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*Mirzayance v. Knowles*, 04-57102

SUKO, District Judge, concurring in part and dissenting in part.

CATHY A. CATTERSON, CLERK  
U.S. COURT OF APPEALS

By virtue of the Supreme Court's granting certiorari, vacating the judgment and remanding the case (GVR order), this panel is required to reconsider its previous decision and, if warranted, to revise or correct it. *See Lawrence on Behalf of Lawrence v. Chater*, 516 U.S. 163, 167, 116 S.Ct. 604, 607, 133 L.Ed.2d 545 (1996)(describing the use of a GVR order as potentially appropriate where intervening development reveals a "reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration . . . ."); *Youngblood v. West Virginia*, 126 S.Ct. 2188 (2006)(dissenting opinions describing the Supreme Court's GVR procedure). The GVR order directed this court to reconsider the case in light of *Carey v. Musladin*, 549 U.S.----, 127 S.Ct. 649 (2006). After reconsideration, and for the reasons set forth below, I concur in the conclusion of Part III of the memorandum disposition finding the district court and the magistrate judge misapprehended our prior remand order. However, as to Parts I, II, IV, V, and VI, I respectfully dissent.

While this court must conduct an independent review of the legal question, facts as determined by the district court are to be reviewed under the "significantly deferential" clearly erroneous standard, in which we accept the district court's findings of fact absent a "definite and firm conviction that a mistake has been

committed. *Silva v. Woodford*, 279 F.3d 825, 835 (9th Cir. 2002) (as amended); *Alcala v. Woodford*, 334 F.3d 862, 868 (9th Cir. 2003). I accordingly disagree with the majority's independent review of the record without regard to the lower court's factual and credibility findings made after a four-day evidentiary hearing.

As set forth in my previous dissent, I also disagree with the majority's conclusion that the petitioner has satisfactorily demonstrated a violation of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). However, whether the judges sitting on this panel would or would not interpret *Strickland* the same as the state and lower federal courts is not the question presented in this appeal. As the *Musladin* decision reaffirmed, this court's role and authority is limited by AEDPA. 127 S.Ct. at 652-53. Specifically, habeas corpus relief may not be granted unless the state court's decision was contrary to, or an unreasonable application of clearly established federal law, or was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. *Id.* (citing 28 U.S.C. § 2254(d)(1) & (2)). This court is without authority to substitute its own judgment on the merits of the petition for that of the state court, in contravention of 28 U.S.C. § 2254(d).

To qualify as an "unreasonable application of clearly established federal law" sufficient to merit habeas corpus relief, the state court's decision to deny

habeas must be more than just incorrect or erroneous: it must be “objectively unreasonable.” *Schiro v. Landrigan*, --- U.S. ----, ----, 127 S.Ct. 1933, 1939 (2007) (noting that AEDPA changed the standards for granting federal habeas relief; the determination that a state court's interpretation is unreasonable is a substantially higher threshold than the determination that a decision is incorrect).

In applying the deferential standard of AEDPA, “[t]he more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations.” *Yarborough v. Alvarado*, 541 U.S. 652, 664, 124 S.Ct. 2140, 158 L.Ed.2d 938 (2004); *see also Musladin*, 127 S.Ct. at 654. Given the broad case-by-case nature of the *Strickland* analysis, the state court had significant leeway in determining petitioner’s habeas petition. Indeed *Strickland* emphasizes that “[n]o particular set of detailed rules for counsel's conduct” is appropriate, but rather that courts must consider whether counsel's assistance was reasonable considering all the circumstances from counsel’s perspective at the time. 466 U.S. at 688-89. It is nevertheless possible for a standard as general as *Strickland* to be applied in an unreasonable manner. *See, e.g., Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (finding a state-court decision both contrary to and involving an unreasonable application of the standard set forth in *Strickland*).

However, the state court's resolution of Mirzayance's habeas petition was not an objectively unreasonable application of Supreme Court precedent.

