APPENDIX

WRIT

OF

CERTIORARI

NO. _____

PET. EXB A-1

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-40439

A True Copy
Certified order issued Mar 27, 2018
Clerk, U.S. Court of Appeals, Fifth Circuit

DESREL RAY LINDEN,

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:

Desrel Ray Linden, Texas prisoner # 1634037, moves for a certificate of appealability (COA) to appeal the district court's denial of his 28 U.S.C. § 2254 application, in which he challenged his conviction for murder. Linden argues that the district court erred in failing to hold an evidentiary hearing and in rejecting his claim that his trial counsel provided ineffective assistance.

To obtain a COA, Linden must make a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2). With respect to claims denied by the district court on the merits, the prisoner must demonstrates that "reasonable jurists could debate whether . . . 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,

PET. EXB. A-1

484–84 (2000) (internal quotation marks and citation omitted). Linden has not made the requisite showing.

Linden contends that his trial counsel provided ineffective assistance by failing to (1) discover, investigate, and present exculpatory statements by five eyewitness and (2) investigate and present exculpatory ballistics evidence. According to Linden, this evidence would have shown that another person shot and killed the victim. However, Linden had repeatedly told a detective at the crime scene, without solicitation, that he shot the victim; accordingly, his defense theory at trial was that he acted in self-defense. In this light, reasonable jurists would not debate whether counsel's failure to present evidence in support of an alternate-shooter theory constituted deficient performance. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Slack*, 529 U.S. at 484–84.

Accordingly, Linden's motion for a COA is DENIED. His motion for an evidentiary hearing is likewise DENIED.

/s/ James L. Dennis
JAMES L. DENNIS
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

BEAUMONT DIVISION

DESREL RAY LINDEN	§	
VS.	§	CIVIL ACTION NO. 1:14cv27
DIRECTOR, TDCJ-CID	§	

ORDER OF DISMISSAL

Petitioner Desrel Ray Linden, an inmate confined at the Stiles 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.

Discussion

On February 25, 2010, following a plea of not guilty in cause number 07-00877 before the Criminal District Court for Jefferson County, Texas, petitioner was tried before a jury and convicted of murder. However, the jury was deadlocked on the assessment of punishment, and the court declared a mistrial. After a new punishment hearing, the jury sentenced petitioner to a term of fifteen years in the Texas Department of Criminal Justice, Correctional Institutions Division. *See Linden v. State*, 347 S.W.3d 819 (Tex.App. - Corpus Christi 2011, pet. ref'd). On appeal, the Thirteenth Court of Appeals affirmed the trial court's judgment. *Id.* On December 7, 2011, the Texas Court of Criminal Appeals refused petitioner's petition for discretionary review. *Linden v. State*, No. PDR 1069-11.

On August 16, 2012, petitioner filed a state application for writ of habeas corpus challenging his conviction. On January 15, 2014, the Court of Criminal Appeals denied relief without written opinion on the findings of the trial court.

The Petition

Petitioner brings this petition for writ of habeas corpus asserting the following twenty-nine grounds for review:

Ground 1: "Actual Innocence/Newly Discovered; Available Evidence 5th, 6th, 8th, 14th amend. violations."

Ground 2: "Prosecutorial misconduct / State withheld exculpatory statements of (5) key eyewitnesses."

Ground 3: "Prosecutorial misconduct / State withheld agreement made with State witness Curly Sinegal."

Ground 4: "Prosecutorial misconduct / introduction of false, perjurious, fraudulent, coerced testimony by police officers."

Ground 5: "Prosecution failed to produce key witness Kenneth Hunter for confrontation of given statements."

Ground 6: "The cumulative effect of the State's *Brady* and other due process violations denied petitioner a fair trial."

Ground 7: "Ineffective assistance of trial counsel failure to investigate; interview facts and witnesses of petitioner's case."

Ground 8: "Ineffective assistance of trial counsel failure to present DNA; medical forensic; ballistic expert witnesses."

Ground 9: "Ineffective assistance of trial counsel failure to argue issue of collateral estoppel with veracity."

Ground 10: "Ineffective assistance of trial counsel failure to object to closing argument / jury charge."

Ground 11: "Trial counsel failed to object to hearsay of Det. Blum relative to Kenneth Hunter's statement of facts."

Ground 12: "Ineffectiveness of appellate counsel failure in raising issue of collateral estoppel on direct appeal."

Ground 13: "Ineffectiveness of appellate counsel to raise issue of State's mis-statement of facts in the closing argument on direct appeal."

Ground 14: "Ineffectiveness of appellate counsel's failure to raise the issue of ineffective assistance of trial counsel."

Ground 15: "Trial Judge Larry Gist committed errors in the jury charge which mislead jury decision process."

Ground 16: "Trial Judge John Stevens erred failing to rule on petitioner's pre-trial motions / witness bench warrants."

Ground 17: "Trial Judge John Stevens failed to properly implement statutory recusal provision in petitioner's (1st trial)."

Ground 18: "Trial Judge Charles Carver failed to meet statutory requirements to preside over petitioner's (2nd trial)."

Ground 19: "Trial Judge Charles Carver erred in his ruling on issue of collateral estoppel in petitioner's (2nd trial)."

Ground 20: "Trial Judge Charles Carver erred not answering jury's question of law in petitioner's (2nd trial)."

Ground 21: "The cumulative effect of state court's trial and appellate counsel's errors denied petitioner a fair trial in both trials."

Ground 22: "Court failed to take notice of petitioner's motion for new trial based on new evidence."

Ground 23: "Court failed to take notice of petitioner's motion for grand jury transcript for defendant and for particularized need."

Ground 24: "Appellate counsels ineffectiveness by not raising issue of cumulative effect for multiple errors in jury charge."

Ground 25: "Evidence factually insufficient to support conviction of murder PC.19.02(b)(1) / statute PC.2.01 misconstrued by appellate court."

Ground 26: "Evidence legally insufficient of offense being committed intentionally/ statute PC 2.01, PC 6.03(a) misconstrued by appeal court."

Ground 27: "Evidence legally insufficient of offense being committed knowingly/statute PC.2.01, PC 6.03(b) misconstrued by appellate court."

Ground 28: "Trial court misapplied self defense in jury charge/appellate court disregarded governing statutes of PC.2.03(d), art. 36.14, art. 36.19."

Ground 29: "Trial court submitted over-inclusive definitions for jury charge appellate court disregarded governing statutes of PC.6.03(a)(b), art. 36.14, art. 36.19."

The Response

The respondent has filed a response to the court's order to show cause why relief should not be granted. The respondent asserts that petitioner's complaints of trial court error are procedurally defaulted. The respondent further contends petitioner has failed to exhaust state remedies regarding his claim that the trial court failed to take notice of his motion for new trial based on new evidence. Thus, the respondent asserts the claim is now also procedurally barred. Therefore, the respondent asserts the claims should be dismissed as unexhausted and procedurally barred. Additionally, the respondent contends petitioner's remaining claims are either not cognizable or are without merit. The respondent asserts that petitioner has failed to show the state court resolution of petitioner's claims 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 or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. Accordingly, the respondent asserts that the petition should be denied and dismissed with prejudice.

Factual Background

On appeal, the intermediate appellate court set forth the following summarization of the facts of this case:

> On May 17, 2007, Linden and his friend, Curley Sinegal, Jr., were traveling between landscape maintenance jobs when Linden stopped his truck for gas in Port Arthur, Texas. At the same time, Peter Tran and his niece, Phuong Tran, pulled up to an adjacent gas pump in Phuong's car. The testimony conflicted as to what was said between the two parties: Phuong testified that Linden asked her if she "wanted to go home with him" and that Linden was confrontational with Peter, asking him "What are you looking at?" and making derogatory comments about Peter's mother;

> Sinegal and Linden testified that no such comments were made to Phuong or to Peter. At this time, Linden and Peter began to yell at one another. When Peter and Phuong began to leave the gas station, Peter threw light bulbs at Linden's truck. Phuong made a u-turn out of the gas station, and Peter then yelled further obscenities at Linden and Sinegal. Phuong dropped Peter off at another vehicle belonging to Peter's girlfriend that was parked across the street. Phuong was not further involved in the encounter. According to defense testimony, Peter began to follow Linden and Sinegal down the street, and when Peter rolled down his window, he continued to yell and made movements as though he was pulling a weapon from between his driver's seat and car door. In response, Linden drew a gun and fired four shots at Peter, emptying his gun; one shot hit Peter in the back of the head and a second shot hit Peter in the neck. Peter crashed his vehicle and died from his injuries. Linden remained at the scene, called 911, and told the responding detective what had transpired. No gun was found in Peter's vehicle, but a tire iron was found between the driver's seat and door.

Linden, 347 S.W.3d at 820-21.

Standard of Review

Title 28 U.S.C. § 2254(a) allows a district court to "entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a).

Section 2254 generally prohibits a petitioner from relitigating issues that were adjudicated on the merits in State court proceedings, with two exceptions. *See* 28 U.S.C. § 2254(d). The first exception allows a petitioner to raise issues previously litigated in the State court in federal habeas proceedings if the adjudication "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." 28 U.S.C. § 2254(d)(1). The second exception permits relitigation if the adjudication "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). Federal habeas relief from a state court's determination is precluded "so long as fairminded jurists could

disagree on the correctness of the state court's decision." *Harrington v. Richter*, 562 U.S. 86, 101 (2011).

Federal habeas courts are not an alternative forum for trying facts and issues which were insufficiently developed in state proceedings. *Williams v. Taylor*, 529 U.S. 420, 437 (2000). Further, following the Supreme Court's decision in *Cullen v. Pinholster*, federal habeas review under 2254(d)(1) "is limited to the record that was before the state court that adjudicated the claim on the merits." *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011).

A decision is contrary to clearly established federal law if the state 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. *See 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.*

A determination of a factual issue made by a state court shall be presumed to be correct upon federal habeas review of the same claim. This court must accept as correct any factual determinations made by the state courts unless the petitioner rebuts the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). The presumption of correctness applies to both implicit and explicit factual findings. *See 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 according to

§ 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. Exhaustion and Procedural Default

The respondent asserts that petitioner's complaints of trial court error are procedurally defaulted. The respondent contends claims of trial error must be raised on direct review and are not subject to collateral attack. Accordingly, the respondent asserts the following claims are procedurally defaulted and should be dismissed: (16) Trial Judge John Stevens erred by failing to rule on petitioner's pre-trial motions / witness bench warrants; (17) Trial Judge John Stevens failed to properly implement statutory recusal provision in petitioner's first trial; (18) Trial Judge Charles Carver failed to meet statutory requirements to preside over petitioner's second trial; (19) Trial Judge Charles Carver erred in his ruling on issue of collateral estoppel in his second trial; and (20) Trial Judge Charles Carver erred not answering the jury's question of law in petitioner's second trial. The respondent further contends petitioner has failed to exhaust state remedies regarding the following claim: (Ground 22) The trial court failed to take notice of petitioner's motion for new trial based on new evidence. Thus, the respondent asserts the claim is now also procedurally barred. Therefore, the respondent asserts the claims should be dismissed as unexhausted and procedurally barred.[1]

[1] A review of the state habeas record reveals petitioner submitted Ground 22 in a supplemental pleading filed in objection to the state's findings and conclusions. The document was filed October 9, 2013. Therefore, the Court of Criminal Appeals had the document before it to consider when making its determination on habeas review. Ground 22 is therefore also procedurally barred. Alternatively, the ground for review has been analyzed in Section IV below and found to be without merit.

