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SUPREME COURT OF THE UNITED STATES

PHILLIP EARL CRENSHAW JR.
Petitioner

v.

RE: CRENSHAW v. FLORIDA
USCA ~~11~~ No 16-17735

JULIE JONES
Respondent

MOTION DIRECTING THE CLERK TO FILE PETITION OUT-OF-TIME

1. Petitioner ask the Clerk of this Court in
Great Meany to file this petition "out-of-time"
so the Supreme Court of the United States
can review petitioner "Writ of Certiorari"

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OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 16-17735-D

PHILLIP EARL CRENSHAW, JR.,

Petitioner-Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent-Appellee.

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

ORDER:

Phillip Earl Crenshaw is a Florida prisoner serving a total 30-year sentence after a jury convicted him of robbery with a firearm and battery in 2013. In 2015, Crenshaw filed the instant habeas corpus petition, pursuant to 28 U.S.C. § 2254, raising two claims: (1) the trial court erred in admitting “similar fact evidence;” and (2) his trial counsel was ineffective in failing to object to improper comments made by the prosecutor during closing arguments.

The State responded that Crenshaw’s Claim 1 was procedurally defaulted because he did not present the federal constitutional nature of the claim to the state

post-conviction court. The State further argued that Crenshaw's Claim 2 was meritless. In his reply to the State's response, Crenshaw argued that he did present the federal constitutional nature of Claim 1 to the state post-conviction court, because he used the phrase "fair trial," which he asserted would "call to mind a specific right guaranteed by the Sixth Amendment of the United States Constitution." In the alternative, Crenshaw argued that his appellate counsel was ineffective in failing to raise the federal component of this claim.

In a report and recommendation ("R&R"), a magistrate judge recommended that Crenshaw's § 2254 petition be denied. The magistrate judge concluded that Crenshaw's Claim 1 was procedurally defaulted because he had not fairly presented the federal constitutional nature of the claim to the state post-conviction court. Additionally, the magistrate judge concluded that Crenshaw's Claim 2 was meritless, as his counsel was not deficient in failing to object to the prosecutorial statements of which Crenshaw complained, and Crenshaw was not prejudiced by any failure to object.

Over Crenshaw's objections, the district court adopted the R&R, denied Crenshaw's § 2254 petition, and denied a COA. The district court had previously granted Crenshaw leave to proceed *in forma pauperis*. Crenshaw now seeks a COA in this Court.

BACKGROUND:

As background, Crenshaw was charged with robbery with a firearm and battery. At trial, prior to opening statements, the trial court instructed the jury that its verdict should be based on the evidence, and that what the lawyers said during opening statements was not evidence and should not be considered as such. The court also instructed the jury that it should make its own judgment as to the credibility of any witness. During opening arguments, the prosecutor told the jury that Crenshaw was charged with getting into a cab, attacking the cab driver, Dewann Joiner, and robbing Joiner at gunpoint. The prosecutor further stated that Joiner would tell the jury that she could identify her attacker and would discuss how the situation made her feel.

During trial, Joiner testified that, on the date of the robbery, she was terrified and afraid of being shot when Crenshaw attacked her. Joiner became emotional when photographs from the crime scene were admitted into evidence, and requested a tissue. Joiner also testified that, after the robbery, she went home to Texas because she was scared. Joiner further testified that she had identified the robber in a photographic lineup and identified Crenshaw in court as the robber.

On cross-examination, defense counsel further questioned Joiner about her fear at the time of the robbery, as part of a defense theory that Joiner's fear, combined with the short amount of time that she had to observe the robber, caused

her to identify the wrong person. A tape recording of Joiner's 911 call also was played for the jury, and Eddie Workman, a former deputy sheriff who responded to Joiner's 911 call, stated that Joiner seemed afraid.