Under the standards established in *Strickland*, to prevail on an ineffective assistance of counsel claim, a habeas petitioner must show that: (1) counsel's performance was deficient because it fell below an objective standard of reasonableness; and (2) the deficient performance prejudiced the defense. *Id.* at 687-88, 104 S.Ct. at 2064. In considering claims of ineffective assistance, courts are to address not "what is prudent or appropriate, but only what is constitutionally compelled." *Burger v. Kemp*, 483 U.S. 776, 794, 107 S.Ct. 3114 (1987).

The majority concludes there was "substantial evidence available to show that Mirzayance was legally insane at the time of the killing," presumably reaching this conclusion by judging the quantity of experts who were subpoenaed to testify on Mirzayance's mental state during the NGI-phase of the trial. A simple comparative count as to the number of experts however, ignores the quality of the totality of evidence, the law, and the facts of the case. At a minimum, the record certainly demonstrates there is substantial ground for a difference of opinion as to whether the petitioner had any chance of succeeding on his insanity defense.

To prove the petitioner was insane it would have been the petitioner's burden to prove by a preponderance of the evidence that he was "incapable of

knowing or understanding the nature and quality of his act”, or that he was incapable of “distinguishing right from wrong”, at the time of the commission of the offense. Cal. Penal Code § 25(b); *People v. Skinner*, 39 Cal.3d 765, 769 (1985)(holding that section 25(b) was intended to reflect two distinct and independent bases upon which a verdict of not guilty by reason of insanity might be returned). During the guilt-phase of the trial, the jury had heard the following facts of the crime: Mirzayance initiated the crime after entering the victim’s bedroom with a knife in hand and a pistol in his pocket; he had waited until he was alone with the victim in the house before he closed the curtains and commenced the fatal stabbing and shooting attack; immediately after the murder he collected the knife and some of the spent bullet shell casings; he then returned to his apartment where he showered and put the bloody clothes into a trash bag; he concocted a false alibi on a telephone answering machine; then drove to a Burger King where he dumped the bag containing the bloody clothes into the restaurant’s trash container.

The defense strategy at trial was to secure no worse than a second degree murder conviction, a level of guilt that was conceded to the jury. In this pursuit, the jury had been given the opportunity to consider some of the petitioner’s mitigating evidence of Mirzayance’s mental state, but had implicitly rejected that

evidence in finding him guilty of first degree murder. According to the jury instruction given at trial, the jury must have found that Mirzayance had “weigh[ed] and consider[ed] the question of killing and the reasons for and against such a choice, and ha[d] in mind the consequences” when he decided to kill Melanie Oohkhtens. The verdict of the jury shed light on its view of the petitioner’s state of mind at the time of the offense. While, as the majority indicates, it did not legally defeat the insanity defense, it certainly was a blow to the likelihood of its success.

Moreover, according to the evidence adduced at the evidentiary hearing conducted by U.S. Magistrate Judge Zarefsky, each of the experts who were prepared to testify during the NGI-phase that the petitioner was insane because of his mental impairment, had also, on the same basis, opined that the petitioner could not have acted with premeditation, a finding the jury had rejected. Having so stated, this testimony would have subjected every one of the petitioner’s “cadre of experts” to impeachment and cross-examination. The weaknesses of the petitioner’s expert evidence was also revealed when upon cross-examination at the evidentiary hearing two of petitioner’s experts testified that Mirzayance’s actions were consistent with “goal-directed behavior designed to avoid detection.” A third expert, Dr. Romanoff, in a written declaration indicated he was not prepared to testify at the sanity-phase as to whether Mirzayance met the legal definition of

insanity. Rather, he was to opine that in his diagnostic opinion Mirzayance had only a “potential” lack of understanding of the wrongfulness of his conduct at the time of the homicide.

Further undermining the possibility of proving Mirzayance insane, the prosecution had intended on calling two experts to testify the petitioner was legally sane, one of which was to testify that he had directly asked Mirzayance whether at the time of the offense he felt it was right or wrong to commit the murder and that Mirzayance had responded that he felt it was wrong. The other prosecution expert was prepared to testify that Mirzayance did not “even [come] close to meeting the criteria” for insanity and that his actions were goal oriented. Finally, petitioner’s parents, who were to provide the “emotional” element of the defense, had indicated a “strong disinclination” to testify during the NGI-phase.

