APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JAN 25 2023

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

ANGEL HERNAN HERNANDEZ,

Petitioner-Appellant,

v.

RON GODWIN, Warden,

Respondent-Appellee.

No. 22-16136

D.C. No. 1:21-cv-01124-JLT-SKO
Eastern District of California,
Fresno

ORDER

Before: S.R. THOMAS and McKEOWN, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 2) is denied because appellant has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

APPENDIX B

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

ANGEL HERNAN HERNANDEZ,

Petitioner,

v.

RON GODWIN, Warden,

Respondent.

Case No. 1:21-cv-01124-JLT-SKO (HC)

ORDER ADOPTING FINDINGS AND RECOMMENDATIONS (Doc. 20)

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS, DIRECTING CLERK OF COURT TO ENTER JUDGMENT AND CLOSE CASE, AND DECLINING TO ISSUE CERTIFICATE OF APPEALABILITY

The assigned magistrate judge issued findings and recommendations to deny this petition on its merits. (Doc. 20.) Petitioner filed objections. (Doc. 23.)

According to 28 U.S.C. § 636(b)(1)(C), the Court has conducted a *de novo* review of the case. Having carefully reviewed the entire file, including Petitioner's objections, the Court concludes that the findings and recommendations are supported by the record and proper analysis. Petitioner's objections present no grounds for questioning the Magistrate Judge's analysis.

In addition, the Court declines to issue a certificate of appealability. A state prisoner seeking a writ of habeas corpus has no absolute entitlement to appeal a district court's denial of his petition, and an appeal is only allowed in certain circumstances. *Miller-El v. Cockrell*, 537 U.S. 322, 335-36 (2003). The controlling statute in determining whether to issue a certificate of

appealability is 28 U.S.C. § 2253, which provides as follows:

> (a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.
>
> (b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.
>
> (c) (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—
>
> > (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
> >
> > (B) the final order in a proceeding under section 2255.
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
>
> (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

If a court denies a petitioner's petition, the court may only issue a certificate of appealability when a petitioner makes a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). To make a substantial showing, the petitioner must establish 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) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983)).

In the present case, the Court finds that Petitioner has not made the required substantial showing of the denial of a constitutional right to justify the issuance of a certificate of appealability. Reasonable jurists would not find the Court's determination that Petitioner is not entitled to federal habeas corpus relief debatable, wrong, or deserving of encouragement to proceed further. Thus, the Court declines to issue a certificate of appealability. Accordingly,

1. The findings and recommendations issued on April 14, 2022, (Doc. 20), are **ADOPTED IN FULL.**

2. The petition for writ of habeas corpus is **DENIED WITH PREJUDICE.**

3. The Court declines to issue a certificate of appealability.

4. The Clerk of Court is directed to enter judgment and close the case.

IT IS SO ORDERED.

Dated: **July 8, 2022**

Jennifer L. Thurston
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

ANGEL HERNAN HERNANDEZ, Petitioner, v. RON GODWIN, Warden, Respondent.	No. 1:21-cv-01124-JLT-SKO (HC) **FINDINGS AND RECOMMENDATION TO DENY PETITION FOR WRIT OF HABEAS CORPUS** **[THIRTY DAY OBJECTION DEADLINE]**

Petitioner is a state prisoner proceeding *pro se* and *in forma pauperis* with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. He is currently in state prison serving a sentence of 35 years-to-life pursuant to a judgment of the Kings County Superior Court. The habeas petition presents five claims challenging the conviction. As discussed below, the Court finds the claims to be without merit and recommends the petition be **DENIED.**

I. PROCEDURAL HISTORY

On March 2, 2016, a Kings County jury found Petitioner guilty of conspiracy to commit assault with a deadly weapon upon a custodial officer (Cal. Penal Code §§ 182(a)(1), 245.3). (Doc. 16-20 at 3.[1]) The jury found true the allegations that Petitioner committed the offense for the benefit of a criminal street gang (Cal. Penal Code § 186.22(b)(1-5)) and that he had suffered three prior felony convictions within the meaning of California's "Three Strikes" law (Cal. Penal

[1] Unless otherwise noted, references are to ECF pagination.

Code §§ 667(b)-(i), 1170.12(a)-(d)(1)). (Doc. 16-20 at 3.) On July 19, 2016, the trial court sentenced Petitioner to a term of 40 years-to-life in state prison. (Doc. 16-20 at 3.)