A person in custody pursuant to the judgment of a State court generally must exhaust available State habeas remedies prior to filing an application in Federal court. Title 28 U.S.C. § 2254 provides in pertinent part the following:

> (b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that –
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> (A) the applicant has exhausted the remedies available in the courts of the State; or
>
> (B)(i) there is an absence of available State corrective process; or
>
> (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

The exhaustion requirement is satisfied when the substance of the federal habeas claim has been "fairly presented" to the highest state court, i.e., the petitioner presents his claims before the state courts in a procedurally proper manner according to the rules of the state courts. *Baldwin v. Reese*, 541 U.S. 27, 29-33 (2004) (holding a petitioner failed to "fairly present" a claim of ineffective assistance by his state appellate counsel merely by labeling the performance of said counsel "ineffective," without accompanying that label with either a reference to federal law or a citation to an opinion applying federal law to such a claim). The exhaustion requirement is not met if the petitioner presents new legal theories or factual claims in his federal habeas petition. *Anderson v. Harless*, 459 U.S. 4, 6-7 (1982); *Riley v. Cockrell*, 339 F.3d 308, 318 (5th Cir. 2003) ("It is not enough that the facts applicable to the federal claims were all before the State court, or that the petitioner made a similar state-law based claim. The federal claim must be the 'substantial equivalent' of the claim brought before the State court."), *cert. denied*, 543 U.S. 1056 (2005); *Wilder v. Cockrell*, 274 F.3d 255, 259 (5th Cir. 2001) ("where petitioner advances in federal court an

argument based on a legal theory distinct from that relied upon in the state court, he fails to satisfy the exhaustion requirement").

If a petitioner has failed to exhaust state court remedies and the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred, the claims are procedurally defaulted for purposes of federal habeas review, irrespective of whether the last state court to which the petitioner actually presented his claims rested its decision upon an independent and adequate state ground. *Coleman v. Thompson*, 501 U.S. 722, 735 n. 1, 111 S.Ct. 2546, 2557 n. 1, 115 L.Ed.2d 640 (1991). On habeas corpus review, a federal court may not consider a state inmate's claim if the state court based its rejection of that claim on an independent and adequate procedural state ground. *See Martin v. Maxey*, 98 F.3d 844, 847 (5th Cir. 1996). The procedural bar will not be considered adequate unless it is applied regularly or strictly to the great majority of similar claims. *Amos v. Scott*, 61 F.3d 333, 338 (5th Cir.), cert denied, 116 S.Ct. 557, 133 L.Ed.2d 458 (1995).

A review of the state habeas proceedings reveals the state court found that petitioner failed to raise his claims of trial court error on direct appeal, and the court found petitioner forfeited review of such claims in the state habeas proceedings. The Court of Criminal Appeals denied relief on the findings of the trial court. Thus, the Court of Criminal Appeals expressly relied upon a state procedural bar in its denial of petitioner's claims, and federal review of such claims is barred.

The Texas Court of Criminal Appeals applies its abuse of the writ doctrine regularly and strictly. *Fearance v. Scott*, 56 F.3d 633, 642 (5th Cir.)(per curiam), cert. denied, 115 S.Ct. 2603, 132 L.Ed.2d 847 (1995). In *Emery v. Johnson*, 139 F.3d 191, 194-96 (5th Cir. 1997), the Fifth Circuit reviewed a district court's denial of a habeas petition in a capital murder case. The Court held that the claims at issue were procedurally barred because if the petitioner tried to exhaust them

in state court they would be barred by the abuse-of-the-writ doctrine of Article 11.071 of the Texas Code of Criminal Procedure. *Id. See also Nobles v. Johnson*, 127 F.3d 409, 423 (5th Cir. 1997) (in accord). The Court further noted that Section 4 of Article 11.07, the Texas Code of Criminal Procedure, adopts the same rule for non-capital felony cases. *Emery*, 139 F.3d at 195 n.3.

A habeas petitioner can overcome a procedural default by showing cause and actual prejudice or a miscarriage of justice. *See Murray v. Carrier*, 477 U.S. 478, 488, 106 S.Ct. 2639, 2645, 91 L.Ed.2d 397 (1986). Here, however, petitioner has failed to demonstrate either cause, prejudice or a miscarriage of justice. Accordingly, petitioner is not entitled to federal habeas corpus relief on these grounds for review as they are procedurally barred.

Petitioner has failed to show either that the state court adjudication was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States or that the state court adjudication resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Accordingly, petitioner's grounds for relief should be dismissed.

II. *Moot Claims*

Petitioner complains that counsel at trial and on appeal were deficient for failing to argue or raise the issue of collateral estoppel in relation to the mistrial called at the punishment phase of his first trial (Grounds 9, part of 10, and 12).

Article III, § 2 of the Constitution limits federal court jurisdiction to the adjudication of actual cases and controversies. *Spencer v. Kemna,* 523 U.S. 1, 7 (1998). An action is rendered moot "when the court cannot grant the relief requested by the moving party." *Salgado v. Federal Bureau of Prisons,* 220 F. App'x 256, 257 (5th Cir. 2007) (citing *Brown v. Resor,* 407 F.2d 281, 283 (5th Cir. 1969) and *Bailey v. Southerland,* 821 F.2d 277, 278 (5th Cir. 1987)). The issue of whether

a case is moot presents a jurisdictional matter because it implicates the Article III requirement that an actual controversy exist at all stages of federal court proceedings. *Bailey,* 821 F.2d at 278. A moot case "presents no Article III case or controversy, and a court has no constitutional jurisdiction to resolve the issue it presents." *Adair v. Dretke,* 150 F. App'x 329, 331 (5th Cir. 2005) (citation omitted).

The state habeas court made the following findings regarding petitioner's claims, and the findings were subsequently adopted by the Texas Court of Criminal Appeals:

> 34. Although Judge Carver ruled against Mr. Makin's position prior to the February 2010, punishment retrial, the Court finds that the claims presented in Ground 9 have been rendered moot by the retrial-jury's identical "yes" response to the same "sudden passion" special issue, and its resulting fifteen-year prison sentence. Ground 9 should be dismissed for that reason.
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> . . .
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> 35. The IAC claims here complain of counsel's failure to object to portions of the State's closing argument during the punishment phase of the December 2008- trial, and complain of counsel's failure to object that the Court's guilt/innocence jury-instructions did not apply the abstract self-defense instructions to the record - facts in the application paragraph.
>
> 36. The mistrial that was declared in the punishment-phase of the December 2008-trial, rendered moot Ground 10's claims of trial counsel errors committed during that proceeding. Applicant's punishment was subsequently determined by a new jury in February 2010.
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> . . .
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> 47. Ground 12's complaint is related to the IAC claim presented in the portion of Ground 9 regarding Judge Carver's ruling prior to the start of the February 2010-punishment retrial resulting in applicant facing the full first-degree range of punishment. As the Court concluded that portion of Ground 9's complaint was moot because the punishment-retrial jury returned a verdict favorable to applicant on the "sudden passion" special issue, and then assessed his prison term at fifteen years', the Court now concludes Ground 12's IAC complaint is also moot for the same reason, and should be dismissed.

SHCR at 19-20, 33. Given these findings, petitioner has already received the only relief available from the complaints he asserts in these grounds for review. No live controversy exists. Therefore, petitioner has failed to show either that the state court adjudication was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States or that the state court adjudication resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Accordingly, petitioner's grounds for relief should be denied as moot. Further, to the extent such claims may be found not moot, the claims are without merit and are denied.

III. Actual Innocence/Newly Discovered Evidence

In his first claim (Ground 1), petitioner asserts he is actually innocent based upon newly discovered evidence, the statements of five "exculpatory eyewitnesses." Plaintiff claims the statements of D. Young, K. Hunter, J. Rodgers, H. Cooper, and J. Chambers implicate another shooter. Additionally, petitioner contends the statements are supported by scientific evidence indicating another individual fired the "killing shot." Petitioner asserts that the statements were in the possession of the state and presumably available to trial counsel.

The state habeas court found none of the statements from the five-named individuals qualify as newly discovered evidence because the evidence was available at the time of his trial. Further, the state court found that petitioner's actual innocence claim is incredible and unworthy of belief because the events related by the witnesses are not consistent with the criminal investigation conducted by police which includes the statement by the passenger in petitioner's truck at the time of the shooting, as well as petitioner's steadfast admission he shot the victim but the shooting was in self-defense. SHCR at 13-14.

Absent a claim of constitutional error supporting a claim of actual innocence, a free-standing claim of actual innocence relevant to the guilt of a state prisoner does not state a basis for federal habeas relief. *See Lucas v. Johnson*, 132 F.3d 1069, 1075-76 (5th Cir. 1998). Further, even assuming the existence of some new evidence and that a bare claim of actual innocence stated a cognizable ground for federal habeas relief, the Supreme Court has stated that, even if a "truly persuasive" showing of actual innocence would warrant federal habeas relief, the threshold for such a claim would be "extraordinarily high." *See Herrera v. Collins*, 506 U.S. 390, 417 (1993). "Actual innocence means factual innocence and not mere legal insufficiency." *United States v. Jones*, 172 F.3d 381, 384 (5th Cir. 1999) (quoting *Bousley v. United States*, 523 U.S. 614, 623 (1998)). In order to establish actual innocence, a petitioner must demonstrate that, in light of all of the evidence, it is more likely than not that no reasonable juror would have convicted the petitioner. *Bousley*, 523 U.S. at 623 (quoting *Schlup v. Delo*, 513 U.S. 298, 328 (1995)). To be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence - whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, critical physical evidence - that was not presented at trial. *Schlup*, 513 U.S. at 324. As petitioner's claim relies on evidence which was available at the time of trial and identifies no claim of constitutional error, the claim is without merit and he has failed to present a cognizable claim.

Petitioner has failed to show either that the state court adjudication was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States or that the state court adjudication resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Accordingly, petitioner's ground for relief should be denied.

