18A826

IN THE SUPREME COURT OF THE UNITED STATES

MATTHEW A. CASTRO,
Petitioner,

v.

CASE NO: 18-11473-C

SEC'Y DEPT. OF CORR.,
ATTORNEY GENERAL,
STATE OF FLORIDA,
Respondent(s).
_____/

MOTION FOR EXTENSION OF TIME
TO FILE WRIT OF CERTIORARI

UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT

LAST RULING COURT

Matthew A. Castro DC # C02140
Hamilton C.I. – Annex
11419 S.W. County Road # 249
Jasper, Florida 32052

JURISDICTION

The United States Court of Appeals Eleventh Circuit has denied issuance of Certificate of Appeal and Motion For Reconsideration. Petitioner avers that this decision was made in conflict with *Buck v. Davis*, 580 U.S. _____, 137 S.Ct. 759 (2017).

Petitioner includes the Order denying the "COA" certificate of appeal and the motion to proceed in forma pauperis, and the motion for rehearing.

Petitioner does not have the resources to hire a private attorney and has been dependent on certified law clerks and other inmates. The individual most familiar with instant case and originator of the majority of legal work has been transferred.

Petitioner has failed in the time allotted to locate a suitable replacement and due to budgetary cutbacks, access to the law library has been limited. In the midst of the holidays with the normal time lags, Hamilton Correctional Institution – Annex was shut down to all movement for approximately a week.

Petitioner's inmate employment as staff canteen man limits his availability to even assist working with the new clerk assigned to case.

Petitioner requests an extension of time to allow the proper research and review of his case by a new clerk, so as not to abuse judicial resources.

The Petitioner recognizes that extensions are not looked upon favorably, but the conditions presented are truthful and beyond Petitioners control. Petitioner has a life sentence and opines his issue(s) have merit.

Wherefore, Petitioner moves this Court to grant an extension of time of sixty days (60) to file Writ of Certiorari.

Respectfully Submitted,

Matthew A. Castro DC # C02140

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this motion has been furnished and forwarded by prepaid First Class U.S. mail delivery on this 6 day of February, 2019 to the following:

Julie Carnes, Justice
Supreme Court of the United States
One First St. NE
Washington, DC 20543

Matthew A. Castro DC # C02140
Hamilton C.I. – Annex
11419 S.W. County Road #249
Jasper, Florida 32052

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-11473

MATTHEW A. CASTRO,

Petitioner-Appellant,

versus

SECRETARY, DEPARTMENT OF CORRECTIONS,
ATTORNEY GENERAL, STATE OF FLORIDA,

Respondent-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

ORDER:

Matthew A. Castro, a Florida prisoner serving a life sentence for first-degree murder, seeks a certificate of appealability from the District Court's denial of his petition for a writ of habeas corpus under 28 U.S.C. § 2254. He also seeks leave to proceed in forma pauperis. This order DENIES the certificate of appealability and DENIES AS MOOT his motion to proceed in forma pauperis.

I. FACTUAL BACKGROUND

Mr. Castro was part of a drug deal gone wrong. Later that same day, he took a gun and went to a hotel where he believed the other party to the deal was staying. He began knocking on doors. Lance Ulland opened one a few doors in. Mr. Castro asked Mr. Ulland if he had been in the parking lot earlier. Mr. Ulland said yes. Mr. Castro then put his gun to Mr. Ulland's head and shot him.

Three people, all staying in Mr. Ulland's hotel room, witnessed the shooting. Stevi Smith, Mr. Ulland's cousin, heard a knock on the door and saw Mr. Castro shoot her cousin when he opened it. Beau Smith, Stevi's sister and Mr. Ulland's other cousin, heard and saw the same things. Kayce Heinmiller, Mr. Smith's girlfriend, was asleep when Mr. Castro knocked. She awoke to the sound of the gunshot and saw Mr. Castro standing in the doorway. Another person staying in the room, Shawn Hall, was just outside when the shooting happened.

