ALAN WILSON
ATTORNEY GENERAL

RECEIVED
Oct 08 2021
S.C. SUPREME COURT

October 8, 2021

The Honorable Patricia A. Howard
Clerk of the South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211
(via supctfilings@sccourts.org)

Re: Michael Elders v. State of South Carolina
Appellate Case No. 2020-000891

Dear Ms. Howard:

The above-referenced post-conviction relief appeal is set for oral argument on October 13, 2021, at 9:30 a.m during the upcoming term of Court. Pursuant to Rule 208(b)(7), SCACR, the State seeks to submit the following cases as supplemental authority in this matter based on the belief that the citations will be relevant and helpful to the Court in addressing the issues raised in the appeal: *Dunn v. Reeves*, 594 U.S. ___, 141 S. Ct. 2405 (2021) and *State v. Makins*, 433 S.C. 494, 860 S.E.2d 666 (2021).

Sincerely,

s/LillianMeadows
LILLIAN L. MEADOWS
Assistant Attorney General
SC Bar No. 103665

LLM/

cc: Taylor D. Gilliam, Esquire (via email)

Enclosures:
Dunn v. Reeves, 594 U.S. ___, 141 S. Ct. 2405 (2021)
State v. Makins, 433 S.C. 494, 860 S.E.2d 666 (2021)

141 S.Ct. 2405
Supreme Court of the United States.

Jefferson S. DUNN, Commissioner, Alabama Department of Corrections
v.
Matthew REEVES

No. 20-1084
|
Decided July 2, 2021

Synopsis

Background: After affirmance, 807 So.2d 18, of state prisoner's murder conviction and death sentence, and affirmance, 226 So.3d 711, of denial of state postconviction relief, prisoner petitioned for federal habeas relief. The United States District Court for the Southern District of Alabama, No. 1:17-cv-00061-KD-MU, Kristi K. DuBose, Chief Judge, denied the petition. Prisoner appealed. The United States Court of Appeals for the Eleventh Circuit, 836 Fed.Appx. 733, affirmed in part and reversed in part.

Granting certiorari, the Supreme Court held that state postconviction counsel reasonably determined that counsel did not perform deficiently, as element of ineffective assistance of counsel, in failing to hire an expert to develop penalty-phrase mitigation evidence of intellectual disability, after receiving funding to retain an expert.

Certiorari granted; reversed and remanded.

Justice Breyer dissented.

Justice Sotomayor filed a dissenting opinion, in which Justice Kagan joined.

Procedural Posture(s): Appellate Review; Post-Conviction Review.

Opinion

***2407** Per Curiam.

Willie Johnson towed Matthew Reeves' broken-down car back to the city after finding Reeves stranded on an Alabama dirt road. In payment for this act of kindness, Reeves murdered Johnson, stole his money, and mocked his dying spasms. Years after being convicted of murder and sentenced to death, Reeves sought state postconviction relief, arguing that his trial counsel should have hired an expert to develop sentencing-phase mitigation evidence of intellectual disability. But despite having the burden to rebut the strong presumption that his attorneys made a legitimate strategic choice, Reeves did not call *any* of them to testify. The Alabama Court of Criminal Appeals denied relief, stressing that lack of evidence about counsel's decisions impeded Reeves' efforts to prove that they acted unreasonably. *Reeves v. State*, 226 So.3d 711, 750–751 (2016).

On federal habeas review, the Eleventh Circuit held that this analysis was not only wrong, but indefensible. In an unpublished, *per curiam* opinion that drew heavily on a dissent from denial of certiorari, the Eleventh Circuit reinterpreted the Alabama court's lengthy opinion as imposing a simple *per se* prohibition on relief in all cases where a prisoner fails to

question his counsel. *Reeves v. Commissioner, Ala. Dept. of Corrections*, 836 Fed.Appx. 733, 744–747 (2020). It was the Eleventh Circuit, however, that went astray in its "readiness to attribute error." *Woodford v. Visciotti*, 537 U.S. 19, 24, 123 S.Ct. 357, 154 L.Ed.2d 279 (2002) (*per curiam*). Federal habeas courts must defer to reasonable state-court decisions, 28 U.S.C. § 2254(d), and the Alabama court's treatment of the spotty record in this case was consistent with this Court's recognition that "the absence of evidence cannot overcome the strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance." *Burt v. Titlow*, 571 U.S. 12, 23, 134 S.Ct. 10, 187 L.Ed.2d 348 (2013) (internal quotation marks and brackets omitted).

I

In November 1996, Reeves and some friends decided to "go out looking for some robberies." *Reeves*, 226 So.3d at 719 (internal quotation marks omitted). The group's initial target was a drug dealer in a nearby town, but their car broke down and left them stranded on the side of the road. A few hours later, however, Johnson happened to drive by in his truck and offered to tow the disabled vehicle to Reeves' house.

After they arrived, Reeves, who was riding in the bed of the truck, stuck a shotgun through the rear window of the cab and shot Johnson in the neck. As Johnson sat slumped in the driver's seat "bleeding heavily and making gagging noises," Reeves directed the rest of the group to "go through Johnson's pockets to get his money." *Id.*, at 720 (internal quotation marks omitted). Throughout the rest of the ***2408** day, Reeves repeatedly "brag[ged] about having shot Johnson," boasting that the murder "would earn him a 'teardrop,' a gang tattoo acquired for killing someone." *Ibid.* (internal quotation marks omitted). And at a party that night, Reeves invented a dance in which he "pretend[ed] to pump a shotgun" and "jerk[ed] his body around in a manner mocking the way that Willie Johnson had died." *Ibid.* (brackets and internal quotation marks omitted).

Alabama charged Reeves with murder and appointed counsel for him. His attorneys took several steps to develop mitigating evidence, including exploring the possibility that Reeves was intellectually disabled. For example, they obtained extensive records of Reeves' educational, medical, and correctional history. Counsel also requested funding to hire a neuropsychologist, Dr. John Goff, to evaluate Reeves and prepare mitigation evidence. And when the trial court initially rejected that request, counsel successfully sought reconsideration.

After the court granted funding, Reeves' attorneys managed to acquire additional mental-health records from the State, including documents related to a pretrial competency evaluation that featured a partial administration of an IQ test.[1] The totality of the evidence reflected that Reeves had a troubled childhood, suffered from numerous behavioral difficulties, and was within the "borderline" range of intelligence. While in school—before being expelled for violence and misbehavior—he had been referred to special services for emotional conflict and behavioral issues. But

Reeves' records also showed that he had previously been *denied* special educational services for intellectual disability. Counsel also learned that Reeves had attended classes and earned certificates in welding, masonry, and automotive mechanics. And the psychologist who initially evaluated Reeves later opined that he was not intellectually disabled.

[1] Around the same time, one of Reeves' attorneys withdrew from the case, explaining that Reeves "ha[d] been combative, argumentative[,] and ha[d] totally refused to assist [the attorney] in any manner." Electronic Case Filing in No. 1:17–cv–00061 (SD Ala.) (ECF), Doc. 23–1, pp. 3, 78. Another attorney replaced him.

At some point before trial, Reeves' attorneys apparently elected to pursue other mitigation strategies instead of hiring Dr. Goff. The record does not reveal the exact reason for this decision—likely because Reeves did not ask them to testify. The record does show, however, that counsel presented a holistic mitigation case. For example, counsel called several witnesses at sentencing—including Reeves' mother and the psychologist who performed the competency evaluation—and elicited testimony about Reeves' turbulent childhood, neglectful family, and educational difficulties. The jury, however, recommended a death sentence.

Reeves later sought postconviction relief in state court, alleging almost 20 theories of error. Relevant here, he asserted that he was categorically exempt from execution by reason of intellectual disability, see *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), or at the very least that counsel should have hired Dr. Goff to develop mitigation along those lines for use at sentencing, see *Porter v. McCollum*, 558 U.S. 30, 130 S.Ct. 447, 175 L.Ed.2d 398 (2009) (*per curiam*). At a 2-day hearing in state court, Reeves called two experts, including Dr. Goff. The doctor concluded that Reeves was intellectually disabled, explaining that the so-called Flynn Effect—a controversial theory involving the inflation of IQ scores over time—required adjusting Reeves' score ***2409** downward into the 60s.[2] Dr. Goff also cited a number of behavioral assessments that supposedly showed Reeves' shortcomings in adaptive functioning. For its part, the State offered the expert testimony of Dr. King, who administered his own evaluation and concluded that Reeves was not intellectually disabled. In fact, Dr. King pointed out that Reeves had a leadership role in a drug-dealing group and earned as much as $2,000 a week.

