IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-40400
USDC No. 4:14-CV-145
USDC No. 4:14-CV-146
USDC No. 4:14-CV-148
USDC No. 4:15-CV-92
USDC No. 4:15-CV-93
USDC No. 4:15-CV-94
USDC No. 4:15-CV-95
USDC No. 4:15-CV-96

A True Copy
Certified order issued Jan 25, 2018
Tyle W. Cayce
Clerk, U.S. Court of Appeals, Fifth Circuit

DINO CONTRERAS MEJIA,

Petitioner-Appellant

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent-Appellee

Appeal from the United States District Court
for the Eastern District of Texas

O R D E R:

Dino Contreras Mejia, Texas prisoner # 1635657, moves for a certificate of appealability (COA) to appeal the district court's dismissal in part and the denial in part of his 28 U.S.C. § 2254 petition challenging his eight convictions for burglary of a habitation. He contends that (1) the district court erred in dismissing his federal habeas claims concerning seven of his convictions as barred by the one-year statute of limitations in 28 U.S.C. § 2244(d); (2) the

evidence was insufficient to support his remaining conviction; (3) the trial court erred by allowing the introduction of testimony that violated his rights under the Confrontation Clause; and (4) his trial counsel was ineffective because he failed to object to a jury instruction on the ground that it allowed the jury to consider evidence of an extraneous offense as proof of his guilt and his character and that it allowed the jury to reach verdicts that were not unanimous.

To obtain a COA, Mejia must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). To satisfy this standard, he must show that reasonable jurists would find the district court's decision to deny relief debatable or wrong, *see Slack v. McDaniel*, 529 U.S. 473, 484 (2000), or "that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further," *Miller-El*, 537 U.S. at 327. Because the district court dismissed some of Mejia's claims as untimely, he must show that the petition states a valid claim of the denial of a constitutional right and "that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack*, 529 U.S. at 484. Mejia has not made the required showing concerning the above claims. Accordingly, Mejia's COA motion is DENIED.

Gregg Costa

GREGG J. COSTA
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

SHERMAN DIVISION

DINO CONTRERAS MEJIA	§	
VS.	§	CIVIL ACTION NO. 4:14-CV-145 (consolidated with 4:14cv146, 4:14cv148, 4:15cv92,
DIRECTOR, TDCJ-CID	§	4:15cv93, 4:15cv94, 4:15cv95, and 4:15cv96)

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

Petitioner Dino Contreras Mejia, a prisoner confined at the Darrington Unit of the Texas Department of Criminal Justice, Correctional Institutions Division, proceeding *pro se*, filed this petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.[1]

This action was referred to the undersigned magistrate judge pursuant to 28 U.S.C. § 636 and the Local Rules for the Assignment of Duties to the United States Magistrate Judge for findings of fact, conclusions of law, and recommendations for the disposition of the case.

Factual Background

The petitioner is in custody pursuant to eight judgments entered in the 362nd Judicial District Court of Denton County, Texas. The petitioner was charged with eight burglaries of habitations in cause numbers F-2008-1891-D, F-2008-1892-D, F-2008-1893-D, F-2008-1894-D, F-2008-1895-D, F-2008-1896-D, F-2008-2245-D, and F-2008-2246-D. The indictments each contained enhancement paragraphs alleging the petitioner had previously been convicted of two felonies. A jury found the

[1] Petitioner filed eight habeas petitions challenging his state court convictions. This petition and cause numbers 4:14-CV-146 , 4:15-CV-92, 4:15-CV-93, 4:15-CV-94, 4:15-CV-95, 4:15-CV-96 primarily challenge his conviction in F-2008-1894-D, but petitioner asserts they also involve his other convictions. Petitioner asserts that cause 4:14-CV-148 primarily challenges his conviction in F-2008-1891-D, but also challenges the other convictions. 2015, the petitions were consolidated, with this petition serving as the lead case. As a result, all filings this case, except for final closing documents.

Appendix G
and
Appendix K

petitioner guilty in each case. The trial court found the enhancement paragraphs were true and sentenced the petitioner to seventy-five years for each offense, with the sentences to run concurrently. However, the trial court ordered the sentences to run consecutively to a sentence previously imposed in Dallas County, Texas. On February 23, 2012, the Second Court of Appeals of Texas affirmed the convictions. The petitioner filed petitions for discretionary review, but they were refused or stricken on July 25, 2012. The petitioner filed a corrected petition for discretionary review in cause number F-2008-1894-D, which was refused on October 10, 2012.

On August 9, 2011, the petitioner filed eight applications for writs of habeas corpus in the trial court. On October 26, 2011, the applications were denied because the petitioner's direct appeals were pending.

On August 26, 2013, the petitioner filed a state habeas application challenging the conviction in cause number F-2008-1894-D. The Texas Court of Criminal Appeals denied the application without written order on October 30, 2013.

On January 7, 2014, the petitioner filed seven state habeas applications challenging his remaining seven convictions. On March 26, 2014, the Texas Court of Criminal Appeals dismissed the applications because they did not comply with Texas Rule of Appellate Procedure 73.1. The petitioner filed seven new state applications on June 14, 2014. Those applications were dismissed on September 17, 2014, because habeas petitions challenging the petitioner's convictions were pending in federal court. The petitioner alleges that the first three of his federal habeas petitions were placed in the prison mail system on February 24, 2014.

The Petition

The petitioner contends the appellate court erred by holding that the evidence of an extraneous offense did not contribute to his convictions and the order cumulating the petitioner's sentences was not defective. The petitioner alleges there was insufficient evidence to support the verdicts. The petitioner contends the trial court erred by: (1) allowing testimony that violated the petitioner's rights under the Confrontation Clause; (2) denying the petitioner's motion to suppress; and (3) allowing the State to introduce evidence of an extraneous offense. With respect to cause number F-2008-1894-D, the petitioner contends counsel provided ineffective assistance by failing to: (1) present an identification expert witness; (2) request a jury instruction on in-court identification; and (3) move to suppress identification testimony.

The Response

The respondent contends that the statute of limitations bars the petitioner's habeas claims arising from cause numbers F-2008-1891-D, F-2008-1892-D, F-2008-1893-D, F-2008-1895-D, F-2008-1896-D, F-2008-2245-D, and F-2008-2246-D. With respect to cause number F-2008-1894-D, the respondent contends the claims of ineffectiveness of counsel lack merit. The respondent contends the remaining claims are procedurally barred.

