Filed 7/23/12 In re Sanchez CA2/7

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re BRYAN SANCHEZ, on Habeas Corpus.	B218637 (Los Angeles County Super. Ct. No. BA272661)

ORIGINAL PROCEEDING on petition for writ of habeas corpus. Michael E. Pastor, Judge. Petition denied.

Donald R. Tickle for Petitioner.

Edmund G. Brown, Jr., and Kamala D. Harris, Attorneys General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Pamela C. Hamanaka, Assistant Attorney General, Susan Sullivan Pithey, Lawrence M. Daniels and Michael J. Wise, Deputy Attorneys General, for Plaintiff and Respondent.

Following a lengthy joint jury trial, Bryan Sanchez, Jasmin Rossier and two other codefendants were found guilty of the murder of Juan Monsivais and the attempted premeditated murder of Manuel De La Rosa in a gang-related drive-by shooting on September 6, 2003. On direct appeal this court affirmed those convictions. (See *People v. Flores* (July 19, 2010, B211207) [nonpub].)[1]

During the pendency of his direct appeal Sanchez filed a verified petition for writ of habeas corpus in this court, contending he was denied the effective assistance of counsel with respect to the murder and attempted premeditated murder charges because (1) his trial counsel, William L. Graysen, entered into a false stipulation with the prosecutor, read to the jury, that Sanchez's father had not informed counsel of Sanchez's alibi defense for the evening of September 6, 2003 until after the trial had started; and (2) trial counsel failed to seek severance of Sanchez's trial from that of Rossier, who purportedly asserted an antagonistic defense with respect to the drive-by shooting. We issued an order to show cause.[2]

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[1] Sanchez, Rossier and Edgar Javier Flores were each found guilty of second degree murder in connection with the shooting death of Monsivais; Rafael R. Fuentes, the shooter, was found guilty of first degree murder. The jury found as to all defendants the offenses were committed to benefit a criminal street gang. Sanchez and Pedro Aguilar were also found guilty of conspiracy to commit murder arising from a gang-related incident two days later involving Marshall High School. We reversed Sanchez and Aguilar's conspiracy convictions and remanded for a new trial on that charge because the trial court had failed to instruct the jury conspiracy to commit assault with a firearm was a lesser included offense of conspiracy to commit murder as alleged in the accusatory pleading.

Sanchez was sentenced to an aggregate indeterminate state prison term of 35 years to life for the murder of Monsivais and the attempted murder of De La Rosa with the associated criminal street gang enhancements.

[2] We initially issued an order to show cause on July 19, 2010, concurrently with the filing of our opinion in Sanchez's direct appeal, returnable before the Los Angeles Superior Court. In our order we directed the superior court to conduct an evidentiary hearing on the material factual conflicts apparent from the declarations concerning Graysen's performance submitted in support of Sanchez's petition and Graysen's contradictory declaration, filed with the Attorney General's informal response. We

After considering the return filed by the Attorney General on behalf of respondent Secretary of the Department of Corrections and Rehabilitation and Sanchez's traverse, as well as the declarations filed in this court under penalty of perjury and the record in Sanchez's direct appeal, we concluded there was a reasonable likelihood Sanchez may be entitled to relief on his claim of ineffective assistance of counsel, but his entitlement to relief depended on the resolution of disputed issues of fact. Accordingly, we directed the Presiding Judge of the Los Angeles Superior Court to select a judge of that court to sit as referee in this proceeding to conduct an evidentiary hearing and to make recommended findings of fact on nine specific questions relating to Graysen's decision to enter into the stipulation with the prosecutor concerning Fidel Sanchez's testimony and his failure to move to sever Sanchez's trial from Rossier's:

"1. When did Fidel Sanchez first tell William Graysen his son Bryan Sanchez was with him in the evening of September 6, 2003? What did he say?

"2. On the first occasion that Fidel Sanchez spoke to Graysen about the alibi defense, did he indicate either a willingness to testify or a refusal to testify for his son?

"3. Did Fidel Sanchez speak to Graysen about Sanchez's alibi defense on more than one occasion prior to the start of trial? If so, when and what did he say on each occasion?

"4. When did Fidel Sanchez first indicate a willingness to testify at trial?

"5. What, if anything, did Graysen disclose to the People before trial concerning Sanchez's alibi defense and witnesses who could support or corroborate that defense?

