United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
October 18, 2024
Lyle W. Cayce
Clerk

No. 23-70004

MICAH BROWN,

Petitioner—Appellant,

versus

BOBBY LUMPKIN, *Director, Texas Department of Criminal Justice, Correctional Institutions Division*,

Respondent—Appellee.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:19-CV-2301

UNPUBLISHED ORDER

Before JONES, HIGGINSON, and HO, *Circuit Judges*.

STEPHEN A. HIGGINSON, *Circuit Judge*:

A Texas jury convicted Micah Brown of murder and sentenced him to death. After direct appeal and collateral review in state court, Brown filed his application for a writ of habeas corpus in federal court. The district court denied relief and a certificate of appealability (COA). Brown now asks the court for a COA on three claims. Concluding that reasonable jurists could not

disagree as to the resolution of these claims by the district court, we deny the COA.

I.

Micah Brown murdered his ex-wife Stella Ray on July 20, 2011, in Greenville, Texas.[1] Brown and Ray shared two young children. Ray was planning to move with their children to a different town to start a new job. In the days preceding the murder, several violent altercations occurred between Brown, Ray, their children, and Ray's other ex-husband Tracy Williams. In one altercation about a week before the murder, Williams allegedly choked Brown in front of Brown and Ray's children. On July 16, Brown told Ray he was suicidal, causing Ray to ask the police to check on Brown. During this welfare check, the police discovered and seized an illegal weapon—a sawed-off shotgun—and ammunition and arrested Brown. Brown was released the next day.

On July 19, Brown allegedly punched his wife and one of his children in the face, leading Ray to file a family violence report with the police. The next day, Brown returned to Ray's home. Finding no one home, Brown stole a shotgun belonging to Ray's son, marijuana, and a camera that contained photographs of Ray's bruised face taken after the previous physical altercation with Brown. Brown returned to his home, where he sawed off the stolen shotgun and loaded it with bullets he used for hunting. After seeing Ray drive past his residence later that evening, Brown got into his own vehicle and pursued Ray, attempting to catch her attention. Noticing Brown following her,

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[1] The facts surrounding Ray's murder and the events preceding it are taken from the Texas Court of Criminal Appeal's opinion affirming Brown's conviction and death sentence on direct appeal. *Brown v. State*, No. AP-77,019, 2015 WL 5453765 (Tex. Crim. App. Sept. 16, 2015).

Ray called 911 and informed the dispatcher that Brown was pursing her, that she previously filed complaints against Brown, and that she feared Brown might ram his vehicle into hers. Ray pulled over, and according to the 911 call, she told Brown that she was on the phone with the police.

When a police officer responding to Ray's 911 call pulled up behind their stopped vehicles, Brown pointed the shotgun at Ray's head and shot her. The fatal shooting was captured on the police vehicle's dashcam. Brown immediately fled in his vehicle while the responding police officers attempted to help Ray. Ray's two children were in the back of her vehicle. Brown was arrested the next day without incident. While at the local jail, Brown agreed to a televised interview, during which he admitted to murdering Ray, claiming Ray threatened his relationship with his children and blaming Ray for his arrest for possessing an illegal shotgun, which prevented him from hunting. Brown also stated he thought Ray was on the phone with the police when he killed her.

Brown was charged with capital murder, pursuant to Texas Penal Code § 19.03(a)(2), which allowed the jury to convict Brown if they found he "intentionally" murdered Ray "in the course of committing or attempting to commit . . . obstruction or retaliation," or "terroristic threat." The jury convicted Brown of capital murder and sentenced him to death in May 2013. On direct appeal, the Texas Court of Criminal Appeals affirmed the conviction and sentence. *Brown v. State*, No. AP-77,019, 2015 WL 5453765 (Tex. Crim. App. Sept. 16, 2015).

While that appeal was pending, Brown filed for a writ of habeas corpus in state court. Following a week-long evidentiary hearing in July 2018, the state habeas court issued its fifty-five page findings of fact, conclusions of law, and recommendation that relief should be denied. *Ex parte Brown*, No. 27,742 (354th Jud. Dist. Ct. Nov. 5, 2018). The Texas Court of Criminal Appeals

(CCA) adopted the recommendation and denied state habeas relief in September 2019. *Ex parte Brown*, No. WR-85,341-01, 2019 WL 4317041 (Tex. Crim. App. Sept. 11, 2019).