Petitioner appealed to the California Court of Appeal, Fifth Appellate District ("Fifth DCA"). On May 25, 2018, the Fifth DCA struck the five-year gang enhancement and amended the judgment accordingly, but otherwise affirmed the judgment. (Doc. 16-20 at 1-4.) Petitioner did not petition for review in the California Supreme Court.

Thereafter, Petitioner filed numerous petitions for writ of habeas corpus in the state courts. (Docs. 16-20 to 16-34.) The petitions were all denied.

On July 26, 2021, Petitioner filed a petition for writ of habeas corpus in this Court. (Doc. 1.) Respondent filed an answer on December 9, 2021. (Doc. 15.) On January 20, 2022, Petitioner filed a traverse to Respondent's answer. (Doc. 18.)

II. FACTUAL BACKGROUND[2]

On April 29, 2014, deputies with the Kings County Sheriff's Department initiated an investigation after an inmate, Matthew Barrera, mentioned, while being transported back from court, that he did not want to do time for attacking a deputy. Deputies questioned Barrera regarding his comments. Barrera stated that there were "shanks" in the B4 Pod and he did not want to "move on a deputy" after being ordered to do so. He stated that another inmate, James Varela, would be able to provide more information.

Deputies later spoke to Varela who informed them that Petitioner had ordered inmates Anthony Spalding, Matthew Barrera, Paul Campos, and Varela to "hit" Deputy Luis Torres, the victim, on April 20, 2014, inside the Kings County Jail. Varela explained that the hit was supposed to take place in the B4 Pod. According to Varela, the plan for the hit was for Spalding to confront Deputy Torres as they walked into the B4 Pod and then physically attack him. Varela stated that he and Barrera were supposed to hit Deputy Torres with a jail-made shank. Campos was instructed to block any deputies that responded to assist the victim. The plan was ordered to be carried out on April 20, 2014, but was spoiled

[2] The facts are derived from the probation report lodged with the Court by Respondent.

when Deputy Torres did not enter the B4 Pod as expected. Varela also informed deputies that another inmate, Raymond Ramirez, was assigned to carry a shank on his person at all times.

According to Sergeant Henderson of the Kings County Jail, the B4 Pod is used as a housing unit for known Norteno gang inmates. Petitioner and inmates Varela, Barrera, Campos, Ramirez, and Spalding are all known and documented Norteno gang members.

As part of their ongoing investigation, deputies spoke with the victim, Deputy Torres. Deputy Torres indicated he did not have any issues with Petitioner and never had interactions outside the normal scope of his duties with any of the individuals involved. Deputy Torres stated he had several interactions with Petitioner while working and only knows Petitioner due to his employment as a detentions deputy sheriff. Deputy Torres indicated that in 2014, Petitioner confronted him about his shift behavior and unfair treatment of Norteno inmates. Deputy Torres informed petitioner he was just doing his job.

Deputies questioned Petitioner on May 2, 2014. Petitioner stated that several Kings County Jail staff had come to him and asked him to "control" the Norteno inmates. Petitioner informed staff that he had no control or power over any inmate housed at the jail. He denied having any issues with Deputy Torres or any other member of the Kings County Sheriff's Department. He adamantly denied any knowledge about a hit being placed on Deputy Torres.

Further investigation revealed that Petitioner was not happy with the treatment of fellow gang members by the victim. Petitioner issued an order to assault Deputy Torres with "full force," which meant to stab Deputy Torres. Petitioner wrote two messages authorizing the hit which were delivered through other Norteno gang members. During the investigation, Petitioner was identified as the "Authority in Charge" of the Kings County Jail for the Norteno gang and only Petitioner or his replacement trainee could have written the messages.

Deputies searched the B4 Pod and located an unauthorized shank. Based on information provided by informants, deputies also searched Ramirez's person for a shank.

Ramirez was placed on a body scanner which provided a positive signal. A shank was located in the holding cell toilet after Ramirez defecated. (Doc. 16-33 at 49-53.)

III. DISCUSSION

A. Jurisdiction

Relief by way of a petition for writ of habeas corpus extends to a person in custody pursuant to the judgment of a state court if the custody is in violation of the Constitution, laws, or treaties of the United States. 28 U.S.C. § 2254(a); 28 U.S.C. § 2241(c)(3); Williams v. Taylor, 529 U.S. 362, 375 n. 7 (2000). Petitioner asserts that he suffered violations of his rights as guaranteed by the United States Constitution. The challenged conviction arises out of the Kings County Superior Court, which is located within the jurisdiction of this court. 28 U.S.C. § 2254(a); 28 U.S.C.§ 2241(d).

