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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

EMILIO TORRES,

Petitioner,

No. CIV S-07-1689 LKK CHS

vs.

SHARON PROSPER,

Respondent.

ORDER

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Petitioner, a state prisoner proceeding pro se, has filed this application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local General Order No. 262.

On December 12, 2008, the magistrate judge filed findings and recommendations herein which were served on all parties and which contained notice to all parties that any objections to the findings and recommendations were to be filed within twenty days. Petitioner was granted an extension of time and has filed objections to the findings and recommendations.

In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 72-304, this court has conducted a de novo review of this case. Having carefully reviewed the entire file,

1 the court finds most of the findings and recommendations to be supported by the record and by  
2 proper analysis, with the exception of the magistrate judge's analysis of petitioner's ineffective  
3 assistance of counsel claim.

4         The findings and recommendations properly set forth the standard for consideration of a  
5 claim of ineffective assistance of counsel: the petitioner must show that counsel's conduct fell  
6 below an objective standard of reasonableness and these errors created a reasonable probability  
7 of a different outcome of the proceedings. Strickland v. Washington, 466 U.S. 668, 687-88, 693-  
8 94 (1984). Where, as here, the petitioner asserts that his counsel's ineffective assistance resulted  
9 in an involuntary plea, to satisfy the prejudice prong, petitioner need only show that his decision  
10 to plea guilty would have been different but for counsel's errors. Hill v. Lockhart, 474 U.S. 52,  
11 58 (1985).

12         With regards to the first prong, the magistrate judge correctly described that it is not  
13 ineffective for counsel to fail to pursue lines of investigation for which he had no notice by the  
14 defendant. For example, counsel does not act ineffectively if he fails to advise his client of the  
15 effect of a prior conviction if the client had not told him of the conviction. Langford v. Day, 110  
16 F.3d 1380, 1387 (9th Cir. 1996) (citing Hill, 474 U.S. at 61-62 (White, J., concurring)). Nor does  
17 counsel act ineffectively for failing to move to suppress a confession if his client did not inform  
18 him that he had not waived his Miranda rights prior to confessing. Id. at 1387.

19         Here, the magistrate judge concluded that petitioner's trial counsel had not acted  
20 ineffectively by failing to interview any of the witnesses or the victim of the robbery for which  
21 petitioner had been charged, to which he pled no contest. According to the magistrate judge,  
22 counsel had no notice of the need to interview these witnesses because petitioner had not  
23 informed him that any evidence presented at the preliminary hearing was untrue or that further  
24 investigation was warranted.

25         This appears to be an unduly narrow reading of Strickland and its progeny. While it is  
26 true that counsel has no obligation to investigate a potential defense when his client has provided

1 no indication that that defense might be meritorious, see, e.g., Langford, 110 F.3d at 1387,  
2 counsel nevertheless has an obligation in every criminal case to conduct reasonable  
3 investigations. Strickland, 466 U.S. at 691; Rompilla v. Beard, 545 U.S. 374, 384-86 (2005);  
4 Wiggins v. Smith, 539 U.S. 510, 533-34 (2003); see also United States v. Mooney, 497 F.3d 397  
5 (4th Cir. 2007); United States v. Barnes, 83 F.3d 934, 939 (7th Cir. 1996). This encompasses a  
6 duty to conduct pre-trial investigations; as many courts have held, counsel is ineffective when he  
7 fails to interview witnesses identified by the state and likely to be called at trial. See, e.g., United  
8 States v. Gray, 878 F.2d 702, 711 (3rd Cir. 1998); Code v. Montgomery, 799 F.2d 1481, 1483  
9 (5th Cir. 1986); Sullivan v. Fairman, 819 F.2d 1382, 1391-92 (7th Cir. 1987).

10 Here, police officers testified at the preliminary hearing as to what the asserted victim and  
11 witnesses of petitioner's robbery had told him. As the magistrate judge acknowledged, he has  
12 declared that he told his attorney "over and over" that he had not been present at the robbery.  
13 Declaration of Emilio Torres in Support of Traverse ¶ 5. It is not the case, therefore, that  
14 petitioner is now asserting counsel should have pursued a line of defense that he would have had  
15 no reason to believe might be fruitful. Instead, petitioner has tendered evidence that he informed  
16 his counsel that he was not present during the robbery. In light of this as well as counsel's notice  
17 of the witnesses' statements on which the state intended to presumably rely, there simply cannot  
18 be a competent, tactical decision for counsel not to have undertaken this most basic pretrial  
19 investigation.

20 Moreover, the court cannot agree that plaintiff cannot meet the prejudice prong of the  
21 Strickland test. While the magistrate judge is correct that a guilty plea is ultimately the decision of  
22 the defendant and not his counsel, it must be informed by competent recommendations by  
23 counsel. Hill, 474 U.S. at 60. In other words, a defendant may be prejudiced if he has been  
24 advised to plead guilty based on counsel's inadequate investigation of the facts and subsequent  
25 advice as to the strength of his defense. Id. Here, petitioner has declared that he would not have  
26 pled guilty had he known that the officers' testimony was untrue and that the asserted witnesses


1 would have testified that they petitioner not been present at the robbery. Declaration of Emilio  
2 Torres in Support of Petition for Habeas Corpus ¶¶ 5-7. This suffices to satisfy the prejudice  
3 prong of the Strickland analysis in the plea context. Hill, 474 U.S. at 58-59.

4 Accordingly, IT IS HEREBY ORDERED that:

- 5 1. The findings and recommendations filed December 12, 2008, are adopted in full except  
6 as to petitioner's claim of ineffective assistance of counsel. The court declines to adopt  
7 the findings and recommendations as to the claim of ineffective assistance of counsel.
- 8 2. The case is referred to the magistrate judge for proceedings consistent with this order.

9 IT IS SO ORDERED.

10 DATED: July 31, 2009.

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14 LAWRENCE K. KARLTON  
15 SENIOR JUDGE  
16 UNITED STATES DISTRICT COURT  
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