IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 14-41190

DONALD FLINT,

Petitioner - Appellant

v.

WILLIAM STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent - Appellee

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

ON PETITION FOR REHEARING EN BANC

Before JOLLY, DENNIS, and PRADO, Circuit Judges.

PER CURIAM:

(✓) No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 14-41190
USDC No. 5:12-CV-53

A True Copy
Certified order issued Dec 04, 2015

Clerk, U.S. Court of Appeals, Fifth Circuit

DONALD FLINT,

Petitioner-Appellant

v.

WILLIAM STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent-Appellee

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

O R D E R:

Donald Flint, Texas prisoner #1509401, seeks a certificate of appealability (COA) to appeal the denial of his 28 U.S.C. § 2254 application, which challenged his convictions on one count of aggravated sexual assault of a child and three counts of indecency with a child. Flint argues that he received ineffective assistance of counsel because counsel did not move for the dismissal of his untimely indictment and that his guilty pleas on two counts are invalid because the trial court did not admonish him of his rights to be tried by a jury, confront his accusers, and to be free from self-incrimination.

In order to obtain a COA, Flint must demonstrate "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).

Flint provides no argument for a COA on his § 2254 claims that the trial court's failure to pronounce his guilt on two counts rendered those convictions void and that he received ineffective assistance of counsel because counsel misadvised him about his sentencing exposure and did not object to evidence of the aggravated assault. Those claims are therefore deemed abandoned. *See Matchett v. Dretke*, 380 F.3d 844, 848 (5th Cir. 2004). As Flint has not shown that jurists of reason could disagree with the district court's resolution of his remaining ineffective assistance of counsel claim and his claim attacking the validity of his guilty plea, his motion for a COA is denied. *See Miller-El*, 537 U.S. at 327.

Seeking court-appointed counsel, Flint has filed a financial affidavit demonstrating his indigence. He has not, however, shown that appointment of counsel is required in the interests of justice. Accordingly, Flint's motion for appointment of counsel is also denied. *See Wardlaw v. Cain*, 541 F.3d 275, 279 (5th Cir. 2008).

MOTIONS DENIED.

/s/ James L. Dennis

JAMES L. DENNIS
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

TEXARKANA DIVISION

DONALD FLINT	§	
VS.	§	CIVIL ACTION NO. 5:12cv53
DIRECTOR, TDCJ-CID	§	

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

Donald Flint, proceeding *pro se*, filed the above-styled petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges three convictions for indecency with a child by sexual contact and a conviction for aggravated sexual assault of a child.

The Court referred this matter to the Honorable Caroline M. Craven, United States Magistrate Judge, for consideration pursuant to 28 U.S.C. § 636 and applicable orders of this court. She has submitted a Report and Recommendation of United States Magistrate Judge concerning this matter, recommending the petition be denied.

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

The Court has conducted a *de novo* review of the objections in light of the record and the applicable law. After considering the objections, the Court is of the opinion that the objections are without merit. The magistrate judge carefully analyzed each of petitioner's grounds for review and the Court agrees with her analysis.

ORDER

Accordingly, the objections are **OVERRULED**. The findings of fact and conclusions of law of the magistrate judge are correct and the report of the magistrate judge is **ADOPTED** as the opinion of the Court. A final judgment shall be entered in accordance with the recommendation of the magistrate judge.

In addition, the Court is of the opinion petitioner is not entitled to a certificate of appealability. An appeal from a judgment denying federal habeas relief may not proceed unless a judge issues a certificate of appealability. *See* U.S.C. § 2253. The standard for a certificate of appealability requires the petitioner to make a substantial showing of the denial of a federal constitutional right. *See Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000); *Elizalde v. Dretke*, 362 F.3d 323, 328 (5th Cir. 2004). To make a substantial showing, the petitioner need not demonstrate that he would prevail on the merits. Rather, he must demonstrate that the issues are subject to debate among jurists of reason, that a court could resolve the issues in a different manner, or that the questions presented are worthy of encouragement to proceed further. *See Slack*, 529 U.S. at 483-84. Any doubt regarding whether to grant a certificate of appealability should be resolved in favor of the petitioner, and the severity of the penalty may be considered in making this determination. *See Miller v. Johnson*, 200 F.3d 274, 280-81 (5th Cir.), *cert. denied*, 531 U.S. 849 (2000).

