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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re MARIO ROCHA, on Habeas Corpus.	B180415 (Los Angeles County Super. Ct. No. BA130020)

ORIGINAL PROCEEDING; petition for writ of habeas corpus. Bob S. Bowers, Jr., Judge. Petition granted.

Latham & Watkins, Robert A. Long, Marcus A. McDaniel, T. Ian Graham; and Susan E. Nash for Petitioner.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Mary Sanchez and David A. Voet, Deputy Attorneys General, for Plaintiff and Respondent.

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With this petition for a writ of habeas corpus, Mario Rocha seeks to have his conviction set aside on the ground that his trial counsel's acts and omissions deprived him of a fair trial. We grant the petition.

BACKGROUND

On the night of February 16, 1996, petitioner Mario Rocha attended a pay-to-enter party, as did more than 40 other people, most of whom were high school students. An argument initiated by Highland Park gang members ultimately erupted, escalated into a physical fight, and then degenerated into a shooting match. Various witnesses identified three individuals as shooters: petitioner, Richard Guzman (Guzman) and Raymond Rivera (Rivera). Three witnesses identified petitioner as a shooter. Two of them identified him as the person who was shooting down the driveway toward the street, or the driveway shooter. Matthew Padilla (Padilla), who had a close look at the driveway shooter, identified petitioner with great certainty. Lauro Mendoza (Mendoza) and Bryan Villalobos (Villalobos) identified petitioner with varying degrees of uncertainty. Petitioner's appearance also fit the physical descriptions of a shooter given by Joel Gutierrez, Hector Villalvazo and George Villareal.

The shooting left Martin Aceves dead and Anthony Moscato wounded. Petitioner, Guzman and Rivera stood trial for murder and premeditated attempted murder. The jury convicted them, and we affirmed all three convictions in a nonpublished opinion, *People v. Guzman* (June 29, 1999, B118906).

Petitioner filed a petition for writ of habeas corpus on August 20, 2002, alleging that he received ineffective assistance of counsel at trial. We denied the petition on August 30, 2002, without prejudice to the filing of a new petition which included an explanatory declaration from trial counsel. Petitioner renewed the petition on September 30, 2002. We ordered the People on January 17, 2003 to show cause before the superior court why the requested relief should not be granted. Judge Bob S. Bowers, Jr., acting as referee, held an evidentiary hearing at which he received oral testimony

from several witnesses. Judge Bowers denied the petition on August 11, 2004. The instant habeas corpus petition followed.

CONTENTIONS

Petitioner contends the referee erroneously denied his habeas corpus petition on the ground that defendant had not proven his actual innocence. He additionally contends he established by a preponderance of the evidence that his trial counsel's investigation was so inadequate that it led to the utter collapse of the adversarial process.

Petitioner asserts the referee erred in finding that Laurie Nevarez Aceves (Nevarez) was not a credible witness and that her testimony would not have aided the defense. He further asserts he established that his trial counsel unreasonably failed to locate and compel testimony from Christina Aragon (Aragon) and Monet Logan Martinez (Logan) in support of his mistaken identity defense.[1]

Petitioner contends the referee erroneously required him to produce three additional witnesses at the evidentiary hearing. He also contends he established that trial counsel's failure to protect him from gang evidence, failure to call Anthony Ramirez as a witness, failure to call the eyewitness identification expert as a witness, and failure to seek a separate trial were not the result of strategic decisions. Petitioner asserts he established that trial counsel failed to argue that there were only two shooters, neither of whom was petitioner. He further contends he established that trial counsel's cross-examination of the three witnesses who identified him as a shooter was incompetent. Finally, he contends the referee failed to address the cumulative effect of trial counsel's errors and omissions.

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[1] We use Logan's and Nevarez's maiden names because these are the names appearing in most of the case records.

