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5 UNITED STATES DISTRICT COURT
6 NORTHERN DISTRICT OF CALIFORNIA
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8 JESSE EDUARDO GILL,

No. C 07-0482 MHP (pr)

9 Petitioner,

**ORDER DENYING PETITION FOR
WRIT OF HABEAS CORPUS**

10 v.

11 T. FELKER, Warden,

12 Respondent.
13 _____/

14 **INTRODUCTION**

15 Jesse Gill filed this pro se action seeking a writ of habeas corpus under 28 U.S.C. §
16 2254. The matter is now before the court for consideration of the merits of the habeas
17 petition. For the reasons discussed below, the petition will be denied.

18 **BACKGROUND**

19 A. The Crime

20 On March 6, 2003, at approximately 11:30 p.m., the Gilroy police were summoned to
21 an apartment on Eigelberry Street and found Wilfredo "Willy" Fuentes' body. Fuentes had
22 been stabbed 27 times; a knife lay on the floor nearby and there were blood smears on the
23 walls. The state prosecuted Jesse Gill for the murder based on largely on statements made by
24 Gill's brother to the police, to his mother, and to his mother's boyfriend that Gill had stabbed
25 Fuentes to death. Shortly after the killing, members of Gill's family made several statements
26 to police that implicated him as the killer, although by trial most of the family members were
27 evasive and purported to be unable to remember details about the events of that day.
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1 The following summarizes the California Court of Appeal's description of the
2 evidence in this case:

3 The Prosecution's Case

4 At the time of his death, Fuentes had been renting a room in an apartment on
5 Eigelberry Street from Sonia Mejia ("Mejia") and her boyfriend, Eduardo Barajas, for about
6 four months. Barajas and Mejia were temporarily living about ten blocks away in an
7 apartment on Wren Avenue with Mejia's sick mother. Also staying in the Wren Avenue
8 apartment were Jorge (Mejia's 15-year old nephew) and Michael (Mejia's 13-year old son).
9 Michael had escaped from the juvenile detention ranch a few days earlier.

10 Gill was Mejia's oldest son. Gill lived nearby with his girlfriend, Sonia S. ("Sonia"),
11 and visited Mejia and Barajas frequently at the Eigelberry apartment.

12 On March 6, 2003, Barajas went to the Eigelberry apartment at 9:00 a.m. Jorge
13 dropped Michael and Angel (his 13-year old friend) off at the Eigelberry apartment later that
14 day. Gill arrived at the apartment around 5 p.m. Barajas later told Gill to leave. Barajas
15 noted that Gill was going through Fuentes' room and acting strangely. Gill did not want to
16 leave and told Michael, "I'm going [to] stick this fool," referring to Fuentes. Augmented CT
17 3. Around 7:30 p.m., Gill left. Barajas also left and drove to Wal-Mart to pick up Mejia.
18 Gill then returned. Gill said he saw someone across the alley and Gill ran down the stairs.
19 Michael and Angel followed Gill. They all returned to the apartment afterwards.

20 When they returned to the apartment, Gill hit Fuentes and said, "remember at the alley
21 last night." Augmented CT 8-9; see RT 318, 320. Gill then pulled out a knife and stabbed
22 Fuentes. Michael expressed surprise and left the room when Gill started walking towards
23 him. Fuentes screamed loudly. Gill continued kicking and stabbing Fuentes. He left the
24 room momentarily and asked Michael, "What'd I do?" Augmented CT 10. Michael
25 remained silent. Fuentes continued groaning, and Gill exclaimed, "He's still alive."
26 Augmented CT 11. Gill stabbed Fuentes more times. Gill, Michael, and Angel fled the
27 apartment through a window. Michael and Angel parted company with Gill and went to
28 church. Afterwards, they walked to the Wren Avenue apartment. Jorge joined them.

1 Mejia and Barajas went to the Wren Avenue apartment at about 10 p.m. Michael,
2 Jorge, and Angel were there. Michael cried and told Barajas that Gill stabbed Fuentes and
3 then the three of them had fled the Eigelberry apartment. Barajas convinced Michael to tell
4 Mejia what happened. Michael then told his mother about the stabbing.

