SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO
Department No. 22

IN THE MATTER OF THE APPLICATION OF MAURICE CALDWELL Petitioner, FOR A WRIT OF HABEAS CORPUS	WRIT NUMBER 5917 COURT NUMBER 1260545 ORDER

Introduction

Pursuant to California Rule of Court 4.551, once an order to show cause has been issued in a proceeding on writ of habeas corpus the respondent has 30 days in which to file a return. Thereafter the petitioner has 30 days in which to file a denial. The court then has 30 days in which to grant, deny or schedule an evidentiary hearing. These time limits have not been met in this case. The order to show cause was issued in August of 2009, and it has taken more than a year for the People to provide this court with a return and memorandum of points and authorities. The petitioner has not yet had a chance to file a denial.

There has been a substantial delay in this case, and the court has before it sufficient evidence to find petitioner was denied the effective assistance of counsel at trial. Petitioner has waited too long for relief; therefore, rather than waiting for the petitioner to file a denial, this court now grants the writ.

Background

Petitioner was convicted of second degree murder in 1991, for a crime that occurred on June 30, 1990. He filed this petition in 2009 in which he alleged there are five reasons his imprisonment is unlawful: 1) Newly discovered evidence undermines the prosecution case; 2) he was convicted on false testimony; 3) he was denied effective assistance of counsel; 4) these cumulative errors deprived him of his right to due process; and, 5) he is actually innocent.

In 2009 this court issued an order to show cause why the requested relief should not be granted. Numerous requests for extensions of time to file the return were made by the People. The last extension granted by the court ordered the People to file the return on August 9, 2010. The People failed to do so and requested late filing of the return. The People did not present for filing the points and authorities in support of the return until September 20, 2010. The petitioner has filed a motion requesting the writ be granted on the undisputed facts in the petition since the return was not timely filed.

The court finds the delay in filing the return to be egregious, and possibly deserving of sanctions. However, the petitioner has been convicted of murder and the safety of the public is at stake. Rather than deciding the writ based only on the petition, the court will accept the People's return and Memorandum of Points and Authorities for filing.

Facts Presented in the Petition

Early in the morning of June 30, 1990, four men (Aguirre, Acosta, Bobila and Viray) drove to the Alemany Projects in San Francisco to buy crack. (Petn. 3:5-7.) They pulled up close to where five to seven people were standing near a streetlight. (Petn. 3:7-9.) These people started toward the car and the four men exited the car. (Petn. 3:9-11.) The approaching men spoke with Acosta. (Petn. 3:11.) One of them handed Bobila two pieces of crack, and Bobila gave that man money. (Petn. 3:12-13.) The man said it was not enough, and Bobila turned to his companions to ask for more money. (Petn. 3:13-14.) At that point one of the men punched Bobila in the face. (Petn. 3:15.) Immediately after that a shot was fired. (Petn. 3:15-16.)

Bobila got in the car and the car window shattered. (Petn. 3:16-17.) Acosta followed, clutching his chest. (Petn. 3: 18.) Bobila put Acosta in the back seat of the car and drove away. (Petn. 3:19.) Bobila heard more shots as he drove away. (Petn. 3:20.) Viray and Aguirre escaped on foot and were not injured. (Petn. 3:21.) Acosta died of shock and loss of blood from

gunshot wounds. (Petn. 3:25.) His wounds were caused by both shotgun pellets and a bullet. (Petn. 3:26.) The primary cause of death was the bullet traveling through Acosta's heart, liver and spleen. (Petn. 3:26-28.)

On July 12, 1990 an anonymous caller advised police to look at Maurice Caldwell for the shooting of Acosta. (Petn. 4:25-26.) On July 13, 1990 the police canvassed the Alemany projects looking for anyone with information. (Petn. 4:27-28.)

Mary Cobbs (a resident of the Alemany projects) said she had seen the whole incident, including a man with a handgun and a man with a shotgun. (Petn. 5:2-7.) She said they did not live in that area. (Petn. 5:7-8.) She did not know their names, but would recognize them if she saw them again. (Petn. 5:8-10.)