[2] According to some proponents of this theory, the Flynn Effect posits that IQ scores increase "by approximately 0.3 points per year," which in turn "requires that the IQ test be 'normed' periodically so that the mean score on the test stays the same" and "that 0.3 points be deducted from [a] full-scale IQ score achieved on an IQ test for each year since the test was last normed." *Reeves v. State*, 226 So.3d 711, 730 (Ala. Crim. App. 2016).

Despite Reeves' focus on his attorney's performance, he did not give them the opportunity to explain their actions. Although all three of his lawyers apparently were alive

and available, Reeves did not call them to testify.

The trial court denied relief, and the Alabama Court of Criminal Appeals affirmed. First, it agreed that Reeves had failed to prove that he was actually intellectually disabled and thus exempt from execution. *Reeves*, 226 So.3d at 744. The court specifically addressed Dr. Goff's reliance on the Flynn Effect, reiterating that this approach "has not been accepted as scientifically valid by all courts" and was "not settled in the psychological community." *Id.*, at 739 (internal quotation marks omitted). In fact, even Dr. Goff had "admitted that he did not use the 'Flynn Effect' for over 20 years after it was first discovered." *Ibid.*

Second, the court rejected Reeves' claim that counsel should have hired an expert to develop mitigating evidence of intellectual disability. Stressing that an attorney's decision not to hire an expert is "typically [a] strategic decisio[n]" that will "not constitute per se deficient performance," the court looked to the record to assess the "reasoning behind counsel's actions." *Id.*, at 750, 751 (internal quotation marks omitted). In this case, the court observed, "the record [was] silent as to th[ose] reasons" "because Reeves failed to call his counsel to testify." *Id.*, at 751 (internal quotation marks omitted). Hence, he could not overcome the "presumption of effectiveness" that courts must afford to trial counsel. *Ibid.* (internal quotation marks omitted).

Reeves sought certiorari, which we denied over a dissent. *Reeves* v. *Alabama*, 583 U. S. ——, 138 S.Ct. 22, 199 L.Ed.2d 341 (2017) (opinion of SOTOMAYOR, J.). The dissent acknowledged that the "absence of counsel's testimony may make it more difficult for a defendant to meet his burden" of proving deficient performance, but still would have reversed and remanded because it understood the Alabama court to have applied "a categorical rule that counsel must testify in order for a petitioner to succeed on a federal constitutional ineffective-assistance-of-counsel claim." *Id.*, at ——, ——, 138 S.Ct., at 23, 26. Although the dissent cited no decision in which this Court reprimanded a state court for taking that approach, it reasoned that such a rule was contrary to decisions in which this Court had "found deficient performance *despite* [attorney] testimony, based on a review of the full record." *Id.*, at ——, 138 S.Ct., at 26. [3]

[3] We note that this dissent—unlike the Eleventh Circuit—considered the case before it entered the exceedingly deferential posture of federal habeas review. Moreover, the dissent did *not* conclude that Reeves was entitled to relief on the merits of his claim, but instead would have "remand[ed] so that the [Alabama court] could explain why, given the full factual record, Reeves' counsel's choices constituted reasonable performance." 583 U. S., at ——, 138 S.Ct., at 29.

***2410** Reeves next sought federal habeas review. The District Court denied relief, but the Eleventh Circuit reversed in part. Like every court before it, the Eleventh Circuit first rejected Reeves' claim that he was intellectually disabled. 836 Fed.Appx. at 741. But, it held that his lawyers were

constitutionally deficient for not developing more evidence of intellectual disability and that this failure might have changed the outcome of the trial.

In reaching that result, the Eleventh Circuit explained that it owed no deference to the "unreasonable" decision of the Alabama court. § 2254(d). Quoting at length from the earlier dissent from denial of certiorari, the panel reasoned that "a *per se* rule that the petitioner must present counsel's testimony" was clearly contrary to federal law. *Id.*, at 744–747. And, to demonstrate that the Alabama court had applied such a rule, the Eleventh Circuit excised a single statement from a lengthy block quote: " '[T]o overcome the strong presumption of effectiveness, a [state] petitioner must, at his evidentiary hearing, question trial counsel regarding his actions and reasoning.' " *Id.*, at 744 (emphasis deleted). The Eleventh Circuit then reasoned that the state court surely must have imposed this "categorical rule" because its opinion also said that Reeves' " 'failure to call his attorneys to testify was fatal to his claims.' " *Ibid.* (emphasis deleted; brackets omitted). But that quote was not quite complete; the original sentence reads, "*In this case*, Reeves's failure to call his attorneys to testify is fatal to his claims of ineffective assistance of counsel." *Reeves*, 226 So.3d at 749 (emphasis added).

II

This case presents a simple question: Did the Alabama court violate clearly established federal law when it rejected Reeves' claim that his attorneys should have hired an expert?

In answering this question, we owe deference to both Reeves' counsel *and* the state court. As to counsel, we have often explained that strategic decisions—including whether to hire an expert—are entitled to a "strong presumption" of reasonableness. *Harrington v. Richter*, 562 U.S. 86, 104, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011). Defense lawyers have "limited" time and resources, and so must choose from among " 'countless' " strategic options. *Id.*, at 106–107, 131 S.Ct. 770. Such decisions are particularly difficult because certain tactics carry the risk of "harm[ing] the defense" by undermining credibility with the jury or distracting from more important issues. *Id.*, at 108, 131 S.Ct. 770.

The burden of rebutting this presumption "rests squarely on the defendant," and "[i]t should go without saying that the absence of evidence cannot overcome [it]." *Titlow*, 571 U.S. at 22–23, 134 S.Ct. 10. In fact, even if there is reason to think that counsel's conduct "was far from exemplary," a court still may not grant relief if "[t]he record does not reveal" that counsel took an approach that no competent lawyer would have chosen. *Id.*, at 23–24, 134 S.Ct. 10.

This analysis is "doubly deferential" when, as here, a state court has decided that counsel performed adequately. *Id.*, at 15, 134 S.Ct. 10 (internal quotation marks omitted); see also *Sexton* v. *Beaudreaux*, 585 U. S. ——, —— – ——, 138 S.Ct. 2555, 2560-2561, 201 L.Ed.2d 986 (2018) (*per curiam*) (deference is "near its apex" in such cases). A federal court may grant habeas relief only if a state court ***2411** violated "*clearly established* Federal law, as determined by *the Supreme Court* of the United States." § 2254(d)(1) (emphasis added). This

"wide latitude" means that federal courts can correct only "extreme malfunctions in the state criminal justice syste[m]." *Richter*, 562 U.S. at 102, 106, 131 S.Ct. 770 (internal quotation marks omitted). And in reviewing the work of their peers, federal judges must begin with the "presumption that state courts know and follow the law." *Woodford*, 537 U.S. at 24, 123 S.Ct. 357. Or, in more concrete terms, a federal court may grant relief only if *every* " 'fairminded juris[t]' " would agree that *every* reasonable lawyer would have made a different decision. *Richter*, 562 U.S. at 101, 131 S.Ct. 770.

A straightforward application of these principles reveals the extent of the Eleventh Circuit's error. We start, as we must, with the case as it came to the Alabama court. Reeves had filed a 100-plus-page brief alleging manifold errors, including several theories of ineffective assistance of counsel. *Reeves*, 226 So.3d at 749–750, and n. 16. Many of these attacked basic strategic choices, including his current argument that counsel should have hired Dr. Goff to develop additional evidence of intellectual disability. Yet, despite Reeves' determination to find fault with his lawyers, he offered no testimony or other evidence from them.

That omission was particularly significant given the "range of possible reasons [Reeves'] counsel may have had for proceeding as they did." *Cullen v. Pinholster*, 563 U.S. 170, 196, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011) (internal quotation marks omitted). This is not a case in which a lawyer "failed to uncover and present *any* evidence of [Reeves'] mental health or mental impairment, [or] his family background." *Porter*, 558 U.S. at 40, 130 S.Ct. 447 (emphasis added). Counsel's initial enthusiasm to collect Reeves' records and obtain funding hardly indicates professional neglect and disinterest.

Rather, we simply do not know what information and considerations emerged as counsel reviewed the case and refined their strategy. The attorneys may very well have pored over the voluminous evidence in their possession—including those obtained *after* their funding request—and identified several reasons that a jury was unlikely to be persuaded by a claim of intellectual disability. After all, although Reeves' records suggested that his intelligence was below average, they also indicated that he was not intellectually disabled. *E.g.*, 226 So.3d at 729. Counsel might also have been concerned about the evidence of Reeves' history of violence, criminal past, and behavior problems, *ibid.*, and concluded that presenting these characteristics alongside a full-throated intellectual-disability argument would have convinced the jury that Reeves "was simply beyond rehabilitation," *Pinholster*, 563 U.S. at 201, 131 S.Ct. 1388. Or, counsel may have uncovered additional evidence confirming their concerns about an intellectual-disability strategy. Perhaps Reeves informed them, as he later did Dr. King, that he was savvy enough to earn thousands of dollars a week in a drug-dealing operation where he had a leadership role. 226 So.3d at 736.

