IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 21-12497-H

EUGENE STAFFINE,

Petitioner-Appellant,

versus

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

Respondents-Appellees.

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

ORDER:

Eugene Staffine is a Florida prisoner serving a life sentence after a jury found him guilty of capital sexual battery and lewd or lascivious molestation. After pursuing a direct appeal and a claim for post-conviction relief in state court, Staffine filed a *pro se* 28 U.S.C. § 2254 federal habeas corpus petition, raising the following four claims:

(1) Ineffective assistance of counsel ("IAC") because his trial counsel failed to develop available exculpatory evidence;

(2) IAC for failing to move to compel the state court for a bill of particulars concerning the date of offense;

(3) IAC for failing to investigate, interview, and call known available exculpatory witnesses; and

(4) The use of a six-member jury violated his right to due process and right to effective trial counsel.

The district court denied Staffine's § 2254 petition and a certificate of appealability ("COA"). Staffine now moves this Court for a COA, as construed from his notice of appeal.

To obtain a COA, a movant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The movant 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). 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). 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 th[e] Court has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 412-13 (2000).

To make a successful IAC claim, a defendant must show both that (1) his counsel's performance was deficient; and (2) the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Which "witnesses, if any, to call, and when to call them, is the epitome of a strategic decision, and it is one that we will seldom, if ever, second guess." *Conklin v. Schofield*, 366 F.3d 1191, 1204 (11th Cir. 2004). Mere speculation that a missing witness would be helpful is insufficient to establish a *Strickland* violation. *Johnson v. Alabama*, 256 F.3d 1156, 1187 (11th Cir. 2001). Florida courts treat child sexual-abuse cases differently than other types of prosecution, allowing an expanded period for the commission of offenses.

Whittingham v. State, 974 So. 2d 616, 618 (Fla. Dist. Ct. App. 2008). A charging document need not specify the exact date of the offense, if such a date is not known, and further, may properly allege a crime occurring between two dates. *State v. Garcia*, 511 So. 2d 714, 716 (Fla. Dist. Ct. App. 1987). Sexual battery of a child is not a "capital" offense in the sense that a defendant may be sentenced to death, and therefore requires only a six-person jury in Florida. *State v. Hogan*, 451 So. 2d 844, 845-46 (Fla. 1984). The Supreme Court has found a six-person jury panel constitutional. *Williams v. Florida*, 399 U.S. 78, 86 (1970).

Here, the state post-conviction court's denial of Staffine's claims was not contrary to, or an unreasonable application of, clearly established federal law. *See* 28 U.S.C. § 2254(d)(1). Trial counsel's decisions to not call certain witnesses, as asserted in Claims 1 and 3, were the type of strategic decisions that courts seldom second guess. Therefore, it was not unreasonable to find that counsel's performance was not deficient. *See Conklin*, 366 F.3d at 1204. Regardless, even if Staffine's trial counsel was deficient regarding these witnesses, Staffine merely speculated that certain witnesses would have been helpful, which is insufficient to establish a *Strickland* violation. *See Johnson*, 256 F.3d at 1187. As for Claim 2, given the nature of the crime, the victim's young age, and the delay in the reporting of the abuse, Staffine did not show that a one-year time frame would have been unreasonable or impermissible under Florida law. *See Whittingham*, 974 So. 2d at 618; *Garcia*, 511 So. 2d at 716. Finally, as to Claim 4, because the offenses were not punishable by death, they were properly tried by a six-person jury. See *Williams*, 399 U.S. at 86; *Hogan*, 451 So. 2d at 845-46. Accordingly, his motion for a COA is DENIED because he has failed to make a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2).

/s/ Robin S. Rosenbaum
UNITED STATES CIRCUIT JUDGE