5 Barajas and Mejia drove to the Eigelberry apartment, and found Fuentes lying in a
6 pool of blood. They called the police.

7 Michael and Angel implicated Gill in the murder when they talked to police.

8 Two neighbors testified that at about 8:00 p.m. on March 6, 2003, they heard sounds
9 like somebody was moving furniture in the Eigelberry apartment. Another neighbor testified
10 that between 7:00 and 8:30 p.m. that day, she saw Gill, Michael, and another male run down
11 the stairs and towards the alley from the Eigelberry apartment.

12 Rosa testified that on March 7, 2003, Gill told her that he stabbed somebody. Rosa
13 did not believe him. Shortly thereafter, the police came to her apartment and arrested Gill.

14 The Defense Case

15 The defense was that of an alibi. The defense presented testimony from Chris Duran
16 and Vinessa Lira that Gill had been at their house at the time of the murder. The alibi was
17 weak, however, in that neither witness had a strong specific memory of the day on which Gill
18 had been at their house and neither was able to definitively put him at their house at the time
19 of the murder. Gill also testified in his own defense and testified to his alibi.

20 The defense also presented evidence about shortcomings in the police investigation
21 and the lack of physical evidence connecting Gill to the murder. The police did not check
22 whether Gill went home after the murder, nor did they search Gill's apartment for evidence.
23 Rosa's drains were not checked for blood. The drains at the Wren Avenue apartment were
24 checked for blood, and no blood was seen. No blood was found on Gill after his arrest and
25 no fingerprints were found on the knife left at the crime scene.

26 Gill testified to his activities on March 6, 2003. He went to the Eigelberry apartment
27 between 4:00 and 5:00 p.m. and saw Barajas. Shortly thereafter, Fuentes, Michael, and
28 Angel arrived. Around 7:30 p.m., Barajas left the apartment. Angel, Michael, and Gill

1 followed, and ran down the hallway and down the stairs. Gill went to Duran's home, stayed
2 for an hour and a half and walked back to his apartment where he lived with Sonia. Sonia's
3 friend was visiting, so went to another friend's house, where he spent the night.

4 Gill also testified to his activities the day after Fuentes was killed. Gill started his day
5 by visiting Sonia's sister's house, where he learned that the police had a warrant for him. He
6 then called a friend to pick him up and learned from his friend that there had been a report
7 about the murder on a police scanner and that Mejia's name had been mentioned. The friend
8 drove Gill to San Jose to see his uncle. When he went to his uncle's home, he learned his
9 uncle had moved, so Gill called his grandmother's home to get his uncle's telephone number.
10 He talked to Mejia on the telephone and became afraid and nervous. His friend then took
11 him back to his sister Rosa's home in Gilroy. Gill told Rosa that he "had stabbed somebody."
12 RT 291. Rosa asked if Gill if he killed the person, and Gill said he did not. See RT 292.
13 Shortly thereafter, Gill was arrested.

14 B. Procedural History

15 Following a jury trial in Santa Clara County Superior Court, Gill was convicted of
16 first degree murder and was found to have used a deadly or dangerous weapon in the
17 commission of the offense. Cal. Penal Code §§ 187, 12022(b)(1). On September 13, 2004,
18 he was sentenced to 26 years to life in state prison.

19 Gill appealed. The California Court of Appeal affirmed his conviction and the
20 California Supreme Court denied his petition for review.

21 Gill's federal habeas petition alleged one claim for relief, i.e., that defense counsel
22 provided ineffective assistance in that she failed to make an offer of proof that testimony
23 excluded on hearsay grounds was admissible for a nonhearsay purpose. The court found the
24 claim to be cognizable and ordered respondent to show cause why the petition should not be
25 granted. Respondent filed an answer and Gill filed a traverse. The matter is ready for a
26 decision on the merits of the petition.

1 decisions but unreasonably applies that principle to the facts of the prisoner's case." Id. at
2 413. "[A] federal habeas court may not issue the writ simply because that court concludes in
3 its independent judgment that the relevant state-court decision applied clearly established
4 federal law erroneously or incorrectly. Rather, that application must also be unreasonable."
5 Id. at 411. A federal habeas court making the "unreasonable application" inquiry should ask
6 whether the state court's application of clearly established federal law was "objectively
7 unreasonable." Id. at 409.