On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which applies to all petitions for writ of habeas corpus filed after its enactment. Lindh v. Murphy, 521 U.S. 320 (1997) (holding the AEDPA only applicable to cases filed after statute's enactment). The instant petition was filed after the enactment of the AEDPA and is therefore governed by its provisions.

B. Legal Standard of Review

A petition for writ of habeas corpus under 28 U.S.C. § 2254(d) will not be granted unless the petitioner can show that the state court's adjudication of his claim: (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); Lockyer v. Andrade, 538 U.S. 63, 70-71 (2003); Williams, 529 U.S. at 412-413.

A state court decision is "contrary to" clearly established federal law "if it applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases, or "if it confronts a set of facts that is materially indistinguishable from a [Supreme Court] decision but reaches a different result." Brown v. Payton, 544 U.S. 133, 141 (2005) (citing Williams, 529 U.S. at 405-

406).

In Harrington v. Richter, 562 U.S. 86, 101 (2011), the U.S. Supreme Court explained that an "unreasonable application" of federal law is an objective test that turns on "whether it is possible that fairminded jurists could disagree" that the state court decision meets the standards set forth in the AEDPA. The Supreme Court has "said time and again that 'an unreasonable application of federal law is different from an incorrect application of federal law.'" Cullen v. Pinholster, 563 U.S. 170, 203 (2011). The petitioner "must show far more than that the state court's decision was 'merely wrong' or 'even clear error.'" Shinn v. Kayer, ___ U.S. ___, ___ , 141 S.Ct. 517, 523, 2020 WL 7327827, *3 (2020) (quoting Virginia v. LeBlanc, 582 U. S. ___, ___, 137 S.Ct. 1726, 1728 (2017) (*per curiam*)). Rather, a state prisoner seeking a writ of habeas corpus from a federal court "must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law *beyond any possibility of fairminded disagreement.*" Richter, 562 U.S. at 103 (emphasis added); see also Kayer, 141 S.Ct. at 523, 2020 WL 7327827, *3. Congress "meant" this standard to be "difficult to meet." Richter, 562 U.S. at 102.

The second prong pertains to state court decisions based on factual findings. Davis v. Woodford, 384 F.3d 628, 637 (9th Cir. 2003) (citing Miller-El v. Cockrell, 537 U.S. 322 (2003)). Under § 2254(d)(2), a federal court may grant habeas relief if a state court's adjudication of the petitioner's claims "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." Wiggins v. Smith, 539 U.S. 510, 520 (2003); Jeffries v. Wood, 114 F.3d 1484, 1500 (9th Cir. 1997). A state court's factual finding is unreasonable when it is "so clearly incorrect that it would not be debatable among reasonable jurists." Jeffries, 114 F.3d at 1500; see Taylor v. Maddox, 366 F.3d 992, 999-1001 (9th Cir. 2004), *cert.denied*, Maddox v. Taylor, 543 U.S. 1038 (2004).

To determine whether habeas relief is available under § 2254(d), the federal court looks to the last reasoned state court decision as the basis of the state court's decision. See Ylst v. Nunnemaker, 501 U.S. 979, 803 (1991); Robinson v. Ignacio, 360 F.3d 1044, 1055 (9th Cir. 2004). "[A]lthough we independently review the record, we still defer to the state court's

ultimate decisions." Pirtle v. Morgan, 313 F.3d 1160, 1167 (9th Cir. 2002).

The prejudicial impact of any constitutional error is assessed by asking whether the error had "a substantial and injurious effect or influence in determining the jury's verdict." Brecht v. Abrahamson, 507 U.S. 619, 623 (1993); see also Fry v. Pliler, 551 U.S. 112, 119-120 (2007) (holding that the Brecht standard applies whether or not the state court recognized the error and reviewed it for harmlessness).

C. Review of Petition

Petitioner raises five claims of ineffective assistance of counsel in his petition. He alleges defense counsel failed to: 1) investigate and interview potential witnesses; 2) impeach witness Ornelas; 3) introduce evidence of Petitioner's prior assistance with police; 4) introduce evidence and expert testimony that the messages were fake; and 5) properly investigate witnesses Varela and Barrera based on their post-trial recantations.

1. Legal Standard

Effective assistance of counsel is guaranteed by the Due Process Clause of the Fourteenth Amendment. Evitts v. Lucey, 469 U.S. 387, 391-405 (1985). Claims of ineffective assistance of counsel are reviewed according to Strickland's two-pronged test. Strickland v. Washington, 466 U.S. 668, 687-88 (1984); Miller v. Keeney, 882 F.2d 1428, 1433 (9th Cir. 1989); United States v. Birtle, 792 F.2d 846, 847 (9th Cir.1986); see also Penson v. Ohio, 488 U.S. 75 (1988) (holding that where a defendant has been actually or constructively denied the assistance of counsel altogether, the Strickland standard does not apply and prejudice is presumed; the implication is that Strickland does apply where counsel is present but ineffective).