In September 2020, Brown filed a federal application for a writ of habeas corpus in the United States District Court for the Northern District of Texas, in which he asserted eleven claims for relief. In August 2021, Brown filed a motion for a *Rhines*[2] stay and abeyance of the federal proceedings to pursue his Fifth Amendment claim, which the district court denied in February 2022. In June 2022, Brown sought to amend his petition. Two months later, a magistrate judge recommended the district court deny Brown's habeas petition, request for an evidentiary hearing, motion for leave to amend, and COA. Brown objected. The district court overruled Brown's objections, adopted the magistrate judge's findings and conclusions of law, and denied habeas relief and a COA (as well as the motion for an evidentiary hearing and motion for leave to amend).

Brown seeks a COA on three claims: (1) ineffective assistance of trial counsel for failure to investigate and present evidence of Brown's Autism Spectrum Disorder (ASD) during the guilt/innocence stage in violation of the Sixth Amendment; (2) ineffective assistance of trial counsel for failure to investigate and present a complete mitigation case, including evidence of Brown's ASD, during the punishment stage in violation of the Sixth Amendment; and (3) the prosecutor's statements during the sentencing stage of trial that the jury should not show mercy to Brown unless he asked for it, in violation of Brown's Fifth Amendment right not to testify at sentencing.

II.

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[2] *Rhines v. Weber*, 544 U.S. 269 (2005).

To obtain a COA, Brown must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). He must demonstrate that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). Additionally, the Supreme Court has held that, "when the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue . . . if the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 478 (2000).

Federal courts must generally defer to state courts' factual determinations "unless the adjudication of the claim . . . resulted in a decision that 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)(2); *see Cullen v. Pinholster*, 563 U.S. 170, 181 (2011). Federal habeas courts must also defer to state court determinations of law unless the state court decision "was contrary to, or involved an unreasonable application of" clearly established Supreme Court law. 28 U.S.C. § 2254(d)(1).

III.

We address Brown's asserted bases for a COA in turn.

A.

Brown first seeks a COA on whether his trial counsel performed deficiently during the guilt/innocence stage of trial by failing to investigate and

present evidence that Brown has ASD.[3] Brown argues that the ASD evidence would have supported his argument that he did not kill Ray to retaliate against her or to obstruct the family violence investigation or the contemporaneous 911 phone call—the basis of the *capital* murder charge—but that he instead killed Ray in anger because Ray was planning to move away with their children. Brown asserts that the ASD evidence would have helped jurors understand why Brown fixated on his belief that Ray was threatening his relationship with his children and would explain his behavior (i.e., the television interview and letter to his cellmate)[4] and courtroom demeanor, which appeared remorseless. Brown contends that, if presented with the evidence, the jury "likely would have" acquitted Brown of capital murder.

To support this ineffectiveness-of-counsel claim, Brown largely relies on the testimony of Maureen Griffin, the mitigation specialist retained by the Brown trial defense team. In her 2015 affidavit attached to Brown's initial application for habeas relief filed in state court, Ms. Griffin affirmed that "[b]ecause the testing of clients is common practice, I recommended to [trial counsel] that [Brown] be examined for mental health and neuropsychological issues." While her affidavit states that Ms. Griffin observed a "flat affect" and was under the "impression" that Brown had Asperger's Syndrome,[5] the affidavit does not state that she relayed these specific concerns to trial

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[3] The state habeas trial court found that Brown failed to establish that he has ASD. Because we conclude that trial's counsel's representation in this context did not fall below the *Strickland* standard regardless of whether that subsequent ASD diagnosis was accurate, we need not wade into that debate.

[4] In a letter to his cellmate, Brown wrote that he did not regret killing Ray and would do the same to Williams, Ray's other ex-husband, if given the opportunity. *Brown*, 2015 WL 5453765, at *5–6.

