IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-10672

A True Copy
Certified order issued Apr 16, 2018
Clerk, U.S. Court of Appeals, Fifth Circuit

CARL ANTHONY WEBB,

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 Northern District of Texas

O R D E R:

Carl Anthony Webb, Texas prisoner # 1648433, was convicted of felony driving while intoxicated (DWI) and sentenced to 99 years of imprisonment. He now moves for a certificate of appealability (COA) to appeal the district court's denial of his 28 U.S.C. § 2254 petition. Webb argues that (1) he is actually innocent of the DWI, (2) he received ineffective assistance of trial and appellate counsel, (3) the prosecutor engaged in misconduct at his trial, and (4) his remaining claims, which he first raised in a second state habeas application, were not procedurally defaulted.

To obtain a COA, Webb must make a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). To meet that standard, a movant must demonstrate

that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000) (internal quotation marks and citation omitted). Webb has not made the requisite showing.

Accordingly, Webb's motion for a COA is DENIED.

/s/Edith H. Jones
EDITH H. JONES
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
SAN ANGELO DIVISION

CARL ANTHONY WEBB, Petitioner, v. LORIE DAVIS, Director, Texas Department of Criminal Justice, Correctional Institutions Division, Respondent.	)	CIVIL ACTION NO. 6:14-CV-049-C ECF

JUDGMENT

For the reasons stated in the Court's Order of even date,

IT IS ORDERED, ADJUDGED, AND DECREED that the above-styled and -numbered cause is dismissed with prejudice.

Dated March 23, 2017.

SAM R. CUMMINGS
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
SAN ANGELO DIVISION

CARL ANTHONY WEBB, Petitioner, v. LORIE DAVIS,[1] Director, Texas Department of Criminal Justice, Correctional Institutions Division, Respondent.	)	CIVIL ACTION NO. 6:14-CV-049-C ECF

ORDER

Petitioner, Carl Anthony Webb, acting *pro se*, filed a Petition for Writ of Habeas Corpus by a Person in State Custody pursuant to 28 U.S.C. § 2254. Respondent filed copies of Petitioner's state court records and an Answer with Brief in Support. Petitioner filed a reply.

I. BACKGROUND

The Court has reviewed the pleadings and state court records and finds the following:

1. By indictment filed on April 27, 2009, in the 35th Judicial District Court of Brown County, Texas, Petitioner was indicted for the felony offense of driving while intoxicated (DWI) with two or more prior DWI convictions, enhanced by two prior non-intoxication-related felony convictions, in Case No. CR20308 styled *The State of Texas v. Carl Anthony Webb.*

2. On May 11, 2010, Petitioner's jury trial commenced. Petitioner pleaded not guilty, but on May 12, 2010, the jury found Petitioner guilty as charged in the indictment and assessed punishment at 99 years' imprisonment in the Texas Department of Criminal Justice - Correctional Institutions Division (TDCJ-ID). The trial court pronounced judgment on the same day.

3. Petitioner filed a notice of appeal on May 12, 2010. He raised two issues on appeal: the trial court committed reversible error by instructing the jury that it could consider

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[1]Lorie Davis has been named Director of the Texas Department of Criminal Justice, Correctional Institutions Division, and the caption is being changed pursuant to Fed. R. Civ. P. 25(d).

Petitioner's refusal to submit to breath and blood tests, and the trial court erred by denying Petitioner's request for a lesser-included offense instruction.

4. In an unpublished memorandum opinion filed May 10, 2012, the Eleventh Court of Appeals affirmed the conviction. Mandate issued February 21, 2013.

5. Petitioner filed his petition for discretionary review (PDR) on July 27, 2012. It was refused on November 21, 2012.

6. Petitioner did not file a petition for writ of certiorari in the United States Supreme Court.

7. Petitioner filed his first application for writ of habeas corpus in the trial court on September 18, 2013. In State Writ No. 76,526-02, Petitioner raised four grounds for review: actual innocence based on new evidence, ineffective assistance of trial counsel, ineffective assistance of appellate counsel, and prosecutorial misconduct.

8. On November 20, 2013, the Court of Criminal Appeals remanded the case to the trial court for findings of fact and conclusions of law. On March 6, 2014, the trial court submitted a supplemental record including, among other things, affidavits of counsel and findings of fact and conclusions of law. On May 7, 2014, the Court of Criminal Appeals denied the application without written order based on the findings of the trial court.