To prevail, Petitioner must show two things. First, he must establish that counsel's deficient performance fell below an objective standard of reasonableness under prevailing professional norms. Strickland, 466 U.S. at 687-88. Second, Petitioner must establish that he suffered prejudice in that there was a reasonable probability that, but for counsel's unprofessional errors, he would have prevailed on appeal. Id. at 694. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome of the trial. Id. The relevant inquiry is not what counsel could have done; rather, it is whether the choices made by counsel were reasonable.

Babbitt v. Calderon, 151 F.3d 1170, 1173 (9th Cir. 1998).

With the passage of the AEDPA, habeas relief may only be granted if the state-court decision unreasonably applied this general Strickland standard for ineffective assistance. Knowles v. Mirzayance, 556 U.S. 111, 122 (2009). Accordingly, the question "is not whether a federal court believes the state court's determination under the Strickland standard "was incorrect but whether that determination was unreasonable–a substantially higher threshold." Schriro v. Landrigan, 550 U.S. 465, 473 (2007); Knowles, 556 U.S. at 123. In effect, the AEDPA standard is "doubly deferential" because it requires that it be shown not only that the state court determination was erroneous, but also that it was objectively unreasonable. Yarborough v. Gentry, 540 U.S. 1, 5 (2003). Moreover, because the Strickland standard is a general standard, a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard. See Yarborough v. Alvarado, 541 U.S. 652, 664 (2004) ("[E]valuating whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations.")

2. Analysis – Failure to Interview Witnesses

Petitioner first contends defense counsel failed to hire a private investigator to interview witnesses in his case. The claim fails on both prongs of the Strickland test.

First, defense counsel stated that he had indeed hired a licensed investigator. (Doc. 1 at 38.) The investigator was also an expert on gang issues. Defense counsel stated that Petitioner never informed him that a specific witness should have been used, and counsel was never given a list of witnesses that would have assisted the defense. (Doc. 1 at 38.) Counsel stated he had reviewed the file and had discussed the case with his expert and Petitioner on more than five occasions, but his review led him to conclude that character witnesses would not have assisted the defense, and there were no exculpatory witnesses. (Doc. 1 at 38.) Counsel further declared that he had discussed the possibility of character witnesses with Petitioner "but as a matter of strategy discarded the idea as it opened [Petitioner's] past to exposure in front of the jury." (Doc. 1 at 39.) Counsel noted that "[c]alling Officer Narcisse as our witness would merely have shown that [Petitioner] was in fact acting as a mouthpiece or leader and thus gave credence to the gang

allegation." (Doc. 1 at 39.) Defense counsel stated he believed it better "to cross the officer to get the information out that we needed." (Doc. 1 at 39.) Thus, defense counsel provided sound reasons for his strategy in this case. A fairminded jurist could conclude that counsel's decision was reasonable.

Petitioner also fails to show any prejudice. To demonstrate prejudice resulting from defense counsel's failure to call a witness, Petitioner "must name the witness, demonstrate that the witness was available to testify and would have done so, set out the content of the witness's proposed testimony, and show that the testimony would have been favorable to a particular defense." Day v. Quarterman, 566 F.3d 527, 538 (5th Cir. 2009). Petitioner makes no such showing. He merely speculates that additional witnesses would have been helpful. Thus, he fails to demonstrate any prejudice.

3. Analysis – Failure to Impeach Ornelas

Petitioner next alleges defense counsel failed to impeach Ronald Ornelas, the main witness against him, with readily available evidence. Again, Petitioner fails to satisfy either prong of Strickland.

Petitioner fails to explain how defense counsel's cross-examination of Ornelas was deficient. Defense counsel cross-examined Ornelas at length, including Ornelas's criminal history of violent criminal activity involving stabbings, beatings, possession of weapons, and ordering assaults on people. (Docs. 16-11 at 85-95; 16-17 at 19-20.) Defense counsel elicited Ornelas's position of authority in the gang. (Doc. 16-11 at 96-107.) He also cross-examined Ornelas about being paid and given a deal by the prosecution in return for his testimony. (Doc. 16-11 at 117-120.) Defense counsel's cross also appears to have been vigorous and thorough.

