialto Police Department property warehouse.

We both were present as LET Gilbert opened the secured suspect vehicle, 2001 Chevy 1500 pickup, Ca. Lic# [REDACTED] LET Gilbert recovered the unspent shell casings from the rear passenger floor of the vehicle. I observed the unspent shell casing to be a 'Winchester' 12 Ga. (red in color) Super X 2 3/4 in. 1-7 1/2.

LET Gilbert tagged the unspent shell casing into property separately with tag# 125027.

We then requested to see the spent shell casings originally recovered from the crime scene and tagged into property with tag# 119153. I opened the property evidence envelop and observed the shell casings which were identified as being tagged A4 thru A10. All the spent shell casings from the homicide scene matched the same make and model type from the suspect's vehicle as being 'Winchester' 12 Ga. (red in color) Super X 2 3/4 in. 1-7 1/2.

All the spent casings were repacked and placed back into property with the same tag number.

DISPOSITION

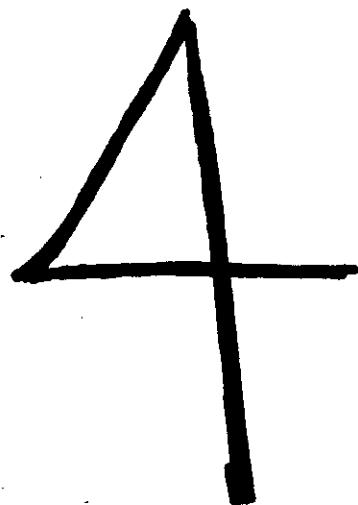
Case closed by arrest.

RECOMMENDATION

Forward a copy of this supplemental to DA K. Smith.

MILLS, JAMES	2122.	02/01/2010 09:33	
Reporting Officer	ID #	Date	Reporting Officer Signature
Assisting Officer	ID#	Date	Assisting Officer Signature
Reviewing Officer	ID#	Date	Reviewing Officer Signature

DOCUMENT



1 MR. SMITH: It has not been marked yet.

2 Q (BY MR. SILVA) Now this is dated 2-23-07; correct?

3 A That's correct.

4 Q That's the date of the crime?

5 A Yes.

6 Q What date was this supposed traffic stop of my client and
7 Mr. Diaz that was 2 -- what day was that 2 -- 28th?

8 A I believe from what I recall 2-28.

9 Q Now, you're saying that was the day that they found this
10 unspent shell casing; correct?

11 A That's the day that they seen it. They didn't actually
12 recover it at that time. She just saw it in the vehicle.

13 Q Well, the date of recovery on this is 2-2-10; correct?

14 A That's what the tag says. Yes.

15 Q So, that shell casing you're telling me that in a murder
16 investigation is found on February 28th, 2007, yet it's not
17 collected into evidence until three years later; is that what
18 your testimony is?

19 A Yes.

20 Q That wasn't fingerprinted, was it?

21 A No.

22 Q That wasn't dusted for prints, was it?

23 A No, it was not.

24 Q Did you yourself go out to the tow yard to collect that?

25 A To our property warehouse yes.

26 Q No, no, no. The date on there is the day it was collected
27 February 2, 2010; correct, on the unspent one?

28 A Yes.

DOCUMENT

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1 2010, nearly three years later? That makes no sense. That is
2 absurd. I mean think about that. They have this piece of
3 evidence that supposedly ties my client to the crime; right?
4 And yet they leave it there in this truck for three years.

5 Where was the truck? Now, Mills said it was at a tow
6 yard. Well, where is this tow yard? Is it secured? Is it
7 unsecured? If it's secured what type of security? 24 hours?
8 Is it behind a block wall or do we have, like, a chain-linked
9 fence with barb wire? Who had access to the truck? Did -- was
10 it only Rialto PD employees? Did Rialto PD employees that are
11 non-sworn non-police officers did they have access to the truck?
12 Was the truck stored underground or above ground? All of those
13 things matter because it doesn't make sense that they wouldn't
14 take it into custody until three years later.

15 Judge, can I approach your clerk?

16 THE COURT: Yes.

17 MR. SILVA: Thank you. Now, there is something else
18 about this envelope that I want you to see and I'm going to try
19 not to invade your personal space but if I do I apologize. It
20 has an identification tag and there is a case number on here,
21 there's a date which says 2-2-10 crime, there is an item, a
22 suspect, there is also a victim. Look at the name on the
23 victim. It's not McCoy. It's not Haston. It's not Franks and
24 it ain't Buckley. That says Pizano, P-i-z-a-n-o. I'm going to
25 put it up here so we all see it.