While one officer was speaking to Ms. Cobbs, another officer came to the door to get the keys to the police car. (Petn. 5:11-13.) He had Caldwell with him and wanted to put him in the car. (Petn. 5:11-13.) Cobbs later claimed she had not seen Caldwell at this time. (Petn. 5:13-15.) The officer did refer to Caldwell by name while at Cobbs' door. (Petn. 5:18-20.)

On July 26, 1990 Cobbs picked Caldwell out of a photo array, calling him "Twan." (Petn. 5:21-22.) She said she had recognized him during the shooting but did not tell the officer when she spoke to him on the 13th, since she was not sure of his

nickname. (Petn. 5:22-25.) She knew him because he had once been her neighbor, but she had said earlier that the shooters did not live "around here" because they did not live around there at that particular time. (Petn. 5:22-6:7.)

Prior to the shooting Cobbs wanted to move out of the projects. (Petn. 6:8-9.) The police inspector told her that if she was threatened and agreed to help them, they would move her out of the projects. (Petn. 6:9-10.) Cobbs identified Caldwell as the man with the shotgun and she was moved out of the projects. (Petn. 6:11-12.)

Viray and Aguirre did not identify Caldwell after viewing a photo lineup on July 27, 1990. (Petn. 6:19-20.) Bobila tentatively identified Caldwell as the man who punched him, but was not sure. (Petn. 6:21-22.) On October 23, 1990, at a live lineup, Aguirre identified Caldwell with a question mark and a "maybe." (Petn. 7:8-10.) Bobila identified Caldwell at the live lineup, but did so based on his previous photo identification and was still not sure. (Petn. 7:12-15.) Neither Viray, nor Aguirre nor Bobila could identify Caldwell in court as a shooter or as someone who was present at the shooting. (Petn. 7:16-18.)

Defense witness Deborah Rodriguez testified that Caldwell was in her upstairs apartment when they heard shots and ran outside. (Petn. 8:2-4.) She also testified that when they went

outside Marritte Funches told her he had shot someone. (Petn. 8:4-6.)

Defense witness Alice Caruthers testified that on June 30th around 2:00 A.M. she saw Marritte Funches arguing with a few people who were trying to buy crack. (Petn. 8:10-12.) She saw Marritte pull out a gun and shoot one of them, but she did not see Caldwell. (Petn. 8:12-14.)

Petitioner told his attorney that Marritte Funches was the actual shooter who killed Acosta. He identified the man with the shotgun as Henry Martin. Counsel did not hire an investigator and did not interview Mary Cobbs or Marritte Funches. Petitioner insisted he was not one of the shooters but had been in a nearby apartment at the time, and wanted to present this as his defense. Counsel thought a better defense was to argue Cobbs had indeed seen Caldwell with the shotgun, but that he had only shot at the car. Under this defense he could not have killed Acosta, because Acosta primarily died from the pistol wound. (Exh. H.)

Petitioner declares he was in bed in an apartment at the time of the shooting and only ran outside after he heard shots. He ran down a path between the apartments and Alemany Street toward the area where the shots came from. He saw Henry Martin standing by the corner, firing a shotgun. He saw him run down Ellsworth Street after firing. He also saw Marritte Funches and Eric Brown standing at the back corner of the same building. He

asked what had happened and was told Eric punched one of the victims and Marritte shot and killed another. He gave this information to his attorney but he is not aware that his attorney ever interviewed Funches, Brown or Martin. He also gave his attorney seven other names of people who might be witnesses. He is not aware that counsel interviewed any of these possible witnesses. When petitioner asked counsel if he interviewed any of these people counsel stated that he did not need to, because he knew petitioner was innocent. He also did not need a lot of witnesses because the prosecution case was weak. Petitioner never saw an investigation report of any kind. Petitioner suggested to counsel that he take photographs of the actual perpetrators and show them around to witnesses, but he never did. (Petn. Exh. I.)

