IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-40676

MUHAMET AJVAZI,

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 Eastern District of Texas

Before DAVIS, HIGGINSON, and ENGELHARDT, Circuit Judges.

PER CURIAM:

This court must examine the basis of its jurisdiction, on its own motion if necessary. *Hill v. City of Seven Points*, 230 F.3d 167, 169 (5th Cir. 2000). Pursuant to 28 U.S.C. § 2107(a) and Federal Rule of Appellate Procedure 4(a)(1)(A), the notice of appeal in a civil case must be filed within thirty days of entry of judgment.

In this habeas corpus case filed by a state prisoner, the final judgment was entered and certificate of appealability was denied on March 31, 2017. Therefore, the final day for filing a timely notice of appeal was Monday, May 1, 2017, because the thirtieth day was a Sunday. *See* Fed. R. App. P.

26(a)(1)(C). The petitioner pro se filed two notices of appeal. The first is dated July 16, 2018 and stamped as filed on July 23, 2018. The second is dated September 17, 2018 and stamped as filed on September 20, 2018. Because the notices of appeal are dated July 16, 2018 and September 17, 2018, they could not have been deposited in the prison's mail system within the prescribed time. *See* FED. R. APP. P. 4(c)(1) (prisoner's pro se notice of appeal is timely filed if deposited in the institution's internal mail system on or before the last day for filing). When set by statute, the time limitation for filing a notice of appeal in a civil case is jurisdictional. *Hamer v. Neighborhood Hous. Servs. of Chi.*,138 S. Ct. 13, 17 (2017); *Bowles v. Russell*, 551 U.S. 205, 214 (2007). The lack of a timely notice mandates dismissal of the appeals. *Robbins v. Maggio*, 750 F.2d 405, 408 (5th Cir. 1985).

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

MUHAMET AJVAZI	§	
	§	
v.	§	CIVIL ACTION NO. 4:14CV764
	§	
DIRECTOR, TDCJ-CID	§	

ORDER ADOPTING REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

The Report and Recommendation of the Magistrate Judge, which contains her findings, conclusions, and recommendation for the disposition of this action, has been presented for consideration. The Report recommends that Muhamet Ajvazi's Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 be denied and the case dismissed with prejudice. Ajvazi has filed no written objections.

Accordingly, it is **ORDERED** that Ajvazi's Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 is **DENIED** and the case is hereby **DISMISSED WITH PREJUDICE**.

Further, it is **ORDERED** that any motion not previously ruled on is **DENIED**.

SIGNED this the 31st day of March, 2017.

Richard A. Schell

RICHARD A. SCHELL
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

MUHAMET AJVAZI	§	
	§	
v.	§	CIVIL ACTION NO. 4:14CV764
	§	
DIRECTOR, TDCJ-CID	§	

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

Pro se Petitioner Muhamet Ajvazi filed a Petition for Writ of Habeas Relief pursuant to 28 U.S.C. § 2254. *See* Dkt. 1. The petition was referred to the undersigned United States Magistrate Judge for findings of fact, conclusions of law, and recommendations for the disposition of the case pursuant to 28 U.S.C. § 636 and the Amended Order for the Adoption of Local Rules for the Assignment of Duties to the United States Magistrate Judge.

BACKGROUND

Petitioner was convicted by a jury of unlawful possession of a firearm by a felon. *See* Dkt. 9-9 at 10, 60. His sentence was enhanced under the Texas habitual offender scheme, which allows enhancement of punishment when the defendant has been convicted of two (2) prior felony offenses, other than state jail felonies. *See* TEX. PENAL CODE ANN. § 12.42(d) (West 2009). The enhancement was based on two (2) Virginia felony convictions: a 2006 conviction for felony eluding police and a 2008 conviction for statutory burglary. *See* Dkt. 9-9 at 10. The jury recommended a sentence of forty (40) years' imprisonment. *See id.* at 60.

