

FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

OCT 18 2022

FOR THE NINTH CIRCUIT

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

KURT MICHAELS,

No. 15-99005

Petitioner-Appellant,

D.C. No.

v.

3:04-cv-00122-JAH-JLB

RON DAVIS, Acting Warden of San
Quentin State Prison; ATTORNEY
GENERAL FOR THE STATE OF
CALIFORNIA,

OPINION

Respondents-Appellees.

Appeal from the United States District Court
for the Southern District of California
John A. Houston, District Judge, Presiding

Argued and Submitted October 25, 2018
San Francisco, California

Before: Ronald M. Gould, Marsha S. Berzon, and Carlos T. Bea, Circuit Judges.

Per Curiam Opinion;
Partial Majority Opinion by Judge Bea
Dissent by Judge Berzon

SUMMARY*

Habeas Corpus/Death Penalty

In a per curiam opinion addressing all issues except penalty phase prejudice, and a separate majority opinion addressing penalty phase prejudice, the panel affirmed the district court's judgment denying Kurt Michaels's habeas corpus petition challenging his California conviction and death sentence for the 1988 murder of JoAnn Clemons.

Per Curiam Opinion

Michaels argued that application of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2254(d), is unconstitutionally retroactive—*i.e.*, that the relevant event to which AEDPA's legal consequences attached is the automatic appeal of his capital sentence in state court, which occurred before AEDPA's effective date. Rejecting this argument, the panel wrote that AEDPA attached new legal consequences to petitions for federal habeas relief, not to Michaels's state court litigation—litigation that was resolved on state law grounds and substantive rules of constitutional law, both unaffected by AEDPA.

Michaels's Claim Three challenged, under *Miranda v. Arizona*, 384 U.S. 436 (1966), the admission of his confession at both the guilt and penalty phases of trial, on the ground that the confession was elicited after Michaels invoked his rights to counsel and silence. The panel wrote that the California Supreme Court's conclusion on direct appeal that Michaels did not unambiguously invoke either his right to counsel or his right to silence with respect to all questioning is fully supported by the record. The California Supreme Court did recognize that Michaels selectively invoked his right not to answer a specific question as protected by *Miranda*, but the California Supreme Court neither determined precisely what question Michaels had declared off limits nor whether the ensuing interrogation impermissibly violated Michaels's invocation of his right to silence with regard to the subject covered by that question. The panel held that the California Supreme Court's decision to ignore a defendant's unambiguous and unequivocal selective

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

invocation of his right to silence as to an area of inquiry during a custodial interrogation, requiring instead that the refusal be repeated in response to each question regarding the subject matter as to which the right was earlier invoked, was contrary to the law clearly established by *Miranda* and its progeny. The panel therefore reviewed de novo the aspects of Michaels's selective invocation of *Miranda* claim, and held that the detectives' continued questioning regarding Michaels's role in the murder after Michaels's selective invocation violated his *Miranda* rights, and that admission of the parts of the interrogation in which Michaels confessed to "what happened" was constitutional error. The panel held that the *Miranda* violation was harmless as to the guilt phase because the evidence presented at trial showing that Michaels committed capital murder was overwhelming even without the confession.

In Claim Four, Michaels argued that his trial lawyers provided ineffective assistance of counsel (IAC) by disclosing to the prosecution a confidential note Michaels had handed to his lawyers, during the preliminary hearing, stating that he would commit violence against his then-codefendant Popik if Popik was not reseated away from Michaels ("the Popik note"). The California Supreme Court held that introduction of the Popik note violated the attorney-client privilege but was harmless. The panel wrote that this IAC claim—which Michaels did not raise on initial state habeas review, as required by California law—was procedurally defaulted. The panel therefore addressed whether the procedural default is excused under *Martinez v. Ryan*, 566 U.S. 1 (2012), and held that it is. In so holding, the panel wrote: (1) the IAC claim is "substantial" under *Martinez* because (a) the claim clearly has some merit, and (b) Michaels demonstrated a substantial claim of prejudice resulting from his trial counsel's deficient performance; and (2) Michaels established "cause" under *Martinez* because (a) Michaels's initial post-conviction relief (PCR) attorneys' failure to raise the IAC claim was unconstitutionally deficient performance, and (b) there is a reasonable probability the PCR court would have granted Michaels relief had his PCR counsel raised the trial counsel IAC claim.

