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E-FILED on 10/12/2011

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

ANTHONY DANIEL GONZALES,

No. C-08-03378 RMW

Petitioner,

v.

MATTHEW CATE, Secretary of California
Department of Corrections and Rehabilitation,

ORDER DENYING PETITION FOR WRIT
OF HABEAS CORPUS, DENYING
REQUEST FOR AN EVIDENTIARY
HEARING, AND DENYING CERTIFICATE
OF APPEALABILITY

Respondent.

[Re Docket Nos. 1, 15]

Anthony Daniel Gonzales petitions for a writ of habeas corpus under 28 U.S.C. § 2254. For the reasons set forth below, the petition for writ of habeas corpus is denied. Petitioner also moves for an evidentiary hearing, or, in the alternative, oral argument. For the reasons set forth below, the motion for an evidentiary hearing or oral argument is also denied.

I. BACKGROUND

On May 22, 2004, petitioner fatally stabbed David Quiroz at a birthday party. According to the testimony of witnesses, petitioner became involved in an altercation with the party's host and was asked to leave the party. Petitioner refused to leave. Rep. Tr. vol. 5, 585, 632-633. A fight involving petitioner, David Quiroz, and Moses Escamilla broke out in the driveway. Rep. Tr. vol. 4,

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS, DENYING REQUEST FOR AN EVIDENTIARY HEARING, AND DENYING CERTIFICATE OF APPEALABILITY—No. C-08-03378 RMW
MEC

1 509-510, 534-535. Witnesses testified that shortly after the fight began, they saw Quiroz collapse
2 into the bushes in the face of petitioner's attack. Rep. Tr. vol. 4, 509-510, 534-535; vol. 5, 642. The
3 fight ended when several guests were able to restrain petitioner. Rep. Tr. vol. 4, 513, 518. By this
4 time, Quiroz was limp and nonresponsive, Rep. Tr. vol. 4, 519-520, and he died at the scene shortly
5 after the arrival of paramedics. Rep. Tr. vol. 4, 281, 560. The forensic pathologist testified that
6 Quiroz suffered eight stab wounds, three of which were potentially fatal. Rep. Tr. vol. 3, 238, 240,
7 246. These wounds were all three-and-a-half inches deep, the full length of the knife blade. Rep.
8 Tr. vol. 3, 240-241; 244-245; 246. The pathologist testified that the wounds were "stabbing
9 wounds" that were deeper than they were wide or long, and that there were no wounds consist with
10 waving a knife back and forth. Rep. Tr. vol. 3, 248-49. The pathologist also testified that Quiroz
11 had injuries consistent with being punched, but no injuries consistent with having punched anyone
12 else, and that Quiroz's blood alcohol level of 0.22 would have made it difficult for Quiroz to defend
13 himself or have much coordination. Rep. Tr. vol. 3, 225; 230-231; 250.

14 Petitioner testified that when he tried to leave the party, a group led by Quiroz attacked and
15 punched him. Rep. Tr. vol. 7, 977. Petitioner testified that he feared for his life, and that he pulled a
16 knife out of his pocket, flicked it open with his thumb, and began swinging it back and forth to force
17 his attackers back. Rep. Tr. vol. 7, 979-80, 1051. He testified that he felt that he "did get somebody
18 a couple time" with the knife as he was swinging it, but that the knife was almost immediately
19 knocked from his hand. Rep. Tr. vol. 7, 980. Petitioner acknowledged that he had lied to the police
20 after he was arrested when he told them that Quiroz pulled the knife on him and attempted to stab
21 him, and that petitioner took the knife from Quiroz and swung it at him in self defense. Rep. Tr. vol.
22 7, 988, 1101. Petitioner testified that he did not know how Quiroz ended up with eight stab wounds,
23 including two wounds to the back of the head. Rep. Tr. vol. 7, 1077-78.

