

1 20, 2006, the California Court of Appeal affirmed the judgment of the trial court and denied
2 petitioner's request for state habeas corpus relief.

3 On December 26, 2006, petitioner filed petitions for review of the direct appeal and of
4 the denial of the habeas corpus petition in the California Supreme Court. The California
5 Supreme Court denied review in both cases on February 7, 2007.

6 Petitioner then filed the instant federal petition for a writ of habeas corpus under 28
7 U.S.C. § 2254. Per order filed November 14, 2007, the Court found that the petition, when
8 liberally construed, stated cognizable claims under § 2254 and ordered respondent to show
9 cause why a writ of habeas corpus should not be granted. Respondent filed an answer to the
10 order to show cause. Petitioner did not file a traverse.

11 12 **STATEMENT OF THE FACTS**

13 The California Court of Appeal summarized the facts of the case as follows:

14 Around 1:00 a.m. in August 2004, Alan Yang was walking to his friend's
15 apartment. As he approached the apartment, Yang saw defendant climbing out of
16 the bedroom window of his friend's apartment. At the time he saw defendant's
feet and legs coming out of the bedroom window, Yang was standing on the
walkway that leads to the apartment.

17 After defendant came out of the window, he placed a metal object on the ground
18 and tried to put the screen that was propped against the wall back into the
window where he had just come out. Yang saw this and confronted defendant.
19 Defendant picked up the metal object he had put on the ground and put it inside
his sweatshirt. Yang called "911" on his cell phone as defendant walked away.
20 Defendant jumped over a fence and Yang gave the "911" dispatcher defendant's
physical description as well as the direction in which defendant was going.

21 The police arrived and located defendant crouching down on the second floor of
22 a nearby apartment complex. The police detained defendant, and Yang identified
him as the person he had seen coming out of the apartment earlier that night. The
23 police found \$22.50 in change in defendant's pants pocket. Defendant told the
police he was transient.

24 When the apartment's occupant, Joann Chou returned home, she found that a
25 metal coin box was missing from the desk in her room. The box had contained
mostly quarters. Chou stated that when she left her apartment that night at 11:00
26 p.m., she left her bedroom window open and the light was on in her room. Chou
also stated that there was a fan in the windowsill of her bedroom, and when she
27 returned that night, the fan had been toppled over onto her bed.

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2 Defendant assert[ed] on appeal that his trial counsel was ineffective because she
3 failed to offer his out of court statement to Yang that he was “playing a trick on
4 his friend,” and that his friend Erik lived in the apartment Yang saw defendant
5 coming out of. Of note, and highlighted in defendant’s argument is that the
6 statement was offered and admitted into evidence in the first trial that resulted in
7 a hung jury.

8 At the second trial, the prosecution moved in limine to exclude any of
9 defendant's hearsay statements unless offered as being against defendant’s
10 interest. The court tentatively granted the motion subject to the district attorney
11 making an objection.

12 In addition, the prosecution moved to exclude any questions about Erik on the
13 ground it would elicit hearsay and not be relevant. The trial court granted this
14 motion, stating in relevant part: “the issue is whether this hearsay statement
15 should come in or not if offered by the defense . . . as the Court understands the
16 circumstances from hearing the last trial, that it is a self-serving statement by the
17 defendant out of court offered to prove the truth of the matter asserted. So I
18 would be granting that motion and I would ask that be followed so we don't have
19 a situation that a witness volunteers that.”

20 At the second trial there was no evidence offered or introduced regarding the
21 conversation between defendant and Yang, or defendant’s claim that he was
22 “playing a trick on his friend,” when Yang saw him.

23 The primary basis for defendant’s claim of ineffective assistance in the second
24 trial is his assertion that his out of court statement to Yang that he was “playing a
25 trick on his friend,” is not hearsay, and therefore, his trial counsel should have
26 attempted to have the evidence admitted.