Because the procedural default of Claim Four is excused, the panel addressed the merits of Michaels's claim that his counsel was constitutionally deficient, as well as—on the merits (in the separate majority opinion)—the cumulative effect of counsel's constitutionally deficient performance and Michaels's improperly admitted confession on the sentencing phase of Michaels's trial. Applying AEDPA review, the panel held that there was no reasonable basis for the state court to have concluded that Michaels's trial counsel's performance was constitutionally adequate as to the disclosure of the Popik note. The panel wrote that under clearly established law and prevailing standards of representation at the time, counsel's breach of

attorney-client confidentiality amounted to constitutionally deficient performance, and it was objectively unreasonable for the California Supreme Court to conclude otherwise, assuming that it did.

In Claim Six, Michaels contended that the trial court violated Michaels's Sixth Amendment right to counsel by denying his motion to substitute another attorney for appointed attorney Richard Grossberg after an irreconcilable conflict with Michaels developed. The panel held that the California Supreme Court reasonably concluded that the conflict was the result of Michaels's subjective distrust, and that Michaels's actions triggered the breakdown of the relationship. The panel held that the state court's other conclusion—that Grossberg rendered constitutionally adequate assistance as it relates to the attorney-client conflict claim—was also reasonable.

In Claim Seven, Michaels argued that his other attorney, Mark Chambers, provided ineffective assistance when he advised Michaels to proceed pro se after the trial court refused to relieve Grossberg. As it turned out, during both the guilt and penalty phases, Chambers conducted the trial proceedings. Given that circumstance, the panel agreed with the district court that, whether or not Chambers provided constitutionally inadequate advice, Michaels did not show that he was prejudiced.

In Claim Nine, Michaels contended that the trial court erred in not conducting a *sua sponte* competency hearing, and his attorneys were constitutionally ineffective for failing to raise the competency issue. The panel held that neither the California Supreme Court's conclusion that the evidence before the trial court was insufficient to require a *sua sponte* competency hearing, nor its rejection of Michaels's IAC competency claim, was unreasonable under AEDPA.

In Claim Thirteen, Michaels argued that the trial court's denial of his request for a continuance before trial on March 26, 1990, violated his due process rights. Given that the standard for determining whether a continuance violates due process affords the substantial discretion to a trial court, as well as the deference owed under AEDPA, the panel held that the circumstances here do not render the California Supreme Court's decision that denial of the continuance was not a due process violation unreasonable.

Majority Opinion

Michaels argued that he is entitled to habeas relief because the introduction of his confession and the Popik note during the penalty phase of the trial prejudiced him

by causing the jury to render a death verdict they otherwise would not have in the absence of this unconstitutional evidence. Applying the actual prejudice standard set forth in *Brecht v. Abrahamson*, 507 U.S. 619 (1993), the panel held that Michaels was not prejudiced by the admission of the confession. The panel explained that there is not a single aggravating factor that the jury could have gleaned from Michaels's confession evidence that was not otherwise proved by ample admissible evidence, nor any piece of mitigation evidence that was rebutted by the confession that would otherwise have gone unrebutted; indeed, the confession evidence helped support the defense's own theory that Michaels killed Clemons to protect her daughter, Christina. Given the limited use of the Popik note and its minimal evidentiary value at trial, the panel could not conclude that it had a prejudicial effect on the jury, even in combination with the confession evidence. The panel therefore rejected Michaels's claim of cumulative error as to the admission of his confession and the Popik note.

In Claim Five, Michaels contended that the prosecutor committed four species of misconduct during the penalty-phase closing arguments. Affirming the denial of relief on this claim, the panel held: (1) the prosecutor did not commit misconduct by arguing Michaels's interest in devil-worship to the jury based on his own tackle box writings and for the proper purpose of rebutting the mitigating evidence of his church membership; (2) there is no clearly established federal law that prohibits the rhetorical admission of the defendant's own views of the suitability of the death penalty during the sentencing phase of the trial; (3) isolated comments describing Michaels as a "contract killer" did not cross into the proscribed territory of arguing that Michaels had committed other murders, and do not constitute the sort of egregious misconduct that amount to a denial of constitutional due process; and (4) given the context of the entire trial and the deferential standard review required under AEDPA, the trial was not rendered fundamentally unfair by the prosecutor's use of name-calling and emotional appeals.

In Claim Ten, Michaels argued that he is entitled to effective assistance of advisory counsel. In Claim Eleven, Michaels argued that Chambers was ineffective at both the guilt and penalty phases because Chambers failed to call as a witness Christina's father, Wendell, who would have corroborated Christina's testimony about how her mother physically abused her. In Claim Twelve, Michaels argued that Chambers was ineffective at the penalty phase because Chambers failed adequately to investigate and present evidence (1) that Michaels's mother was bipolar; (2) that Michaels's mother physically and emotionally abused him throughout his childhood; and (3) that Michaels's methamphetamine use was affected by his long-term brain damage, difficult background, and mental illness. As

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