

NOT FOR PUBLICATION

In the
United States Court of Appeals
For the Eleventh Circuit

No. 24-12843

JAMES AARON TODD,

Petitioner-Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent-Appellee.

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 6:23-cv-00215-PGB-RMN

Before ROSENBAUM, BRANCH, Circuit Judges, and BECERRA,* District Judge.

PER CURIAM:

* The Honorable Jacqueline Becerra, United States District Judge for the Southern District of Florida, sitting by designation.

James Todd, a Florida state prisoner, appeals the district court's dismissal of his 28 U.S.C. § 2254 federal habeas corpus petition as time-barred under the Antiterrorism and Effective Death Penalty Act of 1996's ("AEDPA"), Pub. L. No. 104-32, 110 Stat. 1214 (1996), one-year statute of limitations. On appeal, Todd argues that the district court should have considered his untimely petition because he satisfies the actual-innocence-gateway standard.

But even if Todd could pass through the actual-innocence gateway, he cannot show that the trial court unreasonably resolved his ineffective-assistance-of-counsel claim. The state court reasonably found that counsel performed competently and made a reasonable strategic decision. So we deny Todd's claim.

I. BACKGROUND

We summarize the facts of Todd's state prosecution that are necessary to understand his claim in his habeas petition. In doing so, we begin with the state-court proceedings on Todd's conviction through his direct appeal. Then we review the state postconviction proceedings. Finally, we note the relevant federal-court habeas proceedings.

A. State-court Proceedings Through Todd's Direct Appeal

After a two-day trial, a Florida state jury found Todd guilty of several offenses: trafficking in cocaine (Count I), possession of methadone (Count II), trafficking in oxycodone (Count III), trafficking in hydromorphone (Count IV), possession of fentanyl (Count V), possession of alprazolam (Count VI), possession of

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carisoprodol (Count VII), possession of diazepam (Count VIII), possession of amphetamine (Count IX), possession of Cannabis (Count X), possession of paraphernalia (Count XI), and resisting an officer without violence (Count XII).¹

Count IV is at issue. As to the drug aspect of the count, it charged Todd with “[u]nlawfully and knowingly sell[ing], purchas[ing], manufactur[ing], or deliver[ing], or bring[ing] into the State of Florida, or [being] in actual or constructive possession of 28 grams or more, but less than 30 kilograms of hydromorphone, . . . contrary to Florida Statute 775.087(1)(a) and 893.135(1)(c)1c.”

To prove its case, during trial, the State called the arresting officer, Benjamin Yisrael. At the time, Yisrael worked as a federally funded task-force agent with the Volusia Bureau of Investigations. He testified about the events that unfolded when he and another officer initiated a traffic stop on Todd’s vehicle.

Yisrael was riding in the passenger seat of a law-enforcement vehicle, when he passed Todd traveling in his car. He noticed that Todd was not wearing a seatbelt at the time and observed Todd commit a minor traffic violation. So Yisrael and his partner engaged in a traffic stop of Todd.

As Yisrael approached the passenger’s side of the car, Todd rolled down his window. When he did, Yisrael noticed the “tip” of

¹ Counts I, III, and IV also included charges for using or possessing a weapon while committing the stated offense, but the jury did not find Todd guilty of being armed.

a plastic bag hanging out of the driver's side door pocket. In the tip of the bag, Yisrael could see what he thought were prescription pills and "a white powdery substance" that he believed was cocaine.

As the encounter progressed, Yisrael instructed Todd to get out of his car so a drug dog could sniff it. Todd refused. He tried to turn the car on and continued to resist law enforcement. Eventually, law enforcement tased Todd and pulled him from his car.

Then the officers searched Todd. They found about \$1,000.

