"Appendix A"

17-20095

Copy of decision of the United States court of appeals issued by judge Jones Feb 05, 2018 was ~~sent to~~ not a "finding of facts or conclusion in law."

Mr. Glenn Lloyd Kingham
#01995131
CID Stringfellow Prison
1200 FM 655
Rosharon, TX 77583-0000

~~"Application to extend time"~~

~~Service to other party under SCOTUS rule 13.5 cannot be sent due to only copy already sent to 5th circuit for §2244 permission to file "second or successive habeas"~~

Single judge Jones for the Fifth circuit issued a simple three sentence decision stating some of applicants relevant case law found in Slack v. McDaniel and Miller-El v. Cockrell inter alia pertaining to issuance of COA, then states petitioner has not met the requirement and denies COA.

I affirm this is true and correct 28 U.S.C. §1746.

Glenn Kingham

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-20095 c/w
No. 17-20342

GLENN LLOYD KINGHAM,

Petitioner-Appellant

v.

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

Respondent-Appellee

Appeals from the United States District Court
for the Southern District of Texas

O R D E R:

Glenn Lloyd Kingham, Texas prisoner # 01995131, was convicted of evading arrest or detention with a motor vehicle and was sentenced to eight years of imprisonment. Kingham filed a 28 U.S.C. § 2254 application challenging this conviction that was denied and dismissed by the district court on March 15, 2017. His motion for a certificate of appealability (COA) in case number 17-20095 was filed prior to the ruling by the district court denying the § 2254 application. Accordingly, in case number 17-20095, Kingham's motion for a COA is DENIED.

His second motion for a COA, filed under case number 17-20342, challenges the district court's denial and dismissal of his § 2254 application.

He argues that the district court erred in dismissing some of his claims as unexhausted and procedurally defaulted. He also asserts that the evidence was insufficient to support his conviction, the indictment was invalid, the prosecution engaged in misconduct, he did not voluntarily waive his right to counsel, he was denied the effective assistance of appellate counsel, the trial court was biased, and the trial court erred in not allowing Kingham to recall a witness and define words.

In order to obtain a COA, Kingham must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). Where the district court has denied federal habeas relief on procedural grounds, the applicant must demonstrate that reasonable jurists would find it debatable whether the motion states a valid claim of the denial of a constitutional right and whether the district court was correct in its procedural ruling. *Slack*, 529 U.S. at 484. An applicant satisfies the COA standard "by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). Kingham has not met this standard.

Accordingly, in case number 17-20342, his motion for a COA is DENIED. All outstanding motions are DENIED.

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

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

"Appendix B"

20170406-69

Glen Lloyd Kingham
01995131 String Fellow Unit
1200 FM 655
Rosharon, TX US 77583

CLERK OF COURT
P.O. BOX 61010
HOUSTON, TEXAS 77208
http://www.txs.uscourts.gov

Decision of the United States District Court was sent the Fifth Circuit asking for permission to file "second or successive habeas" 28U.S.C.§2244

Date: Thursday, April 6, 2017
Case Number: 4:15-cv-02751
Document Number: 71 (1 page)
Notice Number: 20170406-69
Notice: The attached order has been entered.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

GLENN LLOYD KINGHAM, (TDCJ-CID #01995131)	§	
Petitioner,	§	
VS.	§	CIVIL ACTION NO. H-15-2751
LORIE DAVIS,	§	
Respondent.	§	

MEMORANDUM AND OPINION

Petitioner, Glenn Lloyd Kingham, seeks habeas corpus relief under 28 U.S.C. § 2254, challenging a conviction in the 230th Judicial District Court of Harris County, Texas. Respondent filed a motion for summary judgment, (Docket Entry No. 55), and copies of the state court record. Kingham has filed his response. (Docket Entry No. 57). After consideration of the motion and response, the record, and applicable authorities, the court grants respondent's motion. The reasons for this ruling are stated below.

I. Background

A jury found Kingham guilty of the felony offense of evading arrest or detention with a motor vehicle. (Cause Number 137157601010). On November 6, 2013, the jury sentenced Kingham to eight years imprisonment. The Fourteenth Court of Appeals of Texas affirmed Kingham's conviction on December 23, 2014. *Kingham v. State,* No. 14–13–01035–CR, 2014 WL 7345942 (Tex. App. -- Houston [14th Dist.] 2014, no pet.)(not designated for publication).

Kingham did not file a petition for discretionary review in the Texas Court of Criminal Appeals. Kingham filed an application for state habeas corpus relief on May 14, 2015, which the Texas Court of Criminal Appeals denied without written order on August 26, 2015. *Ex parte Kingham,* Application No. 83,675-01 at cover. On September 21, 2015, this court received Kingham's federal petition. Kingham contends that his conviction is void for the following reasons:

(1) He was deprived of his First Amendment right to liberty without facts, in violation of his Due Process rights.

(2) There is no standing in law because the court lacked personal jurisdiction over him.

(3) The prosecution committed misconduct by:

a. allowing witness T. Phan to commit perjury;

b. failing to provide the dash cam video during discovery, in violation of *Brady v. Maryland*; and

c. conducting voir dire improperly.

(4) He was denied an opportunity to file pre-trial motions.

(5) He did not waive his right to counsel at the *Faretta* hearing.

(6) He was denied his right against self-incrimination.

(7) The court lacked subject matter jurisdiction because the State failed to prove its case.

(8) The punishment was excessive.

(9) His arrest was illegal.

(10) His appellate counsel was ineffective for failing to raise issues.

(11) The state appellate court denied him his right to be heard.

(12) He was denied the right to recall T. Phan after he was dismissed.

(13) The trial judge was biased.

(14) He was denied the opportunity to clarify a term using Black's Law Dictionary.

(Docket Entry No. 1, Petition for Writ of Habeas Corpus, pp. 6-7, 11-18).

II. Factual Background

The state appellate court summarized the evidence at trial, as follows:

> Officer T. Phan of the City of Webster Police Department noticed a blue Ford Taurus "traveling at a high rate of speed" on I–45 south in Harris County while Phan was patrolling in his marked patrol vehicle on the night of December 18, 2012. Phan followed the vehicle to "pace" its speed and discovered the car was traveling at around 80 miles per hour; the posted speed limit was 65 miles per hour. Phan activated his lights and siren to stop the vehicle, and the driver of the vehicle pulled over to the side of the road.
>
> Phan approached the vehicle and asked the driver, later identified as appellant, if he had a valid driver's license and to identify himself. Appellant refused and was uncooperative, repeatedly asserting that Phan was "unlawfully detaining" him and that he "had the right to remain silent." Phan informed appellant that Phan had stopped appellant for speeding. Phan requested backup because of appellant's uncooperative behavior. Two additional officers—Officer Basset and Officer S. Sosa from the Webster Police Department—arrived shortly at the roadside scene, both in marked patrol vehicles. Basset was able to get the passenger to exit appellant's car. Phan requested that Sosa move her marked patrol vehicle in front of the stopped car. For over ten minutes (both before and after back-up arrived), Phan stood at the driver's side window repeatedly telling appellant that he had been stopped for speeding, requesting his identification, and instructing him to exit his vehicle.
>
> Phan informed appellant that they were going to have to remove him from the vehicle "either peacefully or by force." Nearly fifteen minutes into the traffic stop, after appellant was repeatedly warned that if he did not exit his car he would be removed by force, Basset broke the passenger side window to attempt to unlock the door. Sosa began attempting to break the driver's side window. None of the officers had their weapons drawn during any portion of the roadside interaction.

> Appellant immediately put his car in reverse, pulled away from the nearby officers, put his car in drive, and fled the scene. Officers Phan and Sosa got back into their patrol vehicles and began pursuing appellant. For over ten minutes, appellant evaded the pursuing officers, driving at a high rate of speed on four-lane roads, then through streets and residential neighborhoods. Appellant ran red lights and did not stop at stop signs. At the conclusion of the high-speed chase, appellant ran from his car, evaded on foot, and was not arrested that evening. A warrant was issued for his arrest, and appellant was subsequently arrested.
>
> At his trial, Phan and Sosa testified to the above facts. They both identified appellant as the driver of the vehicle. Phan testified that the Ford Taurus was registered to appellant and that Phan had identified appellant from his driver's license photograph on the evening of the incident. Sosa stated she had also made contact with appellant and described him as "argumentative." Phan testified that he intended to remove appellant from his vehicle for "public safety" because "he might be intoxicated." Phan explained that he observed that appellant had "slurred speech" and a "dried mouth, which are indicators of possible intoxication." Phan anticipated performing standard field sobriety testing on appellant to "continue further with the investigation." Phan and Sosa testified that appellant was being detained before he fled in his vehicle. The dash-cam videos from both Phan's and Sosa's patrol units were played for the jury. Phan's dash-cam video recorded the entire incident, from the time that Phan pulled appellant over to the end of the high-speed chase.
>
> Both sides rested and closed, and the trial court charged the jury. The jury found appellant guilty as charged, and after a punishment hearing, sentenced him to eight years' confinement in the Institutional Division of the Texas Department of Criminal Justice.[1] This appeal timely followed.
>
> FN1 Appellant had a background of evading, failure to identify, and several other nonviolent misdemeanor offenses.

