

FILED

SUPERIOR COURT OF CALIFORNIA  
COUNTY OF ORANGE

FEB 08 2024

DAVID H. YAMASAKI, Clerk of the Court  
*ll*  
BY: C. CEPEDA, DEPUTYSUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF ORANGE

In re FRANCISCO JOSE LOPEZ, ) Orange County Superior Court  
Petitioner ) Case Number: M-21040  
 ) (04CF2780)  
ON HABEAS CORPUS ) ORDER DENYING  
 ) HABEAS CORPUS

**TO THE OFFICE OF ORANGE COUNTY DISTRICT ATTORNEY AND PETITIONER:**

HAVING REVIEWED THE ABOVE CAPTIONED PETITION FOR WRIT OF HABEAS CORPUS AND EXHIBITS SUBMITTED IN SUPPORT THEREOF, THE COURT ISSUES THE FOLLOWING ORDER:

## I.

Petitioner is presently serving an indeterminate term of life imprisonment without the possibility of parole imposed in 2008 after a jury found petitioner guilty of special circumstances gang-related first-degree murder [Pen. Code, § 187(a)/§ 190.2(a)(22)] committed through the discharge of a firearm resulting in death [Pen. Code, § 12022.53(d)/(e)(1)] and for the benefit of a criminal street gang [Pen. Code, § 186.22(b)(1)] as well as street terrorism [Pen. Code, § 186.22(a)]. The judgment of conviction was affirmed on appeal.

Petitioner and Jesus Lopez, both members of a territorial criminal street gang named F Troop, plus three other F Troop members and an individual who belonged to

1 an affiliated street gang, met at a park in the gang's territory.<sup>1</sup> Petitioner displayed a  
2 handgun and told the others "we have a gun ... if something happens." The group left  
3 the park riding bicycles, followed by a truck carrying several other people.  
4

5 Initially the group traveled to the home of a fellow F Troop gang member. They  
6 then went to an intersection located either in or on the border of an area claimed by a  
7 rival street gang named West Myrtle. An eyewitness testified "a minimum of 50" people  
8 "on bicycles" and "walking" were around the intersection at the time.

9 Observing a car driven by Pedro Javier Rosario wearing a muscle T-shirt and  
10 sporting tattoos, the bicyclists hailed him and surrounded his car when it stopped at a  
11 stop sign. Petitioner and Lopez approached the driver's side window and, while  
12 straddling his bicycle, petitioner asked, "Where [are you] from." Rosario said something  
13 and slowly began to drive away. Petitioner pulled out the handgun, aimed at the  
14 vehicle, and, after a couple of seconds, fired the weapon. The bullet shattered the  
15 vehicle's back window and struck Rosario in the back of the head, killing him. The  
16 bicyclists and truck fled the scene.  
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18 II.  
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20 Petitioner, in pro per, challenges the validity of the judgment of conviction and  
21 sentence claiming actual innocence derived from the following alleged claims of error:

- 22 1. Collateral and judicial estoppel barred prosecution of petitioner on the basis that  
23 he was the sole shooter.
- 24 2. The trial judge erred and committed misconduct by a) presiding over the trial  
25 despite advising the parties he had previously worked with the prosecutor's

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28 1 The statement of facts is taken from the appellate opinion affirming the judgment of conviction.  
(*People v. Lopez* (April 20, 2010, G040350) [nonpub. opn.].)

1 father when the judge was a prosecutor, b) allowing the prosecutor to proceed on  
2 a theory petitioner was the sole shooter which contradicted a theory of liability  
3 advanced by the prosecutor in a co-defendant's prior trial, c) preventing the jury  
4 from learning about a prior jury's verdicts and findings, d) aiding the prosecution  
5 by improperly reminding it of missing witnesses, sustaining prosecutorial  
6 objections, and by selecting jury instructions, e) improperly removing a juror  
7 during trial, f) forcing petitioner to waive his attorney-client privilege, and g)  
8 declining to hold a *Marsden* hearing.

9

10 3. The trial court erred in denying petitioner's motion to vacate his murder  
11 conviction made pursuant to former Penal Code § 1170.95.

12 4. The prosecutor engaged in prejudicial misconduct by a) precluding the jury from  
13 learning about a prior jury's verdicts and findings, b) eliciting false perjured  
14 testimony, c) improperly moving to remove a juror during trial, and d) improperly  
15 vouching for the credibility of witnesses and misstating the evidence during  
16 summation.