IV. Trial Court Error

Next, petitioner complains of errors committed by the trial court. Specifically, petitioner claims the trial court erred in misapplying self-defense in the jury charge and submitting over-inclusive definitions for the jury charge (Grounds 28 and 29). Additionally, petitioner claims the Honorable Larry Gist committed errors in the jury charge which misled the jury decision process (Ground 15). Further, petitioner claims the court failed to take notice of his motion for new trial (Ground 22). Finally, petitioner claims the trial court erred by failing to take notice of his motion for grand jury transcripts (Ground 23).

Petitioner's claims of trial court error are based on alleged violations of state law. Allegations of violations of state law do not constitute an independent basis for federal habeas relief. *Mayabb v. Johnson*, 168 F.3d 863, 869 (5th Cir. 1999); *Narvaiz v. Johnson*, 134 F.3d 688, 695 (5th Cir. 1998). Federal habeas relief will not issue to correct errors of state constitutional, statutory, or procedural law unless a federal issue is also present. *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) (holding complaints regarding the admission of evidence under California law did not present grounds for federal habeas relief absent a showing that admission of the evidence in question violated due process). A federal court does "not sit as [a] 'super' state supreme court in a habeas corpus proceeding to review errors under state law." *Wilkerson v. Whitley*, 16 F.3d 64, 67 (5th Cir. 1994). "A federal habeas corpus court will review alleged errors in the trial court's instructions only to determine whether the claimed errors rendered the entire trial fundamentally unfair." *Thompson v. Lynaugh*, 821 F.2d 1054, 1060 (5th Cir. 1987) (citing *Henderson v. Kibbe*, 431 U.S. 145, 154-55 (1977)). In conducting federal habeas review, however, a court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States. Therefore, the relevant inquiry on federal habeas review is whether the erroneous instruction "by itself so infected the entire

trial that the resulting conviction violates due process." *Id.* A criminal proceeding is fundamentally unfair when the error infects and fatally undermines the reliability of the conviction. *Peters v. Whitley*, 942 F.2d 937, 940 (5th Cir. 1991).

To the extent petitioner argues the trial court erred, petitioner's claims are without merit. In the last reasoned opinion on direct review, the state appellate court made the following findings:

> ***B. Jury Charge***
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> By his first and second issues, Linden contends that the trial court committed reversible error by: (1) failing to include an instruction on self-defense in the application portion of the jury charge; and (2) giving incorrect definitions for the required culpable mental state for the crime for which he was indicted.
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> **1. Standard of Review**
>
> "Our first duty in analyzing a jury-charge issue is to decide whether error exists. Then, if we find error, we analyze that error for harm." *Ngo v. State*, 175 S.W.3d 738, 743 (Tex.Crim.App. 2005) (citing *Middleton v. State*, 125 S.W.3d 450, 453 (Tex.Crim.App. 2003)). The degree of harm required to reverse the trial court's judgment depends on whether or not the appellant objected to the charge before it was given to the jury. *Id.* Under *Almanza v. State*, if the defendant has properly objected to the charge, we need only find "some harm" to reverse the trial court's judgment. *Id.* at 743–44 (citing *Almanza v. State*, 686 S.W.2d 157, 171 (Tex.Crim.App. 1985) (op. on reh'g)). If the defendant fails to object, however, or states that he has no objection to the charge, "we will not reverse for jury-charge error unless the record shows 'egregious harm' to the defendant." *Id.* In determining whether egregious harm exists, we examine the charge in its entirety, the state of the evidence, the argument of counsel, and any other relevant information in the record. *Id.*
>
> **2. The Self–Defense Instruction**
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> At his trial, Linden argued that he shot Peter in self-defense. The jury charge, in a separate "Self-defense Charge," included a full and comprehensive explanation of the affirmative defense of self-defense and instructed the jury that if the requirements of a valid self-defense claim were met, or "if [the jury has] a reasonable doubt thereof, [it] should find the defendant not guilty." However, on the following page, the paragraph titled "Charge" does not make the self-defense instruction explicit nor does it apply the self-defense instruction to the facts of Linden's case. Instead, it stated simply:

Now, if you believe from the evidence beyond a reasonable doubt that ... Linden intentionally or knowingly caused the death of Peter Tran ... you shall find the defendant guilty of the offense of [m]urder as alleged in the indictment.

Unless you so find, or if you have a reasonable doubt thereof, you shall find the defendant NOT GUILTY.

By his first issue, Linden argues that this "allowed the jury to find that appellant engaged in the actions made the basis of the prosecution, and then convict him of the charged offense, without requiring the jury to find that the state had disproved self-defense beyond a reasonable doubt." The Texas Court of Criminal Appeals has held that "the failure to apply the law of self-defense to the facts of the case and to instruct the jury to acquit if they held a reasonable doubt on self-defense was error." *Barrera v. State,* 982 S.W.2d 415, 415 (Tex.Crim.App. 1998). Here, the jury charge did not apply the self-defense law to the facts adduced at the trial, and therefore, we conclude that the jury charge contained error. *See id.*; *see also* TEX. PENAL CODE ANN. § 2.03(d) (West 2003) ("If the issue of the existence of a defense is submitted to the jury, the court shall charge that a reasonable doubt on the issue requires that the defendant be acquitted.").

However, because Linden did not object to the error, he must demonstrate egregious harm. *See Almanza*, 686 S.W.2d at 171; *Barrera*, 982 S.W.2d at 417. Under nearly identical facts, we have previously held that the failure to include self-defense in the application paragraph did not cause egregious harm where the appellant relied on self-defense as a defensive theory at trial, it was urged in closing arguments, and a separate instruction on self-defense was given that gave the jury instructions on how to properly apply the defense. *Barrera v. State*, 10 S.W.3d 743, 745 (Tex.App.-Corpus Christi 2000, no pet.). Just as in that case, a separate instruction was given in this case, and in closing argument, Linden's counsel not only argued at length that the jury should find Linden not guilty based on the self-defense instruction, but he actually re-read nearly the entire instruction to the jury. Linden's counsel concluded, "[w]e have the right under our law and under this law to defend ourselves.... [Linden] didn't have a retreat. He reacted. He reacted in self-defense." Just as we concluded in *Barrera*, "[t]here is nothing in the record indicating the jury was misinformed or uninformed on the law of self-defense." *Id.* Considering the jury was given a general instruction on the law of self-defense—and specifically told that it should find Linden not guilty if it believed or had a reasonable doubt as to whether or not he acted in self-defense—and considering that Linden's counsel discussed self-defense in his argument before the jury, we conclude the trial court's error in the jury charge did not cause egregious harm to Linden. *See id.*; *see also Ngo*, 175 S.W.3d at 743–44. Accordingly, we overrule Linden's first issue.

3. Culpable Mental State

By his second issue, Linden contends that the trial court erred by giving improper definitions for "intentionally" and "knowingly" in the jury charge as they pertain to the offense for which he was indicted. Specifically, Linden contends that the definitions in the jury charge included language that would allow him to be convicted because he intentionally or knowingly engaged in the conduct that caused Peter Tran's death, rather than the fact that he intentionally or knowingly caused Peter Tran's death. This distinction is described in terms of "result of conduct" offenses and "nature of conduct" offenses. We agree that the court committed error in defining these terms.

Murder is a result of conduct offense, meaning that the applicable mental state is only that related to the result of the conduct—i.e., intentionally killing—not the conduct that ultimately causes the result—i.e., intentionally firing the gun. *See Cook v. State*, 884 S.W.2d 485, 490 (Tex.Crim.App. 1994). It is error to include the definition relevant to a nature of conduct offense in a jury charge when the appropriate definition would only include language pertaining to the result of conduct. *See Schroeder v. State*, 123 S.W.3d 398, 400 (Tex.Crim.App. 2003). Here, the trial court clearly erred by giving over-inclusive definitions for "intentionally" and "knowingly" in the jury charge. *See id.*

However, here again, Linden must demonstrate egregious harm because he failed to object to the jury charge. *See Almanza*, 686 S.W.2d at 171. In analogous situations, both the First and Fifth District Courts of Appeals have addressed this issue as it pertained to aggravated assault cases—also a result of conduct offense. *Green v. State*, 891 S.W.2d 289, 293 (Tex.App.-Houston [1st Dist.] 1994, pet. ref'd); *Sneed v. State*, 803 S.W.2d 833, 834–35 (Tex.App.-Dallas 1991, pet. ref'd). Each court concluded that the definitions were erroneous, but because the factors outlined by the Texas Court of Criminal Appeals in *Bailey* were unique to each case, the courts differed on whether there was egregious harm that prevented the respective defendants from receiving a fair trial. *Green*, 891 S.W.2d at 295; *Sneed*, 803 S.W.2d at 836–37; *see Bailey v. State*, 867 S.W.2d 42, 43 (Tex.Crim.App. 1993) (noting that the court must consider the following factors: the charge in its entirety, the state of the evidence, the argument of counsel, and any other relevant information in the record in order to determine if egregious harm existed). In determining if egregious harm existed in this case, we look to these same factors. *See Bailey*, 867 S.W.2d at 43.

First, the charge itself mitigated any possible harm to the defendant by giving the proper definition of intentionally and knowingly in the application paragraph. In the portion of the charge where the jury is actually called upon to make a determination, the charge allows the jury to find Linden guilty only if he "intentionally or knowingly caused the death of Peter Tran" and makes no mention of conduct whatsoever. *See id.* Second, as we noted in Part A, *supra*, the evidence in this case

> was clearly sufficient to find that Linden intended the result of his conduct. *See id.* Third, neither party mentioned the erroneous instruction in argument to the jury nor argued that the jury should find Linden guilty based solely on his conduct; and moreover, although Linden admitted to the shooting, he made no argument that he did not intend to kill Peter, only that he acted in self-defense (in fact, he continuously argued that deadly force was justified). *See id.* And fourth, Linden points to no specific evidence in the record that would tend to make this error egregious. *See id.* Therefore, after considering the *Bailey* factors, we conclude that the trial court's error was not so egregious that Linden was denied a fair trial. *See id.; Green*, 891 S.W.2d at 295 (concluding that overwhelming evidence and defense counsel's arguments to the jury in closing argument were sufficient to render erroneous definitions of "intentionally" and "knowingly" not egregiously harmful). Linden's second issue is overruled.

Linden, 347 S.W.3d at 822-25.

Petitioner has failed to show that his claims amounted to anything other than errors of state constitutional, statutory, or procedural law. Accordingly, petitioner's claims do not present grounds for federal habeas relief. Further, petitioner has not otherwise shown his trial was rendered fundamentally unfair thus denying him due process. Therefore, petitioner has failed to show either that the state court adjudication was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States or that the state court adjudication resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Accordingly, petitioner's grounds for relief should be denied.