In this case, the petitioner has not shown that the issue of whether his claims are meritorious is subject to debate among jurists of reason. The factual and legal questions raised by petitioner have been consistently resolved adversely to his position and the questions presented are not worthy of encouragement to proceed further. As a result, a certificate of appealability shall not issue in this matter.

SIGNED this 7th day of October, 2014.

MICHAEL H. SCHNEIDER
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

TEXARKANA DIVISION

DONALD FLINT	§	
VS.	§	CIVIL ACTION NO. 5:12cv53
DIRECTOR, TDCJ-CID	§	

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

Petitioner Donald Flint, an inmate confined within the Texas Department of Criminal Justice, Correctional Institutions Division, proceeding *pro se*, filed this petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

The above-styled action was referred to the undersigned Magistrate Judge 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 for findings of fact, conclusions of law, and recommendations for the disposition of the case.

Prior Proceedings

2004

In 2004, following a jury trial in the 202nd District Court of Bowie County, Texas, petitioner was convicted of two counts of indecency with a child by sexual contact. He also pled guilty to an additional charge of indecency with a child by sexual contact, as well as a charge of aggravated sexual assault of a child. He was sentenced to 50 years imprisonment for aggravated sexual assault of a child and ten years imprisonment for each count of indecency with a child. The conviction was affirmed by the Texas Court of Appeals for the Sixth District. *Flint v. State*, 2009 WL 2408336 (Tex.App.–Texarkana 2009). The Texas Court of Criminal Appeals refused a petition for discretionary review. *Flint v. State*, No. PD–1414-09.

Petitioner subsequently filed a state application for writ of habeas corpus. The Texas Court of Criminal Appeals denied the application without written order on the findings of the trial court without a hearing.

Grounds for Review

Petitioner asserts the following grounds for review: (a) his plea of guilty to the charge of aggravated sexual assault was unintelligent because he was not properly advised of his rights and (b) two of his convictions for indecency with a child are invalid because the trial court failed to make a proper oral announcement of guilt. He also asserts he received ineffective assistance of counsel because counsel: (a) failed to have the charges against him dismissed based upon pre-indictment delay; (b) erroneously advised him that if he entered a plea of guilty to the charge of aggravated sexual assault, the maximum sentence he could receive was 20 years imprisonment and (c) permitted testimony and evidence regarding the charge of aggravated sexual assault to be presented to the jury even though he had already entered a plea of guilty to this charge; (4) failed to request a limiting instruction and (e) failed to require the prosecution to make an election.

Standard of Review

Title 28 U.S.C. § 2254 authorizes the District Court to entertain a petition for writ of habeas corpus on behalf of a person who is in custody pursuant to a state court judgment if the prisoner is in custody in violation of the Constitution or laws or treaties of the United States. 28 U.S.C. § 2254(a). The Court may not grant relief on any claim that was adjudicated in state court proceedings unless the adjudication: (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court or (2) resulted in a decision based on an unreasonable determination of the facts in light of the evidence presented in the state court. 28 U.S.C. § 2254(d). A decision is contrary to clearly established federal law if the state court reaches a conclusion opposite to a decision reached by the Supreme Court on a question of law or if the state court decides a case differently than the Supreme Court has on a materially indistinguishable set of facts. *See Williams v. Taylore*, 529 U.S. 362, 412-13 (2000). An application of clearly established federal law is unreasonable if the state court identifies the correct governing legal principle, but unreasonably applies that principle to the facts. *Id.* An unreasonable application of law differs from an incorrect application; thus, a

federal habeas court may correct what it finds to be an incorrect application of law only if this application is also objectively unreasonable. *Id.* at 409-11. "A state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Harrington v. Richter*, 131 S.Ct. 770, 786 (2011) (citation omitted). "[E]ven a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Id.* The Supreme Court has noted that this standard is difficult to meet "because it was meant to be." *Id.*

This Court must accept as correct any factual determinations made by the state courts unless the petitioner rebuts the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e). The presumption of correctness applies to both implicit and explicit factual findings. *See Young v. Dretke*, 356 F.3d 616, 629 (5th Cir. 2004); *Valdez v. Cockrell*, 274 F.3d 941, 948 n.11 (5th Cir. 2001) ("The presumption of correctness not only applies to explicit findings of fact, but it also applies to those unarticulated findings which are necessary to the state court's conclusions of mixed law and fact."). Deference to the factual findings of a state court is not dependent upon the quality of the state court's evidentiary hearing. *See Valdez*, 274 F.3d at 951.