17 5. Improper admission of hearsay evidence in violation of petitioner's Sixth  
18 Amendment right to confrontation.

19 6. Ineffective assistance by counsel who essentially allegedly failed to a) file any  
20 motions, b) interview eyewitnesses or have their police interviews transcribed, c)  
21 object to the court's alleged conflict of interest, d) call defense witnesses and  
22 experts, e) impeach prosecution witnesses, f) object to the late addition of a  
23 prosecution witness, g) object to the removal of a juror during trial, h) object to  
24 the admission of hearsay evidence and inapplicable jury instructions, i) object to  
25 the prosecution's request to preclude the jury from learning about a prior jury's  
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verdicts and findings, j) object to prosecutorial misconduct occurring during jury instructions as well as during summation, and k) object to the prosecutor's repeated reference to petitioner as Frank during trial.

7. Ineffective assistance by appellate counsel who allegedly failed to secure production of a complete record on appeal as well as raise any of the abovementioned claims of error on appeal.
8. The prosecutor repeatedly referred to petitioner as Frank during trial in violation of the Racial Justice Act.

11

"A habeas corpus petitioner bears the burden of establishing that the judgment under which he or she is restrained is invalid." (*In re Cox* (2003) 30 Cal.4th 974, 997.) "For purposes of collateral attack, all presumptions favor the truth, accuracy, and fairness of the conviction and sentence; defendant thus must undertake the burden of overturning them. Society's interest in the finality of criminal proceedings so demands." (*In re Roberts* (2003) 29 Cal.4th 726, 740-741.) "Because a habeas corpus petition is a collateral attack on a presumptively valid judgment, the petitioner bears a heavy burden initially to plead sufficient grounds for relief, and then later to prove them." (*In re Champion* (2014) 58 Cal.4th 965, 1006-1007.) "To satisfy the initial burden of pleading adequate grounds for relief, an application for habeas corpus must be made by petition, and if the imprisonment is alleged to be illegal, the petition must also state in what the alleged illegality consists. The petition should both (i) state fully and with particularity the facts on which relief is sought as well as (ii) include copies of reasonably available documentary evidence supporting the claim, including pertinent portions of trial transcripts and affidavits or declarations. Conclusory allegations made without any

1 explanation of the basis for the allegations do not warrant relief, let alone an evidentiary  
2 hearing." (*People v. Duvall* (1995) 9 Cal.4th 464, 474-475.)

3 A court, when presented with a petition for writ of habeas corpus, "must first  
4 determine whether the petition states a *prima facie* case for relief—that is, whether it  
5 states facts that, if true, entitle the petitioner to relief—and also whether the stated claims  
6 are for any reason procedurally barred." "If the court determines that the petition does  
7 not state a *prima facie* case for relief or that the claims are all procedurally barred, the  
8 court will deny the petition outright, such dispositions being commonly referred to as  
9 'summary denials.'" When a habeas corpus petition is sufficient on its face (that is, the  
10 petition states a *prima facie* case on a claim that is not procedurally barred), the court is  
11 obligated by statute to issue an order to show cause. An "order to show cause has a  
12 limited function." It does not "establish a *prima facie* determination that petitioner is  
13 entitled to the relief requested." Rather, it signifies a "preliminary determination that the  
14 petitioner has made a *prima facie* statement of specific facts which, if established,  
15 entitle petitioner to habeas corpus relief under existing law." (*Board of Prison Terms v.*  
16 *Superior Court* (2005) 130 Cal.App.4<sup>th</sup> 1212, 1233-1234.)

17  
18 IV.  
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20 The petition is denied on the following separate and independent grounds:

21 The petition, as it pertains to petitioner's first, second, fourth, fifth, sixth, and  
22 seventh claims of error, is denied as untimely. Petitioner does not adequately explain  
23 and justify the over 15-year delay in seeking collateral review of these claims of error.  
24 Petitioner's characterization of his various claims of error as reflecting actual innocence  
25 does not excuse his lack of diligence. "A criminal defendant mounting a collateral attack  
26 on a final judgment of conviction must do so in a timely manner. It has long been  
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1 required that a petitioner explain and justify any significant delay in seeking habeas  
2 corpus relief." (*In re Reno* (2012) 55 Cal.4th 428, 459 superseded by statute on another  
3 ground as stated in *In re Friend* (2021) 11 Cal.5th 720.) Unreasonable delay "bars  
4 consideration of a petition for writ of habeas corpus under the doctrine of laches." (*In re*  
5 *Douglas* (2011) 200 Cal.App.4th 236, 245.) As presented, none of petitioner's claims of  
6 error amount to a potential fundamental miscarriage of justice sufficient to overcome the  
7 procedural bar against untimely requests for habeas corpus relief. (*In re Clark* (1993) 5  
8 Cal.4th 750, 797-798 superseded by statute on another ground as stated in *In re Friend*  
9 (2021) 11 Cal.5th 720.)

