[United States Court of Appeals
Fifth Circuit
FILED
January 22, 2020
Lyle W. Cayce
Clerk]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT COURT

No. 18-10306

JAMES CHRISTOPHER NORTH,
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 Northern District of Texas
USDC No. 1:16-CV-189

Before HIGGINBOTHAM, JONES, and DUNCAN, Circuit Judges.

PER CURIAM:*

Appellant James North, a Texas state prisoner convicted of murder, seeks federal habeas relief under 28 U.S.C. § 2254. The district court dismissed North's habeas application on the merits without deciding whether it was barred by the statute of limitations. We granted a Certificate of Appealability on one of North's four claims. We now hold that North's application was time-barred and that he is not entitled to equitable tolling. The district court's judgment is affirmed.

I.

A jury convicted Appellant James North of murder in 2011 after he shot and killed a man during a road-rage incident in Abilene, Texas.[1] North's conviction became final on December 16, 2014. On November 6, 2015, North filed a habeas corpus petition in state court raising four claims of ineffective assistance of counsel. On January 6, 2016, the Texas Court of Criminal Appeals ("TCCA") dismissed North's petition for failure to comply with Texas Rule of Appellate Procedure 73.1(f), which requires applicants to "include a certificate . . . stating the number of words in" their supporting memoranda.[2] On January 14, North filed a motion for reconsideration, which the TCCA denied on January

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

[1] *See North v. State*, No. 11-11-00338-CR, 2014 WL 272455, *1–2 (Tex. App.—Eastland Jan. 24, 2014, pet. ref'd) (unpublished).

[2] TEX. R. APP. P. 73.1(f).

29. Meanwhile, on January 28, 2016, North filed a new state habeas petition raising the same arguments as the first. On September 21, 2016, the TCCA denied the second petition without written order.

Following the completion of state-court proceedings, North filed a counseled § 2254 petition in the federal district court on October 26, 2016. The district court denied the petition on the merits on March 2, 2018 without deciding whether it was timely filed. North appealed and moved for a Certificate of Appealability ("COA") on two of his four ineffective-assistance claims. This Court granted a COA on the sole issue of whether North was prejudiced by his trial attorneys' failure to object to an alternate juror's presence in the jury room during deliberations.

II.

On appeal from the dismissal of a § 2254 petition, we review the district court's findings of fact for clear error and its conclusions of law *de novo*, "applying the same standard of review to the state court's decision as the district court."[3] Pursuant to the Antiterrorism and Effective Death Penalty Act ("AEDPA"), a federal court may not grant habeas relief unless the state-court judgment rejecting the petitioner's claims (1) "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) "was based on an

[3] *Martinez v. Johnson*, 255 F.3d 229, 237 (5th Cir. 2001).

unreasonable determination of the facts in light of the evidence presented in the State court proceeding."[4]

AEDPA imposes a one-year statute of limitations for filing a federal habeas petition, starting from the date a petitioner's conviction becomes final. [5] This one-year period is tolled for "[t]he 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."[6] In addition, the limitations period may be equitably tolled if the petitioner shows "(1) that he had been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing."[7]

III.

The State contends that North's § 2254 application is time-barred because it was filed more than one year after his conviction became final and does not meet the requirements for statutory or equitable tolling. In the State's view, North's first state-court habeas petition did not toll AEDPA's limitations period because it was not properly filed. Further, North is not entitled to equitable tolling because he failed to pursue his rights diligently and

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[4] 28 U.S.C. § 2254(d)(1)–(2).

[5] *Id.* § 2244(d)(1).

[6] *Id.* § 2244(d)(2); *see Carey v. Saffold*, 536 U.S. 214, 219–20 (2002) (A state post-conviction application remains "pending . . . until the application has achieved final resolution through the State's post-conviction procedure.").

[7] *Mathis v. Thaler*, 616 F.3d 461, 474 (5th Cir. 2010) (internal quotation marks and alterations omitted) (quoting *Holland v. Florida*, 560 U.S. 631, 649 (2010)).

identifies no extraordinary circumstance that prevented him from timely filing.

North counters that his initial state habeas application was properly filed on November 6, 2015, and remained pending until September 21, 2016, thus tolling the limitations period for 320 days and making his federal application timely with five days to spare. North further argues that even if statutory tolling does not apply, he is entitled to equitable tolling because the state courts misled him into believing his application would be considered on the merits. Alternatively, North argues that equitable tolling should apply because his state habeas counsel was ineffective for failing to include the certificate of compliance required by Rule 73.1(f).

We agree with the State. It is uncontested that AEDPA's one-year statute of limitations began to run when North's conviction became final on December 16, 2014. North filed his federal petition 680 days later, long after the limitations period had expired. True, North's initial state-court petition was filed within the limitations period. However, it was not "*properly* filed" because it failed to comply with Texas Rule of Appellate Procedure 73.1's word-count requirement.[8] Thus, it did not toll the statute of limitations. As the Supreme Court has stated, a § 2254 application is properly filed only "when its delivery and acceptance are in compliance with the applicable laws and rules governing filings," including precise requirements for "the form of the document."[9] Accordingly, this Court has affirmed that

[8] 28 U.S.C. § 2244(d)(2) (emphasis added).
[9] *Artuz v. Bennett*, 531 U.S. 4, 8 (2000).