Petitioner appealed his sentence to the Sixth Court of Appeals of Texas. *See Ajvazi v. State*, No. 06-11-00160-CR, 2012 WL 5293346 at *1 (Tex. App.—Texarkana 2012, pet. ref'd untimely filed). The appellate court considered and rejected Petitioner's argument that the trial court abused

its discretion when it allowed testimony from Petitioner's sister regarding an uncharged offense at the punishment phase. *See id.* at *3. The appellate court also considered Petitioner's argument that the Virginia convictions were inadmissible for the purpose of enhancing punishment because the judgments of conviction were not properly authenticated. *See id.* at *1-2. The appellate court found Petitioner's authenticity challenge was meritless, but otherwise reserved judgment on the legal sufficiency of the evidence to support the prior conviction enhancement. *See id.* at *2 n. 3. The appellate court affirmed the judgment and sentence of the trial court. *See id.* at *3.

Petitioner filed a petition for discretionary review ("PDR") with the Texas Court of Criminal Appeals ("CCA"), which dismissed his petition as untimely filed. *See* Dkt. 10-1. Petitioner filed a motion for rehearing, which was also denied. *See id.*

Following the dismissal of his PDR, Petitioner filed a state application for writ of habeas corpus, pursuant to Texas Code of Criminal Procedure, Article 11.07. *See* Dkt. 9-9 at 114-27. In his state writ application, Petitioner abandoned the arguments raised on direct appeal. He argued, instead, that the Virginia convictions were legally insufficient to support the prior felony sentence enhancement because the 2006 felony eluding police conviction was analogous to a Texas state jail felony and the 2008 statutory burglary conviction resulted in a probated sentence, which was not a "final conviction" under Texas Penal Code § 12.42(d). *See id.* He further argued that appellate counsel was ineffective for failing to raise these issues on direct appeal. *See id.* The CCA twice remanded the case to the trial court for findings of fact. *See* Dkt. 9-9 at 2; *Ex parte Ajvazi*, No. WR-80158-01, 2014 WL 1328402 (Tex. Crim. App 2014) (unpublished). Thereafter, the CCA denied Petitioner's application without written order on the findings of the trial court. *See* Dkt. 8-14.

The instant petition was timely filed on November 24, 2014. *See* Dkt. 1.

LEGAL STANDARD

The petition before the Court is governed by the standard of review provided by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). *See* 28 U.S.C. § 2254; *Lindh v. Murphy*, 521 U.S. 320, 336 (1997) (holding AEDPA only applies to those noncapital habeas corpus cases filed after its effective date of April 24, 1996). The statute provides a federal court may issue a writ of habeas corpus for a defendant convicted under a state judgment only if the adjudication of the relevant constitutional claim by the state court: (1) was contrary to clearly established federal law as determined by the Supreme Court; (2) involved an unreasonable application of clearly established federal law as determined by the Supreme Court; or (3) 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. *See* 28 U.S.C. § 2254(d); *Harrington v. Richter*, 562 U.S. 86, 100 (2011).

Review of the state court's decision "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). The state court's factual findings "shall be presumed to be correct" unless the petitioner meets "the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1). "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). Except for the narrow exceptions contained in § 2254(e)(2), the evidence upon which a petitioner would challenge a state court fact-finding must have been presented to the state court. *Pinholster*, 563 U.S. at 181.

An evidentiary hearing is precluded unless: (1) the petitioner's claims rely on a new rule of constitutional law or a factual predicate previously undiscoverable through the exercise of due diligence; and (2) the petitioner establishes by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found him guilty. 28 U.S.C. § 2254(e)(2). A failure to meet this standard of diligence will bar a federal evidentiary hearing in the absence of a convincing claim of actual innocence that can only be established by newly discovered evidence. *See Williams v. Taylor*, 529 U.S. 420, 436 (2000).

ANALYSIS

Petitioner challenges his sentence on the same grounds asserted on direct appeal and in state habeas proceedings. He argues the 2006 and 2008 Virginia convictions were improperly admitted for the enhancement of punishment under Texas law. He further argues that appellate counsel's failure to challenge the legal sufficiency of the convictions used for enhancement constituted ineffective assistance of counsel.

