IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

DIWONE WALLACE,

Petitioner,

v. **No. 3:14-cv-488-DRH-CJP**

MICHAEL MELVIN,

Respondent.

MEMORANDUM and ORDER

HERNDON, District Judge:

In 2001, a jury in St. Clair County, Illinois, convicted Diwone Wallace of the first degree murders of Tina Jackson and Montez Wilson. He was sentenced to natural life imprisonment. He filed a petition for habeas relief pursuant to 28 U.S.C. §2254 (Doc. 1), raising the following grounds:

1. The admission of statements made by victim Wilson deprived him of a fair trial.

2. Trial counsel was ineffective in failing to call witnesses Feron Stanley, Barbara Hunter, and Mario Fulghum, who would have discredited the state's two key witnesses.

3. Trial counsel was ineffective in failing to call his uncle, Calvery Brown, as an additional alibi witness.

4. Appellate counsel was ineffective in failing to argue that trial counsel failed to call Feron Stanley as a witness.

Relevant Facts

This summary of the facts is derived from the detailed description by the Appellate Court of Illinois, Fifth District, in its Rule 23 Orders affirming petitioner's conviction on direct appeal and affirming the denial of his postconviction petition. Copies of those Orders are attached to Doc. 11 as Exhibits 1 and 6.[1] The state court's factual findings are presumed to be correct unless rebutted by clear and convincing evidence, which petitioner has not done. 28 U.S.C. §2254(e).

Five men entered the home of Tina Jackson and Dwayne Wilson during the early morning hours of December 5, 1999. Jackson and Wilson were shot at close range with a shotgun. Defendant and four other men were charged with first-degree murder and tried separately. A sixth man, Terrance Luster, plead guilty to home invasion under an agreement whereby he would testify against the other five men and the state would request a sentence of seven years on the home invasion charge.

Terrance Luster testified that, at about 2:30 a.m. on December 5, 1999, five men, including petitioner, came to his home and asked to use his walkie-talkies. Luster accompanied the men to the victims' home and acted as lookout. One of the men kicked in the door, and the five, excluding Luster, went in. After about ten minutes, Luster called one of the other men on the walkie-talkie, and was told to bring a bag from the porch to the door. As he approached the house, he heard

[1] The Court uses the document, exhibit and page numbers assigned by the CM/ECF system. All exhibits referred to are attached to Doc. 11.

a female scream and a shotgun blast. When he got to the door, he saw petitioner pointing a sawed-off shotgun at Montez Wilson. Wilson turned as if to run, and petitioner shot him.

Tina Jackson died instantly from a shotgun blast to the head. Wilson died later that day from a shotgun blast to his back.

Tina Jackson's brother, aged 12, was in the house at the time of the shooting. He ran to the nearby home of his mother, Trina Jackson. Trina Jackson and her sister Tiffany Jackson immediately went to Tina Jackson's house. Tiffany Jackson entered first. Her eyes met the eyes of Montez Wilson, and Wilson said, "Diwone Smith." Trina Jackson then entered the house. She asked Wilson what happened, and Wilson replied, "Diwone Smith shot me." When a police officer arrived, Trina Jackson heard Wilson tell the officer that Diwone Smith shot him. As Wilson was being carried from the home on a stretcher, his sister Shirley Collins, heard him say, "Diwone shot me." The state presented evidence that petitioner Diwone Wallace was also known as Diwone Smith.

Petitioner testified at his trial. He testified that he was at his grandmother's house at the time of the murders. He said that he was there all evening the evening before the murders, except that he left at around 7:00 or 8:00 in the evening to buy cigarettes and a snack for his son. His son was at the home of petitioner's mother that night. Petitioner took the snack to his mother's house. After about 40 minutes, he returned to his grandmother's house, where he stayed

all night. His grandmother, Victoria Wallace, and his aunt, Brenda Brown, testified that petitioner was at Victoria Wallace's house all night, sleeping on the sofa.

Other facts will be discussed as necessary in the analysis of petitioner's arguments.

Appeal and Postconviction Petition

On direct appeal, Wallace raised the following points:

1. The admission of the hearsay statements of Montez Wilson that petitioner shot him denied him a fair trial.

2. Trial counsel was ineffective in failing to introduce as substantive evidence the prior inconsistent statements of witness Akhenaton Wallace.

3. Trial counsel was ineffective in failing to call Feron Stanley and Barbara Hunter as witnesses.

Ex. 2.

After his conviction was affirmed, petitioner, through counsel, filed a Petition for Leave to Appeal which raised only the first point regarding the admission of Montez Wilson's statements. Ex. 5. The Supreme Court denied the PLA on October 6, 2004. *People v. Wallace*, 823 N.E.2d 611 (Table) (Ill. 2004).