9. Petitioner filed a second application for writ of habeas corpus in the state court on August 25, 2014, in WR. 76,526-03, alleging ineffective assistance of trial counsel for failure to properly investigate Petitioner's prior DWI convictions and for failing to impeach a witness regarding those prior convictions. The Court of Criminal Appeals dismissed the application as subsequent pursuant to Texas' abuse-of-the-writ doctrine.

10. Petitioner filed the instant petition on August 14, 2014. The Court understands Petitioner to state the following grounds for review:

(1). he is actually innocent based on newly discovered evidence;

(2). he received ineffective assistance of counsel at trial when trial counsel

a. failed to seek and obtain discovery of the "DWI case report" and use it to impeach the arresting officer's credibility,
b. failed to object and seek a mistrial when the prosecutor twice vouched for the state's witness,
c. failed to object when the prosecutor used a prejudicial demonstration during closing argument,

d. failed to object when the prosecutor read the indictment to the jury including references to Petitioner's prior DWI convictions, and
e. failed to object when the prosecutor interjected his personal opinion about Petitioner's guilt;

(3). he received ineffective assistance of counsel on appeal when appellate counsel

a. failed to raise the grounds of ineffective assistance of trial counsel referenced above, and
b. failed to investigate the facts and error in Petitioner's case in order to raise stronger constitutional arguments;

(4). the prosecutor committed misconduct that deprived Petitioner of a fair trial when he

a. read Petitioner's indictment to the jury during the guilt/innocence phase of trial, including references to Petitioner's prior DWI convictions,
b. vouched for the credibility of the arresting officer,
c. interjected his own opinion about Petitioner's guilt to the jury,
d. gave an improper demonstration during closing argument, and
e. withheld exculpatory evidence, the "DWI case report," in violation of the *Brady* rule; and

(5). he received ineffective assistance of counsel at trial when trial counsel

a. failed to properly investigate Petitioner's prior DWI convictions, and
b. failed to impeach the state's witness regarding Petitioner's prior DWI probation.

11. This Court has jurisdiction over the parties and subject matter pursuant to 28 U.S.C. §§ 2241 and 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA").

II. STANDARD OF REVIEW

"The [AEDPA] modified a federal habeas court's role in reviewing state prisoner applications in order to prevent federal habeas 'retrials' and to ensure that state court convictions are given effect to the extent possible under law." *Bell v. Cone*, 535 U.S. 685, 693 (2002).

Under the Antiterrorism and Effective Death Penalty Act, a petitioner may not obtain habeas corpus relief in federal court with respect to any claim adjudicated on the merits in state court proceedings unless the adjudication of the claim resulted in a decision contrary to clearly established federal constitutional law or resulted in a decision based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. 28 U.S.C. § 2254(d).

This section creates a "highly deferential standard for evaluating state-court rulings, . . . which demands that state-court decisions be given the benefit of the doubt." *Woodford v. Viscotti*, 537 U.S. 19, 24 (2002) (*per curiam*) (internal quotation marks omitted).

"In the context of federal habeas proceedings, adjudication 'on the merits' is a term of art that refers to whether a court's disposition of the case was substantive as opposed to procedural." *Neal v. Puckett*, 239 F.3d 683, 686 (5th Cir. 2001). In Texas writ jurisprudence, a "denial" of relief usually serves to dispose of claims on their merits. *Miller v. Johnson*, 200 F.3d 274, 281 (5th Cir. 2000). *See Ex parte Torres*, 943 S.W.2d 469, 474 (Tex. Crim. App. 1997) (holding that "denial" signifies the Court of Criminal Appeals addressed and rejected the merits of a state habeas claim,[2] while "dismissal" signifies the Court declined to consider the claim for reasons unrelated to the merits).

A state-court factual determination is not unreasonable merely because the federal court would have reached a different conclusion in the first instance. *Burt v. Titlow*, — U.S. —, 134 S.

