APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-50792

A True Copy
Certified order issued Nov 28, 2018

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

MANUEL ANTONIO MEJIA RIVERA,

Petitioner - Appellant

v.

DONNA KAY MCKINNEY, Bexar County District Clerk, Individually and in Her Own Capacity; GERARDO GONZALES, Individually and in His Own Capacity; LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondents - Appellees

Appeal from the United States District Court
for the Western District of Texas

Before REAVLEY, ELROD, and OLDHAM, 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 July 28, 2015. Therefore, the final day for filing a timely notice of appeal was August 27, 2015.

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The petitioner's pro se notice of appeal is dated September 17, 2018 and stamped as filed on September 21, 2018. Because the notice of appeal is dated September 17, 2018, it 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 appeal. *Robbins v. Maggio*, 750 F.2d 405, 408 (5th Cir. 1985).

APENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT of TEXAS
SAN ANTONIO DIVISION

MANUEL ANTONIO MEJIA RIVERA, TDCJ # 1917399,

Petitioner

v.

WILLIAM STEPHENS,
Texas Department of Criminal Justice
Correctional Institutions Division Director,

Respondent

Civil Action
No. SA-15-CA-446-XR

DISMISSAL ORDER

Before the Court is Petitioner Manuel Antonio Mejia Rivera's 28 U.S.C. § 2254 Habeas Corpus Petition.

Rivera pleaded nolo contendere in 2013 in Bexar County to attempting to take a weapon from a peace officer and aggravated assault with a deadly weapon, and was sentenced to one year and seven years in *State v. Rivera*, Nos. 2013-CR-4809 & 2013-CR-7775 (Tex. 175th Jud. Dist. Ct., *jmt. entered* Dec. 20, 2013). Rivera's State habeas corpus application challenging his aggravated assault conviction was denied. *Ex parte Rivera*, No. 82,099-1 (*denied* Oct. 8, 2014). Rivera's second state habeas corpus application challenging his aggravated assault conviction was dismissed as a subsequent application. *Ex parte Rivera*, No. 82,099-2 (*dismissed* Dec. 17, 2014). Rivera's state habeas corpus application challenging his conviction for attempting to take a weapon from a peace officer was dismissed because this sentence was discharged. *Ex parte Rivera*, No. 82,099-3 (*dismissed* Dec. 17, 2014).

APENDIX B

Rivera's § 2254 Petition contends: he was subjected to an unreasonable search that was not supported by probable cause; the Government concealed material evidence; his counsel was ineffective; and he has been falsely imprisoned and sexually abused resulting in his cruel and unusual punishment. This Court entered an order directing Rivera to show cause why his petition should not be dismissed for failure to present a basis for habeas corpus relief and as conclusory. Rivera's response reasserts his claims without providing any facts in support of those claims.

Rivera's challenge to his conviction for attempting to take a weapon from a peace officer is procedurally barred. Section 2254(b)(1)(A) requires the petitioner to exhaust available state court remedies before seeking federal habeas corpus relief. Rivera's State habeas corpus application challenging his conviction for attempting to take a weapon from a peace officer was dismissed because his sentence was discharged. *Ex parte Rivera*, No. No. 82,099-3. Because Rivera's claims challenging this conviction were dismissed by the Texas courts, these claims are unexhausted and procedurally barred in this federal habeas corpus proceeding. *See Neville v. Dretke*, 423 F.3d 474, 480 (5th Cir. 2005) (when a petitioner is "procedurally barred from raising his claims in state court," his "unexhausted claims are 'plainly meritless'" and "procedurally defaulted").

The record shows Rivera's nolo contendere plea to the aggravated assault charge was knowing and voluntary, and his habeas corpus claims were waived pursuant to his plea. In the Court's Admonishment and Defendant's Waivers and Affidavit of Admonitions, *Ex parte Rivera*, No. 82,099-1 at 24-28, signed by Rivera, he acknowledged he understood: he was charged with aggravated assault with a deadly weapon; he faced a potential sentence of two to twenty years; he wished to plead nolo contendere because it was in his best interest; and he had the right to trial by jury and was waiving this right. Pursuant to the Plea Bargain signed by Rivera, the parties agreed

and recommended Rivera be sentenced to seven years, there would be no application for community supervision or deferred adjudication, and his sentence would be concurrent with his sentence for attempting to take a weapon from a police officer. In the Waiver, Consent to Stipulation of Testimony and Stipulations, *Ex parte Rivera*, No. 82,099-1 at 29-54, Rivera confessed and admitted that on February 15, 2013 he assaulted Javier Gerardo by cutting and stabbing him with a knife as alleged in the Indictment. Rivera stipulated the annexed police reports and witness statements were true. The trial court found Rivera's guilty plea was knowing, voluntary, and he was competent, and Rivera was sentenced to seven years in conformance with the Plea Bargain. The plea documents executed by Rivera are prima facie proof of the matters recited therein, they show his guilty plea was knowing, voluntary, and he was competent, and his conclusory allegations are not sufficient to overcome the strong presumption of verity that attaches to his sworn declarations accompanying his nolo plea. *See Blackledge v. Allison*, 431 U.S. 63, 73-74, 97 S. Ct. 1621, 52 L. Ed. 2d 136 (1977) ("[R]epresentations of the defendant, his lawyer, and the prosecutor at [a guilty plea] hearing, as well as the findings made by the trial judge accepting the plea, constitute a formidable barrier to any subsequent collateral proceedings"); *see also Bonvillain v. Blackburn*, 780 F.2d 1248, 1250 (5th Cir.), *cert. denied*, 476 U.S. 1143 (1986); *U.S. v. McCord*, 618 F.2d 389, 393 (5th Cir. 1980).