Standard of Review

Title 28 U.S.C. § 2254 authorizes the District Court to entertain a petition for writ of habeas corpus on behalf of a person in custody pursuant to a state court judgment if the prisoner is in custody in violation of the Constitution or laws or treaties of the United States. 28 U.S.C. § 2254(a). The Court may not grant relief on any claim that was adjudicated in state court proceedings unless the adjudication: (1) resulted in a decision that was contrary to, or involved an unreasonable

application of, clearly established federal law, as determined by the Supreme Court of the United States;[2] or (2) resulted in a decision based on an unreasonable determination of the facts in light of the evidence presented in the state court. 28 U.S.C. § 2254(d). A decision is contrary to clearly established federal law if the state court reaches a conclusion opposite to a decision reached by the Supreme Court on a question of law, or if the state court decides a case differently than the Supreme Court has on a set of materially indistinguishable facts. *Williams v. Taylor*, 529 U.S. 362, 412-13 (2000). An application of clearly established federal law is unreasonable if the state court identifies the correct governing legal principle, but unreasonably applies that principle to the facts. *Id.* State court decisions must be given the benefit of the doubt. *Renico v. Lett*, 559 U.S. 766, 773 (2010).

The question for federal review is not whether the state court decision was incorrect, but whether it was unreasonable, which is a substantially higher threshold. *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007). Federal courts look to the "last reasoned opinion" as the state court's "decision." *Salts v. Epps*, 676 F.3d 468, 479 (5th Cir. 2012). If a higher state court offered different grounds for its ruling than a lower court, then only the higher court's decision is reviewed. *Id.* "Where a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief." *Harrington v. Richter*, 562 U.S. 86, 98 (2011); *see also Johnson v. Williams*, __ U.S. __, 133 S. Ct. 1088, 1091 (2013) (holding there is a rebuttable presumption that the federal claim was adjudicated on the merits when the state court addresses some claims, but not others, in its opinion).

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[2] In making this determination, federal courts may consider only the record before the state court that adjudicated the claim on the merits. *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011).

This Court must accept as correct any factual determinations made by the state courts unless petitioner rebuts the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e). The presumption of correctness applies to both implicit and explicit factual findings. *Young v. Dretke*, 356 F.3d 616, 629 (5th Cir. 2004); *Valdez v. Cockrell*, 274 F.3d 941, 948 n. 11 (5th Cir. 2001) ("The presumption of correctness not only applies to explicit findings of fact, but it also applies to those unarticulated findings which are necessary to the state court's conclusions of mixed law and fact."). Deference to the factual findings of a state court is not dependent upon the quality of the state court's evidentiary hearing. *See Valdez*, 274 F.3d at 951 (holding that "a full and fair hearing is not a precondition to according § 2254(e)(1)'s presumption of correctness to state habeas court findings of fact nor to applying § 2254(d)'s standards of review.").

Analysis

I. Statute of Limitations

There is a one-year statute of limitations that applies to federal petitions for writs of habeas corpus brought by state prisoners. 28 U.S.C. § 2244(d). The limitation period begins to run from the latest of: (1) the date on which the judgment became final; (2) the date on which an impediment to filing created by unconstitutional state action was removed; (3) the date on which the United States Supreme Court initially recognized the constitutional right if the right is retroactively applicable to cases on collateral review; or (4) the date on which the factual predicate of the claim could have been discovered by due diligence. 28 U.S.C. § 2244(d)(1)(A)-(D). The amendment also provides that the statute of limitations is tolled while a state post-conviction review or other collateral attack is pending. 28 U.S.C. § 2244(d)(2).

The petitioner's grounds for review concern alleged errors that occurred, and were known to the petitioner, during the trial. Therefore, the petitioner should have discovered the factual predicate of his claims before the convictions became final. Because the petitioner did not file a petition for writ of certiorari, the judgments in cause numbers F-2008-1891-D, F-2008-1892-D, F-2008-1893-D, F-2008-1895-D, F-2008-1896-D, F-2008-2245-D, and F-2008-2246-D became final on October 23, 2012. *Ott v. Johnson*, 192 F.3d 510, 513 (5th Cir. 1999) (holding that a state conviction becomes final upon denial of certiorari by the United States Supreme Court or expiration of the time period for seeking certiorari). The statute of limitations began to run the next day, and it expired on October 23, 2013. Petitioner's state applications for habeas relief did not toll the statute of limitations because the first group of applications were filed and dismissed before the convictions were final, and the second and third groups of applications were filed after the statute of limitations had expired. As a result, the claims concerning cause numbers F-2008-1891-D, F-2008-1892-D, F-2008-1893-D, F-2008-1895-D, F-2008-1896-D, F-2008-2245-D, and F-2008-2246-D are untimely.

The statute of limitations may be equitably tolled in appropriate cases. *Holland v. Florida*, 560 U.S. 631, 130 S. Ct. 2549, 2562 (2010). Equitable tolling is only available if: (1) the petitioner diligently pursued his rights, and (2) extraordinary circumstances prevented timely filing. *Id.* Delays of the petitioner's own making are not "extraordinary circumstances." *Sutton v. Cain*, 722 F.3d 312, 316 (5th Cir. 2013). Excusable neglect and ignorance of the law do not justify equitable tolling. *Id.* In this case, the petitioner has not demonstrated that extraordinary circumstances prevented him from filing a timely petition. As a result, equitable tolling is not warranted.

Because petitioner did not file timely petitions challenging cause numbers F-2008-1891-D, F-2008-1892-D, F-2008-1893-D, F-2008-1895-D, F-2008-1896-D, F-2008-2245-D, and F-2008-

2246-D, the petition is dismissed as to those convictions. The remainder of this report concerns the petitioner's claims concerning cause number F-2008-1894-D.

II. Procedural Default

With respect to cause number F-2008-1894-D, the respondent contends that several claims are unexhausted and procedurally barred because they were not raised in his petition for discretionary review (PDR) or in his state habeas application. The respondent contends that the petitioner did not exhaust the claims that his rights under the Confrontation Clause were violated, and that the trial court erred by denying his motion to suppress and by allowing the State to introduce evidence of an extraneous offense. These issues were raised on direct appeal. The petitioner contends that the issues were also raised in his PDR. Because the PDR was not filed in this court as part of the state court records, the court will accept the petitioner's assertion that he raised the issues in his PDR. Therefore, the court will assume the claims are exhausted and address the claims on their merits.