Analysis

Pleas of Guilty

As stated above, petitioner pled guilty to one count of indecency with a child and to aggravated sexual assault. He states his pleas to these offenses were unintelligent because the trial court failed to admonish him as to his right against compulsory self-incrimination, his right to trial by jury, and his right to confront his accusers.

Article 26.13 of the Texas Code of Criminal Procedure governs the admonishments that must be given to a defendant before a plea of guilty is accepted. However, the issue of whether the trial court followed the statute is not dispositive in this matter. Violations of state law do not provide a basis for federal habeas relief. *Manning v. Warden*, 786 F.2d 710, 711 (5th Cir. 1986).

Instead, a guilty plea will be upheld on federal habeas review if it is entered into knowingly, voluntarily and intelligently. *Montoya v. Johnson*, 226 F.3d 399, 405 (5th Cir. 2000); *James v. Cain*, 56 F.3d 662, 666 (5th Cir. 1995). If a defendant understands the charges against him, understands the consequences of his guilty plea and voluntarily chooses to plead guilty, without being coerced to do so, the guilty plea will be upheld on federal review. *Deville v. Whitley*, 21 F.3d 654, 656 (5th Cir. 1994). The "knowing" requirement that a defendant "understands the consequences of a guilty plea" means only that the defendant understands the maximum prison term for the offense charged. *Ables v. Scott*, 73 F.3d 591, 592 (5th Cir. 1996) (citing *United States v. Rivera*, 898 F.2d 442, 447 (5th Cir. 1990)). A guilty plea is not involuntarily or unintelligently entered simply because a defendant was not informed of all the possible collateral consequences flowing from the conviction. *Johnson v. Puckett*, 930 F.2d 445, 448 (5th Cir. 1991) (guilty plea upheld even though trial court failed to admonish defendant that he was not required to incriminate himself).

Petitioner raised this ground for review in his state application for writ of habeas corpus. In considering this ground for review, the trial court stated as follows:

> In applicant's case, the trial court mentioned in *voir dire* what the punishment ranges for the four charges were. The State and defense counsel also mentioned the punishment range in *voir dire*. Additionally, when Mr. Flint pled guilty to counts one and three, the trial court asked Mr. Flint is he was entering his pleas of guilty because he [was] guilty and for no other reason as it relates to counts one and three, Mr. Flint replied, "Yes, sir."
>
> [S]hould the trial court fail to admonish a defendant of the consequences of his guilty plea, the defendant must affirmatively show that he was not aware of the consequences of his plea and that he was misled or harmed by the court, in order to prove his plea was involuntary. The record as a whole demonstrates nothing to indicate the Applicant was not aware of the consequences of his plea. Also, there is no indication Applicant was misled or harmed by the court in any way. Therefore, Applicant has not made the affirmative showing necessary to prove his plea was involuntary.
>
> The Court notes it observed no irregularities at trial when Applicant pled guilty to charges one and three. The Applicant indicated to the court that he understood he was pleading guilty and what the consequences of such a plea would be. There is nothing in the record to indicate that he did not understand the admonitions or the proceedings or that his plea was made involuntarily.
>
> The Court finds Applicant entered his guilty plea voluntarily and intelligently.

U.S. 668 (1984). *See United States v. Grammas*, 376 F.3d 433, 436 (5th Cir. 2004). In order to show that counsel was ineffective a petitioner must demonstrate:

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

Strickland, 466 U.S. at 687. In order to prove the prejudice prong, a petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Day v. Quarterman*, 566 F.3d 527, 536 (5th Cir. 2009). "*Strickland* asks whether it is 'reasonably likely' the result would have been different." *Harrington v. Richter*, 131 S.Ct. 770, 791-92 (2001).