Petitioner also fails to demonstrate prejudice. He speculates that additional impeachment would have benefitted the defense, but this is insufficient. Jones v. Gomez, 66 F.3d 199, 205 (9th Cir. 1995) ("conclusory suggestions that his trial and state appellate counsel provided ineffective assistance fall far short of stating a valid claim of constitutional violation").

4. Analysis – Failure to Introduce Evidence of Petitioner's Cooperation with Police

Petitioner next alleges defense counsel failed to present evidence that he cooperated with

police, because "that would clearly establish that such cooperation was a negative impact to the People's case." (Doc. 1 at 31.) Respondent is correct that the claim is unsubstantiated.

As noted by Respondent, the sole basis for this claim is Petitioner's own statement—with no proof—that he cooperated with law enforcement during the investigation of a 1997 arson case. (Doc. 1 at 25.) Because Petitioner provided no support for the claim, he fails to demonstrate that the state court rejection was unreasonable.

5. Analysis – Failure to Introduce Evidence Concerning Prison Messages

Petitioner contends that defense counsel failed to present an expert to opine that the prison kites[3] were fake. The claim fails for several reasons.

As an initial matter, Petitioner makes no showing that the kites were fake, or how they were fake. He makes no offer of proof from any expert who could testify that the kites were indeed fake. This alone is fatal to his claim. In addition, defense counsel declared that "the assertion that prosecution['s] [g]ang expert was relying on fabricated evidence has no basis." (Doc. 1 at 40.) Given that defense counsel believed the kites to be authentic, a rational jurist could conclude that defense counsel made a reasonable decision in not obtaining an expert on gang kites.

Moreover, defense counsel was successful in excluding the kites from evidence with motions in limine. (Doc. 1 at 38.) He stated, "To have brought up any mention of these items during trial would have been opening up the prosecution to speak to those items and thus prejudice my client." (Doc. 1 at 38.) It would serve no purpose to undermine the authenticity of the gang kites when defense counsel had already successfully kept them out of evidence, and worse, the attempt could prove counter-productive and prejudicial.

Petitioner also fails to show any prejudice. Petitioner does not explain how the outcome would have been any different had the kites been admitted but then alleged to be fake.

6. Analysis – Post-Trial Recantations by Varela and Barrera

Petitioner next claims that defense counsel rendered ineffective assistance in his

[3] A "kite" is a message or note sent between prisoners. It is often written in very small handwriting and concealed so as not to be discovered by prison authorities.

investigation in light of post-trial recantations by Varela and Barrera. Petitioner fails to demonstrate how counsel erred. Counsel stated that he discussed every aspect of the case, including potential witnesses, with Petitioner. (Doc. 1 at 40.) Counsel further stated that he instructed his gang expert to interview witnesses if Petitioner felt it necessary. (Doc. 1 at 39.) Petitioner offers no reason why counsel could or should have known that the witnesses would have recanted after trial.

Petitioner also fails to show any prejudice. Because the witnesses recanted after trial does not mean they would have recanted had defense counsel done further investigation before trial. There is no basis from which to conclude that additional investigation would have led to the witnesses' recantations. The state court could reasonably determine that counsel did not err and that Petitioner failed to show any prejudice.

IV. RECOMMENDATION

Based on the foregoing, the Court RECOMMENDS that the Petition for Writ of Habeas Corpus be DENIED with prejudice on the merits.

This Findings and Recommendation is submitted to the United States District Court Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636 (b)(1)(B) and Rule 304 of the Local Rules of Practice for the United States District Court, Eastern District of California. Within thirty (30) days after being served with a copy of this Findings and Recommendation, any party may file written objections with the Court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendation." Replies to the Objections shall be served and filed within fourteen (14) court days (plus three days if served by mail) after service of the Objections. The Court will then review the Magistrate Judge's ruling pursuant to 28 U.S.C. § 636 (b)(1)(C). The parties are advised that failure to file

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objections within the specified time may waive the right to appeal the Order of the District Court. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

IT IS SO ORDERED.

Dated: **April 14, 2022**

/s/ *Sheila K. Oberto*
UNITED STATES MAGISTRATE JUDGE

APPENDIX C

S267667

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re ANGEL HERNAN HERNANDEZ on Habeas Corpus.

The petition for writ of habeas corpus is denied.