III. Evidence of Extraneous Offense and Cumulation Order

The petitioner contends that the trial and appellate courts erred under state law by holding that evidence of an extraneous offense did not contribute to his conviction and by finding that the order cumulating the sentences was not defective. These claims are not reviewable in a federal habeas proceeding because they are matters of state law. *Wood v. Quarterman*, 503 F.3d 408, 414 (5th Cir. 2007) (holding that a state court's interpretation of state law is not reviewable by a federal court); *Dickerson v. Guste*, 932 F.2d 1142, 1145 (5th Cir. 1991). Federal courts do not "sit as a super state supreme court in such a proceeding to review errors under state law." *Id.* (internal quotes omitted); *see also Moreno v. Estelle*, 717 F.2d 171,179 (5th Cir. 1983) ("It is not our function as a federal appellate court in a habeas proceeding to review a state's interpretation of its own law.").

Therefore, the petitioner is not entitled to relief with respect to his claims that the trial and appellate court's rulings on state law were erroneous.

IV. Insufficient Evidence

The petitioner contends that there was insufficient evidence to support his conviction. Claims regarding sufficiency of the evidence are reviewed under the standard set forth by the Supreme Court in *Jackson v. Virginia*, 443 U.S. 307 (1979). The inquiry to be used with such claims is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 320.

In cause number F-2008-1894-D, the indictment alleged that, on or about May 6, 2008, the petitioner, "with intent to commit theft, enter a habitation, without the effective consent of Matthew Walker, the owner." Under Texas law, a person commits burglary if the person enters a habitation without the effective consent of the owner and intends to commit theft, attempts to commit theft, or commits theft. TEX. PENAL CODE. ANN. § 30.02(a)(1), (3).

Petitioner challenged the sufficiency of the evidence to support his eight burglary convictions on direct appeal. The Court of Appeals summarized the evidence as follows:

> On May 6, 2008, Matthew Walker went to his Lewisville home after eating lunch with his wife, and when he arrived, he saw muddy footprints on the carpet that had not previously been there. When he went upstairs, he noticed that items had been scattered on the floor and that some of his property, including a television and two laptop computers, had been taken without his permission.
>
> On the day of the robbery, one of Walker's neighbors, James Sterett, a convicted felon, came home from running errands and saw a gray station wagon parked in his own driveway with duct tape covering the license plate. Sterett then saw a man coming from Walker's house. The man was Hispanic, middle-aged, had a mustache, and was wearing jeans, a shirt, a light jacket, and a cap. Sterett approached the man

and said, "Excuse me. Can I help you?" The man responded that he was looking for a friend whom he thought lived at Walker's house. The man then drove down an alley, but after Sterett went inside his house, the man returned. Sterett went back outside, and the man drove away from the neighborhood. When Sterett learned that Walker's house had been burglarized, he told the police about what he had seen.

Some of Walker's other neighbors, the Buffingtons, had security cameras mounted on their house. Walker viewed the recording from the day of the robbery, and he brought pictures from the recording to trial.

Max Gehrke, a Lewisville police officer, was assigned to investigate Walker's burglary (along with Mathis's burglary). He testified that the police could not find usable fingerprints at Walker's house. He viewed the Buffingtons' security recording, which showed a gray Dodge Magnum, a station-wagon-like car, that entered the alley of Walker's residence in the time fame of the burglary. Officer Gehrke put pictures taken from the recording on ListServ, and the response that Officer Gehrke received caused him to develop appellant as a suspect for the burglary.

Weeks after the burglary, Officer Gehrke showed Sterett a black and white photographic lineup with six similarly looking men, and Sterett chose appellant as the man he had seen on May 6. Sterett, who testified that he is "very good at remembering faces," also identified appellant in court as the man with whom he had conversed near Walker's house. He testified, "I was trying to look very hard at [appellant's] face ... because I knew he had to be doing something no-good with the duct tape on the license plate, ... and I wanted to remember what he looked like." On cross-examination by appellant's counsel, Sterett conceded that he had not noticed

tattoos on appellant on the date of the offense. Appellant testified later that he has two tattoos on his face.

. . . .

Detectives gathered information by which they believed that the eight Denton County burglaries were linked together. Specifically, the method of the burglaries, the types of items that were taken, and the neighborhoods they were committed in were similar.

On June 10, 2008, the same day as [the last of the series of burglaries] and appellant's arrest, Dallas Police Department (DPD) Officers Corey Parker and Michael Clifford, along with Detective Fred Mends, were at Budget Suites on Stemmons Freeway for several hours to watch room 3073, which they believed to be associated with appellant. The officers eventually saw Mickie Young leave the room, and they believed, based on a conversation with Young, that they had consent to search it. The officers never saw appellant enter or leave room 3073. Upon

searching room 3073, which appeared to be occupied by a man and a woman based on the types of clothes there, the police found jewelry, fur coats, cologne, perfume, and paintings; the officers had to call for a truck because there was "[t]oo much property to put in [their] cars."

After seizing these items, the officers took them to a police station so that "different complainants all over the Metroplex" could identify and retrieve their property. The next morning, the DPD assigned Detective Philip Strodtman to take over the investigation of the burglaries associated with the property found in room 3073. Detective Strodtman communicated with officers in other police agencies and released various items of property to their owners. Stevenson, Goetz, Mathis, Marshall, Hernandez, Whipple, and Lawlor all identified property they owned that had been seized from room 3073.

Diane Willis was managing the Budget Suites on Stemmons Freeway in June 2008. Willis testified that room 3073 was leased to Young and appellant, although Young paid the rent. Willis had not noticed appellant entering room 3073, but she had seen appellant "[m]any times" in the company of Young. She confirmed that appellant was "registered to the room," and she knew that appellant drove a "gray-silver" Dodge Magnum for eight months to a year preceding his arrest. According to Willis, appellant had been at Budget Suites on the night of his arrest, and about a week before that, she had seen him unload groceries into room 3073.

Lewisville Police Department Detective David Henley investigated the burglary of the Stevensons' house, Goetz's house, and Marshall's house. After receiving information from Detective Philip Strodtman on ListServ concerning appellant, in June 2008, Detective Henley entered appellant's name into LeadsOnline, which led Detective Henley to visit Cash Pawn No. 25, to take pictures of some of the items held there, and to eventually seize those items. Joel Mendez, who manages that pawnshop, testified that the pawnshop requires identification from people who sell merchandise to the store. The pawnshop also classifies all of the items that are pawned or sold to the shop by the people who sell them. Mendez testified that appellant had sold items to the pawnshop in 2008 on June 1 and June 5. An exhibit shows that appellant received more than $1,000 for pawning thirty-eight items on those days. Among those items were diamond rings, birthstone rings, a wedding band, and gold earrings. Some of the Lawlors' property, taken on June 4, 2008, was recovered at the pawn shop.