V. Insufficiency of the Evidence

In his next three claims, petitioner challenges the factual and legal sufficiency of the evidence for his conviction. Petitioner first contends the evidence is factually insufficient to support his conviction of murder under Penal Code § 19.02(b)(1) and that the appellate court misconstrued Penal Code § 2.01 (Ground 25). Additionally, in his other two grounds, petitioner contends the evidence is legally insufficient to support a finding that the offense was committed intentionally and

knowingly, and the appellate court misconstrued Penal Code §§ 2.01 and 6.03(a) (Grounds 26 and 27). Petitioner contends the appellate court's misconstruction of the Penal Code denied him the right to a fair trial.

Federal habeas review of an insufficiency of the evidence claim is extremely limited. On habeas review, a federal court cannot disturb a conviction rendered in a state criminal proceeding unless no rational trier of fact could have found the elements of the offense beyond a reasonable doubt. *Jackson v. Virginia,* 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *Gibson v. Collins,* 947 F.2d 780, 781 (5th Cir. 1991). The evidence must be viewed in the light most favorable to the verdict. *Jackson,* 443 U.S. at 319; *Gibson,* 947 F.2d at 781.

The Texas Court of Criminal Appeals previously recognized claims of factual sufficiency of the evidence. *See Clewis v. State*, 922 S.W.2d 126, 129-30 (Tex.Crim.App. 1996). However, it was no longer recognized at the time of petitioner's direct appeal was decided on December 7, 2011. In a case decided on October 6, 2010, the Texas Court of Criminal Appeals determined there is no meaningful distinction between the previous factual-sufficiency standard and the legal-sufficiency standard under *Jackson*; thus, the *Jackson* standard is the only standard courts should apply to criminal convictions. *Brooks v. State,* 323 S.W.3d 893 (Tex.Crim.App. 2010). Even when factual sufficiency review was a cognizable claim in Texas courts, it did not implicate federal constitutional concerns and was not a basis for federal habeas relief. *See Woods v. Cockrell*, 307 F.3d 353, 358 (5th Cir. 2002). Accordingly, petitioner's claim regarding the factual sufficiency of the evidence is without merit.

Further, to the extent petitioner's challenges the legal sufficiency of the evidence, petitioner's claim lacks merit as the evidence in this matter is sufficient to satisfy the *Jackson* standard. On appeal, the state court found the following:

A. Sufficiency of the Evidence

By his third, fourth and fifth issues, Linden contends that the evidence was legally and factually insufficient to support the verdict. Specifically, he contends that the evidence was insufficient to support findings that he acted "intentionally" or "knowingly" in causing the death of Peter Tran.

1. Standard of Review

The Texas Court of Criminal Appeals has held that our only sufficiency review should be under "a rigorous and proper application" of the *Jackson* standard of review, and therefore, we apply only that standard as argued in Linden's legal sufficiency arguments. *See Brooks v. State*, 323 S.W.3d 893, 906 (Tex.Crim.App. 2010). Under this standard, "the relevant question 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." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *see Brooks*, 323 S.W.3d at 902 n. 19. "[T]he fact-finder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review all of the evidence is to be considered in the light most favorable to the prosecution." *Jackson*, 443 U.S. at 319, 99 S.Ct. 2781 (emphasis in original); *see* TEX. CODE CRIM. PROC. ANN. art. 38.04 (West 1979) ("The jury, in all cases, is the exclusive judge of facts proved, and the weight to be given to the testimony ...."); *Wesbrook v. State,* 29 S.W.3d 103, 111 (Tex.Crim.App. 2000) ("The jury is the exclusive judge of the credibility of witnesses and of the weight to be given testimony, and it is also the exclusive province of the jury to reconcile conflicts in the evidence.").

Sufficiency of the evidence is measured by the elements of the offense as defined by a hypothetically correct jury charge. *Malik v. State*, 953 S.W.2d 234, 240 (Tex.Crim.App. 1997). Under a hypothetically correct jury charge, the State was required to prove beyond a reasonable doubt that Linden: (1) intentionally or knowingly (2) caused the death of Peter Tran. *See* TEX. PENAL CODE ANN. § 19.02(b)(1).

A defendant's intent may be inferred from his words, acts, and conduct. *Patrick v. State*, 906 S.W.2d 481, 487 (Tex.Crim.App.1995). "Intent and knowledge are fact questions for the jury, and are almost always proven through evidence of the circumstances surrounding the crime." *Manrique v. State*, 994 S.W.2d 640, 649 (Tex.Crim.App. 1999) (Meyers, J., concurring) (citing *Robles v. State*, 664 S.W.2d 91, 94 (Tex.Crim.App. 1984)).

2. Analysis

In this case, Linden did not deny emptying his gun by firing four shots at Peter. Additionally, the jury heard testimony about the trajectory of the bullets and that the

> back glass of Peter's vehicle was shot out. The State contended that because the bullets hit Peter in the back of the head and neck, this was an indication that Linden had either begun firing before he was even next to Peter or that he continued to fire after Peter was driving away. The jury also heard testimony that Peter did not have a gun. Based on this evidence and the jury's ability to infer a defendant's intent from his words, acts, and conduct, we conclude that, when viewed in the light most favorable to the prosecution, a rational trier of fact could have found beyond a reasonable doubt that Linden acted with the intent to kill Peter. *See Jackson*, 443 U.S. at 319, 99 S.Ct. 2781; *Patrick*, 906 S.W.2d at 487. Having so concluded, we need not address Linden's separate issue concerning the legal sufficiency of evidence supporting a finding that he "knowingly" killed Peter. *See* TEX. PENAL CODE ANN. § 19.02(b)(1) (requiring that a jury must find that a defendant intentionally or knowingly caused the death of an individual); *see also* TEX. R. APP. P. 47.1. Accordingly, we overrule Linden's third, fourth, and fifth issues.

Linden, 347 S.W.3d at 821-22.

Petitioner has failed to demonstrate he is entitled to relief with respect to the state court's determination regarding the sufficiency of the evidence. It is the role of the jury to "weigh conflicting evidence and evaluate the credibility of witnesses." *See United States v. Green*, 180 F.3d 216, 220 (5th Cir. 1999). Thus, it was within the jury's role to resolve any conflicts in the evidence, and they resolved the conflicts against petitioner in this case. Further, petitioner has failed to show the appellate court misconstrued the applicable provisions of the Penal Code or an associated constitutional violation.

Petitioner has failed to show either that the state court adjudication was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States or that the state court adjudication resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Accordingly, petitioner's grounds for relief should be denied.

VI. Ineffective Assistance of Counsel

Petitioner asserts claims of ineffective assistance of counsel against both trial counsel and appellate counsel. Petitioner claims trial counsel provided ineffective assistance of counsel at trial because trial counsel failed to (a) investigate facts and interview witnesses (Ground 7); (b) present expert witnesses for DNA evidence, medical forensics, and ballistics (Ground 8); (c) argue the issue of collateral estoppel with veracity (Ground 9); (d) object to the closing argument and jury charge (Ground 10); and (e) object to hearsay of detective Blum relative to Kenneth Hunter's statement of facts (Ground 11). Additionally, petitioner claims he was denied the effective assistance of counsel on appeal because counsel failed to (a) raise the issue of collateral estoppel on direct appeal (Ground 12); (b) raise the issue of the State's misstatement of facts in the closing argument on direct appeal (Ground 13); (c) raise the issue of ineffective assistance of trial counsel (Ground 14); and (d) raise the issue of the cumulative effect of multiple errors in the jury charge (Ground 24).

When addressing the issue of what a petitioner must prove to demonstrate an actual ineffective assistance of counsel claim, courts look to the standard set forth in *Strickland v. Washington,* 466 U.S. 668 (1984). *See United States v. Grammas*, 376 F.3d 433, 436 (5th Cir. 2004). In order to show that counsel was ineffective a petitioner must demonstrate:

> First... that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings it cannot be said that the conviction or death sentence resulted in a breakdown of the adversarial process that renders the result unreliable.

Strickland, 466 U.S. at 687.

"To show deficient performance, 'the defendant must show that counsel's representation fell below an objective standard of reasonableness.'" *Reed v. Stephens*, 739 F.3d 753, 773 (5th Cir. 2014) (quoting *Strickland*, 466 U.S. at 688). "Counsel's performance is judged based on prevailing norms of practice, and judicial scrutiny of counsel's performance must be highly deferential to avoid 'the distorting effects of hindsight.'" *Loden v. McCarty*, 778 F.3d 484, 494 (5th Cir. 2015) (quoting *Carty v. Thaler*, 583 F.3d 244, 258 (5th Cir. 2009)). In order to prove the prejudice prong, a petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Day v. Quarterman*, 566 F.3d 527, 536 (5th Cir. 2009). "*Strickland* asks whether it is 'reasonably likely' the result would have been different." *Harrington*, 562 U.S. at 111. Because the petitioner must prove both deficient performance and prejudice, the petitioner's failure to prove either will be fatal to his claim. *Johnson v. Scott*, 68 F.3d 106, 109 (5th Cir. 1995).

The burden of proof in a habeas corpus proceeding attacking the effectiveness of trial counsel is upon the petitioner, who must demonstrate counsel's ineffectiveness by a preponderance of the evidence. *See Martin v. Maggio,* 711 F.2d 1273, 1279 (5th Cir. 1983). A habeas petitioner must "affirmatively prove," not just allege, prejudice. *Day,* 556 F.3d at 536. If a petitioner fails to prove the prejudice part of the test, the Court need not address the question of counsel's performance. *Id.* A reviewing court "must strongly presume that trial counsel rendered adequate assistance and that the challenged conduct was the product of a reasoned trial strategy." *Wilkerson v. Collins,* 950 F.2d 1054, 1065 (5th Cir. 1992). In determining the merits of an alleged Sixth Amendment violation, a Court "must be highly deferential" to counsel's conduct. *Strickland,* 466 U.S. at 687.

Whether the representation was deficient is determined as measured against an objective standard of reasonableness. *See Kitchens v. Johnson*, 190 F.3d 698, 701 (5th Cir. 1999). "A conscious and informed decision on trial tactics and strategy cannot be the basis for constitutionally ineffective assistance of counsel unless it is so ill chosen that it permeates the entire trial with obvious unfairness." *United States v. Jones*, 287 F.3d 325, 331 (5th Cir. 2002) (quoting *Garland v. Maggio*, 717 F.2d 199, 206 (5th Cir. 1983)). "There is a strong presumption that counsel's conduct falls within a wide range of reasonable professional assistance." *Woodward v. Epps*, 580 F.3d 318, 329 (5th Cir. 2009) (quoting *Romero v. Lynaugh*, 884 F.2d 871, 876 (5th Cir. 1989)).

