Filed 10/20/17 In re Tarkington CA2/1

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re LAMONT T. TARKINGTON on Habeas Corpus.	B270141 (Los Angeles County Super. Ct. No. MA034011)

ORIGINAL PROCEEDING; petition for writ of habeas corpus, Carol C. Koppel, Judge. (Retired judge of the L.A. Sup. Ct. assigned by the Chief Justice pursuant to art. VI., § 6 of the Cal. Const.) Petition granted.

David M. Thompson, under appointment by the Court of Appeal, for Petitioner.

Kathleen A. Kenealy, Acting Attorney General, Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior

Assistant Attorney General, Zee Rodriguez and Michael C. Keller, Deputy Attorneys General, for Respondent.

A jury convicted petitioner Lamont T. Tarkington (Tarkington) and codefendant Darris Allen (Allen) of five counts of second degree robbery (Pen. Code, § 211)[1] and one count of second degree commercial burglary (§ 459). The jury also found that Tarkington and Allen robbed the bank for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)) and that a principal used a firearm in the commission of that crime (§ 12022.53, subds. (b), (e)(1)). In a bifurcated proceeding, the trial court found that Tarkington had a prior serious felony conviction. The court sentenced Tarkington to 39 years 4 months in state prison.

Tarkington and Allen appealed from the original judgment. (*People v. Tarkington* (Mar. 3, 2009, B199860) [nonpub. opn.].) Although we affirmed the convictions, we held that the trial court abused its discretion in admitting Tarkington's 1997 bank robbery conviction. Nevertheless, we noted that the evidence against Tarkington, although circumstantial, was very strong. Thus, we concluded, it was not reasonably probable that Tarkington would have obtained a better result had evidence of the prior bank robbery not been admitted. We also held that the evidence was insufficient to support the findings that Tarkington and

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

Allen committed the robbery for the benefit of a gang. Thus, the gun use and gang enhancement had to be stricken.

On remand, the trial court resentenced Tarkington to an aggregate 24-year term in state prison. The trial court also imposed a restitution fine and a parole revocation fine, in the amount of $4,800 each. (§§ 1202.4, subd. (b), 1202.45.) Tarkington again appealed, contending that the trial court improperly imposed restitution fines that exceed the fines imposed at his original sentencing. The Attorney General conceded the point and we agreed. We also agreed that Tarkington should have received an additional two days of actual custody credit. (*People v. Tarkington* (Oct. 22, 2010, B219128) [nonpub. opn.].)

On October 14, 2011, Tarkington filed a petition for writ of habeas corpus. Tarkington contended, in relevant part, that he was deprived of adequate assistance of trial counsel. He claimed that trial counsel should have sought certain cell phone information, which, he asserted, would have supported the testimony of a defense witness that Tarkington was in a different and distant location when the robberies were committed. After subsequent evidentiary hearings revealed that certain items found in Tarkington's vehicle, and cited by the prosecution at trial, did not contain red dye from the bank's dye pack, Tarkington filed a supplemental habeas petition with this court, alleging that trial counsel's failure to test these items constituted ineffective assistance of counsel.

We agree and grant the petition.

BACKGROUND

I. Trial

On December 14, 2005, at approximately 10:15 a.m., three masked men robbed tellers at a supermarket bank. Witness Brandi Bateman testified that she saw a white SUV, with its engine running and without any occupants, parked on the sidewalk outside the supermarket. Bateman saw three or four masked men come out of the supermarket, get into the SUV and drive off. She wrote down the license plate number and gave it to the bank's assistant manager.

The robbers took about $12,000. Some of the currency was "bait money," which are bills with recorded serial numbers. The currency also included at least one dye pack, designed to explode and spray dye.

About 6:45 p.m. that same day, Deputy Steven Crosby found the white SUV—a Ford Explorer—parked on the street less than a mile from the supermarket. The engine was running but the vehicle was unoccupied. The deputy found $124 in the vehicle. The deputy saw a line of red dye across the back seats and inside the rear passenger door. He testified that it was likely that the robbers had placed the dye pack into an ice chest to reduce the spread upon explosion but that some leaked out into the vehicle. No ice chest was ever recovered.

The white Ford Explorer had been stolen from Budget Rent-A-Car near LAX.

About 9:00 p.m., Deputies James Wheeler, Ronald Giovanni,[2] and Dianne Moreno stopped a Dodge Magnum hatchback station wagon for a traffic violation. Tarkington's codefendant, Darris Allen, was driving the car, which Tarkington owned. Tarkington was seated in the front passenger seat. Tarkington said his name was Michael Skaggs and displayed a driver's license with that name and his photograph.

Deputies Giovanni, Moreno and Garcia searched the Dodge Magnum in the field. Deputy Giovanni found a black plastic bag wedged between the driver's seat and center console with $3,138 in currency stained with red dye. Deputy Moreno found a jacket on the rear back seat; one pocket contained a large amount of currency "in various denominations containing red dye. It appeared that the money was bleached and it had a small scent of bleach, also." She testified that, while she detected the scent of bleach, she did not smell pepper spray.

Two of the $20 bills found in the car were "bait money" with bank-recorded serial numbers. Deputy Giovanni testified that the bills "had red dye all over" and "appeared to be moist."

Deputy Wheeler testified that, in the rear hatchback area, he saw a white shirt with a stain that looked pink, like Kool-Aid.

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[2] At trial, the deputy gave his name as "Giovanni," but the reporter typed "DiGiovanni" in parts of the transcript.

Deputy Moreno testified that, when she searched Tarkington's person at the station, she found $201 in currency in his pants pocket. The bills had red dye and smelled of bleach.

Detective Lauren Brown testified as to the inventory of Tarkington's vehicle after it was impounded. Detective Brown stated that the deputies who inventoried the car found a letter from State Farm addressed to Mike Skaggs, two citations to Michael Skaggs, and a birth certificate in the name of Michael Skaggs.