"6. Prior to entering into the stipulation with the prosecutor concerning Fidel Sanchez's testimony, did Graysen review any files or conduct any investigation to confirm the timing of Fidel Sanchez's statements to him?

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reissued the order on September 27, 2010 pursuant to the Supreme Court's order on transfer (S185503, filed Sept. 22, 2010), returnable in this court, to permit the People to file a formal return to the petition before deciding whether an evidentiary hearing was necessary.

"7. What, if anything, did Graysen do to investigate whether Rossier's defense would be supportive of, or inconsistent with, Sanchez's alibi defense for the Bellevue Avenue drive-by shooting?

"8. What tactical considerations did Graysen evaluate in deciding not to file a motion to sever Sanchez's trial from Rossier's?

"9. If Graysen's representation of Sanchez fell below an objective standard of reasonableness under prevailing professional norms with respect to his decision to enter into the stipulation concerning Fidel Sanchez or his decision not to move to sever his client's trial from Rossier's or both, did his deficient performance prejudice Sanchez?"

Hon. Ronald S. Coen of the Los Angeles Superior Court was appointed referee and presided at the evidentiary hearing. Nine witnesses testified over two days. Neither Sanchez nor Graysen, his trial counsel (who had died by the time the evidentiary hearing was held), testified. The referee has submitted to this court a six-page statement of his findings, including findings that Graysen's stipulation concerning Sanchez's father and his decision not to move for a severance fell below an objective standard of reasonableness, but, in view of the extremely strong evidence of Sanchez's guilt, Graysen's deficiencies did not prejudice Sanchez.

In response to our invitation both Sanchez and the Attorney General have submitted exceptions to the referee's findings. After our review of the record and the referee's report, as well as consideration of the parties' exceptions and oral argument, we conclude Sanchez is not entitled to habeas corpus relief.

FACTUAL BACKGROUND

1. *The Trial*

The evidence supporting Sanchez's convictions for murder and attempted premeditated murder is set forth at length in *People v. Flores, supra*, B211207. We summarize the key elements.

Sanchez, his girlfriend Rossier and Rafael Fuentes were members of the Red Shield clique of the 18th Street gang, the largest Hispanic criminal street gang in the

United States. Edgar Flores was a member of the Grandview clique of the 18th Street gang. The two cliques were known to socialize together and cooperate in joint gang activities. Sanchez was considered the leader of the younger members of Red Shield. The 18th Street gang's rivals include the Temple Street gang.

The principal trial witnesses regarding the September 6, 2003 drive-by shooting were Norberto Pacheco (also known as Mousey), a member of the Red Shield clique, Santos and David Kuk, members of the Grandview clique, and Dorma Pedro Mendez, the girlfriend of Eric Vasquez, another 18th Street gang member. The Kuk brothers and Mendez were inside the minivan when the shooting occurred but were not charged with the murder or attempted murder of the victims. According to their testimony, Sanchez drove the minivan, which had been stolen several days earlier; Rossier initially sat next to Sanchez in the front passenger seat. Flores, Fuentes and Vasquez were also inside the vehicle. The group traveled to a commercial location near Silver Lake Boulevard where Pacheco provided them with a laundry bag containing two guns and several boxes of ammunition. According to Santos Kuk, Rossier held the bag while Fuentes removed the guns. Flores took the shotgun, and Fuentes the rifle. Fuentes passed the bullets around before loading the guns. At this point Fuentes moved to the front passenger seat; Flores sat in the middle row by the minivan's sliding door.

On Bellevue Avenue the group saw a rival gang member who had been identified as a target by Pacheco, but Sanchez said not to shoot because there was a woman with a baby nearby. Sanchez continued to drive in the neighborhood for several hours looking for "enemies" to shoot. As the minivan drove past the Kuk brothers' home, several Temple Street gang members were seen drinking across the street. After some discussion inside the minivan, Fuentes pulled out the rifle, shouted a derogatory comment and fired repeatedly out the front passenger side window. Flores tried but was unable to get the shotgun to fire out the window of the minivan's side door. Sanchez then drove the minivan to the northbound Hollywood Freeway entrance, which was only a short distance

away. Pacheco testified that Sanchez, Rossier, Flores and Fuentes all spoke to him after the incident and acknowledged their participation in the shooting.[3]

None of the men who had survived the shooting was able to identify the assailants. A small caliber bullet recovered from Monsivais's body was matched to a rifle recovered from the stolen minivan two days after the shooting. Ten of 12 shell casings recovered at the Bellevue Avenue crime scene were determined to have been fired from the rifle, and shell casings recovered from the front passenger seat of the minivan were also fired from the rifle.