Kingham v. State, No. 14–13–01035–CR, 2014 WL 7345942 (Tex. App. -- Houston [14th Dist.] 2014, no pet.)(not designated for publication).

III. The AEDPA Standard of Review

Under 28 U.S.C. § 2254(d), a federal court may grant a habeas writ for a defendant convicted under a state judgment only if the state-court's adjudication of the defendant's constitutional claim (1) "'was contrary to' federal law then clearly established in the holdings of" the Supreme Court, (2) "'involved an unreasonable application of'" clearly established Supreme Court precedent, or (3) "'was based on an unreasonable determination of the facts' in light of the record before the state court." *Harrington v. Richter*, 562 U.S. 86, 100–101 (2011) (quoting *Williams v. Taylor*, 529 U.S. 362, 412 (2000)); 28 U.S.C. § 2254(d). The AEDPA "bars relitigation of any claim 'adjudicated on the merits' in state court, subject only to the exceptions in [28 U.S.C.] §§ 2254(d)(1) and (d)(2)." *Id.* at 98. Under those provisions, "a federal court cannot grant a petition for a writ of habeas corpus unless the state court's adjudication of the merits was 'contrary to, or involved an unreasonable application of, clearly established Federal law.'" *Berghuis v. Thompkins*, 560 U.S. 370, 390 (2010) (quoting 28 U.S.C. § 2254(d)(1)); *see also Thaler v. Haynes*, 559 U.S. 43, 47 (2010); *Bell v. Cone*, 535 U.S. 685, 698 (2002); *Early v. Packer*, 537 U.S. 3, 7-8 (2002); *Williams v. Taylor*, 529 U.S. 362, 413 (2000).

"The question under AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable—a substantially higher threshold." *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007); *see also Morrow v. Dretke*, 367 F.3d 309, 313 (5th Cir. 2004); *Foster v. Johnson*, 293 F.3d 766, 776 (5th Cir. 2002). Similarly, federal courts defer to a state court's factual determinations, presuming all factual findings to be correct. *See* 28 U.S.C. § 2254(e)(1),(2). "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." *Valdez v. Cockrell*, 274 F.3d 941, 948 n.11 (5th Cir. 2001).

Kingham is proceeding *pro se*. A *pro se* habeas petition is construed liberally and not held to the same stringent and rigorous standards as pleadings filed by lawyers. *See Martin v. Maxey*, 98 F.3d 844, 847 n.4 (5th Cir. 1996); *Guidroz v. Lynaugh*, 852 F.2d 832, 834 (5th Cir. 1988); *Woodall v. Foti*, 648 F.2d 268, 271 (5th Cir. Unit A June 1981). This court broadly interprets Kingham's state and federal habeas petitions. *Bledsue v. Johnson*, 188 F.3d 250, 255 (5th Cir. 1999).

IV. The Issues of Exhaustion and Procedural Default

(Grounds 1, 4, 6, 8, & 9)

The scope of federal habeas review is limited by the intertwined doctrines of procedural default and exhaustion. *Bledsue v. Johnson*, 188 F.3d 250, 254 (5th Cir. 1999). Ordinarily, a state prisoner seeking federal habeas relief must first "exhaus[t] the remedies available in the courts of the State," 28 U.S.C. § 2254(b)(1)(A), thereby affording those courts "the first opportunity to address and correct alleged violations of [the] prisoner's federal rights." *Coleman v. Thompson*, 501 U.S. 722, 731 (1991). The adequate and independent state ground doctrine furthers that objective, for without it, "habeas petitioners would be able to avoid the exhaustion requirement by defaulting their federal claims in state court." *Walker v. Martin*, 131 S. Ct. 1120 (2011) (quoting *Coleman*, 501 U.S. at 732). Exhaustion requires that the prisoner "have fairly presented the substance of his claim to the state courts." *Nobles v. Johnson*, 127 F.3d 409, 420 (5th Cir. 1997). Because the exhaustion doctrine is designed to give the state courts a full and fair opportunity to resolve federal constitutional claims before those claims are presented to the federal courts, state prisoners must give

the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process. *O'Sullivan v. Boerckel*, 526 U.S. 838, 846 (1999). "Determining whether a petitioner exhausted his claim in state court is a case- and fact-specific inquiry." *Moore v. Quarterman*, 533 F.3d 338, 341 (5th Cir. 2008) (en banc).

In Texas, a criminal defendant may challenge a conviction by taking the following paths: (1) the petitioner may file a direct appeal followed, if necessary, by a petition for discretionary review in the Texas Court of Criminal Appeals; and/or (2) he may file a petition for writ of habeas corpus under Article 11.07 of the Texas Code of Criminal Procedure in the convicting court, which is transmitted to the Texas Court of Criminal Appeals once the trial court determines whether findings are necessary. *See* TEX. CODE CRIM. PROC. art. 11.07, § 3(c); *see also Busby v. Dretke*, 359 F.3d 708, 723 (5th Cir. 2004) ("Habeas petitioners must exhaust state remedies by pursuing their claims through one complete cycle of either state direct appeal or post-conviction collateral proceedings.").

A federal court generally cannot review the merits of a state prisoner's habeas petition if the claims in the petition are procedurally defaulted. *See, e.g., Magwood v. Patterson*, 561 U.S. 320, 340 (2010) ("If a petitioner does not satisfy the procedural requirements for bringing an error to the state court's attention - whether in trial, appellate, or habeas proceedings, as state law may require - procedural default will bar federal review."). A habeas claim can be procedurally defaulted in either of two ways. *Coleman v. Dretke*, 395 F.3d 216, 220 (5th Cir. 2004), *cert. denied*, 546 U.S. 938 (2005). *See generally O'Sullivan v. Boerckel*, 526 U.S. 838, 850–56 (1999) (Stevens, J., dissenting) (explaining the differences between the two varieties of procedural default); *Bledsue v. Johnson*, 188 F.3d 250, 254 (5th Cir. 1999).

First, "[p]rocedural default . . . occurs when a prisoner fails to exhaust available state remedies and the court to which petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred." *Williams v. Thaler,* 602 F.3d 291, 305 (5th Cir. 2010). When state remedies are rendered unavailable by petitioner's own procedural default, or when "it is obvious that the unexhausted claim would be procedurally barred in state court, we will forego the needless 'judicial ping-pong' and hold the claim procedurally barred from habeas review." *Sones v. Hargett,* 61 F.3d 410, 416 (5th Cir. 1995) (quoting *Steel v. Young,* 11 F.3d 1518, 1524 (10th Cir. 1993); *see also Coleman v. Thompson,* 501 U.S. 722, 736 n.1 (1991)) ("[I]f the petitioner failed to exhaust state remedies and the court to which petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred, . . . [then] there is a procedural default for purposes of federal habeas . . . .").

Second, if the prisoner has presented the claim to the highest available state court but that court has dismissed the claim on a state-law procedural ground instead of deciding it on the merits, the claim has been decided on an independent and adequate state-law ground. *See, e.g., Harris v. Reed,* 489 U.S. 255, 262 (1989). "If a state court clearly and expressly bases its dismissal of a prisoner's claim on a state procedural rule, and that procedural rule provides an independent and adequate ground for dismissal, the prisoner has procedurally defaulted his federal habeas claim." *Nobles v. Johnson,* 127 F.3d 409, 420 (5th Cir. 1997), *cert. denied,* 523 U.S. 1139 (1998). The state procedural rule must be "both independent of the merits of the federal claim and an adequate basis for the court's decision." *Finley v. Johnson,* 243 F.3d 215, 218 (5th Cir. 2001). A state procedural rule is an adequate basis for the court's decision only if it is "strictly or regularly applied

evenhandedly to the vast majority of similar claims." *Amos v. Scott,* 61 F.3d 333, 339 (5th Cir.) (emphasis omitted), *cert. denied,* 516 U.S. 1005 (1995).