The State courts concluded Rivera's plea was knowing and voluntary. *Ex parte Rivera*, No. 82,099-1 at 70-72. A valid plea waives all pre-conviction non-jurisdictional defects. *See Tollett v. Henderson*, 411 U.S. 258, 267, 93 S. Ct. 1602, 36 L. Ed. 2d 235 (1973). Because the record shows Petitioner's guilty plea was knowing and voluntary, Rivera's ineffective counsel and other claims based on matters prior to his plea were waived pursuant to his nolo plea. *See id.*

Moreover, Rule 2(c) of the Rules Governing § 2254 Cases requires that a petition "set forth in summary form the facts supporting each of the grounds" presented. Conclusory and speculative allegations are not sufficient to entitle a petitioner to a hearing or relief in a § 2254 case. *West v. Johnson*, 92 F.3d 1385, 1398-99 (5th Cir. 1996), *cert. denied*, 520 U.S. 1242 (1997); *Perillo v. Johnson*, 79 F.3d 441, 444 (5th Cir. 1996). Rivera's § 2254 Petition is vague and conclusory; Petitioner fails to state any facts (such as who, what, where or when) in support of his claims, and such conclusory claims are not sufficient to state a basis for habeas corpus relief. *See Ross v. Estelle*, 694 F.2d 1008, 1012 (5th Cir. 1983) ("conclusory allegations do not raise a constitutional issue in a habeas proceeding"). Furthermore, Rivera's claim his counsel conspired with the prosecution and coerced him to plead nolo contendere is defied by the affidavit of his former-counsel, *Ex parte Rivera*, No. 82,099-1 at 63-65, which was credited by the State habeas court, *id.* at 71.

Furthermore, Rivera's Fourth Amendment arrest claim is barred by *Stone v. Powell*, 428 U.S. 465, 493-97, 96 S. Ct. 3037, 49 L. Ed. 2d 1067 (1976), where the Supreme Court held Fourth Amendment violations are not a basis for habeas corpus relief if the prisoner had a full and fair opportunity to raise the issue in State court. Because Rivera had a full and fair opportunity to present this claim in State court, the claim is barred in this § 2254 proceeding. *See id.*

Rivera also "sue[s] the State of Texas for damages . . .[of] $32,000." Damages are not available in this habeas corpus case. *See Meadows v. Evans*, 550 F.2d 345, 349 (5th Cir.), *cert. denied*, 434 U.S. 969 (1977). In any event, the Eleventh Amendment bars money damage claims against the State of Texas. *See Pennhurst State Sch. & Hospital v. Halderman*, 465 U.S. 89, 119-21, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984).

Rivera also makes allegations in his § 2254 petition and supplement that though conclusory could be construed as 42 U.S.C. § 1983 civil rights claims. *See Jackson v. Torres*, 720 F.2d 877, 879 (5th Cir. 1983) ("The rule in this Circuit is that any challenge to the fact or duration of a prisoner's confinement is properly treated as a habeas corpus matter, whereas challenges to conditions of confinement may proceed under Section 1983"). These claims shall be dismissed without prejudice because they are not properly raised in this § 2254 habeas corpus case and may be pursued in Rivera's pending § 1983 case.

Rule 4 Governing § 2254 Proceedings states a habeas corpus petition must be summarily dismissed "[i]f it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court." Accordingly, Petitioner Rivera's § 2254 Petition is **DENIED** and **DISMISSED WITH PREJUDICE**. Rivera's allegations in his § 2254 petition that could be construed as § 1983 civil rights claims are **DISMISSED WITHOUT PREJUDICE**. All other pending motions are **DENIED** as moot. Petitioner failed to make "a substantial showing of the denial of a federal right" and cannot make a substantial showing this Court's procedural rulings are incorrect as required by Fed. R. App. P. 22 for a certificate of appealability, *see Slack v. McDaniel*, 529 U.S. 473, 483-84, 120 S. Ct.1595, 146 L. Ed. 2d 542 (2000), and therefore this Court **DENIES** Petitioner a certificate of appealability. *See* Rule 11(a) of the Rules Governing § 2254 Proceedings.

DATED: July 27, 2015

XAVIER RODRIGUEZ
United States District Judge