Detective Henley also visited Detective Strodtman, saw hundreds of items that the DPD had seized from room 3073, and took photographs of the items. He contacted the victims of the burglaries that he was investigating to ask them to look at the photographs and possibly recognize some of the items displayed in them. Goetz, Marshall, and the Stevensons all recognized items in the photographs, retrieved the

> items from Dallas, and then brought the items back to Detective Henley so that he could photograph them individually.
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> Flower Mound Police Department Detective John Ryckeley investigated the Hernandez and Whipple burglaries. Detective Ryckeley noticed muddy shoeprints in Whipple's house and identified pictures of the shoeprints at trial. Later, through ListServ, the DPD contacted Detective Ryckeley to tell him that some of the property taken from Hernandez and Whipple may have been recovered from room 3073, and Hernandez and Whipple identified their property. After appellant's arrest, Detective Ryckeley visited him in jail, seized his Nike shoes through a warrant, and discovered that the size and pattern on the shoes' soles matched the size and pattern of the shoeprints at Whipple's house.
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> . . . .
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> Appellant testified that on the night of his arrest, June 10, 2008, he dropped Young off at Budget Suites at around 9 p.m. When he left the parking lot, the police stopped and arrested him. Appellant confirmed that he knew Young, and he described her as a friend. He said that he signed the lease for room 3073 because Young wanted to live there but did not have valid identification, and he testified that he later tried to remove his name from the lease. Appellant claimed, however, that he never lived or spent the night there, did not have a key to the room, and did not know of any property located there. He testified that Willis's testimony that he frequently went there was wrong, although he conceded that he went there to help Young buy groceries about once every three weeks.
>
> Appellant agreed that he had sold items to a pawnshop and that those items had been taken from the burglary victims' homes, but he denied knowing or suspecting that the items that had been stolen, he said, "The reason I had that jewelry is because Ms. Young gave it to me. She needed money, and she didn't have no I.D. And I took it over there and sold it for her. That money went directly to her."

Mejia v. State, 2012 WL 579455, at *2-3, 5-6 (Tex. App.–Fort Worth Feb. 23, 2012).

The Court of Appeals rejected petitioner's claim that the evidence was insufficient to support his burglary convictions. The Court explained its reasoning as follows:

> Appellant asserts that the State did not prove that he had entered the victims' homes or had possessed their property. But the evidence establishes that eight similarly executed burglaries, at six homes in Lewisville and two homes in Flower Mound, all occurred in less than two months. In seven of the eight burglaries, the victims identified their stolen property as the same property that the police had seized from

room 3073. Appellant's association with room 3073 was not exclusive, but the association enabled the jury to focus on either appellant or Young, the only people that the evidence connected to room 3073, as the burglar. Appellant contends that he did not reside with Young in that room, did not have personal belongings there, and did not possess the stolen property that the police found there. But the jury was free to reject those theories, and it had rational, circumstantial reasons to do so because appellant's name was on the lease for the room, the police found men's clothes in the room upon searching it (and there is no evidence of any other male associated with that room), Willis testified that she had seen him at the Budget Suites "[m]any times" and on a "pretty regular basis" until his arrest in June 2008, and the State impeached appellant's credibility with evidence of previous burglary convictions.

Other facts could have allowed the jury to rationally infer that appellant, not Young, committed each of the burglaries. First, the size and pattern of appellant's shoeprints matched shoeprints found at Whipple's house. Appellant relies on *Casel v. State* to argue that the matching shoeprints are not probative, but in that case, a match between shoeprints at the scene and the shoes the defendant wore while detained for questioning was the "only evidence connecting [the defendant] with the burglary." Here, the State does not rely solely on the shoe print match to link appellant to the burglaries.

Second, Sterett testified that he had talked to appellant near Walker's residence on the date of the burglary of that house. Appellant denied this fact. Although Sterett initially told the police that appellant had missing teeth, and although Sterett had not recalled seeing tattoos on appellant's face on the day the burglary occurred, the jury had rational reasons to accept Sterett's testimony and reject appellant's testimony. For example, Sterett remembered that appellant had covered part of his license plate with duct tape, and appellant conceded that he had covered the license plate in a similar way on another occasion. Also, when Officer Gehrke showed Sterett the photographic lineup, it took Sterett less than two seconds to recognize appellant. We must defer to the jury's implicit resolution of conflicts between Sterett's testimony about how appellant looked on the date of Walker's burglary and appellant's later appearance at trial.

Third, appellant's Dodge Magnum matched the car associated with Walker's burglary (by Sterett and by the Buffingtons' security recording), Stevenson's burglary, and Cecil's burglary. Fourth, the police found some of the Lawlors' property at a pawnshop in Dallas; the manager of that pawnshop testified, and appellant acknowledged, that appellant had sold property to the pawnshop. Fifth, no similar facts connected Young or anyone else to any of the burglaries.

Furthermore, the jury could have rationally rejected the parts of appellant's testimony that, if believed, could have weighed against his involvement in the burglaries. Although appellant said that at the time of the burglaries, he was living in Dallas with three men rather than at room 3073, none of these men corroborated appellant's testimony. The jury could have also rationally disbelieved appellant's claims that he took thirty-eight items of valuable property from Young and sold them to the pawnshop on her behalf without having any knowledge about the items being stolen and without asking Young about where, when, or how she acquired the property. Finally, the jury could have rationally rejected appellant's claim that it was merely bad luck that his interaction with Cecil near her duplex coincided with her property being found in room 3073 on the same day.

Appellant asserts on appeal that the evidence shows that he did not have a key to room 3073 upon his arrest. Appellant testified that he did not have a key to room 3073, but based on the evidence described above concerning appellant's recurring presence at Budget Suites, his unloading of groceries there, and the presence of men's clothing in the room when officers searched it, the jury could have rationally rejected appellant's testimony. Also, while the State stipulated that "no set of keys was taken into the defendant's personal property when he was arrested," this stipulation does not show that appellant did not have keys when he was arrested (the evidence shows that he was driving a car). Furthermore, even if appellant did not have a key to room 3073, he still could have resided there or stored the items he had stolen there.

Contrary to the arguments in appellant's brief, the jury's verdicts of conviction do not necessarily hinge upon appellant's recent possession of stolen property. Nor do the verdicts require appellant's exclusive possession of room 3073 or rest only upon the law of parties.

Also, we do not agree with appellant's numerous contentions that his burglary charges rest on Young's implication of him as a co-occupant with her in room 3073. While the record shows that officers believed that they had obtained consent to search room 3073 from Young, we have not located evidence indicating that Young said anything about appellant on the night the officers searched room 3073. Moreover, without any statement by Young, the jury could have rationally linked appellant to room 3073 through Willis's testimony.