Turning their attention to Todd's car, the officers found a black leather bag like the kind men carry their shaving supplies in. That bag contained "a smorgasbord of narcotics." Yisrael characterized it as "concealed" after the officers found it "on the floorboard in front of the driver's seat." Nearby, under the driver's seat, the officers found a realistic-looking BB gun. Finally, the officers also removed the plastic bag from the driver's side door pocket and discovered "several different types of pills" and "crack cocaine." [

As it relates to Count IV of the information, in total, the officers found 3.64 grams of hydromorphone in the plastic bag in the driver's side door pocket and 57.89 grams in the black leather bag. Put into terms of pills, the officers found 24, 8mg hydromorphone pills in the plastic bag in the driver's pocket side door; and they discovered 384, 8mg hydromorphone pills in the black leather bag.

Among its witnesses, the State also called Jessica Barrington, a laboratory analyst from the Florida Department of Law Enforcement. She testified about the substances the officers found in

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Todd's car. Barrington identified them as cocaine, hydromorphone, alprazolam, methadone, oxycodone, diazepam, carisoprodol, amphetamine, and fentanyl.

After the State rested, Todd put on a defense case. He called Kenneth Bauford. Bauford testified that he was in custody at the time of his testimony. He said that, on the day the officers arrested Todd, Todd had given him a ride in the car earlier. Then Bauford claimed the black leather bag was his. He admitted the bag contained a "bunch of stuff," including "crack, cocaine, roxys, Dilaudids, weed, Valium, methadone, [and] patches." And he explained that he had "pushed" the bag "under the driver's seat" and left it in the car when Todd had parked at a mall because Bauford didn't want anyone to steal the bag and the drugs inside while they were in the mall. When Todd dropped Bauford off at home after they stopped at the mall, Bauford testified, he forgot to take his bag from Todd's car.

After the parties rested and presented their closing arguments, the trial court instructed the jury. As to Count IV, the charge for trafficking in hydromorphone, the court explained that hydromorphone is a "controlled substance." Then the court told the jury that the State must prove three elements beyond a reasonable doubt: (1) that Todd knowingly possessed the substance, (2) that the substance was hydromorphone or a mixture of it, and (3) that the hydromorphone or mixture weighed 4 grams or more. The court also instructed that if the jury was "convinced beyond a reasonable doubt that Todd knew of the illicit nature of the substance,

and all of the elements of the charge have been proved,” the jury should find Todd “guilty of trafficking in hydromorphone.”

As we’ve noted, the jury found Todd guilty of the drug offenses charged in all twelve counts. And with respect to Count IV, the jury determined that at least 28 grams of hydromorphone were involved.

Three weeks later, the court held Todd’s sentencing hearing. At that time, Todd asked the court whether he could be found “guilty of drugs” that a doctor had legally prescribed to him. When the court responded that he could be convicted if he failed to produce a valid prescription, Todd said that he was “prescribed legally hydromorphone . . . 40 of them a month.” The court ultimately imposed the mandatory minimum sentence of 25 years’ imprisonment for Count IV with all the other counts to run concurrently. The greatest mandatory minimum sentence for any other count was 15 years’ imprisonment.

Todd directly appealed. On appeal, he contended that the trial court wrongly denied his second motion to suppress challenging the legality of his detention after the officers stopped his car. The Fifth District Court of Appeal (“Fifth DCA”) affirmed per curiam Todd’s judgment and sentence.

B. State Postconviction Proceedings

After his direct appeal concluded, as relevant here, Todd filed a motion for postconviction relief under Fla. R. Crim. P. 3.850 in

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Florida court. The trial denied portions of Todd's Rule 3.850 motion but held an evidentiary hearing on two allegations: first, his trial counsel was ineffective for failing to present his valid prescription defense to the jury; and second, his counsel interfered with his right to testify in his own defense.

In preparation for the evidentiary hearing, Todd submitted his hydromorphone prescriptions. They showed that he had filled prescriptions for hydromorphone once each month from April to December 2013, except for May. For each month but April, when his physician prescribed 112 pills, Todd received 140 pills. Todd's hydromorphone prescriptions from June to December directed him to "take one tablet by mouth every 4–6 hours as needed per day (max 5 pills per day)," and the pills were to last 28 days at a time.