Later during trial, the prosecutor advised the court that he intended to present similar fact evidence from three witnesses. Prior to allowing these witnesses' testimony, the court instructed the jury as follows:

The evidence that you are about to receive concerning evidence of other crimes, wrongs or acts allegedly committed by the defendant will be considered by you for the limited purpose of proving motive, intent, plan, knowledge, identity, the absence of mistake or accident on the part of the defendant. And you shall consider it only as it relates to those issues. However, the defendant is not on trial for a crime, wrong or act that is not included in the information, that's the charging document, as you recall.

Like Joiner, the three witnesses testified that they were employed as cab drivers with the same cab company and were robbed under circumstances similar to the robbery of Joiner. Each witness testified that they had identified Crenshaw as the robber in a photographic lineup during the investigation of the instant case.

During closing argument, the prosecutor referenced Joiner's demeanor on the stand as well as her 911 call. The prosecutor argued that "[s]he was scared to death. Did you see her emotion? Think about that. Did you see her emotion the way – she had to ask for tissue. She was crying, tears in her eyes. She was scared to death. Is this a misidentification? Can you fake that kind of emotion?" The prosecutor also noted that Joiner had initially told the 911 operator that she was on

Cranston Road, but later answered affirmatively when the operated asked if she was on Clifton Road. The prosecutor argued as follows:

[I]f you listen to that call closely, she gives Cranston at the beginning and changes it to Clifton. Listen to her. Listen to the way she's kind of – the emotional state she's in. She testified today where it was. It's clear. This is a mistake of someone that is emotional. She is scared to death. She is scared to death. You know what happened, you can't fake emotion like that. You can't fake those kind of tears. You can't do it. You know what happened.

Notably, the prosecutor did not reference the similar fact testimony during his initial closing argument. However, during this argument, the prosecutor stated that “[t]he issue is identity. He did it. You know he did it. You know he did it. The evidence has shown you that he did it.” During defense counsel’s closing argument, he referred to the similar fact evidence, arguing that the circumstances of the other three robberies were not so similar as to point to the same perpetrator. Defense counsel also argued that Joiner’s fear prevented her from identifying the correct person as the robber.

In rebuttal argument, the prosecutor argued that this was not a case of misidentification, because the similar fact witnesses also identified Crenshaw as the robber in each of their situations. The prosecutor stated:

You know she is not wrong because Mr. Engeseth was not wrong. You know she's not wrong because Mr. Than wasn't wrong. You know she's not wrong because Mr. Montano wasn't wrong. This isn't a mistake . . . She's not wrong. We know she's right because of each of these, each of these lineups. There are similarities. You heard what they were. Each one of these people were robbed while being a

Yellow Cab driver, not just a cab driver, a Yellow Cab. It's the same cab company, the same cab company.

The prosecutor then argued that the evidence against Crenshaw was overwhelming, stating again “[y]ou know he did it. Each one of you know he did it.”

After closing arguments, the trial court instructed the jury that it should consider the evidence introduced at trial and determine whether such evidence was reliable. The court further instructed the jury that it should not decide the case based on any sympathy. The court also repeated its previous instruction regarding the similar fact evidence. The jury convicted Crenshaw on both counts, and the trial court sentenced Crenshaw to a total of 30 years' imprisonment. Crenshaw thereafter appealed his convictions and sentences, raising one issue – that the trial court had erred by admitting prejudicial collateral crimes evidence. The First District Court of Appeal (“DCA”) affirmed *per curiam*.

Crenshaw then filed a habeas corpus petition in the state court, alleging that his appellate counsel was ineffective in failing to raise an issue regarding the collateral crime evidence on appeal. The First DCA denied this claim in a *per curiam* opinion.