8 DISCUSSION

9 Gill claims that defense counsel provided ineffective assistance in that she failed to
10 make an offer of proof that evidence of his mother's statement to him —"Michael told me
11 that you stabbed Willy"—during a telephone conversation was admissible for the nonhearsay
12 purpose of showing the effect of the statement on Gill. Mem. of P. & A. in Supp. of Traverse
13 at 7. Gill argues that the statement should have been offered to show why he "subsequently
14 [made] statements to his sister Rosa in which he falsely claimed to have stabbed Willy."
15 Id. at 9.

16 At trial, Gill's attorney unsuccessfully tried to have Gill testify to what his mother told
17 him in a telephone conversation:

18 [Defense counsel]: What did your mom tell you?

19 [Gill]: That-that Michael-

20 [Prosecutor]: Well, I would object to that. What the mother said would be hearsay.

21 The Court: Sustained.

22 [Defense counsel]: Until this point did you know any details about the murder and the
23 death of [Fuentes]?

24 [Gill]: When I was using the phone, yes, I did. At that time my mother had told me
25 that Michael-

26 [Prosecutor]: I would object to any hearsay from the mother.

27 [Defense counsel]: Don't tell me what your mother said.
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[Gill]: Okay.

[Defense counsel]: And the question is until up to this point in time other than hearing your mom's name on the scanner did you know any of the details about the death, murder of [Fuentes]?

[Gill]: No, I did not.

[Defense counsel]: After you talked to your mom at your grandmother's, is that right, what did you do next?

[Gill]: At that time I was already scared, nervous, panicked. At that point I already knew that Michael had said-

[Prosecutor]: Objection to hearsay.

The Court: Sustained.

[Defense counsel]: We know you had a phone conversation. After that tell us what you did?

[Gill]: After we used the phone we got back on the truck and we came back to Gilroy.

RT 405–06. Defense counsel ultimately failed to have admitted the statement that Gill's mother told Gill that his brother Michael had blamed Gill for the stabbing.

On appeal, Gill contended that his trial attorney had been ineffective in not arguing for admission of the statement for a non-hearsay purpose. He contended that it was admissible for the purpose of showing that Gill, believing the statement to be true, acted in conformity with such belief by later making statements to his sister in which he falsely claimed to have stabbed the victim because he wanted his brother not to be blamed for the stabbing.

The California Court of Appeal rejected Gill's ineffective assistance of counsel claim because he failed to show prejudice from defense counsel's alleged mistake. Most importantly, counsel's mistake "did not result in the exclusion of all evidence of [Gill's] defense, but in the exclusion of only a minor bit of evidence." Cal. Ct. App. Opinion, p. 12. Other evidence was presented supporting the defense of alibi and innocence. There was testimony from Gill, Duran, and Lira in support of Gill's alibi defense. Also, there was testimony from Gill that, before he talked to his mother on the telephone, he had learned that

1 there had been a murder, that the police had a warrant for his arrest, and that the police were
2 looking for him. Gill also testified that after talking to his mother on the telephone, he was
3 afraid and nervous, and that he "indicated to [his sister] Rosa that he did the stabbing in an
4 attempt to protect Michael, because defendant feared Michael was involved in the stabbing."
5 Id. at 13. In addition, the California Court of Appeal noted that defense counsel was able to
6 and did make a closing argument that Gill learned from his mother what Michael had said
7 about him (even if not the specific words), and suggested that Gill was trying to protect
8 Michael when he falsely admitted to stabbing Fuentes. The state appellate court concluded:

9 [T]he jury obviously rejected defendant's defense theories of alibi and innocence. In
10 light of Michael's and Angel's statements regarding the stabbing incident and their
11 flight out the bedroom window, the testimony about what Michael told Mejia and
12 Barajas about the incident just hours after it occurred, and [Gill's] statements to Rosa
13 indicating his own guilt, we cannot say that it is reasonably probable that the jury
14 would have reached a more favorable verdict had defense counsel made the proposed
15 offer of proof.