CANTIL-SAKAUYE
Chief Justice

APPENDIX D

Rec: 1-5-2021

IN THE

COURT OF APPEAL OF THE STATE OF CALIFORNIA

IN AND FOR THE

FIFTH APPELLATE DISTRICT

In re	F081793
ANGEL HERNANDEZ,	(Kern Super. Ct. No. 14CM1997)
On Habeas Corpus.	**ORDER**

BY THE COURT:*

The "Petition for Writ of Habeas Corpus," filed on September 30, 2020, is denied.

Detjen

Detjen, A.P.J.

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* Before Detjen, A.P.J., Peña, J. and DeSantos, J.

APPENDIX F

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF KINGS

CONFORMED COPY
ORIGINAL FILED ON
JUL 06 2020
MICHELLE S. MARTINEZ, CLERK OF COURT
SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF KINGS
DEPUTY

In re Application of ANGEL HERNANDEZ, Petitioner, for Writ of Habeas Corpus.	No. 19W0111A ORDER RE: PETITION FOR WRIT OF HABEAS CORPUS

ANGEL HERNANDEZ ("Petitioner") filed a petition for writ of habeas corpus on June 25, 2019 ("petition"). Petitioner alleges he was rendered ineffective assistance of counsel by his attorney, Victor Perez, Esq., in connection with Kings County Superior Court Case No. 14CMS1997.

I. Summary of Petition

In Case No. 14CMS1997, Petitioner was alleged to be a Norteno gang leader who directed subordinate members to assault Kings County Jail Deputy Luis Torres. Petitioner was convicted of conspiracy to commit assault with a deadly weapon upon a custodial officer. (Pen. Code §§ 182(a)(1), 245.3.) The jury also found true that Petitioner committed the offenses for the benefit of a criminal street gang, and that he had suffered three (3) prior felony convictions within the meaning of the "Three Strikes Law". (Pen. Code §§ 186.22(b)(1-5), 667(a)(1), 667(b)-(i), 1170.12(a)-(d)(1).) Petitioner is serving a sentence of thirty-five (35) years to life. Petitioner alleges his attorney failed to utilize an investigator to identify and interview witnesses that would challenge the credibility of the People's case. Petitioner asserts that a post-appellate investigation has revealed the following: 1) Sixteen (16) witnesses that were not contacted or interviewed prior to trial; 2) a debrief of the People's key witness, Ronald Ornelas, is inconsistent with the People's theory at trial; 3) evidence that Petitioner previously cooperated with police which would have negatively impacted his leadership in the Norteno gang; and 4) comparisons on three (3) "kites"

[notes] indicates at least one of them was manufactured for trial. (Exhibit A.). Petitioner asserts he was prejudiced by the lack of investigation by his attorney because the foregoing evidence would have undermined the credibility of the People's key witnesses, Norteno members Ronald Ornelas and James Varela.

On August 8, 2019, an Order Re: Petition for Writ of Habeas Corpus issued stating the Kings County District Attorney's Office ("Respondent") may file an informal response to Petitioner's claims. An informal response was filed on September 4, 2019. Petitioner, by and through his retained attorney(s), filed a reply on November 6, 2019. On February 6, 2020, an Order to Show Cause issued. Respondent filed a return on February 27, 2020. Petitioner filed a denial on April 23, 2020.

II. Review of Claims

To prevail on a claim of ineffective assistance of counsel, Petitioner must demonstrate by a preponderance of the evidence that: "(1) counsel's representation was deficient in falling below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficient representation subjected the petitioner to prejudice, *i.e.*, there is a reasonable probability that, but for counsel's failings, the result would have been more favorable to the petitioner." (*In re Jones* (1996) 13 Cal. 4th 552, 561; *People v. Plager* (1987) 196 Cal. App. 3d 1537, 1542-1543.) Petitioner must prove prejudice as a "demonstrable reality," not simply speculation as to the effect of the errors or omissions of counsel." (*People v. Williams* (1988) 44 Cal.3d 883, 937.) An error by counsel, even if professionally unreasonable, does not warrant setting aside a judgment in a criminal proceeding if the error had no effect upon the judgment. (*Strickland v. Washington* (1984) 466 U.S. 668, 691.)