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[2]In *Ex parte Torres*, the Court of Criminal Appeals stated that "[d]ispositions relating to the merits should be labeled 'denials' while dispositions unrelated to the merits should be labeled 'dismissals' . . . ." *Id.* at 474. "A disposition is related to the merits if it decides the merits or makes a determination that the merits of the applicant's claims can never be decided." *Id.* (citing *Hawkins v. Evans*, 64 F.3d 543, 547 (10th Cir. 1995) (disposition is considered "on the merits" if the court refuses to determine the merits because of state procedural default)). *Accord Ex parte Grigsby*, 137 S.W.3d 673, 674 (Tex. Crim. App. 2004).

Ct. 10, 15 (2013). Section 2254(e)(1) provides that a determination of a factual issue made by a state court shall be presumed to be correct. Petitioner has the burden of rebutting this presumption of correctness by clear and convincing evidence. *Canales v. Stephens*, 765 F.3d 551, 563 (5th Cir. 2014). When the Texas Court of Criminal Appeals denies relief in a state habeas corpus application without written order, as in this case, it is an adjudication on the merits, which is entitled to this presumption. *Ex parte Torres*, 943 S.W.2d 469, 472 (Tex. Crim. App. 1997); *Singleton v. Johnson*, 178 F.3d 381, 384 (5th Cir. 1999) (recognizing this Texas state writ jurisprudence).

Petitioner's burden before this Court is significantly heightened in that Petitioner cannot prevail even if he shows that the state court's determination was incorrect. Petitioner must also show that the state court unreasonably applied federal law or made an unreasonable determination of the facts. *Neal v. Puckett*, 286 F.3d 230, 235 (5th Cir. 2002), *cert. denied, Neal v. Epps*, 537 U.S. 1104 (2003).

The facts of the case were summarized in the unpublished opinion of the Eleventh Court of Appeals sitting in Eastland, Texas, and were again recited in Respondent's Answer. Petitioner has provided no evidence to refute the summary; therefore, the Court shall not recite the facts again.

III. DISCUSSION

After carefully reviewing the state court records and the pleadings, the Court finds that an evidentiary hearing is not necessary to resolve the instant petition. *See Young v. Herring*, 938 F.2d 543, 560 n. 12 (5th Cir. 1991) ("[A] petitioner need not receive an evidentiary hearing if it would not develop material facts relevant to the constitutionality of his conviction.").

A. Actual Innocence (Ground 1)

The Supreme Court has declined to define actual innocence as an independently cognizable claim for federal habeas review in non-capital cases. *House v. Bell*, 547 U.S. 518, 555 (2006). Rather, in the context of federal habeas cases, a claim of actual innocence serves as a gateway to overcome impediments such as procedural default or the expiration of the statute of limitations. *McQuiggin v. Perkins*, — U.S. —, 133 S. Ct. 1924, 1928 (2013). However, it is clear that "the threshold for any hypothetical freestanding innocence claim [is] 'extraordinarily high.'" *House,* 547 U.S. at 538 (quoting *Herrera v. Collins*, 506 U.S. 390, 417 (1993)).

"The meaning of actual innocence . . . does not merely require a showing that a reasonable doubt exists in the light of the new evidence, but rather that no reasonable juror would have found the defendant guilty." *Schlup v. Delo*, 513 U.S. 298, 329 (1995). "[T]he *Schlup* standard is demanding and permits review only in the 'extraordinary' case." *House*, 547 U.S. at 538 (2006) (citing *Schlup v. Delo*, 513 U.S. at 329). The applicable standard when considering a petitioner's first federal habeas petition is the *Schlup* standard. *See id.* at 539.

Petitioner asserts that he has discovered new evidence that proves he is actually innocent. Specifically, Petitioner claims that he has discovered a "DWI case report" from the night of his arrest, which Petitioner asserts was withheld by the State because it was exculpatory. Petitioner's emphasis on the DWI case report is misplaced. The report is neither new nor particularly exculpatory. Petitioner first presented this actual-innocence claim to the state habeas court, which found that the DWI case report was not withheld. Petitioner's trial counsel submitted an affidavit stating that he was given the report during pretrial discovery and used it during the trial.