"a 'properly filed application' for § 2244(d)(2) purposes is one that conforms with a state's applicable procedural filing requirements."[10] Indeed, we have specifically recognized that "compliance with the requirements of Rule 73.1 is a prerequisite to consideration of the merits of an applicant's claims."[11] Thus, a petition dismissed by the TCCA for noncompliance with Rule 73.1 is not properly filed and does not toll AEDPA's limitations period.[12] By the time North properly filed his second state habeas petition on January 28, 2016, well over a year had passed since his conviction became final.

North attempts to distinguish our precedents by arguing that his Rule 73.1 violation only pertained to the memorandum accompanying his application, not the habeas application itself. He cites no authority for drawing such a distinction. Moreover, by its own terms, Rule 73.1(f) applies to *all* "computer-generated memorand[a], including any additional memoranda" filed in support of a petition.[13] In any event, the Supreme Court has indicated—and this Court has held in an unpublished opinion—that even if a state court's grounds for dismissing a habeas petition as

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[10] *Mathis*, 616 F.3d at 471 (quoting *Villegas v. Johnson*, 184 F.3d 467, 470 (5th Cir. 1999)); *see Wilson v. Cain*, 564 F.3d 702, 704 (5th Cir. 2009).

[11] *Broussard v. Thaler*, 414 F. App'x 686, 688 (5th Cir. 2011) (unpublished) (per curiam).

[12] *Id.*; *see also Davis v. Quarterman*, 342 F. App'x 952, 953 (5th Cir. 2009) (unpublished) (per curiam) (holding that an application "not filed in conformity with [Rule] 73.1 . . . was not a 'properly filed' state application" and "did not toll the limitation period").

[13] TEX. R. APP. P. 73.1(f).

improperly filed are "debatable," the dismissal is nonetheless "dispositive."[14]

Even if we were to assume that North's first state application did toll the limitations period until it was dismissed on January 6, 2016 and, further, that statutory tolling commenced again with North's motion for reconsideration on January 14, 2016, his federal petition would *still* be three days late.[15] North's attempt to avoid this result with the further assumption that his first state application remained "pending" after the January 6 dismissal is unsupported by any authority.

Because North's claim for statutory tolling fails, his only hope is equitable tolling. Here, too, his arguments are unavailing. Equitable tolling is available only where the petitioner can show "(1) that he had been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing."[16] First, North's

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[14] *Koumjian v. Thaler*, 484 F. App'x 966, 968 (5th Cir. 2012) (unpublished) (per curiam) (citing *Carey v. Saffold*, 536 U.S. 214, 226 (2002) and *Pace v. DiGuglielmo*, 544 U.S. 408, 417 (2005)).

[15] North filed his federal application 680 days after his conviction became final. He argues that the limitations period was tolled from the filing of his first state habeas application on November 6, 2015 to the dismissal of his second state habeas application on September 21, 2016, a period of 320 days. This overlooks the period between the dismissal of his first application on January 6, 2016 and the filing of his second application on January 28, 2016, a period of 22 days. That reduces the tolling to 298 days, and 680 – 298 = 382 days (17 days late). Reducing the gap from 22 days to 8 days by crediting the motion for reconsideration yields 312 days of tolling, and 680 – 312 = 368 (3 days late).

[16] *Mathis*, 616 F.3d at 474 (internal quotation marks and alterations omitted).

eleven-month delay in filing his initial state application weighs against a finding of diligence.[17] Second and more importantly, North cannot point to any "extraordinary circumstance" that prevented timely filing.[18]

This Court has recognized that "extraordinary circumstances exist where a petitioner is misled by an affirmative, but incorrect, representation of a district court on which he relies to his detriment."[19] North argues that the state trial court and the TCCA misled him to believe "that his state habeas application would be considered on the merits"—the trial court by declining to decide on timeliness grounds, and the TCCA by its inconsistent application of Rule 73.1. Because the TCCA sometimes exercises jurisdiction despite Rule 73.1 deficiencies, North argues, it "lulled [him] into inaction" by permitting him to draw the assumption that a filing error would not result in dismissal.[20] Even assuming that incorrect representations of a state habeas court, rather than a federal district court, can excuse a habeas petitioner's late filing, North's claim fails because he identifies no incorrect statement by any court on which he might

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[17] *See, e.g.*, *Stroman v. Thaler*, 603 F.3d 299, 302 (5th Cir. 2010) (affirming the denial of equitable tolling where, *inter alia*, the petitioner had waited seven months to file his state application).
[18] *See Mathis*, 616 F.3d at 474–75.
[19] *Cousin v. Lensing*, 310 F.3d 843, 848 (5th Cir. 2002) (citing *United States v. Patterson*, 211 F.3d 927, 931–32 (5th Cir. 2000)).
[20] *See Ex parte Dotson*, No. WR–84,802–01, 2016 WL 1719367, at *1 n.1 (Tex. Crim. App. Apr. 27, 2016) (unpublished) (per curiam) ("[T]his application does not comply with . . . TEX. R. APP. P. 73.1(f). However, because the record in this case is clear, we will exercise our jurisdiction and grant relief.").

have relied. The trial court was at liberty to decide on the merits rather than on limitations grounds,[21] and dismissals by the TCCA for violations of Rule 73.1, if not universal, are at least routine.[22]

Essentially, North's argument is that an improperly filed state habeas application tolls the limitations period unless and until the state court notifies the petitioner of the filing deficiency. This view would write the "properly filed" condition out of the statute and run afoul of Supreme Court precedent stressing that petitioners must satisfy both the "pending" and "properly filed" requirements.[23] Indeed, this Court has held that even "if a state court mistakenly accepts and considers the merits of a state habeas application in violation of its own procedural

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[21] *Saffold*, 536 U.S. at 225–26 ("A court will sometimes address the merits of a claim that it believes was presented in an untimely way: for instance, where the merits present no difficult issue; where the court wants to give a reviewing court alternative grounds for decision; or where the court wishes to show a prisoner (who may not have a lawyer) that it was not merely a procedural technicality that precluded him from obtaining relief.").