Strategic decisions made by counsel during the course of trial are entitled to substantial deference in the hindsight of federal habeas review. *See Strickland,* 466 U.S. at 689 (emphasizing that "[j]udicial scrutiny of counsel's performance must be highly deferential" and that "every effort [must] be made to eliminate the distorting effects of hindsight"). A federal habeas corpus court may not find ineffective assistance of counsel merely because it disagrees with counsel's chosen trial strategy. *See Crane v. Johnson,* 178 F.3d 309, 312 (5th Cir. 1999).

When a petitioner brings an ineffective assistance claim under the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), the relevant question is whether the state court's application of the deferential *Strickland* standard was unreasonable. *See Beatty v. Stephens*, 759 F.3d 455, 463 (5th Cir. 2014). "Both the *Strickland* standard and AEDPA standard are 'highly deferential,' and 'when the two apply in tandem, review is doubly so.'" *Id.* (quoting *Harrington*, 562 U.S. at 105).

a. Trial Counsel

i. Investigate Facts and Interview Witnesses

In his first two grounds, petitioner asserts that trial counsel was ineffective for failing to investigate facts and interview witnesses (Grounds 7 and 8). Petitioner claims counsel failed to procure disclosure and interview witnesses. Further, petitioner contends counsel failed to present expert witnesses for DNA, medical forensics, or ballistics. Petitioner contends counsel's failures denied him the opportunity for an actual innocence defense.

To establish that an attorney was ineffective for failure to investigate, a petitioner must allege with specificity what the investigation would have revealed and how it would have changed the outcome of the trial. *See United States v. Green*, 882 F.2d 999, 1003 (5th Cir. 1989); *see also Miller v. Dretke*, 420 F.3d 356, 361 (5th Cir. 2005). "Mere conclusory allegations in support of a claim of ineffective assistance of counsel are insufficient to raise a constitutional issue." *Green v. Johnson*, 160 F.3d 1029, 1042 (5th Cir. 1998). "Absent evidence in the record, a court cannot consider a habeas petitioner's bald assertions on a critical issue in his *pro se* petition (in state and federal court), unsupported and unsupportable by anything else contained in the record, to be of probative evidentiary value." *Ross v. Estelle*, 694 F.2d 1008, 1011-12 (5th Cir. 1983).

Additionally, "complaints of uncalled witnesses are not favored, because the presentation of testimonial evidence is a matter of trial strategy and because allegations of what a witness would have testified are largely speculative." *Buckelew v. United States,* 575 F.2d 515, 521 (5th Cir. 1978). Further, the presentation of witness testimony is essentially strategy and, thus, within the trial counsel's domain. *Alexander v. McCotter,* 775 F.2d 595, 602 (5th Cir. 1985). A habeas petitioner must overcome a strong presumption that counsel's decision in not calling a particular witness was a strategic one. *See Murray v. Maggio, Jr.,* 736 F.2d 279, 282 (5th Cir. 1984). In cases

where "the only evidence of a missing witness's testimony is from the defendant," claims of ineffective assistance of counsel are viewed with great caution. *See United States v. Cockrell,* 720 F.2d 1423, 1427 (5th Cir. 1983), *cert. denied,* 467 U.S. 1251, 104 S.Ct. 3534, 82 L.Ed.2d 839 (1984). Moreover, for a petitioner to succeed on the claim, he must have shown that had counsel investigated, he would have found witnesses to support the defense, that such witnesses were available, and had counsel located and called these witnesses, they would have been willing to testify and their testimony would have been favorable to the defense. *See Alexander,* 775 F.2d at 602; *Gomez v. McKaskle,* 734 F.2d 1107,1109-10 (5th Cir. 1984). Conclusory claims are insufficient to entitle a habeas corpus petitioner to relief. *Green v. Johnson,* 160 F.3d 1029, 1045 (5th Cir. 1998); *United States v. Woods,* 870 F.2d 285, 288 n.3 (5th Cir. 1989).

The state habeas court made the following findings regarding petitioner's claims which were adopted by the Texas Court of Criminal Appeals:

> 29. Assuming without deciding that Mr. Makin did not interview the five above-named persons [Young, Hunter, Rodgers, Chambers, and Cooper] or choose to call any of them to testify at trial, the Court finds: (a) these were strategic choices made by Mr. Makin; (b) these strategic choices were reasonable in light of the facts and circumstances presented to Mr. Makin at the time; and, (c) were substantially influenced by applicant's own statements and actions shortly after he shot Mr. Tran when applicant repeatedly approached Major Raymond Clark of the Port Arthur Police Department and admitted that he was the shooter. [2RRpp. 110; 114-117] *See Strickland*, 466 U.S. at 961 (reasonableness of counsels actions "may be determined or substantially influenced by the defendant's own statements or actions[, and c]ounsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information.").
>
> 30. The Court finds that applicant's verbal admission to having shot Mr. Tran was made knowingly and voluntarily, was unsolicited by law enforcement, and was not the product of custodial interrogation. Therefore, applicant's continual, persistent, and voluntary admission of responsibility for Mr. Tran's death would have made it professionally unreasonable for Mr. Makin to present witnesses or physical evidence in furtherance of a defense asserting that Mr. Tran's death was, in fact, caused by

another, unrelated gunman, and not by applicant. *See Ex parte Nailor*, 149 S.W.3d 125, 132-134 (Tex. Crim. App. 2004) (defendant not entitled to self-defense jury instruction when he testified that victim's injuries were the result of "accident," and not any intentional act on his part). *See also Juarez v. State*, 308 S.W.3d 398, 401-406 (Tex. Crim. App. 2010) (discussing long-standing "confession and avoidance" doctrine, requiring the defendant to admit to all elements of the charged offense before being entitled to certain defensive instructions, one of which is self-defense).

31. With regard to Ground 7, the Court concludes applicant has failed to prove, by a preponderance of the evidence, that any decision by Mr. Makin to limit or curtail investigation of the five above-named persons, or refrain from presenting any evidence or testimony from the five above-named persons, was not an informed strategic decision but was, instead, professionally unreasonable; or, even if professionally unreasonable, that a reasonable probability exists that the result of the guilt/innocence or punishment phases would have been different. *Strickland* , 466 U.S. at 691, 694. Ground 7 is without merit.

32. The Court concludes the claims in Ground 8 are without merit for the same reasons set out above in Ground 7's findings and conclusions. Any defensive use of experts in the fields of DNA, medical forensics, and trajectory-ballistics would have been undertaken in an effort to demonstrate that applicant was not the shooter and that Mr. Tran's death was the result of being shot by another, unidentified, unseen, individual. As noted above, because of applicant's unequivocal and persistent admission to having shot Mr. Tran in self-defense, both at the crime-scene and throughout the pendency of the Murder trial, Mr. Makin's "self-defense" trial strategy was virtually pre-determined. No deficient performance can be attributed to Mr. Makin from the claims submitted in Ground 8.

SHCR at 17-19.

Here, petitioner has failed to satisfy his burden of proof in rebutting the presumption of correctness afforded the state court's explicit and implicit findings. Petitioner attempts to relitigate his arguments presented to the state court without rebutting the findings with clear and convincing evidence. Given the evidence presented, petitioner has failed to show either deficient performance or prejudice. Moreover, he has failed to overcome the "doubly" deferential standard that must be accorded counsel in the context of § 2254(d). Petitioner has failed to show either that the state court adjudication was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States or that the state court adjudication

resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Accordingly, petitioner's grounds for relief should be denied.

ii. Failure to Argue and Object

Next, petitioner complains that counsel failed to argue the issue of collateral estoppel with veracity (Ground 9). Further, petitioner argues trial counsel was ineffective by failing to object to the closing argument and the jury instruction on self defense (Ground 10). Petitioner asserted two parts to this argument in his original petition. The remaining portion of petitioner's ineffective assistance of counsel claim that counsel was ineffective for failing to object to the closing argument was discussed and analyzed in Section II above. To the extent petitioner's claim may be found not to be moot, the claim lacks merit.

The state habeas court reviewed this claim and made the following findings which were adopted by the Texas Court of Criminal Appeals:

Ground 9

> 33. As evidenced by Mr. Makin's "Trial Memorandum" appearing in the clerk's record [p. 87], and the colloquies appearing in the reporter's record [5RRpp.1-8; and 6RRpp.1-10], the basis for Mr. Makin's collateral estoppel argument, presented prior to commencement of the February 2010 punishment retrial to Judge Charles Carver, was undertaken in support of this Jurist's ruling at the December 2008, trial, immediately before declaring the punishment-phase mistrial. The legal basis of Mr. Makin's argument before Judge Carver was an attempt to limit applicant's punishment exposure in the punishment-retrial to a second degree felony, based on the deadlocked-jury's "yes" answer to "sudden passion" special issue.
>
> 34. Although Judge Carver ruled against Mr. Makin's position prior to the February 2010, punishment retrial, the Court finds that the claims presented in Ground 9 have been rendered moot by the retrial-jury's identical "yes" response to the same "sudden passion" special issue, and its resulting fifteen-year prison sentence. Ground 9 should be dismissed for that reason.

Ground 10

35. The IAC claims here complain of counsel's failure to object to portions of the State's closing argument during the punishment phase of the December 2008- trial, and complain of counsel's failure to object that the Court's guilt/innocence jury-instructions did not apply the abstract self-defense instructions to the record- facts in the application paragraph.

36. The mistrial that was declared in the punishment-phase of the December 2008-trial, rendered moot Ground 10's claims of trial counsel errors committed during that proceeding. Applicant's punishment was subsequently determined by a new jury in February 2010.

37. Relating to the jury-charge complaint, the Corpus Christi Court of Appeals addressed the defective application paragraph on the merits as it was presented as a stand-alone issue by appellate counsel as issue one. *See Linden v. State*, 347 S.W.3d at 822-823.

38. The Corpus Christi Court of Appeals held it was error for the Court to have failed to apply the self-defense law to the facts elicited before the jury during trial. *Id.* at 823.

39. Assuming that trial counsel was constitutionally deficient for not having objected to the erroneous application paragraph, the Court finds applicant has failed to prove, by a preponderance of the evidence, that there is a reasonable probability that the jury would have returned a "not guilty" verdict, had the application paragraph correctly applied the law to the facts, because the self-defense issue turned on the jury's credibility-determination of applicant, and whether applicant's shooting of Mr. Tran was reasonable under the circumstances as he perceived them to be.