Next, appellant contends that the evidence is insufficient because there is no evidence of appellant's flight during his arrest, there were no witnesses to the entries into the habitations, appellant was not present during the search, there were no rent receipts from room 3073 with appellant's name on them, and the lease of room 3073 was not introduced as an exhibit.

> Viewing all of the evidence in the light most favorable to the jury's verdicts, and deferring to the jury's authority to draw reasonable inferences from basic facts to ultimate facts, we conclude that the evidence was sufficient to enable the jury to rationally find, beyond a reasonable doubt, that appellant committed each of eight similar, linked burglaries by entering each victim's habitation to commit theft.

Mejia, 2012 WL 579455, at *7–10 (citations omitted).

As quoted above, the Court of Appeals throughly reviewed the evidence and found that the evidence was sufficient to establish each element of the offense of burglary. The state court finding is not contrary to, nor does it involve an unreasonable application of, clearly established federal law. Based on the evidence, a reasonable jury could have found that the petitioner committed burglary.

V. Confrontation Clause

Detective Fred Mends, Officer Corey Parker, and Officer Michael Clifford spent several hours watching Room 3073 at the Budget Suites after the petitioner was arrested. The room was leased to the petitioner and Mickie Young. Detective Mends saw Ms. Young leave the room and, based on a conversation with her, he believed he had consent to search the room. The petitioner contends that the testimony of Detective Mends violated the Confrontation Clause because it "inferentially or indirectly presented to the jury Mickie Young's out-of-court testimonial statement to Officer Parker."

The Sixth Amendment guarantees the accused the right to be confronted with the witnesses against him. *Lilly v. Virginia*, 527 U.S. 116, 123 (1999). "The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." *Maryland v. Craig*, 497 U.S. 836, 845 (1990). The right to confrontation is violated if the prosecution introduces the testimonial statement of a witness who does not appear at trial unless the witness was unavailable

K P
Appendix B (U.S Magistrate C.C) Grounds Error
Recommendation

to testify and the defendant previously had an opportunity to cross-examine the witness. *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004).

On direct appeal, the court found that Detective Mends's testimony did not present any out-of-court statements made by Ms. Young concerning the petitioner's connection to room 3073 at the Budget Suites. Detective Mends testified that he went to the Budget Suites because he believed that the petitioner had a room there. The appellate court found that this testimony did not indicate that Ms. Young was the source of that information. Thus, the appellate court rejected this claim. *Mejia*, 2012 WL 579455, at *10.

A violation of the Confrontation Clause is a trial error. *Fratta v. Quarterman*, 536 F.3d 485, 508 n. 16 (5th Cir. 2008). On collateral review, a federal court may grant relief based on constitutional trial error only if the error had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)); *see also Fry v. Pliler*, 551 U.S. 112, 119-20 (2007) (holding that the *Brecht* harmless error standard survived passage of the Antiterrorism and Effective Death Penalty Act of 1996). Under this standard, the petitioner should prevail if the record is balanced such that "a conscientious judge is in grave doubt as to the harmlessness of the error." *O'Neal v. McAninch*, 513 U.S. 432, 435 (1995); *Robertson v. Cain*, 324 F.3d 297, 305 (5th Cir. 2003).

Assuming that the testimony of Detective Mends should have been excluded for the reasons cited by the petitioner, the alleged error did not have a substantial or injurious influence on the jury's verdict. In light of the other evidence supporting the jury's verdict, the admission of the testimony

was harmless. The state court's rejection of this claim was not contrary to, and did not involve an unreasonable application of, clearly established federal law.

VI. Motion to Suppress

The petitioner asserts the trial court erred by denying his motion to suppress the evidence seized as a result of his arrest.

Federal courts may not review Fourth Amendment claims on habeas review where the State has provided an opportunity for full and fair litigation of the claims. *Stone v. Powell*, 428 U.S. 465 (1976). As long as the State provides the processes whereby a defendant can obtain full and fair litigation of a Fourth Amendment claim, *Stone* bars federal habeas review of that claim regardless of whether the defendant employs those processes. *Janecka v. Cockrell*, 301 F.3d 316, 320 (5th Cir. 2002); *Carver v. Alabama*, 577 F.2d 1188, 1192 (5th Cir. 1978).

The petitioner had a full and fair opportunity to litigate his Fourth Amendment claim in state court. The issue was raised before trial, and it was rejected by the trial court after a hearing. On direct appeal, the appellate court found that the petitioner's arrest and the search and seizure were constitutional. The fact that the petitioner disagrees with the state court's ruling is not sufficient to overcome the *Stone* bar. Therefore, this court may not revisit that issue.

VII. Ineffective Assistance of Counsel

The petitioner alleges his trial attorney provided ineffective assistance with respect to the identification of the petitioner by a witness. The petitioner contends his attorney should have presented an identification expert witness, requested a jury instruction on in-court identification, and moved to suppress the identification testimony.

In order to establish an ineffective assistance of counsel claim, the petitioner must prove counsel's performance was deficient, and the deficient performance prejudiced the petitioner's defense. *Strickland v. Washington*, 466 U.S. 668 (1984). Because the petitioner must prove both deficient performance and prejudice, failure to prove either will be fatal to his claim. *Johnson v. Scott*, 68 F.3d 106, 109 (5th Cir. 1995).

Judicial review of counsel's performance is highly deferential. *Strickland*, 466 U.S. at 689. There is a strong presumption that counsel rendered reasonable, professional assistance and that the challenged conduct was the result of a reasoned strategy. *Strickland*, 466 U.S. at 689; *Wilkerson v. Collins*, 950 F.2d 1054, 1065 (5th Cir. 1992). To overcome the presumption that counsel provided reasonably effective assistance, the petitioner must prove his attorney's performance was objectively unreasonable in light of the facts of the petitioner's case, viewed as of the time of the attorney's conduct. *Strickland*, 466 U.S. at 689-90. A reasonable, professional judgment to pursue a certain strategy should not be second-guessed. *Jones v. Barnes*, 463 U.S. 745, 751-54 (1983).

In addition to demonstrating counsel's performance was deficient, the petitioner must also show prejudice resulting from counsel's inadequate performance. *Strickland*, 466 U.S. at 691-92. The petitioner must establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. The petitioner must show a substantial likelihood that the result would have been different if counsel performed competently. *Richter*, 562 U.S. at 111-12. Mere allegations of prejudice are insufficient; the petitioner must affirmatively prove, by a preponderance of the evidence, that he was prejudiced as a result of counsel's deficient performance. *Armstead v. Scott*, 37 F.3d 202, 206 (5th Cir. 1994).