In September 2004, petitioner filed a pro se postconviction petition which raised a number of issues. Counsel was appointed to represent him. Counsel filed three amended petitions and a supplement to the third amended petition. As is relevant here, the third amended petition alleged that trial counsel was ineffective in failing to call Feron Stanley, Barbara Hunter, Mario Fulghum and

Calvery Brown as witnesses. Ex. 21, pp. 18-24. After holding an evidentiary hearing, Ex. 20, the trial court denied the petition.

On appeal, petitioner, through counsel, argued only that trial counsel was ineffective in failing to call Calvery Brown as an additional alibi witness. Ex. 7. Petitioner filed a pro se motion for leave to file a supplemental brief and a pro se supplemental brief in which he argued that trial counsel was ineffective for failing to call Feron Stanley, Barbara Hunter and Marion Fulghum as witnesses. The state moved to strike the pro se pleadings because petitioner was represented by counsel. The Appellate Court granted the motion to strike. Ex. 10-13.

After the Appellate Court affirmed the denial of the postconviction petition, Ex. 6, petitioner filed a pro se petition for leave to appeal arguing that trial counsel had been ineffective in failing to call Feron Stanley, Barbara Hunter, Marion Fulghum and Calvery Brown as witnesses, and that appellate counsel was ineffective for failing to raise trial counsel's failure to call Feron Stanley. Ex. 14.

The Supreme Court denied the PLA on January 29, 2014. *People v. Wallace*, 3 N.E.3d 801 (Table) (Ill. 2014).

Law Applicable to §2254 Petition

This habeas petition is subject to the provisions of the Antiterrorism and Effective Death Penalty Act, known as the AEDPA. "The Antiterrorism and Effective Death Penalty Act of 1996 modified a federal habeas court's role in reviewing state prisoner applications in order to prevent federal habeas 'retrials' and to ensure that state-court convictions are given effect to the extent possible

under law." *Bell v. Cone*, 122 S.Ct. 1843, 1849 (2002).

Habeas is *not* yet another round of appellate review. 28 U.S.C. §2254(d) restricts habeas relief to cases wherein the state court determination "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States" or "a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

A judgment is "contrary to" Supreme Court precedent if the state court "contradicts the governing law set forth in [Supreme Court] cases." *Coleman v. Hardy*, 690 F.3d 811, 814 (7th Cir. 2012), citing *Williams v. Taylor*, 120 S. Ct. 1495, (2000). A state court decision is an "unreasonable application of" clearly established law "if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* The scope of federal review of state court decisions on habeas is "strictly limited" by 28 U.S.C. § 2254(d)(1). *Jackson v. Frank*, 348 F.3d 658, 661 (7th Cir. 2003). The unreasonable application standard is "a difficult standard to meet." *Id.*, at 662. Even an incorrect or erroneous application of the federal precedent will not justify habeas relief; rather, the state court application must be "something like lying well outside the boundaries of permissible differences of opinion." *Id.*, at 662 (internal citation omitted).

Timeliness, Exhaustion and Procedural Default

Respondent concedes that the petition was timely filed and that petitioner has exhausted state remedies. He contends that some of petitioner's grounds are procedurally defaulted.

A habeas petitioner must clear two procedural hurdles before the Court may reach the merits of his habeas corpus petition: exhaustion of remedies and procedural default. *Rodriguez v. Peters*, 63 F.3d 546, 555 (7th Cir. 1995). Before seeking habeas relief, a petitioner is required to bring his claim(s) through "one complete round of the State's established appellate review process" because "the exhaustion doctrine is designed to give the state courts a full and fair opportunity to resolve federal constitutional claims before those claims are presented to the federal courts." *O'Sullivan v. Boerckel*, 526 U.S. 838, 845, 119 S.Ct. 1728 (1999), see also 28 U.S.C. §2254(c). Under the Illinois two-tiered appeals process, a habeas petitioner must fully present his claims not only to an intermediate appellate court, but also to the Illinois Supreme Court, which offers discretionary review in cases such as this one. *Id.* at 843-846.

Analysis

1. Procedurally Defaulted Claims (Grounds 2 & 4)

For his second ground, petitioner argues that trial counsel was ineffective in failing to call witnesses Feron Stanley, Barbara Hunter, and Mario Fulghum. That ground is procedurally defaulted because it was rejected by the state court on independent and adequate state grounds.