[5] The Diagnostic and Statistical Manual of Mental Health Disorders no longer recognizes Asperger's Syndrome as a distinct diagnosis, and Asperger's Syndrome was incorporated into a broader umbrella term of autism spectrum disorders.

counsel. However, during the week-long state habeas trial in July 2018, Ms. Griffin testified that she informed one of the trial counsel that she suspected Brown had Asperger's Syndrome. Both of Brown's trial counsel denied that conversation ever occurred. The state habeas court credited Brown's trial counsel's testimony over Ms. Griffin's testimony when it denied habeas relief. As factual findings and credibility determinations by a state habeas court are entitled to a presumption of correctness unless rebutted by clear and convincing evidence, 28 USC § 2254(e)(1); *see Miller v. Thaler*, 714 F.3d 897, 901 (5th Cir. 2013), which Brown has not presented, we defer to the trial court's determination here.

Because the district court conducted a de novo review of this *Strickland*[6] claim and denied it on the merits,[7] we are tasked with deciding only whether reasonable jurists could disagree with the district court's resolution. Excluding this alleged conversation between the mitigation specialist and state trial counsel, insufficient evidence exists for us to conclude that reasonable jurists would debate whether trial counsel fell below the *Strickland* standard in investigating whether Brown had ASD. During the state habeas hearing, trial counsel testified that none of the eighty-plus people the defense team spoke with, including Brown, his family, and friends, ever noted any history of psychological issues, which would have prompted counsel to investigate further, nor did they observe any behavior that made them believe he may have had a mental health disorder. And, while Dr. Cunningham was retained as mitigation witness and testified during the punishment stage, no

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[6] *Strickland v. Washington*, 466 U.S. 668 (1984).

[7] The district court noted, and Brown concedes, that Brown did not raise this "portion" of the ineffectiveness-of-counsel claim in his state habeas petition. Rather than rule definitively on whether Brown failed to exhaust, the district court, out of an abundance of caution, conducted a de novo review of the merits of the claim.

evidence has been presented to us that he suspected ASD or that he recommended psychological or other type of testing.

Because we conclude that reasonable jurists would not debate the district court's determination that trial counsel did not perform deficiently in failing to identify Brown's subsequent (contested) ASD diagnosis and present evidence of such diagnosis to the jury,[8] we do not reach prejudice or whether Brown's claim is procedurally defaulted.

B.

Brown also asserts that trial counsel was ineffective during the punishment phase of trial by failing to investigate and present a full case in mitigation, including a failure to discover that Brown had "mild" ASD and present evidence on it. Because Brown raised this claim in state court and the CCA rejected that claim on the merits, AEDPA deference applies. In addition to overcoming AEDPA deference, under which the state court's application of Supreme Court precedent must be "unreasonable," *Harrington v. Richter*, 562 U.S. 86, 101 (2011), Brown must show "(1) that his trial counsel rendered deficient performance, and (2) that the deficient performance resulted in actual prejudice," *King v. Davis*, 883 F.3d 577, 586 (5th Cir. 2018). Brown must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. In the mitigation context in a death-

[8] Because we must credit trial counsel's testimony that Ms. Griffin never shared her suspicions regarding ASD with them and that they were unaware that Brown had mannerisms consistent with ASD and we conclude that trial counsel's performance during the guilt/innocence stage of trial did not fall below the *Strickland* standard, we need not reach the district court's determination that any evidence of Brown's ASD would have been inadmissible under Texas law.

penalty case, we must assess the reasonable probability that the jury would have not sentenced Brown to death.

The two questions submitted to the jury at the punishment stage were (1) whether "beyond a reasonable doubt that there is a probability that [Brown] would commit criminal acts of violence that would constitute a continuing threat to society," and (2) whether "[t]aking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, that there is a sufficient mitigating circumstances or circumstances to warrant that a sentence of life imprisonment rather than death sentence be imposed." Jury Verdict, Doc. No. 52-16, pp. 141-42, *Brown v. Davis*, No. 3:19-cv-2301 (N.D. Texas). The jury found in the affirmative on both. *Id.*

Following its week-long evidentiary hearing, the state habeas court concluded that trial counsel's performance during the mitigation stage was not deficient because they presented a "thorough" mitigation case. The state habeas court reasoned that the additional mitigation evidence Brown argued should have been presented to the jury "concerning [Brown's] family history, family dysfunction, relationships, drug abuse, and other difficulties" was "largely cumulative" of the other evidence presented at trial. The CCA adopted these findings and conclusions of law. *Ex parte Brown*, 2019 WL 4317041, at *1.