At the evidentiary hearing, Todd's trial attorney, Lee Mercado, testified that she met with Todd several times before Todd's initial trial. She said they discussed his prescription for hydromorphone and the possibility of a prescription defense.

Mercado believed presenting the prescription defense would weaken Todd's defense for three reasons. First, Mercado knew that Bauford would admit to owning all the drugs in the black leather bag under the driver's seat. Second, Mercado reasoned that the defense "would have . . . required adding up many, many months of filling that prescription in order to have enough drugs that were actually in the bag." And third, Mercado reasoned that, by using the prescription to explain the hydromorphone in the black leather

bag, Todd would effectively concede that the other drugs in the bag were his. Given the risks of the prescription defense, Mercado recalled that Todd ultimately agreed with the “strategy” of using Bauford to testify instead.

After the evidentiary hearing, the trial court denied postconviction relief to Todd. The court found Mercado’s testimony to be credible. And it agreed with her that the “two proposed defenses were properly forecasted as diverging or conflicting in regard to hydromorphone” because “hydromorphone was recovered both from the driver’s side door pocket and the leather bag.” So the court denied Todd’s claim for ineffective assistance because it found Mercado’s performance was not deficient, and prejudice did not inure to Todd. The Fifth DCA affirmed the trial court per curiam on August 23, 2022.

C. Federal Habeas Proceedings

On February 1, 2023, Todd filed a 28 U.S.C. § 2254 habeas petition. He doesn’t dispute its untimeliness.

Todd generally alleged that his trial counsel was ineffective for failing to move to dismiss Count IV, present evidence of the hydromorphone prescription at trial, and use the prescription to move for an acquittal judgment. Although his petition was untimely, he argued that the court should consider it, anyway, because he raised an actual-innocence claim.

The district court held that Todd’s habeas petition was time-barred. The court noted that Todd’s conviction became final on

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November 27, 2017. So under AEDPA, the court reasoned, his one-year limitations period began to run on that date. Though the court acknowledged that the limitations period tolled during Todd's state collateral proceedings, his time to file a habeas petition expired on December 5, 2022. Because Todd didn't file his habeas petition until February 2023, the court calculated, it was untimely.

The district court also rejected Todd's actual-innocence claim as a gateway to consider constitutional issues, despite the petition's untimeliness. First, the court explained that the Eleventh Circuit hadn't yet determined whether an affirmative defense, if proven, qualifies as the actual innocence, rather than just legal innocence, necessary to open the actual-innocence gateway. Second, the court noted that Todd knew about his hydromorphone prescription before trial. So the court reasoned that it wasn't clear that the prescription qualifies as *new* evidence of actual innocence.

And third, even assuming resolution of both these issues in Todd's favor, the court determined that "it [was not] more likely than not that no reasonable juror would have convicted [Todd] of trafficking in hydromorphone had the prescription evidence been presented." As the court explained, "the State presented evidence which contradicted the prescription defense, *i.e.*, the way the hydromorphone pills were packaged in plastic baggies contained in two larger bags that held numerous other similarly packaged controlled substances." So the court denied Todd's petition.

Still, though, the district court granted Todd a certificate of appealability "out of an abundance of caution." The court found

that Todd “ha[d] shown that jurists of reason would find it debatable whether (1) the Petition states a valid claim of the denial of a constitutional right, and (2) the Court was correct in its ruling that the Petition is untimely.”

II. STANDARDS OF REVIEW

We review de novo the district court’s dismissal of a state prisoner’s habeas petition. *See Arthur v. Allen*, 452 F.3d 1234, 1243 (11th Cir. 2006). This review includes the district court’s determination AEDPA’s limitation period barred the petition. *Id.*

III. DISCUSSION

A. *We assume without deciding that Todd can satisfy the actual-innocence gateway.*

On appeal, Todd argues that the district court erred in determining he can’t satisfy the actual-innocence gateway that would allow the district court to consider his untimely constitutional claim that he received ineffective assistance of counsel. He asserts that he established he’s actually innocent of Count IV, the hydromorphone charge. In support, Todd contends that, combined, his prescriptions for hydromorphone prescribed a higher total of hydromorphone pills than officers found in his possession at the time of his arrest. So, Todd urges, he was entitled to a dismissal of Count IV. If Todd is correct about his theory, he would no longer face a mandatory minimum term of 25 years’ imprisonment on Count

IV. Instead, the highest mandatory minimum term of imprisonment he would be subject to would be 15 years' imprisonment on each of several of his other convictions.