Officers arrived on scene and arrested Mr. Castro. One, Officer Dane, asked Mr. Castro where to find the gun. Mr. Castro initially balked but eventually revealed its location. In a post-arrest interview, Mr. Castro expressed remorse about the shooting before invoking his right to remain silent.

The State charged Mr. Castro with first-degree murder, which requires premeditation. Fla. Stat. § 782.04(1)(a)1. The case proceeded to trial. All three eyewitnesses testified, and all three identified Mr. Castro as the shooter. A

Mr. Castro applied for postconviction relief in state court under Florida Rule of Criminal Procedure 3.850. He raised six claims:

- His counsel failed to provide Mr. Kapelsohn, the ballistics expert, with all relevant evidentiary materials;
- His counsel failed to object to the prosecution's acquisition of privileged information from Mr. Kapelsohn;
- His counsel failed to call four material witnesses at trial;
- His counsel failed to competently cross-examine the three eyewitnesses;
- His counsel failed to competently cross-examine the medical examiner;
- His counsel failed to object to the prosecution's improper questions and comments on his right to remain silent;

The trial court ordered an evidentiary hearing on the third claim and denied the others. After the evidentiary hearing, the trial court also denied the third claim. The Fifth District Court of Appeals affirmed the denial without opinion. Castro v. State, 138 So. 3d 465 (Fla. 5th DCA 2014) (table).

After exhausting the state postconviction process, Mr. Castro filed a petition for habeas corpus in federal District Court under 28 U.S.C. § 2254, raising the same six ineffective assistance of counsel claims. He also raised three claims he exhausted on direct appeal:

Court of the United States" or "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). Construing this standard, the Supreme Court has said a certificate of appealability should issue if "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Slack v. McDaniel, 529 U.S. 473, 484, 120 S. Ct. 1595, 1603-04 (2000). If the most recent state-court decision does not explain its reasons for resolving the case the way it did, the federal court looks to "the last related state-court decision that does provide a relevant rationale" and "presume[s] the unexplained decision adopted the same reasoning." Wilson v. Sellers, __ U.S. __, 138 S. Ct. 1188, 1192 (2018).

IV. INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

Mr. Castro seeks a certificate of appealability from the District Court's ruling that the state postconviction court did not unreasonably apply federal law in rejecting Mr. Castro's six ineffective assistance of counsel claims. Under the familiar test from Strickland v. Washington, 466 U.S. 668, 694, 131 S. Ct. 733, 739 (1984), a defendant can prevail on an ineffective assistance claim by showing both that his "counsel's performance fell below an objective standard of reasonableness and that, but for counsel's unprofessional errors, the result of the

proceeding would have been different." Padilla v. Kentucky, 559 U.S. 356, 366, 130 S. Ct. 1473, 1482 (2010) (quotation marks omitted). Strickland creates a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," so "judicial scrutiny of counsel's performance must be highly deferential." Tanzi v. Sec'y, Fla. Dep't of Corrs., 772 F.3d 644, 652 (11th Cir. 2014) (quotation marks omitted).

a. Failure to Turn Over Discovery to Expert

First, Mr. Castro says his counsel was ineffective by failing to turn over all relevant discovery materials to the ballistics expert, Mr. Kapelsohn, who testified at trial that Mr. Castro likely experienced a muscle contraction that led to the shooting. The prosecution impeached Mr. Kapelsohn by showing he did not review one police investigative report, the statements of two witnesses who heard knocks on the door, the statements of the eyewitnesses, and the statement of one officer on the scene. Mr. Castro says his counsel should have given Mr. Kapelsohn this evidence.

Mr. Kapelsohn testified at trial that it did not matter which door Mr. Castro knocked on and that the officer's statement would not have made a difference to his opinion. So Mr. Castro was not prejudiced by his counsel's failure to hand over either of those. Nor was Mr. Kapelsohn prejudiced by the failure to give the eyewitness statements. The eyewitnesses said Mr. Castro was not bumped. So

the muscle-contraction defense. He did not call Ms. Dane because he spoke wit her before trial and realized her testimony would not impeach the other officer. The state trial court did not unreasonably apply clearly established federal law i ruling that these strategic decisions were not objectively unreasonable.

d. Failure to Competently Cross-Examine Three Eyewitnesses

Fourth, Mr. Castro says his counsel failed to competently cross-examine Beau Smith, Kayce Heinmiller, and Stevi Smith, the three eyewitnesses to the shooting.