In Kingham's first ground for federal habeas relief, he alleges that he was deprived of his First Amendment right to liberty. (Docket Entry No. 1, p. 6). In Kingham's fourth and sixth grounds for relief, Kingham alleges that he was denied his right to file pre-trial motions and against self-incrimination. (*Id.* at 7). In his eighth and ninth grounds for relief, Kingham alleges that his punishment was excessive and that his arrest was illegal.

The respondent argues that Kingham did not present these claims on direct appeal or in a petition for writ of habeas corpus under Article 11.07 of the Texas Code of Criminal Procedure. The respondent argues that these claims are procedurally defaulted because Kingham failed to exhaust available state remedies, and the court to which Kingham would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred. The court agrees.

To overcome the procedural bar on nonexhaustion, Kingham must "demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman v. Thompson,* 501 U.S. 722, 750 (1991); *Wainwright v. Sykes,* 433 U.S. 72, 87-91 (1977); *Ries v. Quarterman,* 522 F.3d 517, 523-24 (5th Cir. 2008). Kingham offers no arguments that would excuse the procedural default. Kingham's first, fourth, sixth, eighth, and ninth grounds are dismissed because they are procedurally-barred.

V. The Claim of a Void Indictment

(Ground 2)

Kingham avers that his due process rights were violated because the complaint and indictment were insufficient to confer jurisdiction in the state court to convict him.

The sufficiency of a state indictment is not a basis for federal habeas relief unless the indictment is so defective that it deprives the state court of jurisdiction. *Yohey v. Collins,* 985 F.2d 222, 228 (5th Cir. 1993). A claim of insufficiency of the indictment provides a basis for federal habeas relief only when the indictment is so defective that under no circumstances could a valid state conviction result from proving the facts alleged. *Morlett v. Lynaugh*, 851 F.2d 1521, 1523 (5th Cir. 1988). Sufficiency is determined by looking to the law of the state that issued the indictment. *Alexander v. McCotter*, 775 F.2d 595, 598 (5th Cir. 1985).

The question of whether a defective state indictment nonetheless confers jurisdiction on a state trial court is a matter of state law. *Lavernia v. Lynaugh,* 845 F.2d 493 (5th Cir. 1988); *Bueno v. Beto,* 458 F.2d 457 (5th Cir.), *cert. denied,* 409 U.S. 884 (1972). A 1985 amendment to the Texas Constitution provides that the "presentment of an indictment or information to a court invests the court with jurisdiction of the cause." TEX. CONST. art. V, § 12(b). This amendment applies to all indictments returned after September 1, 1985. *Id.* The Fifth Circuit has held that "due deference must be given to the state court's interpretation of the 1985 amendment, and that alleged defects in an indictment do not deprive the state trial courts of jurisdiction." *McKay v. Collins,* 12 F.3d 66, 68 (5th Cir.), *cert. denied,* 513 U.S. 854 (1994).

The grand jury for the 230th District Court of Harris County, Texas, returned the indictment against Kingham on February 4, 2013. (Docket Entry No. 37-1, Indictment, p. 9). The indictment provided as follows:

> The duly organized Grand Jury of Harris County, Texas, presents in the District Court of Harris County, Texas, that in Harris County, Texas, GLENN LLOYD KINGHAM, hereafter styled the Defendant, heretofore on or about DECEMBER 18, 2012, did then and there unlawfully, intentionally flee from T. PHAN , hereafter styled the Complainant, a PEACE OFFICER employed by WEBSTER POLICE DEPARTMENT, lawfully attempting to DETAIN the Defendant, and the Defendant knew that the Complainant was a PEACE OFFICER attempting to DETAIN the Defendant, and the Defendant used a MOTOR VEHICLE while he was in flight.
> AGAINST THE PEACE AND DIGNITY OF THE STATE.

(*Id.*).

The 1985 amendment applies, and this court accords due deference to the state court's interpretation of the 1985 amendment. This court concludes that the indictment did not deprive the state trial court of jurisdiction.

Kingham raised his void indictment issue in the state court. The state habeas court denied relief. The Fifth Circuit has noted that "the Texas Court of Criminal Appeals in declining to grant relief has necessarily, though not expressly, held that the Texas courts have jurisdiction and that the indictment is sufficient for that purpose." *McKay*, 12 F.3d at 68 (citing *Alexander v. McCotter*, 775 F.2d at 599). Kingham presented his defective indictment claim to the highest state court. That court necessarily found that the trial court had jurisdiction over the case. *McKay,* 12 F.3d at 68. This federal court finds no basis for granting habeas relief on the basis that the indictment was insufficient under Texas law. *Millard v. Lynaugh*, 810 F.2d 1403 (5th Cir.), *cert. denied,* 484 U.S. 838 (1987); *McKay v. Collins*, 12 F.3d at 69.

Kingham is not entitled to habeas relief on this claim.

VI. The Prosecutorial Misconduct Claims

(Ground 3)

A. Perjured Testimony and Fabricated Evidence

Kingham asserts that the prosecutor knowingly allowed Officer T. Phan to commit perjury and make false statements. Kingham alleges that Phan "filed a false police report" because he "conjured situational events once [petitioner was] stopped and being interviewed" and petitioner's "car could not do even the 65 mph testified to as the speed limit." (Docket Entry No. 1, pp. 17–18).

Kingham's assertions regarding the perjured testimony are based solely on allegedly contradictory testimony or prior inconsistent statements, which are insufficient to prove perjury. *United States v. Neal,* 245 F.3d 790, 790 (5th Cir. 2000) (citing *Koch v. Puckett,* 907 F.2d 524, 531 (5th Cir. 1990)) ("Contradictory testimony does not prove perjury."). Moreover, Kingham's allegations do not establish a violation of his right to due process. *See Knox v. Johnson,* 224 F.3d 470, 477 (5th Cir. 2000) (quoting *Giglio v. United States,* 405 U.S. 150, 153 (1972)) (to prove a Due Process violation based on the prosecution's reliance on false testimony, the defendant must establish: "(1) that a witness for the State testified falsely; (2) that such testimony was material; and (3) that the prosecution knew that the testimony was false."); *see also Napue v. Illinois,* 360 U.S. 264 (1959); *United States v. Davis,* 609 F.3d 663, 696 (5th Cir. 2010). Kingham does not prove that Officer Phan's testimony was actually false, that the prosecutor was actually aware of the alleged perjury, or that the testimony was material.

B. The Suppression of Favorable Evidence

Kingham alleges that the prosecutor failed to provide the dash cam video during discovery. "'[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.'" *Banks v. Dretke*, 540 U.S. 668, 691 (2004) (quoting *Brady v. Maryland*, 373 U.S. 83, 87 (1963)). The Supreme Court has consistently held the prosecution's duty to disclose evidence material to either guilt or punishment applies even when there has been no request by the accused. *Banks v. Dretke*, 540 U.S. at 690 (quoting *Strickler v. Greene*, 527 U.S. 263, 280 (1999)); *United States v. Agurs*, 427 U.S. 97 (1976). This duty applies to exculpatory and impeachment evidence. *Strickler v. Greene*, 527 U.S. at 280; *United States v. Bagley*, 473 U.S. 667, 676 (1985).

Undisclosed evidence is material if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Wood v. Bartholomew*, 516 U.S. 1, 5 (1995). A reasonable probability of a different result is shown when nondisclosure puts the case in a different light so as to undermine confidence in the jury verdict. *Kyles v. Whitley*, 514 U.S. 419, 434-35 (1995). "[I]nadmissible evidence may be material under *Brady*." *Spence v. Johnson*, 80 F.3d 989, 1005 n.14 (5th Cir. 1996). The key is "whether the disclosure of the evidence would have created a reasonable probability that the result of the proceeding would have been different." *Felder v. Johnson*, 180 F.3d 206, 212 (5th Cir. 1999).

To establish a violation under *Brady v. Maryland*, 373 U.S. 83 (1963), "a defendant must show that (1) evidence was suppressed; (2) the suppressed evidence was favorable to the defense;

and (3) the suppressed evidence was material to either guilt or punishment." *United States v. Garcia,* 567 F.3d 721, 735 (5th Cir.) (quoted cases omitted), *cert. denied,* 558 U.S. 915 (2009).