Or, counsel may well have further investigated Dr. Goff and decided that his debatable methodologies would undermine credibility with a local jury—possibly a prescient choice given that *every single court* to consider the issue has rejected Reeves' claim of intellectual

disability. In fact, around the time that counsel were formulating their trial strategy, Dr. Goff was already performing questionable evaluations. See, *e.g.*, *King v. Apfel*, 2000 WL 284217, *2 (SD Ala., Feb. 29, 2000) (Dr. ***2412** Goff's 1996 evaluation of a Social Security claimant was "unsupported by the medical evidence," and "*everything else* in the record [was] counter to [his] extreme findings" (emphasis added)); *Small v. Apfel*, 2000 WL 1844727, *3, n. 5 (SD Ala., Oct. 17, 2000) ("[Dr.] Goff's [1998] conclusions regarding deficits in adaptive behavior are not only mere guesses ... but also suffer from a lack of support in the record"). It is not unreasonable for a lawyer to be concerned about overreaching.

Simply put, if the attorneys had been given the chance to testify, they might have pointed to information justifying the strategic decision to devote their time and efforts elsewhere. Yet, Reeves—possibly pursuing a strategy of his own—declined to put that testimonial evidence before the Alabama court. So given that the Alabama court was entitled to reject Reeves' claim if trial counsel had any "possible reaso[n] ... for proceeding as they did," *Pinholster*, 563 U.S. at 196, 131 S.Ct. 1388 (internal quotation marks omitted), it surely was not obliged to accept Reeves' blanket assertion on an incomplete evidentiary record that "[n]o reasonable strategy could support counsel's failure," ECF Doc. 23–29, at 81.

Rather than defer to this commonsense analysis, the Eleventh Circuit took a path that we have long foreclosed: "mischaracterization of the state-court opinion." *Woodford*, 537 U.S. at 22, 123 S.Ct. 357. As explained above, the Alabama court reasonably concluded that the incomplete evidentiary record—which was notably "silent as to the reasons trial counsel ... chose not to hire Dr. Goff or another neuropsychologist"—doomed Reeves' belated efforts to second-guess his attorneys. *Reeves*, 226 So.3d at 751. The Eleventh Circuit, however, recharacterized this case-specific analysis as a "categorical rule" that *any* prisoner will *always* lose if he fails to call and question "trial counsel regarding his or her actions and reasoning." 836 Fed.Appx. at 744 (emphasis deleted; internal quotation marks omitted).

We think it clear from context that the Alabama court did not apply a blanket rule, but rather determined that the facts of this case did not merit relief. As an initial matter, the Alabama court twice recognized that there *can* be instances of "*per se* deficient performance." *Reeves*, 226 So.3d at 750–751. It simply concluded that here, counsel's choice regarding experts involved a strategic decision entitled to a presumption of reasonableness. *Ibid.* Moreover, *other* portions of the opinion's lengthy recitation of the law (which the Eleventh Circuit omitted) belie a categorical approach. In particular, the court twice said that it would consider " 'all the circumstances' " of the case, and it qualified its supposedly categorical rule by explaining that "counsel should *ordinarily* be afforded an opportunity to explain his actions before being denounced as ineffective." *Id.*, at 744, 747 (emphasis added; some internal quotation marks omitted).

Other parts of the opinion yield the same interpretation. For example, the court devoted almost nine pages to discussing ineffective

assistance of counsel. That would have been a curious choice for a "busy state cour[t]" if a single sentence applying a *per se* rule could have sufficed. *Johnson v. Williams*, 568 U.S. 289, 298, 133 S.Ct. 1088, 185 L.Ed.2d 105 (2013) (state courts need not even "discuss separately every single claim"). Within that lengthy discussion, the court individually mentioned many of Reeves' specific theories, including his current intellectual-disability argument. Moreover, that the court in a footnote summarily rejected *different* ineffective-assistance-of-counsel claims for procedural reasons further weighs against imputing a *per se* rule for the theories that ***2413** the court discussed in the body of its opinion. *Reeves*, 226 So.3d at 749–750, n. 16.

Even more important, the actual analysis of the claim at issue here reflects a case-specific approach. The court did not merely say, as the Eleventh Circuit wrongly suggested, that Reeves' " 'failure to call his attorneys to testify was fatal to his claims.' " 836 Fed.Appx. at 744 (brackets omitted). Rather, the opinion prefaced this quote with an important qualifier —"*In this case*." *Reeves*, 226 So.3d at 749 (emphasis added). And sure enough, the court proceeded to explain why Reeves could not prevail "in this case"—because "the record [was] silent as to the reasoning behind counsel's actions." *Id.*, at 751 (internal quotation marks omitted). To be sure, the record in this particular case happened to be deficient "because Reeves failed to call his counsel to testify." *Ibid.* But, this unremarkable observation of cause and effect in light of the facts before the court was hardly an absolute bar in *every* case where *other* record evidence might fill in the details. And, it certainly was not contrary to clearly established law given that this Court and the Eleventh Circuit have made the same observation that a silent record cannot discharge a prisoner's burden. *E.g.*, *Titlow*, 571 U.S. at 15, 22–24, 134 S.Ct. 10; *Grayson v. Thompson*, 257 F.3d 1194, 1218 (CA11 2001) (noting that "the record [was] silent as to why trial counsel did not pursue a motion to suppress the evidence," and that "habeas counsel did not inquire as to trial counsel's reasons for not raising such a claim"). [4]

4 Today's dissent suggests that a more recent decision—*State v. M.D.D.*, —— So. 3d ——, 2020 WL 6110694 (Ala. Crim. App., Oct. 16, 2020)—illustrates that Alabama courts understand *Reeves* to announce a *per se* rule. *Post*, at 2416 – 2418, and n. 4 (opinion of SOTOMAYOR, J.). But that case does the exact opposite. In *M.D.D.*, the petitioner alleged that his attorney should have called a medical expert at trial, yet he did not have the attorney testify at the postconviction hearing. —— So.3d at —— – ——, 2020 WL 6110694, *5–*6. The Alabama court denied relief after examining the evidence and identifying a "sound, strategic reason for not calling [the expert] to testify." *Id.*, at ——, 2020 WL 6110694 at *8 (discussing a possible downside to having the expert testify); see also *id.*, at ——, 2020 WL 6110694 at *9 (explaining, in the alternative, why the petitioner suffered no prejudice). Notably, the court did so after citing *Reeves* and quoting the *same language* that the dissent claims represents a *per se* rule. Compare *id.*,

> at ——— – ———, 2020 WL 6110694 at *7–*8 ("[A] Rule 32 petitioner must, at his evidentiary hearing, question trial counsel regarding his or her actions and reasoning.... In this case, the failure to have trial counsel testify is fatal to [the petitioner's] claims of ineffective assistance of counsel" (emphasis deleted; internal quotation marks omitted)), with *post*, at 2413 – 2414, 2415 – 2416. Again, it would have been strange for a busy Alabama court to devote pages to rejecting a claim if a categorical bar would have sufficed.

* * *

For the foregoing reasons, we grant the petition for a writ of certiorari, reverse the judgment of the Court of Appeals, and remand the case for proceedings consistent with this opinion.

It is so ordered.

Justice BREYER dissents.

Justice SOTOMAYOR, with whom Justice KAGAN joins, dissenting.

Under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), courts must assess a defendant's claim that his attorney failed to provide constitutionally effective assistance "in light of all the circumstances." *Id.*, at 690, 104 S.Ct. 2052. No single type of evidence is a prerequisite to relief. Therefore, as the majority implicitly acknowledges, a *per se* rule that a habeas petitioner's claim fails if his attorney did not testify at an evidentiary ***2414** hearing is flatly incompatible with *Strickland*.

The Court of Criminal Appeals of Alabama applied precisely such a rule in this case. When respondent Matthew Reeves raised several ineffective-assistance-of-counsel (IAC) claims in state postconviction proceedings, the court stated, in no uncertain terms (and underlined for emphasis), that "to overcome the strong presumption of effectiveness, a Rule 32 petitioner must, at his evidentiary hearing, question trial counsel regarding his or her actions and reasoning." *Reeves v. State*, 226 So.3d 711, 748 (2016) (internal quotation marks omitted). Applying that rule "[i]n this case," the court held that "Reeves's failure to call his attorneys to testify is fatal to his claims of ineffective assistance of counsel." *Id.*, at 749. Reeves then sought habeas relief in federal court. Based on the state court's clear holding, the Court of Appeals for the Eleventh Circuit properly determined that the state court's use of the *per se* rule was an unreasonable application of *Strickland*. *Reeves v. Commissioner, Ala. Dept. of Corrections*, 836 Fed.Appx. 733, 744 (2020) (*per curiam*).