On the rear passenger seat, "right towards the middle seat," deputies found, and Detective Lauren Brown booked, a short nylon stocking, tied at the top, that contained about $59 in coins. Detective Brown testified that "inside the red dye they use some type of a pepper spray because you would smell both." He testified that the dye manufacturer generally places a contaminant in the dye so that, when it explodes, it would incapacitate the individual who is carrying it. He stated, "And you can smell that along, you can see the red dye on—on the change. If you look at the bag, you can see some of the residue that's actually on the bag." The detective reiterated that there was red residue from the change, "and you can see it [the red dye residue] on the change."

Deputy District Attorney Mesropi asked Detective Brown whether there were any other items in the car with a color similar to the color on the coins. When Detective

Brown began to answer, saying that there was a T-shirt[3] that looked as though it had the same red color, Tarkington's defense counsel, Carrie Foglesong, objected. The trial court overruled the objection. Detective Brown answered that the color on the shirt appeared to be the same red dye substance as was on the coins and coin bag. He testified that the shirt was found in the rear hatch area of the car, as was a towel, which had "a few spots that has the same red dye coloring."

Detective Brown opened a brown paper bag that he had retrieved from the box of evidence. The detective said that the tank top and towel were in the brown paper bag. He said, "I can smell that." When asked what was in the bag, he responded that there was "a white ribbed tank top. It has what appear to be red dye stain, the same coloring as the change. And when I opened it, I could still smell the pepper spray that they used to put in it." Detective Brown may have gestured with the bag in his hand, because Deputy District Attorney Mesropi asked if he wanted it taken away. The detective replied, "I know it's kind of a pain, but I can already feel it in my eyes." After a break, he testified that he needed the break because he had felt a burning sensation in his eyes and nose. Foglesong, Deputy District Attorney Mesropi and Allen's defense counsel agreed that the shirt and towel should be placed in a sealed plastic bag.

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[3] This item was later described as a sleeveless shirt or tank top.

The next day, Foglesong asked to examine the shirt and towel. She pointed out that Detective Brown "got on the stand and both through words and actions demonstrated an overpowering spray—pepper spray and odor that was so strong . . . that it required a break for him to wash his hands and face." Foglesong argued that she should be able to open the sealed plastic bag to show the shirt and towel to the jury so that the jury could see whether the items had any color. Pointing out that Deputies Wheeler and Giovanni, who had conducted the in-field search of the Dodge Magnum had not mentioned any odor, she also wanted to demonstrate to the jury that the items did not have a strong odor. Deputy District Attorney Mesropi reminded the court that both Foglesong and Allen's counsel had agreed to seal the shirt and towel. Foglesong stated that she wanted to handle the evidence herself, but the court said, "I can tell you that the odor was not good yesterday, and the court was affected by it. I don't think it should be open again."

On cross-examination, Detective Brown testified that robbers generally wash or bleach currency, but do not bother with coins, which they often throw away. He testified that the bag of coins no longer had any color, because the dye pack was a dry dust pack. The sheriff's department chemically processed the bag for DNA and this process might remove other chemicals such as dye or pepper spray.

Detective Brown confirmed that he did not send out the shirt and towel for DNA testing, nor did he have them tested to compare the red coloring to the components of the dye

pack. Defense counsel Foglesong and Nadler repeatedly questioned the detective as to why he did not have the shirt and towel tested for DNA or for bank dye residue. Detective Brown responded that he and other senior detectives concluded that the red coloring on the currency, shirt, and towel "all appeared to be the same." Detective Brown explained testing is expensive and he had to coax the lab to perform the tests on the piece of pantyhose that one of the robbers had used as a mask. DNA removed from that pantyhose piece did not match either Tarkington's or Allen's DNA.

Deputies eventually found an exploded dye pack in a drainage basin about one-half mile from where the robbers had abandoned the Ford Explorer SUV.

In his defense, Tarkington presented witness Phillip Wiley, an assistant at a recreational center in South Central Los Angeles. Wiley testified that, on December 14, 2005, he saw Tarkington at the recreational center between 10:30 a.m. and 11:00 a.m. The two talked about Tarkington's volunteering to coach in an after-school basketball program. Wiley testified that he knew the date because it was shortly before Christmas and Tarkington was wearing Carmelo Anthony shoes which Wiley wanted. Wiley recalled the time because he met his supervisor at 10:30 a.m. and needed to meet his wife to take her to an 11:30 a.m. doctor's appointment. Tarkington's investigator Joseph Szeles determined that the recreation center was about 63 miles from the robbery location and it would have taken

Tarkington an hour and possibly more to drive the distance if traveling at an average speed of about 45 miles per hour.

Tarkington did not testify.

Allen testified that, in December, fellow gang member Marcus Frye offered $3,500 to Allen to steal an SUV with keys. Allen and an accomplice, Jerome, stole the Ford Explorer from a car rental business near LAX. Allen punctured two tires as he drove the SUV out of the parking lot. He bought two new tires, wiped down the SUV, and went to drop off the SUV in Blood territory. Surrounded by 10 to15 people dressed in gang colors, Allen delivered the SUV to a man named "Little Rev." Allen and Jerome drove off in a car that Jerome was driving.

On December 14, 2005, just before 5:00 p.m., Frye telephoned Allen and arranged a meeting at a 7-Eleven store at Washington and Western. Frye met Allen about 6:00 p.m., and gave him a black bag that looked like someone had spilled red soda or fingernail polish on it. Frye said he would give the remainder of the money he owed Allen—about $200—in a few days.

After they completed the transaction, Allen walked over to the home of his friend, Melanie Clark but she had left. He called another friend for a ride, but that person would not take Allen. Finally, Allen called Tarkington, who agreed to drive Allen for gas money. Allen testified that he did not want to call a taxi, because it "costs too much."

Tarkington arrived in his vehicle around 7:30 p.m. He asked Allen to drive because he was tired and wanted to

sleep. Allen put his jacket, which contained $600 of the money from Marcus Frye, in the back seat. Allen paid Tarkington $200 in folded bills while they were stopped at a red light. Tarkington stuffed the bills in his pocket without counting them. Allen did not testify as to the denominations of the bills.

Allen drove to Allen's sister's home at 79th and Normandie, where Allen intended to be dropped off, but she was not home. Allen then continued to drive up Normandie when deputies stopped the car at Century near Normandie.