Kingham has not shown that the prosecution withheld or suppressed evidence during discovery. The record shows that Kingham had access to and knowledge of the dash cam videos found in State's Exhibits 5 and 6. (*See* Docket Entry No. 37-9, Reporter's Record, Vol. VII, pp. 47–49, 131-33). The record shows that State's Exhibit 5 and 6 were both offered at trial, and both videos were played to the jury. (*Id.*). While Kingham lodged several objections to the exhibits, he never indicated that the prosecution had withheld the evidence from him or that he had no knowledge of the exhibits. (*See* Docket Entry No. 37-9, Reporter's Record, Vol. VII, pp. 47–49) (objecting as to hearsay and chain of custody). Kingham was sufficiently familiar with the videos to also object on the basis that "the volume . . . [is] not allowed to be turned up in anyway, shape or form. It will mislead the jury." (Docket Entry No. 37-9, Reporter's Record, Vol. VII, p. 49). When the state had difficulties with the audio of State's Exhibit 5, Kingham showed no surprise.

"(Difficulties with the audio. Audio was fixed and played in front of the jury.)

MR. KINGHAM: See what I mean?"

(*Id.*).

Kingham offers nothing more than his own allegations that the dash cam videos were withheld during discovery, and such conclusory allegations do not warrant federal habeas relief. Assuming that the prosecutor suppressed the exculpatory evidence, the dash cam videos, Kingham has not shown that the suppressed evidence was material to either guilt or punishment. On December 18, 2012, Officer Phan of the City of Webster Police Department came in contact with a blue Ford Taurus, which he determined was traveling at approximately eighty miles per hour in a

sixty-five-mile-per-hour zone on the highway in Harris County, Texas. (Docket Entry No. 37-9, Reporter's Record, Vol. VII, pp. 21-26). Officer Phan activated his lights and conducted a traffic stop. (Docket Entry No. 37-9, Reporter's Record, Vol. VII, p. 30 (State's Exhibit 5)). Approximately thirteen minutes into the traffic stop, after Kingham was repeatedly warned that if he did not exit his vehicle he would be removed by force, Officer Basset broke the passenger side window to attempt to unlock the door. (Docket Entry No. 37-9, Reporter's Record, Vol. VII, pp. 35-36). Kingham then put his vehicle in reverse, drove away from the officers that were next to his vehicle, then put his car in drive and maneuvered through the officers and around Officer Sosa's patrol vehicle. (Docket Entry No. 37-9, Reporter's Record, Vol. VII, pp. 35, 125-26). Over the next twelve minutes, Kingham continually evaded from the pursuing vehicles of Officers Phan and Sosa, driving at a high rate of speed on the highway, streets, and through residential neighborhoods, while running red lights and failing to obey stop signs. (Docket Entry No. 37-9, Reporter's Record, Vol. VII, pp. 54, 127-128).

The dash cam videos were duplicative of testimony by Officers Phan and Sosa concerning the attempt to arrest Kingham on December 18, 2012. Kingham has not shown that there is a reasonable probability that, had the dash cam videos been disclosed to the defense sooner, the result of the proceeding would have been different. Kingham's prosecutorial misconduct claim lacks merit. Kingham is not entitled to habeas relief on this claim.

C. Improper Voir Dire

Kingham alleges that there were "voir dire irregularities." (Docket Entry No. 1, p. 17). For purposes of determining whether there has been prosecutorial misconduct, the Supreme Court has stated that "[t]he relevant question is whether the prosecutors' comments 'so infected the trial with

unfairness as to make the resulting conviction a denial of due process.'" *Darden v. Wainwright,* 477 U.S. 168, 181 (1986) (quoting *Donnelly v. DeChristoforo,* 416 U.S. 637, 643 (1974)). A trial is fundamentally unfair "if there is a reasonable probability that the verdict might have been different had the trial been properly conducted." *Riddle v. Cockrell,* 288 F.3d 713, 720 (5th Cir. 2002) (internal quotation marks omitted).

Whatever error that existed here was harmless. The magnitude of any prejudice from the improper comment when viewed in the context of the entire trial is outweighed by other factors. These counterweights include the effect of cautionary instructions given to the jury. The judge instructed the jury that the arguments of the prosecutor and defense counsel did not constitute evidence. There exists a well-established presumption that jurors understand and follow the court's instructions. *See United States v. Patino-Prado,* 533 F.3d 304, 313 (5th Cir. 2008). This presumption can be overcome only when there "is an overwhelming probability that the jury will be unable to follow the instruction and there is a strong probability that the effect is devastating." *Id.* (quoting *United States v. Barksdale-Contreras,* 972 F.2d 111, 116 (5th Cir. 1992)). Kingham has offered no basis for rejecting the presumption that the jury understood and followed the court's instructions in this case.

Prosecutorial misconduct is analyzed in two steps: (1) whether the prosecutor made an improper remark; and (2) whether the prosecutor's remarks prejudiced the defendant's substantive rights by casting serious doubt on the correctness of the jury verdict. *United States v. Valencia,* 600 F.3d 389, 409 (5th Cir. 2010). Kingham does not identify any improper remarks by the prosecutor during voir dire. Nor does Kingham explain how any remarks by the prosecutor prejudiced the defendant's substantive rights by casting serious doubt on the correctness of the jury verdict. In *Ross*

v. Estelle, 694 F.2d 1008, 1011 (5th Cir. 1983), the Fifth Circuit held that conclusory allegations are an inadequate basis for federal habeas relief, stating that "[a]bsent 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."

The state court's decision as to prosecutorial misconduct reasonably applied the law to the facts, consistent with clearly established federal law. Kingham has not shown a basis for the relief he seeks. 28 U.S.C. § 2254(d)(1).

VII. The Claim Based on a Waiver of the Right to Counsel (Ground 5)

Kingham argues that his waiver of assistance of counsel was not knowingly or intelligently given; therefore, his self-representation violated the Sixth Amendment. The Sixth Amendment grants defendants the constitutional right to represent themselves in federal court. *Faretta v. California*, 422 U.S. 806, 812-21 (1975). For a defendant to exercise his right to self-representation, he must "'knowingly and intelligently' forego counsel, and the request to proceed *pro se* must be 'clear and unequivocal.'" *United States v. Martin*, 790 F.2d 1215, 1218 (5th Cir.), *cert. denied*, 479 U.S. 868 (1968) (citations omitted). The assertion of this right proceeds in two steps: first, the defendant must unequivocally inform the court of his desire to represent himself; and, second, "the court must conduct a *Faretta* hearing to determine whether the defendant is 'knowingly and intelligently' forgoing his right to appointed counsel and whether, by post-invocation action, he has waived the request [to proceed *pro se*]." *United States v. Cano*, 519 F.3d 512, 516 (5th Cir. 2008). "Where a fundamental constitutional right, such as the right to counsel, is concerned, courts indulge

every reasonable presumption against waiver." *Burton v. Collins*, 937 F.2d 131, 133 (5th Cir. 1991), *cert. denied*, 502 U.S. 1006 (1991). When a defendant, unskilled in the law, does not make a clear election to forego counsel, a court should not infer that the defendant has opted to take his own defense. *Id.*

The record shows that Kingham explicitly and unequivocally invoked his right to self-representation. At the start of the first pre-trial *Faretta* hearing, the trial judge confirmed that Kingham sought to represent himself in this case.

"THE COURT: . . . It is my understanding that you wish to represent yourself in your case; is that correct, sir?

THE DEFENDANT: Yes, sir."

(Docket Entry No. 37-4, Reporter's Record, Vol. 2, p. 3).

The trial judge then explained to Kingham that he needed to engage in an inquiry to determine whether Kingham was competent to represent himself and whether Kingham was invoking his right knowingly, intelligently, and voluntarily.

"THE COURT: . . . But my review of the law and my understanding of the law is that in order for you to represent yourself, we have to do this hearing in which I have to ask you questions, in which I need to determine based upon your answers to those questions whether you are competent to represent yourself, whether you are knowingly, intelligently and voluntarily waiving the right to have a lawyer."

(Docket Entry No. 37-4, Reporter's Record, Vol. 2, p. 5).

Although Kingham apparently believed that the judge was conducting a hearing on his writ of habeas corpus, Kingham clearly stated that he wished to speak on his own behalf and had been seeking that right for some time.

"THE DEFENDANT: . . . Under Provision 11.49, I have the right to speak for myself. . . . And I had several motions before you that you never ruled on on the 24th, also waiving that right and stating for the record that I would be representing myself."

(Docket Entry No. 37-4, Reporter's Record, Vol. 2, pp. 6-7).

Kingham also unequivocally stated that he did not wish to be represented by his appointed attorney.