I. Admissibility of Virginia Convictions

Petitioner challenges the trial court's admission of judgments of conviction from 2006 and 2008 Virginia felony convictions during the punishment phase, arguing the judgments of conviction were not properly authenticated because they lacked fingerprints and the last name on the orders was misspelled. He also argues the Virginia offenses where legally insufficient for punishment purposes under Texas Penal Code § 12.42(d) because the State failed to establish the finality of the convictions. Lastly, he argues the 2006 felony eluding police conviction is analogous to a Texas state jail felony, which is insufficient for enhancement purposes under § 12.42(d).

It is generally not the proper role of a federal habeas court to review the admissibility of evidence under state law. *See Estelle v. McGuire*, 502 U.S. 62, 67 (1991). "[T]he Due Process Clause does not permit the federal courts to engage in a finely tuned review of the wisdom of state evidentiary rules." *Marshall v. Lonberger,* 459 U.S. 422, 438, n. 6 (1983). However, a state court's evidentiary ruling presents a cognizable federal habeas claim if the ruling results in a "denial of fundamental fairness." *Neal v. Cain,* 141 F.3d 207, 214 (5th Cir. 1998); *see also Payne v. Tennessee*, 501 U.S. 808, 825 (1991). "An extraneous offense may be admitted into evidence without violating the due process clause if the government makes a 'strong showing that the defendant committed the offense' and if the extraneous offense is 'rationally connected with the offense charged.'" *Story v. Collins*, 920 F.2d 1247, 1254 (5th Cir. 1991) (quoting *Enriquez v. Procunier*, 752 F.2d 111, 115 (5th Cir. 1984)).

Although Petitioner does not expressly assert a due process claim in his petition, his challenge to the authenticity of the Virginia judgments of conviction implicates his rights under the Due Process Clause. However, analysis of the claim reveals no due process violation.

The Sixth Court of Appeals considered the admissibility of the Virginia judgments of conviction under Texas law, finding:

> While the two felony conviction orders lacked Ajvazi's fingerprints, each of the documents did contain both a United States Social Security number and a date of birth of Muhamet Ajvazi (not a common name in East Texas) as the person being convicted. These same identifiers were also present in misdemeanor conviction orders (also from Virginia) introduced by the State, which did contain fingerprints. A witness for the State identified the fingerprints on those misdemeanor conviction orders as matching fingerprints given by Ajvazi prior to trial in the instant case. In addition, the State introduced Ajvazi's resident alien identification card, which showed a date of birth consistent with the dates of birth shown on the other conviction evidence, together with Ajvazi's Social Security card (which bore the same Social Security number as reflected on all of the documents).

Ajvazi, 2012 WL 5293346, at *1. Petitioner has not argued these findings of fact are erroneous, much less rebutted the presumption of veracity by clear and convincing evidence. Accordingly, the state appellate court's findings of fact are presumed correct. *See* 28 U.S.C. § 2254(e)(1); *Valdez*, 274 F.39 at 948 n.11.

Based on these findings, the State made a strong showing that Petitioner committed the Virginia offenses. Given the State's need to prove Petitioner was a felon as an element of both the offense charged and the enhancement provision of the indictment, the extraneous offenses were rationally connected to the offense charged. Accordingly, admission of the extraneous offenses did not amount to a due process violation. *See Enriquez*, 752 F.2d at 115.

Petitioner's remaining challenges to the trial court's admission of the Virginia convictions involve purely evidentiary matters of state law. Accordingly, Petitioner raises no claim of constitutional deprivation subject to review in a federal habeas corpus proceeding. *See Gabel v. McCotter*, 803 F.2d 814, 816 (5th Cir. 1986) (dismissing a habeas petitioner's claim as purely evidentiary and not stating a constitutional claim, where petitioner argued trial court's admission of a prior federal conviction for enhancement purposes was error because the federal conviction would not amount to a felony under Texas law); *Rubio v. Estelle*, 689 F.2d 533, 536 (5th Cir. 1982) (dismissing a federal habeas petitioner's claim because it raised an issue of state criminal procedure not cognizable on federal habeas review, where petitioner challenged an alleged variance between the pleading and proof concerning the date of finality of a prior conviction used for sentence enhancement under a state statute); *Kemph v. Estelle*, 621 F.2d 162 (5th Cir. 1980) (holding a federal habeas petitioner's challenge to the legal sufficiency of a prior offense for enhancement purposes under § 12.42(d) involved a state's interpretation of its own statute and did not raise a constitutional claim cognizable in habeas corpus).