Through linguistic contortion, the Court today rescues the state court's decision by construing it not to apply a *per se* rule at all. Based on that implausible reading, the Court summarily reverses the Eleventh Circuit's grant of relief. The lengths to which this Court goes to ensure that Reeves remains on death row are extraordinary. I respectfully dissent.

I

A

In 1998, Reeves was convicted of capital murder for a brutal crime he committed when he was 18 years old. By a vote of 10 to 2, a divided jury recommended that Reeves be sentenced to death, and the trial court accepted that recommendation.

During his trial, Reeves was initially represented by two attorneys, Blanchard McLeod and Marvin Wiggins. Reeves' counsel moved for the appointment of a neuropsychologist, Dr. John Goff, to conduct an intellectual disability evaluation. When the motion was denied, Reeves' counsel sought rehearing. They explained that they had collected "hundreds of pages of psychological, psychometric and behavioral analysis material relating to [Reeves]." Electronic Case Filing in No. 1:17–cv–00061 (SD Ala.) (ECF), Doc. 23–1, p. 74. That material, McLeod had represented in court, was "exceptionally pertinent" to Reeves' penalty phase defense. ECF Doc. 23–3, at 96. Counsel stated that retaining "a clinical neuropsychologist" like Dr. Goff was "the only avenue open to the defense to compile this information ... and present [it] in an orderly and informative fashion to the jury." ECF Doc. 23–1, at 74–75. The state court granted the request and provided funding to hire Dr. Goff. *Id*., at 81. Around the same time, McLeod was replaced by another attorney, Thomas Goggans. 836 Fed.Appx. at 736.

Reeves' new team, Goggans and Wiggins, failed to follow through on hiring a neuropsychologist. As Dr. Goff later testified, in the more than three months between his appointment and the penalty phase trial, Reeves' attorneys "just never called." ECF Doc. 23–24, at 68. They also never hired any other neuropsychologist to review the evidence and evaluate Reeves for intellectual disability. 836 Fed.Appx. at 748. Instead, on the day of the penalty phase trial, counsel contacted Dr. Kathleen Ronan, a clinical psychologist who had previously evaluated Reeves for competence to stand trial and his mental state at the time of the offense. ECF Doc. 23–26, at 82–84. She had never evaluated Reeves for ***2415** intellectual disability, and she had not spoken with Goggans or Wiggins until "the day that [she] testified." *Id*., at 84.

Dr. Ronan informed Reeves' counsel that her prior evaluation would not serve their purposes. *Ibid*. As she later explained, assessing Reeves for intellectual disability "was not within the scope of [her] evaluation." *Ibid*. Had she been hired to conduct such an assessment, she would have administered a full IQ test and conducted other evaluations designed to diagnose intellectual disability. *Id*., at 85–87. Instead, Dr. Ronan had only administered part of an IQ test and found that Reeves' verbal IQ "was not in a level that they would call him [intellectually disabled]." ECF Doc. 23–8, at 155; see also ECF Doc. 23–26, at 85. An expert for the State later administered a full IQ test, however, showing that Reeves' IQ was well within the range for intellectual disability. *Reeves*, 226 So.3d at 737; ECF Doc. 23–25, at 24; ECF Doc. 23–24, at 26.

Nevertheless, Reeves' counsel called Dr. Ronan to testify. The only other witnesses counsel called were Reeves' mother and a

police detective. The entire penalty phase trial lasted just one and a half hours. ECF Doc. 23–14, at 154. Reviewing the record, the trial judge found that "[t]he only evidence that [he could] consider in mitigation of this offense ... is the evidence of [Reeves'] age and [his] youthfulness." ECF Doc. 23–8, at 212. Concluding that such limited evidence would not outweigh the aggravating circumstances, the court sentenced Reeves to death. *Ibid*.

B

In 2002, Reeves filed a motion for state postconviction relief under Alabama Rule of Criminal Procedure 32 (known as a Rule 32 petition). Reeves alleged that his trial counsel had been constitutionally ineffective in several ways, including by failing to hire a neuropsychologist to evaluate him for intellectual disability.

The state court held a 2-day evidentiary hearing on Reeves' claims. Reeves called Dr. Goff to testify. At the request of Reeves' postconviction counsel, Dr. Goff had reviewed Reeves' mental health and school records and administered "a battery of tests designed to assess Mr. Reeves' IQ, cognitive abilities, and adaptive functioning." 836 Fed.Appx. at 737. Dr. Goff found that Reeves' IQ scores were 71 and 73,[1] showing that Reeves "has significantly subaverage intellectual functioning," and that he "has significant deficits in multiple areas of adaptive functioning." *Ibid.* These deficits manifested before Reeves turned 18 years old. ECF Doc. 23–24, at 25–26, 65–67. Based on his findings, Dr. Goff concluded that Reeves is intellectually disabled. 836 Fed.Appx. at 737. Dr. Goff testified that "had Mr. Reeves' trial counsel asked him to evaluate Mr. Reeves years earlier for the purpose of testifying at trial, he would have performed similar evaluations and reached the same conclusions." *Ibid.*

1 Reeves' IQ scores were even lower after accounting for the Flynn Effect. ECF Doc. 23–24, at 43–46. Dr. Goff concluded that Reeves' IQ fell within the intellectual disability range even without such an adjustment. *Id*., at 44, 99.

Reeves' trial counsel did not testify at the Rule 32 hearing. At the beginning of the hearing, the State had declared that it intended to call Goggans and Wiggins to "explain why they did certain things and maybe why they didn't do certain things." ECF Doc. 23–24, at 14. But at the conclusion of the hearing, the State "decided not to call trial counsel." ECF Doc. 23–25, at 86.

The state court denied Reeves' motion for postconviction relief. On appeal, Reeves ***2416** argued that the lower court had "erred in ignoring substantial evidence in support of [his IAC claim] on the basis that he did not call counsel to testify." ECF Doc. 23–29, at 45. In response, the State argued that because "Reeves failed to call either of his trial attorneys to testify concerning their decision to call Dr. Ronan rather than Dr. Goff," the lower court "properly presumed that they acted reasonably." *Id*., at 199–200.

The Court of Criminal Appeals of Alabama agreed with the State, rejecting Reeves' contention that "testimony from counsel is not

necessary to prove any claim of ineffective assistance of counsel." *Reeves*, 226 So.3d at 747. That argument, the court reasoned, "fail[ed] to take into account the requirement that courts indulge a strong presumption that counsel acted reasonably, a presumption that must be overcome by evidence to the contrary." *Ibid.* (emphasis in original). The court then specified what that evidence must be: " '[T]o overcome the strong presumption of effectiveness, a Rule 32 petitioner must, at his evidentiary hearing, question trial counsel regarding his or her actions and reasoning.' " *Id.*, at 748 (emphasis in original; quoting *Stallworth v. State*, 171 So.3d 53, 92 (Ala. Crim. App. 2013)). The court cited over half a dozen cases supporting that *per se* rule. See 226 So.3d at 748. It then applied the rule to Reeves, explaining that "[i]n this case, Reeves's failure to call his attorneys to testify is fatal to his claims of ineffective assistance of counsel." *Id.*, at 749.

Reeves filed a petition for a writ of certiorari seeking review of the state court's decision, which this Court denied. I dissented, joined by Justice Ginsburg and Justice KAGAN. We pointed out that the state court had applied a *per se* rule "that counsel must testify in order for a petitioner to succeed on a federal constitutional ineffective-assistance-of-counsel claim." *Reeves* v. *Alabama*, 583 U. S. ——, ——, 138 S.Ct. 22, 23, 199 L.Ed.2d 341 (2017). Even the State did not defend the constitutionality of such a rule. See *ibid.*

C

Reeves then filed a federal habeas petition pursuant to 28 U.S.C. § 2254. The District Court denied Reeves' petition and his motion for reconsideration. See 2019 WL 1938805, *11 (SD Ala., May 1, 2019). The Eleventh Circuit reversed in relevant part. It read the state appellate court's decision to "trea[t] Mr. Reeves' failure to call his counsel to testify as a *per se* bar to relief—despite ample evidence in the record to overcome the presumption of adequate representation." 836 Fed.Appx. at 744. In so doing, the state court "unreasonably applied *Strickland*." *Ibid.* The Eleventh Circuit accordingly reviewed Reeves' claim *de novo* and found that Reeves had proved ineffective assistance of counsel. *Id.*, at 747–753.