"THE COURT: . . . You do not want to be represented by Mr. Donnelly; is that correct?

THE DEFENDANT: No, sir."

(Docket Entry No. 37-4, Reporter's Record, Vol. 2, p. 24).

The record also shows that Kingham requested that his bond be reinstated so that he could have the option to hire his own attorney.

"Your Honor, if you would, let me just beg for mercy then and reinstate my bond. . . . and be afforded the right to hire my own attorney and my own assistant attorney so that I can properly defend myself."

(Docket Entry No. 37-4, Reporter's Record, Vol. 2, p. 15).

The record shows that the trial judge did in fact reinstate Kingham's bond and carefully cautioned Kingham that it would be in his best interest to be represented by an attorney.

"THE COURT: I'm just expressing to you before we leave here today that— that for your sake and for your best interest, find an attorney that you're comfortable with, that can represent you and make sure that your rights are being taken care of."

(Docket Entry No. 37-4, Reporter's Record, Vol. 2, pp. 27-28).

Despite this caution, Kingham reiterated his wish to represent himself at his second *Faretta* hearing four months later and at his third *Faretta* hearing in November before a different judge.

"THE WITNESS: . . . We are here today because Mr. Kingham has expressed a desire to speak on his own behalf in representing himself so we can get moving forward with this case. . . . Is that right, sir? Is that your desire at this point?

THE DEFENDANT: At this point, Your Honor."

(Docket Entry No. 37-5, Reporter's Record, Vol. 3, p. 3).

"MR. KINGHAM: To move forward, yes, sir, I would like to represent myself in terms—

THE COURT: That's not a problem. That's your absolute right. Okay."

(Docket Entry No. 37-6, Reporter's Record, Vol. 4, p. 5).

Both trial judges inquired as to Kingham's age, literacy ability, and educational background.

"THE COURT: And how old are you, sir?

THE DEFENDANT: I'm 42. . . .

THE COURT: Do you read and write the English language?

THE DEFENDANT: I do. . . .

THE COURT: What is your educational background and, specifically, what was the last grade you successfully completed?

THE DEFENDANT: I have some college, high school. High school diploma."

(Docket Entry No. 37-5, Reporter's Record, Vol. 3, pp. 4-5); (Docket Entry No. 37-6, Reporter's Record, Vol. 4, pp. 5-6 (same)).

Both judges also inquired as to any learning disabilities or mental health issues, which Kingham denied having.

"THE COURT: Do you have any learning disabilities or communication handicaps? And if you do, please describe them.

THE DEFENDANT: No, I do not.

THE COURT: Have you ever been declared mentally incompetent or treated for any mental health disorder? . . .

THE DEFENDANT: No, I have not."

(Docket Entry No. 37-5, Reporter's Record, Vol. 3, pp. 4-5); (Docket Entry No. 37-6, Reporter's Record, Vol. 4, p. 6 (same)).

Further, in response to the trial judge's inquiries about Kingham's legal experience, Kingham explained that he had previously represented himself in misdemeanor cases in Galveston County.

"THE COURT: All right. Do you— have you ever been— have you ever represented yourself in any other legal proceedings?

THE DEFENDANT: Yes, I have. . . . Mostly Galveston County, victimless allegations that they prosecute like a crime."

(Docket Entry No. 37-5, Reporter's Record, Vol. 3, pp. 5-6);

"MR. KINGHAM: I've represented myself in lower courts in Galveston County."

(Docket Entry No. 37-6, Reporter's Record, Vol. 4, p. 7).

Kingham was also asked about his work experience, and he explained that he runs his own business as a repairman.

"MR. KINGHAM: I'm a self-employed repair man for the last 24 years.

THE COURT: Right. That helps me out a lot. You ran your own business; is that what you're saying?

MR. KINGHAM: Yes, sir."

(Docket Entry No. 37-6, Reporter's Record, Vol. 4, pp. 6-7).

In response to further inquiries, Kingham acknowledged that he had the right to court-appointed counsel and that he was aware that his current court-appointed lawyer could continue to represent him but that he objected to such representation.

"THE COURT: Do you understand that you have the right to court-appointed counsel?

THE DEFENDANT: I understand under the constitution I have the right to a court of record under common law jurisdiction with assistance of counsel. I do know that is a constitutional protection."

(Docket Entry No. 37-5, Reporter's Record, Vol. 3, p. 9);

"THE COURT: Okay. Now, also let me get to this. It's my understanding that you have a court appointed attorney that has represented to you— to represent you, and that— was that over your objection?

MR. KINGHAM: Yes, sir."

(Docket Entry No. 37-6, Reporter's Record, Vol. 4, p. 15).

Kingham also later stated that if he had to hire a lawyer, he had sufficient funds to do so.

"THE COURT: Listen to me carefully. If you had to hire a lawyer as you stand here today, do you have sufficient funds in which to hire a lawyer?

MR. KINGHAM: Yes, sir."

(*See* Docket Entry No. 37-6, Reporter's Record, Vol. 4, p. 11).

Kingham was read the probable cause that supported the charges against him and understood the range of punishment.

"THE DEFENDANT: You see, now I know what. Got it, two to 10 [years] for the alleged offense. Okay."

(Docket Entry No. 37-5, Reporter's Record, Vol. 3, p. 13); (Docket Entry No. 37-6, Reporter's Record, Vol. 4, p. 9).

Both trial judges also admonished Kingham as to the advantages and disadvantages of self-representation. (Docket Entry No. 37-5, Reporter's Record, Vol. 3, pp. 13–15; Docket Entry No. 37-6, Reporter's Record, Vol. 4, pp. 11–14). Specifically, both trial judges explained, and Kingham acknowledged, that he would not be able to allege ineffective assistance of counsel if he was found guilty.

"THE DEFENDANT: If I represent myself, I do know that I would not be able to claim ineffective assistance of counsel because I'm speaking on my own behalf."

(Docket Entry No. 37-5, Reporter's Record, Vol. 3, p. 13); (Docket Entry No. 37-6, Reporter's Record, Vol. 4, p. 11).

Kingham also acknowledged that he would be bound by the same rules of evidence and procedure as an attorney would, without any special treatment for his lack of legal training.

"THE DEFENDANT: I understand that the rules of Texas, Code of Criminal Procedure must also be applied by non-bar union members. . . . I believe I will not get any special treatment from this Court."

(Docket Entry No. 37-5, Reporter's Record, Vol. 3, p. 14); (Docket Entry No. 37-6, Reporter's Record, Vol. 4, p. 11).

Kingham was warned that, due to such lack of training, he may fail to properly preserve points of error which would affect his appellate claims.

"THE COURT: Do you understand that because of your lack of formal legal training, you may fail to properly raise points of error in the trial record and you may waive that error?"

(Docket Entry No. 37-5, Reporter's Record, Vol. 3, p. 14);

"THE COURT: . . . Is it a possibility if you represent yourself that you might miss some appellate law if you don't object properly. You understand that?

MR. KINGHAM: Yes, sir."

(Docket Entry No. 37-6, Reporter's Record, Vol. 4, p. 12).

At the end of these admonishments, the trial judge found Kingham competent to go to trial and found that Kingham had very "directly expressed his desire to represent himself." (Docket Entry No. 37-6, Reporter's Record, Vol. 4, p. 30). The trial judge allowed appointed counsel to withdraw and formally stated that Kingham was now representing himself. (*Id.*). Kingham does not show that the exercise of his right to self-representation was not knowingly, intelligently, and voluntarily invoked.

The record shows that in three *Faretta* hearings, Kingham informed the court of his desire to represent himself, (Docket Entry No. 37-4, Reporter's Record, Vol. 2, p. 6), thereby satisfying the first step of this process. Kingham expressed a clear desire to represent himself. The court explained the benefits of having appointed counsel and the pitfalls of proceeding without counsel, and Kingham requested to proceed *pro se*.

"In order to determine whether the right to counsel has been effectively waived, the proper inquiry is to evaluate the circumstances of each case as well as the background of the defendant." *Wiggins v. Procunier*, 753 F.2d 1318, 1320 (5th Cir. 1985). In *Martin*, the Fifth Circuit articulated a list of factors to be considered in determining whether a defendant's motion has been "knowingly and intelligently" made:

> The Court must consider the defendant's age and education, and other background, experience, and conduct. The Court must ensure that the waiver is not the result of coercion or mistreatment of the defendant, and must be satisfied that the accused understands the nature of the charges, the consequences of the proceedings, and the practical meaning of the right he is waiving.