A habeas petitioner must "affirmatively prove," not just allege, prejudice. *Day*, 556 F.3d at 536. If a petitioner fails to prove the prejudice part of the test, the court need not address the question of counsel's performance. *Id.* A reviewing court "must strongly presume that trial counsel rendered adequate assistance and that the challenged conduct was the product of a reasoned trial strategy." *Wilkerson v. Collins*, 950 F.2d 1054, 1065 (5th Cir. 1992). In determining the merits of an alleged Sixth Amendment violation, a court "must be highly deferential" to counsel's conduct. *Strickland*, 466 U.S. at 687.

Whether the representation was deficient is determined as measured against an objective standard of reasonableness. *Kitchens v. Johnson*, 190 F.3d 698, 701 (5th Cir. 1999). "A conscious and informed decision on trial tactics and strategy cannot be the basis for constitutionally ineffective assistance of counsel unless it is so ill chosen that it permeates the entire trial with obvious unfairness." *United States v. Jones*, 287 F.3d 325, 331 (5th Cir. 2002) (quoting *Garland v. Maggio*, 717 F.2d 119, 2006 (5th Cir. 1983)). "There is a strong presumption that counsel's conduct falls within a wide range of reasonable professional

because it would have been futile. In addition, there is not a reasonable probability the ultimate result of the proceeding would have been different if counsel had made such a motion and the court had granted it. The state would then have been free to obtain a new indictment against petitioner and continue proceedings against him. The Texas Court of Criminal Appeals has stated that as the state may seek another indictment against a defendant, a dismissal under Article 32.01 will likely offer only temporary relief. *Ex parte Martin*, 6 S.W.3d 524, 529 (Tex.Crim.App. 1999).[2] As counsel's performance did not fall below an objective standard of reasonableness or result in prejudice, this ground for review is without merit.

2. Erroneous Advice Regarding Sentence for Aggravated Sexual Assault

Petitioner asserts counsel advised him to plead guilty to the charge of aggravated sexual assault by incorrectly telling him that the maximum sentence he faced upon conviction was 20 years imprisonment. He states this led him to believe he was pleading guilty to a nonaggravated offense and going to trial on an aggravated offense. He states that if he knew he could receive a sentence of up to 99 years imprisonment if convicted of aggravated sexual assault, he would not have pled guilty to this offense.

Petitioner raised this ground for review in his state application for writ of habeas corpus. The rejection by the state courts of this ground for review would appear to have been based upon the determination that counsel did not tell petitioner that the maximum sentence he faced if convicted of aggravated sexual assault was 20 years imprisonment. As set forth above, a federal habeas court must accept as correct any factual determination–including implicit factual findings–made by a state court unless the presumption of correctness is rebutted by clear and convincing evidence. Petitioner has not met this standard. As the state courts' factual determination on this point has not been rebutted by clear and convincing evidence, the finding

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[2] Petitioner contends that the state would have been unable to seek a new indictment if the court had dismissed the original indictment pursuant to Article 32.01. This is mistaken. In 1997, Texas law was amended to provide that a dismissal under Article 32.01 would not bar a subsequent prosecution. *Ex parte Seidel*, 39 S.W.3d 221, 224 (Tex.Crim.App. 2001).

must be accepted as correct. Accordingly, this ground for review does not provide petitioner with a basis for relief in this proceeding.[3]

3. Permitting Presentation of Evidence Regarding Aggravated Sexual Assault Charge

Petitioner states that even though he had pled guilty to the charge of aggravated sexual assault, defense counsel did not object during *voir dire* when the prosecution told the jury it would be presenting evidence on a charge of aggravated sexual assault. Nor did counsel object when the prosecution repeatedly brought up evidence concerning the aggravated sexual assault charge. Further, counsel did not object when the prosecution essentially forced petitioner to confess to details of the aggravated sexual assault charge or when the prosecution referenced details of the aggravated sexual assault charge during closing arguments. Finally, petitioner states counsel did not object when the prosecution elicited testimony that petitioner assaulted the complainant on 20 other occasions or when the prosecutor stated during closing argument that petitioner had sexually assaulted the complaint on more occasions than she could count.

