APPENDIX

756 Fed.Appx. 418
This case was not selected for
publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1
generally governing citation of judicial decisions
issued on or after Jan. 1, 2007. See also
U.S.Ct. of App. 5th Cir. Rules 28.7 and 47.5.
United States Court of Appeals, Fifth Circuit.

Christopher Devon JACKSON, Petitioner-Appellant
v.
Lorie **DAVIS**, Director, Texas Department of Criminal Justice, Correctional Institutions Division, Respondent-Appellee

No. 18-70014
|
Filed December 10, 2018

Synopsis

Background: Defendant was convicted in state court of capital murder and sentenced to death. After the Texas Court of Criminal Appeals, Keller, P.J., 2010 WL 114409, affirmed and his state habeas petition was denied, defendant sought federal habeas relief. The United States District Court for the Southern District of Texas, No. 4:15-CV-208, denied the petition and defendant sought a certificate of appealability.

Holdings: The Court of Appeals held that:

[1] defense counsel was not deficient, and

[2] any deficiency by defense counsel did not prejudice defendant.

Denied.

West Headnotes (2)

[1] Criminal Law
Adequacy of investigation of mitigating circumstances

Criminal Law
Presentation of evidence in sentencing phase

Defense counsel was not deficient in punishment phase in state prosecution for capital murder, despite defendant's contention that counsel failed to properly investigate, develop, and present mitigation evidence concerning defendant's mental health; counsel hired experts, he called family members and a mitigation investigator to testify, and counsel made tactical decisions about which lines of inquiry would do more harm than good. U.S. Const. Amend. 6.

Cases that cite this headnote

[2] Criminal Law
Adequacy of investigation of mitigating circumstances

Criminal Law
Presentation of evidence in sentencing phase

Any deficiency by defense counsel during punishment phase in failing to properly investigate, develop, and present mitigation evidence concerning defendant's mental health did not prejudice defendant in state prosecution for capital murder; defendant had long-standing, intensifying, and consistent violent behavior, even throughout trial, and the evidence of guilty was overwhelming. U.S. Const. Amend. 6.

Cases that cite this headnote

Appeal from the United States District Court for the Southern District of Texas, USDC No. 4:15-CV-208

Attorneys and Law Firms

Matthew Birk Baumgartner, Graves, Dougherty, Hearon & Moody, P.C., Austin, TX, for Petitioner-Appellant

Stephen M. Hoffman, Assistant Attorney General, Office of the Attorney General, Financial Litigation &

Charitable Trusts Division, Austin, TX, for Respondent-Appellee

Before CLEMENT, OWEN, and GRAVES, Circuit Judges.

Opinion

PER CURIAM: *

Christopher Jackson was convicted and sentenced to death for killing Eric Smith after carjacking the SUV that Smith was driving. **Jackson** seeks a certificate of appealability ("COA") as to his allegations of ineffective assistance of counsel. Finding his arguments unpersuasive, we DENY his request.

*419 FACTS AND PROCEEDINGS

A jury convicted and sentenced **Jackson** to death for killing Smith while committing or attempting to commit robbery. The Texas Court of Criminal Appeals ("TCCA") upheld **Jackson**'s conviction. ***Jackson*** *v. State*, 2010 WL 114409 (Tex. Crim. App. Jan. 12, 2010). The Supreme Court denied *certiorari*. ***Jackson*** *v. Texas*, 562 U.S. 844, 131 S.Ct. 82, 178 L.Ed.2d 53 (2010).

Jackson then filed a state application for *habeas corpus*. After briefing and a hearing, the trial court recommended that the TCCA deny relief and submitted proposed findings of fact and conclusions of law. Following its own review, the TCCA adopted the trial court's position and denied **Jackson**'s application. *Ex parte* ***Jackson***, 2014 WL 5372347 (Tex. Crim. App. Aug. 20, 2014) (*per curiam*).

Jackson filed a federal petition for *habeas corpus*. After briefing was complete, and limited discovery, the district court denied *habeas* relief and a COA in a memorandum opinion and order. **Jackson** now requests a COA from this court.

STANDARD OF REVIEW

Jackson's COA request is governed by the Antiterrorism and Effective Death Penalty Act ("AEDPA"). We will grant a COA under AEDPA only if **Jackson** can make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This standard is met if "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000). In a death-penalty case, we resolve any doubts over whether a COA is proper in the petitioner's favor. *Pippin v. Dretke*, 434 F.3d 782, 787 (5th Cir. 2005).