DISCUSSION

Habeas Corpus Standard of Review

When a prisoner seeks a writ of habeas corpus, we presume that the trial court convicted and sentenced the petitioner fairly, accurately and in reliance upon truthful evidence. (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1260.) The petitioning prisoner therefore bears the burden of alleging and proving by a preponderance of the evidence the facts upon which he seeks relief. (*In re Sassounian* (1995) 9 Cal.4th 535, 546-547.)

When we consider a habeas corpus petition following an evidentiary hearing, we give great weight to the referee's factual findings if they are supported by substantial evidence, although those findings are not binding upon us. (*In re Sakarias* (2005) 35 Cal.4th 140, 151, citing *In re Malone* (1996) 12 Cal.4th 935, 946.) It is particularly important that we defer to the referee's findings resolving conflicting evidence and assessing witness credibility, for unlike us, the referee has an opportunity to observe the manner in which the witness testifies and the witness's demeanor. (*Malone*, *supra*, at p. 946.) We review mixed questions of fact and law independently, however. (*In re Johnson* (1998) 18 Cal.4th 447, 461.)

Ineffective Assistance Standard of Review

A habeas corpus petitioner contending that he received ineffective assistance of counsel must show that his trial counsel's conduct failed to conform to an objective standard of reasonable competence and that his counsel's acts or omissions prejudiced him. (*Bell v. Cone* (2002) 535 U.S. 685, 695; *Strickland v. Washington* (1984) 466 U.S. 668, 687.) To establish prejudice, the petitioner must prove that he received an unreliable or fundamentally unfair trial as a result of his trial counsel's failures. (*In re Visciotti* (1996) 14 Cal.4th 325, 352; see also *Strickland v. Washington*, *supra*, 466 U.S. at p. 686.) If the petitioner fails to demonstrate prejudice, we may reject his ineffectiveness claim without considering whether counsel's performance was deficient. (*Strickland*, *supra*, at p. 697.)

We generally do not second guess a strategic or tactical decision. (*People v. Farnam* (2002) 28 Cal.4th 107, 202; *People v. Mitcham* (1992) 1 Cal.4th 1027, 1059.) We thus must reject an ineffectiveness claim if the record establishes that trial counsel's challenged action, viewed from counsel's perspective at the time, was the result of a tactical decision which was within the range of reasonably competent representation. (*People v. Freeman* (1994) 8 Cal.4th 450, 498; *People v. Bunyard* (1988) 45 Cal.3d 1189, 1215.) If the record does not reveal the reasons behind counsel's action, we also must reject the ineffectiveness claim unless there could not be a satisfactory explanation. (*Farnam*, *supra*, at p. 202.)

Requirement that Petitioner Prove His Innocence

Petitioner claimed only that trial counsel's incompetence deprived him of a fair trial, and therefore of due process, *not* that he actually was innocent. The referee consequently did err in relying on petitioner's failure to prove his innocence.

Ineffective Assistance of Counsel

Adequacy of Trial Counsel's Investigation

Inasmuch as counsel need not investigate all potential witnesses, the failure to find some of them generally constitutes incompetence only when counsel has *refused* to investigate leads that potentially would be beneficial to the defendant. (*People v. Jackson* (1980) 28 Cal.3d 264, 289; *Hendricks v. Calderon* (9th Cir. 1995) 70 F.3d 1032, 1040.) As we shall discuss in detail, trial counsel's approach to the investigation was so deficient that it was tantamount to a refusal to investigate.

Trial counsel had a duty to conduct a reasonable investigation or to make a reasonably informed decision that particular investigations were unnecessary. (*Strickland v. Washington*, *supra*, 466 U.S. at pp. 690-691.) The duty included the conduct of a prompt investigation and the exploration of all potentially relevant avenues. (ABA Stds. for Crim. Justice (3d ed. 1993) std. 4-4.1, p. 181.) This required counsel to exercise "[c]onsiderable ingenuity" to locate potential percipient witnesses and dogged effort to

secure their cooperation. (*Id.*, com. to std. 4-4.1, p. 182.) The failure to perform this duty constitutes ineffective assistance. (*Strickland*, *supra*, at p. 691.)