The Eleventh Circuit was not alone in interpreting the state court's decision to apply a "categorical rule." *Id.*, at 744. Less than a month earlier, the Court of Criminal Appeals of Alabama (the same court that had issued the decision in question) denied another defendant's IAC claim. Once again, the court stated its *per se* rule: "[T]o overcome the strong presumption of effectiveness, a Rule 32 petitioner must, at his evidentiary hearing, question trial counsel regarding his or her actions and reasoning." *State v. M.D.D.*, —— So. 3d ——, ——, 2020 WL 6110694, *7 (Oct. 16, 2020) (internal quotation marks omitted; emphasis deleted). In support, the court cited its prior decision in *Reeves*, which it summarized as "holding that [a] Rule 32 petitioner had failed to prove his claims of ineffective assistance of trial and appellate counsel because he did not call his trial or ***2417** appellate counsel to testify at the Rule 32 evidentiary hearing." *Id.*, at ——, 2020 WL 6110694 at *8. As in Reeves' case, the court

in *M.D.D.* held that "the failure to have trial counsel testify is fatal to M.D.D.'s claims of ineffective assistance of counsel." *Ibid.* [2]

[2] The state court separately held that relief was not warranted because the court could conceive of a sound strategic reason for counsel's actions and because M.D.D. failed to show prejudice. See *State v. M.D.D.*, —— So. 3d ——, —— – ——, 2020 WL 6110694, *8–*9 (Ala. Crim. App., Oct. 16, 2020).

The State petitioned this Court to review the Eleventh Circuit's decision in *Reeves*. Despite the Alabama court's plain embrace of a *per se* rule, the State accused the Eleventh Circuit of too "readily attributing error to the state court" by interpreting its decision to "purportedly creat[e] and us[e] this per se rule." Pet. for Cert. i. On that basis, the State asked this Court to reverse summarily the Eleventh Circuit. *Id.*, at 30.

II

The sole question presented in this case is whether the Court of Criminal Appeals of Alabama applied a categorical rule that Reeves' failure to call his attorneys to testify was fatal to his IAC claim as a matter of law. No one disputes that such a rule would be an "unreasonable application" of *Strickland* and its progeny. 28 U.S.C. § 2254(d)(1); see also *ante*, at 2407, 2412; Pet. for Cert. 1. Under those decisions, no single type of evidence, such as counsel's testimony, is a prerequisite to relief. [3] See *Roe v. Flores-Ortega*, 528 U.S. 470, 478, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000) (describing *Strickland*'s "circumstance-specific reasonableness inquiry"); *Williams v. Taylor*, 529 U.S. 362, 391, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (explaining that "the *Strickland* test 'of necessity requires a case-by-case examination of the evidence' ").

[3] As the Eleventh Circuit recognized, this Court has found deficient performance without any testimony from trial counsel. See *Reeves v. Commissioner, Ala. Dept. of Corrections*, 836 Fed.Appx. 733, 751 (2020) (*per curiam*) (discussing *Buck* v. *Davis*, 580 U. S. ——, 137 S.Ct. 759, 197 L.Ed.2d 1 (2017)). This Court has also found deficient performance when counsel testified and "attempt[ed] to justify their [actions] as reflecting a tactical judgment." *Wiggins v. Smith*, 539 U.S. 510, 521, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003).

The Court of Criminal Appeals improperly applied such a *per se* rule here. It began by invoking Reeves' burden "to present evidence" sufficient to overcome the "strong presumption that counsel acted reasonably." *Reeves*, 226 So.3d at 751 (emphasis deleted). It then ignored all of the evidence that Reeves' counsel had acted unreasonably, including Dr. Goff's description of the evaluation he would have conducted, Dr. Ronan's warning that her testimony was no substitute for an actual intellectual disability assessment, and trial counsel's repeated representations about the necessity of hiring Dr. Goff to conduct such an evaluation.

The court held that none of this evidence mattered because trial counsel did not testify: "[B]ecause Reeves failed to call his counsel to testify, the record is silent as to the reasons trial counsel ... chose not to hire Dr. Goff or another neuropsychologist." *Ibid.* The court treated that fact as "fatal" to Reeves' claim. *Id.*, at 749. Because Reeves could not establish the subjective "reasoning behind counsel's actions, the presumption of effectiveness [was] sufficient to deny relief." *Id.*, at 751 (internal quotation marks omitted); see also *M.D.D.*, ___ So. 3d, at ____, 2020 WL 6110694, *8 (explaining that the court denied Reeves ***2418** relief "because he did not call his trial ... counsel to testify"). [4]

[4] The Court has no answer to the explicit description in *M.D.D.* of the state court's reasoning in *Reeves.* Instead, the Court collapses the state court's alternative holdings in *M.D.D.*, conflating the state court's application of the *per se* rule requiring counsel's testimony with the state court's separate reasons for denying relief. *Ante,* at 2413, n. 4. It is true, as the Court notes, that the state court "examin[ed] the evidence and identif[ied] a sound, strategic reason" for counsel's actions "after citing *Reeves* and quoting the *same language* that the dissent claims represents a *per se* rule." *Ibid.* (internal quotation marks omitted). What the Court fails to mention is that the state court first concluded that the *per se* rule applied in *Reeves* was sufficient, on its own, to deny relief. *M.D.D.*, ___ So. 3d, at ____, 2020 WL 6110694, *8 ("In this case, the failure to have trial counsel testify is fatal to M.D.D.'s claims of ineffective assistance of counsel," because "where the record is silent as to the reasoning behind counsel's actions, the presumption of effectiveness is sufficient to deny relief " (internal quotation marks omitted)). Only after announcing this holding did the state court separately offer two additional, independent reasons for denying relief, explaining that "[f]urther," there was a "sound, strategic reason" for counsel's actions, and "[m]ore[o]ver," an examination of the record showed that M.D.D. had failed to demonstrate prejudice. *Id.*, at ____–____, 2020 WL 6110694 at *8–*9. Contrary to the Court's suggestion, these alternative holdings formed no part of the state court's discussion of *Reeves* or application of the *per se* rule. The Court rewrites yet another state-court decision in service of its efforts to rewrite this one.

III

In reviewing habeas petitions, "federal judges must begin with the 'presumption that state courts know and follow the law.' " *Ante*, at 2411 (quoting *Woodford v. Visciotti*, 537 U.S. 19, 24, 123 S.Ct. 357, 154 L.Ed.2d 279 (2002) (*per curiam*)). But when state courts contravene this Court's precedents, federal courts cannot turn a blind eye. Here, it is hard to see how the state court could have been any clearer in applying a *per se* rule that undisputedly violates *Strickland*.

A

The Court declares that it is "clear from context that the Alabama court did not apply a blanket rule, but rather determined that the facts of this case did not merit relief." *Ante*, at 2412. The problem is that the "facts of this case" make no appearance in the state court's discussion. See *Reeves*, 226 So.3d at 749–751. This Court thus searches for some sign (any sign) that the state court implicitly assessed the facts of the case.

The Court first points to two statements at the beginning of the state court's analysis in which it "said that it would consider 'all the circumstances' of the case." *Ante*, at 2412. But after perfunctorily citing the *Strickland* standard, the state court never actually followed through on its obligation to consider the evidence. Its analysis began and ended with counsel's failure to testify. See *Reeves*, 226 So.3d at 750–751. State courts cannot insulate their decisions from scrutiny by quoting the proper standard and then ignoring it.

In a similar vein, this Court seizes upon the state court's quotation from an earlier case stating that trial " 'counsel should *ordinarily* be afforded an opportunity to explain his actions before being denounced as ineffective.' " *Ante*, at 2412. This, the Court claims, "belie[s] a categorical approach." *Ante*, at 2412. The state court, however, expressly overrode that formulation of the rule, stating that the court "[s]ubsequently" held that IAC petitioners " 'must' " question trial counsel. *Reeves*, 226 So.3d at 747–748 (emphasis in original). It relied on that rule to reject Reeves' claim. *Id.*, at 748–749.

***2419** The Court also cites the length of the state court's opinion as purported proof that the court conducted a fact-specific inquiry. *Ante*, at 2412 – 2413. But what matters is the state court's reasoning, not the length of its opinion. The state court did not spend "almost nine pages" conducting a detailed "case-specific" analysis. *Ibid*. The vast majority of the state court's discussion instead consists of a list of Reeves' IAC allegations and lengthy block quotes of general legal standards. See *Reeves*, 226 So.3d at 744–750. When the court finally turned to the facts of this case, it explicitly barred relief only "because Reeves failed to call his counsel to testify." *Id.*, at 751.

Finally, the Court latches on to three words, "[i]n this case," insisting that they prove that the state court merely concluded that trial counsel's testimony was critical to Reeves' IAC claim "[i]n this case." *Ante*, at 2412 – 2413 (quoting 226 So.3d at 749; emphasis deleted). But in using the phrase "[i]n this case," the state court was not addressing the evidentiary record. It was analogizing Reeves' case to the many cases it had just cited for the proposition that " 'a Rule 32 petitioner must, at his evidentiary hearing, question trial counsel regarding his or her actions and reasoning.' " *Id.*, at 748–749 (emphasis in original). It then concluded that "Reeves's failure to call his attorneys to testify" in this case was similarly "fatal to his claims." *Id.*, at 749. If the state court had meant to weigh the evidence in the record, it would have. It did not. This Court is putting words in the state court's mouth that the state court never uttered, and which are flatly inconsistent with what the state court did say.