Mr. Castro says his counsel ought to have cross-examined Beau Smith ab two inconsistencies. In a pre-trial deposition, Mr. Smith said Shawn Hall, anot person staying in the hotel room, walked out of the room when Mr. Castro aske Mr. Ulland if he had been in the parking lot earlier. Mr. Smith testified at trial t Mr. Hall left after Mr. Ulland opened the door but before Mr. Castro spoke. Mr Castro's counsel did in fact try to impeach Mr. Smith with this inconsistency: Next, Mr. Smith testified in his pre-trial deposition that Mr. Castro "didn't poin the gun at me or anything" but that he "didn't let the gun go all the way down" after he shot Mr. Ulland. At trial, Mr. Smith testified that Mr. Castro "pointed gun at—straight towards me. . . . [H]e pointed the gun towards the middle of th room, towards me." Mr. Castro says the failure to impeach Mr. Smith with this inconsistency left the prosecution's theory of premeditation went unrebutted. H

He said Mr. Castro called twice after the killing to say he had done something stupid and that the shooting was an accident.

Mr. Hines and Mr. Hakes were staying in the same room at the hotel where the crime occurred. Mr. Hakes testified he did not hear anyone knocking on the doors. He said he heard a sound like a rock being thrown at the door that night and heard people screaming afterward. Mr. Hines corroborated Mr. Hakes' testimony.

Ms. Dane, a police officer, testified at a pretrial deposition that another officer told her Mr. Castro "wasn't telling him anything." The other officer testified at trial to statements Mr. Castro made before Ms. Dane arrived. Mr. Castro says Ms. Dane should have been called to impeach the other officer. At the evidentiary hearing, Ms. Dane testified that she meant to say the other officer told her Mr. Castro wasn't telling him anything about where the gun was. The state postconviction court credited this explanation.

Mr. Castro's counsel testified at the hearing that he knew of all four witnesses but decided not to call them. He did not call Mr. Fraley—after a discussion with Mr. Castro and his family—because Mr. Fraley would testify that he and Mr. Castro had been drinking that night, and this evidence would have undermined the muscle-contraction defense. He did not call Mr. Hines or Mr. Hakes because there was testimony about the knocking from other witnesses, and he wanted to downplay conflicting facts about knocking in favor of highlighting

the prosecution's theory of premeditation rested mostly on Mr. Castro putting the gun to Mr. Ulland's eye, along with other circumstantial evidence. It was not an unreasonable application of clearly established federal law for the state postconviction court to conclude this omission did not prejudice Mr. Castro.

Mr. Castro further says his counsel should have examined Mr. Smith about a statement from his pre-trial deposition, where he said, "Sean [Mr. Hall] just left. He never saw it happen. I don't think Sean saw it happen. For a good twenty minutes Sean was gone." The state postconviction court held this statement was consistent with Mr. Smith's testimony on cross-examination that Mr. Hall already walked out of the room when Mr. Castro shot Mr. Ulland. That is so. It was not an unreasonable application of clearly stablished federal law to rule this omission did not prejudice Mr. Castro.

Mr. Castro says his counsel should have cross-examined Kayce Heinmiller about four inconsistencies. Ms. Heinmiller testified in a pre-trial deposition that she heard the knock on the hotel room door, but at trial she testified she did not hear the knock because she was asleep. She testified in her pre-trial deposition that the room door was never closed, but she testified at trial that Mr. Smith closed it at some point. Finally, she testified in her deposition that the room was small, so the door hit the bed when it opened. At trial, the state presented evidence that the door area was not so crowded. Mr. Castro says these inconsistencies would have poked

holes in the state's case. But the state postconviction court did not unreasonably apply clearly established federal law when it held that Mr. Castro was not prejudiced. The testimony established the most significant fact going to premeditation: that Mr. Castro put his gun to Mr. Ulland's eye. The state postconviction court did not unreasonably conclude impeachment about other matters was unlikely to have changed the trial outcome.