In considering this ground for review, the state habeas court wrote:

> When Applicant pled guilty to charges one and three after the indictment was read, the court did not at that time accept his plea. The trial court did not accept the plea until all evidence had been presented to the court.
>
> A plea of guilty to a felony before a jury admits the existence of all incriminating facts necessary to establish guilt. [W]here such guilty plea is before the jury the presumption of evidence does not obtain under the plea and there is no issue of justification of it. Introduction of evidence by the State in a felony case involving a plea of guilty before the jury is to enable the jury to [assess the penalty]. The State's right to introduce evidence is not restricted by the entry of a plea of guiilty, or by his admission of facts sought to be proved.

The state courts determined that the evidence and statements described by petitioner were admissible. When considering a habeas petition, "federal ... courts sit to review state court applications of federal law. A federal court lacks authority to rule that a state court correctly interpreted its own law." *Charles v. Thaler*, 629 F.3d 494, 500 (5th Cir. 2011).

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[3] In addition, the undersigned notes that during *voir dire*, the trial court stated that the maximum sentence a person charged with aggravated sexual assault faced was 99 years imprisonment.

As the state courts have concluded that the evidence and statements described by petitioner were admissible, any objection made by counsel would have been overruled. Accordingly, counsel's failure to make such objections did not fall below an objective standard of reasonableness and did not cause petitioner to suffer prejudice. This ground for review is therefore without merit.

4. Failure to Request Limiting Instruction

Petitioner states counsel was ineffective for failing to request a limiting instruction informing the jury they could not use extraneous evidence as proof of guilt for the offenses petitioner was on trial for committing.

It appears likely the trial court would have given the instruction described by petitioner if counsel had requested it. Pursuant to Texas law, "the defendant is entitled, on timely request, to an instruction by the trial judge limiting the jury's consideration of extraneous offenses to those purposes for which they are admitted." *Abnor v. State*, 871 S.W.2d 726, 738 (Tex.Crim.App. 1994). However, it cannot be concluded petitioner suffered prejudice because the instruction was not given. The trial court clearly told the jury they were only being asked to decide whether petitioner had committed the offenses described in counts two and four of the indictment. While the jury did hear evidence concerning the offenses described in counts one and three, there is no indication that the verdict on counts two and four was based on the evidence regarding counts one and three. The evidence regarding counts two and four was strong and there is not a reasonable probability petitioner would have been acquitted on these counts if a limiting instruction had been given. This ground for review is therefore without merit.

5. Failure to Require Prosecution to Make Election

Finally, petitioner states counsel was ineffective for never requesting that the prosecution be required to elect on which allegations it was asking the jury to convict.

This ground for review is without merit. It is clear that the prosecution was asking the jury to convict petitioner based on the allegations in the two counts of the indictment to which he

did not enter a plea of guilty. In its instructions, the court told the jury petitioner had pled guilty to counts one and three of the indictment and that the court had found him guilty of these counts. The court then told the jurors they were being asked to decide whether petitioner had committed the offenses described in counts two and four of the indictment.

As it was clear what allegations the prosecution was asking the jury to find petitioner guilty of, and as the court told the jury they were only being asked to determine whether petitioner had committed the offenses described in counts two and four of the indictment, any request by counsel to force the prosecution to make the election described by petitioner would have been denied. Counsel's failure to make such a request therefore did not fall below an objective standard of reasonableness and did not cause petitioner to suffer prejudice.

Recommendation

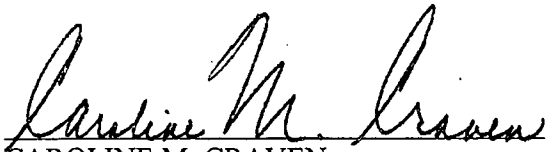
This petition for writ of habeas corpus should be denied.

Objections

Objections must be (1) specific, (2) in writing, and (3) served and filed within 14 days after being served with a copy of this report. 28 U.S.C. § 636(b)(1).

Failure to file objections bars a party from (1) entitlement to *de novo* review by a district judge of proposed findings and recommendations, *Rodriguez v. Bowen*, 857 F.2d 275, 276-77 (5th Cir. 1988), and (2) appellate review, except on grounds of plain error, of unobjected-to factual findings and legal conclusions accepted by the district court, *Douglass v. United Serv. Auto. Ass'n.*, 79 F.3d 1415, 1419 (5th Cir. 1996) (*en banc*).

SIGNED this 10th day of September, 2014.



CAROLINE M. CRAVEN
UNITED STATES MAGISTRATE JUDGE