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SHELDON, J., dissenting. In this case, the majority has determined that the habeas court's denial of the petition for certification to appeal filed by the petitioner, Jorge Sanchez, must be upheld because the court did not abuse its discretion in ruling that the petitioner failed to satisfy the prejudice prong of the controlling test for ineffective assistance of counsel set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). I respectfully disagree.

The petitioner's claim of ineffective assistance was based upon his trial lawyer's failure to call two witnesses to testify in his defense at trial. The witnesses, Antonio Rigual and Lester Simonetty, were both claimed by the petitioner to contradict key portions of the state's case against him, which was built centrally upon the testimony of Edwardo Ortiz, an admitted member of the Latin Kings gang with a lengthy criminal record, who testified against the petitioner while in custody as an informant for the Federal Bureau of Investigation (FBI).<sup>1</sup> According to Ortiz, the petitioner murdered the victim, Angel Soto, in order to gain readmission to the Latin Kings, which had previously expelled him. When the petitioner inquired of his cousin, Rigual, how he might gain readmission to the gang, Rigual allegedly told him, after having spoken with Ortiz, that he could gain readmission by killing one of two people with whom local gang leader Richard Morales was angry because one of them had carried on a relationship with the wife of the president of the Latin Kings while the other, Soto, had known of the relationship but did not report it. According to Ortiz, Rigual was also the person to whom the petitioner revealed, again in Ortiz' presence at Rigual's birthday party, that he had done the killing—a revelation that reportedly prompted Rigual to give the petitioner back his beads, betokening his readmission to the gang.

Simonetty, the petitioner's brother, was claimed by Ortiz to have joined him in planning to burn the stolen and repainted motor vehicle that the petitioner had used to approach the victim by surprise in order to commit the murder. The only reason that Simonetty did not follow through with Ortiz on this plan was reportedly that the police located the stolen vehicle before he and Ortiz could torch it. When they testified at the habeas trial, both Rigual and Simonetty denied that they were members of the Latin Kings in the relevant time frame and denied that they had any knowledge of the petitioner's involvement in the killing of Soto. Rigual testified that he did not have conversations with any members of the Latin Kings about the petitioner's alleged effort to be readmitted into the gang, nor was he even aware that Soto was murdered. Simonetty testified

that he did not know any members of the Latin Kings who were involved in the murder of Soto, nor did he have conversations about the murder with any such individuals.

In announcing its decision from the bench, the habeas court ruled that the plaintiff had failed to establish either the performance prong or the prejudice prong of *Strickland* for the following reasons. After assuming, *arguendo*, at the outset, that the performance prong of *Strickland* had been satisfied because defense counsel could not recall or explain why he had failed to call the two witnesses at trial, or even whether he had investigated them, the court then ruled that the petitioner had failed to prove prejudice because calling the witnesses to testify would actually have harmed the petitioner's defense by ascribing to him a motive to kill the victim. The court added that even if the witnesses had been called to the stand at trial, it was unlikely that the jury would have believed them because they both had criminal records and unspecified "motive[s] to be deceptive." No explanation of these findings was ever offered. At the end of that ruling, the court concluded that, in light of the two witnesses' unhelpfulness to the defense, it was not deficient performance by defense counsel not to have called them at trial.

With due respect to the habeas court, I believe that its conclusion that the two witnesses' testimony would have hurt the petitioner's defense by giving him a motive to murder Soto is unfounded. In fact, they offered critical evidence to contradict the state's key witness in two important respects. As for Rigual, his denial of Latin Kings membership and of knowledge of the murder or of the petitioner's involvement in it directly contradicted a critical element of the state's central theory of the case: that the petitioner was motivated to kill the victim by his desire to regain membership in the Latin Kings. According to Ortiz, Rigual was a key player in the events that unfolded both because Rigual told the petitioner that he could be readmitted to the gang by killing Soto and because he made good on that representation by personally readmitting him when the petitioner informed him that he had killed Soto. If the jury had believed Rigual instead of Ortiz, or had even entertained a reasonable doubt about Ortiz' testimony based upon Rigual's contrary testimony, the petitioner's prospects at his criminal trial would have markedly improved.

As for Simonetty, although his role in the events surrounding the murder was less central than Rigual's, he still was uniquely situated to contradict a key aspect of Ortiz' story, which was that after he and Simonetty learned of the crime, they made plans together to incinerate the car. Because Simonetty was the only other person claimed by Ortiz to have been involved in the postshooting plan to torch the car, his denial of any

involvement in it, or of any reason for doing so, could also have furnished a significant basis for discrediting Ortiz' testimony.

As for the habeas court's conclusion that Rigual and Simonetty would not likely have been believed by a jury because of their criminal records, it is important to note that the essential value of their testimony to the defense in this case would have been to contradict Ortiz, an admitted member of the Latin Kings who had an extensive criminal record and pending criminal charges of his own. The critical question, moreover, is whether their relevant testimony contradicting Ortiz would have been of such significance as to raise reasonable doubt about the state's theory of the case. Here, with no admissions by the petitioner except through Ortiz, no forensic evidence tying the petitioner to the crime and no eyewitnesses against him—in essence, nothing but Ortiz' testimony to establish his guilt—the witnesses' testimony would probably have been quite helpful to the petitioner had defense counsel called them at trial.

The court also observed that both witnesses had unspecified motives to be deceptive. Here, however, where neither the true significance of the witnesses' testimony nor the insignificance, in context, of their criminal records, was properly assessed, I believe that the mere assertion that the witnesses had motives to be deceptive is insufficient to support the court's ruling that the petitioner failed to establish prejudice based upon the trial lawyer's failure to call the two witnesses at trial.<sup>2</sup>

Although, as previously noted, the habeas court also ruled that the petitioner failed to establish the performance prong of ineffective assistance of counsel under *Strickland*, that ruling was based solely upon the court's unfounded finding that the witnesses' testimony would have harmed the petitioner by establishing a motive for him to kill the victim. I believe that that ruling fails to furnish an alternative basis for upholding the habeas court's denial of the petitioner's petition for certification to appeal under the performance prong of *Strickland*.

Having determined that the habeas court abused its discretion in ruling that the petitioner failed to satisfy the prejudice prong of *Strickland*, I next turn to a discussion of remedy. On that score, I would note that the mere fact that the court erred in rejecting the petitioner's claim does not, in itself, mean that the petitioner has met his burden of proving that his counsel was ineffective and thus that his habeas petition should be granted. Accordingly, I would reverse the habeas court's decision and remand the case for a new habeas trial on all aspects of the petitioner's ineffective assistance of counsel claim.

<sup>1</sup> At the petitioner's trial, Ortiz admitted that after he was arrested by the

FBI in New Jersey, he entered into an agreement to cooperate with federal and state authorities concerning the activities of the Latin Kings. When asked by defense counsel whether his sentence in an unrelated case depended on his cooperation and testimony in the petitioner's case, Ortiz responded in the affirmative.

<sup>2</sup> The majority suggests that, in reaching this conclusion, I have failed to pay due deference to the habeas court's determinations of credibility, which must be upheld on appeal unless they are shown to have been clearly erroneous. I respectfully disagree. The findings I object to were not in fact credibility determinations. Instead, they were assessments of the likelihood that the two witnesses' testimony would have been believed and credited by the jury had they been called to testify at trial. These findings were predicated upon the acknowledged existence of bases for impeaching the two witnesses that were identical in character to those affecting the credibility of the state's witness, Ortiz, whose testimony they would have contradicted. I find it unsupportable to conclude, on this record, that the two witnesses were not likely to have been believed solely because they, like Ortiz, had criminal records and possible motives to be deceptive.

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