Sanchez, the only defendant to testify in his or her own defense, denied being in the stolen minivan and presented an alibi defense for the night of September 6, 2003. Sanchez testified he spent most of the day at the restaurant managed by his father; around 4:00 or 4:30 p.m. he went to the home of Larry Mendez, another employee of the restaurant, to shower and get ready to go out with Rossier; he met Rossier back at the restaurant around 7:00 p.m., where they ate dinner and then went to a nearby movie; he and Rossier returned to the restaurant around 10:00 p.m., at which time his father and he gave Rossier a ride home. Sanchez and his father returned to their home around 11:00 p.m.—which was approximately 30 minutes after the time of the drive-by shooting.

Sanchez's father testified for the defense and corroborated Sanchez's description and basic timeline of the events of September 6, 2003.[4] During cross-examination the prosecutor asked him, "Isn't it true that the first time that you have talked to Mr. Graysen, for example, about where your son was on the night of September 6, is during this trial?" Fidel Sanchez insisted he had discussed this information with Graysen before the trial

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[3] Pacheco pleaded guilty to voluntary manslaughter for his role in the shooting with a provisional sentence of 17 years subject to his agreement to testify truthfully against the remaining defendants.

[4] Mendez and another restaurant employee testified Sanchez frequently worked at the restaurant on Saturdays and would leave around 10:30 p.m. with his father, although neither could remember whether Sanchez was at the restaurant on September 6, 2003. Mendez also testified he lived near the restaurant and Sanchez would sometimes take showers at his home.

began although he could not remember when those discussions occurred, only that "it was before." (Fidel Sanchez acknowledged he had not told the police his son was with him during the time of the drive-by shooting.) After Fidel Sanchez's testimony, the jury was read (by Graysen) a stipulation between Graysen on behalf of his client and the People: "The parties stipulate that William Grays[e]n was hired to be Bryan Sanchez'[s] attorney on December 6, 2005. Further, the first time Fidel Sanchez spoke with Mr. Grays[e]n about being with Bryan on the night of September 6, 2003, was on or shortly after March 1, 2008 [that is, the day before the beginning of jury selection]." After directing the written stipulation be marked as a defense exhibit, the judge instructed the jury that it was to consider the stipulated facts "are proven."

Although Sanchez's testimony provided Rossier with an alibi defense, in his closing argument Rossier's counsel, Kirt J. Hopson, did not mention that testimony. Instead, Hopson focused on the People's evidence and argued it showed, at most, that Rossier was in the stolen minivan during the drive-by shooting because she had gone along with her boyfriend, Sanchez, to watch or engage in tagging. Rossier, he insisted, was no different from Mendez, who had admitted being in the van with her boyfriend during the drive-by shooting but was not charged with the crimes.[5]

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[5] The Attorney General insists this summary of Hopson's closing argument, which was included in both our order to show cause and order directing selection and appointment of a referee, is incorrect and suggests we have confused the September 6, 2003 Bellevue Avenue drive-by shooting of the Temple Street gang members and the August 29, 2003 tagging incident and shooting of a Silver Lake gang member, which involved several of the same individuals, including Sanchez and Rossier. We are confident our reading of the record is correct.

As he reviewed Mendez's testimony for the jury, Hopson argued, "She [(Mendez)] stated she didn't know there was going to be a shooting that day even after hearing the word 'jale.' She never said, if you remember, when it was said, who was around when it was said, whether my client [Rossier] heard it, or whether anybody else heard it. . . . There is no evidence that my client [(Rossier)] knew anything about this. There is no evidence that it was anything more than my client going with her boyfriend to watch the tagging, maybe to do tagging, maybe to go to this new clique. But no evidence she knew anything about this shooting being talked about by all the individuals. . . . She

2. *Pretrial Motions*

Rossier's pretrial motion for severance of the charges against her on the ground the strong evidence of her codefendants' guilt would impermissibly taint her was denied by the trial court. Sanchez did not move to sever his case from Rossier's.