Mr. Castro also says Ms. Heinmiller testified during her deposition that she saw Mr. Hall inside the hotel room after the shooting. She did not testify to this at trial. Her deposition testimony on this point was inconsistent with Beau Smith's, Stevi Smith's, and Mr. Hall's trial testimony. Mr. Castro raised this in his state habeas petition, but the state postconviction court appears to have passed on it. The District Court did, and concluded it did not prejudice Mr. Castro. That is so. Mr. Castro's theory was that Mr. Hall bumped him and caused the shooting. Had Mr. Hall been inside the room the whole time, that would have undermined Mr. Castro's theory.

Mr. Castro says his counsel ought to have cross-examined Stevi Smith about a recorded statement she gave to the police. An officer asked her if she saw Mr. Castro's weapon, and she replied, "I didn't see anything, I was right behind it, all I could see is blonde hair." In fact, Mr. Castro's counsel did cross-examine Ms. Smith about this statement, and she testified she did not remember saying it. Mr.

Castro suggests Ms. Smith stated she didn't see anything and his counsel was ineffective for failing to introduce the recorded statement to impeach Ms. Smith. But Ms. Smith's statement was that she did not see Mr. Castro's weapon. In that same recorded statement, Ms. Smith said she saw Mr. Ulland open the hotel room door and saw Mr. Castro shoot her cousin. The state postconviction court did not unreasonably apply federal law when it concluded that the failure to introduce the recorded statement did not prejudice Mr. Castro.

Ms. Smith testified at trial that Mr. Castro put his arm down after shooting Mr. Ulland and then picked the gun back up and pointed it at her and Mr. Smith. She did not mention this in her recorded statement. Mr. Castro says his counsel ought to have impeached her about that. Impeaching her on this point would have undermined the state's case on premeditation, he says. The state postconviction court did not unreasonably apply clearly established federal law when it concluded this omission did not prejudice Mr. Castro. Ms. Smith positively identified Mr. Castro as the shooter, and the prosecution's premeditation case hinged mainly on other evidence.

e. Failure to Competently Cross-Examine the Medical Examiner

Fifth, Mr. Castro says his counsel failed to competently cross-examine the medical examiner, Dr. Marie Herrmann, who testified that Mr. Ulland had a "contact gunshot wound" to the head. Dr. Herrmann testified the wound was

consistent with a gun being pressed to Mr. Ulland's eye and then fired. On cross, Mr. Castro's counsel asked Dr. Herrmann, "[Y]ou are unable to tell us—and correct me if I'm wrong—the circumstances surrounding the shooting of Mr. Ulland; correct?" Dr. Herrmann replied, "That's correct." In closing, the prosecution used Dr. Herrmann's testimony that Mr. Ulland had a contact wound to argue Mr. Castro premeditated the killing.

Mr. Castro says his counsel ought to have asked Dr. Herrmann if the injury would also be consistent with a gun accidentally striking the defendant's eye and being fired. This question, Mr. Castro says, would have supported the defense theory that he was bumped and accidentally discharged the firearm. Even if Mr. Castro's counsel could have phrased the question more clearly, the state postconviction court did not unreasonably apply clearly established federal law in concluding the cross-examination did not prejudice Mr. Castro. Mr. Castro's counsel got the medical examiner to testify she could not say how Mr. Castro's gun made contact with the victim's eye. Nonetheless, the jury rejected Mr. Castro's accidental-shooting defense.