Crenshaw later filed a Fla. R. Crim. P. 3.850 motion, arguing that his trial counsel was ineffective for, *inter alia*, failing to object to prosecutorial comments during closing arguments. The state post-conviction court summarily denied Crenshaw's Rule 3.850 motion. The court found that, regarding the prosecutor's

statements on Joiner's emotion, in the full context, the prosecutor was explaining how the victim's demeanor supported her identification of the witness, and thus, the comments were not improper. The state court noted that defense counsel also used Joiner's emotional state to support its theory of misidentification. As to the prosecutor's statements regarding the similar fact witnesses, the state court found that such was a response to the defense's closing argument, and was for the purpose of arguing identity, and therefore, the comments were not improper.

Finally, as to the prosecutor's comments on Crenshaw's guilt, the state post-conviction court found that the comments that Crenshaw "did it" were qualified by a statement that the evidence showed that Crenshaw "did it." Thus, taken in context, the state court concluded that the prosecutor was not stating his personal belief of Crenshaw's guilt, but stating that the evidence showed Crenshaw was the perpetrator. Additionally, the state court noted that there was overwhelming evidence of Crenshaw's guilt, and therefore, even if the prosecutor improperly commented on Crenshaw's guilt, Crenshaw had not shown prejudice. Crenshaw appealed the denial of his Rule 3.850 motion to the First DCA, which affirmed in a *per curiam* opinion.

Crenshaw then filed the instant federal habeas petition. The district court concluded that Crenshaw's Claim 1 was procedurally defaulted, because he had not fairly presented the federal constitutional nature of the claim to the state

post-conviction court. Additionally, the district court concluded that the state court's decision, denying Crenshaw's Claim 2, was not an unreasonable application of clearly established federal law or an unreasonable determination of the facts. The district court found that the prosecutor's comments on Joiner's demeanor were made to rebut defense counsel's suggestion that her emotional state supported a theory of misidentification.

Additionally, the district court found that the prosecutor's statements regarding similar fact witnesses were made in rebuttal to defense counsel's closing argument and were limited to the purpose of identification. Finally, the district court concluded that, in context, the prosecutor's comments on Crenshaw's guilt were not his personal belief, but rather, a comment that the evidence showed that Crenshaw was the robber. Moreover, the district court agreed with the state court that Crenshaw had not shown any prejudice, even if such remarks were improper.

DISCUSSION:

In order to obtain a COA, a petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The petitioner satisfies this requirement by demonstrating that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," or that the issues "deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quotation omitted). Where the district court has denied a

habeas petition on procedural grounds, the petitioner must show that reasonable jurists would find debatable whether: (1) the district court was correct in its procedural ruling, and (2) the petition stated a valid claim of the denial of a constitutional right. *Id.*

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 involved an unreasonable application of, clearly established [f]ederal 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 [s]tate court proceeding.” 28 U.S.C. § 2254(d)(1), (2). A state court’s decision is “contrary to” federal law if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or if the state court decides a case differently than the Court has on a set of materially indistinguishable facts. *Lackyer v. Andrade*, 538 U.S. 63, 73 (2003). A state court’s factual findings are presumed correct absent clear and convincing evidence to the contrary. 28 U.S.C. § 2254(e)(1).

Claim 1:

In Claim 1, Crenshaw argued that the trial court erroneously admitted “similar fact evidence.” Crenshaw stated that, in the instant case, he was charged with calling for a cab and then robbing the cab driver at gunpoint. During trial, the

state court allowed three witnesses to testify that they were cab drivers and had been robbed, under similar circumstances, by Crenshaw. Crenshaw argued that this evidence was prejudicial and violated his right to a fair trial. In his reply, Crenshaw argued that any procedural default of this claim should be excused because his appellate counsel was ineffective for failing to raise the federal component of the claim.

Crenshaw previously raised this claim on direct appeal, by arguing that the trial court erred by admitting prejudicial collateral crime evidence. However, Crenshaw's arguments addressed whether the admission of such evidence was improper under Florida law. Crenshaw did reference the impact such admission had on his right to "a fair trial," however, he did not cite to any federal law and did not indicate any federal law basis for his claim.