On March 19, 1991, after deliberating for a full day, the jury announced it found Caldwell "not guilty" of first degree murder, but "guilty" of second degree murder, attempted murder, discharging a firearm into an occupied vehicle and the related enhancements. (Petn. 8:16-19.)

The jury was polled and the foreman stated he had actually voted "not guilty" on second degree murder. (Petn. 8:19-20.) He had filled out the verdict form indicating guilty because he thought he was obligated to do so based on the court's response to jury questions. (Petn. 8:21-23.) Another foreman was chosen and deliberations continued the next day. (Petn. 8:25-27.) The

jury then found Caldwell guilty of second degree murder and found all allegations true. (Petn. 9:1-2.)

A new trial motion was denied and the conviction was affirmed by the Court of Appeal. (Petn. 9:4-10.)

Marritte Funches has recently confessed to shooting Acosta with the handgun. He is currently serving a life sentence for first degree murder in an unrelated case. He knows who the shotgun shooter was, but will not divulge that information. He declares it was not Maurice Caldwell. He declares the shotgun shooter was standing across the street from him, behind the corner of the building where Mary Cobbs lived. (Exh. D.) He knew Cobbs and said she lived in a center unit and could not have seen the shotgun shooter, although she could have seen him. (Exh. D.) Petitioner's counsel never spoke to him, and he never heard that petitioner's counsel was looking for him.

Marcus Mendez, one of the people petitioner told counsel was a possible witness, declares that he heard the shots fired, went to his kitchen door and looked out. He saw a group of people, and saw Maurice Caldwell running towards that group. Caldwell had nothing in his hands, and was not holding a gun. He closed the door and heard no more shots. He was never called to testify. (Exh. G.)

Petitioner also gave his counsel the name of Maurice Tolliver. Tolliver declares that he witnessed the shooting that night, because at the time he was sitting on some stairs outside

of a building in the projects. He saw Marritte shoot the victim and he saw Henry (Martin) at the side of the building shooting a larger gun he held with two hands. As the victims drove away Henry passed the shotgun to a taller guy who shot at the car as it was trying to leave. He knew Caldwell and had seen him a few hours before the shooting. Caldwell had gone inside with a girl and Tolliver did not see him again that night. He is positive he was not one of the shooters and did not participate in the incident. He remained on the scene until the police arrived and a detective took his name. That was the only time he was interviewed by law enforcement about the shooting. No defense investigator or attorney ever attempted to interview him. He would have been willing to testify. Maurice Caldwell told him that he told his attorney that Tolliver was a witness and where he could find him, so Tolliver had been expecting Caldwell's attorney to talk to him. (Exh. J, filed separately on October 2, 2009.)

Demetrius Jones was present that night as well. He initially told the police he did not see anything. He did not volunteer to testify because he did not really want to get involved, and because he had an outstanding warrant for his arrest on another matter. (Exh. M. filed separately on April 30, 2010.) The night of the shooting he was standing at the side of the building on Ellsworth Street. He saw Marritte Funches, Henry Martin and Eric Brown outside as well. He saw

Marritte shoot the victim from a few feet away. He saw Henry Martin standing on the side of Cobbs' building. Martin started firing a 12 gauge shotgun. Martin stepped out from the side of the building and continued firing. He did not see Caldwell that night. Caldwell and Martin were approximately the same height with similar hair. Martin was wearing a 49er's jacket and Caldwell sometimes wore a 49er's jacket. Jones does not believe Caldwell knew he was a witness, because he never told anyone until recently. (Exh. M.) Counsel for petitioner discovered Jones was a witness through investigation concerning this writ.

Facts from the People's Return

The People deny many of the facts presented by petitioner based on small details. For instance, the People deny the fact that the victims exited the car and Acosta handed Bobila some money. Instead, the People point out that Bobila testified Acosta handed him the money while still in the car. (Ret. 7.) Many of the denials are of this type and most of them need not be addressed by the court.

The People deny that the medical examiner determined the bullet wound to be the primary cause of death. Rather, he testified that the "major injury" was caused by the bullet wound, but each of the injuries contributed to the shock and hemorrhage that eventually killed Acosta. (Ret. 14.)