Section 893.13(6)(a), Fla. Stat., establishes the prescription defense to drug-related charges. Under it, “a person may not be in actual or constructive possession of a controlled substance unless such controlled substance was lawfully obtained from a practitioner or pursuant to a valid prescription or order of a practitioner while acting in the course of his or her professional practice” Fla. Stat. § 893.13(6)(a).

Here, Todd presented valid prescriptions for more than the total number of hydromorphone pills that law enforcement found in his possession. And the State of Florida does not contest Todd's assertion that his prescriptions would have entitled him to dismissal of the hydromorphone charge.

So next we consider whether these circumstances satisfy the actual-innocence gateway that *Schlup v. Delo*, 513 U.S. 298, 327 (1995), established. To pass through the actual-innocence gateway, a petitioner must show that based on new evidence, “it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt.” *Id.*; see also *McQuiggin v. Perkins*, 569 U.S. 383, 393 (2013) (holding that the actual-innocence gateway “survived AEDPA's passage”).

As relevant here, three aspects of this standard are important. First, the actual-innocence gateway is an expression of the fundamental-miscarriage-of-justice doctrine. See *Schlup*, 513 U.S. at

314–15 (“Schlup may obtain review of his constitutional claims only if he falls within the narrow class of cases implicating a fundamental miscarriage of justice.”) (cleaned up). Neither we nor the Supreme Court has expressly said whether “actual innocence” in this context requires factual innocence or whether legal innocence will suffice. See *Rozelle v Sec’y, Fla. Dep’t of Corr.*, 672 F.3d 1000, 1013, 1015 (11th Cir. 2012). But we’ve recognized that “in dicta, we have strongly suggested” that legal innocence alone does not establish “actual innocence” in the *Schlup* gateway context. See *id.* at 1013. Rather, we’ve suggested factual innocence is necessary. *Id.* We’ve also said in a different habeas context that a petitioner must show factual innocence, not merely legal innocence, to obtain collateral review of a sentence under the “complete miscarriage of justice” doctrine. See *Spencer v. United States*, 773 F.3d 1132, 1143 (11th Cir. 2014) (en banc).

It’s similarly unclear whether the prescription defense, as an affirmative defense, qualifies as factual or legal innocence. See *Rozelle*, 672 F.3d at 1013–14.

Second, the Supreme Court hasn’t precisely defined what qualifies as “new, reliable evidence” under the actual-innocence standard.² Neither have we. So it’s not clear whether Todd’s prescriptions count because he didn’t present them at trial, even though he had them in his possession at that time.

² The unanswered question is whether “new reliable evidence” must be (1) newly discovered (*i.e.*, unknown of and unavailable at time of trial) or

And third, the standard that “it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt in light of the new evidence” requires a court to “make a probabilistic determination about what reasonable, properly instructed jurors would do.” *Schlup*, 513 U.S. at 329. The Supreme Court has emphasized the difficulty of the petitioner’s task in convincing the court: “[T]he *Schlup* standard is demanding and permits review only in the extraordinary case.” *House v. Bell*, 547 U.S. 518, 538 (2006) (quotation marks omitted).

It’s less than clear that Todd can pass through the *Schlup* actual-innocence gateway. But for purposes of our analysis, we will assume without deciding that he can.

That’s so because even if Todd can satisfy *Schlup*’s requirements, as we explain below, his ineffective-assistance claim necessarily fails under AEDPA review, regardless. And “we may affirm on any basis in the record, even if the district court did not actually rely on that basis.” *Davis v. Legal Servs. Ala., Inc.*, 19 F.4th 1261, 1268 (11th Cir. 2021).

