NOT FOR PUBLICATION

In the
United States Court of Appeals
For the Eleventh Circuit

No. 23-13862
Non-Argument Calendar

CLARK MACKENDRICK,

Petitioner-Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Florida
D.C. Docket No. 4:22-cv-00404-WS-MJF

Before NEWSOM, BRASHER, and ANDERSON, Circuit Judges.

PER CURIAM:

Clark Mackendrick, a Florida prisoner now serving life in prison for capital sexual battery and lewd or lascivious molestation, appeals the district court's denial of his 28 U.S.C. § 2254 petition.

We granted a certificate of appealability as to whether, given the deference owed to the state court's evaluation of the claim, the district court erred in concluding that Mackendrick's trial counsel was not ineffective for failing to retain and present an expert witness to refute the state's expert regarding the victim's physical examination. On appeal, Mackendrick argues that his counsel was ineffective for failing to provide an expert—like the one that Mackendrick presented at a subsequent state post-conviction evidentiary hearing—to refute the state's expert's conclusion that although the physical exam of the victim was "normal," this was not necessarily inconsistent with the abuse that she alleged Mackendrick had committed years earlier.

We review *de novo* the district court's denial of a habeas corpus petition. *McNair v. Campbell*, 416 F.3d 1291, 1297 (11th Cir. 2005). The Antiterrorism and Effective Death Penalty Act ("AEDPA") imposes a "highly deferential standard for evaluating state-court rulings and demands that the state-court decisions be given the benefit of the doubt." *Renico v. Lett*, 559 U.S. 766, 774 (2010) (quotation marks and citation omitted). Thus, we review the district court's decision de novo, but review the state 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). 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." *White v. Woodall*, 572 U.S. 415, 419-20 (2014).

For claims of ineffective assistance of counsel, a petitioner must demonstrate both that (1) counsel's performance was deficient, meaning that it fell below an objective standard of reasonableness, and (2) the petitioner was prejudiced by the deficient performance, i.e., there was a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984). Scrutiny of counsel's performance should be highly deferential and include a strong presumption that the conduct "falls within the wide range of reasonable professional assistance[.]" *Id*. at 689.

The defendant bears the burden of proving that counsel's representation was unreasonable and must overcome the presumption that the action might have been considered a sound trial strategy. *Id*. at 689. "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable, but strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Broadnax v. Comm'r*, 996 F.3d 1215, 1222-23 (11th Cir. 2021) (quotation marks and citation omitted). Strategic decisions,

including about whether to hire an expert, are entitled to a strong presumption of reasonableness, and "[i]n many instances cross-examination will be sufficient to expose defects in an expert's presentation." *Harrington v. Richter*, 562 U.S. 86, 111 (2011).

We have recognized that establishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is "all the more difficult because the standards created by *Strickland* and § 2254(d) are both highly deferential and when the two apply in tandem, review is doubly so." *Jenkins v. Comm'r, Ala. Dep't of Corr.*, 963 F.3d 1248, 1265 (11th Cir. 2020) (internal alterations and quotation marks omitted). Accordingly, when § 2254(d) applies, "[t]he question is whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard." *Cullen v. Pinholster*, 563 U.S. 170, 229-30 (2011).

Here, pursuant to double deference review, the question is whether the state appellate court's decision was an unreasonable application of the *Strickland* test, that is, whether there is any reasonable argument that Mackendrick's trial counsel did not perform deficiently. *See* 28 U.S.C. § 2254(d)(1); *Pinholster*, 563 U.S. at 229-30; *Jenkins*, 963 F.3d at 1265. Regardless of Mackendrick's contentions, there remains a reasonable argument that Bowman did not perform deficiently, because the state appellate court correctly found that she first investigated the issue of finding an expert witness by speaking to two potential experts on the phone and discussing the details of the case.

She then used her professional judgment to conclude that the testimony of the doctors would hurt Mackendrick more than it

would help because the experts told Bowman that, had they testified, they would have agreed with the state's expert's conclusions, that the injuries from the alleged abuse could have healed. Thus, as the state appellate court found, she engaged in a reasonable strategy to attack the credibility of the victim instead because she believed that this was where the case would turn. *Broadnax*, 996 F.3d at 1222-23; *Harrington*, 562 U.S. at 111.

The state appellate court also correctly noted that Bowman was "not required to continue contacting experts until she found one . . . willing to testify against the state's expert." Mackendrick cannot overcome the fact that Bowman took steps to investigate potential expert witnesses and chose a different trial strategy based on that investigation. 28 U.S.C. § 2254(d)(1); *Pinholster*, 563 U.S. at 229-30; *Jenkins*, 963 F.3d at 1265. Nor can he overcome that the state appellate court was correct in noting that, as a matter of law, her investigation via phone was reasonable because neither *Strickland*, nor any other clearly established law, requires an attorney to engage in a specific method of consultation, nor is an attorney required to continue to contact experts until she discovers one who would provide beneficial testimony. *Strickland*, 466 U.S. 668 (requiring only that counsel provide "reasonably effective assistance . . . within the range of competence demanded of attorneys in criminal cases.") (internal quotations and citation omitted).

Even if Mackendrick and his family were correct that Bowman never relayed the option of an expert witness to them, this also does not nullify the state appellate court's finding that

Bowman investigated potential experts and made a reasonable strategic decision. *Strickland* does not require that she relay every conceivable choice, and "strategic choices made after thorough investigation of law and facts . . . are virtually unchallengeable." *Strickland*, 466 U.S. at 690-91; 28 U.S.C. § 2254(d)(1).

Further, Mackendrick failed to show that another expert would have actually contradicted Jn-Baptiste's testimony. Jn-Baptiste testified that, although she did not find evidence of trauma upon her exam, that was "not inconsistent" with the victim's allegations because it is "common for those injuries [] to heal after a period of time," and Dr. Anderson testified that he agreed with Jn-Baptiste about what the lack of injury meant scientifically, despite disagreeing about whether a patient's history should affect the diagnosis. Similarly, Jn-Baptiste testified that, if the abuse "didn't happen, it would also be a normal exam," and Dr. Anderson also agreed, noting that the victim would not necessarily need to show signs of injury to have been sexually abused, and the absence of injury does not completely rule out sexual assault.

Accordingly, both Jn-Baptiste and Dr. Anderson agreed that the lack of findings on examination alone could neither make a positive diagnosis, nor a negative diagnosis. This is further support for Bowman's reasonable strategic decision to stop contacting experts and focus on cross-examining the victim. *See* 28 U.S.C. § 2254(d)(1); *Pinholster*, 563 U.S. at 229-30; *Jenkins*, 963 F.3d at 1265. Thus, the state appellate court was correct to conclude that Mackendrick did not satisfy the doubly deferential standard because there is a

reasonable argument that Bowman did not perform deficiently, and the district court did not err in denying his 28 U.S.C. § 2254 petition. Accordingly, we affirm.

AFFIRMED.