In rebuttal, Deputy James Wheeler testified that Allen told the deputy conflicting stories as to how he obtained the money. Initially, Allen said that the money in Tarkington's car came from Allen's having sold his girlfriend's car to Frye. When a computer search showed no vehicles registered to the girlfriend and no information on Frye, Allen then said that he got the money from selling marijuana to a man named Mark and refused to answer any further questions.

In closing argument, Foglesong pointed out that the deputies who searched Tarkington's vehicle did not report a bag of coins under the jacket once they removed it, so it is "doubtful" that the bag of coins was actually in the car. Foglesong further implied that Deputy Brown had lied about the odor from the shirt and towel when opening the brown bag. She emphasized that the deputies did not report an "overwhelming" odor of pepper spray when they found the shirt and towel in the Dodge; instead, a deputy reported only that the items had a slight scent of bleach.

Foglesong also argued at length regarding the prosecution's failure to test the shirt and towel for bank dye residue. As part of her argument, Foglesong stated, "[T]he stain he [Detective Brown] felt was red dye was not tested. Right. Didn't ask for it . . . [W]hen you have these facilities and you have these available services to you, the test could have been performed. It should have been. And when you're looking at a piece of clothing that potential piece of evidence and you're talking about stains and all those kinds of things, that should have been tested. What is it? Is it Kool-Aid? . . . Is it a dye pack? Does it match? Does it match the red dye that was in the dye pack that was recovered at a later date?" Foglesong later said that the shirt and towel would be placed in the jury room and impliedly invited the jurors to examine them for odor.

The jury convicted both Tarkington and Allen of five counts of second degree robbery and one count of second degree commercial burglary. The jury also found that the robberies and burglary were committed for the benefit of a criminal street gang and that as to the robbery counts a principal was personally armed with a firearm and personally used a firearm. The trial court sentenced Tarkington to 39 years and four months, imposing the upper term of five years for the robbery in count one and one-third the midterm for the remaining offenses, doubled as strikes, plus 10 years for the gang enhancement and an additional 10 years for the firearm use enhancement.

II. Direct Appeals

In his first direct appeal, Tarkington challenged the admission of his prior bank robbery conviction as well as the imposition of the gang and firearm enhancements. We affirmed the convictions but held that the trial court abused its discretion in admitting evidence of Tarkington's 1997 bank robbery conviction. Nevertheless, we noted that the evidence against Tarkington, although circumstantial, was very strong. "Less than 11 hours after the robbery the police arrested Tarkington while a passenger in his own car containing over $3000 in loot from the crime. The police even found some of that loot in Tarkington's pocket. Further supporting evidence of Tarkington's guilt included the testimony of one of the tellers who stated that Tarkington had the same or similar skin color, height and build as two of the robbers, Tarkington's giving the police a false identification at the traffic stop and the presence in his car of an unexplained bag of coins covered with red dye." (*People v. Tarkington*, *supra*, B199860 at p. 4.)

We modified the judgment as follows: "The gang enhancements as to each defendant are reversed with directions that they be dismissed and that the 10-year sentences on those enhancements be stricken. The court is also directed to modify Tarkington's sentence by striking the 10-year firearm use enhancement, imposing the consecutive one-year armed principal enhancement and staying the sentence on the burglary conviction." (*People v. Tarkington*, *supra*, B199860 at p. 5.)

Upon remand, the trial court resentenced Tarkington to an aggregate 24-year term in state prison, as follows: 10 years (the upper term of five years doubled) for the robbery in count 1, enhanced by five years for the finding of a prior serious felony, for 15 years; plus eight years calculated as four 2-year terms, to be served consecutively, for the four additional counts of robbery (doubled terms of one-third of the middle term of three years). The trial court stayed the term imposed for the burglary pursuant to section 654 and imposed a one-year enhancement for a principal-armed finding. The trial court imposed a restitution fine and a parole revocation fine, in the amount of $4,800 each. (§§ 1202.4, subd. (b), 1202.45.)

Tarkington appealed, again, this time challenging the trial court's calculation of his presentence credit and the amount of restitution required. We ordered the judgment "modified to provide that the Penal Code section 1202.4, subdivision (b), restitution fine and section 1202.45 parole revocation fine are reduced to $2,000 each and that Tarkington is entitled to total presentence credits in the amount of 1515 days, consisting of 1318 days of actual custody credit and 197 days of local conduct and worktime credit." (*People v. Tarkington*, *supra*, B219128 at p. 2.)

III. Habeas Petition and Evidentiary Hearings

On October 14, 2011, Tarkington filed a petition for writ of habeas corpus. Tarkington contended the prosecutor violated his constitutional rights by falsifying exculpatory evidence, and he was deprived of adequate assistance of trial

counsel. He claimed that trial counsel Foglesong should have sought the cell phone information, which, he asserted, would have supported the testimony of his witness Wiley that Tarkington was in South Los Angeles, not Palmdale, when the robberies were committed.

Tarkington included a December 5, 2007 letter from Foglesong to habeas counsel David Thompson, in which she stated that the prosecution did not rely on cell phone information. Foglesong also stated that she believed that the jury convicted Tarkington because his codefendant Allen presented an unbelievable story in an attempt to exonerate Tarkington, which had "the inverse effect." Foglesong went on to state that she made a strategic decision not to raise the issue of the amount of money taken. Tarkington included a follow-up letter from Foglesong to Thompson, in which she stated that the jury would have hung, eight to four in favor of acquittal, but voted to convict after codefendant Allen's testimony was read back to the jury in full.

Tarkington further asserted that the prosecution withheld exculpatory evidence, including an Federal Bureau of Investigation (FBI) report that would have shown one of the witnesses described a robber that did not match his attributes. He also complained that the prosecution withheld cell phone information regarding his cell phone and Allen's cell phone.

Tarkington did not raise the issue of the dye evidence in this petition. He did not contend that Foglesong provided

ineffective assistance in failing to have the shirt and towel tested for bank dye residue.

On November 18, 2011, this court issued an order to show cause returnable before the superior court. The trial court complied with our order by appointing an attorney for Tarkington, conducting evidentiary hearings, and reviewing new forensic evidence. The hearings were conducted over the course of several years, holding hearings on October 18 and 19, 2012; March 7, 2013; and May 28, 2015.