[22] *See, e.g.*, *Ex parte Blacklock*, 191 S.W.3d 718, 719 (Tex. Crim. App. 2006) (dismissing a habeas application because "the form was not filled out as required by the appellate rules," specifically Rule 73.1(c)); *see also Dittman v. Davis*, No. 3:16-cv-2339-C-BN, 2017 WL 4535286, at *3 (N.D. Tex. Sept. 21, 2017) (quoting *Broussard*, 414 F. App'x at 688) ("Even if the state trial court (or the convicting court) considers the merits of the state-habeas petition, the CCA may still dismiss that petition under Rule 73.1 . . . , as the CCA 'makes the final decision whether the application complies with all filing requirements and whether to grant or deny the application.'").

[23] *See Artuz*, 531 U.S. at 9.

filing requirements . . . , that habeas application is not 'properly filed.'"[24]

Nor is North entitled to equitable tolling on the ground that his state habeas counsel was ineffective for failing to include the certificate of compliance required by Rule 73.1(f). As the Supreme Court has explained, only "abandonment" by counsel, not mere "attorney negligence" or "attorney error," can support equitable tolling.[25] North's allegation is but a "'garden variety claim of excusable neglect' [that] does not warrant equitable tolling."[26]

IV.

In sum, North's federal habeas application is time-barred. Whereas the district court dismissed North's application on its merits without considering timeliness, we reach the same conclusion on timeliness grounds without addressing the merits. The judgment of the district court is affirmed.

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[24] *Larry v. Dretke*, 361 F.3d 890, 895 (5th Cir. 2004).
[25] *Maples v. Thomas*, 565 U.S. 266, 282 (2012).
[26] *Holland*, 560 U.S. at 651–52 (quoting *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990)).

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Fifth Circuit
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Attest: Lyle W. Cayce
Clerk, U.S. Court of Appeals,
Fifth Circuit

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT COURT

No. 18-10306

D.C. Docket No. 1:16-CV-189

JAMES CHRISTOPHER NORTH,
Petitioner - Appellant

v.

LORIE DAVIS, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,
Respondent – Appellee

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

Before HIGGINBOTHAM, JONES, and DUNCAN, Circuit Judges.

JUDGMENT

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is affirmed.

IT IS FURTHER ORDERED that each party bear its own costs on appeal.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
ABILENE DIVISION

JAMES CHRISTOPHER NORTH	)	
Petitioner,	)	
v.	)	CIVIL ACTION NO. 1:16-CV-189-C
LORIE DAVIS, Director, Texas Department of Criminal Justice, Correctional Institutions Division,	)	
Respondent.	)	

JUDGMENT

IT IS ORDERED, ADJUDGED, AND DECREED that the above-styled and -numbered cause is dismissed with prejudice.

Dated March 2, 2018.

s/ Sam R. Cummings
SAM R. SUMMINGS
Senior United States
District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
ABILENE DIVISION

JAMES CHRISTOPHER NORTH	)	
Petitioner,	)	
v.	)	CIVIL ACTION NO. 1:16-CV-189-C
LORIE DAVIS, Director, Texas Department of Criminal Justice, Correctional Institutions Division,	)	
Respondent.	)	

ORDER

Petitioner, James Christopher North, with the assistance of counsel, filed a Petition for Writ of Habeas Corpus by a Person in State Custody pursuant to 28 U.S.C. § 2254 on October 26, 2016. Respondent filed copies of Petitioner's state court records and an Answer with Brief in Support. Petitioner filed a reply. Also pending before the Court is Petitioner's Motion for Discovery (Gunshot Residue Testing), Respondent's Response in Opposition to Motion for Discovery, and Petitioner's Reply.

I. BACKGROUND

The Court has reviewed the pleadings and state court records and finds the following:

> l. Petitioner is in custody pursuant to a judgment and sentence out of the 350th District Court of Taylor County, Texas, in Case No. 9790-D styled *The State of Texas v. James Christopher North*. By indictment filed on February 17, 2011, Petitioner was charged with the murder of Austin Dale David by shooting him with a handgun.
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> 2. Voir dire for the jury trial commenced on October 11, 2011, and trial commenced the following day. Although Petitioner pleaded not guilty, the jury found Petitioner guilty on October 25, 2011. The punishment phase commenced the next day, and on October 26, 2011, the jury assessed Petitioner's punishment at seventy (70) years' confinement in the Texas Department of Criminal Justice (TDCJ). The trial court pronounced judgment the same day.
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> 3. Petitioner filed a motion for new trial as well as a notice of appeal on November 23, 2011. He raised two issues on appeal: the trial court (1) incorrectly charged the jury as to the law of self-defense and (2) abused its discretion when it refused to give the

jury a "presumption of reasonableness" instruction.

4. In an unpublished opinion filed January 24, 2014, the Eleventh Court of Appeals affirmed the conviction. Mandate issued October 23, 2014.

