United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
October 19, 2023
Lyle W. Cayce
Clerk

No. 22-70001

RICHARD LEE TABLER,

Petitioner—Appellant,

versus

BOBBY LUMPKIN, *Director, Texas Department of Criminal Justice, Correctional Institutions Division*,

Respondent—Appellee.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 6:10-CV-34

Before GRAVES, DUNCAN, and ENGELHARDT, *Circuit Judges*.

PER CURIAM:[*]

The district court granted petitioner Richard Tabler a partial Certificate of Appealability ("COA") to appeal that court's denial of his habeas corpus petition. The COA covers two issues: first, whether Tabler's state habeas counsel abandoned him or otherwise performed deficiently by not challenging his competency to waive further habeas proceedings; and

[*] This opinion is not designated for publication. *See* 5TH CIR. R. 47.5.

second, whether Tabler was prejudiced by his trial counsel's failure to object to victim-impact evidence at the punishment phase of his capital murder trial. Addressing the first issue only, we conclude that Tabler's state habeas attorneys neither abandoned him nor rendered ineffective assistance by not contesting his competency to waive further habeas proceedings. Tabler therefore fails to show "cause" under *Martinez v. Ryan*, 566 U.S. 1 (2012), for procedurally defaulting his claim regarding his trial counsel's performance. We therefore do not address that claim.[1]

The district court's judgment denying Tabler's habeas corpus petition is AFFIRMED.

I.

A.

We have previously recited the facts regarding Tabler's 2007 conviction and death sentence for shooting two people to death. *See Tabler v. Stephens*, 588 F. App'x 297, 298–99 (5th Cir. 2014) ("*Tabler I*"), *vacated in part by* 591 F. App'x 281 (5th Cir. 2015) ("*Tabler II*"). Relevant to this appeal, in addition to those murders, Tabler was also indicted for murdering two young women for spreading news of his crimes. Those charges were eventually dismissed. During the punishment phase at Tabler's trial, however, the court allowed the women's relatives to testify about the effect their deaths had on family and friends. Tabler's trial counsel did not object to this evidence.

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[1] We DENY Tabler's pending motion to expand the COA to include additional grounds.

Additionally, Tabler's trial counsel presented mitigating evidence at the punishment phase in an attempt to show that Tabler was "not normal." *Ibid.* This evidence included:

> (1) [T]estimony from Tabler's mother and sister about his difficult childhood, potential birth trauma, and history of psychiatric treatment; (2) testimony from Dr. Meyer Proler, a clinical neurophysiologist, concerning an abnormality of the left temporal frontal region of Tabler's brain that causes difficulty learning, planning, and weighing the consequences of actions; (3) testimony from Dr. Susan Stone, a psychiatrist, that Tabler suffered from a severe case of attention deficit hyperactivity disorder, borderline personality disorder, and a history of head injuries, all of which inhibited his ability to rationally assess situations and control his impulses; and (4) testimony from Dr. Deborah Jacobvitz, a psychologist, regarding the impact of parental neglect and abandonment on Tabler's development.

Ibid.

B.

The Texas Court of Criminal Appeals ("CCA") upheld Tabler's conviction and death sentence on direct appeal. *See Tabler v. Texas*, No. 75,677, 2009 WL 4931882 (Tex. Crim. App. Dec. 16, 2009), *cert. denied*, 562 U.S. 842 (2010). While that appeal proceeded to the CCA, Tabler went back and forth on whether to waive further state habeas proceedings. Before he ultimately waived these rights, his state habeas counsel retained an investigator and a mitigation specialist. The mitigation specialist spent about thirty hours working on Tabler's case; she met with him, reviewed the trial record, and communicated with habeas counsel.

