

FILED

JAN 5 2023

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

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MICHAEL LAMAR ROSE,

Petitioner-Appellant,

v.

A. HEDGPETH; KAMALA D. HARRIS,

Respondents-Appellees.

No. 21-55351

D.C. No.

5:11-cv-01654-FLA-JPR

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Fernando L. Aenlle-Rocha, District Judge, Presiding

Argued and Submitted June 16, 2022
Pasadena, California

Before: RAWLINSON and CHRISTEN, Circuit Judges, and NAVARRO,**
District Judge.
Dissent by Judge CHRISTEN.

Michael Lamar Rose (Rose) appeals the district court's denial of his habeas
petition filed under 18 U.S.C. § 2254. We have jurisdiction pursuant to 28 U.S.C.

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

** The Honorable Gloria M. Navarro, United States District Judge for
the District of Nevada, sitting by designation.

§ 1291. Reviewing de novo, *see Fox v. Johnson*, 832 F.3d 978, 985 (9th Cir. 2016), we reverse the district court’s denial of habeas relief.

The pivotal issue in this case is whether under the United States Supreme Court’s recent decision in *Shinn v. Ramirez*, Rose was “at fault” or “bears responsibility” for the undeveloped state record, thereby precluding the federal court from developing the evidentiary record. 142 S.Ct. 1718, 1734 (2022).

We conclude that the *Shinn* decision does not foreclose consideration of the evidence developed in the district court because Rose did not “fail[] to develop the factual basis” of his claim in the California proceedings. *Id.* at 1728. Rose requested new counsel under California law, asserting ineffectiveness of his trial counsel. And Rose “expressly requested an evidentiary hearing in the California [Court] of [A]ppeal.” *Rose v. Hedgpeth*, 735 F. App’x 266, 270 (9th Cir. 2018) (citation omitted). Importantly, a prior panel of this court explicitly determined that on these facts, Rose “ha[d] not shown a lack of diligence” in the state court proceedings. *Id.*

Because *Shinn* does not foreclose consideration of the evidentiary record developed in the district court, we consider Rose’s claim based on that record.

1. Rose contends that trial counsel was ineffective for failing to call Africa Boulden (Boulden) to testify about statements the victim, Michael Denmon (Denmon), allegedly made describing Rose's lack of participation in the crimes.

Ineffective assistance of counsel is established when (1) counsel's performance "fell below an objective standard of reasonableness" and (2) the counsel's deficient performance prejudiced the defense, such that there is a "reasonable probability that . . . the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984).

Based on the evidentiary record, trial counsel was ineffective for failing to call Boulden to testify. Boulden's testimony that Denmon admitted (1) Rose "was scared"; (2) "[Rose] didn't do anything"; and (3) two co-defendants wanted to kill Rose but were ordered not to, would have bolstered Rose's duress defense and damaged the credibility of Denmon, the prosecution's primary witness. *See Rose*, 735 F. App'x at 270; *see also Lunbery v. Hornbeak*, 605 F.3d 754, 762 (9th Cir. 2010) (noting that statements from the defendant do not carry as much weight as "independent evidence").

Rose was prejudiced because a prior panel of this court has already determined that Rose made "a colorable argument . . . that there is a reasonable probability that, but for counsel's unprofessional errors, the results would have

been different.” *Rose*, 735 F. App’x at 270. Additional evidence consistent with Rose’s duress defense would have tipped the scales in favor of a finding of reasonable doubt. *See id.* For example, Boulden’s testimony would have corroborated Rose’s testimony that he “didn’t do anything,” but “was scared” of his co-defendant and of being killed. *See Lunbery*, 605 F.3d at 762. Thus, there is a reasonable probability that Boulden’s testimony, combined with the other evidence introduced at trial to support Rose’s duress defense, would have resulted in a different outcome. *See Strickland*, 466 U.S. at 694.

2. We expand the certificate of appealability to include Rose’s argument that trial counsel should have interviewed Charlene Bell (Bell) and should have sought to admit into evidence a video of Denmon that included exculpatory statements. *See Browning v. Baker*, 875 F.3d 444, 471 (9th Cir. 2017), *as amended* (expanding a certificate of appealability to include additional allegations of ineffectiveness when there is a certified ineffective assistance claim already before the court). As with Boulden, an interview with Bell would have revealed that Rose did not shoot anyone, and that Denmon “wanted [Rose] in jail.” Notably, Bell would have testified that Denmon conceded that Rose “was basically just caught up at the wrong time with his own circle.” This testimony would have corroborated Rose’s duress defense and further impeached Denmon’s testimony.

3. Counsel's failure to view the video containing exculpatory statements was similarly ineffective. *See Strickland*, 466 U.S. at 690–91; *see also Rose*, 735 F. App'x at 269. For example, the video would have revealed Denmon's desire to blame Rose for the crime, not because he believed Rose was culpable, but because Rose was related to the main perpetrator. *See Rose*, 735 F. App'x at 269. There is a reasonable probability that the presentation of the video, together with the other evidence that bolstered Rose's duress defense, would have resulted in a different outcome for Rose. *See Strickland*, 466 U.S. at 694; *see also Rose*, 735 F. App'x at 270.

Because counsel's actions were not the result of a reasonable litigation strategy, *see Rose*, 735 F. App'x at 269, we reverse the district court's denial of habeas relief. We remand with instructions to grant a conditional writ of habeas corpus ordering Rose's release unless the State of California elects within 90 days of the issuance of the mandate to retry him. Any retrial must commence within a reasonable time as set by the district court.

REVERSED AND REMANDED.

JAN 5 2023

Rose v. Hedgpeth, No. 21-55351MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS**CHRISTEN, Circuit Judge., dissenting:**

In my view, the intervening authority of *Shinn v. Ramirez*, 142 S. Ct. 1718 (2022), prevents us from considering the evidence Rose developed in the federal district court evidentiary hearing. If we were free to consider that evidence, I would agree with the majority that Rose demonstrated his counsel's performance "fell below an objective standard of reasonableness," but I am not persuaded there is a "reasonable probability" the result of the proceeding would have been different but for counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984).

Some of the statements Denmon made in the video bolstered key points of his trial testimony, such as his testimony that Rose asked for a ride to his aunt's house. Other statements Denmon made in the video were helpful to Rose, such as the statement that Rose did not shoot anyone and the statement that Rose did not receive any money. But these statements were either uncontested or refuted by other evidence in the record, including Rose's admission that he received over \$400 in hush money. Bell made some statements that were consistent with Rose's defense, but she also said she did not think Denmon was trying to "get Rose in trouble for something he did not do." Similarly, though parts of Boulden's testimony supported Rose's duress defense, her statements were not based on

personal knowledge and on cross-examination she testified that Denmon felt that Rose had set him up. Because I do not see a reasonable probability that this evidence would have resulted in a different outcome, I respectfully dissent.