26 Look at that. Victim Pizano right there. You want to
27 know what reasonable doubt looks like? Right there. Whose
28 Pizano? Who is he? Is that the reason they didn't take this

1 into evidence until three years later? Who is Pizano, ladies
2 and gentlemen? Why is McCoy's name not on there? He's the
3 victim. Well, technically legally speaking so is Haston. Okay.
4 So, Haston. Legally speaking so is Franks and legally speaking
5 so is Buckley. That name is not on there.

6 You know back earlier in my argument I talked about the
7 old jury instructions and the old jury instructions they were
8 really wordy, it was really difficult to understand, and the
9 reasonable doubt instruction was written in the negative form so
10 it was kind of weird; right? And one of the things you'll be
11 able to do is you'll be able to ask the judge questions. Under
12 the old jury instructions you would have people -- jurors always
13 ask, hey, Judge, can you help us out on reasonable doubt? Can
14 you give us an example or can you define it more? And you know
15 what I came up with last night in trying to explain this to you
16 that if you want a picture of reasonable doubt there you go. It
17 doesn't match, ladies and gentlemen. It doesn't match.

18 Reasonable doubt is defined as an abiding conviction of
19 the truth of the charge. An abiding conviction of the truth of
20 the charge. Can you sit there right now knowing what you know
21 and tell me that you have an abiding conviction that this shell
22 casing, which isn't taken into evidence until three years after
23 this horrific crime occurs, was found in that car on December --
24 on February 28th, 2007, when it has somebody else's name as the
25 victim? You can't. You can't. That's reasonable doubt. The
26 lack of an abiding conviction of the truth of the charge that's
27 what it is, ladies and gentlemen, and you're seeing it here
28 firsthand.

1 Now, this was never explained to you at trial. Now,
2 Mr. Smith has one last chance to talk to you about it, okay, I
3 don't know what he's going to say. I'm not clairvoyant but he's
4 probably going to say, you know what, it says 2-2-10, it says
5 Sanchez and Diaz, it says 187 so just disregard it, look at all
6 the other evidence. No. Don't do that. Don't do that. What's
7 the evidence that they had against my client? What did he say?
8 The shell casing and this supposed statement that you have been
9 told to read about it with caution.

10 The facts of this case belie common sense because if my
11 client was the driver why is the shooter trying to get into
12 Franks' vehicle? Okay. And now you have this. And not only do
13 you have that, just think about it we told you during jury
14 selection use your common sense. Does common sense tell you
15 that an experienced police detective investigating a murder is
16 going to leave such a key piece of evidence in a car for three
17 years? That's ludicrous. That's crazy. Why would he do that?
18 Why would you leave it in a car for three years? Why do they
19 pick up the shell casing at the scene and this one they
20 supposedly leave and don't pick it up until 2010 and then who
21 the heck is that victim?

22 You have something -- you have seen something that most
23 jurors don't see and that is this type of malfeasance of, you
24 know, it's always hard for us as defense attorneys to get up
25 here and start talking about conspiracy theories, right, because
26 then I start sounding like Oliver Stone and I don't like to
27 sound that way. But, ladies and gentlemen, if it walks like a
28 duck and it talks like a duck then it is a duck.

1 Does this make sense that you're going to leave that
2 piece of evidence in that car for three years? No, it doesn't.
3 And then to top it all off when you put it in it has somebody
4 else's name on it. I don't know maybe Pizano was a victim of a
5 similar crime with a similar shell casing and they put it into
6 evidence; right? They put it into evidence three years later
7 and then they're going to tie it to these two guys. The picture
8 of the shell casing in my client's truck that was supposedly
9 taken on 2-28-07. That's not time stamped. No time stamp. No
10 date stamp. So, we can't say that it was taken that day.

11 We know that Detective Mills, right, lies to Michele
12 Romero about whether the interview was recorded or not or her
13 meeting with my client. In this interview with Christian
14 Sanchez (sic.) one point Mr. Sanchez said, "They told me they
15 got video." Well, they don't have a video. You know that. You
16 would have seen it. So, he lied to Sanchez about having a video
17 too.

18 So, we have detectives who aren't above lying, right, to
19 try to get a conviction. That's how desperate they are to clear
20 this case to get somebody. They're lying; right? Well, they
21 say I'm using a ruse but it's a lie. Ruse is a fancy word for
22 saying lie. Knowing all that and then they do this? They pull
23 this? No. This, ladies and gentlemen, that is reasonable doubt
24 that is what it is.

25 Reasonable doubt is defined as follows: It's not a mere
26 possible doubt because everything related to human affairs is
27 open to some possible or imaginary doubt, and I'm saying it from
28 memory because I know it by heart. It's an abiding conviction