The evidence is not new, and moreover the evidence does not prove Petitioner's innocence. Petitioner focuses his claim on the perceived discrepancy between the report and the testimony of the arresting officer, Chandra Means. The DWI case report indicates that there was a video recording of Petitioner's arrest and it was downloaded at the Brownwood Police Department. However, at trial, Officer Means testified that the video could not be presented because she had inadvertently failed to download and preserve it. Petitioner seems to conclude from this discrepancy that Officer Means lied in her testimony, that the prosecutor and Officer Means conspired to conceal the video from the defense, and the video would necessarily prove his innocence. Petitioner wholly fails to address how the video, if it did exist, would necessarily overcome "the overwhelming weight of the evidence against [Petitioner] on the issue of intoxication." *See Webb v. State*, 2012 Tex. App. LEXIS 3704, *4 (Tex. App.–Eastland, 2012).

At trial, the jury heard evidence that Petitioner "was sitting in his vehicle in the middle of the road for no apparent reason, swerved into oncoming traffic when he did move his vehicle from the middle of the road, parked his vehicle on the wrong side of the road, smelled of an alcoholic beverage, had red and glassy eyes, failed the HGN test, could not perform any of the field sobriety tests administered to him, and failed a blood-alcohol test." *Id.* Specifically, the jury heard evidence that "[Petitioner's] blood contained 0.17 grams of alcohol per 100 milliliters of blood, which is over double the level necessary to show intoxication as set forth in the statute." *Id.* at 3.

Petitioner has failed to satisfy the substantial burden imposed by *Schlup,* that "in light of the new evidence, no reasonable juror would have found the Petitioner guilty," much less the "extraordinarily high" standard necessary to raise a stand-alone actual innocence claim. On

habeas review, the trial court found that Officer Means did not conceal evidence but did unintentionally fail to properly preserve the video recording of Petitioner's arrest. The trial court went on to note that this issue was known in advance of trial and fully litigated. Moreover, even if the evidence was new, it would not overcome the overwhelming evidence of Petitioner's guilt. Petitioner's claim that the DWI report presents new evidence of his actual innocence is without merit.

B. Ineffective Assistance of Counsel (Grounds 2 and 3)

Petitioner alleges he received ineffective assistance of counsel and includes a laundry list of complaints against both his trial and his appellate attorneys. Respondent argues that Petitioner's allegations are meritless and that two of his claims are procedurally defaulted. The Court agrees.

The proper standard for judging Petitioner's contentions is enunciated in *Strickland v. Washington*, 466 U.S. 668, 689 (1984). Under the two-pronged *Strickland* standard, a petitioner must show that defense counsel's performance was both deficient and prejudicial. *Id.* at 687. An attorney's performance was deficient if the attorney made errors so serious that the attorney was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment to the United States Constitution. *Id.* That is, counsel's performance must have fallen below the standards of reasonably competent representation as determined by the norms of the profession.

A reviewing court's scrutiny of trial counsel's performance is highly deferential, with a strong presumption that counsel's performance falls within the wide range of reasonable professional assistance. *Id.* at 689. A strong presumption exists "that trial counsel rendered adequate assistance and that the challenged conduct was reasoned trial strategy." *Wilkerson v.*

Collins, 950 F.2d 1054, 1065 (5th Cir. 1992) (citing *Strickland*, 466 U.S. at 694). This is a heavy burden that requires a "substantial," and not just a "conceivable," likelihood of a different result. *Harrington v. Richter*, 562 U.S. 86, 112 (2011); *see also Cullen v. Pinholster*, 563 U.S. 170, 189 (2011).

Additionally, a petitioner must show that counsel's deficient performance prejudiced the defense. To establish this prong, a petitioner must show that counsel's errors were so serious as to deprive petitioner of a fair trial. *Strickland*, 466 U.S. at 687. Specifically, to prove prejudice, a petitioner must show "(1) there is a reasonable probability that, but for counsel's unprofessional errors, the ultimate result of the proceeding would have been different . . . and (2) counsel's deficient performance rendered the trial fundamentally unfair." *Creel v. Johnson*, 162 F.3d 385, 395 (5th Cir. 1998). "Unreliability or unfairness does not result if the ineffectiveness of counsel does not deprive the defendant of any substantive or procedural right to which the law entitles him." *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993). A showing of significant prejudice is required. *Spriggs v. Collins*, 993 F.2d 85, 88 n. 4. (5th Cir. 1993). If a petitioner fails to show either the deficiency or prejudice prong of the *Strickland* test, then the Court need not consider the other prong. *Strickland,* 466 U.S. at 697.

