

DEC 14 2009

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ANDRES GONZALEZ,

Petitioner - Appellant,

v.

EDWARD J. CADEN,

Respondent - Appellee.

No. 07-55507

D.C. No. 2:04-cv-04795-GAF

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Gary A. Feess, District Judge, Presiding

Submitted November 17, 2009**

Before: ALARCÓN, TROTT, and TASHIMA, Circuit Judges.

California state prisoner Andres Gonzalez appeals from the district court's judgment denying his 28 U.S.C. § 2254 habeas petition. We have jurisdiction pursuant to 28 U.S.C. § 2253, and we vacate and remand.

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

Gonzalez contends that his defense counsel was ineffective by failing to present the testimony of Dagoberto Cardona. We vacate the district court's denial of the habeas petition and remand to the district court to hold an evidentiary hearing and rule on the merits of Gonzalez's ineffective assistance of counsel claim.¹ See *Scott v. Schriro*, 567 F.3d 573, 584 (9th Cir. 2009) (per curiam) (remanding to district court to conduct an evidentiary hearing); see also *Houston v. Schomig*, 533 F.3d 1076, 1083 n.4 (9th Cir. 2008) (remanding sua sponte).

VACATED; REMANDED.

¹ We note that defense counsel's performance was far from stellar. See, e.g., *In re Vargas*, 83 Cal. App. 4th 1125 (Ct. App. 2000) (enumerating defense counsel's performance in past cases).