16 Cal. Ct. App. Opinion, p. 13.

17 The state court's decision must be upheld unless it is contrary to or an unreasonable
18 application of Strickland v. Washington, 466 U.S. 668 (1984), or was based on an
19 unreasonable determination of the facts in light of the evidence presented in the state court
20 proceeding. 28 U.S.C. § 2254(d).

21 The Sixth Amendment to the U.S. Constitution guarantees not only assistance, but
22 effective assistance, of counsel. See Strickland, 466 U.S. at 686. The purpose of the right is
23 to ensure a fair trial, and the benchmark for judging any claim of ineffectiveness is "whether
24 counsel's conduct so undermined the proper functioning of the adversarial process that the
25 trial cannot be relied on as having produced a just result." Id. To prevail on an ineffective
26 assistance of counsel claim, a habeas petitioner must show that (1) counsel's performance
27 was "deficient," i.e., his "representation fell below an objective standard of reasonableness"
28 under prevailing professional norms, id. at 687-88, and (2) prejudice flowed from counsel's
performance, i.e., that there is a reasonable probability that, but for counsel's errors, the result
of the proceedings would have been different. See id. at 691-94. "[A] court need not
determine whether counsel's performance was deficient before examining the prejudice

1 suffered by defendant as a result of the alleged deficiencies. . . . If it is easier to dispose of an
2 ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be
3 followed." Strickland, 466 U.S. at 697.

4 The first issue is whether the California Court of Appeal's decision was contrary to
5 Strickland. The state appellate court misstated the prejudice requirement at page 12, but
6 stated it correctly in the conclusion at page 13 of the opinion. Specifically, at page 12, the
7 state court omitted a key phrase at a critical point when it stated: "Even where deficient
8 performance appears, the conviction must be upheld unless the defendant demonstrates
9 prejudice, i.e., that 'but for counsel's unprofessional errors, the result of the proceeding would
10 have been different. A reasonable probability is a probability sufficient to undermine
11 confidence in the outcome.'" Id. at 12 (some internal quotation marks omitted). The actual
12 standard from Strickland is less onerous for the defendant: a defendant "must show that *there*
13 *is a reasonable probability* that, but for counsel's unprofessional errors, the result of the
14 proceeding would have been different. A reasonable probability is a probability sufficient to
15 undermine confidence in the outcome." Strickland, 466 U.S. at 694. By following the
16 lineage of the citations in the state court decision, one can see that someone shortened a
17 quotation from Strickland at an inopportune place. The California Court of Appeal's opinion
18 quoted from People v. Anderson, 25 Cal. 4th 543, 569 (Cal. 2001), which in turn quoted from
19 People v. Ledesma, 43 Cal. 3d 171, 217-18 (Cal. 1987), which in turn quoted from
20 Strickland. Ledesma had the key phrase regarding "reasonable probability" inserted at the
21 right place, but Anderson omitted that key phrase and the California Court of Appeal
22 repeated the error here. In addition to the fact that it appears that the misstatement on page
23 12 of the opinion is attributable to an erroneous effort to shorten a quotation, this court notes
24 that the California Court of Appeal correctly identified Strickland as the governing Supreme
25 Court case and correctly articulated the prejudice standard in its conclusion at page 13.
26 Under those circumstances, this court does not find the state court's decision to be contrary to
27 Strickland. See Woodford v. Visciotti, 537 U.S. 19, 24 (2002) (state court's "occasional
28 shorthand reference to [Strickland's] standard by use of the term 'probable' without the

1 modifier may perhaps be imprecise" but was not contrary to Strickland in light of statements
2 elsewhere in state court opinion that showed the court understood and applied the Strickland
3 standard).