The People also deny that Mary Cobbs said she had seen the "whole thing." Although she said she had seen the whole thing

she qualified that with additional statements she saw two men, one with a handgun and one with what looked like a shotgun. She saw "two fellows" in the car and the shooting of the car. (Ret. 22.)

The People deny that petitioner was brought to Mary Cobbs' door by a uniformed officer and that both Cobbs and Officer Gerrans could have seen petitioner. Cobbs was in the kitchen and Gerrans answered the door, and there is no evidence Cobbs saw the petitioner at that time. (Ret. 25-27.)

And the People deny that Cobbs wanted to move out of the projects before the incident. Rather, Cobbs felt threatened by petitioner to the point where she did not want to identify him and when she told the police this they offered to move her if she continued to be a witness for them. (Ret. 45-48.) After she identified petitioner from photographs she was moved. (Ret. 48.)

The People deny that Cobbs was the sole witness identifying petitioner, because Bobila picked petitioner out of a photo lineup and a live lineup and Aguirre picked petitioner out of a live lineup. (Ret. 51.) However, the People admit that none of the surviving victims positively identified petitioner as one of the shooters. (Ret. 55.)

The People admit that Jacqueline Williams (a prosecution witness) testified that she heard two gunshots and that petitioner was inside when she heard them. Both Deborah

Rodriguez and Jacqueline Williams testified they heard no further shots after petitioner went outside. (Ret. 70.)

Ms. Williams and Ms. Rodriguez agreed on petitioner being inside when the shots were heard, but disagreed on several other points. These included how many and the identities of the other people who were present, what petitioner was wearing when he went out, and whether or not Rodriguez ran out with petitioner or a few minutes thereafter. (Ret. 70-73.)

The People deny that the jury verdicts occurred exactly as petitioner states. The People state that petitioner was first found guilty on attempted murder and shooting at an occupied vehicle with allegations. The jury found petitioner not guilty of first degree murder. The foreperson told the court he did not want to be the one to sign the verdict form and the next day a new foreperson was chosen. The jury asked for new forms regarding the second degree murder and petitioner was then found guilty of second degree murder. (Ret. 78-79.)

The People explain that the new trial motion was based on defense counsel's argument that Cobbs' testimony petitioner fired the shotgun from underneath the lamppost was inconsistent with the evidence presented by the ballistics expert. The People opposed the motion by arguing that it was clear there were shots fired that Cobbs did not witness, and the People believed that although the physical evidence did not point only to Cobbs' version, it did not exclude her testimony as a

possible explanation for the evidence that was recovered. (Ret. 80.)

On appeal the petitioner argued that evidence of prior uncharged acts should not have been admitted, instructional error, ineffective assistance of counsel (based on counsel's failure to object to portions of the prosecutions' cross-examination of Betty Tyler). All arguments were rejected, the court finding specifically that the lack of objection during cross-examination was an informed tactical choice because counsel did not want to highlight certain aspects of Tyler's testimony. (Ret. 81-82.)

Authority

Delay

The People argue that the petitioner is not entitled to relief because of the delay between judgment and this petition.

A petition for writ of habeas corpus should be filed as promptly as the circumstances allow, and a petitioner will be expected to demonstrate due diligence in pursuing potential claims. (*In re Clark* (1993) 5 Cal.4th 750, 765.) Where there has been a significant delay in seeking habeas corpus relief, a petitioner must point to particular circumstances sufficient to explain and justify the delay, particularly when the petitioner has made prior attacks on the validity of the judgment without raising the issues. (*Id.*)

Ineffective Assistance of Counsel

The inquiry into whether counsel performed competently under prevailing professional norms consists of two prongs: whether counsel's performance was inadequate and whether his inadequate performance prejudiced the defense. (*Strickland v. Washington* (1984) 466 U.S. 668, 688.) To prove prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. (*Id.* at 694.)