3. *The Reference Hearing*

Nine witnesses testified at the evidentiary hearing. Sanchez called Hopson; Joanne Sanchez, Bryan Sanchez's sister; Manuel Covarrubias, an employee at the restaurant managed by Sanchez's father; Fidel Sanchez; David Piper, an attorney who worked with Graysen during his representation of Sanchez; Donald Tickle, Sanchez's appellate counsel; and Mark Shapiro, codefendant Rafael Fuentes's trial counsel. Respondent called Valerie Salkin, the trial prosecutor, and Larry Mendez, another restaurant employee. At the outset of the hearing the parties stipulated Graysen had died, which Judge Coen reported hampered his ability to respond to our questions since he did not have the benefit of Graysen's explanation for his actions and omissions. Judge Coen also expressly found Fidel and Joanne Sanchez's credibility "suspect." To the extent their testimony conflicted with parts of Piper's testimony, Judge Coen "specifically believed Mr. David Piper and specifically disbelieved Ms. Joanne Sanchez and Mr. Fidel Sanchez."

[(Mendez)] went back with her boyfriend [(to the Red Clique meeting area)] the next day after the Temple shooting. She testified to that. She is with her boyfriend. The same as my client [Rossier] was with her boyfriend."

As we explained in our opinion on the direct appeal, the suggestion that the 18th Street gang members go on a mission or a "jale" occurred on September 6, 2003, not on August 29, 2003; and Hopson's argument Rossier and Mendez were both simply accompanying their boyfriends plainly referred to the drive-by shooting, not the tagging incident.

a. *Findings relating to Fidel Sanchez's willingness to corroborate the alibi defense and Graysen's stipulation*

Piper began working on Sanchez's case in early 2007. Based on his testimony, Judge Coen found Fidel Sanchez informed Graysen his son had worked at his restaurant on the evening of the murder and, after finishing work, had gone to the movies with Rossier and then returned to the restaurant with her around the time of the shooting, "at the latest [in] January or February, 2007." Judge Coen further found Fidel Sanchez had advised Graysen of his ability to corroborate Sanchez's alibi before January 2007, perhaps as early as their first meeting in September 2005 and again in late October or early November 2005, although Judge Coen concluded Joanne Sanchez's testimony her father would repeat there was an alibi defense every time he spoke to an attorney was not credible. Judge Coen also found Fidel Sanchez indicated a willingness to testify well before the trial date and never indicated a refusal to testify. Specifically, he found "Fidel Sanchez first indicated a willingness to testify at the latest, and most likely before, January or February, 2007."

Prior to trial former deputy district attorney (now Judge) Valerie Salkin was aware Sanchez might present an alibi defense. However, Graysen did not inform her Fidel Sanchez would be an alibi witness until the end of the People's case. When Salkin complained about the late revelation of the witness and the apparent serious discovery violation,[6] Graysen explained it was not a discovery violation at all because he did not have the information earlier—that is, he advised Salkin that Fidel Sanchez had just told him Sanchez was with him at the time of the drive-by shooting. Salkin then said, if the witness testified that he had given the information to Graysen at some point long before trial, "I was going to call Mr. Graysen to testify to what I just said, which is to testify that Fidel had just told him this." The stipulation between Graysen and Salkin was a compromise to resolve the late discovery issue.

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[6] Salkin testified she also told Graysen his belated disclosure of the witness was unethical.

Because of Graysen's death, Judge Coen was unable to make any findings regarding what, if any, investigation or review of his files Graysen conducted before entering into the stipulation with Salkin concerning Fidel Sanchez's testimony. However, Judge Coen noted "it is inconceivable that Attorney Graysen was unaware of Fidel Sanchez's statements until after the start of the trial, i.e., March 1, 2008."

b. *Findings relating to Graysen's knowledge of Rossier's inconsistent defense and the decision not to move to sever Sanchez's trial*

Based on Hopson's unrebutted testimony, Judge Coen found Graysen had informed Hopson of Sanchez's alibi defense, including Rossier's involvement in it, 60 days prior to trial. A month to six weeks thereafter, Hopson told Graysen Rossier would not join in that defense. Judge Coen was unable to make any findings regarding the tactical considerations evaluated by Graysen in deciding not to file a motion to sever Sanchez's trial.

c. *Findings relating to Graysen's deficient performance*

Noting his own experience of almost 27 years as a criminal trial judge and 11 years as a criminal trial prosecutor, Judge Coen found Graysen's stipulation concerning Fidel Sanchez and his decision not to move for severance "fell below an objective standard of reasonableness. . . . Although this Court did not have the benefit of an explanation for Attorney Graysen's actions and omissions, the record before the Court shows that Attorney Graysen had no rational tactical purpose for his incompetent act and failure to act."