Federal habeas review under Section 2254 is “greatly circumscribed and is highly deferential to the state courts.” *Alston v. Dep’t of Corr., Fla.*, 610 F.3d 1318, 1325 (11th Cir. 2010) (quotation marks omitted). Federal courts can grant habeas relief only if the state

(2) merely newly presented (*i.e.*, not presented previously at trial regardless of whether the evidence was known or available).

court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "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). The petitioner "must show that the state court applied federal law to the facts of his case in an objectively unreasonable manner." *Alston*, 610 F.3d at 1325.

Todd can't do that here. A defendant is entitled to the effective assistance of counsel "to protect the fundamental right to a fair trial." *Strickland v. Washington*, 466 U.S. 668, 684, 686 (1984); see U.S. Const. amend. VI. To prevail on a claim of ineffective assistance of counsel, "a petitioner must affirmatively prove both deficient performance and actual prejudice." *Castillo v. Fla., Sec'y of Dep't of Corr.*, 722 F.3d 1281, 1286 (11th Cir. 2013).

To establish deficient performance, a petitioner must show that "counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. In evaluating an attorney's performance, "[c]ourts must indulge the strong presumption that counsel's performance was reasonable and that counsel made all significant decisions in the exercise of reasonable professional judgment." *Chandler v. United States*, 218 F.3d 1305, 1314 (11th Cir. 2000) (en banc) (cleaned up). Indeed, to satisfy *Strickland*'s deficient-performance prong, a petitioner must show that counsel erred in such an "egregious" way that "no reasonably competent attorney would have acted similarly." *Harvey v. Warden, Union Corr.*

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Inst., 629 F.3d 1228, 1239 (11th Cir. 2011). And “strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable.” *Strickland*, 466 U.S. at 690.

Plus, AEDPA review is “highly deferential” in its own right. *Harrington v. Richter*, 562 U.S. 86, 105 (2011). To warrant granting a Section 2254 petition, it’s not enough for a state court’s decision to be simply “incorrect”; it must be “unreasonabl[y]” “incorrect.” *Williams v. Taylor*, 529 U.S. 362, 411 (2000). So under AEDPA, our review of a state court’s determination of the competency of counsel’s performance is “doubly” deferential. *Harrington*, 562 U.S. at 105.

Todd cannot satisfy this high threshold. To start, he can’t show that the district court’s factual determinations about Mercado’s credibility and testimony were “unreasonable” under Section 2254(d)(2). After hearing Mercado testify, the state court found her credible and credited her version of events. There’s nothing unreasonable about the state court’s decision to do so.

And based on Mercado’s testimony, the state court did not incorrectly apply *Strickland*’s deficient-performance prong, let alone unreasonably incorrectly apply it. Mercado explained that, after obtaining and reviewing the prescriptions, she made a strategic decision not to advance the prescription defense. She did so, she said, for two reasons.

First, law enforcement found the hydromorphone (the subject of the prescription) in both locations where they found the

other charged drugs, and they were all packaged similarly, in individual little baggies. So by owning the hydromorphone in both locations, Mercado reasoned, Todd would run a heavy risk of incriminating himself on all the charges.

And second, Bauford was willing to testify that all the drugs in the black leather bag were his. If the jury believed him, Mercado thought, it would find Todd not guilty, at least of all the drugs in that bag, including the hydromorphone.

Ultimately, of course, the verdict reflects that the jury did not believe Bauford. But Mercado's decision to forgo the prescription defense in favor of seeking an acquittal on several of the charges was a reasonable one. Not only that, it was a strategic one. So the state court correctly applied *Strickland* when it held that counsel's performance was not deficient. And we must defer to that decision.

IV. CONCLUSION

For the reasons we've explained, we affirm the district court's order dismissing Todd's habeas petition.

AFFIRMED.