Petitioner must establish prejudice as a "demonstrable reality" - the incompetence must have resulted in a fundamentally unfair proceeding or an unreliable verdict; he cannot simply speculate as to the effect of the errors or omissions of counsel. (*In re Clark* (1993) 5 Cal.4th 750, 766.) Petitioner must establish he is entitled to relief on an ineffective assistance of counsel claim by a preponderance of the evidence. (*People v. Ledesma* (1987) 43 Cal.3d 171, 218.)

In the case of *In re Edward S.* (2009) 173 Cal.App.4th 387, a juvenile appealed from a juvenile court judgment sustaining a petition alleging he annoyed or molested a child, attempted lewd and lascivious acts on that child and made a criminal threat against that child. The juvenile argued ineffective assistance of counsel and sought a new jurisdictional hearing. The trial court found no ineffective assistance of counsel. The appellate

court disagreed with the trial court and found the juvenile had been denied the effective assistance of counsel.

The court addressed several issues raised, including counsel's failure to seek ancillary defense services and failure to properly voir dire the child witness. Counsel also failed to interview certain witnesses, in particular the appellant's uncle Jason, who had information he thought would be useful at the hearing.

Jason had information about other sexual incidents involving the victim's family, including alleged molestations. He also was aware that the victim was a liar and had threatened to make up stories about people in order to get her way. For instance, she once was told she could not go somewhere and when a relative tried to stop her from going she said if he did not let her go she would tell people that he pushed her down the stairs and hit her. (*Id.* at 401.)

The appellate court agreed with the appellant that "a defense attorney who fails to investigate potentially exculpatory evidence, including evidence that might be used to impeach key prosecution witnesses, renders deficient representation." (*Id.* at 407.) Furthermore, California case law is clear that counsel should "investigate all possible defenses and should not select a defense strategy without first carrying out an adequate investigation." (*Ibid.*)

The appellate court also recognized the seriousness of the charges and the fact that it exposed appellant to sex offender registration requirements. (*Ibid.*) Reasonable counsel would have recognized the need to "devote adequate time and resources to appellant's defense." (*Ibid.*)

The trial court had found the evidence of ineffective assistance of counsel inadequate. This was partially because it mainly consisted of Jason's testimony, which the judge believed was largely hearsay and was not credible because Jason was an ex-felon. (*Id.* at 410.)

The appellate court found Jason's testimony could not be so easily dismissed. It noted that Jason's credibility should not be evaluated from the same perspective as a trier of fact, but from the perspective of counsel charged with a duty to defend his client. (*Ibid.*) The question was not whether Jason's claims were true, but whether counsel's failure to investigate their truth was reasonable. (*Ibid.*)

The appellate court found counsel's performance was deficient and resulted in prejudice to the appellant, so it reversed the judgment.

In *People v. Jones* (2010) 186 Cal.App.4th 216 the defendant was convicted of transportation of methamphetamine. The methamphetamine was discovered after defendant was stopped for failure to stop at a stop sign. He claimed the stop was "bogus"

and the officer could not have observed the stop sign from his vantage point.

Jones' motion to suppress was denied and Jones alleged ineffective assistance of counsel because his attorney failed to locate potential witnesses that could testify he did stop at the stop sign and failed to obtain an investigator to prove the police officer could not have seen him run the stop sign.

The appellate court's confidence in the denial of the motion to suppress was "substantially undermined" by counsel's investigative failures and the court remanded the case for a new suppression hearing.

Conclusion

On the issue of delay this court finds that petitioner has presented sufficient evidence to explain and justify any delay. The majority of the evidence upon which this petition is based was gathered in the last few years. Petitioner had no evidence with which to make a prima facie case before this evidence was obtained. Also, the fact that ineffective assistance of counsel was raised on appeal does not affect this claim, because the rejected claim on appeal was based on a specific argument (that counsel failed to make certain objections at trial) that is not addressed here.

On the issue of ineffective assistance of counsel the People argue that counsel was not ineffective. They assert the fact that counsel did not hire an investigator does not mean he

had no assistance or failed to investigate. The People point out that the trial court granted counsel's request to have two paralegals who were working with him be given access to the jail to speak with petitioner.