In evaluating ineffective assistance of counsel allegations, counsel's tactical decisions must be afforded great deference and courts should not second-guess reasonable tactical decisions. (*See, People v. Hinton* (2006) 37 Cal.4th 839, 876; *People v. Weaver (2001)* 26 Cal. 4th 876, 928.) It is legally insufficient to allege poor tactics; a petitioner has an affirmative duty to show the omissions cannot be explained by an informed choice of tactics. (*People v. Kelley* (1990) 220 Cal.App.3d 1358, 1373.) To the extent the record fails to disclose why counsel acted or failed to act in the manner challenged, we will affirm the judgment "unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation." (*People v. Hart* (1999) 20 Cal.4th 546, 623-624 (*Hart*).) Case law recognizes that "counsel's

omission legitimately may have been based in part on considerations that do not appear on the record, including confidential communications from the client." (*People v. Lucas* (1995) 12 Cal.4th 415, 443.)

a. Sixteen (16) witnesses were not contacted or interviewed prior to trial

Petitioner fails to identify the sixteen (16) witnesses and explain what information could have been elicited from them via a pretrial interview or testimony at trial. (*People v. Karis* (1988) 46 Cal.3d 612 [conclusory allegations do not warrant relief, let alone an evidentiary hearing]; *In re Fields* (1990) 51 Cal.3d 1063 [no habeas relief based on failure of counsel to investigate unless evidence is produced, not merely described or alleged].)

Additionally, the initial declaration of trial counsel (Mr. Perez) and supplemental declaration filed with Respondent's return indicate that Mr. Perez made reasonable tactical decisions about witnesses that will not be second-guessed by this court. In particular, Mr. Perez did hire a private investigator and gang expert, Mr. Estevane. Due to the incident occurring in a locked facility, Mr. Perez and Mr. Gregorio Estevane assessed that all witnesses were included in the prosecution's case in chief. (Return, Exhibit 1.) Mr. Perez and Defendant discussed the idea of character witnesses for the defense case, but abandoned this strategy because it would have opened the door to expose Petitioner's past in front of the jury. (Return, Exhibit 1.) After consulting Petitioner, Mr. Perez also made the tactical decision not to call Officer Narcisse as a defense witness because he felt doing so would actually provide more credibility to the prosecution's allegation that Petitioner was acting as a leader of the Nortenos in Kings County Jail. (Return, Exhibit 1.) Mr. Perez met with Petitioner on many occasions and discussed witnesses, trial strategy, and physical evidence. The only witnesses requested were Ronald Ornelas and James Varela. (Return, Exhibit 1.)

Accordingly, Petitioner cannot demonstrate deficient representation or resulting prejudice. (*In re Jones* (1996) 13 Cal. 4th 552, 561; *People v. Plager* (1987) 196 Cal. App. 3d 1537, 1542-1543.)

b. A debrief of the People's key witness, Ronald Ornelas, is inconsistent with the People's theory at trial

As to this claim, Petitioner has also failed to demonstrate prejudice. (*People v. Williams* (1988) 44 Cal.3d 883, 937.) Petitioner has failed to present any information in his petition and supplemental briefing that is new or contradicts or undermines evidence that was already presented to the jury. (*People v. Lucas* (1995) 12 Cal.4th 415 [no ineffective

assistance of counsel based on review of cumulative evidence]; *People v. Shoals* (1992) 8 Cal.App.4th 475 [there must be probability that defendant inability to present alleged evidence prejudiced the outcome of the trial].)

At trial, the prosecution presented evidence that Petitioner was a long time Norteno member who became the leader of the Nortenos in Kings County Jail upon his booking in December of 2013. Witnesses established that Petitioner was the leader and Ronald Ornelas was the second in command. Evidence established that Petitioner targeted Deputy Torres via authored kites to James Varela and Matthew Barela; a detailed plan was created with inmates Varela, Campos and Spalding to assault Deputy Torres with a shank during a riot. Evidence presented at trial included a riot 30-minute video, *Ronald Ornelas's debrief with law enforcement*, a shank and relevant gang evidence for Petitioner.

Ronald Ornelas was extensively cross-examined and impeached at trial. It was elicited by Mr. Perez that Mr. Ornelas was an influential Norteno who was the leader at Kings County Jail. Additionally, Mr. Perez elicited that there was a chain of command that did not include Petitioner, especially since Mr. Ornelas was in custody at Kings County Jail before Petitioner was admitted on new offenses. Additionally, James Varela made clean up payments to Mr. Ornelas, not Petitioner. Petitioner was never seen giving orders. Defense focused on the extensive video evidence, which did not depict Petitioner present at the riot or providing commands. Defense elicited testimony that the kites appeared to belong to Mr. Ornelas since they were signed by "Casa", which was associated with Mr. Ornelas. Mr. Perez elicited through cross-examination that the kites were not signed by Petitioner. It was further elicited by Mr. Perez that Mr. Ornelas was transferred to protective custody after speaking with law enforcement. It was also established that he was subsequently released and provided $2,400.00 per month by the prosecution.