With respect to prejudice, Judge Coen concluded, based on our opinion on the direct appeal, the evidence of Sanchez's guilt was extremely strong. In addition to the testimony of his accomplices connecting him to the drive-by shooting, Sanchez had been arrested two days after the murder in the stolen minivan used in the crime, his fingerprints were found on the vehicle and forensic tests confirmed a rifle recovered from the minivan at the time of Sanchez's arrest was the murder weapon. On the other hand, Judge Coen found the stipulation concerning Fidel Sanchez did not eviscerate Sanchez's case and the independent evidence of Sanchez's guilt was sufficient to uphold denial of

severance even if Sanchez and Rossier presented antagonistic defenses. Accordingly, Judge Coen found "Graysen's deficiencies on both areas of concern did not prejudice defendant."

4. *Sanchez's Exceptions to the Referee's Findings*

Judge Coen found Graysen had informed Rossier's counsel of Sanchez's alibi defense 60 days prior to trial and Hopson told Graysen Rossier would not join in that defense a month to six weeks later (that is, approximately 15 to 30 days before trial). In his exception to the referee's findings, Sanchez quotes Hopson's testimony that he advised Graysen he was not joining in his defense a month or six weeks prior to trial. Other than this detail, Sanchez's exceptions challenge only the referee's finding that Graysen's deficient performance as trial counsel did not prejudice Sanchez.

5. *The Attorney General's Exceptions to the Referee's Findings*

The Attorney General's principal objection to the referee's report is that Judge Coen did not consider, let alone credit, Graysen's personal declaration dated September 18, 2009 (submitted with the Attorney General's informal response to Sanchez's petition for writ of habeas corpus). In that declaration Graysen averred he did not know about Fidel Sanchez's confirmation of Sanchez's alibi defense and his willingness to testify until on or after March 1, 2008. Accordingly, the stipulation he entered with the prosecutor was accurate and was necessary to blunt her objection to the identification of the witness at such a late date.

The Attorney General also argues Judge Coen ignored Graysen's explanation of his tactical reasons for failing to file a severance motion (basically his evaluation "that the [trial judge] had correctly analyzed the severance issue" when he denied the other parties' motions) and contends "as a matter of law" the trial court could not have granted a severance motion on the ground of antagonistic defenses had one been made by

Graysen.[7] Accordingly, Graysen could not have provided ineffective assistance by failing to file the motion.

DISCUSSION

1. *Adoption of the Referee's Factual Findings*

We have compared the referee's report to the transcript of the evidentiary hearing. The factual discussion and record citations are accurate and reliable. The report, including its credibility discussion, is thorough and convincing and is fully responsive to our questions.

As discussed, the only significant challenge to the referee's findings is the Attorney General's objection that Judge Coen ignored Graysen's personal declaration, which had been filed with the respondent's initial, informal response to the habeas petition. The Attorney General's exception to the findings on this ground is misplaced. A reference hearing following issuance of an order to show cause is subject to the same rules of evidence as a criminal trial. (*In re Miranda* (2008) 43 Cal.4th 541, 574-575; *In re Fields* (1990) 51 Cal.3d 1063, 1070.) An out-of-court declaration is hearsay and, unless subject to some exception permitting it to be admitted, is properly excluded from the hearing upon timely and proper objection. (Evid. Code, § 1200; see *In re Miranda*, at p. 575; *In re Scott* (2003) 29 Cal.4th 783, 822-823.) Indeed, in this case respondent did not even attempt to introduce Graysen's declaration into evidence at the reference hearing; and Judge Coen correctly ruled, in response to an inquiry from Sanchez's counsel, that testimony concerning statements made by Graysen was hearsay.

Accordingly, we adopt the referee's factual findings on questions 1 through 8. However, the significance of those findings to the legal issues raised by Sanchez's petition—whether Graysen's representation fell below an objective standard of

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[7] The Attorney General also takes issue with the referee's finding that Graysen knew a month or so before trial that Rossier's counsel intended to present a defense that was inconsistent with Sanchez's alibi. This exception is based on selected excerpts from Hopson's testimony at the evidentiary hearing and the assertion Graysen could not foresee Rossier's defense counsel's closing argument prior to trial.

reasonableness under prevailing professional norms and, if so, whether his deficient performance was prejudicial, matters embraced within our question 9—is for us to determine. (See *In re Scott*, *supra*, 29 Cal.4th at p. 824 [referee's credibility determinations and resolution of disputed facts are entitled to great weight; "[t]he significance of those findings to the legal issues is for us to determine"]; *People v. Ledesma* (1987) 43 Cal.3d 171, 219 [where the referee's factual findings are supported by ample, credible evidence, they are entitled to great weight; but legal conclusions and resolution of mixed law-fact questions are subject to independent review].)