40. Applicant did not dispute the fact that the trial-evidence indicated no firearm of any kind was found inside Mr. Tran's vehicle when it was searched in the course of the subsequent criminal investigation. [2RRp.166; 3RRp.92]

41. During his testimony, applicant acknowledged a heated confrontation had taken place between himself and Mr. Tran at a gas station only moments before the shooting, with both men shouting at each other. [3RRpp.79-85] Moments after both men drove away from the gas station, applicant was driving his pick up truck along Gulfway Drive, with Curley Sinegal riding in the passenger seat, when applicant notices Mr. Tran, now driving a different car than before, appear next to his truck in the outside lane. [RR3p.81] Applicant's direct examination testimony continues as follows: [RR3pp.91-97]

Q. [Mr. Makin] And at some point did you become aware of another vehicle?

A. [applicant] Yes.

Q. And was that the blue Lexus?

A. Yes, it was.

Q. And was there traffic behind you on the road?

A. I assume so.

Q. Do you remember?

A. At this point in time, no, I don't remember if it was directly behind; but Gulfway's a busy street. So, they had - - I would assume they had some traffic behind me.

Q. Tell the jury from the moment you noticed the blue vehicle till you picked your gun up and shot, how many seconds was that?

A. Maybe 4 seconds.

Q. Did you during any time in those 4 seconds think, "Well, I can speed up and get away from him"?

A. No.

Q. Did you think, "I can hit my brakes and get away from him"?

A. No.

Q. Did you think, "I could go left and get away from him"?

A. No.

Q. In other words, was there any way you could've retreated and got away from Mr. Tran?

A. No.

Q. Now, you've heard all the testimony, there was no gun found in Mr. Tran's car?

A. I heard that.

Q. In spite of that, did you believe the he had a gun and was threatening you?

A. Yes, I did.

Q. Did you perceive that as an apparent danger to your life?

A. Absolutely.

Q. Did you perceive it to be an apparent danger to Mr. Sinegal's life?

A. Yes, I did.

Q. How many bullets were in your gun?

A. Approximately four.

Q. Okay. Well, we've heard testimony there were four casings and bullets and all. And, so, when you fired, did you empty your gun?

A. Yes.

Q. Did you at any time really aim, or was it just merely pointing out the window and pulling the trigger?

A. It was just pulling it and just pointing it out the window (indicating).

Q. After the shooting what happened?

A. After the shooting the car drifted over. It hit a light pole. I stopped in the street to allow other traffic to pass, make sure it was safe, and then I turned and I parked behind Charles Maull Associates building and I got my phone and I called 911.

Q. Okay. Now, the blue Lexus was in front of that building, Charles Maull's building, correct?

A. Yes.

Q. And it had hit a telephone pole?

A. Yes.

Q. And did you stay up there by your vehicle or back away from the vehicle?

A. I stayed away from the vehicle.

Q. Okay. So, you didn't see who was coming to the vehicle, looking at it or anything like that?

A. No, I did not.

Q. Did you stay by your vehicle?

A. Yes.

Q. Did you keep Mr. Sinegal by you?

A. Yes.

****

Q. Okay. What happened next?

A. When I noticed the police arrive, I noticed Major Clark out in the Gulfway Drive; and I went directly to him.

Q. And did you tell him, "I need to talk to you"?

A. Yes, I did.

Q. And what did he first tell you?

A. He kind of put me off.

Q. He was busy?

A. Yes, he was.

****

Q. Okay. And did y'all walk away from Gulfway, and did you talk to him?

A. Well, right there on Gulfway I spoke to him and there was somebody else standing up there saying he seen a black truck and I let the major know, "I'm the guy in the black truck," and I told him, I said, "I'm parked in the rear of this building. Would you like to walk to the back with me?"

Q. And did you tell him you had a gun?

A. Yes, I did.

Q. And did you tell him everything you remember that happened?

A. Yes, I did.

Q. At some point did they take you down to the Port Arthur Police station?

A. Yes.

Q. And that was on May 17th, correct?

A. Yes.

Q. And did you give them a statement about your - - basically what you just told this jury?

A. Yes, I did.

Q. Did they arrest you then?

A. No, they did not.

Q. But at some later point, you were called and told there was a warrant for your arrest?

A. Yes.

Q. And did you go down and surrender yourself?

A. Yes, I did.

Q. And did you then go and talk to the grand jury?

A. Yes, I did.

Q. And as a result of all that, we're here today?

A. Yes.

****

Q. Well, did you - - did you do anything to incite or invite or start the problem with Mr. Tran?

A. No, I did not.

Q. Did you reasonably believe on May 17th you had no choice but to pick your pistol up and shoot?

A. I had to defend myself. Yes.

Q. Do you know if you even saw this tire tool that we've all talked about and seen the pictures of?

A. In my mind, I seen a gun is what I seen, a gun.

42. On cross-examination, applicant's self-defense claim devolved in the following respects: [3RRpp.98- 1 14]

> (a) In his statement to the police, and in his testimony before the grand jury, applicant used the term "weapon," not "gun" as in his direct examination testimony, when describing what Mr. Tran was holding when applicant began shooting.
>
> (b) Applicant demonstrated to the jury he saw Mr. Tran reach across his body with his right hand, and lifted up an item which appeared to applicant to be the "black handle" of a gun, at which point applicant immediately began shooting.
>
> (c) Applicant kept his .380 semiautomatic handgun in his truck between the seats on the console, with a towel covering it.
>
> (d) At the time of the shooting, applicant did not possess a concealed handgun permit, nor had he ever possessed such a license.
>
> (e) Applicant assumed the truth of Major Clark's testimony that once applicant identified the black truck as his vehicle, a police officer was positioned next to the vehicle to secure its contents, and applicant agreed that he fired four shots from his handgun at Mr. Tran and that the three shell-casings subsequently found inside his truck came from three of those four shots.
>
> (f) When the State's attorney confronted applicant with certain arguably critical omissions in his written statement to the police, and in his subsequent grand jury testimony, as compared with what he testified to the jury on direct examination, applicant could only respond that, when under pressure, he is able to provide only the facts he is able to remember while he remembers other facts only in hindsight.

43. In the Court's estimation, the following exchange between applicant and the State's attorney damaged applicant 's credibility regarding his self-defense claim to a significant degree: [3RRpp. 111-114]

Q. [State's attorney] What hand did you see the gun in?

A. [applicant] His right hand.

Q. Did he point it at you?

A. He was pulling it up.

Q. Demonstrate again and how high did he get it up before you open fire - -

A. He got it - -

Q. - - if you would, please.

A. He got it up to where I could see it. He reached over, pulled it up. I'm able to see it (indicating).

Q. And that's when you opened fire?

A. When I seen the black handle of the gun - -

Q. And he's facing towards you?

A. - - that's when I grabbed my gun.

Q. He's facing towards you?

A. Yes.

Q. Directly towards you when you opened fire?

A. Not - - evidently not directly.

Q. Well, I just asked you was he facing towards you; and you say he was. But, of course, all the bullet impacts are on this side, aren't they?

A. You mean was he facing toward me, or was I - -

Q. Yes.

A. - - facing towards him?

Q. Yes. Was he facing toward you?

A. He was not facing toward me. He was at an angle like this, like this - -

Q. So, he didn't even - -

A. - - coming up with the weapon and he (indicating) - -

Q. So, he didn't even aim the gun?

A. - - and he's driving a car.

Q. He didn't even aim the gun, right?

A. No. All I seen was the handle of the gun; and that was enough for me, in my mind, to know I'm dead.

Q. Could you tell what kind of gun it was?

A. No, I could not tell what kind of gun it was.

Q. How could you even tell it was a gun?

A. It looked like a gun.

Q. Well, now, earlier you testified it was a gun. Now, you're saying it looked like a gun. Which is it, Mr. Linden?

A. In my mind, it was a gun.

Q. Mr. Linden - -

A. I seen a black handle. When something looks like a gun, in your mind, it is a gun.

Q. But you told this jury you saw a gun, did you not? Mr. Linden, that's a yes-or-no question.

A. Once again, in my mind - -

[State's non-responsive objection overruled]

Q. Did you tell this jury it was a gun or not? It's on the transcript. Did you tell them it was a gun or not?

A. In my mind, it seemed to have been a gun. I seen a gun, in my mind.

Q. In his right hand, correct?

(....).

A. Correct.

Q. Then he reached over his body to pull out from somewhere between his seat and the door, correct?

A. Yes.

Q. What color was the gun that you say he pulled up?

A. It looked black to me.

Q. And will you agree - - you've reviewed your grand jury testimony - - again, before the grand jury, just like in your statement with the Port Arthur Police Department, you don't use the word "gun"; you used the term "weapon"; is that correct?

A. My definition of "weapon" is gun. It's all the same.

44. Again, under Ground 10's jury charge complaint, on the instant habeas record, including the portions of applicant's trial testimony set out above, the Court finds that counsel's failure to object to the erroneous application paragraph did not create a reasonable probability that the result of the trial would have been different had counsel so objected. The Court concludes that applicant has failed to carry his burden to prove both Strickland-prongs by a preponderance of the evidence. *Ex parte Niswanger*, 335 S.W.3d 611, 615 (Tex. Crim. App. 2011). Ground 10 is without merit.

SHCR at 20-31.

Counsel is not required to make futile motions or frivolous objections. *Johnson v. Cockrell*, 306 F.3d 249, 255 (5th Cir. 2002); *Koch v. Puckett*, 907 F.2d 524, 527 (5th Cir. 1990) ("This Court has made clear that counsel is not required to make futile motions or objections."). Failure to make a frivolous objection does not cause counsel's performance to fall below an objective level of reasonableness. *See Green v. Johnson*, 160 F.3d 1029, 1037 (5th Cir. 1998). Additionally, petitioner has failed to show a reasonable probability that, but for counsel's failure to object or argue, the outcome of his trial would have been different.

Petitioner has failed to satisfy his burden of proof in rebutting the presumption of correctness afforded the state court's explicit and implicit findings. Petitioner attempts to relitigate his arguments presented to the state court without rebutting the findings with clear and convincing evidence. Again, petitioner has failed to show either deficient performance or prejudice. Moreover, he has failed to overcome the "doubly" deferential standard that must be accorded counsel in the context of § 2254(d). Petitioner has failed to show either that the state court adjudication was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States or that the state court adjudication resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Accordingly, petitioner's grounds for relief should be denied.

iii. Failure to Object to Detective Blum's Testimony

Petitioner contends trial counsel was ineffective for failing to object to Detective Blum's testimony (Ground 11). Petitioner claims counsel should have objected to hearsay testimony of Detective Blum regarding statements from Kenneth Hunter which petitioner claims violated his rights under the Confrontation Clause.