Habeas counsel also received funds to have Tabler examined by a psychologist. In 2008, the court authorized Dr. Kit Harrison to "conduct[] a

neuropsycho[lo]gical evaluation appropriate in assisting counsel for the Defendant in the preparation of the defense." The court also asked Dr. Harrison to provide an opinion on Tabler's legal competency. About a month after his visit to Tabler in prison, Dr. Harrison sent a two-page letter to Tabler's counsel stating that Tabler was "forensically competent to make decisions to suspend his automatic appeal." Just over a month later, Dr. Harrison completed a report containing the results of Tabler's neuropsychological evaluation. The report noted that "Tabler demonstrate[d] a deep and severe constellation of mental illnesses" and "rapid-cycling mood destabilization with strong evidence of Bipolar Disorder, Type I." The report did not speak to Tabler's competency to waive his habeas rights. Tabler eventually wrote to the CCA, stating, "I wish to drop all my appeals & get an execution date."

The state court held a hearing to determine whether Tabler was competent to waive further habeas proceedings. Habeas counsel provided the court with Dr. Harrison's letter opining that Tabler was indeed legally competent. Counsel did not, however, provide the court with Dr. Harrison's subsequent report containing the results of his neuropsychological evaluation.

When asked at the hearing whether "the defense [was] ready to proceed," following Tabler's directive that he wished to waive his rights, his attorneys stated that they did "not announce ready[] because [they did] not intend to take a position one way or the other of what should happen." Counsel had told Tabler before this hearing that they did not think it was their job to help Tabler drop his habeas petition but neither was it their job to pursue habeas relief against Tabler's wishes. If the court asked whether they thought Tabler was competent to make this decision himself, counsel told him, they would tell the court that he was, "but that [would] be the extent of [their] involvement."

Counsel took no part in the ensuing colloquy between Tabler and the court, where Tabler stood by his decision to waive further habeas proceedings. After this conversation, the court permitted Tabler to waive his state habeas rights, and the court relieved counsel from any further obligation to investigate the case. Tabler was therefore without representation when his deadline for filing a state habeas elapsed in November 2008.

Nine months after the competency hearing and eight months after his state habeas petition was due, Tabler changed his mind. In a letter to the court, he asked to "pick all my appeals back up." On July 14, 2009, well past the forty-five-day deadline to file a state habeas petition, Tabler's state habeas counsel filed a motion to resume representation and establish a new filing date. The motion contended Tabler had been incompetent to waive his habeas rights. The CCA denied the motion, concluding that Tabler failed to show good cause because "his failure to file a timely writ of habeas corpus was attributable to his own continued insistence on foregoing that remedy." *Tabler I*, 588 F. App'x at 300.

C.

After the CCA denied Tabler's direct appeal and his motion to establish a new state habeas filing date, Tabler wrote a letter protesting a stay of execution in his case and requesting an execution date, which was effectively an expression of his desire to waive his federal habeas rights. The federal district court appointed Dr. Richard Saunders to perform a psychological evaluation before a competency hearing. Dr. Saunders found Tabler competent to waive further proceedings but concluded that his desire to waive was the result of the conditions of his confinement and his treatment by staff and other inmates. Accordingly, the district court ordered Tabler's federal habeas case to proceed because his previously expressed desire to waive had not been voluntary.

In 2012, the district court denied Tabler's federal habeas petition, which included a claim for ineffective assistance of trial counsel ("IATC"). The court rejected this claim because "the failure to exhaust" in state court "was due to [Tabler's] choice," and thus there was "no good cause to" justify allowing him to return to state court to exhaust this claim. Tabler's attorneys then moved to withdraw on the ground that new counsel was needed to offer unconflicted arguments about the impact of the Supreme Court's then-recent decision in *Martinez*. The court appointed new counsel for appeal.

We denied Tabler's request for a COA and affirmed the district court's denial of habeas relief. *See id.* at 298–99. A few months later, however, we reversed course, opting to remand for the district court to "consider in the first instance whether Tabler, represented by his new counsel . . . or other unconflicted counsel, can establish cause for the procedural default of any ineffective-assistance-of-trial-counsel claims pursuant to *Martinez* that he may raise, and, if so, whether those claims merit relief." *Tabler II*, 591 F. App'x at 281. Tabler filed an amended federal habeas petition addressing ineffectiveness of both state habeas counsel and state trial counsel under *Martinez*.

The district court ruled that Tabler did not demonstrate cause and prejudice under *Martinez*. The court determined that his state habeas attorneys were not deficient and, in the alternative, Tabler was not prejudiced by their conduct. Additionally, the court found that Tabler's trial attorneys were not ineffective.