Soon after petitioner retained him, trial counsel was aware that several witnesses interviewed by police had observed someone shooting a gun on the evening of February 16, 1996, that some of those eyewitnesses identified Guzman and some Rivera as shooters, and that three eyewitnesses (Villalobos, Mendoza and Padilla) had stated that petitioner was one of the shooters. Trial counsel understood that Villalobos and Mendoza had some uncertainty about their identifications of petitioner and that only Padilla was certain that petitioner was a shooter.

Trial counsel believed that the evidence showed as many as two, but not more than two, shooters responsible for the shooting of Martin Aceves and Anthony Moscato and knew that successful defense of petitioner would turn on demonstrating that petitioner was not one of the shooters. In addition, trial counsel knew or should have known that the success of petitioner's defense would depend upon his ability to discredit or undercut the eyewitness identifications of Villalobos, Mendoza and Padilla, and that his greatest challenge was to discredit or undercut the identification by Padilla. Trial counsel also understood that the People had evidence that Guzman and Rivera were gang members.

Trial counsel further learned at the outset of his representation of petitioner that many witnesses were high school students who did not want to get involved in the case or whose parents did not want them to be involved, that some of the witnesses were hiding from the defense and that others, when found, would be reluctant to speak. Although trial counsel recognized that extra work would be required to secure the cooperation of witnesses, he waited approximately five months after he had begun representing petitioner and less than five weeks prior to October 2, 1997, the date then set for trial, to begin his investigation, by reviewing the original police investigative file.

Similarly, although trial counsel hired an investigator, Patrick Sullivan (Sullivan), in April 1997, he failed to manage or direct Sullivan in any true investigative work. Instead, counsel testified, he initially told Sullivan "to go out and interview all the witnesses," entrusting Sullivan to locate them. Trial counsel wanted Sullivan to

interview all of the witnesses, including anyone who had observed the argument, the ensuing fight or the shootings that followed. Counsel recognized that each person who attended the party on the evening of February 16, 1996 was a potential witness, as was the owner or occupant of the house where the events took place. It is unclear, however, what steps Sullivan took to locate witnesses and, as the months went by, he interviewed none of these people. In fact, during the entire investigation, Sullivan provided trial counsel with only two written reports of witness interviews throughout his employment as counsel's investigator. Both of these witnesses, Gabriel Ramirez and Rosie Aldana, were petitioner's friends and therefore not likely to be particularly helpful to petitioner's defense. There is no evidence that trial counsel or Sullivan interviewed witnesses who could help establish that petitioner was not one of the shooters other than those of petitioner's friends who were the subjects of his two written reports.

Trial counsel admitted that upon his retention, he did not meet with his predecessor. He never asked her about the background of the case, the evidence against petitioner or her views about defense strategy.

When trial counsel reviewed the file, he found that his predecessor had prepared trial subpoenas in February 1997 for 12 witnesses. He did not ask her the reasons she had chosen the witnesses named in the subpoenas.

Trial counsel also failed to discuss the case with his predecessor's investigators, who had interviewed several witnesses and had prepared written reports of at least eight witness interviews, including Villalobos, one of the identifying witnesses. Counsel failed to do this notwithstanding his inability to obtain an interview with Villalobos.

The case file contained a declaration one of the predecessor investigators had obtained from Damien Sanchez (Sanchez), from which trial counsel concluded that Sanchez was an "essential" witness for the defense. Counsel nonetheless did not seek the investigator's assistance in locating Sanchez.

Trial counsel had copies of witness interview request forms that the police had prepared, provided to potential witnesses and asked them to sign. More than 30 of the witnesses had signed the forms after checking a box indicating that they did not wish to

speak with defense counsel. When counsel reviewed these forms, he concluded that they were an impediment to his witness interviews. His only strategy for dealing with this impediment, however, was to request from the prosecution new information concerning witness addresses. He did not take that step until more than five months after his retention as petitioner's counsel, which was approximately one month before trial.