27 Blan v. Santa Cruz County Superior Court, No. H028989, 2006 WL 3353944, at *1-2
28 (Cal. Ct. App. Nov. 20, 2006).

DISCUSSION

A. Standard of Review

29 The Court may entertain a petition for a writ of habeas corpus “in behalf of a person in
30 custody pursuant to the judgment of a State court only on the ground that he is in custody in
31 violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a).

32 The writ of habeas corpus may not be granted with respect to any claim that was
33 adjudicated on the merits in state court unless the state court’s adjudication of the claims: “(1)
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1 resulted in a decision that was contrary to, or involved an unreasonable application of, clearly
2 established Federal law, as determined by the Supreme Court of the United States; or (2) resulted
3 in a decision that was based on an unreasonable determination of the facts in light of the
4 evidence presented in the State court proceeding.” Id. § 2254(d).

5 “Under the ‘contrary to’ clause, a federal habeas court may grant the writ if the state court
6 arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if
7 the state court decides a case differently than [the] Court has on a set of materially
8 indistinguishable facts.” Williams v. Taylor, 529 U.S. 362, 412-13 (2000). “Under the
9 ‘reasonable application clause,’ a federal habeas court may grant the writ if the state court
10 identifies the correct governing legal principle from [the] Court’s decisions but unreasonably
11 applies that principle to the facts of the prisoner’s case.” Id. at 413.

12 “[A] federal habeas court may not issue the writ simply because the court concludes in its
13 independent judgment that the relevant state-court decision applied clearly established federal
14 law erroneously or incorrectly. Rather, that application must also be unreasonable.” Id. at 411.
15 A federal habeas court making the “unreasonable application” inquiry should ask whether the
16 state court's application of clearly established federal law was “objectively unreasonable.” Id. at
17 409.

18 The only definitive source of clearly established federal law under 28 U.S.C. § 2254(d) is
19 in the holdings (as opposed to the dicta) of the Supreme Court as of the time of the state court
20 decision. Id. at 412; Clark v. Murphy, 331 F.3d 1062, 1069 (9th Cir. 2003). While circuit law
21 may be “persuasive authority” for purposes of determining whether a state court decision is an
22 unreasonable application of Supreme Court precedent, only the Supreme Court’s holdings are
23 binding on the state courts and only those holdings need be “reasonably” applied. Id.

24 B. Claims & Analysis

25 Petitioner seeks federal habeas relief based on a claim of ineffective assistance of counsel.
26 Specifically, Petitioner contends his trial counsel was ineffective in failing to offer his statement
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1 to Yang that he had been “playing a trick on his friends” as non-hearsay or under a hearsay
2 exception. The claim is without merit.

3 To prevail on a claim of ineffective assistance of counsel, petitioner must pass the
4 two-part test set forth in Strickland v. Washington, 466 U.S. 668, 687 (1984). Petitioner must
5 demonstrate that: (1) “counsel’s representation fell below an objective standard of
6 reasonableness,” and (2) “counsel's deficient performance prejudiced the defense.” Id. at
7 687-88. Concerning the first element, there is a “strong presumption that counsel’s conduct falls
8 within the wide range of reasonable professional assistance.” Id. at 689. Hence, “judicial
9 scrutiny of counsel’s performance must be highly deferential.” Id. To fulfill the second
10 element, a “defendant must show that there is a reasonable probability that, but for counsel's
11 unprofessional errors, the result of the proceeding would have been different.” Id. at 694. A
12 reasonable probability is a probability sufficient to undermine the confidence in the outcome. Id.