In the context of § 2254(d), the deferential standard that must be accorded to counsel's representation must also be considered in tandem with the deference that must be accorded state court decisions, which has been referred to as "doubly" deferential. *Harrington v. Richter*, 562 U.S. 86 (2011). "When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Id.* "If the standard is difficult to meet, that is because it was

meant to be." *Id.* at 786; *see also Morales v. Thaler*, 714 F.3d 295, 302 (5th Cir. 2013). The absence of evidence cannot overcome the "strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance" and cannot establish that performance was deficient. *Burt v. Titlow*, ___ U.S. ___, 134 S. Ct. 10, 187 L. Ed. 2d 348 (2013).

As discussed below, Petitioner's ineffective-assistance-of-counsel claim was adjudicated on the merits in a state-court proceeding, and the denial of relief was based on a factual determination that will not be overturned unless it is objectively unreasonable in light of the evidence presented in the state court proceeding. *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003). A state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance. *Burt*, 134 S. Ct. at 15. Section 2254(e)(1) provides that a determination of a factual issue made by a state court shall be presumed to be correct. The petitioner has the burden of rebutting this presumption of correctness by clear and convincing evidence. *Hill v. Johnson*, 210 F.3d 481, 485 (5th Cir. 2000). When the Texas Court of Criminal Appeals denies relief in a state habeas corpus application without written order, it is an adjudication on the merits, which is entitled to this presumption. *Ex parte Torres*, 943 S.W.2d at 472; *Singleton*, 178 F.3d at 384 (recognizing this Texas state writ jurisprudence).

Where, as here, "a state court has already rejected an ineffective-assistance claim, a federal court may grant habeas relief [only] if the decision was 'contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.'" *Yarbrough v. Gentry*, 540 U.S. 1, 5 (2003) (quoting 28 U.S.C. §

2254(d)(1)). *See Santellan v. Cockrell*, 271 F.3d 190, 193 (5th Cir. 2001) ("[A] federal court's authority under AEDPA is . . . limited to determining the reasonableness of the ultimate decision," even if the state court has rejected an ineffective-assistance claim without any reasoning.).

The record shows that Petitioner raised ineffective assistance of counsel in his first application for state habeas review. In fact, the instant federal petition contains essentially the same allegations as Petitioner's state habeas application.[3] Petitioner's trial attorney and appellate attorney each submitted affidavits related to his claims. The trial court entered findings of fact and conclusions of law and specifically found that Petitioner received effective assistance of counsel at both the trial and appellate stages. For example, the trial court found that Petitioner's trial counsel received all discovery, including the DWI case report, which was used during trial to question witnesses. The trial court also found that there was no objectionable error in reading the indictment, which included Petitioner's DWI prior convictions for jurisdictional purposes, to the jury. The trial court's findings of fact and conclusions of law thoroughly address each of Petitioner's claims and conclude that they are wholly without merit. The Texas Court of Criminal Appeals denied Petitioner's state habeas application based on the findings made by the trial court.

Petitioner has failed to present clear and convincing evidence to rebut the presumption of correctness afforded to the findings of the state court. Indeed, Petitioner has done little more than restate the same arguments that failed to persuade the state court. Petitioner simply presents

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[3]Petitioner's Grounds 1-4 were raised and addressed on the merits in his first state habeas case; however, he did not raise his Ground 5 claims until his second state habeas application, which was dismissed as subsequent by the state habeas court.

conclusory allegations that the DWI case report is new (it is not), that it proves his innocence (it does not), and that his counsel was ineffective (he was not).

This Court also finds that Petitioner has not established the requisite deficient performance or actual prejudice for a valid ineffective-assistance claim. Accordingly, Petitioner fails to show that the state court's decision to deny relief was unreasonable under *Strickland.* Petitioner is not entitled to habeas relief on this ground.

C. Prosecutorial Misconduct (Ground 4)

Petitioner's fourth ground for review alleges that he was deprived of a fair trial due to prosecutorial misconduct. Petitioner alleges that the prosecutor improperly read Petitioner's indictment to the jury during the guilt/innocence phase of trial, including references to Petitioner's prior DWI convictions; vouched for the credibility of the arresting officer; interjected his own opinion about Petitioner's guilt to the jury; gave an improper demonstration during closing argument; and withheld exculpatory evidence (the "DWI case report") in violation of the *Brady* rule.