5. Petitioner's motion for extension of time to file his petition for discretionary review (PDR) was granted on June 11, 2014, making his PDR due on July 9, 2014. Petitioner timely filed his PDR raising one ground for review: the evidence presented at trial, when viewed in the light most favorable to the defense, raised the issue of self-defense and the Court of Appeals' decision holding otherwise conflicts with prior decisions and amounts to a severe departure from the accepted and normal course of judicial proceedings. The PDR was refused on September 17, 2014.

6. Petitioner did not file a petition for writ of certiorari.

7. Petitioner filed his first application for writ of habeas corpus, with assistance of counsel, in the trial court on November 6, 2015. In State Writ No. 84,239-01, Petitioner raised four grounds for review: his trial attorneys were ineffective for failing to (1) present his most viable defense; (2)

object to the trial court's instruction to the alternate juror to be present during the jury's deliberation; (3) investigate and present crucial evidence in support of the alternative defense advanced; and (4) prepare witnesses to testify. Petitioner filed a motion for forensic testing along with his first state habeas application.

8. On November 20, 2015, the trial court entered findings and conclusions regarding three of the four grounds raised in Petitioner's first state habeas application.

9. On January 6, 2016, the Texas Court of Criminal Appeals (TCCA) dismissed Petitioner's first state habeas application as noncompliant with Tex. R. App. P. 73.1.

10. On January 14, 2016, Petitioner filed a Motion to Sua Sponte Reconsider the Dismissal of Application for Writ of Habeas Corpus for Non-Compliance with Tex. R. App. P. 73.1. The Motion was denied on January 29, 2016.

11. Petitioner filed his second application for writ of habeas corpus in the trial court on January 28, 2016. In State Writ No. 84,239-02, Petitioner raised the same four grounds as those raised in his first state habeas

application. Petitioner also filed a motion for forensic testing along with his second state habeas application.

12. On February 17, 2016, the trial court filed its response to the second state habeas application, essentially attaching and incorporating the findings and conclusions filed in response to the first state habeas application.

13. On June 8, 2016, the TCCA ordered the trial court to make findings of fact and conclusions of law as to whether the performance of trial counsel was deficient and, if so, whether counsel's deficient performance prejudiced Petitioner. The trial court obtained affidavits from Petitioner's trial counsel and entered findings of fact and conclusions of law in response on June 30, 2016, finding that trial counsel was not deficient.

14. On September 21, 2016, the TCCA denied Petitioner's second state habeas application without written order.

15. Petitioner filed the instant petition on October 26, 2016. The Court understands Petitioner to raise essentially the same four grounds for review as he raised in his state habeas applications - that is, he received

> ineffective assistance of trial counsel when counsel failed to(1) present Petitioner's most viable defense; (2) object to the trial court's instruction to the alternate juror to be present during the jury's deliberations; (3) failed to investigate and present crucial evidence in support of self-defense; and (4) failed to prepare witnesses to testify. Petitioner also contends that the cumulative effect of these errors was prejudicial.
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> 16. This Court has jurisdiction over the parties and subject matter pursuant to 28U.S.C. §§ 2241 and 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA").

II. STANDARD OF REVIEW

"The [AEDPA] modified a federal habeas court's role in reviewing state prisoner applications in order to prevent federal habeas 'retrials' and to ensure that state court convictions are given effect to the extent possible under law." *Bell v. Cone,* 535 U.S. 685, 693 (2002).

Under the Antiterrorism and Effective Death Penalty Act, a petitioner may not obtain habeas corpus relief in federal court with respect to any claim adjudicated on the merits in state court proceedings unless the adjudication of the claim resulted in a decision contrary to clearly established federal constitutional law or resulted in a decision based on

an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. 28 U.S.C. § 2254(d). This section creates a "highly deferential standard for evaluating state-court rulings, ... which demands that state-court decisions be given the benefit of the doubt." *Woodford v. Viscotti,* 537 U.S. 19, 24 (2002) *(per curiam)* (internal quotation marks omitted).

"In the context of federal habeas proceedings, adjudication 'on the merits' is a term of art that refers to whether a court's disposition of the case was substantive as opposed to procedural." *Neal* v. *Puckett,* 239 F.3d 683,686 (5th Cir. 2001). In Texas writ jurisprudence, a "denial" of relief usually serves to dispose of claims on their merits. *Miller* v. *Johnson,* 200 F.3d 274,281 (5th Cir. 2000). *See Ex parte Torres,* 943 S.W.2d 469,474 (Tex. Crim. App. 1997) (holding that "denial" signifies the Court of Criminal Appeals addressed and rejected the merits of a state habeas claim,[1] while "dismissal" signifies the Court declined

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[1] In *Ex parte Torres,* the Court of Criminal Appeals stated that "[d]ispositions relating to the merits should be labeled ' denials' while dispositions unrelated to the merits should be labeled 'dismissals' . . . ." *Id. at* 474. "A disposition is related to the merits if it decides the merits or makes a determination that the merits of the applicant's claims can never be decided." *Id* . (citing *Hawkins v. Evans,* 64 F.3d 543, 547 (10th Cir. 1995) (disposition is considered "on the merits" if the court refuses to determine the merits because of state procedural default)). *Accord Ex parte Grigsby,* 137 S.W.3d 673, 674 (Tex. Crim. App. 2004).

to consider the claim for reasons unrelated to the merits).

