NOT FOR PUBLICATION

FILED

DEC 15 2022

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LYNETTE MCDANIELS, Petitioner-Appellant, v. JANELLE ESPINOZA, Warden, Respondent-Appellee.	No. 21-16629 D.C. No. 3:18-cv-03495-VC MEMORANDUM[*]

Appeal from the United States District Court
for the Northern District of California
Vince Chhabria, District Judge, Presiding

Submitted December 6, 2022[**]
San Francisco, California

Before: GRABER, WALLACH,[***] and WATFORD, Circuit Judges.

Petitioner Lynette McDaniels was convicted of six counts of robbery and four associated weapons charges. She claims her conviction should be overturned

[*] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

[**] The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

[***] The Honorable Evan J. Wallach, United States Circuit Judge for the U.S. Court of Appeals for the Federal Circuit, sitting by designation.

because of ineffective assistance of counsel due to defense counsel's failure to seek a final ruling on the admissibility of potentially exculpatory third-party DNA evidence collected from bait money left behind at one of the robberies. The California Superior Court and the district court both denied Petitioner's habeas petition for failure to demonstrate prejudice. Petitioner timely seeks our review. We deny the petition for the same reason.

The district court determined that the California Superior Court's finding that "[t]here is neither direct nor circumstantial evidence in the record . . . that the robber ever touched the bait money during the robbery" was unreasonable and therefore reviewed Petitioner's claim *de novo*. Respondent contends that this statement does not justify deviating from the typical "highly deferential standard for evaluating state-court [habeas] rulings." *Lindh v. Murphy*, 521 U.S. 320, 333 n.7 (1997). Even if we assume that *de novo* review was proper,[1] Petitioner still fails to show prejudice.

First, the trial judge likely would not have admitted the evidence had defense counsel pressed for a final ruling, because Ms. Kakoui's testimony did not "fill in

[1] The district court reviewed the entire ineffective assistance of counsel claim *de novo* based on its determination that a single factual finding by the state court was incorrect. However, only an unreasonable application of federal law by the state court can trigger authority under AEDPA for the district court to conduct a *de novo* review of the state court's legal determinations. 28 U.S.C. § 2254(d)(1); *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007).

the gaps" regarding necessary foundation as to its relevance for exculpatory purposes, as defense counsel had promised at the pretrial hearing. Ms. Kakoui did not even see the robber touch the bait money, much less address the trial judge's foundational questions surrounding how the bait money was structured and handled prior to its use. Second, even if admitted, the third-party DNA evidence would not have created a substantial likelihood of affecting the outcome in the case, *see Harrington v. Richter*, 562 U.S. 86, 111–12 (2011), given the strength of the evidence against Petitioner and the speculative nature of the DNA evidence. Given this record, any error by the district court was harmless.

PETITION DENIED.