"Before a federal court may grant habeas relief to a state prisoner, the prisoner must exhaust his remedies in state court." *O'Sullivan v. Boerckel*, 526 U.S. 838, 842 (1999); *see* 28 U.S.C. § 2254(b)(1). To exhaust state remedies, the petitioner must fairly present every issue raised in his federal petition through "one complete round of the State's established appellate review process," either on direct appeal or on collateral review. *See O'Sullivan*, 526 U.S. at 845. A petitioner does not exhaust a claim when because "he d[oes] not assert [the] claim

as a matter of federal law" before the state post-conviction court. *Jimenez v. Fla. Dep't of Corr.*, 481 F.3d 1337, 1342 (11th Cir. 2007).

A federal claim is subject to procedural default where: (1) the state court applies an independent and adequate ground of state procedure to conclude that the petitioner's federal claim is barred; or (2) the petitioner never raised a claim in state court, and it is obvious that the unexhausted claim would now be procedurally barred under state procedural rules. *Bailey v. Nagle*, 172 F.3d 1299, 1302-03 (11th Cir. 1999). A procedural default may be excused if the movant establishes (1) cause and prejudice for failure to present the claim properly, or (2) a fundamental miscarriage of justice. *Id.* at 1306.

An ineffective-assistance-of-counsel claim, if both exhausted and not procedurally defaulted, may constitute cause. *Hill v. Jones*, 81 F.3d 1015, 1029-31 (11th Cir. 1996). "In other words, ineffective assistance adequate to establish cause for the procedural default of some *other* constitutional claim is *itself* an independent constitutional claim." *Edwards v. Carpenter*, 529 U.S. 446, 451 (2000). Therefore, a federal habeas court is barred from considering an ineffective-assistance-of-counsel claim as cause for procedural default of another claim if the ineffective-assistance claim was itself procedurally defaulted, unless the petitioner can show cause and prejudice concerning the default with respect to the ineffective-assistance claim itself. *Id.* at 452-53.

Here, reasonable jurists would agree that Crenshaw was procedurally barred from raising Claim 1 in his § 2254 petition. *See Slack*, 529 U.S. at 484; *see also Bailey*, 172 F.3d at 1302-03. The district court correctly concluded that Claim 1 was procedurally defaulted, as Crenshaw had never raised the federal constitutional nature of this claim in state court. Although Crenshaw referenced his right to a “fair trial” on direct appeal, such a phrase alone, without any citation to federal law or any indication that Crenshaw sought to raise a federal constitutional claim, is insufficient to meet the exhaustion requirement. *See Jimenez*, 481 F.3d at 1342. Crenshaw’s claim would now be barred in a Rule 3.850 motion because he failed to raise it on direct appeal, and therefore, his claim is procedurally defaulted. *See Bailey*, 172 F.3d at 1302-03; *see also O’Sullivan*, 526 U.S. at 845.

In an attempt to overcome the procedural bar, Crenshaw alleged, in his reply to the State’s response, that his appellate counsel was ineffective for failing to raise the federal nature of his claim on direct appeal. However, Crenshaw may not rely on such an ineffective-assistance-of-counsel claim as cause for the procedural default of Claim 1, because the ineffective-assistance claim would also be procedurally defaulted. *See Edwards*, 529 U.S. at 452-53. Although Crenshaw raised a claim of ineffective-assistance-of-appellate-counsel in a Rule 3.850 motion, he did not argue that appellate counsel failed to raise the federal nature of his “similar fact evidence” argument on direct appeal.

Crenshaw's claim would now be barred in a Rule 3.850 motion, because Crenshaw failed to raise the claim in his first Rule 3.850 motion, and therefore, such claim would be procedurally defaulted. *See Bailey*, 172 F.3d at 1302-03; *see also O'Sullivan*, 526 U.S. at 845. Accordingly, Crenshaw cannot rely on this claim of ineffective assistance of counsel to excuse his procedural default of Claim 1, and thus, it is recommended that a COA be denied.