B

Finding no relevant factual analysis in the state court's decision, this Court attempts its own, speculating as to what Reeves' counsel might have said had they been called to testify. See *ante*, at 2411 – 2412. For instance, the Court imagines that "counsel may have uncovered additional evidence confirming their concerns about an intellectual-disability strategy." *Ante*, at 2411. [5] The Court also insinuates that Reeves may have strategically declined to call his trial counsel to avoid harmful testimony. *Ante*, at 2412. But if counsel's testimony would have been damaging to Reeves' claim, one would have expected the State to call counsel to testify. Yet the State expressly declined to do so, despite having counsel available to testify. See ECF Doc. 23–25, at 85–86.

[5] The Court hypothesizes that "[t]he attorneys may very well have pored over the voluminous evidence in their possession—including those obtained *after* their funding request—and identified several reasons that a jury was unlikely to be persuaded [by] a claim of intellectual disability." *Ante*, at 2411 (noting evidence indicating that Reeves' "intelligence was below average," but he was not intellectually disabled, and Reeves' "history of violence, criminal past, and behavior problems"). But counsel already knew of these concerns when they moved for Dr. Goff's appointment. For instance, several months before counsel filed their initial motion, they received a report from Dr. Ronan's guilt-phase evaluation detailing these issues. See ECF Doc. 23–13, at 61–63, 65. It is hard to see how counsel's later request for the records underlying that evaluation could have significantly changed their calculus. See *ante*, at 2408; ECF Doc. 23–1, at 88. Moreover, even if counsel had discovered additional evidence related to Reeves' intellectual disability, there would still be a need for an expert to evaluate the evidence in its totality. Indeed, Reeves' counsel argued to the state court that, given the volume of evidence, they needed the assistance of a qualified expert to properly "compile" and "correlate" the information and evaluate Reeves. *Id.*, at 74–75; see ECF Doc. 23–3, at 91 (counsel arguing that they required Dr. Goff's assistance because "the amount of material that we have received through discovery ... is beyond our ability to deal with").

***2420** The Court's eagerness to invent scenarios harmful to Reeves' claim stems from its apparent belief that "the Alabama court was entitled to reject Reeves' claim if trial counsel had any 'possible reaso[n] ... for proceeding as they did.' " *Ante*, at 2412 (quoting *Cullen v. Pinholster*, 563 U.S. 170, 196, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011)). That view has no basis in this Court's precedent. *Cullen* did not hold that an IAC claim fails if a court can imagine any possible reason for counsel's actions. No claim could ever survive such a standard. One can always imagine some unsubstantiated reason for what trial counsel did. *Cullen* instead stated that, to assess whether counsel's conduct was

reasonable, courts must "entertain the range of possible reasons" for counsel's actions in light of the events and evidence actually established in the record. *Id.*, at 196, 131 S.Ct. 1388 (internal quotation marks omitted). The Court's speculations about what may have occurred after Dr. Goff's appointment are pure conjecture.

In any case, the Court's guesswork is beside the point because it was not the basis for the state court's decision. When a state court gives a reasoned explanation for its decision, federal habeas courts must review that decision on its own terms. See *Wilson* v. *Sellers*, 584 U. S. ——, ——, 138 S.Ct. 1188, 1192, 200 L.Ed.2d 530 (2018) ("In that case, a federal habeas court simply reviews the specific reasons given by the state court and defers to those reasons if they are reasonable"). Here, the state court relied solely on the mere fact that Reeves' counsel did not testify. That is the only reason subject to our review, and it plainly contravenes *Strickland*.

Even as the Court attempts to save the state court's decision, it erroneously embraces the state court's flawed assumption that IAC claims require direct evidence of the subjective " 'reasoning behind counsel's actions.' " See *ante*, at 2413. "*Strickland*, however, calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind." *Harrington v. Richter*, 562 U.S. 86, 110, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011). "A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690, 104 S.Ct. 2052. This inquiry must be conducted "[e]ven assuming" that counsel acted "for strategic reasons," *Wiggins v. Smith*, 539 U.S. 510, 527, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003), and even if counsel does not testify. Cf. *Buck*, 580 U. S., at ——, 137 S.Ct., at 775 ("No competent defense attorney would introduce such evidence about his own client"). " 'In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances.' " *Hinton v. Alabama*, 571 U.S. 263, 273, 134 S.Ct. 1081, 188 L.Ed.2d 1 (2014) (*per curiam*). This Court simply cannot escape the fact that the state court failed to conduct the necessary inquiry.

* * *

Today's decision continues a troubling trend in which this Court strains to reverse summarily any grants of relief to those facing execution. See, *e.g.*, *United States* v. *Higgs*, 592 U. S. ——, 141 S.Ct. 645, 208 L.Ed.2d 582 (2021) (emergency vacatur of stay and reversal); *Shinn* v. *Kayer*, 592 U. S. ——, 141 S.Ct. 517, 208 L.Ed.2d 353 (2020) (*per curiam*) (summary vacatur); *Dunn* v. *Ray*, 586 U. S. ——, 139 S.Ct. 661, 203 L.Ed.2d 145 (2019) (emergency vacatur of stay). This Court has ***2421** shown no such interest in cases in which defendants seek relief based on compelling showings that their constitutional rights were violated. See, *e.g.*, *Johnson* v. *Precythe*, 593 U. S. ——, 141 S.Ct. 1622, —— L.Ed.2d —— (2021) (denying certiorari); *Whatley* v. *Warden*, 593 U. S. ——,

141 S.Ct. 1299, —— L.Ed.2d —— (2021) (same); *Bernard* v. *United States*, 592 U. S. ——, 141 S.Ct. 504, 208 L.Ed.2d 484 (2020) (same). In Reeves' case, this Court stops the lower court from granting Reeves' petition by adopting an utterly implausible reading of the state court's decision. In essence, the Court turns "deference," *ante*, at 2410 – 2411, into a rule that federal habeas relief is never available to those facing execution. I respectfully dissent.

All Citations

141 S.Ct. 2405, 210 L.Ed.2d 812, 21 Cal. Daily Op. Serv. 6600, 29 Fla. L. Weekly Fed. S 1

End of Document

433 S.C. 494
Supreme Court of South Carolina.

The STATE, Petitioner,
v.
Ontario Stefon Patrick
MAKINS, Respondent.

Appellate Case No. 2020-000024
|
Opinion No. 28039
|
Heard March 24, 2021
|
Filed June 23, 2021

Synopsis

Background: Defendant was convicted in the Circuit Court, Greenville County, Robin B. Stilwell, J., of third-degree criminal sexual conduct (CSC) with a minor. Defendant appealed. The Court of Appeals, 428 S.C. 440, 835 S.E.2d 532, reversed. State petitioned for writ of certiorari, which was granted.

The Supreme Court, James, J., held that testimony of childhood-trauma expert, addressing the various manifestations of child sexual abuse, followed immediately by expert's affirmative response that she treated minor victim, did not constitute improper bolstering of victim's credibility.

Reversed.

Procedural Posture(s): Appellate Review; Trial or Guilt Phase Motion or Objection.

***667 ON WRIT OF CERTIORARI TO THE COURT OF APPEALS**

Appeal from Greenville County, Robin B. Stilwell, Circuit Court Judge

Attorneys and Law Firms

Attorney General Alan McCrory Wilson and Senior Assistant Attorney General David A. Spencer, of Columbia; and Solicitor William W. Wilkins III, of Greenville, for Petitioner.

Appellate Defender Taylor Davis Gilliam, of Columbia, for Respondent.

Opinion

JUSTICE JAMES:

Ontario Stefon Patrick Makins was indicted for lewd act upon a minor, third-degree criminal sexual conduct (CSC) with a minor, ***668** and first-degree CSC with a minor.[1] He was convicted by a jury of third-degree CSC with a minor. The court of appeals reversed the conviction, holding a therapist's affirmation she treated the minor victim (Minor) improperly bolstered Minor's credibility. *State v. Makins*, 428 S.C. 440, 835 S.E.2d 532 (Ct. App. 2019). We granted the State's petition for a writ of certiorari.