The district court granted a partial COA to consider the effectiveness of state habeas counsel when they chose not to challenge Tabler's competency to waive further habeas proceedings. The COA also covered whether Tabler was prejudiced under *Strickland v. Washington*, 466 U.S. 668

(1984), when trial counsel did not object to the victim-impact evidence at punishment. Tabler unsuccessfully moved to alter or amend the judgment and to expand the COA under Federal Rule of Civil Procedure 59(e). This appeal followed.

II.

When reviewing a district court's denial of a writ of habeas corpus, we review the court's "factual findings for clear error and its legal conclusions *de novo*." *Mullis v. Lumpkin*, 70 F.4th 906, 909 (5th Cir. 2023). We also apply *de novo* review to mixed questions of law and fact "by independently applying the law to the facts found by the district court, as long as the district court's factual determinations are not clearly erroneous." *Ramirez v. Dretke*, 396 F.3d 646, 649 (5th Cir. 2005). "Ineffective-assistance-of-counsel claims are mixed questions of law and fact." *Mullis*, 70 F.4th at 909.

III.

On appeal, Tabler argues that he can show cause under *Martinez* for procedurally defaulting his IATC claim because his state habeas counsel both abandoned him and also performed deficiently at his competency hearing. The district court rejected these arguments. At *Martinez* prong one, the court ruled that Tabler's habeas attorneys neither abandoned him nor performed deficiently. Additionally, at *Martinez* prong two, the court ruled that Tabler could not support his underlying IATC claim. We limit our analysis to the court's *Martinez* prong-one ruling, which we affirm.[2]

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[2] In *Mullis*, we recently clarified that our precedent was not abrogated by *Shinn v. Ramirez*, 142 S. Ct. 1718 (2022), and thus permits consideration of "evidence outside the state record . . . in *Martinez* claims for the limited purpose of establishing an excuse for procedural default." *Mullis*, 70 F.4th at 910–11 (citing *Segundo v. Davis*, 831 F.3d 345, 351 (5th Cir. 2016)). *Mullis* does not affect this case, however, because the district court considered evidence beyond the state record in finding no cause under *Martinez*.

A.

Federal courts are authorized "to issue habeas corpus relief for persons in state custody" by 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). *Harrington v. Richter*, 562 U.S. 86, 97 (2011). A petitioner must first exhaust all available state court remedies. 28 U.S.C. § 2254(b)(1)(A). The Supreme Court, however, recognizes "an important corollary to the exhaustion requirement: the doctrine of procedural default." *Shinn v. Ramirez*, 596 U.S. 366, 378 (2022) (citations and internal quotation marks omitted). Under this doctrine, a petitioner defaults his federal claims if he does not first assert them in state court consistent with state procedural rules. *Ibid.*

Tabler argues the procedural default of his IATC claim should be excused due to state habeas counsel's ineffectiveness. He can overcome procedural default only by showing (1) "cause for the default" and (2) "actual prejudice" resulting from "the alleged violation of federal law." *Id.* at 379 (citing *Coleman v. Thompson*, 501 U.S. 722, 750 (1991)). "Cause" means that "some objective factor external to the defense impeded [the petitioner's] efforts to comply with the State's procedural rule." *Ibid.* (citation omitted). An external factor is one that "cannot fairly be attributed to" the petitioner. *Coleman*, 501 U.S. at 753. To establish "actual prejudice," a petitioner "must show not merely a substantial federal claim, such that the errors at trial created a *possibility* of prejudice, but rather that the constitutional violation worked to his *actual* and substantial disadvantage." *Shinn*, 596 U.S. at 379–80 (cleaned up) (citation omitted).