II. Ineffective Assistance of Counsel

Petitioner also asserts that appellate counsel rendered ineffective assistance when he failed to advance certain claims on appeal. A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction requires the defendant to show the performance was deficient and the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). A failure to establish either the deficient performance or prejudice prong of the *Strickland* standard makes it unnecessary to examine the other prong. *See id.* at 697.

The *Strickland* standard applies to claims of appellate counsel error. *See Smith v. Robbins*, 528 U.S. 259, 285 (2000). In considering the deficient performance prong, an attorney's decision not to pursue a certain claim on appeal after considering the claim and believing it to be without merit falls within the "wide range of professionally competent assistance" demanded by Strickland. *Smith v. Murray*, 477 U.S. 527, 536 (1986). Indeed, the process of "'winnowing out weaker arguments on appeal and focusing on' those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy." *Id.* (quoting *Jones v. Barnes*, 463 U.S. 745, 751–52 (1983)). Prejudice in the context of appellate counsel error requires the petitioner to demonstrate a reasonable probability that he would have prevailed on appeal. *See Robbins*, 528 U.S. at 285–86. The prejudice inquiry is determined under the current state of the law, as opposed to the state of the law in effect at the time of the underlying state court direct appeal. *See Briseno v. Cockrell*, 274 F.3d 204, 211 (5th Cir. 2001); *Westley v. Johnson*, 83 F.3d 714, 723 (5th Cir. 1996).

Petitioner's unadorned claim that appellate counsel "rendered ineffective assistance because he failed to challenge the sufficiency of the convictions used for enhancement" is vague

and conclusory. *See* Dkt. 1 at 6. To the extent he argues appellate counsel failed to challenge the admissibility of the Virginia convictions outright, the argument is not supported by the record and does not sustain an ineffective assistance claim. *See United States v. Johnson*, 679 F.2d 54, 58-59 (5th Cir. 1982) (holding a defendant's allegations of ineffective counsel must be supported by the record). Indeed, the state appellate court expressly considered whether the Virginia convictions had been sufficiently authenticated for purposes of admissibility. *See Ajvazi*, 2012 WL 5293346 at *2.

To the extent Petitioner's complaint lies with appellate counsel's purported failure to challenge admission of the Virginia convictions based on the finality of the statutory burglary conviction and the fact that the felony eluding police conviction was analogous to a Texas state jail felony, the argument is also not supported by the record. Petitioner's appellate brief states:

> At trial, the State introduced copies alleged judgments by conviction, which were used as enhancements to the indictment (Ct. Rep. at 55, 56, vol. 5). State's Exhibit 19 was an alleged final conviction from Virginia for Felony Eluding Police (*id* at 56). State's Exhibit 20 was an alleged final conviction from Virginia for Statutory Burglary (*id* at 55). The State attempted to enlighten the trial court about the matter, but used only the opinion of the State's attorney, with no foundation or authentication of any treatises or Virginia codes (*id* at 71).
>
> The defense objected to the admission of both documents because there were no fingerprints identifying Defendant as the same person named in the documents (*id* at 51, 54). The defense further objected because State's Exhibit 20 referred to a suspended sentence, and argued under *Ramegio v. State* that such a sentence is considered to be a Virginia split sentence, and not admissible as a final conviction in Texas (*Ramegio v. State*, 637 S.W.2d 926). Furthermore, State's Exhibit 19, alleging a conviction for Felony Eluding Police in Virginia, would have, at that time, been a State Jail Felony in Texas (Ct. Rep. at 69, vol 5). Therefore, the Court should reverse and remand due to the admission of evidence of prior convictions used as enhancements that were and were not final, as well as State's Exhibit 19 being the equivalent of a State Jail Felony, and not an Institutional Division Felony in Texas.