A few weeks before the trial date of November 10, 1997, counsel still had not located or interviewed a number of witnesses. At this juncture, he was forced to narrow his focus to only those witnesses who could provide an alibi for petitioner. On October 9, 1997, trial counsel prepared a handwritten list of 16 witnesses, the first six of whom were potential defense witnesses and the remainder of whom were witnesses that counsel thought the prosecution planned to call, i.e., those who had seen a shooter or something that could be tied to a shooter. The witness list included Logan but did not include Nevarez, Aragon, or the occupant of the residence at which the shootings had occurred.

On October 10, 1997, trial counsel wrote to the prosecutor. He requested the addresses of 10 of the witnesses on his handwritten list, those who had seen a shooter or something related to a shooter. The prosecutor responded on the same day by providing trial counsel with the 10 witness addresses that counsel had requested, as well as two additional witness addresses. Trial counsel, in turn, gave his investigator, Sullivan, the 12 addresses. In effect, counsel was asking the investigator to concentrate his investigate effort on interviewing and subpoenaing those witnesses. On October 17, 1997, approximately three weeks before the scheduled trial date of November 10, trial counsel admitted that his investigation of witnesses was incomplete.

Trial counsel and Sullivan spent little time preparing for trial. Counsel did not submit time sheets and does not have records for any period before October 1997. His October time sheets reveal that he spent only eight and one-half hours on petitioner's case during that month. Sullivan's time sheets reveal that he only worked 13 hours over six days in investigative endeavors. Only on October 31, 1997 did he actually interview witnesses.

The foregoing recitation establishes that trial counsel ignored petitioner's case for a prolonged period after his appointment as counsel, made only desultory efforts, if any, to locate most witnesses and spent very little documented time in preparation of the case. This is such an extreme defalcation of the duty to conduct a timely and reasonable factual investigation of the case as to constitute a breakdown in the adversarial process. We turn now to the question of prejudice.

Petitioner's post-trial counsel succeeded in unearthing three witnesses, Nevarez, Aragon and Logan, whose testimony seemingly could have cast reasonable doubt on petitioner's guilt. Although the referee found Nevarez to be less than credible and the testimony of Aragon and Logan to be unhelpful to the defense, the existence of these witnesses suggests what a timely and thorough investigation might have yielded. At this juncture, we cannot know what other witnesses trial counsel might have discovered and persuaded to cooperate who could have confirmed that petitioner was not in the victims' vicinity when the shootings occurred and whom the jury might have viewed as less biased. When trial counsel's failure to investigate is this comprehensive, it is impossible to have any degree of confidence that petitioner received a fair trial. In other words, the deficient performance trial counsel rendered in conducting his pretrial investigation necessarily was prejudicial to petitioner and thus requires a new trial. In light of this conclusion, we need not address petitioner's other contentions.

The petition for writ of habeas corpus is granted, and the judgment of the Los Angeles County Superior Court in *People v. Mario Rocha*, No. BA130020, is vacated in its entirety. Upon finality of this opinion, the Clerk of the Court of Appeal shall remit a certified copy of this opinion and order to the Los Angeles County Superior Court for filing, and respondent shall serve another copy thereof on the prosecuting attorney in conformity with Penal Code section 1382, subdivision (a)(2). (*In re Jones* (1996) 13 Cal.4th 552, 588.) The People remain free to retry petitioner for the crimes at issue.[2]

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SPENCER, P.J.

We concur:

VOGEL, J.

ROTHSCHILD, J.

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[2] Pursuant to Business and Professions Code section 6086.7, we are required to report our reversal of the judgment on the ground of ineffectiveness of counsel to the State Bar of California for investigation of the appropriateness of initiating disciplinary action against Attorney Anthony J. Garcia. (*In re Jones*, *supra*, 13 Cal.4th at p. 589, fn. 9.)