The state habeas court made the following findings regarding petitioner's claims which were adopted by the Texas Court of Criminal Appeals:

> 45. Under Ground 11, the portion of the trial record to which applicant directs the Court's attention does not contain any hearsay testimony from Detective Mark Blum. [2RRpp.171-172] Detective Blum was attempting to explain why, early in his investigation, he noticed the physical evidence, as well as facts contained in certain witness statements, appeared to be somewhat inconsistent. Upon testifying he determined further investigation was needed, Detective Blum was then asked the following questions:

> Q. [State's attorney] Did you have occasion on the 20th of May to speak with a witness by the name of Kenneth Hunter?
>
> A. Yes, sir, I did.
>
> Q. And did you, in fact, have an opportunity to take a statement from Mr. Hunter on that date and, to use the term, throw that into the mix?
>
> A. Yes, sir.
>
> Q. After - - did you speak with him alone, or was there anybody else with you?
>
> A. Sergeant Harrison was present with me.
>
> Q. But who did the actual interview? That would've been you; is that correct?
>
> A. Yes, sir.
>
> 46. Again, the Court finds no hearsay in the above-quoted testimony from Detective Blum. Detective Blum simply indicates he spoke with Kenneth Hunter on May 20, and then took a statement from Hunter on that date. This portion of Detective Blum's testimony does not contain hearsay. *See* TEX. R. EVID. 801(d). As such, trial counsel cannot be held ineffective for having withheld a hearsay objection. The Court concludes that Ground 11 is without merit.

SHCR at 31-33.

It is clear in the Fifth Circuit that "counsel is not required to make futile motions or objections." *See Roberts v. Thaler*, 681 F.3d 597, 611 (5th Cir. 2012); *Murray v. Maggio*, 736 F.2d 279, 283 (5th Cir. 1984). "Failure to raise meritless objections is not ineffective lawyering; it is the very opposite." *Clark v. Collins*, 19 F.3d 959, 966 (5th Cir. 1994). Counsel was not deficient in his performance for failing to raise petitioner's meritless claims. Further, in light of the strong evidence against him, petitioner has failed to show any related prejudice. Accordingly, petitioner's claim is without merit and should be denied.

Petitioner has failed to demonstrate he is entitled to relief with respect to the habeas court's determination that trial counsel's performance was constitutional. Again, petitioner has failed to

show either deficient performance or prejudice related to his claims. Moreover, he has failed to overcome the "doubly" deferential standard that must be accorded counsel in the context of § 2254(d). Petitioner has failed to show either that the state court adjudication was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States or that the state court adjudication resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Accordingly, petitioner's grounds for relief should be denied.

b. Appellate Counsel

In addition to his assertions of ineffective assistance on the part of trial counsel, petitioner also alleges he was denied effective assistance of counsel on appeal because appellate counsel failed to (a) raise the issue of collateral estoppel; (b) raise the issue of the State's misstatement of facts in the closing argument on direct appeal; (c) raise the issue of ineffective assistance of trial counsel; and (d) raise the issue of cumulative effect for multiple errors in the jury charge.[2]

A claim asserting ineffective assistance of appellate counsel is reviewed under *Strickland*'s performance and prejudice prongs. *See Henderson v. Quarterman,* 460 F.3d 654, 665 (5th Cir. 2006) (recognizing that *Strickland* applies to ineffective assistance of appellate counsel claims). A petitioner alleging ineffective appellate representation "must first show that his counsel was objectively unreasonable . . . in failing to find arguable issues to appeal - that is, that counsel unreasonably failed to discover nonfrivolous issues and to file a merits brief raising them" and then "demonstrat[e] prejudice. That is, he must show a reasonable probability that, but for his counsel's

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[2] Petitioner's claim that appellate counsel failed to raise the issue of collateral estoppel on direct appeal was previously analyzed in Section II above and found to be moot. To the extent the claim may be found to not be moot, the claim is without merit.

unreasonable failure ... he would have prevailed on his appeal." *Smith v. Robbins,* 528 U.S. 259, 285–86, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000). Appellate counsel "need not (and should not) raise every nonfrivolous claim, but rather may select from among them in order to maximize the likelihood of success on appeal." *Id.* at 288 (citing *Jones v. Barnes,* 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983)). Thus, it is possible that an ineffective assistance claim may be "based on counsel's failure to raise a particular claim, but it is difficult to demonstrate that counsel was incompetent." *Id.* (citing *Gray v. Greer,* 800 F.2d 644, 646 (7th Cir. 1986)). To demonstrate that a failure to raise an issue was deficient, a petitioner must show that a particular nonfrivolous issue was clearly stronger than issues that counsel did present. *Id.*

The state habeas court made the following findings relevant to petitioner's claims which were adopted by the Texas Court of Criminal Appeals:

Ground 12

> 47. Ground 12's complaint is related to the IAC claim presented in the portion of Ground 9 regarding Judge Carver's ruling prior to the start of the February 2010-punishment retrial resulting in applicant facing the full first-degree range of punishment. As the Court concluded that portion of Ground 9's complaint was moot because the punishment-retrial jury returned a verdict favorable to applicant on the "sudden passion" special issue, and then assessed his prison term at fifteen years', the Court now concludes Ground 12's IAC complaint is also moot for the same reason, and should be dismissed.

Grounds 13, 14, and 24 [supplement]

> 48. Grounds 13, 14, and 24 [supplement] complain of David W. Barlow's failure to raise (a) the purported State's misstatement of fact in during its closing argument in the February 2010-punishment retrial [13]; (b) ineffective assistance of trial counsel [14]; and (c) cumulative effect of multiple errors in the jury charge [24].
>
> 49. To show Mr. Barlow, as appellate counsel, was constitutionally ineffective for failing to assert a particular issue on appeal, applicant must prove, by a preponderance of the evidence, that: (a) counsel's decision not to raise a particular matter as an appellate issue was objectively unreasonable, and (b) there is a reasonable probability that, but for counsel's failure to raise that particular matter,

the applicant would have prevailed on appeal. *Ex parte Santana* , 227 S.W.3d 700, 704-705 (Tex. Crim. App. 2007); *see also Smith v. Robbins*, 528 U.S. 259, 285-286 (2000).

50. After considering the allegations and argument on pages 50-51 of applicant's separately-bound "memorandum," the Court concludes that Ground 13 is without merit because applicant has failed to demonstrate there is a reasonable probability the court of appeals would have held the State's purported miscounting of the gunshots applicant fired at Mr. Tran - - 5 shots instead of 4 shots - -reversible error. [See 8RRpp.258-259] The Court further concludes that it is not objectively unreasonable for appellate counsel to have refrained from presenting the matter to the court of appeals as an appellate issue, because said jury-argument, even if a misstatement of the trial-facts, is non-constitutional error and, therefore, is not held reversible unless it can be said to have affected applicant's substantial rights. See Tex. R. App. P. 44.2(b). Based on the entire punishment-retrial record, the Court concludes the purported misstatement of facts by the prosecutor did not affect applicant 's substantial rights. Ground 13, therefore, is without merit as appellate counsel did not provide ineffective assistance in this instance.

51. The Court concludes that Ground 14 also lacks merit because the CCA has long-held the better practice is to present ineffective assistance of counsel claims by way of post-conviction writ of habeas corpus because the trial record is typically inadequate in several respects for making IAC determinations, and because counsel is permitted the opportunity to explain his trial strategy in order to rebut the various IAC claims presented. *See Lopez v. State*, 343 S.W.3d 137, 143 (Tex. Crim. App. 2011) ("This Court has repeatedly stated that claims of ineffective assistance of counsel are generally not successful on direct appeal and are more appropriately urged in a hearing on an application for writ of habeas corpus. On direct appeal, the record is usually inadequately developed and 'cannot adequately reflect the failings of trial counsel' for an appellate court 'to fairly evaluate the merits of such a serious allegation.' Unlike other claims rejected on direct appeal, claims of ineffective assistance of counsel rejected due to lack of adequate information may be reconsidered on an application for a writ of habeas corpus." (footnotes omitted) (*citing, inter alia, Ex parte Nailor*, 149 S.W.2d 125, 131 (Tex. Crim. App. 2004); *Bone v. State*, 77 S.W.3d 828, 833 n. 13 (Tex. Crim. App. 2002); *Mitchell v. State*, 68 S.W.3d 640, 642 (Tex. Crim. App. 2002); *Thompson v. State*, 9 S.W.3d 808, 813-814 (Tex. Crim. App. 1999)). Thus, the Court concludes it was not objectively unreasonable for Mr. Barlow to have refrained from raising ineffective assistance of trial counsel on direct appeal. Ground 14 is without merit.

52. Ground 24 [supplement] complains that Mr. Barlow failed to present an appellate issue regarding "the cumulative effect of multiple errors in the jury charge."

> 53. The Court concludes Ground 24 is without merit because Mr. Barlow raised, as appellate issues one and two, stand-alone complaints about the errors in the jury charge, and was partially successful in doing so. Although the Corpus Christi Court of Appeals found the charge erroneous under both issues, it ultimately found no egregious harm occurred in either instance when the errors were considered in light of the entire trial record. *See Linden v. State*, 347 S.W.3d at 822-825. Under these circumstances, the Court concludes that applicant cannot meet his burden to establish that, but for Mr. Barlow's failure to raise the additional stand-alone issue of cumulative jury-charge error in his appellate brief, there is a reasonable probability that applicant would have prevailed on the cumulative jury-charge error issue with the Corpus Christi Court of Appeals. *See Ex parte Santana*, 227 S.W.3d at 704-705. The Court concludes that Mr. Barlow, as appellate counsel, was not constitutionally ineffective for refraining from raising such issue on direct appeal. Ground 24 [supplement] is without merit.

SHCR at 33-36.

Petitioner has failed to demonstrate he is entitled to relief with respect to the habeas court's determination that appellate counsel's performance was constitutional. Petitioner has failed to show appellate counsel's performance was either deficient or prejudicial. Petitioner has failed to show either that the state court adjudication was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States or that the state court adjudication resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Accordingly, petitioner's grounds for relief against appellate counsel should be denied.

VII. Prosecutorial Error and Cumulative Error

Petitioner raises four grounds of prosecutorial error and one ground based on the cumulative effect of these alleged errors. Petitioner claims the prosecution withheld exculpatory statements of five key witnesses (Ground 2) and withheld an agreement made with the State's witness Curly Sinegal (Ground 3). Additionally, petitioner contends the prosecutor introduced false, perjurious, fraudulent, coerced testimony of police officers (Ground 4). Further, petitioner claims the

prosecutor failed to produce key witness Kenneth Hunter for confrontation of his given statements (Ground 5). Finally, petitioner contends the cumulative effect of the State's *Brady* and other due process violations, denied him a fair trial (Ground 6).

Due process is violated when the prosecution withholds evidence that is both favorable to the accused and "material to either guilt or to punishment." *Brady v. Maryland,* 373 U.S. 83, 87 (1963). This rule covers evidence that might be used for impeachment purposes. *Edmond v. Collins,* 8 F.3d 290, 293 (5th Cir. 1993). "A *Brady* claim involves three elements; 1) the prosecution's suppression or withholding of evidence, 2) which evidence is favorable, and 3) material to the defense." *United States v. Stephens,* 964 F.2d 424, 435 (5th Cir. 1992). Materiality is defined as "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceedings would have been different." *United States v. Bagley,* 473 U.S. 667, 682 (1985).