Also, the People assert counsel's choice to present only certain witnesses was a strategic choice rather than incompetence. Marritte Funches and Maurice Tolliver had prior criminal convictions and would have had their credibility impeached. Marcus Mendez was only 14 and Demetrius Jones was only 18 at the time and it would have been reasonable for counsel to determine the jury might perceive them as impressionable or under the influence of the petitioner.

Finally, the People argue that no prejudice resulted from any of these strategic choices, because the additional witnesses would have only presented cumulative evidence.

The fact that counsel had paralegals working for him does not change the fact that the evidence presented in this petition shows counsel does not remember interviewing or attempting to interview Marritte Funches. Funches was identified by witnesses as the pistol shooter and one would think counsel could remember interviewing or attempting to interview the man who was allegedly guilty of the charged crime.

In addition, counsel does not address what he did with regard to other possible witnesses named by petitioner, including alleged shotgun shooter Henry Martin.

Furthermore, two "paralegals" visiting petitioner in jail does not appear to be an adequate substitution for an investigator who would go into the field to check the scene and track down witnesses.

Nor does this court accept counsel's actions as being part of a well thought out strategy. As the court in *Edward S.* pointed out, counsel must thoroughly investigate before determining a defense or strategy. It does not appear that counsel did so here. For one thing, Demetrius Jones was an adult and could not be characterized as too young to testify. Furthermore, Demetrius Jones was not a witness named by the petitioner, and counsel would only have been able to make a decision whether to have him testify if he had thoroughly investigated possible eyewitnesses in the area where the crime took place. Jones did not surface as a possible witness until the investigation for this petition. (Exhs. I & M.)

In his declaration counsel states petitioner insisted he was innocent and wanted to present that defense to the jury. Counsel thought the better strategy would have been to admit having shot the shotgun at the car, but argue this was not what killed the victim. This proposed "defense" would have exposed petitioner to almost certain criminal liability.

> When there are multiple concurrent causes of death, the jury need not decide whether the defendant's conduct was the primary cause of death, but need only

> decide whether the defendant's conduct was a substantial factor in causing the death.

(*People v. Butler* (2010) Cal.App.4th 998, 1009.) Furthermore, he would have been admitting guilt to firing into an occupied vehicle.

Although the People argue the witnesses who did not testify would only have been cumulative, this court does not believe this defeats a finding of prejudice. The case against petitioner was almost completely based on eyewitness testimony. Although counsel may not have believed he needed more witnesses to establish petitioner's defense, he made this decision without first performing an adequate investigation. It could very well be that one or all of these potential witnesses would have been more credible than the witnesses who did testify. Twenty years have passed and we will never know what a thorough investigation near the time of the incident may have uncovered.

Counsel's failure to investigate the possibility that petitioner was actually innocent and talk to the alleged perpetrators and possible witnesses made petitioner's trial unfair and rendered the verdict unreliable. Therefore this court finds the judgment should be reversed and petitioner provided a new trial. Because the court finds ineffective assistance of counsel, it need not address the issue of actual innocence or any of the other issues raised in the petition.

Finally, it should be noted that in the years since this trial, counsel has been disciplined numerous times by the state

bar. The first incident occurred several months after petitioner's trial. In that case counsel was suspended from the practice of law for six months stayed, with a one-year period of probation. The discipline was the result of counsel's "failure to perform legal services with competence in a single-client matter." ~~Petitioner~~ Counsel was recently disbarred and can no longer practice law in California. (*In the matter of Craig Kenneth Martin* (SBN 74750)(2010) State Bar Court Case No. 06-O-10765-LMA.)

Order

The petition for a writ of habeas corpus is granted to the extent that this court finds petitioner received ineffective assistance at trial, making the judgment under which he is confined unlawful. The order to show cause is discharged, judgment is reversed and the writ is ordered to issue.

Furthermore, a copy of this order will be provided to the California State Bar, as required under Business and Professions Code section 6086.7.

It is so ordered.

12/15/10
Date

CHARLES E. HAINES
Judge of the Superior Court