16.
Appendix ~~B~~ (U.S. Magistrate Doc. 52)
Ineffective Assistance

Analysis of an ineffective assistance claim on federal habeas review of a state court conviction is not the same as adjudicating the claim on direct review of a federal conviction. *Richter*, 562 U.S. at 101. The key question on habeas review is not whether counsel's performance fell below the *Strickland* standard, but whether the state court's application of *Strickland* was unreasonable. *Id.* Even if the petitioner has a strong case for granting relief, that does not mean the court was unreasonable in denying relief. *Id.* at 102.

The petitioner contends that he was misidentified by Mr. Sterrett as the person Mr. Sterrett saw and spoke to outside the Walker home. The petitioner contends that his attorney should have filed a motion to suppress Mr. Sterrett's in-court identification, presented an expert witness in identification to discredit the testimony of Mr. Sterrett, and request a jury instruction on in-court identifications.

The petitioner raised these claims in his state habeas application. The State submitted proposed findings, which were adopted by the trial court. The trial court found that the petitioner did not show that the photo line-up identification or the in-court identification were unreliable, and, therefore, the testimony of an expert witness would not have aided the defense. The trial court also found that the jury charge was not erroneous. Based on these findings, the trial court found that counsel did not perform deficiently, and that counsel's performance did not undermine confidence in the outcome of the trial. Application No. WR-24,438-13, at 160-61.

The state court's application of *Strickland* was reasonable. The state court applied the appropriate law, and the finding was based on a reasonable determination of the facts in light of the evidence presented in the state court proceeding. The state court adjudication was not contrary to, and did not involve an unreasonable application of, clearly established federal law.

Recommendation

This petition for writ of habeas corpus should be denied.

Objections

Within fourteen days after receipt of the magistrate judge's report, any party may serve and file written objections to the findings of facts, conclusions of law and recommendations of the magistrate judge. 28 U.S.C. § 636(b)(1)(C).

Failure to file written objections to the proposed findings of facts, conclusions of law and recommendations contained within this report within fourteen days after service shall bar an aggrieved party from *de novo* review by the district court of the proposed findings, conclusions and recommendations and from appellate review of factual findings and legal conclusions accepted by the district court except on grounds of plain error. *Douglass v. United Services Automobile Ass'n,* 79 F.3d 1415, 1417 (5th Cir. 1996) (en banc); 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72.

SIGNED this 9th day of February, 2017.

Christine A. Nowak
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

SHERMAN DIVISION

DINO CONTRERAS MEJIA	§	
VS.	§	CIVIL ACTION NO. 4:14-CV-145 (consolidated with 4:14cv146, 4:14cv148, 4:15cv92,
DIRECTOR, TDCJ-CID	§	4:15cv93, 4:15cv94, 4:15cv95, and 4:15cv96)

MEMORANDUM ORDER OVERRULING OBJECTIONS AND ADOPTING THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

Petitioner Dino Contreras Mejia, a prisoner confined at the Darrington Unit of the Texas Department of Criminal Justice, Correctional Institutions Division, filed these petitions for writs of habeas corpus pursuant to 28 U.S.C. § 2254.

The Court referred this matter to the Honorable Christine A. Nowak, United States Magistrate Judge, for consideration pursuant to applicable laws and orders of the Court. The magistrate judge has submitted a report recommending denying the petition.

The Court has received and considered the Report and Recommendation of United States Magistrate Judge, along with the record, pleadings, and all available evidence. The parties filed objections to the Report and Recommendation.

The Court has conducted a *de novo* review of the objections in relation to the pleadings and the applicable law. *See* FED. R. CIV. P. 72(b). After careful consideration, the Court concludes the objections are without merit.

Procedural History

The petitioner is in custody pursuant to eight judgments entered in the 362nd Judicial District Court of Denton County, Texas. The petitioner was convicted of burglary of habitations in cause

Appendix B (Adopt) Opinion of Fed. Dist Ct.

numbers F-2008-1891-D, F-2008-1892-D, F-2008-1893-D, F-2008-1894-D, F-2008-1895-D, F-2008-1896-D, F-2008-2245-D, and F-2008-2246-D. The petitioner was sentenced to seventy-five years for each offense, with the sentences to run concurrently with each other and consecutively to a sentence previously imposed in Dallas County, Texas.

After pursuing relief from the judgments in the state courts, the petitioner filed eight federal habeas petitions pursuant to 28 U.S.C. § 2254. Each petition challenged one or more of the burglary convictions. The petitioner raised six grounds for review with respect to each of his eight convictions. First, the petitioner contends the state courts erred by holding that the evidence of an extraneous offense did not contribute to his convictions and that the order cumulating the petitioner's sentences was not defective. The petitioner alleges there was insufficient evidence to support the verdicts. The petitioner contends the trial court erred by: (1) allowing testimony that violated the petitioner's rights under the Confrontation Clause; (2) denying the petitioner's motion to suppress; and (3) allowing the State to introduce evidence of an extraneous offense. With respect to cause number F-2008-1894-D, the petitioner also contends counsel provided ineffective assistance by failing to: (1) present an identification expert witness; (2) request a jury instruction on in-court identification; and (3) move to suppress identification testimony.

The magistrate judge found that the statute of limitations barred review of the judgments in cause numbers F-2008-1891-D, F-2008-1892-D, F-2008-1893-D, F-2008-1895-D, F-2008-1896-D, F-2008-2245-D, and F-2008-2246-D. The magistrate judge reviewed the merits of each claim with respect to cause number F-2008-1894-D and concluded that the claims lack merit.

Objections

Both parties filed objections to the magistrate judge's report and recommendation. With respect to cause number F-2008-1894-D, the respondent contends that several claims are unexhausted and procedurally barred because they were not presented to the Texas Court of Criminal Appeals in a petition for discretionary review (PDR) or a state habeas application. The petitioner objects to the magistrate judge's finding that the judgments in cause numbers F-2008-1891-D, F-2008-1892-D, F-2008-1893-D, F-2008-1895-D, F-2008-1896-D, F-2008-2245-D, and F-2008-2246-D are barred by the statute of limitations. The petitioner also contends the magistrate judge erred by recommending the denial of the petitioner's claims of a Confrontation Clause violation, ineffective assistance of counsel, insufficiency of the evidence, an improper cumulation order, and the erroneous denial of a motion to suppress.

Statute of Limitations

The petitioner asserts the magistrate judge incorrectly concluded that the judgments in cause numbers F-2008-1891-D, F-2008-1892-D, F-2008-1893-D, F-2008-1895-D, F-2008-1896-D, F-2008-2245-D, and F-2008-2246-D are barred by the one-year statute of limitations that applies to § 2254 habeas petitions.