Claim 2:

In Claim 2, Crenshaw argued that his trial counsel was ineffective in failing to object to improper comments by the prosecutor during closing arguments. Specifically, Crenshaw argued that the prosecutor made three types of improper comments: (1) comments on the emotional display of the victim, which the prosecutor used to argue that the victim was truthful and to appeal to the jurors' sympathies; (2) comments regarding the similar fact evidence witnesses, which the prosecutor used to indicate that Crenshaw committed the instant offense; and (3) comments regarding Crenshaw's guilt. Crenshaw argued that, had the prosecutor not been allowed to make these comments, he would not have been convicted. As discussed above, Crenshaw previously raised this claim in a Rule 3.850 motion, and the state post-conviction court found the claim meritless.

To succeed on an ineffective-assistance claim under *Strickland*, a petitioner must show that (1) his attorney's performance was deficient, and (2) the deficient

performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Counsel's performance is deficient only if it falls below the wide range of competence demanded of attorneys in criminal cases. *Id.* at 688. Counsel's performance is not deficient so long as the particular approach taken could be considered sound strategy. *Chandler v. United States*, 218 F.3d 1305, 1314 (11th Cir. 2000) (*en banc*). Further, counsel's performance cannot be deficient for failing to raise issues that have no merit. *Card v. Dugger*, 911 F.2d 1494, 1520 (11th Cir. 1990). Prejudice 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 a federal habeas corpus petition, allegedly improper prosecutorial remarks are reviewed to determine whether, in the context of the entire trial, such remarks were sufficiently prejudicial to violate the petitioner's due process rights. *Donnelly v. DeChristoforo*, 416 U.S. 637, 639 (1974); *Parker v. Head*, 244 F.3d 831, 838 (11th Cir. 2001). "Such a determination depends on whether there is a reasonable probability that, in the absence of the improper remarks, the outcome of the trial would have been different." *Williams v. Weldon*, 826 F.2d 1018, 1023 (11th Cir. 1987). Thus, to establish prosecutorial misconduct, a two-prong test must be satisfied: (1) the prosecutor's comments must have been improper; and

(2) the comments must have rendered the trial fundamentally unfair. *United States v. Eyster*, 948 F.2d 1196, 1206 (11th Cir. 1991).

A prosecutor is not limited to a bare recitation of the facts, but instead, may comment on the evidence and express the conclusions he contends the jury should draw from the evidence. *United States v. Johns*, 734 F.2d 657, 663 (11th Cir. 1984). Although a prosecutor is prohibited from vouching for a witness, such prohibition “does not forbid prosecutors from arguing credibility . . . it forbids arguing credibility based on the reputation of the government office or on evidence not before the jury.” *United States v. Hernandez*, 921 F.2d 1569, 1573 (11th Cir. 1991). Additionally, when a prosecutor voices a personal opinion, but indicates that his belief is based on evidence in the record, the comment is not improper. *United States v. Granville*, 716 F.2d 819, 822 (11th Cir. 1983).

Moreover, the prosecutor “as an advocate, is entitled to make a fair response to the arguments of defense counsel.” *Holland v. Florida*, 775 F.3d 1294, 1318 (11th Cir. 2014) (quotation omitted). When a prosecutor’s comments are an “invited reply” in response to defense counsel’s remarks, and he does “no more than respond substantially in order to ‘right the scale,’ such comments would not warrant reversing a conviction.” *United States v. Young*, 470 U.S. 1, 11-13 (1985).

Here, reasonable jurists would not debate whether the state post-conviction court made an unreasonable determination of the facts or unreasonably applied

Strickland in denying Crenshaw's Claim 2. None of the prosecutor's comments during closing argument, of which Crenshaw complains, were improper. First, the prosecutor's statements regarding Joiner's emotional state were not improper. Crenshaw asserted that the prosecutor used Joiner's emotional state to gain the sympathies of the jury, and thus, sway them to convict. However, in context, it is clear that the prosecutor referred to Joiner's emotional state to support her credibility as a witness and the credibility of her identification of Crenshaw as the robber. Such comments, using evidence in the record to support Joiner's credibility, are not improper. *See Hernandez*, 921 F.2d at 1573.