Martin, 790 F.2d at 1218 (citations omitted). Applying these factors, no doubt exists as to whether Kingham's waiver was knowingly, voluntarily, and intelligently made.

In a collateral attack on a conviction defended *pro se*, the defendant has the burden to prove that he did not competently or intelligently waive his right to the assistance of counsel. *Iowa v. Tovar*, 541 U.S. 77, 92 (2004). The record establishes that Kingham was informed of his right to counsel and warned of the risks of representing himself. The court repeatedly expressed his confidence in court-appointed counsel's ability to represent Kingham effectively. The court questioned Kingham regarding his background, education, and experience. The court also had ample opportunity to observe Kingham. Based on the reasons stated above, the court is satisfied that Kingham understood his rights, and that the trial court committed no error by allowing him to proceed *pro se*.

The state court's decision was not contrary to clearly established federal law. Kingham is not entitled to habeas relief. 28 U.S.C. § 2254(d)(1).

VIII. The Ineffective Assistance of Appellate Counsel Claim

(Ground 10)

Kingham alleges that his appellate counsel was ineffective because she did not consult with him, and as a result, failed to raise the prosecution's misconduct with regard to T. Phan as an issue on appeal. (Docket Entry No. 1, p. 11).

Persons convicted of a crime are entitled to effective assistance of counsel on direct appeal. *See Evitts v. Lucey,* 469 U.S. 387 (1985). The Supreme Court has articulated a now-familiar test for claims of ineffective assistance of counsel:

> First, the defendant must show 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 from a breakdown in the adversary process that renders the result unreliable.

Strickland v. Washington, 466 U.S. 668, 687 (1984). The Sixth Amendment does not require appellate counsel to raise every non-frivolous claim available on appeal, since counsel's effort to serve his client to the best of his professional ability will often depend on strategic choices about which claims to pursue on appeal. *Jones v. Barnes,* 463 U.S. 745, 751-52 (1983). However, the Supreme Court has indicated that, while difficult, it is possible to make out a claim for ineffective assistance of counsel based on defense counsel's failure to raise certain issues on appeal. *Smith v. Robbins,* 528 U.S. 259, 288 (2000) ("Notwithstanding *Barnes,* it is still possible to bring a *Strickland* claim based on counsel's failure to raise a particular claim, but it is difficult to demonstrate that

counsel was incompetent."). In *Smith,* the Supreme Court identified, as an example supporting this statement, the Seventh Circuit case of *Gray v. Greer,* 800 F.2d 644 (7th Cir. 1986), in which that court stated that "[g]enerally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome." *Smith,* 528 U.S. at 288 (quoting *Gray,* 800 F.2d at 646). In *Gray,* the Seventh Circuit further held that if appellate counsel "failed to raise a significant and obvious issue, the failure could be viewed as deficient performance" and that if the issue that was not raised "may have resulted in a reversal of the conviction, or an order for a new trial, the failure was prejudicial." 800 F.2d at 646.

On appeal, Kingham raised two issues. In his first issue, Kingham asserted that there was insufficient evidence to support his conviction. In his second issue, Kingham asserted that he was egregiously harmed by the trial court's jury charge error.

This court cannot say that the claims regarding prosecutorial misconduct were clearly stronger than any of the claims raised by appellate counsel. In fact, this court finds that these claims were considerably weaker. This court has considered and rejected the prosecutorial misconduct claim on the merits. This court must indulge a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. Kingham has not overcome the presumption that, under the circumstances, the challenged action might be considered sound appellate strategy.

In addition to deficient performance, to prevail on his habeas claim, Kingham must also show prejudice, which the Supreme Court has defined as "a reasonable probability that, but for his counsel's unreasonable failure . . . he would have prevailed on his appeal." *Robbins,* 528 U.S. at 285; *see also Moreno v. Dretke,* 450 F.3d 158, 168 (5th Cir. 2006) ("When the petitioner challenges the performance of his appellate counsel, he must show that with effective counsel, there was a

reasonable probability that he would have won on appeal."). "A reasonable probability is a probability sufficient to undermine confidence in the outcome," *Strickland,* 466 U.S. at 694. This requires a "'substantial,' not just 'conceivable,' likelihood of a different result." *Cullen v. Pinholster,* 563 U.S. 170, 189 (2011) (quoting *Harrington v. Richter,* 562 U.S. 86, 112 (2011)).

The record as a whole does not indicate that the state habeas court acted unreasonably. *See Pinholster,* 563 U.S. at 187-190. Moreover, under AEDPA, a finding by this court that Kingham was prejudiced is not sufficient. Rather, to grant relief, this court must conclude that the state court's determination that Kingham was not prejudiced was objectively unreasonable. *See id.* at 202-203 (holding that "[e]ven if the Court of Appeals might have reached a different conclusion as an initial matter," the question under AEDPA review is whether the state court unreasonably applied Supreme Court precedent); *Harrington,* 562 U.S. at 101 ("[A]n *unreasonable* application of federal law is different from an *incorrect* application of federal law." (internal quotation marks omitted)); *see also Neal v. Puckett,* 286 F.3d 230, 246 (5th Cir. 2002)("The precise question . . . is whether the [state] court's ultimate conclusion . . . is objectively unreasonable.").

The state court's decision was not contrary to clearly established federal law. Kingham is not entitled to habeas relief. 28 U.S.C. § 2254(d)(1).

IX. The Claim Based on Sufficiency of the Evidence (Ground 7)

Kingham challenges the legal sufficiency of the evidence introduced at his trial. Respondent argues that this claim is procedurally defaulted because Kingham did not raise the claim in a petition for discretionary review. In the interest of judicial economy, the court addresses the merits of this claim without addressing the procedural default issue. The court finds that this claim lacks merit.

In reviewing legal sufficiency, Texas and federal courts view the evidence in the light most favorable to the verdict and ask whether a rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

A federal habeas corpus court reviewing a petition under 28 U.S.C. § 2254 asks only whether a constitutional violation infected the petitioner's state trial. *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991); *Pemberton v. Collins*, 991 F.2d 1218, 1223 (5th Cir. 1993).

Kingham's claim that the evidence was legally insufficient lacks merit. A federal habeas corpus court reviews the evidentiary sufficiency of a state court conviction under the legal standard found in *Jackson v. Virginia*, 443 U.S. 307 (1979). This standard requires only that a reviewing court determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 319. In conducting that review, a federal habeas corpus court may not substitute its view of the evidence for that of the fact finder, but must consider all of the evidence in the light most favorable to the verdict. *See Weeks v. Scott*, 55 F.3d 1059, 1061 (5th Cir. 1995). The evidence need not exclude every reasonable hypothesis of innocence or be completely inconsistent with every conclusion except guilt, as long as a reasonable trier of fact could find that the evidence established guilt beyond a reasonable doubt. *United States v. Stevenson,* 126 F.3d 662, 664 (5th Cir. 1997). To determine whether the evidence is sufficient to support a state criminal conviction, a federal habeas court looks to state law for the substantive elements of the relevant criminal offense. *Jackson,* 443 U.S. at 324 n.16; *Dupuy v. Cain*, 201 F.3d 582, 589 (5th Cir. 2000), *cert. denied,* 121 S. Ct. 885 (2001). Either direct or circumstantial evidence can contribute to the sufficiency of the evidence underlying the conviction. *Schrader v. Whitley,* 904 F.2d 282, 287 (5th Cir.), *cert. denied,* 498 U.S.

903 (1990). A federal court may not substitute its own judgment regarding the credibility of witnesses for that of the state courts. *Marler v. Blackburn,* 777 F.2d 1007, 1012 (5th Cir. 1985). All credibility choices must be resolved in favor of the jury's verdict. *United States v. Nguyen,* 28 F.3d 477, 480 (5th Cir. 1994). Credibility issues are for the finder of fact and do not undermine the sufficiency of the evidence. *United States v. Morgan,* 117 F.3d 849, 854 n.2 (5th Cir.), *cert. denied,* 118 S. Ct. 641 (1997). "Where a state appellate court has conducted a thoughtful review of the evidence, moreover, its determination is entitled to great deference." *Callins v. Collins*, 998 F.2d 269, 276 (5th Cir. 1993)(citation omitted).