2. *Governing Legal Principles*

a. *Habeas corpus*

"""For purposes of collateral attack, all presumptions favor the truth, accuracy, and fairness of the conviction and sentence; *defendant* thus must undertake the burden of overturning them. Society's interest in the finality of criminal proceedings so demands, and due process is not thereby offended."""" (*In re Avena* (1996) 12 Cal.4th 694, 710.) "'Because a petition for writ of habeas corpus seeks to collaterally attack a presumptively final criminal judgment, petitioner bears a heavy burden initially to *plead* sufficient grounds for relief, and then later to *prove* them.' [Citation.] The petitioner 'must prove, by a preponderance of the evidence, facts that establish a basis for relief on habeas corpus.'" (*In re Price* (2011) 51 Cal.4th 547, 559.)

b. *Ineffective assistance of counsel*

"'To establish ineffective assistance of counsel under either the federal or state guarantee, a defendant must show that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and that counsel's deficient performance was prejudicial, i.e., that a reasonable probability exists that, but for counsel's failings, the result would have been more favorable to the defendant.'" (*In re Roberts* (2003) 29 Cal.4th 726, 744-745; see *Strickland v. Washington* (1984) 466 U.S. 668, 694 [104 S.Ct. 2052, 80 L.Ed.2d 674]; *People v. Ledesma, supra,* 43 Cal.3d at p. 217.) With respect to the requisite showing of prejudice in a habeas

corpus proceeding alleging trial counsel was incompetent, "'the petitioner must show us what the trial would have been like, had he been competently represented, so we can compare that with the trial that actually occurred and determine whether it is reasonably probable that the result would have been different.' [Citation.] After weighing the available evidence, its strength and the strength of the evidence the prosecution presented at trial [citation], can we conclude petitioner has shown prejudice? That is, has he shown a probability of prejudice 'sufficient to undermine confidence in the outcome?'" (*In re Hardy* (2007) 41 Cal.4th 977, 1025.)

3. *Trial Counsel's Conduct*

a. *The stipulation*

There can be no question the value of Fidel Sanchez's testimony corroborating Sanchez's alibi defense was significantly undermined by the stipulation between Graysen and the prosecutor that the first time Fidel Sanchez spoke with Graysen about being with Sanchez on the night of September 6, 2003 was on, or shortly after, March 1, 2008. Indeed, in closing argument the People asserted Fidel Sanchez had "never told anybody that his son was at Palermo's the night of the murder. That included his attorney. We stipulated to that. He never even told—Mr. Fidel Sanchez never told Mr. Graysen he was part of this alibi until during the last month. You heard a stipulation Mr. Graysen had this case for like two years. He is just coming in and trying to create an alibi because the evidence against his son is overwhelming."

As established by the evidence at the reference hearing and found by Judge Coen, Graysen knew Fidel Sanchez could corroborate his son's alibi defense at least a year prior to the commencement of the trial. Moreover, Fidel Sanchez indicated a willingness to testify well before the trial date. There was no rational tactical reason for Graysen not to timely notify the People Fidel Sanchez would be a defense witness. We fully agree with Judge Coen's conclusion that Graysen's failure to do so and his subsequent entry into the factually inaccurate stipulation in an effort to salvage Fidel Sanchez's testimony constituted deficient performance by trial counsel that fell below an objective standard of

reasonableness under prevailing professional norms. (See *Strickland v. Washington, supra,* 466 U.S. at p. 694; *People v. Gamache* (2010) 48 Cal.4th 347, 381.)[8]

b. *The omitted motion to sever*

The issue of Graysen's failure to move to sever Sanchez's trial from Rossier's is not as straightforward. Granting such a motion, although not required under the facts as known to the parties and the trial court, would have been within the court's broad discretion. Because there is a reasonable probability a motion to sever would have been granted, Graysen's performance was deficient in this regard as well.