13 The California Court of Appeal rejected Petitioner’s claim on the ground that “any offer
14 by defense counsel to admit the statement would have been futile.” Blan, 2006 WL 3353944, at
15 *2. Contrary to Petitioner’s argument on appeal, the court held that “his out of court statement
16 [was] a classic example of hearsay evidence” and did not fall within any exception to the hearsay
17 rule. Id. at *3. The court explained:

18 Hearsay is defined in the Evidence Codes as “a statement that was made other than
19 by a witness while testifying at the hearing and that is offered for the truth of the
20 matter stated.” ([Cal.] Evid. Code, § 1200.) Here, defendant’s statement to Yang
21 when he was found climbing out of a bedroom window at 1:00 o’clock in the
22 morning that he was “playing a trick on a friend,” is an express declaration of
23 defendant's conduct and motive. The only relevance the statement has is to prove
24 the truth of the matter asserted therein – that defendant was not in fact
25 burglarizing the apartment, but instead was playing a trick on his friend. Under
26 these circumstances, the statement is hearsay, and the trial court properly ruled that
27 it should be excluded from evidence.

28 In addition, there is no exception to the hearsay rule that would allow the
admission of this evidence. Defendant asserts the statement qualifies as an
exception to the hearsay rule as both a contemporaneous statement ([Cal.] Evid.
Code, § 1241), as well as a statement of his state of mind ([Cal.] Evid. Code, §
1250, subd. (a)). With regard to the state of mind exception, even if the statement
would quality under the exception, it would not pass the requirement of
trustworthiness in Evidence Code section 1252. The circumstances under which

1 the statement was made demonstrate it lacks trustworthiness. Specifically,
2 defendant was highly motivated to fabricate the motives for his actions when he
3 was caught coming out of a bedroom window early in the morning and attempting
to replace a screen on the window. Therefore, the statement would not be
admissible under the state of mind exception.

4 Moreover, defendant's statement also does not fall within the contemporaneous
statement exception under Evidence Code section 1241, which provides:
5 "Evidence of a statement is not made inadmissible by the hearsay rule if the
statement: (a) Is offered to explain, qualify, or make understandable conduct of the
6 declarant; and (b) Was made while the declarant was engaged in such conduct."
7 Here, defendant's statement that he was "playing a trick on his friend," does not
accompany the conduct, in that he was putting the screen back on the window at
8 the time he made the statement was made. In short, the statement was not made
while defendant was committing the act of "playing a trick," and therefore, it does
not fall within the contemporaneous statement exception.

9 Because defendant's statement was hearsay that would not fall within any
10 exception to the hearsay rule, defense counsel's failure to offer the statement as
evidence in the second trial was a sound and reasoned decision, and did not fall
11 below the objective standard of reasonableness under prevailing professional
norms.

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13 Id. at *3.

14 The California Court of Appeal's rejection of Petitioner's claim of ineffective assistance
15 of counsel was not an objectively unreasonable application of Strickland. See 28 U.S.C. §
16 2254(d). The state court reasonably concluded that Petitioner's statement was not admissible
17 under California law. Cf. Bradshaw v. Richey, 546 U.S. 74, 76 (2005) (state court's
18 interpretation of state law binds a federal court sitting in habeas corpus). Under these
19 circumstances, it cannot be said that counsel's decision not to offer the statement as evidence
20 amounted to deficient performance. See Juan H. v. Allen, 408 F.3d 1262, 1273 (9th Cir. 2005)
21 (trial counsel cannot have been ineffective for failing to raise a meritless motion); James v. Borg,
22 24 F.3d 20, 27 (9th Cir. 1994) (same). Nor can it be said that counsel's decision prejudiced
23 Petitioner. Petitioner cannot show that (1) had counsel moved to offer the statement as evidence,
24 it is reasonable that the trial court would have granted the motion as meritorious; and (2) had the
25 motion been granted, it is reasonable that there would have been an outcome more favorable to
26 him. Wilson v. Henry, 185 F.3d 986, 990 (9th Cir. 1999). Petitioner is not entitled to federal

1 habeas relief on his claim of ineffective assistance of counsel.

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3 **CONCLUSION**

4 After a careful review of the record and pertinent law, the Court is satisfied that the
5 petition for a writ of habeas corpus must be DENIED.

6 The clerk shall enter judgment in favor of respondent and close the file.

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8 SO ORDERED.

9 DATED: Oct. 19, 2009

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12 CHARLES R. BREYER
13 United States District Judge
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