Ordinarily, state habeas counsel's "ignorance or inadvertence" does not establish "cause" to excuse procedural default because the petitioner bears the risk of attorney error. *Id.* at 380 (citing *Coleman*, 501 U.S. at 753). But the Supreme Court carved out a "narrow exception" to this rule in

Martinez. 566 U.S. at 9. The Court held "that ineffective assistance of state postconviction counsel may constitute 'cause' to forgive procedural default of a trial-ineffective-assistance claim." *Shinn*, 596 U.S. at 380. The *Martinez* exception applies if the procedurally defaulted claim is IATC and "if the State's judicial system effectively forecloses direct review of trial-ineffective-assistance claims." *Ibid.* (citing *Trevino v. Thaler*, 569 U.S. 413, 428 (2013)); *see also Trevino*, 569 U.S. at 428 (holding Texas's judicial system satisfies this requirement). To establish "cause" under *Martinez*, we apply the familiar *Strickland* test. *See Martinez*, 566 U.S. at 14. Accordingly, the petitioner must show habeas counsel's performance was (1) "deficient" and (2) "prejudiced" his defense. *Strickland*, 466 U.S. at 687.

Another way to show "cause" under *Martinez* is attorney abandonment. *Maples v. Thomas*, 565 U.S. 266, 281 (2012). An attorney who "abandons his client without notice, and thereby occasions" default, severs "the principal-agent relationship." *Ibid.* A client therefore "cannot be charged with the acts or omissions of an attorney who has abandoned him," nor "faulted for failing to act on his own behalf when he lacks reason to believe his attorneys of record, in fact, are not representing him." *Id.* at 283.

B.

We first address whether Tabler's state habeas attorneys were deficient under *Strickland* or abandoned him as in *Maples*. Tabler argues that habeas counsel performed deficiently by not challenging his competency to waive further state habeas proceedings and by failing to properly investigate his competency, thus satisfying *Strickland* prong one. *See Strickland*, 466 U.S. at 687. He largely relies on the same argument to show habeas counsel abandoned him. *See Maples*, 565 U.S. at 283. We disagree on both counts.

Counsel performs deficiently under *Strickland* by falling "below an objective standard of reasonableness." 466 U.S. at 688. In assessing

counsel's performance, however, courts must be "highly deferential," look to "the totality of the evidence," must eliminate the "distorting effects of hindsight," and "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689, 695.

According to Tabler, his habeas attorneys performed deficiently by attending the competency "hearing as spectators rather than participants and wash[ing] their hands of Mr. Tabler." He also claims their investigation of his mental capacity was insufficient in light of their knowledge of the mental challenges he faced. Instead of "offer[ing] no resistance to their client's efforts to waive" his rights, Tabler argues his attorneys should have had him evaluated by a second psychologist to contest the opinion of Dr. Harrison.[3]

Texas law allows prisoners to waive state habeas review. *Ex parte Reynoso*, 228 S.W.3d 163, 165 (Tex. Crim. App. 2007) (per curiam). Prisoners may also waive state habeas representation, provided the waiver is "intelligent and voluntary." TEX. CODE CRIM. PROC. ANN. art. 11.071 § 2(a); *see also Ex Parte Gallo*, 448 S.W.3d 1, 5 n.23 (Tex. Crim. App. 2014); *Mullis*, 70 F.4th at 912 n.6 (noting "[t]he competency inquiry differs from the knowing-and-voluntary inquiry," but, given the petitioner's arguments, "the distinction is irrelevant here"). The Fifth Circuit describes the postconviction competency inquiry as follows: (1) Does "the individual suffer from a mental disease, disorder, or defect?"; (2) Does "that condition prevent him from understanding his legal position and the options available

[3] Tabler also argues that habeas counsel failed to object to the state court's incorrect implication that his habeas deadline would occur after the CCA decided his direct appeal. We disagree. Habeas counsel repeatedly told Tabler that he needed to decide whether to proceed on state habeas long before his direct appeal was resolved. In one letter, in fact, Tabler's counsel told him that waiting until the CCA decided his direct appeal would occur well after they would have to file a habeas application.

to him?"; (3) Does "that condition nevertheless prevent him from making a rational choice among his options?" *Mullis*, 70 F.4th at 912 (citing *Mata v. Johnson*, 210 F.3d 324, 328 (5th Cir. 2000)).