The district court, in adopting the magistrate judge's Findings, Conclusions, and Recommendation, determined the CCA reasonably concluded that the Brown defense team's mitigation investigation and presentation did not fall below an objective level of reasonableness. In its Recommendation, the magistrate judge emphasized the scope of the investigation by summarizing the mitigation defense presented at trial, which included testimony from Brown's biological parents, sister, and friends; two mental health experts; a

minister and counselor who met with Brown during his incarceration; and jail staff. Testimony from family and mental health professionals related to Brown's dysfunctional family life; history of substance abuse, depression, anxiety, and Attention Hyperactivity Disorder (ADHD); childhood sexual abuse at the hands of his stepbrother; and physical and emotional abuse caused by his stepfather. As to future dangerousness, the counselor who met with Brown in jail testified that Brown had experienced a religious conversion, while the minister who counseled him in jail testified Brown was respectful and remorseful. Jail staff testified that Brown had not caused any problems while in detention.

Brown argues that trial counsel's mitigation investigation and presentation were deficient because, inter alia, counsel did not ask Brown's family members about the intense level of trauma Brown experienced, failed to demonstrate the depths of Brown's drug addiction, and did not present testimony about Brown's then-undiagnosed ASD.

No one disputes that Brown had never been diagnosed with ASD prior to his conviction and sentence. Brown argues that the mitigation expert's suggestion to trial counsel that Brown may have Asperger's Syndrome, paired with Brown's comment that he "can't show emotion well" and statements made by Brown that made him appear remorseless, should have triggered trial counsel to investigate further.

As mentioned above, the state habeas trial court, whose findings were adopted by the CCA and to which we owe deference, found Ms. Griffin's testimony that she told trial counsel that Brown may have Asperger's Syndrome not credible.

Applying the double deference required by AEDPA and crediting trial counsels' testimony, we cannot say that the CCA's determination that trial counsel's mitigation investigation and presentation did not fall below the

Strickland standard is unreasonable. As a result, reasonable jurists could not debate the district court's denial of counsel's claimed ineffectiveness, and we need not examine prejudice.

C.

Last, Brown seeks a COA on his prosecutorial misconduct claim, arguing that reasonable jurists would debate whether the state trial prosecutor violated Brown's Fifth Amendment rights by allegedly commenting on Brown's decision not to testify during the punishment stage of trial. Brown had testified during the guilt/innocence stage of the trial.[9] Embedded in this claim is Brown's motion for a *Rhines* stay to exhaust this claim in state court. Because of the lack of clarity as to whether Brown is seeking a COA on both the district court's denial of this claim on the merits and as to the denial of his motion for a *Rhines* stay, we address both out of an abundance of caution.

1.

The Fifth Amendment forbids prosecutors from commenting—directly or indirectly—on a criminal defendant's choice not to testify. *United States v. Bohuchot*, 625 F.3d 892, 901 (5th Cir. 2010). The test for determining whether a prosecutor's remarks constitute a constitutional violation is "(1) whether the prosecutor's manifest intent was to comment on the defendant's silence or (2) whether the character of the remark was such that the jury would naturally and necessarily construe it as a comment on the defendant's silence." *Rhoades v. Davis*, 852 F.3d 422, 432–33 (5th Cir. 2017) (quoting *Bohuchot*, 625 F.3d at 901)).

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[9] Brown's decision to testify during the guilt/innocence stage of trial did not constitute a waiver of his Fifth Amendment privilege during the sentencing stage of trial. *See Mitchell v. United States*, 526 U.S. 314, 316-17 (1999).