"When two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they must be tried jointly unless the court orders separate trials." (Pen. Code, § 1098; see *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 40 ["[j]oint trials are favored because they 'promote [economy and] efficiency' and "'serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts"""].) Thus, there is a legislative (and judicial) preference for joint trials when authorized. (See *People v. Letner and Tobin* (2010) 50 Cal.4th 99, 150.) Nonetheless, the trial court retains discretion to order separate trials if necessary to avoid undue prejudice to one of the defendants. (*Ibid*. ["'the court may, in its discretion, order separate trials "in the face of an incriminating confession, prejudicial association with codefendants, likely confusion resulting from evidence on multiple counts, conflicting defenses, or the possibility that at a separate trial a codefendant would give exonerating testimony"""]; accord, *People v. Box* (2000) 23 Cal.4th 1153, 1195, disapproved on another ground in *People v. Martinez* (2010) 47 Cal.4th 911, 948, fn. 10; see *People v. Lewis* (2008) 43 Cal.4th 415, 452 ["[t]he court may, in its discretion, order separate trials

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[8] Although the Attorney General disputes the referee's factual findings regarding the circumstances leading up to Graysen's entry into the stipulation (because he failed to accord any weight to Graysen's inadmissible declaration), there is no challenge to Judge Coen's assessment, based on those findings, that Graysen's performance in this regard was "incompetent."

if, among other reasons, there is an incriminating confession by one defendant that implicates a codefendant, or if the defendants will present conflicting defenses"].)

"Antagonistic defenses alone do not compel severance." (*People v. Cummings* (1993) 4 Cal.4th 1233, 1286.) "[A] trial court, in denying severance, abuses its discretion only when the conflict between the defendants *alone* will demonstrate to the jury that they are guilty. If, instead, 'there exists sufficient independent evidence against the moving defendant, it is not the conflict alone that demonstrates his or her guilt, and antagonistic defenses do not compel severance.'" (*People v. Letner and Tobin, supra,* 50 Cal.4th at p. 150.)[9]

Here, in his closing argument Hopson failed to even mention Sanchez's alibi defense, which would have exonerated Rossier as well—a conspicuous silence that surely weakened whatever persuasive force Sanchez and his father's testimony may otherwise have had. Yet, as the Attorney General has emphasized, Rossier did not testify she was in the stolen minivan with Sanchez during the Bellevue Avenue drive-by shooting (she did not testify at all), nor did Hopson concede that fact in his argument. Rather, he argued the People's accomplice witnesses, whose credibility he vigorously attacked, testified only that Rossier had accompanied Sanchez that evening without any prior knowledge a shooting had been planned: Rossier was just "with her boyfriend." Although not affirmatively supportive of Sanchez's alibi, Rossier's trial strategy was neither antagonistic to, nor irreconcilable with, Sanchez's defense.

Under these circumstances denial of a motion to sever, if Graysen had made one, would not have been reversible error—that is, an abuse of the trial court's considerable discretion. (See *People v. Coffman and Marlow, supra,* 34 Cal.4th at p. 41 [court's denial of a motion for severance is reviewed for an abuse of discretion, "judged on the facts as they appeared at the time of ruling"]; *People v. Balderas* (1985) 41 Cal.3d 144,

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[9] "'[M]utual antagonism' only exists where the acceptance of one party's defense will preclude the acquittal of the other." (*People v. Hardy* (1992) 2 Cal.4th 86, 168.)

171 [appellate court reviews trial court's denial of pretrial severance motion based on the facts known and the showing made at the time of the motion itself].)

However, the Attorney General misstates the law in contending the trial court "could not have granted a severance" to Sanchez and, therefore, Graysen could not have provided ineffective assistance by failing to request it. Based on the information Graysen had in advance of trial concerning Rossier's defense strategy, as found by the referee, granting a motion to sever would have been well within the trial court's discretion. Moreover, a motion to sever from Sanchez would have complemented Rossier's own motion for a severance, which was based on the joinder of charges involving the September 6, 2003 drive-by shooting with charges relating to August 29, 2003 and September 8, 2003, which named her codefendants but not Rossier.

In sum, a motion to sever Sanchez's and Rossier's trials *might* have been granted. If it had, the negative impact of Rossier's failure to adopt Sanchez's alibi defense would have been avoided. Conversely, there was no conceivable tactical benefit to Sanchez in failing to request severance. Accordingly, we agree with Judge Coen's evaluation that Graysen's decision not to move for severance fell below an objective standard of reasonableness.