In deciding **Jackson**'s COA question, we must keep in mind the extraordinary deference that AEDPA places around the TCCA's conclusions of law and findings of fact—it is through this deferential lens that the district court evaluated **Jackson**'s constitutional claims. Under AEDPA, a federal court cannot grant *habeas* relief to a state prisoner on any claim adjudicated on its merits by the state court unless 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 ... or ... 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)(1)–(2). And our inquiry is "limited to the record that was before the state court" and "focuses on what a state court knew and did." *Cullen v. Pinholster*, 563 U.S. 170, 181–82, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011).

A decision is contrary to federal law when it either reaches a conclusion opposite to that of the Supreme Court on a question of law, or arrives at an opposite result on facts that are materially indistinguishable from those confronted by a relevant Supreme Court case. *Sprouse v. Stephens*, 748 F.3d 609, 616 (5th Cir. 2014). A decision involves an unreasonable application of federal law if it "correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case." *Perez v. Cain*, 529 F.3d 588, 594 (5th Cir. 2008) (quoting *Williams v. Taylor*, 529 U.S. 362, 407–08, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000)). The state court's decision must not just be wrong; it must be unreasonable —meaning no "fairminded jurist" could possibly agree with it. *Harrington v. Richter*, 562 U.S. 86, 101, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011).

***420** On appeal, we review "the district court's findings of fact for clear error and its conclusions of law de novo." *Dorsey v. Stephens*, 720 F.3d 309, 314 (5th Cir. 2013). An appellate court "will not disturb a district court's factual findings unless they are implausible in light of the record considered as a whole." *Wiley v. Epps*, 625 F.3d 199, 213

(5th Cir. 2010). "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Id.* (quoting *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 574, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985)).

DISCUSSION

[1] In the district court, **Jackson** argued that his counsel performed ineffectively by failing to investigate and present mitigating evidence during the punishment phase. **Jackson** had raised the same claim in state court.

Jackson reasserted the claim in the original state petition, along with additional grounds for relief not presented to the state court. The district court held that the new grounds were procedurally defaulted because they had not been exhausted in state court. Aside from a conclusory footnote asserting that the district court should not have "split" his claim, **Jackson** has offered no argument contesting the procedural default.

Jackson's reply argues that "Respondent[ ] ... artificially segregate[es] Mr. **Jackson**'s ... claim into a supposed 'exhausted' and an 'unexhausted' portion." But Respondent did no such thing; it simply adopted the same framework articulated by the district court. If **Jackson** had wanted to challenge that framework, he should have done so clearly and explicitly in his opening brief. *Cf. Baris v. Sulpicio Lines, Inc.*, 932 F.2d 1540, 1546 n.9 (5th Cir. 1991) ("Customarily we decline even to consider arguments raised for the first time in a reply brief."). Accordingly, any challenge to the procedural default is waived, and we will consider only the rejection of the claims characterized by the district court as properly exhausted. *Summers v. Dretke*, 431 F.3d 861, 870 (5th Cir. 2005) (A failure "to adequately brief ... issues" results in waiver).

We will consider **Jackson**'s assertion that his trial counsel failed to properly investigate, develop, and present mitigation evidence concerning **Jackson**'s mental health. To succeed under *Strickland*, **Jackson** must show that counsel's performance was deficient, and that this deficiency prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

The district court painstakingly reviewed the evidence and arguments **Jackson** now wishes trial counsel would have presented to the jury. It cogently explained why the state *habeas* court rejected these claims and, attentive to the deferential standard of review, independently determined that those conclusions were consistent with *Strickland* and its progeny.

There is no reason to repeat that analysis here. In short, trial counsel did not abdicate his responsibility to prepare for and conduct the punishment phase. He hired experts, called family members and a mitigation investigator to the stand to discuss **Jackson**'s background, and made reasoned decisions about what kind of evidence or lines of inquiry he thought would do more harm than good. In other words, he had sufficient familiarity with **Jackson**'s mental-health history and family background to make the tactical decisions that he made about the evidence to put before the jury and the vehicle by which to put it.

[2] And even if the evidence and experts had been presented as **Jackson** now ***421** wishes, the jury would still have had to consider **Jackson**'s long-standing, intensifying, and consistent—even throughout the trial—violent behavior. Given the weight of this overwhelming evidence, **Jackson** has not shown any reasonable probability of a different result at sentencing.

CONCLUSION

The district court's opinion is thorough and well-reasoned with respect to all of the preserved issues. No reasonable jurist could disagree. **Jackson**'s request for COA is DENIED.

All Citations

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Footnotes

* 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.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-70014

CHRISTOPHER DEVON JACKSON,

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

ON PETITION FOR REHEARING

Before CLEMENT, OWEN and GRAVES, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is denied.

ENTERED FOR THE COURT:

/s/ EDITH B. CLEMENT
UNITED STATES CIRCUIT JUDGE