"Absent evidence in the record, a court cannot consider a habeas petitioner's bald assertions on a critical issue in his pro se petition (in state and federal court), unsupported and unsubstantiated by anything else contained in the record, to be of probative evidentiary value." *Ross v. Estelle,* 694 F.2d 1008, 1011-12 and n. 2 (5th Cir. 1983); *see Koch v. Puckett,* 907 F.2d 524, 530 (5th Cir. 1990).

Further, the deliberate deception of a court and jurors by the presentation of known false evidence violates the Due Process Clause of the Fourteenth Amendment. *See Giglio v. United States,* 405 U.S. 150, 153, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). The "same result obtains when the State, although not soliciting the false evidence, allows it to go uncorrected when it appears." *Id.* (quoting *Napue v. Illinois,* 360 U.S. 264, 269, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959)). "Although *Giglio* and *Napue* use the term 'promise' in referring to covered-up deals, they establish that the crux of a Fourteenth Amendment violation is deception. A promise is unnecessary." *See Tassin v. Cain,* 517 F.3d 770, 778 (5th Cir. 2008). In order to obtain relief on his claim, petitioner must show

that the witnesses testified falsely, the State knew the testimony was false, and the testimony was material in that it could reasonably have affected the judgment of the jury. *See Napue,* 360 U.S. at 271, 79 S.Ct. 1173.

When attempting to show perjured testimony, the false or misleading nature of certain testimony cannot be established simply by pointing to contradictory testimony from other witnesses, inconsistencies within a witness's testimony, or conflicts between or among written statements and live testimony. Such matters go only to the weight of the evidence and the credibility of the witness. *See Koch v. Puckett,* 907 F.2d 524, 531 (5th Cir. 1990) (holding that contradictions or inconsistencies in trial testimony are to be resolved by the trier of fact and do not suffice to prove testimony was false).

To merit habeas relief, the prosecutorial misconduct must have infected the entire trial with unfairness so as to make the resulting conviction a denial of due process. *Greer v. Miller*, 483 U.S. 756, 765 (1987). The conduct must have rendered the trial fundamentally unfair. *Darden v. Wainwright*, 477 U.S. 168, 179-81 (1986).

Finally, cumulative error can be an independent basis for habeas corpus relief where "(1) the individual errors involved matters of constitutional dimensions rather than mere violations of state law; (2) the errors were not procedurally defaulted for habeas purposes; and (3) the errors 'so infected the entire trial that the resulting conviction violates due process." *Westley v. Johnson*, 83 F.3d 714, 726 (5th Cir.1996) (citing *Derden v. McNeel*, 978 F.2d 1453, 1454 (5th Cir.1992)). In evaluating a claim of cumulative error, meritless claims or claims that are not prejudicial cannot be aggregated, no matter the total number raised. *Derden*, 978 F.2d at 1461. *See also United States v. Nine Million Forty One Thousand Five Hundred Ninety Eight Dollars and Sixty Eight Cents*, 163 F.3d 238, 250 (5th Cir.1998).

The state habeas court reviewed petitioner's claims and made the following findings which were adopted by the Texas Court of Criminal Appeals:

Ground 2

8. The Court finds the claims alleged under Ground 2 are refuted in the habeas record by applicant's own Exhibit 24, which is a copy of a memo dated May 29, 2008 [over six months before the start of the jury trial in December 2008], from the prosecuting attorney, Ramon Rodriguez, to trial counsel, Mr. Makin, listing all potential State's witnesses as of that date. Among the possible witnesses listed are the names of the five persons applicant alleges the State withheld: "Dan Young, Kenneth Hunter, Jason Rodgers, June Chambers and Hannah Cooper." Indeed, Mr. Rodriguez's memo explicitly informs Mr. Makin that Hunter, Rodgers, Cooper, and Young may have knowledge of "possible exculpatory evidence." The Court concludes that the facts applicant has pleaded under Ground 2 do not establish, by a preponderance of the evidence, his entitlement to relief from his underlying Murder conviction or sentence. *See Ex parte Chandler*, 182 S.W.3d 350, 353 n. 2 (Tex. Crim. App. 2005); *Ex parte Richardson* , 70 S.W.3d 865, 870 (Tex. Crim. App. 2002).

Grounds 3 through 5

9. The CCA recently reaffirmed that "[t]he general rule is clear . . . that an applicant must show harm to obtain habeas relief: '[A] post-conviction habeas corpus application must allege facts which show both a cognizable irregularity and harm.'" *Ex parte Parrott*, 396 S.W.3d 531, 534 (Tex. Crim. App. 2013) (quoting *Ex parte Tovar*, 901 S.W.2d 484, 486 (Tex. Crim. App. 1995)). It was also stated in *Parrott* that "[a]n applicant demonstrates harm with proof 'by a preponderance of the evidence that the error contributed to his conviction or punishment.'" *Ex parte Parrott*, 396 S.W.3d at 534 (quoting *Ex parte Williams*, 65 S.W.3d 656, 658 (Tex. Crim. App. 2001)). The CCA additionally instructed that "[p]roof of harm may be developed through evidence beyond the appellate record [as the] introduction of new evidence is a key distinguishing feature of habeas corpus." *Ex parte Parrott*, 396 S.W.3d at 534 (citing *Rouse v. State*, 300 S.W.3d 754, 762 n. 17 (Tex. Crim. App. 2009)).

10. The Court finds that the underlying bases for the prosecutorial misconduct claims submitted in Grounds 3, 4, and 5 rely on no "new" facts, nor has applicant supported these claims with any proof having come into existence subsequent to the jury trials in the underlying Murder cause, except for the copies of correspondence between applicant and Mr. Makin and his staff.

11. With regard to the claims made in Ground 3, the Court finds said claim that a secret "agreement" between the State and eyewitness-Curley Sinegal is pure

> speculation on applicant's part because he provides no independent proof in support of said claim. The Court concludes this claim is without merit.
>
> 12. Regarding Grounds 4 and 5, the Court finds that applicant has failed to demonstrate how the testimony of Detective Mark Blum relating to when and under what circumstances witness-statements were taken from Curley Sinegal, Phuong Anh Tran, and Kenneth Hunter, or the State's failure to secure Hunter as a witness for the defense, resulted in applicant being improperly convicted for murdering Mr. Tran, or to an improper assessment of fifteen-year in prison, in light of the fact that applicant fully admitted to shooting the victim, Mr. Tran, on the day in question, albeit in self-defense. *See Ex parte Parrott*, 396 S.W.3d at 534. Thus, the Court concludes that Grounds 4 and 5 are without merit.
>
> ***Ground 6***
>
> 13. The Court also concludes that Ground 6, complaining of the cumulative effects of the prosecutorial misconduct alleged in Grounds 3 through 5, is also without merit because the Court has found no merit to the claims submitted in Grounds 3 through 5. *See Gamboa v. State*, 296 S.W.3d 574, 585 (Tex. Crim. App. 2009) (CCA acknowledges possibility that "a number of errors [may] cumulatively rise to the point where they become harmful," but also states "we have never found that 'non-errors may in their cumulative effect cause error.'")

SHCR at 9-12.

The state court's determinations are not unreasonable in light of the evidence presented in the state court proceeding. Further, petitioner has failed to satisfy his burden of rebutting the court's factual determinations with clear and convincing evidence. Petitioner has shown neither that the state court adjudication was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States nor that the state court adjudication resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Accordingly, petitioner's grounds for relief should be denied.

VIII. Cumulative Effect

In his only remaining ground for review, petitioner claims that the cumulative effect of State court's trial and appellate counsel's errors denied him a fair trial in both trials (Ground 21).

The state habeas court made the following findings which were adopted by the Texas Court of Criminal Appeals:

> 54. Here, applicant complains that the cumulative effect of the State's "multiple due process violations," as alleged by him in Grounds 1 through 20, ultimately deprived him of his right to a fair trial under both the Texas and United States Constitutions.
>
> 55. As the CCA has noted, "[i]t is conceivable that a number of errors may be found harmful in their cumulative effect. *See e.g., Stahl v. State,* 749 S.W.2d 826, 832 (Tex. Crim. App. 1988) (holding harm lies in the cumulative effect of the outburst and the improper arguments). But, we are aware of no authority holding that non-errors may in their cumulative effect cause error." *Chamberlain v. State*, 998 S.W.2d 230, 238 (Tex. Crim. App. 1999). *See also Gamboa v. State*, 296 S.W.3d at 585 (same).
>
> 56. As this Court has determined Grounds 1 through 20 to be without merit, Ground 21's "cumulative error" claim is likewise without merit as non-meritorious habeas grounds for relief cannot, in their cumulative effect, give rise to "error" amounting to jurisdictional defects, or violations of constitutional or fundamental rights. *See generally Ex parte Ramey*, 382 S.W.3d 396, 397 (Tex. Crim. App. 2012) ("Habeas corpus is available only for jurisdictional defects and violations of constitutional or fundamental rights[.]"). Based on the habeas record now under consideration the Court concludes Ground 21 is without merit.

SHCR at 37.

As the state court found, because petitioner's previous grounds have been found to be without merit, petitioner's cumulative error claim is likewise without merit. When a petitioner's claims have been found to be without merit, he is not entitled to relief based upon the cumulative effect of errors. *United States v. Moye*, 951 F.2d 59, 63 n.7 (5th Cir. 1992); *Derden*, 978 F.2d at 1454.

The state court's determinations are not unreasonable in light of the evidence presented in the state court proceeding. Further, petitioner has failed to satisfy his burden of rebutting the court's

factual determinations with clear and convincing evidence. Petitioner has shown neither that the state court adjudication was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States nor that the state court adjudication resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Accordingly, petitioner's ground for relief should be denied.

IX. Certificate of Appealability

Furthermore, 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 movant 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 movant 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. Any doubt regarding whether to grant a certificate of appealability is resolved in favor of the movant, 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.), *cert. denied*, 531 U.S. 849 (2000).

Here, 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 movant 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. Therefore, petitioner has failed to make a sufficient showing to merit the issuance of a certificate of appealability. Accordingly, a certificate of appealability shall not be issued.

Conclusion

Petitioner has failed to present a meritorious ground for review warranting relief. Petitioner has failed to show either that the state court adjudication was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States or that the state court adjudication resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Accordingly, petitioner's relief are denied and dismissed. A final judgment will be entered in this case in accordance with this order.

So Ordered and Signed
Mar 30, 2017

Ron Clark, United States District Judge

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