Moreover, defense counsel had raised the issue of Joiner's emotional state throughout the trial to support his theory of victim misidentification. Accordingly, the prosecutor's argument, that Joiner's emotional state supported the credibility of her identification, can properly be categorized as a fair response to defense counsel's theory, which was not improper. *See Holland*, 775 F.3d at 1318; *Young*, 470 U.S. at 11-13. Finally, to the extent that Crenshaw argues that the prosecutor's comments on Joiner's emotional state led the jury to convict him out of sympathy for Joiner, the trial court had explicitly instructed the jury not to be swayed by sympathy to any party. As a result, Crenshaw cannot show that he was prejudiced by the prosecutor's comments regarding Joiner's emotional state.

Second, the prosecutor's statements regarding the similar fact witnesses were not improper. Notably, the prosecutor omitted any reference to this evidence during his initial closing argument. However, defense counsel thereafter argued that the circumstances presented by these witnesses were not similar enough to support a conclusion that each robbery was committed by the same individual. In rebuttal, the prosecutor then argued that the similar fact evidence supported Joiner's identification of Crenshaw as the robber. These comments were clearly made in response to defense counsel's argument, and were limited to the issue of identification. Accordingly, the prosecutor's comments, which were a fair response to defense counsel's closing arguments, were not improper. *See Holland*, 775 F.3d at 1318; *Young*, 470 U.S. at 11-13.

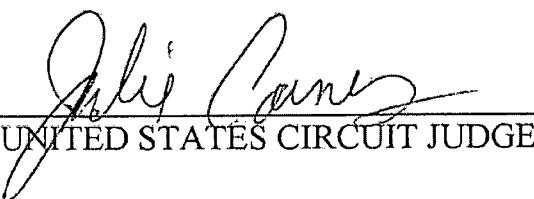
Third, the prosecutor's statements regarding Crenshaw's guilt were not improper. In his initial closing argument, the prosecutor stated, “[h]e did it. You know he did it. You know he did it. The evidence has shown you that he did it.” On rebuttal, after discussing the overwhelming evidence against Crenshaw, the prosecutor again stated that, “[y]ou know he did it. Each one of you know he did it.” As both the state post-conviction court and the district court found, the prosecutor's statements regarding Crenshaw's guilt were not improper because, in context, they did not state the prosecutor's personal belief that Crenshaw was guilty, but rather, indicated that the evidence presented at trial showed Crenshaw

was guilty. Such a comment is not outside the scope of proper closing arguments made regarding the valid conclusions that could be drawn from the evidence presented. *See Johns*, 734 F.2d at 663; *Granville*, 716 F.2d at 822.

Thus, because none of the prosecutorial comments, of which Crenshaw complains, were improper, Crenshaw's trial counsel was not ineffective in failing to object to such comments. *See Strickland*, 466 U.S. at 688; *Card*, 911 F.2d at 1520. Accordingly, the state post-conviction court did not unreasonably apply *Strickland* in denying Crenshaw's Claim 2, and no COA is warranted.

CONCLUSION:

Because reasonable jurists would not debate whether the district court erred in denying Crenshaw's Claim 1 as procedurally defaulted and Claim 2 as meritless, his motion for a COA is DENIED.



UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 16-17735-D

PHILLIP EARL CRENSHAW, JR.,

Petitioner-Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent-Appellee.

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

Before: JULIE CARNES and NEWSOM, Circuit Judges.

BY THE COURT:

Phillip Earl Crenshaw, Jr., has filed a motion for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's October 18, 2017, order denying his motion for a certificate of appealability. Upon review, Crenshaw's motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief.

**Additional material
from this filing is
available in the
Clerk's Office.**