A state-court factual determination is not unreasonable merely because the federal court would have reached a different conclusion in the first instance. *Burt* v. *Titlow,* -- U.S. --, 134 S. Ct. 10, 15 (2013). Section 2254(e)(l) provides that a determination of a factual issue made by a state court shall be presumed to be correct. Petitioner has the burden of rebutting this presumption of correctness by clear and convincing evidence. *Canales* v. *Stephens,* 765 F.3d 551,563 (5th Cir. 2014). When the Texas Court of Criminal Appeals denies relief in a state habeas corpus application without written order, as in this case, it is an adjudication on the merits, which is entitled to this presumption. *Ex parte Torres,* 943 S.W.2d 469,472 (Tex. Crim. App. 1997); *Singleton* v. *Johnson,* 178 F.3d 381, 384 (5th Cir. 1999) (recognizing this Texas state writ jurisprudence).

Petitioner's burden before this Court is significantly heightened in that Petitioner cannot prevail even if he shows that the state court's determination was incorrect. Petitioner must also show that the state court unreasonably applied federal law or made an unreasonable determination of the facts. *Neal v. Puckett,* 286 F.3d 230, 235 (5th Cir. 2002), *cert. denied, Neal v. Epps,* 537 U.S. 1104 (2003).

The facts of the case were summarized in the unpublished opinion of the Eleventh Court of Appeals sitting in Eastland, Texas, and such were recited in Respondent's Answer. Petitioner has provided no

evidence to refute the summary; therefore, the Court shall not recite the facts again.

III. DISCUSSION

After carefully reviewing the state court records and the pleadings, the Court finds that an evidentiary hearing is not necessary to resolve the instant petition. *See Young v. Herring,* 938 F.2d 543,560 n. 12 (5th Cir. 1991) ("[A] petitioner need not receive an evidentiary hearing if it would not develop material facts relevant to the constitutionality of his conviction.").

Petitioner urges the Court to find that he received ineffective assistance of counsel in four separate grounds. In response, Respondent argues that Petitioner's federal habeas petition is barred by the AEDPA's statute of limitations.

Alternatively, Respondent argues that the petition lacks merit because Petitioner has not shown that the state court's adjudication of his ineffective assistance of counsel claims reflected an unreasonable application of clearly established federal law as set out in *Strickland v. Washington,* 466 U.S. 668 (1984) and *Harrington v. Richter,* 562 U.S. 86, 104 (2011). *See* 2254(d)(l). In his Reply, Petitioner argues that his petition is timely based upon both statutory and equitable tolling. Moreover, Petitioner argues that counsel's decisions in representing Petitioner amounted to unreasonable and deficient performance, and that the state court's rejection of his application was contrary to, and involved an unreasonable application of, clearly established Federal law, and was based on an

unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

Ineffective Assistance of Counsel

The proper standard for judging Petitioner's claims that he received ineffective assistance of counsel is enunciated in *Strickland v. Washington,* 466 U.S. 668, 689, 104 S. Ct. 2052, 2065, 80 L. Ed. 2d 674 (1984). Under the two-pronged *Strickland* standard, a petitioner must show that defense counsel's performance was both deficient and prejudicial. *Id.* at 687, 104 S. Ct. at 2064. An attorney's performance was deficient if the attorney made errors so serious that the attorney was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment to the United States Constitution. *Id.* That is, counsel's performance must have fallen below the standards of reasonably competent representation as determined by the norms of the profession.

A reviewing court's scrutiny of trial counsel's performance is highly deferential, with a strong presumption that counsel's performance falls within the wide range of reasonable professional assistance. *Id.* at 689, 104 S. Ct. at 2065. A strong presumption exists "that trial counsel rendered adequate assistance and that the challenged conduct was reasoned trial strategy." *Wilkerson v. Collins,* 950 F.2d 1054, 1065 (5th Cir. 1992) (citing *Strickland,* 466 U.S. at 694, 104 S. Ct. at 2068). This is a heavy burden that requires a "substantial," and not just a "conceivable," likelihood of a different result. *Harrington v. Richter,* 562 U.S. 86, 104, 131 S. Ct. 770, 787, 178 L.Ed. 2d 624 (2011); *see also Cullen v.*

Pinholster, 563 U.S. 170, 189, 131 S. Ct. 1388, 1403, 179 L. Ed. 2d 557 (2011).

Additionally, a petitioner must show that counsel's deficient performance prejudiced the defense. To establish this prong, a petitioner must show that counsel's errors were so serious as to deprive petitioner of a fair trial. *Strickland,* 466 U.S. at 687, 104 S. Ct. at 2064. Specifically, to prove prejudice, a petitioner must show "(1) there is a reasonable probability that, but for counsel's unprofessional errors, the ultimate result of the proceeding would have been different ... and (2) counsel's deficient performance rendered the trial fundamentally unfair." *Creel v. Johnson,* 162 F.3d 385,395 (5th Cir. 1998). "Unreliability or unfairness does not result if the ineffectiveness of counsel does not deprive the defendant of any substantive or procedural right to which the law entitles him." *Lockhart v. Fretwell,* 506 U.S. 364, 372, 113 S. Ct. 838, 844, 122 L. Ed. 2d 180 (1993). A showing of significant prejudice is required. *Spriggs v. Collins,* 993 F.2d 85, 88 n. 4. (5th Cir. 1993). If a petitioner fails to show either the deficiency or prejudice prong of the *Strickland* test, then the Court need not consider the other prong. *Strickland,* 466 U.S. at 697, 104 S. Ct. at 2069.

In the context of§ 2254(d), the deferential standard that must be accorded to counsel's representation must also be considered in tandem with the deference that must be accorded state court decisions, which has been referred to as "doubly" deferential. *Harrington v. Richter,* 562 U.S. 86, 105, 131 S. Ct. 770, 788, 178 L. Ed. 2d 624 (2011). "When§

2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard." *Id.* "If the standard is difficult to meet, that is because it was meant to be." *Id.* at 786; *see also Morales v. Thaler,* 714 F.3d 295,302 (5th Cir. 2013). The absence of evidence cannot overcome the "strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance" and cannot establish that performance was deficient. *Burt v. Titlow*, -- U.S. --, 134 S. Ct. 10, 187 L. Ed. 2d 348 (2013).

As discussed below, Petitioner's ineffective-assistance-of-counsel claim was adjudicated on the merits in a state-court proceeding, and the denial of relief was based on a factual determination that will not be overturned unless it is objectively unreasonable in light of the evidence presented in the state court proceeding. *Miller-El v. Cockrell,* 537 U.S. 322, 340, 123 S. Ct. 1029, 1041 (2003). A state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance. *Burt,* 134 S. Ct. at 15. Section 2254(e)(1) provides that a determination of a factual issue made by a state court shall be presumed to be correct. The petitioner has the burden of rebutting this presumption of correctness by clear and convincing evidence. *Hill v. Johnson,* 210 F.3d 481,485 (5th Cir. 2000). When the Texas Court of Criminal Appeals denies relief in a state habeas corpus application without written order, it is an adjudication on the merits, which is entitled to this presumption. *Ex parte Torres,* 943 S.W.2d at 472;

Singleton, 178 F.3d at 384 (recognizing this Texas state writ jurisprudence).

Where, as here, "a state court has already rejected an ineffective-assistance claim, a federal court may grant habeas relief [only] if the decision was 'contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.'" *Yarbrough v. Gentry,* 540 U.S. 1, 5 (2003) (quoting 28 U.S.C. § 2254(d)(l)). *See Santellan v. Cockrell,* 271 F.3d 190, 193 (5th Cir. 2001) ("[A] federal court's authority under AEDPA is ... limited to determining the reasonableness of the ultimate decision," even if the state court has rejected an ineffective-assistance claim without any reasoning.).

1. Failure to Present Most Viable Defense.

In his first ground, Petitioner argues that his trial attorneys were ineffective for failing to present his most viable defense; that is, that a prior brain injury prevented Petitioner from forming a culpable criminal intent. Petitioner places special emphasis on the contention that trial counsel learned well in advance of trial that their primary self-defense witness was unhelpful, making this a rare case in which counsel's decision was outside the bounds of acceptable strategy. Petitioner further argues that "[t]here is certainly a 'reasonable probability' that had [Petitioner's] trial attorneys presented a neuropsychologist and/or an expert in traumatic brain injury during the guilt phase of trial the result of the proceeding would have been different," and "(h]ad an expert such as Dr. Price and Dr. Winslade

explained to the jury the impact [Petitioner's] brain injury had on his decision-making ability, it is likely the jury would have found that North did not have the requisite culpable mental state to commit murder."

Respondent points to the affidavits collected in Petitioner's state habeas proceedings from both defense counsel and from the prosecutor wherein both agreed that self-defense was likely the only viable defense strategy. Respondent further notes that in their affidavit, trial counsel acknowledged that they knew of Petitioner's brain injury and his pretrial statements, consulted with mental-health experts and presented evidence of his injury at punishment. The Court notes that in their affidavit, trial counsel David Thedford and Sam Moore explained their strategic decision:

> Sam Moore had known Applicant for many years. He knew Applicant and his parents prior to the brain injury and how it happened. His medical records were examined and discussed with a neuropsychologist and a psychiatrist prior to trial to determine applicant's level of function. No one stated he did not have the ability to form intent to commit murder. (See neuropsychologist and psychiatrist testimony attached hereto and made a part hereof by reference.)
>
> Further, trial counsel had represented Applicant on several criminal and civil matters and consulted with him on

several cases beginning in 2006 and continuing through the murder trial.

Applicant lived in his own home, had a driver's license; owned and drove a pickup truck. Numerous conferences were held with Applicant since 2006, and he always appeared alone in the office and alone with his counsel in court. He also purchased the firearm used in this case prior to the altercation, the subject of this suit. Applicant always understood the issues involved in the various cases and always made the decisions about what he wanted to do.

Applicant and his family were counseled prior to and during every major decision in this case. Applicant and his family refused to allow him to testify, even after being advised that self- defense would be hard to sell without his testimony.

Trial counsel, Applicant and Applicant's family believed self-defense was the best defense to this murder charge.

No experienced trial attorney who defends and has defended criminal cases would offer two separate defenses in the same case in the guilt/innocence stage. Trial counsel believe self-defense and a lack of ability to form an intent would be inconsistent and neither defense would be successful.