1 Third-degree CSC with a minor is codified in S.C. Code Ann. § 16-3-655(C) (2015). Conduct that would now qualify as third-degree CSC with a minor was formerly known as lewd act upon a minor and was codified in S.C. Code Ann. § 16-15-140 (repealed 2012). The effective date

> of the repeal of section 16-15-140 and its replacement with subsection 16-3-655(C) was June 18, 2012. The indictment range in this case began on June 17, 2012, and ended on March 20, 2015, so Makins was indicted for both lewd act and third-degree CSC with a minor.

Background

The State presented evidence at trial that Makins sexually abused Minor on several occasions when Minor was between the ages of five and eight. Minor was ten at the time of trial. After the allegations were made, Minor was treated by Kristin Rich, a childhood trauma therapist. Minor and Rich were the primary prosecution witnesses. The State called Rich both as an expert in the treatment of child trauma and child sexual abuse dynamics and as Minor's treating therapist. Rich's testimony as treating therapist is the basis of Makins's appeal. As Minor's treating therapist, Rich gave limited testimony about certain disclosures Minor made to her during therapy sessions. We address one primary issue in this appeal: by testifying both as an expert in characteristics of child trauma and child sexual abuse dynamics and as Minor's treating therapist, did Rich imply she thought Minor was truthful, thereby improperly bolstering Minor's credibility?

The trial court and the parties discussed vouching extensively throughout the trial. Before the jury was impaneled, the trial court expressed reservations about allowing certain portions of Rich's testimony:

> This is my concern about this witness and why I'm somewhat circumspect. We have a long line of cases which discuss expert witnesses buttressing the credibility of minor witnesses. And although I think that most of what [Rich] talked about in a vacuum is okay, my concern is that [Rich] begins to talk about the specific treatment and discussions with [Minor] and without saying "that makes her believable," [Rich] is suggesting that that makes [Minor] believable. And I want to make sure that what we're not doing is an end run around forensic interviewers being qualified as expert witnesses and thereby buttressing the credibility of witnesses.... [T]he question is, what opinion will be offered and how close are we going to get to [Rich] saying, "I talked to [Minor]. I diagnosed [Minor] as being a victim of childhood sexual trauma and all of her answers were consistent with my diagnosis for childhood sexual trauma."

The trial court continued:

> And when and if [Rich] gets to the point that says anything that suggests -- and I understand that she's not going to say it verbatim and she's not going to articulate it very, very clearly. But anything that suggest [sic] that "I diagnosed this girl and because she shows all of these signs, she's telling the truth," that's where we can't go.

Later in the pre-trial process, the trial court clarified:

> I don't think I have any issue with [Rich] saying

> that she talked to [Minor], and that [Minor] exhibits symptoms of post-traumatic stress disorder. Beyond that, I'm concerned that if [Rich] starts matching up her testimony with [Minor's] symptoms, we are essentially establishing a circumstance where she is vouching for the credibility of the witness. If that happens, I don't think that I have any choice but to declare a mistrial and I don't want to get there. You can put her in the -- on the stand to testify as a fact witness without any vouching for the credibility. And then use a blind witness if you want to. Or you can use a blind witness. But don't get to the point where she's vouching for the credibility, okay?

Before the jury, Rich testified about her training in and her use of "trauma-focused cognitive behavioral therapy, which is particularly ***669** related to childhood trauma." She defined trauma as:

> ... a very bad event where somebody feels like they might be hurt or killed or something very bad might happen to them. And generally, it's shocking in nature where somebody feels helpless or terrorized or horrified.... It's something that tragically shifts your life.

Rich testified to her specialized trauma training, particularly for children who have disclosed sexual abuse. Rich estimated she had provided therapy to approximately 500 children over the course of her career and between 120 to 150 of those children had experienced trauma as a result of sexual abuse. After the trial court qualified her as an expert, Rich testified to the symptoms children exhibit that are associated with trauma and, more specifically, symptoms of sexual abuse trauma. She also explained delayed disclosure and why children often disclose such abuse in a piecemeal fashion over time.

At this juncture, the State said, "I want to move a little more specifically. Have you provided therapy to the victim in this case, [Minor]?" Rich replied, "[y]es." Defense counsel objected, the jury was excused, and defense counsel moved for a mistrial.

Defense counsel argued the combination of Rich's testimony about treating trauma victims, the focus on sexual abuse symptoms and trauma treatment, and her statement that a sizeable portion of her clients have suffered sexual abuse equated to Rich testifying, " 'Every child I work with or every person I work with has suffered some trauma. That's why I provide counseling to them, is they are my clientele.' " Defense counsel argued Rich vouched for Minor's credibility by "saying in essence 'if she didn't suffer trauma, I wouldn't be working with her.' " He further argued,

"she is saying, 'I believe Minor has suffered a trauma.' " To be clear, these comments by defense counsel were not quotes of Rich's actual testimony, but rather were defense counsel's summary of the practical impact of Rich's testimony upon the jury.

The State argued Rich's testimony had so far been the equivalent of blind expert testimony, and Rich had not stated she believed Minor. The State reiterated the limitations the trial court had placed on Rich's testimony and argued adopting defense counsel's position would preclude the State from using experts in this context.

Stating this is "definitely an issue on appeal," the trial court concluded Rich had testified as a blind witness up to that point and had not yet gotten to the point of vouching. The trial court denied the motion for mistrial. After a recess, the trial court further limited Rich's testimony to whether she treated Minor, whether Minor disclosed sexual abuse, and the circumstances of the disclosure:

> I think, after having heard the testimony and heard what [Rich] said, I think that once [Rich] starts to say that "I was the attending physician and I diagnosed this and I treated this," then we are right back where the Supreme Court told us not to go and that's vouching for the credibility of the witness. Now, I recognize that [Rich] wouldn't expressly say that [Minor is] truthful. But I think it ultimately serves the same end.

The jury returned to the courtroom. Rich testified Minor disclosed to her that she had been sexually abused but did not want to talk about it. Rich testified she asked Minor about "the worst time," and Minor drew a picture to illustrate. The drawing depicted an act that would constitute first-degree CSC with a minor. When Rich asked who the people in the picture were, Minor identified herself and Makins. Rich testified, "[i]t wasn't until the second session that [Minor] would say [what she saw] because part of the therapy is to be able to say the things that you're scared of." Rich stated Minor disclosed the abuse started when she was five and ended around ages seven or eight, and it always happened at her sister Toi's house. Toi is Makins's girlfriend, and they have two children together.

Minor testified Makins forced her to perform oral sex multiple times (first-degree CSC with a minor) and touched her inappropriately (lewd act and third-degree CSC with a minor). She testified Makins made her ***670** touch his penis with her hand (lewd act and third-degree CSC with a minor), and she said he showed her sexually-oriented websites on his phone. Minor testified she did not know this was wrong until she attended a school presentation on "tricky people" and child molesters. The State presented no direct physical evidence of sexual abuse.

The jury acquitted Makins of first-degree CSC with a minor and lewd act but convicted him of third-degree CSC with a minor. The court of appeals reversed the conviction, holding Rich's testimony she treated Minor implied she believed Minor was telling the truth and improperly bolstered Minor's credibility. *State v. Makins*, 428 S.C. 440, 449-50, 835 S.E.2d 532, 537 (Ct. App. 2019). This Court granted

the State a writ of certiorari to review the court of appeals' decision.

Standard of Review

The decision to grant or deny a mistrial is within the sound discretion of the trial court. *State v. Dawkins*, 297 S.C. 386, 394, 377 S.E.2d 298, 302 (1989). The trial court's decision will not be overturned on appeal absent an abuse of discretion resulting in prejudice to the defendant. *Id.* Granting a mistrial is a serious and extreme measure which should only be taken when the prejudice can be removed no other way. *State v. Kelsey*, 331 S.C. 50, 70, 502 S.E.2d 63, 73 (1998).

"The decision to admit or exclude testimony from an expert witness rests within the trial court's sound discretion." *State v. Price*, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006). "The trial court's decision to admit expert testimony will not be reversed on appeal absent an abuse of discretion." *Id.* "An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law." *State v. Bryant*, 372 S.C. 305, 312, 642 S.E.2d 582, 586 (2007).

Discussion

The standard of review is critical to our analysis of both the trial court's denial of the mistrial motion and its evidentiary rulings. If the standard of review were de novo, an appellate court could simply rule on the evidentiary and mistrial issues in accordance with its own view of the dynamic faced by the trial court. However, under the deferential standard applicable here, an appellate court cannot disturb the trial court's rulings unless they lacked evidentiary support or were controlled by an error of law. In their briefs, the parties cited the correct standard of review but did not tailor their arguments to it. The court of appeals cited the standard of review but did not articulate how its holding took this standard into account. As we will explain, this is a difficult case, and our holding largely turns on the application of this deferential standard to the trial court's rulings.