Tarkington was the first person to testify at the hearings. He admitted that when deputies stopped him at 9:15 p.m. on the night of the robbery, he gave them a false name, Michael Skaggs and had, in his Dodge station wagon, a birth certificate and social security card showing the name of Michael Skaggs. He explained that he lied, because he "was absconding on federal probation, and I didn't want to go to jail."

Tarkington also testified that, on the day of the robbery, Tarkington telephoned Allen at 1:25 p.m. to offer Allen a ride from Lancaster. Tarkington arrived at the home of Allen's friend in Lancaster at around 4:30 p.m. or 5:00 p.m.. Allen was wearing a jacket, which he placed in the back seat of the Dodge. Tarkington and Allen waited until about 7:00 p.m. for the traffic to subside before heading back. The Dodge gas tank was three-quarters full when Tarkington drove out to Lancaster. Allen did not tell

Tarkington what Allen would pay him for the ride. Allen drove, so Tarkington did not know how much gas was used.[4]

With respect to the shirt and towel found in the vehicle, Tarkington testified that he kept a sleeveless white shirt and towel in the rear cargo area of his Dodge wagon to clean the chrome on his rims. He explained that the items had red coloring because, about a week before he was arrested, he had "wasted some vodka and ruby red cranberry juice" and used the shirt and towel to clean up the spill.

Tarkington acknowledged that the evidence at trial showed that deputies removed $201 in currency from his pants pocket and that the currency was covered in red dye. While Allen gave currency to Tarkington, Allen did not give him coins.

Tarkington's habeas counsel, Dale Atherton, asked Foglesong about Tarkington's shirt and towel, both of which showed "pink coloration." The prosecution had used the articles to demonstrate to the jury that dye from the stolen currency had transferred to the shirt and towel. Foglesong testified she had opened a bag containing one of the items, held it close to her face and argued that contrary to the testimony of police officers, the item did not have an odor. She stated that Tarkington had told her that the items had

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[4] Tarkington's testimony differs significantly from Allen's trial testimony in this respect. Allen testified that he drove Tarkington's car along Normandie, a distance shorter than 10 miles. Tarkington testified that he drove Allen from Lancaster to Los Angeles, a distance of over 80 miles.

been in a pile in his car and that "a Gatorade or something" had spilled on them.

Foglesong testified that the prosecution brought the shirt and towel to the courtroom in a box on the day of trial. She did not ask for a continuance to have them tested.

Foglesong later testified that the police arrested Tarkington about 11 hours after the robbery, giving him sufficient time to change clothes. She also stated that she called a witness, Wiley, who testified that he met with Tarkington while the robbery was taking place. Wiley remembered the meeting because he spotted Tarkington's new "Car[m]ello Anthony shoes" at the time.

At the next hearing on March 7, 2013, Deputy Sheriff James Wheeler testified that when he stopped Tarkington's car on Century Boulevard east of Normandie, Tarkington gave him a false name—Michael Skaggs; Wheeler ran the name and found a warrant for Michael Skaggs; when the deputy ran the fingerprints, he discovered "Skaggs" was really Tarkington and arrested him. When Wheeler saw the currency recovered from Tarkington's car, it had red stains on it, like "cherry juice." He recovered three cell phones, two from Allen and one from Tarkington.

The hearings were continued to allow Atherton to have forensic testing completed.

Joseph J. Cavaleri, Senior Criminalist, wrote a memorandum to Deputy District Attorney Melissa Hammond in which Cavaleri reported that he examined some of the currency recovered from Tarkington's car and

concluded that the bills had been exposed to bank dye (MAAQ), which had been treated with a solvent: "I was asked to document my opinion regarding the potential removal of MAAQ from fabric by solvent washing. An experiment was performed where I spiked a fabric swatch with MAAQ, rubbed the MAAQ into the fabric, and then washed the fabric swatch with water for about 5 minutes. The water wash removed almost all of the MAAQ—only a very faint stained area remained on the fabric swatch. The area with the faint stain was cutout, extracted with methanol solvent, and then tested with gas chromatography with mass spectrometry (GC-MS) in an effort to confirm the presence of MAAQ on the swatch. MAAQ was not detected on the water washed fabric swatch. Water washing can remove MAAQ from fabric. In addition, bleach is a water based product that may also be used to remove MAAQ from materials." Significantly, Cavaleri found no MAAQ on Tarkington's shirt and towel.

Criminologist Peter D. Barnett wrote a supplemental report, also concluding that there was no MAAQ on Tarkington's shirt or towel. However, Barnett advised: "Whether or not any manner of laundering could have selectively removed MAAQ from the shirt and towel, leaving the red stains that are now visible, has not been determined."

At the May 28, 2015 hearing, Deputy District Attorney Hammond objected to the MAAQ testing, because

Tarkington had not challenged the testing in his original petition.

With respect to the cell phone found in his possession, Tarkington testified that the phone was under the name of Debonair Smith. He denied having more than one cell phone. He admitted to using aliases of Donte Jones and Corey Willard.

Tarkington testified that he never discussed cell phones with Foglesong and denied instructing her not to use cell phone records.

Tarkington testified that he had his Sprint cell phone on December 15, 2005, the day of the robbery and had made calls. He further testified that he never spoke with Foglesong about his cell phone and that she had never asked about his cell phone. Tarkington first learned about the use of cell tower information in a defense after conviction. Atherton went over the Sprint cell phone record for December 15, 2005, showing that Allen had telephoned Tarkington at 1:53 a.m., with the next activity at 1:25 p.m. Atherton asked Tarkington whether the record had been "manipulated or were fraudulent," and Tarkington responded, "Yes, sir." Tarkington explained that he had made and received additional calls on December 14, 2005, but the Sprint record did not reflect those calls. Additionally, he had used the phone between December 8 and December 14, but the record showed no activity. Tarkington also testified that the Sprint record showed no

activity on Allen's cell phone records for December 8 through December 14.

Before she first met with Tarkington, Foglesong wanted to obtain cell phone records to establish Tarkington's location at the time of the robbery and to account for calls he made and received.