f. Failure to Object to Prosecutor's Allusions to Mr. Castro's Silence

Finally, Mr. Castro says his counsel failed to object to the prosecutor's allusions to his right to remain silent. Mr. Castro took the stand to testify he was bumped, which caused him to pull the trigger. On cross-examination, the

prosecutor asked, "[A]nd it's correct that you never told anybody, anybody until today, that somebody bumped into your left side, which caused you to lose—which caused the gun to go down, lose your balance, hit your right side on the door frame, and shoot Lance Ulland?" Mr. Castro responded, "I told that to my attorney." The prosecutor said, "Okay, I mean any police." Mr. Castro said, "No, ma'am, I did not." In closing argument, the prosecutor noted that Mr. Castro sat with police for over an hour on the scene and never said anything about it. Mr. Castro's counsel did not object to the question or to the closing. Mr. Castro says this failure was ineffective under the Florida and United States Constitutions.

The United States Supreme Court has clearly established that impeaching a defendant who has received Miranda warnings with the defendant's silence violates due process. Branch v. Sec'y, Fla. Dept. of Corrs., 638 F.3d 1353, 1354 (11th Cir. 2011) (citing Doyle v. Ohio, 426 U.S. 610, 617-18, 96 S. Ct. 2240, 2244-45 (1976)); see Fugate v. Head, 261 F.3d 1206, 1223 (11th Cir. 2001). But a defendant who voluntarily speaks after receiving Miranda warnings can be impeached with prior inconsistent statements. See United States v. Dodd, 111 F.3d 867, 869-70 (11th Cir. 1997) (citing Anderson v. Charles, 447 U.S. 404, 409, 100 S. Ct. 2180, 2182 (1980)). Defense counsel's failure to object to improper impeachment with a defendant's silence is ineffective. Fugate, 261 F.3d at 1223. The error is subject to prejudice analysis. See id.

There was no error here because the prosecutor was not commenting on Mr. Castro's silence. Mr. Castro was apprehended and was given a Miranda warning. He then voluntarily related the evening's events to the officer. During that time, he never mentioned being bumped. It was not illegal for the prosecutor to comment on the discrepancy between the post-arrest statement and trial testimony. It thus was not ineffective for his counsel to fail to object.

V.

Mr. Castro also seeks a certificate of appealability on the District Court's denial of his habeas petition with respect to three other issues: a trial court evidentiary ruling excluding some of Mr. Castro's out-of-court statements, the trial court's denial of Mr. Castro's motion for judgment of acquittal, and alleged prosecutorial misconduct in closing statements.

a. Exclusion of Post-Arrest Statements of Remorse

Mr. Castro made statements expressing remorse for the crime in a post-arrest interview. He sought to introduce these at trial, but the trial court excluded them as inadmissible hearsay. Federal courts generally do not review state evidentiary rulings raised in a habeas petition unless the ruling affected the fundamental fairness of the trial. See Snowden v. Singletary, 135 F.3d 732, 737 (11th Cir. 1998). It is fundamentally unfair to admit evidence that is "material in the sense of a crucial, critical, highly significant factor." Id. There was no fundamental

unfairness here. Under Florida evidence law, a defendant cannot admit his own prior self-serving statement for the truth of the matter asserted. See Barber v. State, 576 So. 2d 825, 830 (Fla. 1st DCA 1991) (citations omitted). Mr. Castro had to show his statements feel into a hearsay exception. He said they qualified as spontaneous statements or excited utterances, defined respectively in Florida law as "a statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter" and "a statement or excited utterance related to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Fla. Stat. § 90.803. Mr. Castro made his statements some two hours after the shooting, when, the trial court concluded, Mr. Castro was no longer under the stress of excitement. That ruling was not fundamentally unfair.