24 Petitioner was convicted in Santa Clara County Superior Court of second degree murder with
25 an enhancement for use of a deadly and dangerous weapon. On September 9, 2005, petitioner was
26 sentenced to sixteen years to life in state prison. Petitioner filed a notice of appeal on September 23,
27 2005. On December 20, 2006, petitioner filed a petition for writ of habeas corpus in the California
28 Court of Appeal in conjunction with his appeal. On May 23, 2007, the California Court of Appeal

1 affirmed petitioner's conviction and denied petitioner's habeas petition. The California Supreme
2 Court denied review of petitioner's appeal on August 13, 2008, and denied review of petitioner's
3 habeas petition on September 4, 2008. The instant petition for habeas corpus was filed in this court
4 on July 14, 2008.

5 **II. ANALYSIS**

6 **A. Legal Standard**

7 A court may grant a petition for writ of habeas corpus "on behalf of a person in custody
8 pursuant to the judgment of a State court only on the ground that he is in custody in violation of the
9 Constitution or laws and treaties of the United States." 28 U.S.C. § 2254(a). The court may grant
10 the writ only if the state court's ruling "resulted in a decision that was contrary to, or involved an
11 unreasonable application of, clearly established Federal law, as determined by the Supreme Court of
12 the United States" or was "based on an unreasonable determination of the facts in light of the
13 evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

14 For a state court's decision to be contrary to clearly established federal law, it must apply a
15 rule that contradicts the governing law set forth in Supreme Court cases, or confront a set of facts
16 that are materially indistinguishable from a Court decision and nevertheless arrive at a different
17 result from Court precedent. *Early v. Packer*, 537 U.S. 3, 8 (2002). A state court decision is an
18 unreasonable application of clearly established federal law "if the state court identifies the correct
19 governing legal principle . . . but unreasonably applies that principle to the facts of the prisoner's
20 case." *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003). The court cannot grant a habeas petition as
21 being an "unreasonable application" of federal law merely because, in its opinion, the law was
22 incorrectly applied in a case. *Bell v. Cone*, 535 U.S. 685, 698-99 (2002). Rather, the state court's
23 application of federal law must be "objectively unreasonable" in order to justify granting the
24 petition. *Id.* The review of state court decisions is highly deferential, and state court decisions
25 should be given the benefit of the doubt. *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002).

26 AEDPA also restricts the district court's discretion to grant an evidentiary hearing. *Baja v.*
27 *Ducharme*, 187 F.3d 1075, 1077 (9th Cir. 1999). The statue provides that "if the applicant has failed
28 to develop the factual basis of a claim in State court proceedings, the court shall not hold an

1 evidentiary hearing on the claims" unless the applicant shows that the claim relies on a new rule of
2 constitutional law previously unavailable or a factual predicate that could not have been previously
3 discovered through the exercise of due diligence. 28 U.S.C. § 2254(e)(2). The facts underlying the
4 claim would also need to "be sufficient to establish by clear and convincing evidence that but for
5 constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying
6 offense." *Id.* "If the record refutes the applicant's factual allegations or otherwise precludes habeas
7 relief, a district court is not required to hold an evidentiary hearing." *Schriro v. Landrigan*, 550 U.S.
8 465, 474 (2007).

9 **B. Petitioner's Claims**

10 Petitioner raises three claims of ineffective assistance of counsel. He contends that trial counsel
11 was constitutionally ineffective (1) by not asking petitioner to demonstrate one-handed operation of the
12 knife or retaining an expert witness to testify about the operation of the knife and demonstrate operation
13 for the jury, (2) by not challenging the court's decision to submit the knife to the jury in sealed plastic,
14 and (3) by choosing to respond in her closing argument to the prosecution's incorrect statement about
15 the knife, rather than objecting to the statement.

16 In order to establish that counsel was ineffective, petitioner bears the burden of showing that
17 counsel's performance fell below an objective standard of reasonableness under prevailing professional
18 norms and that there is a reasonable probability the result of the proceeding would have been different.
19 *Strickland v. Washington*, 466 U.S. 668, 687-688, 695-96 (1984). In determining whether performance
20 fell below an objective standard of reasonableness, the reviewing court "must indulge a strong
21 presumption that counsel's conduct falls within the wide range of reasonable professional assistance."
22 *Id.* at 689. Strategic decisions by counsel are "virtually unchallengeable." *Id.* at 690. A reasonable
23 probability the result of the proceeding would have been different is "a probability sufficient to
24 undermine confidence in the outcome." *Id.* at 694. Petitioner must affirmatively prove prejudice. *Id.*
25 at 693.