When they spoke about cell phones, Foglesong learned that Tarkington had cell phones in various names and that some of the names were associated with gangs. She decided not to subpoena cell phone records because the record "could be bringing in evidence of aliases and ongoing criminalities, and that the phones would be in places where I didn't want them to be." Foglesong testified that "we were trying very hard to decriminalize Mr. Tarkington and make sure that there w[ere] not issues of aliases, priors, cocaine use, parole violation, being on the run and all the things that were going on, sent to the jury." She told Tarkington that the cell phone records would be problematic and the two of them made a joint decision not to use the records as part of their trial strategy. Later at the hearing, Foglesong testified, somewhat to the contrary of her earlier testimony, that Tarkington directed her not to use the cell phone records at trial. Whenever she raised the issue of cell phone records, Tarkington told her "not to go there. That it would be the—they'd be in the wrong place with the wrong people."

Foglesong also testified that when habeas counsel Thompson asked about the cell phone records, she did not tell him that Tarkington had told her not to use them, nor

did she tell Thompson that she had concluded that the records would lead to revelations about Tarkington's gang affiliations, aliases, and past criminal history.

Jeff Fishbach, a forensic technologist, testified that he examined the cell phone data for both Tarkington's phone and Allen's phones to find a five-day gap in the records leading up to the day of the robbery. No calls were made or received on these cell phones during the time the robbery actually took place or on the days leading up to the day of the robbery. However, there were calls on the day of the robbery. Fishbach testified Tarkington's cell phone was in the name of Michael Skaggs (the name that Tarkington gave the deputy sheriff when he was arrested).

Fischbach testified that Tarkington's phone and Allen's phones could be used as direct contact phones, that is, as walkie-talkies. There was no five-day gap in the direct phone usage. However, direct contact phones do utilize cell towers and there would have been a tower hit upon use.

Sprint's record custodian Ray Clark testified as to how Sprint keeps track of calls and stores its reports. He explained that Sprint does not track calls coming in to direct connect phones. Tarkington's phone was a prepaid Boost phone, and Tarkington might not have used it because he had "no money on the phone." Clark also speculated that the five-day gap demonstrated that Tarkington and Allen were hoping to keep their location secret. Alternatively, when Atherton reminded Clark that the calls started up again

before the robbery, Clark responded that the same gap on the phones meant "lack of use."

Clark testified that the United States Attorney's Office had requested the phone information in 2006.

Deputy District Attorney Mesropi testified that he prosecuted Tarkington. Mesropi testified that in 2010 he obtained Tarkington's cell phone records and reviewed them to conclude that no calls were made during the time that the robbery took place and that there was no cell tower information at all. In 2011, Mesropi sent a CD of the phone records to habeas counsel Thompson.

Mesropi also testified that, although the police had seized Tarkington's cell phone, he did not ask for any analysis or evidence regarding cell phone towers, because "cell phones were not what they are now wherein every investigation involves an actual—us getting cell site information and so forth" and he did not think "it would yield any valuable evidence."

Mesropi stated that he "manipulated" the cell phone records by providing an Excel spreadsheet as well as a .pdf file in addition to date stamping the records.

When asked whether he had seen any FBI reports, Mesropi responded that he had only seen Tarkington's bank robbery history. He was not aware that the FBI had conducted its own investigation of the robbery.

The trial court denied the petition after having considered all the evidence, including the lab reports, and stated that the evidence was sufficient "for the jury to come

to the decision they came to." After the trial court denied the petition, Tarkington's counsel Atherton reminded the court that the defense and the prosecution had stipulated that there was no bank dye on the shirt or towel. Atherton asked whether "[t]he court is saying that even if you were to remove that piece of evidence, . . . the court would still be of the same opinion that there [were] sufficient facts to sustain the jury verdict[?]" The court answered, "Yes, yes."

The deputy district attorney reiterated the People's objection to the bank dye issue, because Tarkington had not challenged the lack of residue on the shirt and towel in the petition. The trial court responded, "Even in spite of that, the court has found it isn't only the bank dye on the money; it is the entire set of circumstances surrounding this case."

DISCUSSION

In his supplemental habeas petition, Tarkington contends he was denied effective assistance of counsel when Foglesong failed to have the shirt and towel tested for the presence of red dye. Tarkington also maintains that the test results constitute newly discovered evidence; that the evidence introduced at trial regarding the shirt and towel constituted false evidence under section 1473; and that the cumulative effect of the improperly admitted evidence and ineffective assistance of counsel denied Tarkington the constitutional right to a fair trial.

The Attorney General argues that Tarkington's petition should be denied because it is a second or successive petition presented after an unjustified substantial delay.

With respect to the merits of the petition, the Attorney General contends that trial counsel's failure to test the shirt and towel did not amount to ineffective assistance of counsel; that the test results do not constitute newly discovered evidence; that the test results do not show Tarkington was convicted based on false evidence; and that the cumulative error argument lacks merit.

As discussed below, we hold that Tarkington did in fact receive ineffective assistance of counsel when trial counsel inexplicably neglected to test the shirt and towel and that, when considered alongside the other evidence we have previously deemed inadmissible, the writ must be granted.[5]

I. Ineffective Assistance of Counsel

A. *Standard of Review*

"The Supreme Court, courts of appeal, superior courts, and their judges have original jurisdiction in habeas corpus proceedings." (Cal. Const., art. VI, § 10.) "[A] habeas corpus proceeding is not a trial of guilt or innocence and the findings of the habeas corpus court do not constitute an acquittal. The scope of a writ of habeas corpus is broad, but in this case, as in most cases, it is designed to correct an erroneous conviction. It achieves that purpose by invalidating the conviction and restoring the defendant to the position she or he would be in if there had been no trial and conviction." (*In re Cruz* (2003) 104 Cal.App.4th 1339,

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[5] Thus, we need not decide whether the test results constitute newly discovered evidence or if they show that Tarkington was convicted based on false evidence.