Kingham raised this issue on appeal, and that court rejected this claim, stating:

> In his first issue, appellant asserts that there is insufficient evidence to support his conviction. A person commits an offense if he intentionally flees from a person he knows is a peace officer attempting lawfully to arrest or detain him. Tex. Penal Code § 38.04(a). When the actor uses a vehicle while in flight, this offense is a felony of the third degree. *See id.* § 38.04(b)(2).
>
> When determining whether evidence is legally sufficient to support the verdict, we view all of the evidence in the light most favorable to the verdict and determine, based on that evidence and any reasonable inferences therefrom, whether any rational fact finder could have found the elements of the offense beyond a reasonable doubt. *Gear v. State,* 340 S.W.3d 743, 746 (Tex. Crim. App. 2011) (citing *Jackson v. Virginia,* 443 U.S. 307, 318–19 (1979)). We do not sit as a thirteenth juror and may not substitute our judgment for that of the fact finder by re-evaluating weight and credibility of the evidence. *Isassi v. State,* 330 S.W.3d 633, 638 (Tex. Crim. App. 2010). Rather, we defer to the responsibility of the fact finder to fairly resolve conflicts in testimony, weigh the evidence, and draw reasonable inferences from basic facts to ultimate facts. *Id.* The verdict may not be overturned unless it is irrational or unsupported by proof beyond a reasonable doubt. *Matson v. State,* 819 S.W.2d 839, 846 (Tex. Crim. App. 1991). Therefore, if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt,

we must affirm. *McDuff v. State,* 939 S.W.2d 607, 614 (Tex. Crim. App. 1997).

Here, appellant asserts that there is a material variance between the indictment and the evidence. He urges that, although the State indicted him for evading *detention,* the evidence at trial proved that he was instead evading *arrest.* The indictment alleged that appellant

> did then and there unlawfully, intentionally flee from T. PHAN, hereafter styled the Complainant, a PEACE OFFICER employed by WEBSTER POLICE DEPARTMENT, lawfully attempting to DETAIN the defendant, and the Defendant knew the Complainant was a PEACE OFFICER attempting to DETAIN the Defendant, and the Defendant used a MOTOR VEHICLE while he was in flight.

When the state alleges a narrower manner and means by which an offense may be committed in the indictment, that definition is "the law as authorized by the indictment"; thus the narrower allegation must be proved beyond a reasonable doubt. *Geick v. State,* 349 S.W.3d 542, 548 (Tex. Crim. App. 2011). Based on this indictment, then, the State was required to prove beyond a reasonable doubt that appellant evaded detention. *See id.* As this is the only element of the offense for which appellant challenges the sufficiency of the evidence, we confine our review to whether there is legally sufficient evidence that appellant evaded detention.

On a routine traffic stop, police officers may request certain information from a driver, such as a driver's license and car registration, and may conduct a computer check on that information. *Kothe v. State,* 152 S.W.3d 54, 63 (Tex. Crim. App. 2004). After the computer check is completed and the officer knows that the driver has a currently valid license, no outstanding warrants, and the car is not stolen, the traffic-stop investigation is fully resolved. *Id.* at 63–64. At this point, the detention must end and the driver must be permitted to leave. *Id.* at 64. However, once an officer concludes the investigation of the conduct that initiated the traffic stop, continued detention is permitted if the officer has reasonable suspicion to believe another offense has been or is being committed. *Vasquez v. State,* 324 S.W.3d 912, 919 (Tex. App. – Houston [14th Dist.] 2010, pet. ref'd). An officer's reasonable suspicion must be supported by specific articulable facts that, taken together with rational inferences from those facts, would warrant a person of reasonable caution in the belief that a continued detention was justified. *Id.* at 920.

> As noted above, appellant was pulled over for speeding, which is a reasonable detention. *See id.* at 919 ("[A]n officer may initiate a traffic stop if he has a reasonable basis for suspecting that a person has committed a traffic violation."). Appellant was uncooperative during the traffic stop and refused to provide identification or exit the vehicle. There is no indication that any of the officers were able to complete the traffic stop so that appellant's detention should have ended and he should have been permitted to leave. *See Kothe,* 152 S.W.3d at 63–64. Further, Phan testified that appellant had slurred speech and a dry mouth, which Phan stated were both factors indicative of being under the influence of alcohol. Phan stated that he wanted appellant to exit the vehicle for "public safety" and so he could further investigate whether appellant was driving while intoxicated. Thus, Phan articulated specific facts that warranted his continued detention of appellant. *See Vasquez,* 324 S.W.3d at 920–21. And appellant fled before Phan was able to either complete the investigation of the traffic stop or further investigate whether appellant was driving while intoxicated.
>
> Viewing this evidence in the light most favorable to the verdict, there is more than sufficient evidence from which any rational juror could have found that appellant was evading detention as charged in the indictment. Accordingly, we overrule appellant's first issue.

Kingham v. State, No. 14–13–01035–CR, 2014 WL 7345942 (Tex. App. -- Houston [14th Dist.] 2014, no pet.)(not designated for publication).

The evidence was sufficient to support Kingham's conviction for evading arrest or detention with a motor vehicle. Kingham is not entitled to habeas relief on his sufficiency-of-the-evidence claim. *Callins v. Collins*, 998 F.2d 269, 276 (5th Cir. 1993), *cert. denied*, 510 U.S. 1141 (1994).

X. The Claim Based on a Denial of the Right to File a Brief

(Ground 11)

Kingham alleges that he was denied his right to be heard because the Texas Fourteenth Court of Appeals ignored his brief filed on January 26, 2015. Kingham's claim finds no support in the record. Kingham filed an appellate brief on January 26, 2015. The record shows that the appellate

court construed the January 26 brief as a motion for rehearing because it was submitted after Kingham's appeal had already been affirmed. *See Kingham*, 2014 WL 7345942 (affirmed December 23, 2014); (Docket Entry No. 55-1, p. 3). A motion for rehearing may be filed within 15 days after the court of appeals' judgment is issued. TEX. R. APP. PROC. 49.1. The appellate court denied Kingham's motion for rehearing on April 10, 2015. (Docket Entry No. 55-1, p. 3). To the extent Kingham merely disagrees with the outcome of the appellate court's decision, such a claim is purely a question of state law that is not cognizable on federal habeas review. *See Lewis v. Jeffers*, 497 U.S. 764, 780 (1990) (""[F]ederal habeas corpus relief does not lie for errors of state law."); *also Pulley v. Harris*, 465 U.S. 37, 41 (1984).

XI. The Claims Based on Trial Court Error

(Grounds 12 and 14)

In his twelfth ground for federal habeas relief, Kingham alleges that witness T. Phan was dismissed "without [his] permission and despite [his] objection." (Docket Entry No. 1, p. 17). Kingham alleges that he wished to recall Phan because Phan had "alleged [Kingham's] failure to I.D. gave him right to arrest [Kingham]." (*Id.* at 18). Kingham asserts that the trial court erred when it refused to allow Kingham to recall Phan. In his fourteenth ground for federal habeas relief, Kingham complains that the trial court erred when it denied him the opportunity to "clarify a term for all present by reading from Black's Law Dictionary."

Challenges to rulings based on state evidentiary rules or state law are not cognizable on federal habeas corpus review. *Wood v. Quarterman,* 503 F.3d 408, 414 (5th Cir. 2007); *Derden v. McNeel,* 978 F.2d 1453, 1458 (5th Cir. 1992). A state court's evidentiary rulings present cognizable habeas claims only if they violate a specific constitutional right or make the trial fundamentally

unfair. *Johnson v. Puckett,* 176 F.3d 809, 820 (5th Cir. 1999) (citing *Cupit v. Whitley,* 28 F.3d 532, 536 (5th Cir. 1994)). "The failure to admit evidence amounts to a due process violation only when the omitted evidence is a crucial, critical, highly significant factor in the context of the entire trial." *Johnson,* 176 F.3d at 821 (citing *Thomas v. Lynaugh,* 812 F.2d 225, 230 (5th Cir. 1987)). On federal habeas review of a state conviction, constitutional error is harmless unless it "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson,* 507 U.S. 619, 637 (1993) (internal citations and quotation marks omitted). A petitioner is not entitled to habeas relief based on trial court error unless the error resulted in actual prejudice. *Id.* at 637.

As noted, Kingham alleges that the trial court refused to recall Phan. The record shows that Kingham did in fact request to have Phan recalled after the state had rested its case.

"MR. KINGHAM: Your Honor, at this time I would like to recall Officer Phan just very briefly." (Docket Entry No. 37-10, Reporter's Record, Vol. VIII, p. 27).

However, the record shows that, when Phan was dismissed during the state's case-in-chief, he was dismissed without objection from Kingham, except to remind the court and the witness that Phan was subject to the witness exclusion rule.