26 The state court's rejection of petitioner's claims was not an unreasonable application of
27 *Strickland*. Petitioner argues that defense counsel should have taken additional steps to inform the jury
28 about how the knife worked, because he asserts that whether he opened the knife with one or two hands

1 was central to his claim of self defense. But because petitioner testified that the knife could be opened
2 with one hand, the evidence necessary to explain the operation of the knife was before the jury. Rep.
3 Tr. vol. 7, 1094-95. The prosecution did not offer any evidence that the knife was necessarily operated
4 with two hands. The operation of a thumb stud to open a knife was not outside the capability of the
5 average juror to understand and did not require expert testimony. Counsel was not objectively
6 unreasonable in failing to obtain additional testimony regarding the operation of the knife.

7 Counsel was also not objectively unreasonable in failing to object to the judge's decision to
8 provide the knife—contaminated with potentially harmful biological matter—in protective packaging to
9 the jury. Control of whether and how items in evidence are presented to the jury falls within the sound
10 discretion of the trial court. *See People v. Walker*, 150 Cal. App. 2d 594, 603 (1957). In light of the
11 evidence presented at trial and given the court's strong interest in protecting the evidence as well as the
12 jurors from injury, an objection would have been futile.

13 Finally, counsel was not objectively unreasonable in choosing to correct the statement of the
14 prosecutor in closing argument that "you have to take two hands to open" the knife and that it was
15 impossible that petitioner "did as he described it was, grabbing on to someone and he's bent over a bush
16 being beaten up and he's able to pull that knife out of his pocket and open it with one hand and then do
17 the stabbing. That's a lie. The truth is that he would have had to have taken that knife out and open it
18 up in preparation." Rep. Tr. vol. 9, 1508-09. Trial counsel heard the challenged comment, was aware
19 that it was not based on the evidence, and addressed the misstatement of fact in her closing argument.
20 Rep. Tr. vol. 10, 1552. Her decision to address the comment in her own argument, rather than objecting,
21 was a tactical decision based on a complete awareness of all the relevant facts and applicable law. It
22 was not objectively unreasonable.

23 Petitioner contends that an evidentiary hearing is necessary because a factual dispute exists as
24 to whether he was denied effective assistance of counsel based on the failure of counsel to introduce
25 testimony by an expert witness regarding the likelihood that petitioner could have opened the knife
26 with one hand. Petitioner is not entitled to an evidentiary hearing regarding the proposed expert
27 testimony because petitioner has not demonstrated that such testimony would establish that but for
28 constitutional error, no reasonable factfinder would have found him guilty of the underlying offense.

1 Petitioner has also failed to show that his claims rely on a factual predicate that could not have been
2 previously discovered through the exercise of due diligence. 28 U.S.C. § 2254(e)(2).

3 **III. CERTIFICATE OF APPEALABILITY**

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5 The federal rules governing habeas cases brought by state prisoners require a district court
6 that denies a habeas petition to grant or deny a certificate of appealability ("COA") in its ruling. *See*
7 Rule 11(a), Rules Governing § 2254 Cases, 28 U.S.C. § 2254 (effective December 1, 2009). For the
8 reasons set out in the discussion above, petitioner has not shown "that jurists of reason would find it
9 debatable whether the petition states a valid claim of the denial of a constitutional right [or] that
10 jurists of reason would find it debatable whether the district court was correct in its procedural
11 ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Accordingly, a COA is denied.

12 **IV. ORDER**

13 For the foregoing reasons, the petition for writ of habeas corpus is denied, the request for an
14 evidentiary hearing is denied and a certificate of appealability will not be issued.

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16 DATED: 10/12/2011

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RONALD M. WHYTE
United States District Judge