In order to preserve a claim of ineffective assistance for habeas review, petitioner must present "the specific acts or omissions of counsel" that give rise to the claim. *Johnson v. Hulett*, 574 F.3d 428, 432 (7th Cir. 2009). A habeas petitioner is required to present both the facts and the law on which he relies, and "failure to alert the state court to a complaint about one aspect of counsel's assistance will lead to a procedural default." *Stevens v. McBride*, 489 F.3d 883, 894 (7th Cir. 2007). Thus, petitioner must have presented his claim regarding the failure to call a specific witness for one full round of state court consideration before this Court can consider it.

Petitioner argued ineffectiveness in failing to call Feron Stanley and Barbara Hunter on direct appeal, but did not include that point in his direct appeal PLA. He raised the claim as to all three witnesses in his postconviction petition, but did not raise it in his counseled brief on postconviction appeal. Petitioner did file a pro se brief raising the issue, but the Appellate Court granted the state's motion to strike the pro se brief. The motion argued that the filing of the pro se brief violated the rule against "hybrid representation," i.e., that a party who is represented by counsel has no right to also file pro se pleadings. Ex. 12.

In his fourth ground, petitioner argues that appellate counsel was ineffective in failing to challenge trial counsel's failure to call Feron Stanley. Again, this claim was not presented in counsel's brief on postconviction appeal. It was raised only in the pro se postconviction appeal brief which was stricken. The claim is

also contradicted by the record in that appellate counsel argued on direct appeal that trial counsel should have called Feron Stanley. Ex. 2, p. 2.

The Illinois rule against hybrid representation constitutes an independent and adequate state ground. *Clemons v. Pfister*, 845 F.3d 816, 820 (7th Cir. 2017). Therefore, the claims set forth in grounds two and four are procedurally defaulted.

Petitioner's defaulted arguments cannot be considered here unless petitioner demonstrates cause for his default and prejudice, or that failure to consider his arguments will result in a miscarriage of justice. *Perruquet v. Briley*, 390 F.3d 505, 514-515 (7th Cir. 2004). He has not attempted to show cause and prejudice, but he does argue miscarriage of justice. See, Reply, Doc. 15. However, in order to show that a miscarriage of justice is likely to result, he must meet the demanding *Schlup* standard for a claim of actual innocence, which he has not done. *McQuiggin v. Perkins*, 133 S. Ct. 1924, 1931 (2013).

2. Admission of Montez Wilson's Hearsay Statements (Ground 1)

Witnesses Trina Jackson, Tiffany Jackson, and Shirley Collins testified that, at the scene of the shooting, victim Montez Wilson said that "Diwone" or "Diwone Smith" shot him. The trial court admitted the hearsay statements as spontaneous declarations or excited utterances.

On habeas review, the federal court assesses the decision of the last state court to rule on the merits of the claim. *Simpson v. Battaglia*, 458 F.3d 585, 592 (7th Cir. 2006). Here, that is the Appellate Court's decision on direct appeal.

Pursuant to 28 U.S.C. §2254(d)(1), petitioner is entitled to habeas relief only if he establishes that the state court's decision was contrary to or an unreasonable application of clearly established federal law, as determined by the Supreme Court. The analysis under 28 U.S.C. § 2254(d) looks to the law that was clearly established by Supreme Court precedent at the time of the state court's decision. *Wiggins v. Smith*, 123 S. Ct. 2527, 2534 (2003).

The Appellate Court affirmed on the basis of state law regarding admissibility of hearsay evidence. Ex. 1, pp. 2-6. The state court also correctly noted that the then-recent case of *Crawford v. Washington*, 124 S.Ct. 1354 (2004), held that, even though hearsay evidence may be admissible under state evidentiary rules, if the out-of-court statements qualify as "testimonial," they may not be admitted against a defendant unless the defendant previously had a chance to cross examine the declarant and the declarant is unavailable. Thus, the state correctly identified the applicable Supreme Court precedent and accurately summarized its holding.

Petitioner does not advance any particular argument as to why the state court's application of *Crawford* was unreasonable. Rather, he argues that Montez Wilson's statements did not qualify as spontaneous declarations or excited utterances. Doc. 1, pp. 8-10. However, that is a state law claim that cannot be considered here. *Richardson v. Lemke*, 745 F.3d 258, 275 (7th Cir. 2014); *Brown v. Watters*, 599 F.3d 602, 616 (7th Cir. 2010).

Despite petitioner's failure to advance an argument regarding the state court's application of *Crawford*, this Court has considered the issue and concludes that the state court reasonably applied Supreme Court precedent. The state court noted that *Crawford* did not give an exhaustive definition of "testimonial," but did give some guidance. Applying the Supreme Court's guidance, the state court concluded that "the out-of-court statements of the victim here, made to friends and relatives while the victim lay mortally wounded at the scene only minutes after the shooting, are not in the nature of 'testimonial' statements." See, Ex. 1, pp. 6-7.