1346, citing *In re Crow* (1971) 4 Cal.3d 613, 620.) "[A] successful habeas corpus petition necessarily contemplates and virtually always permits a retrial. [Citations.] The possibility of a retrial is often assumed without discussion." (*In re Cruz*, at p. 1347.)

A criminal defendant is guaranteed the right to the assistance of counsel by both the state and federal Constitutions. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15.) "Construed in light of its purpose, the right entitles the defendant not to some bare assistance but rather to *effective* assistance." (*People v. Ledesma* (1987) 43 Cal.3d 171, 215 citing *Strickland v. Washington* (1984) 466 U.S. 668, 684 and *People v. Pope* (1979) 23 Cal.3d 412, 422.) In order to demonstrate ineffective assistance of counsel, a defendant must first show counsel's performance was deficient because his or her "representation fell below an objective standard of reasonableness . . . under prevailing professional norms." (*Strickland v. Washington*, at pp. 687–688; see *Pope*, at pp. 423–425.) Second, a defendant must also show prejudice flowing from counsel's performance or lack thereof. (*Strickland*, at pp. 691–692.) Prejudice is shown when there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Id.* at p. 694.) This second prong of the *Strickland* test is not solely one of outcome determination. Instead, the question is "whether counsel's deficient

performance renders the result of the trial unreliable or the proceeding fundamentally unfair." (*Lockhart v. Fretwell* (1993) 506 U.S. 364, 372.) Reviewing courts will reverse convictions on the ground of inadequate counsel if the record affirmatively discloses that counsel "had no rational tactical purpose for his act or omission." (*People v. Fosselman* (1983) 33 Cal.3d 572, 581.)

Where, as here, the trial court has denied habeas corpus relief after an evidentiary hearing (i.e. the hearing held on the order to show cause ordered in response to Tarkington's first habeas corpus petition) and a new habeas petition is then presented to an appellate court based upon the transcript of the evidentiary proceedings conducted in the superior court, "the appellate court is not bound by the factual determinations [made below] but, rather, independently evaluates the evidence and makes its own factual determinations." (*In re Wright* (1978) 78 Cal.App.3d 788, 801.) Accordingly, we must undertake an independent review of the record to determine whether Tarkington has established by a preponderance of substantial, credible evidence that counsel's performance was deficient and, if so, that he suffered prejudice. (See *In re Alvernaz* (1992) 2 Cal.4th 924, 944–945.)

B. *Merits*

Bluntly stated, there was simply no rational tactical purpose for counsel's failure to test the towel and shirt. At trial, the prosecutor asked Detective Brown whether there were any other items in the car with a color similar to the

color on the coins. When Detective Brown began to answer, saying that there was a T-shirt that looked as though it had the same red color, Tarkington's defense counsel objected. The trial court overruled the objection. Detective Brown answered that the color on the shirt appeared to be the same red dye substance as was on the coins and coin bag. He testified that the deputies found the shirt in the rear hatch area in a pile of clothing. They also found the towel, with "a few spots that has the same red dye coloring," in the rear hatch area.

Neither the prosecution nor the defense had tested the items to determine if they actually contained MAAQ. Yet the detective effectively conducted a live "test" from the witness stand when he opened the paper bag containing the two items and claimed: "I could still smell the pepper spray that they used to put in it." Adding to this pantomime, when asked if he wanted the bag taken away, the detective replied, "I know it's kind of a pain, but I can already feel it in my eyes." After a break, he testified that he needed the break because he had felt a burning sensation in his eyes and nose.

Tarkington's trial counsel tried to ameliorate the damage caused by this testimony by seeking permission to open the sealed plastic bag to show the shirt and towel to the jury. Trial counsel also cross-examined Detective Brown as to why he did not have the shirt and towel tested for DNA or for bank dye residue. Furthermore, in closing argument, trial counsel focused on the prosecution's failure to test the shirt and towel for bank dye residue, implying that

Deputy Brown had lied about the odor from the items when he opened the brown bag. Trial counsel also emphasized that other deputies did not report an overwhelming odor of pepper spray when they found the shirt and towel in the vehicle; instead, a deputy reported only that the items had a slight scent of bleach.

Nevertheless, trial counsel's cross-examination and closing argument cannot be described as strategic. They were instead an unsuccessful attempt to staunch the damage caused by Detective Brown's testimony and impromptu, in-court scientific "testing" which had been sprung on defense counsel without prior notice.[6] A violation of section 1054 et seq. subjects the prosecution to possible sanctions if brought to the court's attention prior to the close of trial. (*People v. Bohannon* (2000) 82 Cal.App.4th 798, 805, disapproved on another ground in *People v. Zambrano* (2007) 41 Cal.4th

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[6] Section 1054.1, subdivision (f), requires the prosecution to provide to the defense "any reports or statements of experts made in conjunction with the case, including the results of . . . scientific tests, experiments, or comparisons which the prosecutor intends to offer in evidence at the trial." This provision does not require that the reports or statements of expert witnesses be written in order for the prosecutor to be required to disclose them. Oral reports from experts must also be disclosed. (*People v. Lamb* (2006) 136 Cal.App.4th 575, 580.) Absent good cause, such evidence must be disclosed at least 30 days before trial, or immediately if discovered or obtained within 30 days of trial. (§ 1054.7.)

1082, 1135, fn. 13.) Trial courts have broad discretion to determine if a party has engaged in discovery abuse and whether to impose sanctions for any such abuse. (*People v. Jenkins* (2000) 22 Cal.4th 900, 951.) The normal remedy for noncompliance with a discovery obligation is not the exclusion of the evidence but rather the granting of a continuance to the aggrieved party. (*People v. Robbins* (1988) 45 Cal.3d 867, 884, overturned by 1990 amendment to section 190.41 in *People v. Jennings* (1991) 53 Cal.3d 334, 387, fn. 13.)

Nevertheless, Tarkington's trial counsel did not seek a continuance to test the shirt and towel and counsel's testimony at the subsequent evidentiary hearing does not shed light on the matter. Counsel testified that although she did not have the items tested prior to trial because "they came up close in proximity to the trial," she did not ask for a continuance once the prosecution sought to admit the items during trial.