b. Denial of Motion for Judgment of Acquittal

Mr. Castro says the trial court erred in denying his motion for judgment of acquittal. He argued at trial the prosecution did not prove premeditation, meaning he could be convicted of manslaughter but not first-degree murder. Reviewing the sufficiency of the evidence, a federal court must determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Owen v. Sec'y, Dep't of Corrs., 586 F.3d 894, 918 (11th Cir. 2009). Premeditation

under Florida law means "more than a mere intent to kill; it is a fully formed conscious purpose to kill." Green v. State, 715 So. 2d 940, 943 (Fla. 1998). It may be proved by circumstantial evidence. Woods v. State, 733 So. 2d 980, 985 (1998). The trial court did not unreasonably apply clearly established federal law when it held a rational trier of fact could conclude Mr. Castro premeditated the killing. The evidence at trial showed Mr. Castro took a gun and went looking for the person who sold him bad drugs. He knocked on several doors before reaching Mr. Ulland's hotel room. He shot Mr. Ulland in the eye immediately after Mr. Ulland said he had been in the hotel parking lot earlier that night. This was sufficient evidence for a jury to conclude Mr. Castro had a purpose to kill.

c. Prosecutorial Misconduct During Closing Argument

Finally, Mr. Castro says the prosecutor made an improper demonstration during closing arguments. The prosecutor used the murder weapon and an autopsy photograph of Mr. Ulland to demonstrate how Mr. Castro would have put the gun to Mr. Ulland's eye. The trial court allowed the demonstration over a defense objection. A prosecutor's improper closing "violate[s] the Constitution only if [it] so infected the trial with unfairness as to make the resulting conviction a denial of due process." Parker v. Matthews, 567 U.S. 37, 45, 132 S. Ct. 2148, 2154 (2012). Improper argument rises to the level of a denial of due process "when there is reasonable probability that, but for the prosecutor's offending remarks, the

habeas proceedings unless a judge issues a certificate of appealability. Even if the district judge denies a certificate, a circuit judge may issue one. And the circuit judge reviews whether jurists of reason could debate whether the petitioner's case should have been resolved differently. Miller-El, 537 U.S. at 336, 123 S. Ct. at 1039. Even assuming it would raise constitutional concerns if the District Court were solely responsible for granting or denying certificates of appealability, Mr. Castro had a full and fair opportunity to seek a certificate in this Court.

VI. Failure of Habeas Counsel to Develop Facts in Postconviction Proceedings

Mr. Castro asserts that his postconviction counsel rendered ineffective assistance by failing to develop facts in support of his claims. In support, he cites Buck v. Davis, 580 U.S. __, 137 S. Ct. 759 (2017), but that case concerned ineffective assistance during the penalty phase of a capital murder trial. In any event, his postconviction counsel did try to develop the factual record: she requested an evidentiary hearing on all claims raised in his state postconviction motion and his federal habeas petition. Indeed, the state postconviction court held an evidentiary on matters it felt warranted one. Mr. Castro's postconviction counsel was therefore not ineffective for failing to develop the record.

VII. State Court Rulings Unsupported by Factual Findings

Mr. Castro finally contends the state court decisions lacked factual support and that he is therefore entitled to a hearing under 28 U.S.C. § 2254(e). But the state court's decision did have factual support, and, where necessary, the state court developed the record. Mr. Castro is not entitled to an evidentiary hearing in federal court. See Daniel v. Comm'r, Ala. Dept. of Corrs., 822 F.3d 1248, 1280 (discussing the prerequisites for getting an evidentiary hearing on a habeas petition).

VIII. Conclusion

In the last analysis, jurists of reason would not debate whether the District Court properly resolved Mr. Castro's habeas petition. A certificate of appealability is therefore DENIED. Mr. Castro's motion to proceed in forma pauperis is DENIED AS MOOT.

Barrett J. Martin
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-11473-C

MATTHEW A. CASTRO,

Petitioner-Appellant,

versus

SECRETARY, DEPARTMENT OF CORRECTIONS,
ATTORNEY GENERAL, STATE OF FLORIDA,

Respondents-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

Before: MARTIN and ROSENBAUM, Circuit Judges.

BY THE COURT:

Matthew A. Castro has filed a motion for reconsideration of this Court's order dated September 27, 2018, denying his motions for a certificate of appealability and leave to proceed *in forma pauperis* in his appeal of the district court's denial of his 28 U.S.C. § 2254 habeas corpus petition. Upon review, Mr. Castro's motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief.