IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 17-20787

KEVIN TERRELL TATUM,

Petitioner-Appellant

v.

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

Respondent-Appellee

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

O R D E R:

Kevin Terrell Tatum, Texas prisoner # 1409740, moves this court for a certificate of appealability (COA) to appeal the denial of his 28 U.S.C. § 2254 application, wherein he sought to challenge his conviction of murder in violation of Texas Penal Code Annotated § 19.02(b). Citing an affidavit of a recanting witness, he argues that the evidence shows that he acted in self-defense or in sudden passion. He further argues that his trial counsel was ineffective for failing to raise the issue of sudden passion in mitigation, for failing to adequately investigate the case and interview witnesses who could have corroborated his self-defense argument, and for failing to make certain objections at trial. He does not brief the other claims he raised in his § 2254 application and has, therefore, abandoned them. *See Hughes v. Johnson*, 191

F.3d 607, 613 (5th Cir. 1999); *Yohey v. Collins*, 985 F.2d 222, 224-25 (5th Cir. 1993).

To obtain a COA, a prisoner 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). 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).

Tatum fails to make the requisite showing. Consequently, his motion for a COA is DENIED.

JAMES C. HO
UNITED STATES CIRCUIT JUDGE

A True Copy
Certified order issued Nov 05, 2018

Tyle W. Cayce
Clerk, U.S. Court of Appeals, Fifth Circuit

IN THE UNITED STATES COURT OF APPEALS
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KEVIN TERRELL TATUM,

Petitioner - Appellant

v.

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

Respondent - Appellee

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

Before SOUTHWICK, HAYNES and HO, Circuit Judges.

PER CURIAM:

A member of this panel previously denied appellant's motion for certificate of appealability. The panel has considered appellant's motion for reconsideration. IT IS ORDERED that the motion is DENIED.

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

KEVIN TERRELL TATUM,	§	
	§	
Petitioner,	§	
	§	
v.	§	CIVIL ACTION NO. H-14-1735
	§	
LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,	§	
	§	
Respondent.	§	

FINAL JUDGMENT

It is ORDERED and ADJUDGED for the reasons set forth in this Court's separate Order Adopting Recommendation of the Magistrate Judge, and the Memorandum and Recommendation of the Magistrate Judge filed on September 6, 2017, which Memorandum and Recommendation, with the clarification made in the accompanying Order, is adopted as the opinion of this Court, that Respondent's Motion for Summary Judgment (Document No. 47) is GRANTED, Petitioner's Federal Application and Supplemental Application for Writ of Habeas Corpus (Document Nos. 1 and 43) are DENIED, and this case is DISMISSED WITH PREJUDICE. It is further

ORDERED that a Certificate of Appealability is DENIED.

This is a **FINAL JUDGMENT.**

The Clerk will enter this Order and send copies to all parties of record.

SIGNED at Houston, Texas, on this 30th day of November, 2017.

EWING WERLEIN, JR.
UNITED STATES DISTRICT JUDGE

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

KEVIN TERRELL TATUM,	§	
	§	
Petitioner,	§	
	§	
v.	§	CIVIL ACTION NO. H-14-1735
	§	
LORIE DAVIS, DIRECTOR,	§	
TEXAS DEPARTMENT OF CRIMINAL	§	
JUSTICE, CORRECTIONAL	§	
INSTITUTIONS DIVISION,	§	
	§	
Respondent.	§	

ORDER ADOPTING RECOMMENDATION OF THE MAGISTRATE JUDGE

Pending is Respondent's Motion for Summary Judgment (Document No. 47) against Petitioner's Federal Application for Writ of Habeas Corpus (Document No. 1) and Supplemental Application for Writ of Habeas Corpus (Document No. 43). The Court has received from the Magistrate Judge a Memorandum and Recommendation recommending that Respondent's Motion for Summary Judgment be GRANTED, and that Petitioner's Application and Supplemental Application for Writ of Habeas Corpus be DENIED and DISMISSED with prejudice. Both Respondent and Petitioner have filed Objections (Document Nos. 55 & 61) to the Memorandum and Recommendation. The Court has made a *de novo* determination of Respondent's Motion for Summary Judgment, Petitioner's Response, Petitioner's Application and Supplemental Application for Writ of Habeas Corpus, the Memorandum and Recommendation, and both sides' Objections. Having done so, a

small clarification on the Memorandum and Recommendation, based on the record, is appropriate.

In the second (middle) paragraph on page 15 of the Memorandum and Recommendation, the Magistrate Judge states that Tatum's assertion in his "second" state application (as the State describes it), which was filed June 25, 2012, was "predicated on a June 2013 affidavit from Charlie Ivory." Obviously, those dates are inconsistent. Tatum filed the so-called "second" state application on June 25, 2012, not intending it (as the Magistrate Judge correctly observed) as a separate application but, as Tatum expressly stated in the document, as adding "'supplemental' points to previously filed writ [of August 31, 2009] that is still pending and not yet resolved." Document No. 48-1, at 3. A year later--with the June 2009 state application still pending--Tatum procured the June 30, 2013 Affidavit of Charlie Ivory, who largely renounced his trial testimony against Tatum and presented an account favorable to Tatum. On September 5, 2013, still with the June 2009 state petition pending, Tatum further supplemented the State petition by filing the Ivory Affidavit as an attachment to what he denominated his Response to State's Original Answer and Proposed Order (Document No. 48-1, at 71 of 115, and Affidavit at 81-83 of 115). When Tatum supplemented his still-pending 2009 petition with Ivory's 2013 Affidavit, Tatum then advanced his argument of actual innocence. The foregoing clarification of sequential dates

replaces the statement made on page 15 of the Memorandum and Recommendation referred to in the first sentence of this paragraph.

With the foregoing clarification, the Court is of the opinion that the findings and recommendations of the Magistrate Judge are correct and should be and hereby are accepted by the Court in their entirety. Accordingly,

It is ORDERED and ADJUDGED for the reasons set forth in the Memorandum and Recommendation of the United States Magistrate Judge filed on September 6, 2017 which, with the clarification made above, is adopted in its entirety as the opinion of this Court, that Respondent's Motion for Summary Judgment (Document No. 47) is GRANTED, and Petitioner's Application and Supplemental Application for Writ of Habeas Corpus (Document Nos. 1 and 43) are DENIED and DISMISSED with prejudice. It is further

ORDERED that a certificate of appealability is DENIED. A certificate of appealability from a habeas corpus proceeding will not issue unless the petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This standard "includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Slack v. McDaniel, 120 S. Ct. 1595, 1603-1604 (2000) (internal quotations and citations omitted). Stated differently, where the claims have been dismissed on the merits, the petitioner "must demonstrate that

reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Id. at 1604; Beazley v. Johnson, 242 F.3d 248, 263 (5th Cir.), *cert. denied*, 122 S.Ct. 329 (2001). When the claims have been dismissed on procedural grounds, the petitioner must show that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Slack, 120 S. Ct. at 1604. A district court may deny a certificate of appealability *sua sponte*, without requiring further briefing or argument. Alexander v. Johnson, 211 F.3d 895, 898 (5th Cir. 2000).

For the reasons set forth in the Memorandum and Recommendation, the Court determines that Petitioner has not made a substantial showing of the denial of a constitutional right, and that reasonable jurists would not debate the correctness of either the substantive or procedural rulings.

The Clerk will enter this Order and send copies to all parties of record.

Signed at Houston, Texas on this 30th day of November, 2017.

Ewing Werlein, Jr.

EWING WERLEIN, JR.
UNITED STATES DISTRICT JUDGE

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

KEVIN TERRELL TATUM,	§	
	§	
Petitioner,	§	
	§	
V.	§	CIVIL ACTION NO. H-14-1735
	§	
WILLIAM STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,	§	
	§	
Respondent.	§	

MEMORANDUM AND RECOMMENDATION GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

Before the Magistrate Judge in this proceeding brought pursuant to 28 U.S.C. § 2254 is Respondent's Motion for Summary Judgment (Document No. 47) against Petitioner's Federal Application for Writ of Habeas Corpus (Document No. 1) and Supplement thereto (Document No. 43). Having considered Respondent's Motion for Summary Judgment, Petitioner's Traverse in response (Document No. 51), the claims raised by Petitioner in his § 2254 Application and Supplemental § 2254 Application, the state court records, and the applicable law, the Magistrate Judge RECOMMENDS, for the reasons set forth below, that Respondent's Motion for Summary Judgment (Document No. 47) be GRANTED, that Petitioner's Federal Application for Writ of Habeas Corpus and Supplemental Application (Document Nos. 1 & 43) be DENIED, and that this case be DISMISSED WITH PREJUDICE.

I. Introduction and Procedural History

Kevin Terrell Tatum ("Tatum") is currently incarcerated in Texas Department of Criminal Justice, Correctional Institutions Division (TDCJ-CID), as a result of a 2006 murder conviction in the 179th District Court of Harris County, Texas, cause no. 1042008, for which he was sentenced to forty-five (45) years imprisonment. Tatum was charged by indictment with that offense on December 9, 2005, with the Indictment alleging:

> . . . KEVIN TERRELL TATUM, hereafter styled the Defendant, heretofore on or about SEPTEMBER 28, 2005, did then and there unlawfully, intentionally and knowingly cause the death of BONNIE MOCK, hereinafter called the Complaint, by SHOOTING THE COMPLAINANT WITH A DEADLY WEAPON, NAMELY, A FIREARM.
>
> It is further presented that in Harris County, Texas, KEVIN TERRELL TATUM, hereinafter styled the Defendant, heretofore on or about SEPTEMBER 28, 2005, did then and there unlawfully, intend to cause serious bodily injury to BONNIE MOCK, hereinafter called the Complainant, and did cause the death of the Complainant by intentionally and knowingly committing an act clearly dangerous to human life, namely BY SHOOTING THE COMPLAINANT WITH A DEADLY WEAPON, TO WIT: A FIREARM.

Tatum pled not guilty and proceeded to trial. On December 8, 2006, a jury found Tatum guilty, and he was thereafter sentenced by the jury, following a punishment hearing, to forty-five years incarceration.

Tatum appealed his conviction, with his appointed appellate counsel, Patti Sedita, filing an *Anders* brief, and Tatum himself filing a separate brief. On August 29, 2008, Texas' First Court of Appeals affirmed the conviction in an unpublished opinion. *Tatum v. State*, No. 01-06-01190-CR. Tatum's petition for discretionary review was then refused by the Texas Court of Criminal Appeals on March 11, 2009. Tatum did not file a petition for writ of certiorari, and his conviction therefore became final on or about June 9, 2009.

On August 31, 2009, Tatum filed a state application for writ of habeas corpus. That application was initially denied without written order on March 19, 2014, but was, upon reconsideration, dismissed on April 15, 2015, as "noncompliant with the Rules of Appellate Procedure." Tatum's subsequent state application for writ of habeas corpus, filed on or about June 25, 2012, was denied by the Texas Court of Criminal Appeals without written order on October 5, 2016, on the findings of the trial court without a hearing. This § 2254 proceeding, which was filed by Tatum on or about June 18, 2014, after his first state application for writ of habeas corpus had been initially denied, was stayed to allow the state courts to consider claims Tatum had attempted to add to his first state application for writ of habeas corpus (Document No. 14). Briefing was then "re-opened" to allow Respondent to conform its responsive pleading to Tatum's claims and address the ruling by the Texas Court of Criminal Appeals on Tatum's "second" state application for writ of habeas corpus (Document No. 38). Thereafter, Tatum filed a Supplemental § 2254 Application (Document No. 43), and Respondent filed a Motion for Summary Judgment (Document No. 47). This § 2254 proceeding is ripe for ruling.

II. Factual and Evidentiary Background

The murder charge, of which Tatum was convicted, arose from a shooting outside of a club on September 28, 2005. There was no dispute that Tatum shot the Complaint, Bonnie Mock, in the leg, and that Mock died of his injuries. The only dispute at trial was Tatum's state of mind, with the defense being that Tatum shot Mock in self-defense, after feeling threatened by Mock and a group of others.

The facts and circumstances leading up to the offense are generally not in dispute. Tatum

and Charlie Ivory grew up in the same, or bordering neighborhoods, and had attended elementary, middle and high schools together. They knew each other, but were not friends. Tatum and Ivory each had a child by the same woman, and they, at times, either dated or were "friends" with, the same women. Ostensibly because of this, there was animosity between the two in the month or so prior to the offense, with heated telephone calls between them about planning a "fight." No definite plans for a fight were made. Instead, Tatum and Ivory ran into each other unexpectedly outside of a nightclub, the Surf Shack, in the early morning hours on September 28, 2005. More talk of fighting ensued, with Ivory testifying at trial that he agreed to fight Tatum behind the club. Both Tatum and Ivory had friends present when they went behind the club to fight, but Ivory insisted that the fight be one-on-one. It is what happened next that is in dispute.

Ivory testified at trial that Tatum walked away from him and got in his car, which was parked nearby. Ivory and his friends followed, walking after Tatum's car as he drove slowly through the parking lot, with Ivory yelling at Tatum get out of the car and fight. The yelling and mention of a fight attracted the attention of others in the parking lot. According to Ivory, when Tatum's car was about three yards from the entrance/exit of the parking lot, a mutual acquaintance of his and Tatum's, Bonnie Mock, approached him, and then approached Tatum in his car, to ask what was going on. Mock, who was in front of Ivory at the time, was shot by Tatum from his car. Tatum also shot at and hit Ivory, and one of Ivory's cousins, Charles Page. Mock died of his injuries. Ivory and Page were treated at the hospital and released. Tatum left the scene following the shooting, called 911 to report that he had heard shooting from everywhere at the club's parking lot, and turned himself in to authorities a week later.

The State's evidence consisted of the testimony of Ivory that the only weapon fired at the

scene was Tatum's, that he saw no one else with a weapon, that Mock was not acting aggressively, and that Mock did not try to pull Tatum out of his car, did not yank the door to Tatum's car open, and did not break any windows in Tatum's car. Two witnesses at the scene, Kim Boyd and Tameka Hall, neither of whom knew any of the participants, testified at they heard Bonnie Mock mention a "fight" and saw him run off towards the crowd that was gathering in the parking lot. They both also testified that when they were in their car, trying to exit the parking lot, Tatum's car was directly in front of them, they saw Bonnie Mock approach Tatum in his car, with his hands in the air, and ask "what's up," and then saw Tatum open the driver's side door, put his left foot out of the car, and start shooting. Mock was hit and fell to the ground. According to both Kim Boyd and Tameka Hall, they saw no one (other than Tatum) with a gun, no shots were fired at the scene prior to the shots fired by Tatum, and they saw no one throwing bottles at Tatum's car, no one shooting at Tatum's car, and no one threatening Tatum. Kim Boyd also testified that Mock was not acting aggressively, and that there was no car in front of Tatum's preventing him from leaving the parking lot before the shooting. Another witness, Chentera Willis, who knew both Tatum and Mock, testified at trial that she also saw Bonnie Mock approach Tatum's car with his hands up and ask "what's up," and saw the driver of the car open the door and start shooting. She didn't see any cars in front of Tatum's at the time of the shooting, and there were no shots fired before Tatum's. Evidence collected at the scene consisted of five spent shell casings, all from the same gun. There was no damage to Tatum's car.

In support of his self-defense defense, Tatum testified along with two other witnesses, Christopher Alexander and Ashley Perry. Alexander testified that he and Tatum were being followed aggressively by Ivory and his friends, Tatum was nervous and panicking when he got into his car and headed toward the parking lot exit, he heard a glass bottle breaking somewhere, a dark

colored car pulled in front of Tatum's car near the exit, blocking them in, and a guy got out of the car and started punching the window of Tatum;'s car, saying "what's up." The driver's side door of Tatum's car then came open and he heard shots. Perry, similarly, testified that she saw a group of people following Tatum, acting as if they wanted to fight, that Tatum and Alexander got in Tatum's car and were pursued through the parking lot by several people, including someone who was walking alongside the car, beating on it and yelling for Tatum to get out of the car, that a black car stopped in front of Tatum's near the exit and one of the occupants of that car "lifted up his shirt," and was beating on Tatum's car and grabbing the door before she heard shots being fired.

Tatum testified in his own defense that he "seen a weapon," heard bottles of glass thrown towards his car, "seen a gunshot," and that he was in fear for this life as he drove through the parking lot toward the exit. At the exit, a car was blocking his from leaving the parking lot, and a guy ran up to his car and started punching his window, trying to break out the glass, and reached for and yanked on the driver's side door, causing it to open. According to Tatum, he grabbed the weapon he kept in his car and started shooting, but did not intend to kill anyone.

Most of the jury charge was devoted to the following instructions on self-defense:

> Upon the law of self-defense, you are instructed that a person is justified in using force against another when and to the degree he reasonably believes the force is immediately necessary to protect himself against the other person's use or attempted use of unlawful force. The use of force against another is not justified in response to verbal provocation alone.
>
> A person is justified in using deadly force against another if he would be justified in using force against the other in the first place, as above set out, and when he reasonably believes that deadly force is immediately necessary to protect himself against the other person's use or attempted use of unlawful deadly force, and if a reasonable person in the defendant's situation would not have retreated.
>
> By the term "reasonable belief" as used herein is meant a belief that would be held by an ordinary and prudent person in the same circumstances as the

defendant.

By the term "deadly force" is meant force that is intended or known by the persons using it to cause, or in the manner of its use or intended use is capable of causing, death or serious bodily injury.

When a person is attacked with unlawful deadly force, or he reasonably believes he is under attack or attempted attack with unlawful deadly force, and there is created in the mind of such person a reasonable expectation or fear of death or serious bodily injury, then the law excuses or justifies such person in resorting to deadly force by any means at his command to the degree that he reasonably believes immediately necessary, viewed from his standpoint at the time, to protect himself from such attack or attempted attack. And it is not necessary that there be an actual attack or attempted attack, as a person has a right to defend his life and person from apparent danger as fully and to the sane extent as he would have had the danger been real, provided that he acted upon a reasonable apprehension of danger, as it appeared to him from his standpoint at the time, and that he reasonably believed such deadly force was immediately necessary to protect himself against the other person's use or attempted use of unlawful deadly force.

In determining the existence of real or apparent danger, you should consider all the facts and circumstances in the case in evidence before you, together with all relevant facts and circumstances going to show the condition of the mind of the defendant at the time of the occurrence in question, and in considering such circumstances, you should place yourself in the defendant's position at that time and view them from his standpoint alone.

You are instructed that you may consider all relevant facts and circumstance surrounding the offense, if any, and the previous relationship existing between the accused and Bonnie Mock, together with all relevant facts and circumstances going to show the condition of the mind of the accused at the time of the offense, if any.

Therefore, if you find from the evidence beyond a reasonable doubt that the defendant, Kevin Terrell Tatum, did cause the death of Bonnie Mock, by shooting Bonnie Mock with a deadly weapon, namely, a firearm, as alleged, but you further find from the evidence, as viewed from the standpoint of the defendant at the time, that from the words or conduct, or both of Bonnie Mock it reasonably appeared to the defendant that his life or person was in danger and there was created in his mind a reasonable expectation or fear of death or serious bodily injury from the use of unlawful deadly force at the hands of Bonnie Mock, and that acting under such apprehension and reasonably believing that the use of deadly force in his part was immediately necessary to protect himself against Bonnie Mock's use or attempted use of unlawful deadly force, he shot Bonnie Mock and that a reasonable person in the defendant's situation would not have retreated, then you should acquit the

> defendant on the grounds of self-defense; or if you have a reasonable doubt as to whether or not the defendant was acting in self-defense on said occasion and under the circumstances, then you should give the defendant the benefit of that doubt and say by your verdict, not guilty.
>
> If you find from the evidence beyond a reasonable doubt that at the time and place in question the defendant did not reasonably believe that he was in danger of death or serious bodily injury, or that a reasonable person in the defendant's situation would have retreated before using deadly force against Bonnie Mock, or that the defendant, under the circumstances as viewed by him from his standpoint a the time, did not reasonably believe that the degree of force actually used by him was immediately necessary to protect himself against Bonnie Mock's use or attempted use of unlawful deadly force, then you should find against the defendant on the issue of self-defense.

Jury Charge at 3-5 (Document No. 8-5 at 442-44). During deliberations, the jury asked for and were provided excerpts of the testimony from Kim Boyd and Tameka Hall about whether there was any car in front of Tatum's at the parking lot exit at the time of the shooting. The jury thereafter found Tatum guilty of murder and assessed his punishment at forty-five years imprisonment.

III. Claims

Through both his initial § 2254 Application (Document No. 1) and his Supplemental Application (Document No. 43) Tatum raises the following claims challenging his murder conviction:

1. that a newly secured affidavit of a witness (Charlie Ivory) establishes his actual innocence of the murder offense;

2. that there is legally insufficient evidence to support his conviction for murder;

3. that his trial counsel, Fred Reynolds, was ineffective for: (a) failing to pursue a lesser included offense based on sudden passion; (b) failing to present mitigating evidence at the punishment stage on sudden passion; (c) failing to properly investigate the offense; and (d) failing to object, on various grounds, during voir dire, the guilt-innocence stage, the punishment stage, and during closing arguments;

4. that his appellate counsel, Patti Sedita, was ineffective for: (a) filing an *Anders* brief; and (2) failing to raise challenges to the sufficiency of the evidence, trial counsel's effectiveness, and the State's inadequate and unfair investigation of the offense;

5. that he was denied due process by the State's inadequate investigation;

6. that the State suppressed favorable evidence about his attempts to avoid/flee/escape the confrontation with the decedent; and

7. that he was denied due process and a fair trial by virtue of the prosecutor's commitment questions during voir dire.

In a lengthy and comprehensive Motion for Summary Judgment, Respondent argues that all of Tatum's claims are time-barred, that many of Tatum's claims are unexhausted and procedurally barred from review, and that no relief is available to Tatum on the merits of any of his claims.

IV. Standards of Review

A. Statute of Limitations

Pursuant to 28 U.S.C. § 2244(d), § 2254 applicants are subject to a one year limitations period as follows:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State Court. The limitation period shall run from the latest of--
>
> > (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
> >
> > (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
> >
> > (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Where a state post-conviction proceeding has been dismissed as not properly filed, the tolling provisions in § 2244(d)(2) do not apply. *Wickware v. Thaler*, 404 F.App'x 856, 858 (5th Cir. 2010); *Davis v. Quarterman*, 342 F.App'x 952, 953 (5th Cir, 2009).

B. Exhaustion and related Procedural Bar

Federal habeas corpus petitioners are required to exhaust their available state law remedies. *Deters v. Collins*, 985 F.2d 789, 795 (5th Cir. 1993). In order to exhaust state law remedies, Texas prisoners must fairly present their claims to the highest state court, the Texas Court of Criminal Appeals, TEX. CODE CRIM. PROC. ANN. art. 44.45, through a petition for discretionary review and/or a state application for writ of habeas corpus. TEX. R. APP. P. 68; TEX. CODE CRIM. PROC. ANN. art. 11.07, et seq. "'It is not enough that all the facts necessary to support the federal claim were before the state courts or that a somewhat similar state-law claim was made.'" *Ex Parte Wilder*, 274 F.3d 255, 259-260 (5th Cir. 2001) (quoting *Anderson v. Harless*, 459 U.S. 4, 6 (1982)). Rather, the petitioner must have presented the highest state court with the same claim, the same factual basis for the claim, and the same legal theory in order to meet the exhaustion requirement. *Id.* "[F]leeting reference to the federal constitution," especially when such reference is not accompanied by any federal case law authority, generally does not suffice to "alert and afford a state court the opportunity to address an alleged violation of federal rights," and that "vague references to such expansive concepts as due process and fair trial" in a state court proceeding will not satisfy the exhaustion requirement. *Id.* at 260.

When unexhausted claims are contained in a § 2254 application, and when such claims, if the petitioner tried to exhaust them in state court, "would be barred by the abuse-of-the-writ doctrine of Article 11.071 of the Texas Code of Criminal Procedure," the claims should be dismissed with prejudice as procedurally barred. *Horsley v. Johnson*, 197 F.3d 134, 137 (5th Cir. 1999); *see also Nobles v. Johnson*, 127 F.3d 409, 420 (5th Cir. 1997) ("A procedural default also occurs when a prisoner fails to exhaust available state remedies and 'the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred.'"), *cert. denied*, 523 U.S. 1139 (1998). Only when the petitioner makes a colorable showing that his unexhausted claims would be considered on the merits by the state courts if he attempted to exhaust them, should the claims be dismissed without prejudice. *Horsley,* 197 F.3d at 136-137.

C. Merits Review under § 2254(d)

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), when a claim presented in a federal habeas corpus proceeding has already been adjudicated on the merits in a state proceeding, federal review is limited. 28 U.S.C. § 2254(d) provides:

> (d) An application for writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> > (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 of the United States; or
> >
> > (2) 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.

"For purposes of 28 U.S.C. § 2254(d)(1), clearly established law as determined by [the Supreme]

Court 'refers to the holdings, as opposed to the dicta, of th[e] Court's decisions as of the time of the relevant state-court decision.'" *Yarborough v. Alvarado*, 541 U.S. 652, 660-61 (2004) (quoting *Williams v. Taylor*, 529 U.S. 362, 412 (2000)).

"[A] decision by a state court is 'contrary to' [the United States Supreme Court's] clearly established law if it 'applies a rule that contradicts the governing law set forth in [Supreme Court] cases' or if it 'confronts a set of facts that are materially indistinguishable from a decision of [the Supreme Court] and nevertheless arrives at a result different from [its] precedent.'" *Price v. Vincent*, 538 U.S. 634, 640 (2003) (quoting *Williams*, 529 U.S. at 405-406). A state court decision involves an "unreasonable application of" clearly established federal law "if the state court identifies the correct governing legal principle from the Supreme Court's decision but unreasonably applies that principle to the facts of the prisoner's case." *Williams*, 529 U.S. at 413. "State-court decisions are measured against [the Supreme Court's] precedents as of 'the time the state court renders its decision.'" *Cullen v. Pinholster*, 563 U.S. 170, 182 (2011) (quoting *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003)). Similarly, state court decisions are reviewed under § 2254(d) by reference to the facts that were before the state court at the time. *Id.* ("It would be strange to ask federal courts to analyze whether a state court adjudication resulted in a decision that unreasonably applied federal law to facts not before the state court.").

For factual issues, "the AEDPA precludes federal habeas relief unless the state court's decision on the merits was 'based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.'" 28 U.S.C. § 2254(d)(2) (2000). "[A] state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance." *Wood v. Allen*, 558 U.S. 290, 301 (2010).

Instead, factual determinations made by state courts carry a presumption of correctness and federal courts on habeas review are bound by them unless there is clear and convincing evidence to the contrary. 28 U.S.C. § 2254(e)(1) (2000). *Smith v. Cockrell*, 311 F.3d 661, 667 (5th Cir. 2002), *cert. dism'd,* 541 U.S. 913 (2004).

Under § 2254(d), once a federal constitutional claim has been adjudicated by a state court, a federal court cannot conduct an independent review of that claim in a federal habeas corpus proceeding. *Harrington v. Richter*, 562 U.S. 86, 102 (2011). Rather, it is for the federal court only to determine whether the state court's decision was contrary to or involved an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States, and whether the state court's decision was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. *Woodford*, 537 U.S. at 27 ("The federal habeas scheme leaves primary responsibility with the state courts for these judgments and authorizes federal-court intervention only when a state-court decision is objectively unreasonable."). This is true regardless of whether the state court rejected the claims summarily, or with a reasoned analysis. *Cullen*, 563 U.S. at 187 ("Section 2254(d) applies even where there has been a summary denial."). Where a claim has been adjudicated on the merits by the state courts, relief is available under § 2254(d) *only* in those situations "where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with" Supreme Court precedent. *Richter*, 562 U.S. at 102.

Whether a federal habeas court would have, or could have, reached a conclusion contrary to that reached by the state court on an issue is not determinative under § 2254(d). *Id.* ("even a strong case for relief does not mean that the state court's contrary conclusion was unreasonable."). In

addition, the correctness of the state court's decision is not determinative. As instructed by the Supreme Court in *Wiggins v. Smith*, 539 U.S. 510, 520 (2003), "[i]n order for a federal court to find a state court's application of our precedent 'unreasonable,' the state court's decision must have been more than incorrect or erroneous. . . . The state court's application must have been 'objectively unreasonable.'" (citations omitted); *see also Price*, 538 U.S. at 641 ("'[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the state court decision applied [a Supreme Court case] incorrectly. Rather, it is the habeas applicant's burden to show that the state court applied [that case] to the facts of his case in an objectively unreasonable manner.'") (quoting *Woodford v. Visciotti*, 537 U.S. 19, 24-25 (2002)). Moreover, it is the state court's ultimate decision that is to be reviewed for reasonableness, not its reasoning. *Neal v. Puckett*, 286 F.3d 230, 244-46 (5th Cir. 2002), *cert. denied*, 537 U.S. 1104 (2003); *Pondexter v. Dretke*, 346 F.3d 142, 148-9 (5th Cir. 2003), *cert. denied*, 541 U.S. 1045 (2004). A habeas petitioner can only overcome § 2254(d)'s bar "by showing that 'there was no reasonable basis'" for the state court's rejection of his claim(s). *Cullen*, 563 U.S. at 188 (quoting *Richter*, 562 U.S. at 98)).

V. Discussion – Limitations

Respondent first argues that all of Tatum's claims are barred by § 2244(d)'s one year statute of limitations. According to Respondent, because Tatum's conviction was final on or about June 9, 2009, when Tatum did not file a petition for writ of certiorari, and because Tatum's first state application for writ of habeas corpus was dismissed as improperly filed, the pendency of that application (from August 31, 2009, through April 15, 2015) did not toll the limitations period under § 2244(d)(2) and this § 2254 proceeding, filed in 2014, and all the claims raised in it, are untimely.

Tatum answers Respondent's limitations argument by reference to *McQuiggin v. Perkins*, ___ U.S. ____, 135 S. Ct. 1924 (2013), in which the Supreme Court held that actual innocence may provide a "gateway" for allowing consideration of otherwise time-barred claims. But, it is not the mere allegation of actual innocence that will open such a "gateway"; instead, a claimant seeking to avoid a limitations bar must present "'evidence of innocence so strong that a court cannot have confidence in the outcome of the trial." *Id.* at 1936. In other words, an "actual innocence" exception to the limitations bar will only be found if the evidence presented by the habeas petitioner convinces the court that "it is more likely than not that no reasonable juror would have convicted [the petitioner]." *Id.* at 1933.

The statute of limitations defense asserted by Respondent int his case is complicated by two things: (1) Tatum's filing of his "second" state application for writ of habeas corpus as a "supplement" to his first; and (2) Tatum's assertion, in his second state application for writ of habeas corpus, of a claim of actual innocence, which is predicated on a June 2013 affidavit from Charlie Ivory. It is Tatum's "supplement" argument that is the most straight-forward and compelling.

The record shows that Tatum filed what Respondent characterizes as Tatum's "first" state application for writ of habeas corpus on August 31, 2009. Before the Texas Court of Criminal Appeals took any action on that application, Tatum filed, on June 25, 2012, what Respondent characterizes as Tatum's "second" state application for writ of habeas corpus. That characterization, by both Respondent and the Texas state courts, supports Respondent's limitations argument and would necessitate a determination of whether Tatum's actual innocence claim could overcome the limitations bar under *McQuiggin*. But the characterization of Tatum's state court filings as two separate state applications for writ of habeas corpus is contrary to the contents of those filings, *see*

Application No. 1042008-B at 3 (Document No. 48-1 at 8) ("The current claims are 'supplemental' points to previously filed writ that is still pending and not yet resolved."), and contrary to Tatum's position all along in this case that the June 2012 state court filing was a supplement to, and continuation of, his first state application for writ of habeas corpus. This Court is not in a position to disagree with the state courts' characterization of Tatum's state court filings, but it can, and should, look at the substance of Tatum's state court filings in order to determine whether Tatum's claims are subject to § 2244(d)'s limitations bar. Considering the substance of those filings, in which it appears that Tatum was attempting to supplement his initial state application for writ of habeas corpus, not file a second or successive application, the undersigned concludes that equitable tolling, at the least, is available to save this § 2254 proceeding from the limitations bar.

Equitable tolling may, in rare and exceptional circumstances, be available to "preserve a [party's] claims when strict application of the statute of limitations would be inequitable." *Davis v. Johnson*, 158 F.3d 806, 810 (5th Cir. 1998) (quoting *Lambert v. United States*, 44 F.3d 296, 298 (5th Cir.1995). "Equitable tolling applies principally where [one party] is actively misled by the [other party] about the cause of action or is prevented in some extraordinary way from asserting his rights." *See Coleman v. Johnson*, 184 F.3d 398, 402 (5th Cir. 1999) (quoting *Rashidi v. American President Lines*, 96 F.3d 124, 128 (5th Cir. 1996)). The burden of proving rare and extraordinary circumstance in support of equitable tolling lies strictly with the petitioner. *Alexander v. Cockrell*, 294 F.3d 626, 629 (5th Cir. 2002).

Here, two circumstances, which were completely out of Tatum's control, warrant equitable tolling. First, the Texas Court of Criminal Appeals denied his state application for writ of habeas corpus on March 19, 2014, but then, *sua sponte*, over a year later, withdrew that denial and dismissed the application as improperly filed. Second, as set forth above, the Texas Court of

Criminal Appeals addressed and rejected on the merits all of Tatum's "supplemental" claims when it denied what it had characterized as Tatum's "second" state application for writ of habeas corpus. Absent that characterization and the *sua sponte* "dismissal" of the August 31, 2009 filing, this § 2254 proceeding, which was filed by Tatum on or about June 18, 2014, within three months of the Texas Court of Criminal Appeals' initial "denial" of his state application for writ of habeas corpus, would undoubtedly be timely. Thus, it is the state court's characterization of Tatum's state court filings, over which Tatum had no control, that affected Tatum's ability to file a timely § 2254 application. Under these circumstances, where the record shows that Tatum has pursued his claims diligently, both in this case and in the state courts, equitable tolling should be available to save Tatum's claims from the limitations bar in § 2244(d).

VI. Discussion – Exhaustion and Procedural Bar

Separate, but somewhat related to Respondent's limitations defense, Respondent maintains that many of Tatum's claims are unexhausted and procedurally barred from review in this proceeding. According to Respondent, because Tatum's first state application for writ of habeas corpus was "dismissed," the claims raised therein that were not included in Tatum's petition for discretionary review have not been fairly presented to the Texas Court of Criminal Appeals, and are therefore unexhausted and procedurally barred from review. Again, this argument is based on the Texas Court of Criminal Appeals' characterization of Tatum's state filings as two separate and successive state applications for writ of habeas corpus.

The record shows that Tatum raised three claims in his petition for discretionary review: that

his trial counsel was ineffective, that the trial court erred in allowing the prosecutor to ask "commitment questions" during voir dire, and that his appellate counsel was ineffective. Those claims, because they were presented to the Texas Court of Criminal Appeals in Tatum's petition for discretionary review, are exhausted. As for the claims raised by Tatum in his "first" state application for writ of habeas corpus that were not included in what was considered Tatum's "second" state application for writ of habeas corpus, such claims have not been fairly presented to, or considered by, the Texas Court of Criminal Appeals because the "first" application was dismissed. Therefore, such claims are unexhausted. As for whether such unexhausted claims should be considered procedurally barred from review in this § 2254 proceeding, it cannot be said with any confidence on this record whether a subsequent state application for writ of habeas corpus, if one were to be filed by Tatum, would be dismissed as an abuse of the writ. Moreover, the Texas Court of Criminal Appeals has already once, *sua sponte*, reconsidered its ruling in Tatum's state habeas proceeding(s). On that basis, Tatum's unexhausted claims will be reviewed herein on the merits.

VII. Discussion – Merits Review

Claims that were considered and rejected by the Texas Court of Criminal Appeals on the merits are subject to review under § 2254(d). Claims that were not adjudicated by the Texas Court of Criminal Appeals on the merits are reviewed *de novo*. *Garcia v. Davis*, No. 15-70039, ___ F. App'x ___, 2017 WL 3121977 (5th Cir. July 21, 2017) ("a federal court's review of an unexhausted claim is de novo").

A. Actual Innocence Claim (Claim 1)

In his first claim, Tatum maintains that the post-trial affidavit of Charlie Ivory, one of the State's main witnesses, establishes his "actual innocence" of the murder offense. Ivory states, in that June 30, 2013, affidavit, as follows:

> I was [one] of those present at the scene of the Offense the Applicant, KEVIN TERRELL TATUM was tried and convicted on, and can speak factually of the circumstances involved in the case. On September 28, 2005, I, the Complaint, and others visited a club called the SURF SHACK, located in Houston, Texas, where the incident occurred. I testified at TATUM's Trial, and was the chief State Witness. While at the SURF SHACK, I ran into TATUM, and due to a past dispute, I desired to settle the score by picking a fight with TATUM. I was accompanied with four (4) of my cousins, whom were urging I fight TATUM. Due to their back-up, I pursued TATUM to fight with him. TATUM sought to flee from me, and flee the scene, by getting into his car. While trying to leave the scene, TATUM was pursued and the Complainant, MOCK sought to open TATUM's car door to drag him out of the car to fight with me. MOCK did in fact have a handgun. I know this is fact because after MOCK was shot, we took the handgun from his person seeking to protect MOCK from being the aggressor and to make MOCK look innocent. We did not know, at the time, the shot to his legs were [sic] life threatening.
>
> Shortly after MOCK sought to pry open TATUM's car door, to drag him out of his vehicle, we heard GUNSHOTS. TATUM shot from his vehicle and again tried to escape. TATUM was clearly placed in a threatening situation, and sought to defend himself against an act of aggression on my part, which lead [sic] to MOCK seeking to pry TATUM's car door and drag jim out of his own vehicle, resulting into [sic] MOCK's demise.
>
> During trial, I did not testify to MOCK's possession of a handgun, nor did I testify to MOCK's threat to TATUM by seeking to drag him out of his vehicle, while having a gun in his possession. I intentionally misrepresented the facts because I was encouraged by the victim's [Mother] to lie on TATUM to make her son look innocent, and to make it appear that TATUM shot MOCK for no reason, to assure that TATUM receive[d] a life sentence. Having a relationship with MOCK and his Mother, and disliking TATUM, I went along with the lie, and testified untruthfully, intentionally omitting facts that would cast MOCK in a bad light. TATUM sought to avoid the entire incident by fleeing in his vehicle. There were other witnesses at Trial who testified truthfully to the fact that TATUM was acting in SELF DEFENSE. I even parked my vehicle at the exit, to assure that TATUM was trapped in, seeking to avoid any escape on TATUM's part. It was my car that TATUM hit while trying to flee. I did lie at trial, to make MOCK appear innocent, and that TATUM shot

> MOCK for no reason. I DID NOT testify truthfully as to provocation. Further, I did not disclose to the Jury that we got the gun that BONNIE [MOCK] had in his possession and threatened TATUM with, to make it appear that TATUM shot MOCK for no reason. The offense that TATUM was eventually accused and convicted of was a classic case of Self Defense against one waging a weapon at him, and seeking to drag him out of his own vehicle, for the purposes of threatening or actually causing harm. The sole purpose of seeking to drag TATUM out of the car was for TATUM and I to fight. I was with my cousins, and felt assured I would have prevailed against TATUM. I realize now I was very very wrong, and after changing my life and embracing Christianity, it is my desire to correct the wrong, and possibly assist in a wrongful murder conviction. It is my position TATUM was acting "LAWFULLY", in defense of his person, against the unwarranted attack and threat of MOCK, the Complainant.

(Document No. 43-1). As argued by Respondent, however, the "factual" contents of that affidavit do not *establish* Tatum's innocence of the murder offense.[1] In addition, Ivory's affidavit, standing alone, does not provide a legal basis for consideration of Tatum's actual innocence claim.

"Supreme Court jurisprudence does not support an independent claim for federal habeas relief based on an allegation of actual innocence." *Dowthitt v. Johnson*, 180 F.Supp.2d 832, 843 (S.D. Tex. 2000) (Atlas, J.). Instead, a claim of actual innocence may be a "'gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits.'" *Schlup v. Delo*, 512 U.S. 298, 316 (1995) (quoting *Herrera v. Collins*, 506 U.S. 390, 400 (1993)). To serve as such a "gateway", however, a petitioner must "support his allegations of

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[1] Given the uncontested evidence in the record that Tatum shot Mock and that Mock died of his injuries, the contents of Ivory's June 30, 2013, affidavit are only relevant to Tatum's claim of self-defense. However, a review of the record convinces the undersigned that the contents of Ivory's after-the-fact affidavit do not *establish* self-defense. Two uninterested witnesses testified at trial that Mock was not acting aggressively and was not threatening Tatum, and that neither saw anyone with a weapon other than Tatum. One of those witnesses also testified that no one was blocking Tatum's car from exiting the parking lot. That testimony, by those two uninterested witnesses, corroborated the testimony of Ivory at trial. In addition, Ivory's testimony at trial was consistent with his account to police following the shooting. As such, the contents of Ivory's June 30, 2013, affidavit cannot, on this record, be considered reliable evidence in support of Tatum's claim of self-defense, and the contents of that affidavit do not undermine confidence in the jury's verdict.

constitutional error with new reliable evidence–whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence – that was not presented at trial," and must demonstrate that "it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *Schlup*, 513 U.S. at 324, 327.

Here, Tatum's independent actual innocence claim is not cognizable in this § 2254 proceeding. In addition, to the extent Tatum's actual innocence claim and the contents of Charlie Ivory's affidavit are intended to buttress any of the other claims he raises in this § 2254 proceeding, the contents of that affidavit will be addressed in connection with Tatum's particular claims, below. As a stand-alone actual innocence claim, however, it is subject to dismissal.

B. Insufficient Evidence Claim (Claim 2)

In his next claim, premised somewhat on the contents of Charlie Ivory's June 30, 2013, affidavit, Tatum maintains that the evidence supporting his murder conviction is insufficient. According to Tatum, there is no evidence in the record to establish "(A) the absence of sudden passion; and (B) the absence of self defense," and the "evidence gives rise to 'equal probabilities and equal possibilities concerning a key element of the offense, i.e., whether or not [his] actions were 'lawful.'" § 2254 Application (Document No. 1-1 at 28).[2]

A claim of factual insufficiency is not cognizable in a federal habeas corpus proceeding because it is a product of state law and implicates no federal constitutional right(s). *Woods v.*

[2] Tatum's insufficient/no evidence claim was not raised in his direct appeal, in his petition for discretionary review, or in his "first" state application for writ of habeas corpus. It was included in Tatum's "second" habeas filing, but it was rejected by the state courts as not cognizable and procedurally barred. *See* Findings of Fact and Conclusions of Law at 3 (Document No. 48-2 at 45) ("With respect to [Tatum's] first ground for relied, a claim of insufficiency of the evidence does not state a claim for relief in habeas corpus. *Ex parte Easter,* 615 S.W.2d 719 (Tex. Crim. App. 1981). Though [Tatum] couches his argument as 'no evidence' he challenges the sufficiency of the evidence as to self-defense and sudden passion.").

Cockrell, 307 F.3d 353, 358 (5th Cir. 2002), *Wanzer v. Cockrell*, 2002 WL 31045971 (N.D. Tex. 2002). A claim of legal insufficiency, in contrast, does implicate federal due process guarantees, and is governed by the standard set forth in *Jackson v. Virginia*, 443 U.S. 307, 325 (1979). Under that standard, a petitioner must prove that no rational trier of fact could have found the existence of facts necessary to establish the offense beyond a reasonable doubt. *Id.* at 325-26. In applying the standard, all evidence is viewed in the light most favorable to the prosecution, *id.* at 319; *Bujol v. Cain*, 713 F.2d 112, 115 (5th Cir. 1983), *cert. denied*, 464 U.S. 1049 (1984), and all credibility choices and conflicts in the evidence are resolved in favor of the verdict. *United States v. Graves*, 669 F.2d 964, 969 (5th Cir. 1982).

Here, viewing the evidence in the light most favorable to the prosecution, there was sufficient evidence to support Tatum's murder conviction.[3] In addition, a review of the evidence shows there was sufficient evidence upon which the jury could have relied in rejecting Tatum's claim of self-defense. Critical to the jury in this case, as reflected in the jury notes sent to the Court during its deliberation, was whether Tatum was prevented from leaving the parking lot before the shooting. Kim Boyd, an uninterested witness, testified that there was no car in front of Tatum's at the exit. She also testified, as did several others, that Mock was not acting aggressively and his hands were in the air. Based on this evidence, taken in a light most favorable to the prosecution, a jury could reasonably have believed that Tatum was not acting in self-defense. *See e.g., Teague v. Stephens*, No. A-13-CA-444, SS, 2014 WL 5461414 at *9 (W.D. Tex. Oct. 27, 2014) (rejecting sufficiency of the evidence claim related to self-defense because the jury could have believed the defendant was

[3] A person commits murder under section 19.02(b)(2) when that person (1) intends to cause serious bodily injury and (2) commits an act clearly dangerous to human life that (3) causes the death of an individual. Tex. Penal Code § 19.02(b)(2)." *Cannon v. State*, 401 S.W.3d 907, 910 (Tex. App. – Houston [14th Dist.] 2013).

not justified in his belief that he "needed to use deadly force to defend himself").

As for the defense of "sudden passion," it was not presented to the jury and no finding was made relative thereto. Moreover, as argued by Respondent, "sudden passion" under Texas law relates to punishment, and not guilt-innocence. *See* TEX. PENAL CODE § 19.02(d) ("At the punishment stage of a trial, the defendant may raise the issue as to whether he caused the death under the immediate influence of sudden passion arising from an adequate cause. If the defendant proves the issue in the affirmative by a preponderance of the evidence, the offense is a felony of the second degree."). Because there was no issue submitted to the jury at punishment on the defensive mitigating issue of sudden passion, and because Tatum bore the burden on that issue at sentencing, Tatum cannot maintain a sufficiency of the evidence claim related thereto.

In all, there is sufficient evidence in the record to support the jury's verdict. Accordingly, Tatum's sufficiency of the evidence claim should be dismissed.

C. Ineffective Assistance of Counsel Claims (Claim 3)

In his next claim, Tatum maintains that his trial counsel, Fred Reynolds, was ineffective for: (a) failing to pursue a lesser included offense instruction; (b) failing to present mitigating evidence at the punishment stage on sudden passion; (c) failing to properly investigate the offense; and (d) failing to lodge proper objections during voir dire, the guilt-innocence stage, the punishment stage, and during closing arguments. Some of these ineffectiveness claims were considered and rejected by he Texas Court of Criminal Appeals, while others were not.[4] In any event, such claims are

[4] In Tatum's "second" state application for writ of habeas corpus, which was denied by the Texas Court of Criminal Appeals without written order on the findings of the trial court, Tatum alleged that his trial counsel was ineffective for: (1) failing to raise a sudden passion defense at sentencing; and (2) failing to investigate the offense because he did not: (a) hire an investigator to investigate damage to Tatum's car; (b) ask Deputy Ortiz about damage to Tatum's car and the absence of fingerprint testing; (c) request and obtain Tatum's cell phone records; (d) interview

governed by the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984).

In *Strickland*, the Supreme Court determined that relief is available if a petitioner can show that his counsel was deficient and that the deficiency prejudiced him to the extent that a fair trial could not be had. *Id.* at 687. Deficiency under *Strickland* is judged by an objective reasonableness standard, with great deference given to counsel and a presumption that the disputed conduct is reasonable. *Id.* at 687-689. The prejudice element requires a petitioner to "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A petitioner has the burden to prove both the deficiency and the prejudice prongs in order to be entitled to relief. *United States v. Chavez*, 193 F.3d 375, 378 (5th Cir. 1999).

Under *Strickland*, judicial scrutiny of counsel's performance is highly deferential and a strong presumption is made that "trial counsel rendered adequate assistance and that the challenged conduct was the product of reasoned trial strategy." *Wilkerson v. Collins*, 950 F.2d 1054, 1065 (5th Cir. 1992) (citing *Strickland*), *cert. denied*, 509 U.S. 921 (1993). In order to overcome the presumption of competency, a petitioner "must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." *Strickland*, 466 U.S. at 690. Under the prejudice prong of *Strickland*, a petitioner must be able to establish that absent his counsel's deficient performance the result of his trial would have been different, "and that counsel's errors were so serious that they rendered the proceedings unfair or the result unreliable." *Chavez*, 193 F.3d at 378; *Cullen*, 131 S.Ct. at 1403 ("[t]he benchmark for judging any claim of ineffectiveness must

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and/or subpoena the security guards that were at the scene; and (e) review Mock's medical records. All of Tatum's other ineffectiveness claims, raised by Tatum in his "first" state application for writ of habeas corpus, were dismissed, and were therefore not adjudicated on the merits.

be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result") (quoting *Strickland*, 466 U.S. at 686)). "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Strickland*, 466 U.S. at 691.

Constitutionally effective assistance of counsel under *Strickland* is not errorless counsel. The determination whether counsel has rendered reasonably effective assistance turns on the totality of facts in the entire record. Each case is judged in the light of the number, nature, and seriousness of the charges against a defendant, the strength of the case against him, and the strength and complexity of his possible defense. *Baldwin v. Maggio*, 704 F.2d 1325, 1329 (5th Cir. 1983), *cert. denied*, 467 U.S. 1220 (1984). The reasonableness of the challenged conduct is determined by viewing the circumstances at the time of that conduct. *Strickland*, 466 U.S. at 690-691. Counsel will not be judged ineffective only by hindsight. "The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." *Yarborough v. Gentry*, 540 U.S. 1, 124 S.Ct. 1, 6 (2003).

A. Lesser Included Offense

Tatum maintains, presumably in retrospect given the jury's rejection of his claim of self-defense, that his counsel should have requested a lesser included offense instruction on manslaughter and/or criminally negligently homicide.

In Texas, a person commits the offense of manslaughter "if he recklessly causes the death of an individual." TEX. PENAL CODE ANN. § 19.04 (West). A person commits the offense of criminally negligent homicide "if he causes the death of an individual by criminal negligence." TEX.

PENAL CODE ANN. § 19.05 (West). Both manslaughter and criminally negligent homicide are lesser included offenses of murder. TEX. CODE CRIM. PROC. Art. 37.09 ("An offense is a lesser included offense if: (1) it is established by proof of the same or less than all the facts required to establish the commission of the offense charged; (2) it differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property, or public interest suffices to establish its commission; (3) it differs from the offense charged only in the respect that a less culpable mental state suffices to establish its commission; or (4) it consists of an attempt to commit the offense charged or an otherwise included offense."). But, just because manslaughter and criminally negligent homicide are lesser included offenses of murder does not mean that a defendant is entitled to a lesser included offense instruction. Instead, a defendant is entitled to a jury instruction on a lesser included offense only if two requirements are met: "(1) the requested charge is for a lesser-included offense of the charged offense; and(2) there is some evidence that, if the defendant is guilty, he is only guilty of the lesser offense." *Guzman v. State*, 188 S.W.3d 185, 188 (Tex. Crim. App. 2006) (quoting *Hayward v. State*, 158 S.W.3d 476, 478 (Texas Crim. App. 2005)).

Here, the evidence in the record did not support the submission of an instruction on the lesser included offenses of manslaughter or criminally negligent homicide. Tatum testified in support of his self-defense claim. While he testified that he "blocked" out the actual shooting, he also testified that he loaded the gun and fired it intentionally because he "was fearing for [his] life." (Document No. 8-13 at 72, 88, 92). Nothing in the record suggested that Tatum acted recklessly or negligently. Moreover, his trial counsel stated in an affidavit he filed in the state habeas proceeding, the contents of which the state trial court found to be credible and true (Document No. 48-2 at 44), that Tatum understood the murder charge, and relayed to counsel "that his reaction was in self-defense."

(Document No. 48-1 at 85). Given Tatum's position on his claim of self-defense, as well as the absence of evidence in the record to support the characterization of his conduct as reckless and/or negligent, counsel had no basis, strategic or otherwise, for seeking a lesser included offense instruction. As such, under *Strickland*, this ineffectiveness claim has no merit.

B. Sudden Passion

Tatum's next complaint, about counsel's failure to pursue "sudden passion" as a mitigating defense at sentencing, was addressed and rejected by the Texas Court of Criminal Appeals in connection with Tatum's "second" state application for writ of habeas corpus. In so doing, the Texas Court of Criminal Appeals relied on the following findings and conclusions of the state trial court:

> 2. [Tatum] fails to show that Reynolds' conduct as [Tatum's] trial attorney fell below an objective standard of reasonableness and that, but for trial counsel's alleged deficient conduct, there is a reasonable probability that the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Hernandez v. State*, 726 S.W.2d 53, 57 (Tex. Crim. App. 1986) (adopting the *Strickland* standard in Texas); and *Narvaiz v. State*, 840 S.W.2d 415, 434 (Tex. Crim. App. 1992) (defining two-part *Strickland* standard).
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> 3. [Tatum] has failed to show that if he had requested a jury instruction on "sudden passion" that the trial court would have erred in denying the instruction. *See Ex parte White*, 160 S.W.3d 46 (Tex. Crim. App. 2004) (to successfully assert that trial counsel's failure to object amounted to ineffective assistance, an applicant must show that the trial judge would have committed error in overruling such an objection).
>
> 4. Assuming *arguendo* that counsel was deficient for failing to request a sudden passion instruction, [Tatum] cannot show he was harmed. *Wooten v. State*, 400 S.W.3d 601, 609 (Tex. Crim. App. 2013) (It is highly unlikely that a jury that had already rejected an applicant's claim that he reasonably believed that deadly force was immediately necessary to defend himself would nevertheless find in his favor on the issue of sudden passion).
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> 5. Furthermore, [Tatum] fails to show that the record supports an inference: 1) that [Tatum] in fact acted under the immediate influence of a passion such as terror, anger, range [sic], or resentment; 2) that his sudden passion was in fact induced by some provocation by the deceased or another acting with him, which provocation

> would commonly produce such a passion in a person of ordinary temper; 3) that [Tatum] committed the murder before regaining his capacity for cool reflection; and 4) that a causal connection existed "between the provocation, passion, and homicide." *McKinney v. State*, 179 S.W.3d 565, 569 (Tex. Crim. App. 2005).
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> 6. The totality of the representation afforded [Tatum] was sufficient to protect his right to reasonably effective assistance of trial counsel in the primary case.

Findings of Fact and Conclusions of Law at 3-5 (Document No. 48-2 at 45-47).

"In Texas, if a defendant is convicted of murder, he may argue at the punishment phase of the trial that he caused the death of the victim while under the immediate influence of sudden passion arising from an adequate cause. If a defendant establishes he was under the influence of sudden passion, the offense level is reduced from a first-degree felony to a second-degree felony. The maximum term of imprisonment for a second degree felony is 20 years." *Bradshaw v. Dir., TDCJ-CID*, No. 5:11CV49, 2015 WL 364239, at *7 (E.D. Tex. Jan. 23, 2015). Here, as determined by the Texas Court of Criminal Appeals in connection with Tatum's "second" state application for writ of habeas corpus, it is unlikely that a sudden passion instruction, if one had been requested by counsel, would have been warranted. That determination, which was based on state law and therefore not reviewable herein, *Creel v. Johnson*, 162 F.3d 385, 390-91 (5th Cir. 1998) (federal courts defer to the state courts "interpretation of its law for whether a lesser-included-offense instruction is warranted"), fully supports the Texas courts' determination that counsel's performance was reasonably effective. Under § 2254(d) and the doubly deferential standard of review for ineffective assistance of counsel claims,[5] no relief is available to Tatum on this claim.

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[5] When an ineffective assistance of counsel claim has been adjudicated on the merits by the state courts, federal habeas review is "doubly deferential," with the court taking a "highly deferential look at counsel's performance" under *Strickland*, and then imposing a second layer of deference under § 2254(d). *Cullen*, 563 U.S. at 190. Under § 2254(d), therefore, the question is not whether counsel's actions were reasonable," but "whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard." *Richter*, 562 U.S. at 105. As for *Strickland's* prejudice

C. Investigation

Tatum next contends that his trial counsel was ineffective for failing to investigate the offense, alleging, in particular, that counsel failed to: (1) hire an investigator; (2) investigate that damage to Tatum's car; (3) ask Deputy Ortiz about the existence of damage to his car and the absence of fingerprint testing; (4) request and obtain Tatum's cell phone records; (5) ask who Mark Moore was; (6) interview or subpoena Sergeant Fields, who was first officer to speak to Charlie Ivory after the offense; (7) interview or subpoena Deputy Sternberg; (8) interview Dr. Brad Scott, Mock's attending physician at the time of his death; (9) ask any questions of Detective Yvonne Cooper; (10) interview or subpoena any of the security guards that were at the scene; and (11) review Mock's medical records to determine whether the 7 minute delay in his treatment following the shooting caused or contributed to his death.

None of these allegations of ineffectiveness are supported by any factual allegations from which it could be determined that counsel's performance was deficient or that Tatum was prejudiced thereby. Tatum maintains that his counsel should have investigated the damage to his car that occurred when he attempted to flee the parking lot. But Tatum testified at trial that he was able to maneuver out of the parking spot he was in without hitting or scratching any other cars, and made no mention of there being any damage to his car. (Document No. 8-13 at 104-106). And, Officer

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prong, "the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently." *Richter*, 562 U.S. at 111. Instead, the question is whether "fairminded jurists could disagree that the state court's decision conflicts with [the Supreme Court's] precedents. *Id.* at 102. If "'fairminded jurists could disagree' on the correctness of the state court's decision," § 2254(d)(1) precludes relief. *Id.* at 101. In contrast, where there is no "possibility that fairminded jurists could disagree" and fairminded jurists would uniformly conclude that the state court's decision is contrary to, or based on an unreasonable application of clearly established Federal law, relief is available under § 2254(d)(1). *Id* at 102.

Ortiz testified that there was no damage to Tatum's car. (Document No. 8-12 at 107).[6] Similarly, Tatum cannot show that counsel's failure to obtain his cell phone records had any effect on any issue in the case. Both Charlie Ivory and Tatum testified that they had had several hostile telephone conversations prior to September 28, 2005. Tatum has not alleged how his cell phone records would have added anything favorable for the defense. As for the witnesses Tatum believes his counsel should have interviewed and/or subpoenaed (Mark Moore, Sergeant Fields, Deputy Sternberg; Dr. Brad Scott, or the un-named security guards), Tatum has neither alleged nor offered any evidence that any of those witnesses had evidence favorable to the defense. As for counsel's failure to question Detective Yvonne Cooper at trial, Tatum has not alleged what counsel should have asked her, particularly given Cooper's testimony during the State's case in chief that the witnesses' accounts were all generally consistent. (Document No. 8-12 at 116). Finally, with regard to counsel's alleged failure to review Mock's medical records, while Tatum asserts that a 7 minute delay in providing Mock with treatment could have contributed to his death, Tatum does not allege or show how that would have been favorable for the defense. The gunshot wound damaged Mock's femoral artery. A review of the medical records, standing alone, would not have provided counsel with a viable basis for challenging the murder charge against Tatum.

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[6] Officer Ortiz testified directly and unequivocally about this as follows:

> Q: All right. Did you see any other – any signs of the vehicle being under attack of any kind, like, maybe not bullet holes, but someone throwing rocks or bottles or anything like that on the vehicle? Did you notice any of that?
> A: I didn't see any damage to the vehicle.
> Q: Nothing?
> A: Nothing.

(Document No. 8-12 at 107).

In all, Tatum's complaints about counsel's failure to investigate the case are unsupported by any factual allegations or evidence that could show that counsel's performance was deficient, or that Tatum was prejudiced thereby. As such, under *Strickland*, no relief is available to Tatum on his failure to investigate ineffective assistance of counsel claims.

D. Objections

Over several pages of his Memorandum of Law (Document No. 1-4 at 18-22), Tatum raises a multitude of complaints about counsel's failure to object during voir dire, the guilt-innocence stage, and during the punishment phase. With respect to voir dire, Tatum complains about counsel's failure to object to: (1) the prosecutor's comments about defense counsel's ability; (2) the prosecutor injecting his own race into the case; (3) the prosecutor's comments on presumption of innocence; (4) the prosecutor commenting on the facts of the case; (5) a venireperson commenting on police "shooting people down;" (6) a venireperson commenting on friend being killed because he retreated; (7) a venireperson's comment that person was guilty if he was arrested and tried; and (7) the prosecutor's improper commitment questions. As for the guilt-innocence stage, Tatum complains about his counsel's failure to object to: (1) the chain of custody for the recovered bullet fragments; (2) the prosecutor asking Tatum to demonstrate how he shot Mock; and (3) the prosecutor's comments about drug dealers, gang members, drive-by shootings and street justice. Finally, with regard to the punishment hearing, Tatum faults his counsel for failing to object to: (1) Mock's mother's speculation that Tatum knew who she was when he saw her after the offense; (2) the prosecutor badgering Tatum about the extraneous offense; (3) the introduction of the extraneous offense; (4) the prosecutor's comments on the weight of the evidence; (5) the prosecutor stating that he was the "Chief" prosecutor when arguing against probation; (6) the prosecutor's comments

bolstering the testimony of Charlie Ivory; and (7) the prosecutor's comments about drugs and Ivory's drug conviction.

All of these complaints about counsel's failure to object were made by Tatum generally, without any specific argument or reference as to how the trial or Tatum's self-defense claim was affected thereby. Given the general, conclusory nature of these ineffectiveness claims, coupled with a review of the entire record in connection with counsel's self-defense strategy, the undersigned concludes that none of the objections Tatum believes his counsel should have made had any effect on the jury's verdict or the sentence Tatum received. As aptly argued by Respondent, Tatum has not shown that counsel's performance during voir dire resulted in a partial jury; has not shown that counsel's performance at trial resulted in a verdict that is not worthy of confidence; and has not shown that counsel's performance at sentencing affected the length of his sentence. In all, under *Strickland*, no relief is available to Tatum on his failure-to- object ineffective assistance of counsel claims.

D. Ineffective Assistance of Appellate Counsel Claim (Claim 4)

In his next claim, Tatum maintains that his appellate counsel, Patti Sedita, was ineffective for: (a) filing an *Anders* brief; and (2) failing to raise challenges to the sufficiency of the evidence, trial counsel's effectiveness, and the State's inadequate and unfair investigation of the offense. Tatum raised these ineffective assistance of appellate counsel claims in his "second" state application for writ of habeas corpus, which was rejected by the Texas Court of Criminal Appeals on the merits. In so doing, the Texas Court of Criminal Appeals relied on the following conclusions of law reached by the state trial court on Tatum's ineffective assistance of appellate counsel claims:

> 7. [Tatum] fails to show that appellate counsel's conduct fell below an objective standard of reasonableness and that, but for trial counsel's alleged deficient conduct,

> there is a reasonable probability that the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Hernandez v. State*, 726 S.W.2d 53, 57 (Tex. Crim. App. 1986) (adopting the *Strickland* standard in Texas); and *Narvaiz v. State*, 840 S.W.2d 415, 434 (Tex. Crim. App. 1992) (defining the two-part *Strickland* standard).
>
> 8. The totality of the representation afforded [Tatum] was sufficient to protect his right to reasonably effective assistance of appellate counsel in the primary case.

Findings of Fact and Conclusions of Law at 5 (Document No. 48-2 at 47).

Claims of ineffective assistance of appellate counsel are generally assessed under the same two part *Strickland* deficiency and prejudice standard as claims of ineffective assistance of trial counsel. *Williams v. Collins*, 16 F.3d 626, 635 (5th Cir.), *cert. denied*, 512 U.S. 1289 (1994). With respect to *Strickland's* deficiency prong, however, "[o]n appeal, effective assistance of counsel does not mean counsel who will raise every nonfrivolous ground of appeal available." *Green v. Johnson*, 160 F.3d 1029, 1043 (5th Cir. 1998), *cert. denied*, 525 U.S. 1174 (1999); *see also Ellis v. Lynaugh*, 873 F.2d 830, 840 (5th Cir.) ("The Constitution does not require appellate counsel to raise every nonfrivolous ground that might be pressed on appeal."), *cert. denied*, 493 U.S. 970 (1989). Rather, "[a]ppellate counsel is obligated to only raise and brief those issues that are believed to have the best chance of success." *Rose*, 141 F.Supp.2d at 704-705. "[O]nly when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome." *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1985) (cited with approval in *Smith v. Robbins*, 528 U.S. 259, 288 (2000)). As for *Strickland's* prejudice prong, "[p]rejudice results if the attorney's deficient performance would likely render either the defendant's trial fundamentally unfair or the conviction and sentence unreliable." *United States v. Dovalina*, 262 F.3d 472, 474 (5th Cir. 2001).

Here, the record shows that Sedita filed an *Anders* brief, raising two claims (sufficiency of the evidence and ineffective assistance of trial counsel) that she determined were not "arguable

grounds for reversal." (Document No. 8-2). Tatum filed a *pro se* Brief, raising claims of ineffective assistance of trial counsel, ineffective assistance of appellate counsel, and trial court error in the allowance of improper commitment questions during voir dire. In a short, essentially one-page Opinion, Texas' Fourteenth Court of Appeals found that "the appeal [was] frivolous and without merit and that there [was] no reversible error." *Tatum v. State*, No. 01-06-01190 (Document No. 8-26).

Because the Texas Court of Appeals considered the validity of the *Anders* Brief that was filed, and reviewed the claims Tatum raised in his *pro se* Brief– the same claims Tatum contends Sedita should have raised for him on appeal – the Texas Court of Criminal Appeals' rejection of Tatum's ineffective assistance of appellate counsel claims is not contrary to or based on an unreasonable application of *Strickland* and its appellate-context progeny. Clearly, if the Texas Court of Appeals considered and rejected the claims Tatum believes his appellate counsel should have raised, Tatum cannot show that he was prejudiced by appellate counsel's performance. Consequently, under § 2254(d), no relief is available to Tatum on his ineffective assistance of appellate counsel claim.

E. Due Process/Inadequate Investigation Claim and Suppression of Evidence Claim (Claims 5 and 6)

In his next claim, Tatum maintains that the State conducted an inadequate investigation of the offense, failing to test the door handle of his car for Mock's prints, and failing to investigate and determine whether there was any damage to his car from his attempts to flee the parking lot. He also claims that the State suppressed evidence that "Mock grabbed the driver's side door, attempting to drag him out," and he (Tatum) hit Ivory's car while "attempting to escape." § 2254 Application (Document No. 1) at 8.

Defendants do not enjoy a general constitutional right to a proper or thorough investigation of the offense with which they are charged. Rather, for a due process violation to arise, the police investigation must have been so inadequate that it: (1) was "tantamount to a suppression of relevant evidence", *Owens v. Foltz*, 797 F.2d 294, 296 (6th Cir. 1986), or (2) resulted in an identification procedure that was "'so unnecessarily suggestive and conducive to irreparable mistaken identification'" of the defendant as the perpetrator. *Foster v. California,* 394 U.S. 440, 442 (1969) (quoting *Stovall v. Denno*, 388 U.S. 293, 302 (1967)). When the inadequacy of the police investigation is premised on "nothing more than negligence on the part of the police investigators" and there is no indication of "any bad faith on [the part of investigators] in failing to preserve [ ] evidence," a federal due process claim has not been stated. *Holdren v. Legursky*, 16 F.3d 57, 60 (4th Cir.), *cert. denied*, 513 U.S. 831 (1994).

Here, Tatum does not allege, and there is no evidence to support his claim, that the police's investigation of the offense was conducted in bad faith. The investigating officers testified at trial about their investigation at the scene, their interviews with witnesses, and their examination of Tatum's vehicle. Deputy Ortiz, in particular, testified that there were no bullet holes or broken glass in Tatum's car, no shots inside the vehicle, and no damage to the vehicle at all. (Document No. 8-12 at 102-107). Tatum has not shown that the police decided, in bad faith, not to test the door handle for fingerprints. No relief is therefore available on Tatum's due process/improper investigation claim (claim 5).

As for his suppression of evidence claim, it fails because there is no evidence that any favorable fingerprint or vehicle damage evidence existed. In *Brady v. Maryland*, 373 U.S. 83, 87 (1963), the United States Supreme Court held that "suppression by the prosecution of evidence

favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87. In order to prevail on a suppression of evidence claim, however, it must be shown that evidence was actually suppressed by the prosecution and that the suppressed evidence was material. *Strickler v. Greene*, 527 U.S. 263, 281-282 (1999) ("There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued."). Evidence is material under *Brady* if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985).

Here, there is no evidence in the record to support Tatum's claim that favorable evidence was withheld. Indeed, Tatum's own allegations indicate that there was no fingerprint testing done. In addition, Tatum points to no evidence (only his own, after-the fact assertions) that there was any damage to his car. As such, his suppression of evidence claim (claim 6) also fails on the merits.

F. Improper Commitment Questions during Voir Dire (Claim 7)

In his final claim, Tatum maintains that he was denied due process and a fair trial by virtue of the prosecutor's "commitment" questions during voir dire. According to Tatum, the prosecutor improperly asked prospective jurors to promise that they would convict Tatum if it was proven, beyond a reasonable doubt, that Tatum committed the offense.

Tatum unsuccessfully raised this claim in his *pro se* appellate brief and in his petition for discretionary review. Based on the state courts' rejection of this claim, ostensibly on state law grounds that are not reviewable in this § 2254 proceeding, *Estelle v. McGuire*, 502 U.S. 62, 67–68, (1991) ("we reemphasize that it is not the province of a federal habeas court to reexamine state-court

determinations on state-law questions"), and the absence of any evidence or credible allegation that the commitment questions had any affect on the jury's verdict, herein, Tatum has not alleged, or established, a violation of his federal constitutional rights attendant to the commitment questions he complains of herein. As such, no relief is available on this claim.

VIII. Conclusion and Recommendation

Based on the foregoing and the conclusion that no relief is available to Tatum on the merits of any of his claims, the Magistrate Judge RECOMMENDS that Respondent's Motion for Summary Judgment (Document No. 47) be GRANTED, that Petitioner's Application and Supplemental Application for Writ of Habeas Corpus (Document Nos. 1 & 43) be DENIED and that this § 2254 proceeding be DISMISSED WITH PREJUDICE on the merits.

The Clerk shall file this instrument and provide a copy to all counsel and unrepresented parties of record. Within fourteen (14) days after being served with a copy, any party may file written objections pursuant to 28 U.S.C. § 636(b)(1)(C), FED. R. CIV. P. 72(b), and General Order 80-5, S.D. Texas. Failure to file objections within such period shall bar an aggrieved party from attacking factual findings on appeal. *Thomas v. Arn*, 474 U.S. 140, 144-145 (1985); *Ware v. King*, 694 F.2d 89, 91 (5th Cir. 1982), *cert. denied*, 461 U.S. 930 (1983); *Nettles v. Wainwright*, 677 F.2d 404, 408 (5th Cir. 1982) (en banc). Moreover, absent plain error, failure to file objections within the fourteen day period bars an aggrieved party from attacking conclusions of law on appeal. *Douglass v. United Services Automobile Association,* 79 F.3d 1415, 1429 (5th Cir. 1996). The original of any

written objections shall be filed with the United States District Clerk.

Signed at Houston, Texas, this 5th day of September, 2017.

Frances H. Stacy
United States Magistrate Judge

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