The state court's application of *Crawford* was certainly within the range of acceptable opinion. Again, the standard for demonstrating that a state court unreasonably applied Supreme Court precedent is demanding; "a petitioner's claim fails if 'fairminded jurists could disagree on the correctness of the state court's decision.'" *Johnson v. Jaimet*, ___ F.3d. ___, 2017 WL 1174399, at *4 (7th Cir. Mar. 30, 2017).

Later cases confirm that the state court correctly applied *Crawford*. See, e.g., *Ohio v. Clark*, 135 S. Ct. 2173 (2015)(statement by child to his teacher identifying defendant as person who hurt him not testimonial); *Michigan v. Bryant*, 131 S. Ct. 1143 (2011)(statement by mortally wounded victim to police identifying his assailant not testimonial); *Davis v. Washington*, 126 S. Ct. 2266 (2006)(statements to 911 operator not testimonial, but victim's statements in affidavit given to police were testimonial). Because the state court reasonably

applied Supreme Court precedent, petitioner is not entitled to habeas relief on ground 1.

3. Ineffective Assistance for Failure to Call Calvery Brown (Ground 3)

Petitioner presented his claim that trial counsel was ineffective in failing to call his uncle, Calvery Brown, as an additional alibi witness in his postconviction petition. The trial court held an evidentiary hearing at which Brown and trial counsel testified.

Calvery Brown testified that he was petitioner's uncle and he lived at the home of petitioner's grandmother in December 1999. He said he was at that home on the evening of December 4 through the morning of December 5, 1999, i.e., at the time of the murders. He testified that he was up all night sitting in his friend's car in the driveway, and that Diwone Wallace was in the house all night. Calvery Brown testified that he went in and out of the house during the evening of December 4 and the early morning of December 5, and petitioner was there the whole time, lying on the couch with his (petitioner's) son. Calvery Brown went back in the house for good at around 3:30 or 4:00 a.m., and went to sleep at about 6:00 or 6:30 a.m. Ex. 20, pp. 14-19.

Petitioner was represented at trial by William Stiehl, Jr. Mr. Stiehl testified that he called a number of family witnesses to establish petitioner's alibi. He did not specifically recall petitioner's family saying that they had more people to testify that petitioner was at home at the time of the murder. He said that, in general, "If you call more than two or three witnesses to say the same thing then

in my experience the jury tends to not pay attention. The idea is, if you're presenting a witness, to have them impart their information to the jury, but not to be redundant." Ex. 20, pp. 64-65. He did not recall petitioner asking him to call more alibi witnesses, or recall the name Calvery Brown. Ex. 20, p. 70.

A claim of ineffective assistance of counsel must be analyzed under *Strickland v. Washington*, 104 S.Ct. 2052 (1984). Analysis under *Strickland* and on habeas review under §2254 are both highly deferential. Where, as here, both apply, the review is "doubly" deferential. *Harrington v. Richter*, 131 S.Ct. 770, 788 (2011).

In order to show ineffective assistance of counsel under *Strickland*, a petitioner must demonstrate (1) that counsel's performance "fell below an objective standard of reasonableness" ("the performance prong"), and (2) "that the deficient performance prejudiced the defense" ("the prejudice prong"). *Strickland*, 104 S. Ct. 2066-2067. In order to be entitled to habeas relief, the petitioner must satisfy *both* prongs of the *Strickland* analysis. However, there is no mandatory order for the analysis, and a habeas court is not required to address both prongs if the petitioner has failed to make a sufficient showing on one. *Id*. at 2069.

With respect to prejudice, a petitioner must demonstrate "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." *Strickland*, 104 S. Ct. at

2068. "The likelihood of a different result must be substantial, not just conceivable." *Harrington*, 131 S. Ct. at 792. Ultimately, "[t]he focus of the *Strickland* test for prejudice … is not simply whether the outcome would have been different; rather, counsel's shortcomings must render the proceeding fundamentally unfair or unreliable." *Gray v. Hardy*, 598 F.3d 324, 331 (7th Cir. 2010).

The last state court to rule on the merits of this claim was the Appellate Court on appeal from the denial of the postconviction petition. Ex. 6. The Appellate Court correctly identified *Strickland* as the applicable Supreme Court precedent regarding claims of ineffective assistance, and recognized that the *Strickland* two-pronged test requires a showing of both deficient performance by counsel and resulting prejudice. The Appellate Court concluded that the failure to call Calvery Brown was not prejudicial because Brown's testimony would only have been cumulative to the testimony of his grandmother and his aunt that he had been at his grandmother's home during the relevant time.