The statute of limitations begins to run from the latest of: (1) the date on which the judgment became final; (2) the date on which an impediment to filing created by unconstitutional state action was removed; (3) the date on which the United States Supreme Court initially recognized the constitutional right if the right is retroactively applicable to cases on collateral review; or (4) the date on which the factual predicate of the claim could have been discovered by due diligence. 28 U.S.C. § 2244(d)(1)(A)-(D).

In this case, the petitioner should have discovered the factual predicate of his claims before the convictions became final, there was no state-created impediment to filing, and his petitions do not rely on newly-created constitutional rights. Therefore, the statute of limitations began to run when the convictions became final. In cause numbers F-2008-1891-D, F-2008-1892-D, F-2008-1893-D, F-2008-1895-D, F-2008-1896-D, F-2008-2245-D, and F-2008-2246-D, the petitioner filed petitions for discretionary review. The Texas Court of Criminal Appeals refused or struck each of those petitions on July 25, 2012. Because the petitioner did not file petitions for writ of certiorari, the judgments in cause numbers F-2008-1891-D, F-2008-1892-D, F-2008-1893-D, F-2008-1895-D, F-2008-1896-D, F-2008-2245-D, and F-2008-2246-D became final on October 23, 2012. *Ott v. Johnson*, 192 F.3d 510, 513 (5th Cir. 1999) (holding that a state conviction becomes final upon denial of certiorari by the United States Supreme Court or expiration of the time period for seeking certiorari). The statute of limitations began to run the next day, and it expired on October 23, 2013. The first three of the petitioner's federal habeas petitions were placed in the prison mail system on February 24, 2014. Giving the petitioner the benefit of the doubt that each of his claims with respect to each of his convictions were raised in those first three petitions, the statute of limitations had expired four months before the first federal petitions were filed.

The statute of limitations is tolled while a state post-conviction review or other collateral attack is pending. 28 U.S.C. § 2244(d)(2). Petitioner's state applications for habeas relief did not toll the statute of limitations because the first group of state applications were filed and dismissed in 2011, before the convictions were final, and the second and third groups of state applications were filed in 2014, after the statute of limitations had expired. As a result, the claims concerning

cause numbers F-2008-1891-D, F-2008-1892-D, F-2008-1893-D, F-2008-1895-D, F-2008-1896-D, F-2008-2245-D, and F-2008-2246-D are untimely.

The judgment in cause number F-2008-1894-D is not barred by the statute of limitations because the petitioner filed a second petition for discretionary review (PDR) in that case, which caused the limitations period to start on a later date than in the other cases. The Texas Court of Criminal Appeals refused the second PDR on October 10, 2012. The petitioner did not file a petition for writ of certiorari, and the judgment became final on January 8, 2013. On August 26, 2013, the petitioner filed a state habeas application challenging the conviction in cause number F-2008-1894-D. The statute of limitations was tolled until the Texas Court of Criminal Appeals denied the application without written order on October 30, 2013. The federal habeas petitions challenging F-2008-1894-D, which were filed on February 24, 2014, are timely.

Procedural Default

With respect to cause number F-2008-1894-D, the respondent contends that several claims are unexhausted and procedurally barred because they were not raised in a PDR or a state habeas application. Specifically, the respondent contends the following claims are unexhausted: (1) the state courts erred by holding that evidence of an extraneous offense did not contribute to the convictions and that the order cumulating the sentences was not defective; (2) the evidence was insufficient to support the convictions; and (3) the trial court erred by allowing testimony that violated the Confrontation Clause, denying the petitioner's motion to suppress evidence, and allowing the State to introduce evidence of an extraneous offense.

The respondent failed to submit the PDR from cause number F-2008-1894-D with the state court records. Without reviewing the PDR, it is impossible for this Court to determine whether the

claims were presented to the Texas Court of Criminal Appeals. As a result of the incomplete records, the magistrate judge assumed the claims were exhausted and addressed them on the merits. In her objections, the respondent erroneously contends the PDR was filed in this action as part 9 of docket entry 27. In fact, cause number F-2008-1894-D is not identified as one of the criminal convictions the petitioner challenged in that PDR, and the first PDR for cause number F-2008-1894-D is not part of the record. Further, the petitioner contends that he filed a second PDR challenging cause number F-2008-1894-D, which the Texas Court of Criminal Appeals refused on October 10, 2012. The second PDR is also missing from the state court records. Because the respondent failed to demonstrate that the claims were unexhausted and procedurally barred, the magistrate judge did not err by considering the merits of the claims related to cause number F-2008-1894-D.

Confrontation Clause

On June 10, 2008, the day of the last burglary and the petitioner's arrest, three law enforcement officers spent several hours watching room 3073 of a Budget Suites hotel. Eventually they saw Mickie Young leave the hotel room. Based on a conversation with Ms. Young, the officers believed they had consent to search the room. The police found signs that both a man and a woman were staying in room 3073, and the officers discovered property that had been stolen during the burglaries. At trial, Detective Fred Mends testified that he believed he had consent to search the hotel room after speaking with Ms. Young. The petitioner claims this testimony violated his rights under the Confrontation Clause because it "inferentially or indirectly presented to the jury Mickie Young's out-of-court testimonial statement."

The state court concluded that the testimony did not violate the Confrontation Clause because it did not present any out-of-court statements made by Ms. Young concerning the petitioner's

connection to the hotel room. The magistrate judge found that the state court's rejection of this claim was a reasonable application of clearly established federal law. Additionally, on collateral review, a federal court may grant relief based on constitutional trial error only if the error had a "substantial and injurious effect or influence in determining the jury's verdict." *See Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993). In light of the significant evidence supporting the conviction in cause number F-2008-1894-D, as summarized in the appellate court's opinion, the magistrate judge correctly concluded that the alleged error did not have a substantial or injurious influence on the jury's verdict.

Insufficient Evidence

The petitioner contends the evidence was insufficient to support his conviction. In reviewing the sufficiency of the evidence, the Court must determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *See Jackson v. Virginia*, 443 U.S. 307, 320 (1979). This standard requires the Court to look at the state statute to determine the essential elements of the crime. In Texas a person commits burglary if the person enters a habitation without the effective consent of the owner and intends to commit theft, attempts to commit theft, or commits theft. TEX. PENAL CODE ANN. § 30.02(a)(1), (3).