4. *Prejudice*

To establish prejudice, Sanchez must prove he received an unreliable or fundamentally unfair trial as a result of his trial counsel's failures. (*In re Visciotti* (1996) 14 Cal.4th 325, 352; see also *Strickland v. Washington, supra*, 466 U.S. at p. 686; *In re Harris* (1993) 5 Cal.4th 813, 833.) He has failed to carry that burden.

To be sure, Graysen's deficient lawyering compromised Sanchez's alibi defense. Had he timely identified Fidel Sanchez as a witness and successfully moved for a severance of Sanchez's trial from Rossier's (a possible, but by no means inevitable, result), the jury would not have heard the stipulation that devastated Fidel Sanchez's credibility or been exposed to Rossier's implicit denial of her role in Sanchez's proffered alibi. But we are persuaded a somewhat stronger alibi would not have had any impact on

the outcome of this trial, and counsel's errors do not undermine our confidence in that outcome. (See *Porter v. McCollum* (2009) 558 U.S. ___ [130 S.Ct. 447, 455-456, 175 L.Ed.2d 398] [defendant not required to show that counsel's deficient conduct "more likely than not altered the outcome," but rather that he establish "'a probability sufficient to undermine confidence in [that] outcome'"].)

With respect to the alibi defense itself, as the Attorney General notes, there was no physical evidence supporting Sanchez's claim he worked at his father's restaurant and then went to a movie and dinner with Rossier: no timecard, paycheck, ticket stubs or security videotapes, even though the restaurant had security cameras.[10] In addition, Fidel Sanchez's testimony was highly suspect even without the additional problems created by Graysen's incompetence. He did not tell police officers when initially interviewed that his son had been with him throughout the day and evening of the murder. Moreover, Fidel Sanchez had also provided an alibi for his son for an unrelated home invasion robbery committed the day after the drive-by shooting. Although Fidel Sanchez insisted to police his son was at home with him when the robbery occurred, Sanchez subsequently pleaded guilty to the offense, casting serious doubt as to the father's veracity and plainly supporting the prosecutor's argument he was prepared to lie to protect his son.

Sanchez's active role in the Bellevue Avenue shooting as the driver of the stolen minivan was established by three witnesses who were inside the vehicle (David Kuk, Santos Kuk and Dorma Pedro Mendez), as well as Norbeto Pacheco, who provided the weapons used in the incident. Further incriminating evidence was furnished by James Felix, a government informant who was a member of the Hoovers clique of the 18th Street gang. The Kuk brothers also described the planning that preceded the crime, including Sanchez's participation in the discussion of a mission or "jale," at the Red Shield clique's gathering spot at 10th Place and Albany Street earlier that day. Counsel

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[10] As discussed, neither of the restaurant employees who generally confirmed Sanchez's and his father's testimony that Sanchez often worked at the restaurant on Saturdays was able to remember whether he had been there at all on September 6, 2003, let alone corroborate Sanchez's presence at specific times critical to the alibi defense.

for the various codefendants at the joint trial vigorously challenged the credibility of these witnesses. The jury was cautioned that Pacheco was an accomplice as a matter of law and that several other witnesses may be accomplices, whose testimony was therefore to be viewed with caution. Nonetheless, the jury believed these gang members' description of the evening's events, including not only Sanchez's role but also Rossier's. The jury's credibility judgments were amply justified by the record.

Finally, the forensic evidence that was introduced at trial, although certainly not conclusive, did link Sanchez to the Bellevue Avenue drive-by shooting. Two days after the offense, on September 8, 2003, Sanchez was arrested in the stolen minivan that had been used in the crimes. The murder weapon (a .22 caliber rifle) was still inside the vehicle. In addition, cell phone records established the phone Sanchez had in his possession when arrested, which was registered to Rossier's father, had been used to make calls on the evening of September 6, 2003 utilizing transmission towers in proximity to the location of the shootings. Although those records do not establish who, in fact, placed the calls, the inference it was either Sanchez himself or Rossier is strong; either scenario eviscerates Sanchez's defense.

In sum, the evidence of Sanchez's participation in the drive-by shooting was extremely strong, and his alibi defense unconvincing even without regard to the harmful effects of Graysen's errors. Sanchez was constitutionally entitled to a better defense; but we are nevertheless convinced, based on our thorough review of the trial record, he received a fundamentally fair trial and his convictions for murder and attempted murder are reliable.

DISPOSITION

The petition for writ of habeas corpus is denied.

PERLUSS, P. J.

We concur:

WOODS, J.

ZELON, J.