No. _____

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT A. HAMBERG,
Petitioner,

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE ELEVENTH CIRCUIT COURT OF APPEALS

APPENDIX TO APPLICATION FOR EXTENSION OF TIME TO FILE PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

[DO NOT PUBLISH]

In the

United States Court of Appeals

For the Eleventh Circuit

No. 22-13967

Non-Argument Calendar

ROBERT A. HAMBERG,

Petitioner-Appellant,

versus

SECRETARY, DEPARTMENT OF CORRECTIONS,

Respondent-Appellee.

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 2:21-cv-00383-SPC-KCD

Before NEWSOM, ABUDU, and MARCUS, Circuit Judges.

PER CURIAM:

Robert Hamberg, a Florida prisoner, appeals the district court's denial of his counseled 28 U.S.C. § 2254 habeas corpus petition. We granted a certificate of appealability ("COA") on one issue: Did Hamberg's trial counsel provide ineffective assistance, under *Strickland v. Washington*, 466 U.S. 668 (1984) by failing to properly prepare Hamberg to testify so that he did not open the door to evidence about when and how he had met his wife, Dianne Hamberg? Hamberg argues that the district court erred when it found that the state postconviction court correctly found that Hamberg's counsel, Gerald Berry, was not ineffective under *Strickland* because Berry did not properly prepare him to testify in his own defense. After careful review, we affirm.

When examining the district court's denial of a habeas petition under § 2254, we review the district court's findings of fact for clear error, and review *de novo* both questions of law and mixed questions of law and fact. *Gilliam v. Sec'y for Dep't of Corr.*, 480 F.3d 1027, 1032 (11th Cir. 2007). A claim of ineffective assistance of counsel is a mixed question of law and fact that we review *de novo*. *Ward v. Hall*, 592 F.3d 1144, 1155 (11th Cir. 2010). However, the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") imposes a "highly deferential standard for evaluating state-court rulings and demands that state-court decisions be given the benefit of the doubt." *Renico v. Lett*, 559 U.S. 766, 773 (2010) (quotations

and citations omitted). So, we review the district court's decision *de novo*, but review the state habeas court's decision with deference. *Reed v. Sec'y, Fla. Dep't of Corr.*, 593 F.3d 1217, 1239 (11th Cir. 2010).

If a state court has adjudicated a claim on the merits, a federal court may grant habeas relief only if the decision of the state court (1) was contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme Court, or (2) was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d)(1), (2); *see Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (explaining that, when a § 2254 petitioner asserts a claim that has been adjudicated on the merits in state court proceedings, the petitioner bears the burden of proving that he is entitled to relief in light of § 2254(d)'s standard of deference).

Under § 2254(d)(1), a federal habeas court making the unreasonable application inquiry "should ask whether the state court's application of clearly established federal law was objectively unreasonable." *Williams v. Taylor*, 529 U.S. 362, 409 (2000). "[A]n *unreasonable* application of federal law is different from an *incorrect* application of federal law." *Id.* at 410 (emphasis in original). Even if the federal court concludes that the state court applied federal law incorrectly, relief is appropriate only if that application also is objectively unreasonable. *Bell v. Cone*, 535 U.S. 685, 694 (2002). Thus, a state prisoner seeking federal habeas relief "must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well

understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011).

To prevail on an ineffective-assistance-of-counsel claim, a defendant must satisfy the two-part test established in *Strickland*. *Strickland*, 466 U.S. at 687–94. Deficient performance "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id* at 687. Prejudice occurs when there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at 694. Because both parts of the *Strickland* test must be satisfied in order to show ineffective assistance, we need not address the deficient performance prong if the defendant cannot meet the prejudice prong, or vice versa. *Holladay v. Haley*, 209 F.3d 1243, 1248 (11th Cir. 2000).

We've noted that, when a defendant testifies on his own behalf, he risks the jury concluding the opposite of his testimony is true. *United States v. Brown*, 53 F.3d 312, 314 (11th Cir. 1995). Statements made by a defendant may also be considered as substantive evidence of his guilt if the jury disbelieves it. *Id*.

Here, the district court did not err in denying Hamberg's § 2254 petition because the state postconviction court's application of *Strickland* was not contrary to, nor an unreasonable application of, clearly established law or based on an unreasonable interpretation of the facts. 28 U.S.C. § 2254(d)(1), (2). As we'll explain, the state postconviction court's finding that Berry's performance did

not constitute ineffective assistance of counsel was not unreasonable in light of the evidence presented at the state postconviction evidentiary hearing.

The relevant background is this. Hamberg was tried in state court on eight counts of lewd and lascivious battery. Pretrial, the state argued that it should be permitted to enter evidence at trial about Hamberg's early relationship with his now ex-wife -- who met Hamberg when he was a high school band teacher and she was a 14 or 15-year-old student in his class and entered into a relationship with him when she was 18 -- to show the similarities between the stories of his ex-wife and the victim in the instant case. The state court ruled that evidence about Hamberg's relationship with his ex-wife would not be admitted, but that if he testified in his own defense and said he'd never done anything like the charged offenses before, then evidence about his ex-wife could be presented.