(Ex Parte North, WR-84,239-02, Affidavit of Sam Moore and David Thedford (June 22, 2016) (Doc. 15-20, pp. 1-2)). With regard to the contention that their primary self-defense witness was unhelpful, Counsel stated:

> The reason that self-defense was the best defense and the only one to be presented on the guilt/innocence phase of the trial was because of the statement of the Applicant about what happened on February 9, 2011, 'that he intended to shoot the deceased because he was afraid he was going to die'; because of the statements of the eye witnesses to the event and because Applicant's lawyers had hired Dr. Casada and a self-defense expert, Albert Rodriguez, of Austin, Texas.
>
> Albert Rodriguez held himself out as an expert in self-defense having recently retired from the Department of Public Safety of Texas. His last position was related as expert and instructor to DPS troops on self-defense.
>
> Shortly after counsel was hired in late February or March 2011, he drove to Austin and met with him at a hotel. The facts of the incident were related to Albert Rodriguez exactly as related by Applicant, Mr. Rodriguez stated he could help as an expert on self-defense.

He listed two references that he had worked for with their addresses and numbers for me to contact. One was in Austin, Texas, and one was in San Marcos, Texas, and both were criminal lawyers. Both gave Albert Rodriguez excellent recommendations, and the Austin lawyer related facts of a case in Austin that Rodriguez had testified in that were similar to the facts in Applicant's case. That case was reportedly a not guilty verdict.

Mr. Rodriguez was hired and paid an initial fee of $3,000. All of the file was presented to Mr. Rodriguez; numerous conversations were held between Mr. Rodriguez and trial counsel regarding the case.

Rodriguez came to Abilene, Texas to trial attorney's office and spent one day interviewing Applicant. Mr. Rodriguez indicated everything was alright with regard to Applicant's defense. He was eventually paid $13,000, which was never returned. The week before the trial in the 350th District Court, trial attorney called Mr. Rodriguez to advise what time, date and location he was going to be needed. He advised at that time he could not help and would not appear.

At this late date trial counsel did not have time to contact another expert and

> did not have the funds if he did have time. All of our effort and attention was directed at self-defense, and we did not or could not change our defense at this late date. We still believe self-defense was the best defense, even without an expert.

Id. at pp. 3-4.

The affidavit of trial counsel and the record contains sufficient evidence to demonstrate that counsel's decision not to present a defense based on Petitioner's inability to form the requisite *mens rea* due to traumatic brain injury resulted from an informed trial strategy, and that such strategy was at least, in part, based upon the examination of Petitioner's medical records by a neuropsychologist and psychiatrist prior to trial. Petitioner has presented no argument or evidence in this federal habeas action that could lead the court to conclude that the state courts unreasonably applied the standards set forth in *Strickland* based on the evidence presented in state court. 28 U.S.C. § 2254(d). Furthermore, federal habeas courts are not to lightly second-guess counsel's decisions on matters of tactics and generally entrust such matters to the professional discretion of counsel. Indeed, "[s]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Strickland,* 466 U.S. at 690. A conscious and informed decision on trial tactics and strategy cannot be the basis of constitutionally ineffective assistance of counsel unless it is so ill chosen that it permeates the entire trial with obvious

unfairness." *Id.* at 689. Clearly, Petitioner's trial attorneys were functioning as the counsel guaranteed by the Sixth Amendment, and the state court's decision denying petitioner relief on this issue was not unreasonable. *See Neal v. Puckett,* 286 F.3d at 235.

In addition to failing to show deficient performance under *Strickland,* Petitioner fails to demonstrate resulting prejudice, that is, a reasonable probability that, but for counsel's failure to pursue a defensive strategy predicated on his traumatic brain injury, the outcome of his trial would have been different. Petitioner also fails to show that the state court's decision was an unreasonable application of the clearly established federal law of *Strickland,* or was contrary to that established law, or was based on an unreasonable determination of facts. *See* 28 U.S.C. § 2254(d), (e). Accordingly, Petitioner is not entitled to relief on this ground.

2. Alternate Juror.

In his next ground, Petitioner complains that trial counsel were ineffective when they failed to object to the trial court's instruction to the alternate juror to be present during the jury's deliberation. In support of this ground, Petitioner provided an affidavit of the alternate juror stating that she participated in the jury's deliberations at both the guilt and punishment phases and expressed her opinion that Petitioner was guilty. Respondent argues that such an objection would have been meritless, and in any event, this Court must presume that the TCCA denied relief on the grounds set out in the trial court's response. *See Ylst v. Nunnemaker,* 501 U.S. 797, 803 (1991). Consequently, Respondent argues that as the

TCCA found the convicting court's interpretation of state law regarding alternate jurors acceptable, this Court may defer to that finding. Additionally, Respondent argues that even if counsel's failure to object to the instruction to the alternate juror to be present during the jury's deliberation was deficient, he has not shown that he was prejudiced.

After reviewing the pleadings and the record in this case, the Court agrees that Petitioner has not met the requirements of the second prong of *Strickland;* that is, he has not proven that the outcome would have been different or that the verdict was affected in any way by the presence of the alternate juror, or that her opinion as expressed had any impact on the decision that was made by the jurors who ultimately voted to find Petitioner guilty. Petitioner fails to show that the state court's decision was an unreasonable application of the clearly established federal law of *Strickland,* or was contrary to that established law, or was based on an unreasonable determination of facts. *See* 28 U.S.C. § 2254(d), (e). Accordingly, Petitioner is not entitled to relief on this ground.

3. Forensic Testing

In his third ground, Petitioner claims that trial counsel was ineffective in failing to investigate and present crucial evidence that the victim fired a gun in support of the defensive strategy of self-defense. Specifically, Petitioner contends that if counsel had ensured that the victim's clothing was tested for gunshot residue, he could prove that he acted in self-defense because the clothing "could have established that the [victim] fired his gun at [Petitioner]," and that trial counsel was ineffective when they "put all

their eggs in the self-defense basket," but failed to investigate and develop readily available evidence that may have led them to decide that the self-defense strategy was not the best approach in this case.