See Dkt. 8-11 at 10-11. It is evident from counsel's characterization of the Virginia convictions as "alleged final conviction[s]" that he at least attempted to raise the issue of finality on appeal. And counsel unequivocally argued the Virginia felony eluding police conviction was not sufficient for enhancement purposes under § 12.42(d) because it was analogous to a Texas state jail felony. Any contention that counsel failed to raise these arguments lacks merit and cannot sustain a claim of ineffective assistance of counsel. *See Johnson*, 679 F.2d at 58-59.

Any other alleged omission on the part of appellate counsel is unspecified in the petition and unsupported by citation to the factual record. Such conclusory allegations are not enough to sustain a claim of ineffective counsel. *See Sayre v. Anderson*, 238 F.3d 631, 635-36 (5th Cir. 2001).

In denying state habeas relief, the state habeas court concluded appellate counsel "made efforts to prevent the use of the foreign state convictions for purposes of enhancements" and, therefore, "his performance was not deficient." Dkt. 9-2 at 3. Petitioner has not demonstrated that the state court's decision was contrary to or involved an unreasonable application of clearly established federal law. Nor has he shown the decision was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Accordingly, he has shown no entitlement to federal habeas relief.

CERTIFICATE OF APPEALABILITY

An appeal may not be taken to the court of appeals from a final order in a habeas corpus proceeding "unless a circuit justice or judge issues a certificate of appealability." 28 U.S.C. § 2253(c)(1)(B). Although Petitioner has not yet filed a notice of appeal, it is respectfully recommended that the Court, nonetheless, address whether he would be entitled to a certificate of appealability. *See Alexander v. Johnson*, 211 F.3d 895, 898 (5th Cir. 2000) (A district court may *sua sponte* rule on a certificate of appealability because "the district court that denies a [movant]

relief is in the best position to determine whether the [movant] has made a substantial showing of a denial of a constitutional right on the issues before the court. Further briefing and argument on the very issues the court has just ruled on would be repetitious.").

A certificate of appealability may issue only if a movant has made a "substantial showing of the denial of a constitutional right." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); 28 U.S.C. § 2253(c)(2). "In order to make a substantial showing, a petitioner must demonstrate that 'reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.'" *Henry v. Cockrell*, 327 F.3d 429, 431 (5th Cir. 2003) (quoting *Slack*, 529 U.S. at 484). "When the district court has denied a claim on procedural grounds, however, the petitioner must also demonstrate that 'jurists of reason would find it debatable whether the district court was correct in its procedural ruling.'" *Id.* (quoting *Slack*, 529 U.S. at 484).

In this case, there is no likelihood that reasonable jurists could debate the denial of the petition on substantive or procedural grounds, nor find that the issues presented are adequate to deserve encouragement to proceed. *See Miller-El v. Cockrell*, 537 U.S. 322, 336-37 (2003) (citing *Slack*, 529 U.S. at 484). Accordingly, it is respectfully recommended that the Court find that Petitioner is not entitled to a certificate of appealability as to his claims.

RECOMMENDATION

The Court recommends Petitioner Muhamet Ajvazi's Petition for a Writ of Habeas Relief pursuant to 28 U.S.C. § 2254 (Dkt. 1) should be DENIED and that the case be DISMISSED WITH PREJUDICE. It is further recommended that a certificate of appealability be DENIED.

Within fourteen (14) days after service of the Magistrate Judge's report, any party must serve and file specific written objections to the findings and recommendations of the Magistrate Judge. 28 U.S.C. § 636(b)(1)(C). In order to be specific, an objection must identify the specific

finding or recommendation to which objection is made, state the basis for the objection, and specify the place in the Magistrate Judge's Report and Recommendation where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the Magistrate Judge is not specific.

Failure to file specific, written objections will bar the party from appealing the unobjected-to factual findings and legal conclusions of the Magistrate Judge that are accepted by the district court, except upon grounds of plain error, provided that the party has been served with notice that such consequences will result from a failure to object. *See Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1417 (5th Cir. 1996) (en banc), *superseded by statute on other grounds*, 28 U.S.C. § 636(b)(1) (extending the time to file objections from ten (10) to fourteen (14) days).

SIGNED this 22nd day of December, 2016.

KIMBERLY C. PRIEST JOHNSON
UNITED STATES MAGISTRATE JUDGE

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