Later, at trial, the victim testified that Hamberg was her high school band teacher, that she would meet him at his house and at school, and that they would engage in sexual activities. Hamberg decided to testify in his own defense. Toward the end of his direct examination, Hamberg was asked by his lawyer, Berry, whether there were "some things that you regret having done." After answering "yes," Hamberg said "[w]ell, I was naive and although I'd heard about teachers putting themselves in dangerous positions, I never thought it would happen to me, but yes, I would have never taken her by my house." At that point, the state argued that Hamberg's answer opened the door to admit evidence about how and

when he met his ex-wife, and the trial court agreed. The state proceeded to question Hamberg about meeting his ex-wife when she was 14 or 15 and marrying her when she was 18, and his ex-wife was brought in to confirm that Hamberg was her ex-husband. The jury found Hamberg guilty on all counts and he was sentenced to 30 years' imprisonment followed by 15 years of probation.

In a post-conviction motion, Hamberg argued, as relevant to this appeal, that his trial counsel, Berry, had been ineffective by failing to prepare him to testify in his own defense and failing to provide him any cautionary instruction to not open the door to the evidence about his relationship with his ex-wife. The state court conducted an evidentiary hearing on Hamberg's post-conviction motion, during which Berry testified about preparing Hamberg for trial. Berry detailed that both he and his partner, Shannon McFee, had spent a lot of time preparing Hamberg to testify, conducting mock direct and cross-examinations of Hamberg and generally discussing with him the issue of opening the door to damaging evidence. Berry added that he did not expect Hamberg to answer his question about whether there were things Hamberg "regret[ted] having done" the way he did at trial. Instead, Berry had intended for Hamberg to answer by summarizing his testimony from his direct examination that he regretted bringing the victim to his house, so Berry had not foreseen how the question could open the door to evidence about Hamberg's ex-wife. However, Berry admitted that he did not feel like he prepared Hamberg appropriately for the specific question he asked, and regretted having asked it.

Hamberg also testified during the state post-conviction hearing and conceded that Berry had prepared him to testify in his own defense. As for the question about Hamberg having regrets, Berry had talked to him the week before and asked if he regretted taking the girl by his house, which he responded that he did. Hamberg said that he did not remember Berry telling him that he needed to proceed with caution or warning him on how to phrase things when answering questions. However, Hamberg admitted that he was present during the pre-trial hearing to exclude evidence about his ex-wife, though he did not remember the court warning him about opening the door to this evidence.

After the hearing, the post-conviction court denied Hamberg's motion for postconviction relief and found that Berry did not provide ineffective assistance of counsel. In so doing, the court summarized at length the testimony introduced at the evidentiary hearing, pointing out that Hamberg admitted that Berry had prepared him to testify at trial; that during these prep sessions, Berry had not warned Hamberg about speaking about his past, though counsel had asked about whether Hamberg had any regrets and Hamberg had answered by saying that bringing the victim to his house was a dumb idea; that Berry was surprised by Hamberg's answer to this question on the stand; and that Hamberg had been present at the hearing on the motion to exclude evidence.

Giving deference to the state postconviction court, as we must, we cannot say that the state post-conviction court unreasonably determined that Berry was not ineffective. As we've discussed,

Berry prepared Hamberg to testify in his own defense at length by conducting mock direct and cross-examination. Further, Berry testified that the question he asked Hamberg -- and prepped him on -- was to provide Hamberg an opportunity to state that he regretted bringing the victim to his home, not to discuss his past or how he met his wife. And, importantly, Hamberg attended the pretrial hearing where the court expressly warned him not to open the door to evidence about his ex-wife. On this record, the state postconviction court did not unreasonably determine that Berry had not performed ineffectively in preparing Hamberg for his testimony or in questioning him on the stand.

Nor can Hamberg show prejudice under *Strickland*. Even if the information about his ex-wife had not come in, there is no reasonable probability that the outcome of the trial would have been different. At trial, the victim squarely testified that she had engaged in sexual relations with Hamberg. Hamberg then testified in his own defense, denying that he had committed any of the "serious crimes" the victim had accused him of, including her claims that they had engaged in sexual relations with each other. Despite his testimony, the jury chose to believe the victim. Indeed, the jury was allowed not only to disbelieve Hamberg's own testimony, but, moreover, to believe the opposite of what he said. *See Brown*, 53 F.3d at 314. Thus, there was ample evidence of Hamberg's guilt, and he simply cannot show prejudice.

In short, the district court did not err in holding that the state postconviction court properly applied federal law when it found

that Hamberg's trial counsel did not provide ineffective assistance of counsel under *Strickland*. Accordingly, we affirm.

AFFIRMED.