Respondent argues that Petitioner has not shown what additional forensic testing would have revealed or how it would have aided his case, noting that the gunshot residue test of the victim's hands was discussed during the trial, and further relying on the findings made by the trial court in his state habeas proceedings to support a conclusion that the claim is meritless.

In response to the Respondent's Answer, Petitioner filed a Motion for Discovery (Gunshot Residue Testing) that is essentially the same as the one filed in the state habeas court, arguing that the discovery was necessary for this Court to fairly and fully review the constitutionality of his conviction. Respondent filed a Response in Opposition to the Motion for Discovery, advising the Court that the victim's clothing had been returned to the mother of the victim. Respondent also argued, among other things, that this Court is limited to that evidence before the state court at the time the state court made its decision; the evidence sought would be cumulative; and Petitioner had not shown good cause for discovery in light of the other evidence presented at the trial.

After reviewing the pleadings and the record in this case, the Court agrees that Petitioner has not shown that counsel was ineffective for failing to have the victim's clothing tested for gunshot residue. Petitioner fails to show that the state court's decision was an unreasonable application of the clearly

established federal law of *Strickland,* or was contrary to that established law, or was based on an unreasonable determination of facts. *See* 28 U.S.C. § 2254(d), (e).

Accordingly, Petitioner is not entitled to relief on this ground. Moreover, for the reasons stated in Respondent's Response in Opposition, the Court finds that the Motion for Discovery should be DENIED.

4. Failure to Prepare Multiple Witnesses.

In his fourth ground, Petitioner alleges that trial counsel was ineffective for failing to prepare three witnesses, namely Tyler Casey, Jamaine Robinson, and Elaine Menta. Petitioner contends this failure resulted in the witnesses presenting testimony that supported the prosecution, and that he would have been better off calling no witnesses at all. Petitioner contends that failure to prepare Robinson alone was extremely prejudicial, stating that "it appears that [Petitioner's] counsel did not talk to Robinson before calling him to the stand." In sum, Petitioner argues that the lack of preparation of three witnesses was prejudicial because it undermines confidence in the outcome of the proceedings. In Response, Respondent essentially counters that this claim is a "bare allegation," and as such fails to show that counsel's performance was deficient or prejudicial.

Even if the three witnesses did not prove to be the best witnesses once on the stand, other than the conclusory assertion that it "appears" that trial counsel did not talk to Robinson prior to his

testimony, there is nothing in the record to indicate that trial counsel did not attempt to prepare these witnesses for testimony prior to trial. "Mere conclusory allegations do not raise a constitutional issue in a habeas proceeding." *Ross v. Estelle,* 694 F.2d 1008, 1011 (5th Cir. 1983). The state court's determination of this habeas claim was not contrary to or an unreasonable application of clearly established federal law or based on an unreasonable determination of the facts in light of the evidence. *See* 28 U.S.C. § 2254(d). Petitioner is not entitled to habeas relief on this ground.

5. Cumulative Errors

Finally, Petitioner argues that counsel's failures were cumulatively prejudicial. Federal habeas relief is only available for cumulative errors that are of a constitutional dimension. *Coble v. Dretke,* 444 F.3d 345, 355 (5th Cir. 2006); *Livingston v. Johnson,* 107 F.3d 297, 309 (5th Cir. 1997). Petitioner here has failed to establish any error in the conduct of his counsel. Therefore, relief is not available on this basis. *See Shields v. Dretke,* 122 Fed. Appx. 133, 154 (5th Cir. 2005) (claim that cumulative effect of trial counsel error was denial of effective assistance of counsel fails where petitioner has shown no such error); *United States v. Moye,* 951 F.2d 59, 63 n. 7 (5th Cir. 1992) ("Because we find no merit to any ofMoye's arguments of error, his claim of cumulative error must also fail"). Accordingly, the Court concludes that Petitioner is not entitled to relief on his claims of ineffective assistance of counsel.

IV. CONCLUSION

For the reasons set forth above and in Respondent's Answer, the Court finds that whether or not the Petition is barred by the statute of limitations, the Petition is without merit because Petitioner has not demonstrated that the state court's adjudication of his claims was contrary to or an unreasonable application of clearly established Supreme Court law as required by 28 U.S.C. § 2254(d). In addition, the Court finds that, pursuant to Rule 22 of the Federal Rules of Appellate Procedure and 28 U.S.C. § 2253(c), Petitioner has failed to show that reasonable jurists would (1) find the Court's "assessment of the constitutional claims debatable or wrong," or (2) find "it debatable whether the petition states a valid claim of the denial of a constitutional right" and "debatable whether [this Court] was correct in its procedural ruling," and any request for a certificate of appealability should be denied. *Slack v. McDaniel,* 529 U.S. 473, 484 (2000).

It is, therefore, ORDERED:

1. The instant Petition for Writ of Habeas Corpus is DENIED and dismissed with prejudice.

2. All relief not expressly granted is denied and any pending motions, including Petitioner's Motion for Discovery (Gunshot Residue Testing) are DENIED.

3. Any request for certificate of appealability is denied.

Dated March 2, 2018.

s/ Sam. R. Cummings
SAM R. CUMMINGS
Senior United States
District Judge