10  
11 The petition, as it pertains to petitioner's first, second, fourth, and fifth claims of  
12 error, is also denied on grounds petitioner does not adequately explain and justify his  
13 failure to raise his claims of error on direct appeal. Merely claiming actual innocence  
14 and ineffective assistance by appellate counsel in conclusory fashion is insufficient to  
15 justify petitioner's lack of diligence. When an "issue could have been but was not raised  
16 on appeal, the unjustified failure to present it on appeal generally precludes its  
17 consideration on habeas corpus." (*In re Sakarias* (2005) 35 Cal.4th 140, 169.)  
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20 The petition, as it pertains to petitioner's third claim of error, is denied on grounds  
21 the issue was considered and denied on appeal. (*People v. Lopez* (Aug. 4, 2021,  
22 G059828) [nonpub. opn.].) Issues raised and rejected on appeal cannot be renewed  
23 and considered via habeas corpus. (*In re Reno, supra*, 55 Cal.4th at 477 citing *In re*  
24 *Waltreus* (1965) 62 Cal.2d 218, 225.)  
25

26 The petition, with respect to petitioner's last three claims of error, is denied on  
27 grounds it fails to set forth a *prima facie* case warranting habeas corpus relief.  
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1 "In reviewing an ineffective assistance of counsel claim, courts do not generally  
2 second guess counsel's tactical decisions. Judicial scrutiny of counsel's performance  
3 must be highly deferential. It is all too tempting for a defendant to second guess [sic]  
4 counsel's assistance after conviction or adverse sentence, and it is all too easy for a  
5 court, examining counsel's defense after it has proved unsuccessful, to conclude that a  
6 particular act or omission of counsel was unreasonable. A fair assessment of attorney  
7 performance requires that every effort be made to eliminate the distorting effects of  
8 hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to  
9 evaluate the conduct from counsel's perspective at the time. Because of the difficulties  
10 inherent in making the evaluation, a court must indulge a strong presumption that  
11 counsel's conduct falls within the wide range of reasonable professional assistance; that  
12 is, the defendant must overcome the presumption that, under the circumstances, the  
13 challenged action might be considered sound trial strategy." (*In re Alcox* (2006) 137  
14 Cal.App.4th 657, 665 citing *Strickland v. Washington* (1984) 466 U.S. 668, 689.)

17 "A defendant claiming ineffective representation bears the burden of proving by a  
18 preponderance of the evidence both (1) that counsel's performance was deficient, i.e.,  
19 that the representation fell below an objective standard of reasonableness, and (2) that  
20 there is a reasonable probability that, but for counsel's unprofessional errors, the result  
21 would have been more favorable to defendant, i.e., a probability sufficient to undermine  
22 confidence in the outcome." (*In re Lucas* (2004) 33 Cal.4th 682, 721.) "To establish  
23 prejudice, it is not enough to show that the errors had some conceivable effect on the  
24 outcome of the proceeding. To show prejudice, defendant must show a reasonable  
25 probability that he would have received a more favorable result had counsel's  
26 performance not been deficient. A reasonable probability is a probability sufficient to  
27

1 undermine confidence in the outcome. The likelihood of a different result must be  
2 substantial, not just conceivable." (*People v. Rogers* (2016) 245 Cal.App.4th 1353,  
3 1367.) "In any case, when considering a claim of ineffective assistance of counsel, a  
4 court need not determine whether counsel's performance was deficient before  
5 examining the prejudice suffered by the defendant as a result of the alleged  
6 deficiencies.... If it is easier to dispose of an ineffectiveness claim on the ground of lack  
7 of sufficient prejudice, which we expect will often be so, that course should be followed.  
8 A defendant must prove prejudice that is a 'demonstrable reality,' not simply  
9 speculation." (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1241.)