Under the circumstances presented to Wager, a reasonable attorney in the exercise of proper professional judgment could question the viability and merit of the insanity defense and conclude it was therefore inappropriate to pursue. *See e.g. U.S. v. Cronin*, 466 U.S. 648, 104 S.Ct. 2039 n.19 (1984)(“...[T]he Sixth Amendment does not require that counsel do what is impossible or unethical. If there is no bona fide defense to the charge, counsel cannot create one and may disserve the interests of his client by attempting a useless charade.”); *Cepulonis v.*

*Ponte*, 699 F.2d 573, 575 (1st Cir. 1983)(“ . . . counsel need not chase wild factual geese when it appears, in light of informed professional judgment, that a defense is implausible or insubstantial as a matter of law, or, as here, as a matter of fact and of the realities of proof, procedure, and trial tactics.”). Counsel has no constitutional duty to raise every non-frivolous issue requested by a defendant.

*Jones v. Barnes*, 463 U.S. 745, 751-54, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983).

The fact that the psychiatric defense was his sole defense remaining does not alter this analysis. This conclusion is echoed by the Seventh Circuit in its decision in *Jones v. Page*, 76 F.3d 831, 843 (7th Cir. 1996), wherein the court held:

We refuse to hold that [counsel’s] prudent, good-faith decision to forego an insanity defense (after investigation) constitutes ineffective assistance of counsel. Implicit in such a holding would be the notion that in order to represent a criminal defendant competently, an attorney must not only pursue each and every possible psychiatric defense, but perhaps also search out and present questionable ‘expert’ testimony in support of such arguments. A holding of this kind would defy common sense and contradict well-established case law . . . .”

76 F.3d 831 (internal citations omitted). More importantly, in light of all of the facts described above, the undersigned finds it is at least debatable whether *Strickland* mandated Wager to pursue the NGI defense, and thus it was not objectively unreasonable for the state court to conclude counsel’s performance was not deficient under *Strickland*.

It is true that another lawyer in Wager's position might reasonably have requested a further continuance, might have taken time to attempt to persuade the parents to testify, and because it was the sole remaining defense available, may have chosen to forge ahead with the defense no matter what. But *Strickland* admonishes courts to resist the natural temptation to play Monday-morning quarterback. *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052. Even if petitioner were able to overcome the strong presumption that counsel's actions were within the range of reasonable professional assistance, to succeed under *Strickland* the petitioner must be able to also prove prejudice. This demands he demonstrate there is a "reasonable probability that but for the alleged unprofessional error that the outcome would have been different-probability sufficient enough to undermine the confidence in the outcome." 466 U.S. at 694. Given the facts of the crime, the petitioner's burden of proof, the jury's verdict, and arguable weakness of petitioner's expert evidence compared to the totality of the prosecution's evidence (including two court-appointed psychiatrists who found the defendant to be sane), the undersigned cannot conclude that the state court would have been "objectively unreasonable" in concluding the petitioner had failed to meet this burden. To the contrary, the state court could reasonably find the petitioner had not demonstrated a "reasonable probability" that he would have been found insane at the time he

committed the murder and that his resulting sentence would have been any different.

In conclusion, in addition to the great deference to counsel's performance mandated by *Strickland*, AEDPA adds another layer of deference-this one to a state court's decision-when we are considering whether to grant federal habeas relief from a state court's decision. Under AEDPA, this court has no authority to grant habeas corpus relief simply because it concludes, in its independent judgment, that a state supreme court's application of *Strickland* is erroneous or incorrect.

*Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 1512, 146 L.Ed.2d 389 (2000).

Consideration of whether the state court's application of *Strickland* was "objectively unreasonable" leads me to the conclusion that it was not. I therefore respectfully dissent from Parts I, II, IV, V, and VI of the amended disposition.