Even if counsel had tested the items, and the results were not favorable to the defense, the prosecution would not have been entitled to those test results. Section 1054.3, subdivision (1), the defense analogue to section 1054.1, subdivision (f), requires the defense to disclose to the prosecution "the names and addresses of persons, other than the defendant, he or she intends to call as witnesses at trial, together with . . . any reports or statements of experts made in connection with the case, and including the results of . . . scientific tests, experiments, or comparisons which the

defendant intends to offer in evidence at the trial." Thus, counsel would not have been required to disclose any adverse test results as long as she did not call their expert as a witness at trial or seek to offer the report into evidence.

Admittedly, the prosecution would have known that the defense tested the items given that any testing of the towel and shirt would have required coordination with the prosecutor as well as the police evidence technician tasked with storing the items. Had the defense sought the items without later providing a report once testing was completed or designating an expert witness for trial, the prosecution likely would have concluded that the results had been adverse to the defense and would have sought to test the same items as a result. But the prosecution could have tested these items at any time prior to trial subject to pretrial discovery deadlines. Thus, if counsel's decision not to test the items was based on this fear, it made little sense.

Along this same line, the Attorney General posits that counsel's failure to test the shirt and towel was a reasonable decision because it avoided provoking the prosecution into testing *other* items, such as the $201 in cash found in Tarkington's pocket, the $3,138 in cash found in a plastic bag, and the $59 in coins found inside a nylon stocking cap. However, as noted by Tarkington, he never disputed that any of these items, particularly the cash, came from the bank robbery. Both the coins and the $3,138 in the plastic bag were stained with red dye, while the cash also smelled like bleach and had serial numbers matching money taken

in the robbery. As for the $201 found in Tarkington's pocket, it also appeared to be stained with red dye and smelled of bleach. But Allen testified that he gave Tarkington the cash to pay for gas and neither contested that the money was stained and smelled of bleach. Allen said he had received the money found in Tarkington's vehicle from Marcus Frye, as compensation for stealing the rental car. Allen claimed the $3,250 he had received from Frye looked like someone had spilled red soda or fingernail polish on it. Allen also testified that he paid Tarkington $200 from Frye's cash and that Tarkington had stuffed the bills in his pocket without counting them. Thus, even if testing the shirt and towel had spurred the prosecution to test the cash and coins, doing so would not have weakened the defense's theory of the case at all.

It is true that "[r]eviewing courts defer to counsel's reasonable tactical decisions in examining a claim of ineffective assistance of counsel (see *People v. Wright* (1990) 52 Cal.3d 367, 412), and there is a 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.' " (*People v. Lucas* (1995) 12 Cal.4th 415, 436–437 quoting *Strickland*, *supra*, 466 U.S. at p. 689.) Indeed, "we accord great deference to counsel's tactical decisions" (*People v. Frye* (1998) 18 Cal.4th 894, 979), and, as our Supreme Court has noted, "courts should not second-guess reasonable, if difficult, tactical decisions in the harsh light of hindsight." (*People v. Scott* (1997) 15 Cal.4th 1188, 1212.) "Tactical errors are generally not deemed reversible,

and counsel's decisionmaking must be evaluated in the context of the available facts." (*People v. Bolin* (1998) 18 Cal.4th 297, 333.)

We may reverse on grounds of ineffective assistance of counsel only if the record affirmatively discloses no rational purpose for counsel's act or omission. (See *People v. Lucas*, *supra*, 12 Cal.4th at p. 437.) Where the record contains no explanation for the challenged representation, we will reject an ineffective assistance claim unless—as here—counsel was asked to explain his performance and failed to provide an explanation or there simply could be no satisfactory explanation. (See *People v. Earp* (1999) 20 Cal.4th 826, 871.)

C. *Harmless Error Analysis*

The Attorney General contends that even if counsel acted unreasonably by failing to test the shirt and towel, Tarkington suffered no prejudice because "there can be no doubt that [Tarkington] possessed the loot taken from the robbery." However, as discussed above, Tarkington has never denied he possessed money that had clearly come from the robbery. His defense did not rely on a contrary claim.

Prejudice requires that the defendant show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland*, *supra*, 466 U.S. at p. 694.) Here, "[a]fter weighing the available evidence, its strength and the strength of the evidence the prosecution presented at trial," we conclude

that Tarkington has shown he was prejudiced by counsel's deficient performance. (*In re Hardy* (2007) 41 Cal.4th 977, 1025.)

The only item found on Tarkington that tied him to the robbery was the $200 in cash, which Allen said he gave to Tarkington as payment for the ride. The shirt and towel found in the back of the vehicle were thus used by the prosecution to help directly connect Tarkington to the robbery. Three alternate jurors also discussed these items while the jury was deliberating. According to a deputy public defender, he heard the alternate jurors discussing the trial evidence in the hallway. Two of the three alternate jurors admitted discussing the shirt and towel, and one wondered whether the detective had "picked up the tank top when he checked it for pepper spray or whether it was the towel." Another alternate juror said they discussed wanting to see both the shirt and the towel. If alternate jurors discussed and expressed a desire to examine these items, the jurors on the panel likely did as well. Indeed, it is not surprising that the jurors focused on the shirt and towel given that the they were the only items Tarkington argued were unconnected to the robbery. Thus, the shirt and towel were not merely cumulative pieces of evidence that tied Tarkington to the robbery without a viable explanation as to how they came into his possession; they were the only items to do so.[7]

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[7] Indeed, during the evidentiary hearings, Tarkington's counsel said he did not know what the testing the items

Given that only Allen's fingerprints were found inside the getaway car; that no DNA or other physical evidence put Tarkington either in the bank or the getaway car; that the DNA of two other people—but not Tarkington—were found on the nylon stocking containing the $59 in coins found in the back of his car; and that, as we have previously held, neither Tarkington's prior bank robbery conviction nor his gang affiliation should have been admitted into evidence, there is a reasonable probability Tarkington would have obtained a more favorable result had counsel's performance not been deficient. (*Strickland*, *supra*, 466 U.S. at p. 694.) Indeed, the case against Tarkington has been reduced to the false name he gave to law enforcement when pulled over—unsurprising given he was still on federal supervised release[8]—and the alleged similarities between Tarkington's height, build, and skin color to one of the robbers.[9] Even if

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would show but said that, "If it's red dye, that's not very good," to which the court replied, "No," thus confirming the importance of this evidence, whether incriminating or exculpatory.