"MR. KINGHAM: In the interest of the jury, I have no more questions for this witness. In the interest of the jury, I will not ask this man any more questions. . . .

THE COURT: You may step down, sir. Thank you for your time and testimony.

MR. KINGHAM: Your Honor, if we could remind the witness about the—

THE COURT: He knows. He's finished testifying. He will not be allowed to testify again."

(Docket Entry No. 37-9, Reporter's Record, Vol. VII, p. 117); *see also*:

"THE COURT: No. He was released. There was no objection. He's not here. Let's move on."

(Docket Entry No. 37-10, Reporter's Record, Vol. VIII, p. 28).

The record also shows that, when asked what he would like to question Phan about, Kingham admitted that he wanted to ask Phan about his testimony that failing to ID was an arrestable offense; however, the court pointed out, and the record supports, that Phan had already been extensively questioned on that issue during both cross and direct examination. *See*:

"MR. KINGHAM: Specifically, Your Honor, he testified that the initial alleged speeding was not a lawful arrestable offense. Then he goes on to testify that because the alleged driver, alleging me, failed to ID, that that made it a lawful arrest. . . .

THE COURT: All right. Here's the situation. That area was covered very well. Very well, over and over. So, unless you have something different, I need to know what that would be."

(Docket Entry No. 37-10, Reporter's Record, Vol. VIII, p. 29);

"Q: Is failing to identify yourself to a police officer an arrestable offense in the State of Texas?

A. Yes, ma'am."

(Docket Entry No. 37-9, Reporter's Record, Vol. VII, pp. 31-32, 61–64 (extensive questioning on cross examination regarding why, if speeding is not an arrestable offense, Phan had probable cause to arrest), 115 (testifying during direct examination that, after speaking to the defendant who had been stopped for speeding, "the defendant failed to identify himself to a police officer," which is an arrestable offense), 116–17 (cross examining Phan as to the legal basis for his statement that failure to ID is an arrestable offense)).

Thus, any further testimony on this matter during recall of this witness would have been cumulative, and Kingham cannot show that he was harmed by the trial court's refusal to allow the recall.

Kingham claims that the trial court denied him the opportunity to define a term according to Black's Law Dictionary. This claim is conclusory. Kingham is apparently referring to the exchange during voir dire where, in response to a potential juror's question, Kingham requested the opportunity to define "crime" according to Black's Law Dictionary. (Docket Entry No. 37-7, Reporter's Record, Vol. V, pp. 73-74). The trial judge denied Kingham's request to use Black's Law Dictionary but then provided the jurors with the definition of "probable cause" according to the Texas Penal Code.

"MR. KINGHAM: Sir, for the clarification of the jury, would you give what your definition of a crime according to Black's Law's Dictionary?

THE COURT: Not according to Black Law's Dictionary. I can tell you what probable cause under the Texas Penal Code is: Officers must have sufficient evidence that you have committed some offense, which is contained in the penal code."

(Docket Entry No. 37-7, Reporter's Record, Vol. V, p. 74).

Kingham has not shown that the trial judge committed any error in refusing to allow Kingham to define a term according to Black's Law Dictionary for the jury. Nor has Kingham shown that he was harmed by the trial judge's refusal.

Kingham has not shown that, even if the trial court erred, such errors "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 637.

XII. The Claim Based on Judicial Bias

(Claim 13)

In his thirteenth ground for federal habeas relief, Kingham alleges that the trial judge "was biased and prejudiced." Kingham fails to meet his burden under AEDPA and is not entitled to relief

on this ground. The Due Process Clause requires a "fair trial in a fair tribunal." *Bracy v. Gramley,* 520 U.S. 899, 904 (1997) (citing *Withrow v. Larkin,* 421 U.S. 35, 46 (1975)). Accordingly, to prove judicial bias in contravention of due process, Petitioner must demonstrate that the trial judge had an actual bias against him or an interest in the outcome of his particular case. *See id.* at 905 (citing *Aetna Life Ins. Co. v. Lavoie,* 475 U.S. 813, 821-822 (1986)). The judge's comments fall within "ordinary efforts at courtroom administration," which do not support a bias or partiality challenge. *Liteky v. United States,* 510 U.S. 540, 555–56 (1994). Judicial rulings alone almost never constitute a valid basis for a bias or partiality motion, and Petitioner does not otherwise demonstrate a basis for relief. *See Liteky,* 510 U.S. at 555; *United States v. Grinnell Corp.,* 384 U.S. 563, 583 (1966).

Here, Kingham wholly fails to make this showing. Indeed, the record shows that Kingham filed a motion to recuse Judge Burnett on November 5, 2013, in which he alleged that Judge Burnett was biased because he "intentionally denied any fairness including right to discovery and objections to alleged jurisdiction." (Docket Entry No. 37-2, Clerk's Record, pp. 26-28). A hearing was held that same day by Judge Rains to assess the merits of Kingham's motion. (Docket Entry No. 37-8, Reporter's Record, Vol. VI, pp. 9-14). Judge Rains denied Kingham's motion.

"THE COURT: Based on the facts presented to me, I've denied your motion."

(Docket Entry No. 37-8, Reporter's Record, Vol. VI, p. 13); (Docket Entry No. 37-2, Clerk's Record, p. 30).

Indeed, it is clear that Kingham alleged no more bias than adverse rulings made by Judge Burnett, and such adverse rulings alone cannot generally provide a basis for relief. Moreover, the state habeas court has already considered and rejected Kingham's instant allegation. (Docket Entry No. 37-27, State Application No. 83,675-01, Action Taken Sheet). The state court's decision was

not contrary to clearly established federal law. Kingham is not entitled to habeas relief. 28 U.S.C. § 2254(d)(1).

XIII. Conclusion

Respondent's Motion for Summary Judgment, (Docket Entry No. 55), is GRANTED. Kingham's petition for a writ of habeas corpus is DENIED. This case is DISMISSED. Kingham's motions for summary judgment, (Docket Entries Nos. 51 & 61), are DENIED. Kingham's motion demanding rule of law, (Docket Entry No. 59), is DENIED. Any remaining pending motions are DENIED as moot.

The Supreme Court has stated that the showing necessary for a Certificate of Appealability is a substantial showing of the denial of a constitutional right. *Hernandez v. Johnson,* 213 F.3d 243, 248 (5th Cir. 2000) (citing *Slack v. McDaniel,* 529 U.S. 473, 483-84 (2000)). Under that standard, an applicant makes a substantial showing when he demonstrates that his application involves issues that are debatable among jurists of reason, that another court could resolve the issues differently, or that the issues are suitable enough to deserve encouragement to proceed further. *See Clark v. Johnson,* 202 F.3d 760, 763 (5th Cir. 2000). Where a district court has rejected a prisoner's constitutional claims on the merits, the applicant must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. *Slack,* 529 U.S. 484.

This court denies Kingham's petition after careful consideration of the merits of his constitutional claims. This court denies a COA because Kingham has not made the necessary showing for issuance. Accordingly, a certificate of appealability is DENIED.

SIGNED at Houston, Texas, on March 15, 2017.

VANESSA D. GILMORE
UNITED STATES DISTRICT JUDGE

17-20095

"Appendix C"

Copy of Order denying rehearing

Applicant sent only copy to Fifth Circuit under 28 U.S.C §2244 asking for permission to file "second or successive habeas" per local rule.

Mr. Glenn Lloyd Kingham
#01995131, ref. 17-37
CID LeBlanc Pre Release Facility
3695 FM 3514
Beaumont, TX 77705-0000

Panel order No 17-20095 issued on April 18, 2018 had not ruled by findings of facts or conclusions in law. Order stated only that judge Jones who was the single judge that ruled on COA Feb. 05, 2018 had already denied COA, she also was paneled with Higginbotham and Costa on Motion for Rehearing denied April 18, 2018 which also simply stated denied. "Motion denied," a two sentence ruling with no substance.

I affirm under penalty of perjury this is true and correct 28 U.S.C §1746

Glenn Kingham

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-20095

Cons. w/17-20342

GLENN LLOYD KINGHAM,

Petitioner - Appellant

v.

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

Respondent - Appellee

Appeals from the United States District Court
for the Southern District of Texas

Before HIGGINBOTHAM, JONES, and COSTA Circuit Judges.

PER CURIAM:

A member of this panel previously denied appellant's motions for certificate of appealability filed separately as to each appeal, together with all outstanding motions filed. The panel has considered appellant's motion for reconsideration as to the denial of certificate of appealability in each appeal only. IT IS ORDERED that the motion is DENIED.

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