10  
11 The allegations made concerning trial counsel are largely conclusory and not  
12 independently corroborated. As such, petitioner does not meet his burden of  
13 demonstrating that counsel's performance fell below an objective standard of  
14 reasonableness. Furthermore, petitioner does not establish demonstrable prejudice  
15 because of the numerous errors and omissions attributed to counsel in view of the  
16 evidence adduced at trial. Absent a showing of demonstrable prejudice, there is no  
17 basis upon which habeas corpus relief can be granted based on a claim of ineffective  
18 assistance of counsel.

19  
20 To the extent petitioner argues that prejudice should be presumed because of  
21 counsel's representation or lack thereof, petitioner's contention is without substance.  
22 Petitioner does not demonstrate he was abandoned by counsel or that counsel  
23 completely failed to subject the prosecution's case to meaningful adversarial testing.  
24 Presumed prejudice is limited to those few situations where counsel's failure is  
25 complete. "When we spoke in *Cronic* of the possibility of presuming prejudice based on  
26 an attorney's failure to test the prosecutor's case, we indicated that the attorney's failure  
27  
28

1 must be complete. We said if counsel entirely fails to subject the prosecution's case to  
2 meaningful adversarial testing." (*Bell v. Cone* (2002) 535 U.S. 685, 697 see also *In re*  
3 *Avena* (1996) 12 Cal.4th 694.)

4 To establish a claim of ineffective assistance of appellate counsel, a petitioner  
5 must show that counsel unreasonably failed to raise arguable issues on appeal and that  
6 such failure was prejudicial. Prejudice is established by showing a reasonable  
7 probability that, but for counsel's failures, petitioner would have prevailed on his appeal.  
8 (*Smith v. Robbins* (2000) 528 U.S. 259, 285-286; see also *People v. Osband* (1996) 13  
9 Cal.4th 622, 664.)

10 As presented, the petition does not demonstrate that appellate counsel  
11 unreasonably neglected to raise arguable issues on direct appeal and that such failure  
12 was demonstrably prejudicial to petitioner.

13 With respect to petitioner's remaining claim of error, petitioner is currently  
14 imprisoned due to his conviction for special circumstances first-degree murder and is  
15 therefore eligible to seek post-conviction relief via habeas corpus under the Racial  
16 Justice Act. (Pen. Code, § 745(a)(2), (b), (j)(3); § 1473(e).)

17 However, petitioner does not meet his burden of making a *prima facie* case for  
18 relief based on a potential violation of the Racial Justice Act as required under Penal  
19 Code § 1473(e). Assuming what petitioner alleges is true, petitioner does not  
20 demonstrate that racial epithets or racially discriminatory language was used during his  
21 trial. It is commonly understood that the name Frank can be used as an English version  
22 of the name Francisco. Without more, the prosecutor's alleged use of the name Frank  
23 during petitioner's trial does not invoke or appeal to racial bias nor does it reference  
24 petitioner's physical appearance, culture, ethnicity, or natural origin to an objective

1 observer to qualify as racially discriminatory language under the Racial Justice Act.

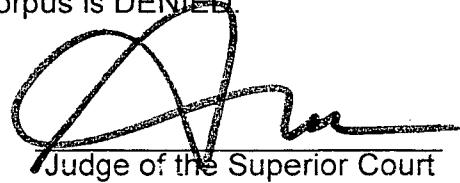
2 (Pen. Code, § 745(h)(4).)

3 No prima facie case for relief is established. An order to show cause will issue  
4 only if petitioner has established a prima facie case for relief on habeas corpus.

5 (People v. Duvall, *supra*, 9 Cal.4th at 475.)

6 The petition for writ of habeas corpus is DENIED.

7 Dated: 2/8/21

  
8  
9 Judge of the Superior Court

10 ANDRE MANSSOURIAN

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FOURTH APPELLATE DISTRICT  
DIVISION THREE

In re FRANCISCO JOSE LOPEZ  
on Habeas Corpus.

G063915

(Super. Ct. No. 04CF2780)

O R D E R

THE COURT:\*

The petition for a writ of habeas corpus and request for appointment of counsel are DENIED.

O'LEARY, P. J.

\* Before O'Leary, P. J., Delaney, J., and Gooding, J.

Court of Appeal, Fourth Appellate District, Division Three - No. G063915 JUN 18 2024

Jorge Navarrete Clerk

S284485

Deputy

## IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re FRANCISCO JOSE LOPEZ on Habeas Corpus.

The petition for review is denied.

Corrigan, J., was absent and did not participate.

GUERRERO

*Chief Justice*

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