When a federal habeas petitioner alleges prosecutorial misconduct in a state criminal trial, the court must determine whether the alleged impropriety "so infected the . . . trial with unfairness as to make the result[] a denial of due process." *Barrientes v. Johnson*, 221 F.3d 741, 753 (5th Cir. 2000). "A trial is fundamentally unfair if 'there is a reasonable probability that the verdict might have been different had the trial been properly conducted.'" *Id.* (quoting *Foy v. Donnelly*, 959 F.2d 1307, 1317 (5th Cir. 1992)).

The factual basis for Petitioner's claims is largely intertwined with his claims of actual innocence and ineffective assistance of counsel discussed above. Again, on habeas review the

trial court made specific factual findings in each instance and concluded that none rose to the level of prosecutorial misconduct. In fact, the trial court found in each instance that there was no error at all, much less reversible error. And again, Petitioner has failed to present clear and convincing evidence to overcome the presumption of correctness applied to the factual findings of the state court. The Court likewise finds that there was no prosecutorial misconduct. Since there was no error, Petitioner cannot make the requisite showing of fundamental unfairness. Petitioner is not entitled to relief on this ground.

D. Ineffective Assistance of Counsel (Ground 5)

Petitioner raises two additional claims of ineffective assistance of trial counsel in his fifth ground. In this new ground, Petitioner argues that his trial counsel was ineffective for failing to investigate his prior DWI convictions and for failing to impeach a witness called by the state regarding the prior DWI convictions. These are the only claims in the instant petition that were not fully adjudicated on the merits in the state courts below. Petitioner did not raise these two claims until his second state application for habeas corpus, which was dismissed as subsequent pursuant to Texas' abuse-of-the-writ doctrine.

Federal habeas review is unavailable for these procedurally defaulted[4] claims unless Petitioner can demonstrate (1) cause for the procedural default and actual prejudice as a result of the alleged constitutional violation or (2) that failure to consider his claims will result in a fundamental miscarriage of justice. *Coleman v. Thompson*, 501 U.S. 722, 749-50 (1991).

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[4]Texas' abuse-of-the-writ doctrine is an independent and adequate state procedural bar. *See Fearance v. Scott,* 56 F.3d 633, 642 (5th Cir. 1995).

First, Petitioner has failed to show cause for his procedural default. All of the supporting documentation and information offered by Petitioner relate to the three prior DWI convictions alleged by the State as jurisdictional enhancements. This information was known, or should have been known, to Petitioner before trial and certainly could have been raised in Petitioner's initial state habeas application. Additionally, Petitioner cannot show actual prejudice or a resulting fundamental miscarriage of justice. As explained in the Respondent's Answer, Petitioner cannot overcome the default because his claims are without merit. In sum, Petitioner has failed to show any evidence that his trial counsel could have discovered that would have necessarily prevented the jury from finding the jurisdictional enhancements true. At best, Petitioner's allegations question the validity of one of the three alleged prior DWI convictions. However, that leaves two other prior DWI convictions, which is sufficient for the jurisdictional enhancement. Petitioner cannot show actual prejudice or a fundamental miscarriage of justice

IV. CONCLUSION

For the reasons set forth above and in Respondent's Answer, the Court finds that Petitioner has not demonstrated that the state court's adjudication of his claims was contrary to or an unreasonable application of clearly established Supreme Court law as required by 28 U.S.C. § 2254(d). In addition, the Court finds that, pursuant to Rule 22 of the Federal Rules of Appellate Procedure and 28 U.S.C. § 2253(c), Petitioner has failed to show that reasonable jurists would (1) find the Court's "assessment of the constitutional claims debatable or wrong" or (2) find "it debatable whether the petition states a valid claim of the denial of a constitutional right" and "debatable whether [this Court] was correct in its procedural ruling," and any request for a certificate of appealability should be denied. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

It is, therefore, ORDERED:

1. The instant Petition for Writ of Habeas Corpus is DENIED and dismissed with prejudice.

2. All relief not expressly granted is denied and any pending motions are denied.

3. Any request for certificate of appealability is denied.

Dated March 23, 2017.

SAM R. CUMMINGS
Senior United States District Judge

Additional material from this filing is available in the Clerk's Office.