4 The California Court of Appeal did not unreasonably apply Strickland when it
5 determined that Gill's claim failed on Strickland's prejudice prong. The state court found that
6 Gill failed to show any prejudice resulting from the failure to introduce his mother's
7 statement that Gill's brother said Gill stabbed Fuentes. As the state appellate court explained,
8 only a minor piece of defense evidence was excluded as a result of counsel's assumed error.
9 The jury heard evidence supporting Gill's defenses of alibi and innocence. Also, the
10 testimony by Rosa that that Gill said, "I stabbed somebody" was not central to the
11 prosecution's case and was only briefly mentioned in the closing argument. The
12 prosecution's case rested much more heavily on the statements that Gill's family and friends
13 made to the police shortly after the killing, which pointed overwhelmingly at Gill as the
14 killer. Also, even though that specific statement was excluded, defense counsel relied on the
15 essence of that statement in her closing argument. Defense counsel argued that Michael told
16 Mejia that Gill stabbed Fuentes because Michael was involved: "[Gill] says by the time he
17 got to his sister's apartment the next day he knew what was said. . . . So he knows that
18 Michael has said that [Gill] stabbed [Fuentes]. If [Gill] knows he didn't do it, what possible
19 explanation could there be for Michael saying that [Gill] did it other than Michael must be
20 involved somehow." RT 486. In other words, counsel was able to make the point in closing
21 argument even without the testimony of the precise words Gill's mother uttered to him.

22 Another reason the exclusion of the evidence was not prejudicial was that Gill's
23 explanation for why he admitted killing Willy was far-fetched. When he made the
24 admission, Gill knew there was a warrant for his arrest and that the police were looking for
25 him. There was no evidence suggesting that Gill knew so little about the criminal justice
26 system that he did not realize that there would be extreme negative consequences if he
27 admitted to a murder. Familial closeness also did not provide a believable reason for his
28 admission: when Gill learned that his friend heard on a police scanner a report of a murder

1 with a mention of his mother, he did not check on his mother's welfare but instead left town
2 to collect a debt from his uncle. And it is at least counterintuitive to react to a false
3 accusation that one has committed a crime by confessing to committing that crime.

4 An additional reason the exclusion of the evidence was not prejudicial was that Gill
5 denied making the statement that the evidence supposedly explained. While he claims here
6 that his mother's statement would show why he said "I stabbed somebody," at trial he denied
7 he even made that statement and insisted that he told his sister, "*they say* I stabbed
8 somebody." Compare RT 292, 292 (Rosa's testimony) with RT 408, 413 (Gill's testimony).
9 The latter statement does not accept responsibility for the stabbing, and does not appear to be
10 an effort to shield his brother Michael, even if Gill stated that he was "indicating" he did the
11 stabbing while at the same time he was denying that he did the stabbing. See RT 408-09,
12 413. Under the version he told at trial, Gill did not admit to stabbing Fuentes, but only
13 suggested that someone was blaming him for it.

14 In his traverse, Gill argues that the state appellate court's decision that there was no
15 prejudice was incorrect because Crane v. Kentucky, 476 U.S. 683 (1986), requires a
16 meaningful opportunity to present a complete defense, including evidence of the
17 circumstances under which a defendant confessed. Gill mixes apples and oranges, however.
18 Gill's claim here is for ineffective assistance of counsel, not for a denial of the right to present
19 a defense. The prejudice analysis for an ineffective assistance of counsel claim is done
20 within the framework set out by Strickland, not Crane. Further, Crane never even reached
21 the question of whether the error was prejudicial. Crane determined that the exclusion of the
22 evidence violated the Sixth Amendment's Compulsory Process Clause and the Fourteenth
23 Amendment's Due Process Clause, 476 U.S. at 690, but specifically declined to decide
24 whether the error was harmless and left that for the lower court to resolve, id. at 691.
25 Therefore, Crane has no relevance to Gill's claim for ineffective assistance of counsel. Gill
26 fails to persuade with his suggestion that the state appellate court used the wrong prejudice
27 standard when it applied the Strickland prejudice standard.

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1 For the foregoing reasons, it can be said with certainty that there is not a
2 reasonable probability that the result of the proceedings would have been different had
3 defense counsel been able to introduce Mejia's statement as evidence at trial. The state
4 appellate court's rejection of the ineffective assistance of counsel claim was not contrary to or
5 an unreasonable application of clearly established federal law, as determined by the U.S.
6 Supreme Court.

7 **CONCLUSION**

8 The petition for writ of habeas corpus is DENIED on the merits. The clerk shall close
9 the file.

10 IT IS SO ORDERED.

11 DATED: February 13, 2009


Marilyn Hall Patel
United States District Judge