Additionally, Mr. Perez's supplemental declaration establishes that he made several attempts to gain access to Mr. Ornelas, but Kings County District Attorney Jeremy Warren informed Mr. Perez this would not occur due to Ornelas' protective custody status. Mr. Perez made attempts to interview James Varela, but was unable to. (Return, Exhibit 1.) In preparation for witness examination at trial, Mr. Perez examined all video records, inmate movement and work schedule documentation prior to trial. Mr. Perez assessed that past law enforcement reports involving the defendant were sufficient for the jury to find gang membership. (Return, Exhibit 1.)

c. Evidence that Petitioner previously cooperated with police which would have negatively impacted his leadership in the Norteno gang

Petitioner has failed to provide any information about how he cooperated with law enforcement in 1997. (*People v. Karis* (1988) 46 Cal.3d 612 [conclusory allegations do not warrant relief, let alone an evidentiary hearing]; *In re Fields* (1990) 51 Cal.3d 1063 [no habeas relief based on failure of counsel to investigate unless evidence is produced, not merely described or alleged].) Additionally, there is nothing in the record to indicate that any Norteno gang member at Kings County Jail was aware of the alleged cooperation. Accordingly, this information would not be admissible under Evidence Code § 352. Furthermore, it is clear from his declaration and the trial testimony outlined above that Mr. Perez made a tactical decision to pursue a defense centered on the theory that Mr. Ornelas was in charge, not Petitioner. (*People v. Kelley* (1990) 220 Cal.App.3d 1358, 1373.)

d. Comparisons on three (3) "kites" [notes] indicates at least one of them was manufactured for trial

Mr. Viruetta, the gang expert proffered by Petitioner, opines that one of the "kites" admitted at trial was manufactured. Mr. Viruetta has no personal knowledge of or training in Kings County gangs or their presence and operations in Kings County Jail. Mr. Viruetta does not have any personal knowledge or experience with gang kites in Kings County Jail. (*People v. Prunty* (2015) 62 Cal.4th 59; *People v. Sanchez* (2016) 63 Cal.4th 665.) Mr. Viruetta's opinion is inadmissible speculation.

Additionally, Mr. Perez assessed that past law enforcement reports involving the defendant were sufficient for the jury to find gang membership; he denies the assertion that the prosecution gang expert fabricated evidence. (Return, Exhibit 1.) As included in the informal response, Mr. Perez sought ultimately favorable rulings regarding gang evidence. As to the kites, as he assessed raising the items would have prejudiced Petitioner. (Return, Exhibit 2.) The record demonstrates a tactical decision by Mr. Perez regarding the kites.

e. Varela and Barrera Recant of Trial Testimony

Finally, Petitioner urges this court to accept his ineffective assistance of counsel allegations against Mr. Perez for failure to investigate due to post-trial statements by witnesses Varela and Barrera recanting their trial testimony. "It is not uncommon, after trial, for one not charged with a crime to attempt to absolve his fellow confederate who has been convicted. [Citations.] The court is not bound to accept the statement[s] of the [witnesses] as true and is entitled to regard it with distrust and disfavor. [Citations.]" (*People v. Shoals*

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(992) 8 Cal.App.4th 475, 488.) This court notes that both Varela and Barrera are in state custody and are members of Northern Structure gangs. Furthermore, their allegation is unsupported by the evidence admitted at trial. Correctional Officers [Torres, Ulrey, and Henderson] testified that Petitioner behaved as the leader of the Nortenos in the Kings County Jail and spoke for members in the pod. Law enforcement officers [Thompson, Deeds, and Buhl] testified that Petitioner was the leader of the Nortenos in Avenal and the jail. Deputy Bartecceanu even visited Petitioner and warned him not to execute the planned hit on Deputy Torres.

Based on the foregoing, **IT IS HEREBY ORDERED**, the petition is denied. After consideration of the verified petition, return, denial and included declarations, this court does not find that there is a reasonable likelihood that Petitioner is entitled to relief and such relief depends on a resolution of fact. (Cal. Rule of Ct, Rule 4.551(h).) On its own motion the court extends the time to rule on this petition, finding good cause to do so under California Rules of Court, rule 4.551, subdivision (h) considering the unusually high number of writ petitions pending before this court, court closures and/or court staff reductions due to the coronavirus pandemic, and the insignificant prejudicial effect thereof to the parties

Dated: 09/06/, 2020

Robert S. Burns
Presiding Judge
Kings County Superior Court

SUPERIOR COURT KINGS COUNTY STATE OF CALIFORNIA

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Additional material from this filing is available in the Clerk's Office.