The state appellate court reviewed the extensive record and found that there was sufficient evidence to establish each element of burglary with respect to each of the petitioner's convictions. The appellate court presented a lengthy summary of the evidence, which the magistrate judge quoted extensively. Briefly, the evidence shows that many of the stolen items were located in a hotel room. The hotel room was leased in the petitioner's name and contained men's clothing. The petitioner

was frequently seen at the hotel room. The size and pattern of the petitioner's shoe prints matched the shoe prints found at one of the burglarized homes. Eyewitnesses identified the petitioner and his vehicle at several of the crime scenes, including the home that was burglarized in F-2008-1894-D. Also, the manager of a pawn shop testified that the petitioner had sold stolen property to the pawn shop.

A rational jury, viewing the evidence in the light most favorable to the prosecution, could have found the essential elements of the crime of burglary beyond a reasonable doubt. Thus, the magistrate judge did not err by finding that the state court's determination is not contrary to, or an unreasonable application of, clearly established federal law.

Ineffective Assistance of Counsel

The petitioner contends that he was misidentified by an eyewitness, and that his trial attorney provided ineffective assistance of counsel with respect to the testimony of the eyewitness. The petitioner contends his trial attorney should have presented an expert witness in eyewitness identification, requested a jury instruction on in-court identification, and moved to suppress the identification testimony of the eyewitness.

To establish a claim of ineffective assistance of counsel, the petitioner must prove counsel's performance was deficient, and the deficient performance prejudiced the petitioner's defense. *Strickland v. Washington*, 466 U.S. 668 (1984). Because the petitioner must prove both deficient performance and prejudice, failure to prove either will be fatal to his claim. *Johnson v. Scott*, 68 F.3d 106, 109 (5th Cir. 1995).

During the state habeas proceedings, the trial court found that the petitioner did not show the photographic line-up identification or the in-court identification were unreliable. Therefore, the

trial court found that the testimony of an expert witness would not have aided the defense. The trial court also found that the jury charge was not erroneous. The trial court found that counsel did not perform deficiently with respect to the eyewitness identification, and that counsel's performance did not undermine confidence in the outcome of the trial.

Analysis of an ineffective assistance claim on federal habeas review of a state court conviction is not the same as adjudicating the claim on direct review of a federal conviction. *Harrington v. Richter*, 562 U.S. 86, 101 (2011). The Court does not make an independent determination as to whether counsel's performance fell below the *Strickland* standard. Instead, the Court must determine whether the state court's application of *Strickland* was unreasonable. *Id.* In this case, the magistrate judge correctly concluded that the state court's application of *Strickland* was reasonable. The state court applied the appropriate law, and the finding was based on a reasonable determination of the facts in light of the evidence presented in the state court proceeding. The petitioner's conclusory assertion that the eyewitness incorrectly identified him as being at the scene of the crime is not sufficient to support a claim for federal habeas relief. *Ross v. Estelle*, 694 F.2d 1008, 1012 (5th Cir. 1983). The state court's adjudication was not contrary to, and did not involve an unreasonable application of, clearly established federal law.

Cumulation Order

The petitioner contends that the trial court erred by entering a cumulation order that will require the petitioner to serve his eight burglary sentences consecutively to a prior sentence. As the magistrate judge concluded, this claim is not reviewable in a federal habeas proceeding because it is a matter of state law. *Wood v. Quarterman*, 508 F.3d 408, 414 (5th Cir. 2007) (holding that a state court's interpretation of state law is not reviewable by a federal court); *Dickerson v. Guste*, 932 F.2d

1142, 1145 (5th Cir. 1991); *Moreno v. Estelle*, 717 F.2d 171,179 (5th Cir. 1983) ("It is not our function as a federal appellate court in a habeas proceeding to review a state's interpretation of its own law."). Therefore, the petitioner is not entitled to relief with respect to his claim that it was improper to run the sentences consecutively.

Denial of Motion to Suppress

The petitioner contends the trial court erred by denying his motion to suppress the evidence seized as a result of his arrest. However, federal courts may not review Fourth Amendment claims on habeas review if the State provided an opportunity for full and fair litigation of the claims, regardless of whether the defendant employed those processes. *Stone v. Powell*, 428 U.S. 465 (1976). Because the petitioner had a full and fair opportunity to litigate his Fourth Amendment claim in state court, the magistrate judge correctly concluded that *Stone* bars the petitioner from relitigating his claim in federal court. The issue was raised before trial, and it was rejected by the trial court after a hearing. The petitioner's disagreement with the state court's ruling is not sufficient to overcome the *Stone* bar.

Certificate of Appealability

In this case, the petitioner is not entitled to the issuance of a certificate of appealability. An appeal from a judgment denying federal habeas corpus relief may not proceed unless a judge issues a certificate of appealability. *See* 28 U.S.C. § 2253; FED. R. APP. P. 22(b). The standard for granting a certificate of appealability, like that for granting a certificate of probable cause to appeal under prior law, requires the petitioner to make a substantial showing of the denial of a federal constitutional right. *See Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000); *Elizalde v. Dretke*, 362

F.3d 323, 328 (5th Cir. 2004); *see also Barefoot v. Estelle*, 463 U.S. 880, 893 (1982). In making that substantial showing, the petitioner need not establish that he should prevail on the merits. Rather, he must demonstrate that the issues are subject to debate among jurists of reason, that a court could resolve the issues in a different manner, or that the questions presented are worthy of encouragement to proceed further. *See Slack*, 529 U.S. at 483-84; *Avila v. Quarterman*, 560 F.3d 299, 304 (5th Cir. 2009). If the petition was denied on procedural grounds, the petitioner must show that jurists of reason would find it debatable: (1) whether the petition raises a valid claim of the denial of a constitutional right, and (2) whether the district court was correct in its procedural ruling. *Slack*, 529 U.S. at 484; *Elizalde*, 362 F.3d at 328. Any doubt regarding whether to grant a certificate of appealability is resolved in favor of the petitioner, and the severity of the penalty may be considered in making this determination. *See Miller v. Johnson*, 200 F.3d 274, 280-81 (5th Cir. 2000).

The petitioner has not shown that any of the issues raised by his claims are subject to debate among jurists of reason. The factual and legal questions advanced by the petitioner are not novel and have been consistently resolved adversely to his position. In addition, the questions presented are not worthy of encouragement to proceed further. The petitioner has failed to make a sufficient showing to merit the issuance of a certificate of appealability.

ORDER

Accordingly, the objections are **OVERRULED**. The findings of fact and conclusions of law of the magistrate judge are correct, and the report of the magistrate judge is **ADOPTED**. A final judgment will be entered in this case in accordance with the magistrate judge's recommendation. A certificate of appealability will not be issued.

SIGNED this 29th day of March, 2017.

AMOS L. MAZZANT
UNITED STATES DISTRICT JUDGE