Considering all the circumstances, Tabler has not cleared "*Strickland*'s high bar" to show state habeas counsel's performance was objectively unreasonable. *See Harrington*, 562 U.S. at 105 (citation omitted); *see also Strickland*, 466 U.S. at 695. To the contrary, his habeas attorneys followed his explicit wish to drop further habeas proceedings, reasonably finding him "competent to make this decision" for himself. *Cf. Wood v. Quarterman*, 491 F.3d 196, 203 (5th Cir. 2007) ("Neither the Supreme Court nor this court has ever held that a lawyer provides ineffective assistance by complying with the client's clear and unambiguous instructions to not present evidence."). Throughout these proceedings, the trial court, the CCA, the federal district court, and the multiple mental health professionals that evaluated Tabler found him mentally competent to make substantive decisions surrounding his case.

In *Mullis*, we rejected an argument nearly identical to Tabler's. 70 F.4th at 911–14. There, petitioner argued his habeas counsel failed to challenge his waiver of habeas proceedings at a competency hearing and failed to give the court-appointed mental health expert all "relevant mental-health records, trial transcripts, and other information" the petitioner thought "'critical' to the evaluation." *Id.* at 912. We held that, "[g]iven the context, the habeas attorneys were reasonable in not challenging" the expert's conclusions about petitioner's competency. *Id.* at 913. Moreover, habeas counsel's decision was supported by the fact that counsel engaged a mental health expert and that there had been no previous finding that petitioner was incompetent to make decisions in his case. *Id.* at 914 ("[Petitioner's] habeas attorneys provided reasonably effective representation, even if their efforts were sometimes imperfect. The

investigation into [petitioner's] competence was adequate, given the available facts.").

Mullis is on all fours here. Just as in that case, Tabler "endured his entire trial without being found legally incompetent by the court," and the same judge who presided over the trial also presided over the competency hearing. *Id.* at 913. It was entirely reasonable, then, for Tabler's habeas counsel to "merely acquiesce[] to [Tabler's] wishes in light of a court-appointed expert's finding that [Tabler] was competent—wishes that are permissible given that defendants need not pursue habeas relief at all." *Id.* at 914. Most importantly, Dr. Harrison, the psychologist hired to review Tabler's competency to waive further habeas proceedings, concluded that Tabler was "forensically competent to make decisions to suspend his automatic appeal."

Tabler argues that Dr. Harrison's two-page letter was not thorough enough to be reasonably relied upon by counsel. *Cf., e.g.*, *Mullis*, 70 F.4th at 912 (court-appointed psychiatrist provided "a twenty-page report" explaining why the petitioner "was competent to waive his right to habeas review"). But the *length* of Dr. Harrison's letter did not determine whether counsel was reasonable in relying on it. As shown by Dr. Harrison's follow-on eighteen-page neuropsychological report stemming from the same evaluation, Dr. Harrison was well aware "of the contours of [Tabler's] diagnoses and mental-health history." *Id.* at 913; *see also Roberts v. Dretke*, 381 F.3d 491, 499 (5th Cir. 2004) ("[I]t is clear from Dr. Arambula's report that the doctor was well aware of the fact that Roberts had previously had suicidal thoughts."). Given that Dr. Harrison had the full picture of Tabler's mental health, it was reasonable for habeas counsel not to challenge Dr. Harrison's conclusions as to Tabler's competency.

Tabler also argues habeas counsel should have been on "notice" that his waiver was suspect because they knew about his extensive history of mental challenges. We disagree. Even assuming counsel doubted Tabler's competency to waive habeas, they reasonably cured that suspicion by outsourcing the question to a mental health professional. And contrary to Tabler's assertion, given these circumstances, habeas counsel had no duty to continue searching for a psychologist to contradict Dr. Harrison's opinion. *See Mullis*, 70 F.4th at 913 (holding, though "the opinion of a court-appointed psychiatrist does not always exonerate counsel of any duty to investigate further," given similar circumstances to here, the petitioner's "habeas attorneys did not have a duty to investigate more than they did").

Finally, Tabler's attempt to tar his counsel's performance as "abandonment" also misses the mark. The paradigm abandonment case, *Maples*, is nothing like this one. *See Maples*, 565 U.S. 266. Maples's attorneys left their law firm without informing Maples, and no other attorney stepped in to represent him. *Id.* at 283–84, 274. At the time of the procedural default, then, Maples had no way of knowing his attorneys were no longer representing him. *Id.* at 289.