"The assessment of witness credibility is within the exclusive province of the jury." *State v. McKerley*, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012). While experts can testify to their opinion, they are precluded from offering an opinion about the credibility of other witnesses. *State v. Kromah*, 401 S.C. 340, 358, 737 S.E.2d 490, 499 (2013). "Specifically, it is improper for a witness to testify as to his or her opinion about the credibility of a child victim in a sexual abuse matter." *Id.* at 358-59, 737 S.E.2d at 500. "A witness may not give an opinion for the purpose of conveying to the jury—directly or indirectly—that she believes the victim." *Briggs v. State*, 421 S.C. 316, 324, 806 S.E.2d 713, 717 (2017).

In *State v. Anderson*, the Court recognized the expertise of child abuse assessment experts, who testify to the behavioral characteristics of sex abuse victims, but cautioned:

> The better practice, however, is not to have the individual who examined the alleged

> victim testify, but rather to call an independent expert. To allow the person who examined the child to testify to the characteristics of victims runs the risk that the expert will vouch for the alleged victim's credibility.

413 S.C. 212, 218-19, 776 S.E.2d 76, 79 (2015). In *Briggs*, this Court reiterated it had not created any new law or standard regarding admissibility in *Kromah* or *Anderson* but instead applied the general rule that a witness cannot bolster the credibility of another witness because doing so invades the province ***671** of the jury. 421 S.C. at 328, 806 S.E.2d at 719.

In the instant case, the court of appeals held as follows:

> We find Rich's opinion testimony addressing the various manifestations of child sexual abuse, followed immediately by her affirmative response that she treated [Minor], implied she believed [Minor] was telling the truth with respect to her allegations of sexual abuse. If Rich believed [Minor] had not been telling the truth, Rich would have not needed to treat her. As the circuit court warned, Rich's testimony implied she was treating [Minor] for sexual trauma because [Minor] had suffered such trauma.

Makins, 428 S.C. at 448-49, 835 S.E.2d at 537.

The State argues the court of appeals erred in ruling Rich's testimony that she treated Minor implied she believed Minor. The State argues Rich gave permissible blind expert testimony and testified to the time, date, and circumstances of her meeting with Minor. The State further argues that while Rich testified she treated Minor and that Minor disclosed abuse to her, Rich did not testify about Minor's diagnosis, state she suffered from trauma, provide an opinion, or make conclusions or findings in her testimony. The State argues no improper bolstering occurred because Rich did not comment directly or indirectly on Minor's credibility.

This case is distinguishable from precedent cited by the parties because Rich's alleged improper bolstering was not direct. Rich's simple affirmation that she provided therapy to Minor also differs from previous indirect vouching cases in which expert witness testimony was more extensive. *See* *Briggs*, 421 S.C. at 329, 806 S.E.2d at 720 (ruling forensic interviewer's testimony she made the determination the child understood the difference between the truth and a lie "indirectly revealed she believed the subsequent disclosure ... was the truth"); *State v. Chavis*, 412 S.C. 101, 108, 771 S.E.2d 336, 340 (2015) (holding forensic interviewer's testimony that child victim should "not be around [Appellant] for any

reason" improperly bolstered the child victim's credibility); *Kromah*, 401 S.C. at 359, 737 S.E.2d at 500 (ruling forensic interviewer's testimony about "a compelling finding of child abuse" was the equivalent of her stating the child was being truthful); *State v. Jennings*, 394 S.C. 473, 480, 716 S.E.2d 91, 94 (2011) (concluding there was no other way to interpret the language in the forensic interviewer's reports that each child had "provide[d] a compelling disclosure of abuse by [appellant]" than to mean she believed the children were truthful).

Whether Rich's testimony constituted improper bolstering is a close question. As a result of the limitations the trial court placed on her testimony, Rich never testified she advised Minor about the importance of being truthful, never testified directly as to Minor's truthfulness, and never opined Minor's behavior indicated truthfulness. While Rich was allowed to confirm she treated Minor, she was not allowed to explain why she was treating Minor, detail her treatment of Minor, or testify as to her diagnosis of Minor. Rich only addressed the circumstances of Minor's disclosure of abuse and the drawing Minor produced in therapy.

The court of appeals referenced the timing and manner in which Rich affirmed she treated Minor, noting Rich's opinion testimony on the "various manifestations of child sexual abuse" was "followed immediately" by her response that she treated Minor, therefore implying Rich believed Minor's allegations. *Makins*, 428 S.C. at 448-49, 835 S.E.2d at 537. While we do not reject outright the notion that circumstances, such as timing and manner, could possibly contribute to improper bolstering, this Court has typically focused on the content of the expert's testimony. *See, e.g.*, *Briggs*, 421 S.C. at 324, 806 S.E.2d at 717 (explaining the general rule governing bolstering is "a witness may not give an opinion for the purpose of conveying to the jury—directly or indirectly—that she believes the victim"). We see no reason to abandon our prior approach based upon the facts of this case. To suggest Rich's simple affirmation that she provided therapy to Minor can singularly constitute improper bolstering is a bridge too far. In this specific context, Rich's "yes" alone, without more, did not convey to the jury that Rich believed Minor.

The State further argues the court of appeals' holding on bolstering is too broad. We agree. As noted above, the court of appeals ***672** concluded, "[i]f Rich believed [Minor] had not been telling the truth, Rich would not have needed to treat her." The exclusion of Rich's testimony on this ground goes beyond this Court's warning in *Anderson* against having one expert testify as a general characteristics expert and as a treating expert. The application of such an overly broad rule would mean the testimony of a child's treating therapist—even when there was a blind characteristics expert—always indirectly and improperly bolsters the child's credibility. In practical terms, the court of appeals' ruling would require the exclusion of treating experts' testimony in general—a result Makins acknowledged he is seeking but one he struggled to defend during oral argument. This Court and the court of appeals have generally allowed the testimony of treating experts in this context. *See State v. White*, 361 S.C. 407, 415, 605 S.E.2d 540, 544 (2004) (holding treating

psychotherapist's testimony that adult victim's symptoms were consistent with those of someone who recently suffered trauma was probative to refute defendant's contention the sex was consensual and to prove a sexual assault occurred); *Dawkins*, 297 S.C. at 394, 377 S.E.2d at 302 (considering testimony of the minor's treating psychiatrist); *State v. Dempsey*, 340 S.C. 565, 572, 532 S.E.2d 306, 310 (Ct. App. 2000) (addressing testimony of the minor's treating therapist); *State v. Berry*, 413 S.C. 118, 131, 775 S.E.2d 51, 57 (Ct. App. 2015) (concluding treating psychotherapist's testimony about minor victim's symptoms was based on personal observations and was admissible), *aff'd as modified on other grounds*, 418 S.C. 500, 795 S.E.2d 26 (2016).

Furthermore, the court of appeals also erred in appearing to create a bright line rule where this Court has refused to do so. While *Anderson* cautioned the better practice is to use a separate witness for general characteristics testimony, it did not forbid the practice of calling a dual expert. 413 S.C. at 218-19, 776 S.E.2d at 79. The court of appeals appears to leave no room for the treating individual to do both. The mere fact that Rich testified as a dual expert is not improper bolstering per se.

Rich's testimony served valid evidentiary purposes. Rich's testimony as Minor's treating therapist was required to lay the foundation for introducing Minor's graphic drawing into evidence. Minor's drawing and her disclosure to Rich were the basis of the most serious charge against Makins—first-degree CSC with a minor. Therefore, Rich's testimony served a purpose other than to vouch for Minor's credibility. *Contra* *Briggs*, 421 S.C. at 329, 806 S.E.2d at 720 (stating the witness's testimony was improper where there was no other purpose for it than to bolster the victim's credibility).

The trial court's limitations on Rich's testimony achieved their purpose—her testimony contained no direct or indirect bolstering discernible to this Court. The trial court deftly navigated the issue and protected the proceeding from improper bolstering. We find no abuse of discretion in the trial court's decisions to deny Makins's motion for mistrial or to admit Rich's limited testimony. [2]

2 We note defense counsel used the trial court's rulings to his advantage during closing arguments when he argued no one testified why Rich was treating Minor or if Minor suffered symptoms due to the alleged abuse. This was the very evidence the trial court excluded after defense counsel's objections.

While we find no improper bolstering occurred in this case, we repeat our warning in *Anderson* about dual experts. Using one witness as both a characteristics expert and the treatment witness is a risky undertaking. This issue might have been avoided completely had the State called a blind characteristics expert, a path the trial court repeatedly encouraged the State to follow. Instead, the State chose to proceed with Rich acting as a dual expert. While we rule in the State's favor on these facts, this opinion should not be construed as a retreat from our warning in *Anderson*.

Conclusion

For the foregoing reasons, we reverse the court of appeals and reinstate the conviction.

REVERSED.

BEATTY, C.J., KITTREDGE, HEARN and FEW, JJ., concur.

All Citations

433 S.C. 494, 860 S.E.2d 666