This Court is mindful that "the bar for establishing the unreasonableness of a state court's application of *Strickland* 'is a high one, and only a clear error in applying *Strickland* will support a writ of habeas corpus.'" *Jones v. Brown*, 756 F.3d 1000, 1007 (7th Cir. 2014), citing *Allen v. Chandler*, 555 F.3d 596, 600 (7th Cir. 2009). Petitioner does not come close to clearing the bar here.

In view of the fact that two witnesses had corroborated petitioner's alibi, the state court reasonably concluded that counsel's failure to call Calvery Brown as an

additional alibi witness was not prejudicial. Besides the fact that Brown's testimony would only have been cumulative, the state court noted that the evidence against petitioner was not closely balanced and that it was unlikely that the jury would have expected Brown to testify based on petitioner's mention of his name during his testimony.

This Court also notes that Calvery Brown's testimony at the evidentiary hearing contradicted petitioner's trial testimony. According to Brown, petitioner was babysitting his (petitioner's) son at the home of petitioner's grandmother during the time in question. Ex. 20, pp. 17-18; 23. However, at trial, petitioner testified that he had one son, and that his son was at his (petitioner's) mother's house that night, not with him at his grandmother's. Ex. 18, pp. 6-7. This discrepancy suggests that Calvery Brown was, at best, mistaken as to which evening and night were in issue.

"It is settled that a federal habeas court may overturn a state court's application of federal law only if it is so erroneous that 'there is no possibility fair-minded jurists could disagree that the state court's decision conflicts with this Court's precedents.'" *Nevada v. Jackson*, 133 S. Ct. 1990, 1992 (2013), citing *Harrington v. Richter*, 131 S. Ct. 770, 786 (2011). Here, the state court determined that the failure to call Calvery Brown was not prejudicial. That decision is well within the boundaries of permissible differences of opinion. *Jackson v. Frank*, 348 F.3d 658, 662 (7th Cir. 2003).

Certificate of Appealability

Pursuant to Rule 11 of the Rules Governing Section 2254 Cases, this Court must "issue or deny a certificate of appealability when it enters a final order adverse to the applicant." A certificate should be issued only where the petitioner "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(c)(2).

In order for a certificate of appealability to issue, petitioner must show that "reasonable jurists" would find this Court's "assessment of the constitutional claims debatable or wrong." See, *Slack v. McDaniel*, 120 S.Ct. 1595, 1604 (2000). Where a petition is dismissed on procedural grounds without reaching the underlying constitutional issue, the petitioner must show both that reasonable jurists would "find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, *Ibid.*

Here, no reasonable jurist would find it debatable whether this Court's rulings on procedural default or on the substantive issues were correct. Accordingly, the Court denies a certificate of appealability.

Conclusion

Diwone Wallace's petition for habeas relief under 28 U.S.C. §2254 **(Doc. 1)** is **DENIED**. This cause of action is **DISMISSED WITH PREJUDICE**. The Clerk of Court shall enter judgment accordingly.

IT IS SO ORDERED.

Signed this 6th day of April, 2017.

Digitally signed by Judge David R. Herndon
Date: 2017.04.06 13:28:00 -05'00'

UNITED STATES DISTRICT JUDGE

Notice

If petitioner wishes to appeal the dismissal or denial of his petition, he may file a notice of appeal with this court within thirty days of the entry of judgment. Fed. R. App. P. 4(a)(1)(A). A motion for leave to appeal in forma pauperis should set forth the issues petitioner plans to present on appeal. See Fed. R. App. P. 24(a)(1)(C).

A certificate of appealability is required to appeal from the dismissal or denial of a §2254 petition. Rule 11 of the Rules Governing §2254 Cases requires that, when entering a final order adverse to the petitioner, the district court must issue or deny a certificate of appealability. Here, the Court has denied a certificate. In order to appeal the dismissal or denial of his petition, petitioner must obtain a certificate of appealability from the court of appeals.

Petitioner cannot appeal from this Court's denial of a certificate of appealability. Further, a motion to reconsider the denial does not extend the time for appeal. See, Rule 11(a).

Petitioner is further advised that a motion to alter or amend the judgment filed pursuant to Federal Rule of Civil Procedure 59(e) must be filed no later than 28 days after the entry of the judgment—a deadline that cannot be extended. A proper and timely Rule 59(e) motion may toll the thirty day appeal deadline. Other motions, including a Rule 60 motion for relief from a final judgment, order, or proceeding, do not toll the deadline for an appeal.