The conduct of Tabler's habeas counsel is worlds away from the abandonment in *Maples*. Tabler's lawyers hired an investigator, a mitigation specialist, and a psychologist for a neuropsychological evaluation. They also attended the competency hearing and respected Tabler's desire to waive further proceedings. And although Tabler was technically unrepresented when his state habeas filing date expired in November 2008, he had ample notice that he would be proceeding without counsel. *Contra id.* at 281 (holding abandonment excuses default "when an attorney abandons his client *without notice*" (emphasis added)). Counsel informed Tabler before the competency hearing that he would not be arguing for or against Tabler's decision to waive further proceedings. Moreover, Tabler agreed that he did

not "want to continue [his] appeals after [his] direct appeal has concluded," he understood his attorneys had "time constraints" for filing a state writ of habeas corpus, and yet he stated, "There's nothing really more [that] needs to be said. I thanked [my attorneys] for what they did. I'm ready to go. Let's get this done." Even after this, his habeas counsel agreed to be available on standby and to remain as his lawyer, even if not formally because he was not filing a state habeas petition. In short, there was no abandonment.

C.

Tabler separately contends that his habeas attorneys performed deficiently by not giving the state judge all pertinent information about his mental health. We need not decide whether the attorneys were deficient in this regard because Tabler has not shown any prejudice, thus failing *Strickland* prong two. 466 U.S. at 687.

Tabler asserts that, if counsel had given the state judge Dr. Harrison's eighteen-page report containing the results of his neuropsychological examination, the judge would not have found him competent to waive further habeas proceedings. Although the report addressed issues separate from Tabler's competency, Tabler argues the report nonetheless contained information relevant to whether he could rationally choose among options. The federal district court rejected these arguments. It found that, even if counsel had provided the state court with Dr. Harrison's full report, there is no substantial likelihood that the court would have found Tabler incompetent to waive habeas. We agree with the district court.

Prejudice under *Strickland* means "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694; *see also Harrington*, 562

U.S. at 112 ("The likelihood of a different result must be substantial, not just conceivable.").

Dr. Harrison's report depicted a "deep and severe constellation of mental illnesses described on Axis I [that] have been disabling and debilitating for [Tabler] since at least early adolescence and have never been adequately managed from a medical or psychological standpoint." The report also identified "rapid-cycling mood destabilization" in Tabler, "with strong evidence of Bipolar Disorder, Type I." Had the state court seen this report—along with other convincing evidence that Tabler's waiver was driven by "severe mental illness"—Tabler argues it is probable that the court would not have found him competent to waive his state habeas rights. We disagree.

Tabler has not shown a substantial likelihood that the outcome would have been different had the state court seen this report. *See Harrington*, 562 U.S. at 112. Dr. Harrison was the same psychologist who authored a letter specifically opining that Tabler was mentally capable of waiving his state habeas rights. Furthermore, the judge at the competency hearing was the same judge that presided over Tabler's murder trial, where his attorneys presented evidence of mental incapacity similar to that provided in Dr. Harrison's eighteen-page report. *See Dennis ex rel. Butko v. Budge*, 378 F.3d 880, 894 (9th Cir. 2004) ("[J]udges who have an opportunity to observe and question a prisoner are often in the best position to judge competency, especially . . . where the judge has had more than one opportunity to observe and interact with the prisoner."). This evidence included multiple doctors testifying about Tabler's extensive history of mental challenges. Faced with that knowledge, in addition to its colloquy with Tabler at the competency hearing, the state court accepted Dr. Harrison's opinion and found Tabler competent to waive further proceedings.

Accordingly, we hold that Tabler has not shown a substantial likelihood that the full report from Dr. Harrison would have changed the outcome of the competency hearing. *See Strickland*, 466 U.S. at 694. Therefore, he cannot show cause under *Martinez* to overcome the procedural default of his IATC claim.

IV.

The district court's judgment denying Tabler's petition for writ of habeas corpus is AFFIRMED.