[8] At trial it was revealed Tarkington had a driver's license in the false name he had given to law enforcement and had received two traffic citations in that name before the robbery. Thus, Tarkington's use of the alias was longstanding and unrelated to any attempt to avoid being connected to the bank robbery.

[9] In interviews with the FBI, a teller said both robbers who jumped the counter had medium complexions, were five

we apply the trial court's incorrect sufficiency of the evidence standard of review, the case against Tarkington is simply not strong enough to uphold.

The Attorney General correctly notes that Tarkington's previous habeas petitions did not specifically cite trial counsel's failure to test the shirt and towel as a basis for his ineffective assistance of counsel claim. Tarkington counters that although he believed the red stains on the items were not from pepper spray or red dye, he could have reasonably concluded that trial counsel's demonstration before the jury sufficiently blunted the impact of Detective Brown's greatly exaggerated testimony. Only upon the prosecutor's presentation of the shirt and towel during the habeas evidentiary hearings did Tarkington understand " 'the importance of the information offered in support of the claim and the legal basis for the claim' " (*In re Robbins* (1998) 18 Cal.4th 770, 780), that is, the ineffective assistance of trial counsel in not having the items examined.

To prevent abuse of the habeas writ and preserve the finality of judgments, the courts have developed the rule that a defendant is not permitted to bring a successive

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feet nine inches to five feet 10 inches tall, and had medium builds, weighing about 170 to 180 pounds. Other tellers said the robbers were similar, at five feet eight inches to five feet nine inches tall and 160 to 170 pounds. It is undisputed that Tarkington has a dark complexion, is about five feet 11 inches tall, and does not have a medium build, weighing about 200 pounds in late 2005.

habeas petition before the same court based on a claim that was, or could have been, presented in a previous petition, unless there are new facts or law that could not have been previously presented or a fundamental miscarriage of justice has occurred. (*In re Clark* (1993) 5 Cal.4th 750, 774–775, 797; *Younan v. Caruso* (1996) 51 Cal.App.4th 401, 410–411.) Given the paucity of evidence in Tarkington's criminal case, an exception to the rule against successive petitions is warranted here. The scant evidence cited by the Attorney General in support of barring Tarkington's claim—that some of the money found in his possession bore serial numbers matching money from the robbery and at least one of the bills contained red dye—was never disputed by Tarkington. Thus, application of a procedural bar would in fact result in a fundamental miscarriage of justice.[10]

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[10] We also note that because the shirt and towel were tested while the evidentiary hearings were still ongoing, the issue was fully litigated before the trial court. Thus, our consideration of the issue does not waste scarce judicial resources. (See *In re Reno* (2012) 55 Cal.4th 428, 460.)

DISPOSITION

The petition for a writ of habeas corpus is granted. Lamont T. Tarkington's convictions are reversed. The prosecution may elect to retry Tarkington within the statutory timeframe. Otherwise, Tarkington is to be released from custody.

NOT TO BE PUBLISHED.

JOHNSON, J.

I concur:

CHANEY, J.

ROTHSCHILD, P. J., dissenting:

The majority concludes that petitioner was deprived of his right to the effective assistance of counsel. I respectfully disagree.

Petitioner contends that his counsel was constitutionally deficient by failing to request a continuance to test the red-stained shirt and towel found in the rear area of petitioner's car. I note initially that there is no evidence in our record that defense counsel had any reason to test these items for MAAQ prior to trial; petitioner's argument and the majority's opinion is based on counsel's failure to request a continuance during trial to test the items. Admittedly, defense counsel could have requested a continuance to have the items tested for MAAQ during trial.[1] Doing so, however, posed a substantial risk to the petitioner.

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[1] In the habeas proceeding below, habeas counsel asked petitioner's trial counsel why she did not have the items tested, and she explained that "they came up close in proximity to the trial and—no, I didn't ask to have them tested." When asked if she had asked for a continuance to test the items, counsel said she did not. Although she was then asked if she "just let it go," she only answered, "I did not ask for a continuance"; she was never asked *why* she did not request a continuance. Petitioner's trial counsel next told habeas counsel, "[A]ctually I have to readdress that issue." Habeas counsel, however, did not let trial counsel explain further and moved on to a differed subject. Trial counsel was never asked to explain why she did not request

There were two possible outcomes of testing: (1) the items contained MAAQ, or (2) they did not contain MAAQ. The first outcome would have been exculpatory and favorable to the defendant. The second outcome would have been inculpatory and extremely damaging to the defense case. There is no evidence that defense counsel knew what the results would be at the time she had to make the decision whether to request a continuance to allow testing.

Significantly, defense counsel could have reasonably expected that if the court granted the defense request to conduct testing, the prosecution would also request testing. The possibility that the prosecution would discover that the items contained MAAQ meant that the prosecution might not only discover highly inculpatory evidence, but that the defense would be deprived of the argument that the prosecution's investigation was flawed because it failed to test the items. Because defense counsel could not know at that time what the results of any test would be, her decision not to request a continuance was a reasonable tactical or strategic decision. As such, counsel should not be found deficient merely because, with the benefit of hindsight, the testing conducted during the habeas proceeding revealed that the items did not contain MAAQ. We should not, our Supreme Court has explained, " 'second-guess reasonable, if

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a continuance and, when she attempted to address the issue, habeas counsel changed the subject.

difficult, tactical decisions in the harsh light of hindsight.' " (*People v. Weaver* (2001) 26 Cal.4th 876, 926.)

Counsel's decision was, at most, a close call. Under such circumstances, we should require the petitioner to present expert testimony to support that counsel's decision fell below the requisite standard of care. (See *In re Avena* (1996) 12 Cal.4th 694, 720 ["reliance on attorney experts [to establish ineffective assistance] is commonplace"].) Here, petitioner offered no expert testimony or other evidence sufficient to establish that counsel fell below the applicable standard of care.

I would deny the petition.

ROTHSCHILD, P. J.