Brown contends that the following remarks made by the prosecutor during closing arguments impermissibly referenced Brown's decision not to testify during the sentencing phase of trial:

> [M]ercy is given by God to those who show true repentance. Right? True repentance. Full unadulterated, unmitigated responsibility. I did it. It's my fault. I'm not blaming my family. I'm not blaming the victim. I'm not blaming society. I'm not blaming drugs. I did it. Please forgive me. Show me mercy, Lord. That's how mercy is given. That's how repentance occurs.
>
> Have you seen that from this Defendant? Absolutely not. So give him what he's asking for. That's what they want you to do when you go back in there to make your decision. Think about that.
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> . . . .
>
> Who do we give life without parole to in a capital murder case? A defendant who throws himself at the mercy of the jury.
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> . . . .
>
> A defendant who throws himself on his face in front of the jury and said I did it all, forgive me. It's my fault.
>
> . . . .
>
> [Y]ou don't give mercy to someone who hasn't asked for it, who hasn't asked for redemption, who hasn't admitted everything they've done. But you know what you give them? You give them justice under this law, man's law, your law.

a.

As to the first prong—whether the prosecutor's manifest intent was to comment on the defendant's choice not to testify—if there exists an "equally plausible explanation for the remark," the prosecutor's intent is not

manifest. *United States v. Davis*, 609 F.3d 663, 685 (5th Cir. 2010) (quoting *United States v. Grosz*, 76 F.3d 1318, 1326 (5th Cir. 1996)).

Both the State and the district court point to other plausible explanations for the prosecutor's remarks. Most persuasively, the prosecutor may have been referencing Brown's apparent lack of remorse for murdering his ex-wife as demonstrated by the following trial evidence: (1) Brown testified during the guilt/innocence stage that Ray was responsible for her own death because she threatened to take their children away; (2) Brown told a reporter that he did not regret killing Ray, but regretted that he killed her in front of his children; and (3) Brown phoned Ray's mother after he killed Ray to inform her. The prosecutor may also have been referencing the testimony of mitigation witnesses, such as family members who referenced the abuse Brown suffered at the hands of his stepfather and stepbrother or the mental health professionals who testified regarding the effect of Brown's drug dependency and the corrupting effect of the violent community in which he was raised.

Because equal, if not more, plausible explanations for the prosecutor's closing remarks exist, reasonable jurists could not conclude that the prosecutor's manifest intent was to focus on Brown's decision not to testify during the sentencing phase of the trial.

b.

As our court explained in *United States v. Davis*, in determining "whether a jury would naturally and necessarily construe a remark as a comment on the defendant's failure to testify, 'the question is not whether the jury possibly or even probably would view the challenged remark in this manner, but whether the jury necessarily would have done so.'" 609 F.3d at 685 (quoting *Grosz*, 76 F.3d at 1326). Therefore, in the context of this COA, we are tasked with asking if reasonable jurists would debate whether the only way

to construe the prosecutor's remarks were as a commentary on Brown's choice not to testify at sentencing. For the same reasons the prosecutor's remarks do not reflect the required manifest intent, the answer to this question is no. The jury could have construed the prosecutor's remarks as referencing Brown's apparent lack of remorse or the testimony of Brown's mitigation witnesses.

* * *

Because we find that the Fifth Amendment claim lacks merit, we do not consider whether the claim could have survived procedural default.

2.

Brown argues the district court abused its discretion when it denied Brown's motion for a *Rhines* stay to exhaust his Fifth Amendment claim. *See Young v. Stephens*, 795 F.3d 484, 495 (5th Cir. 2015). A district court abuses its discretion in denying a *Rhines* stay only if (1) there was good cause for failing to exhaust the claim in state court, (2) the claim is potentially meritorious, and (3) "there is no indication that the petitioner engaged in intentionally dilatory litigation tactics." *Rhines v. Weber*, 544 U.S. 269, 278 (2005). Because we have just concluded that Brown's prosecutorial misconduct claim is not meritorious, we need not reach the other two prongs. The district court did not abuse its discretion in denying the motion for a *Rhines* stay.

* * *

For these reasons, we deny Brown's motion for a COA on all claims.

United States Court of Appeals

FIFTH CIRCUIT
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October 18, 2024

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 23-70004 Brown v. Lumpkin
USDC No. 3:19-CV-2301

Enclosed is an order entered in this case.

Sincerely,

LYLE W. CAYCE, Clerk

By: _____
Monica R. Washington, Deputy Clerk
504-310-7705

Ms. Donna F. Coltharp
Ms. Molly Knowles
Mr. Benjamin Humphreys McGee III
Mr. Ali Mustapha Nasser