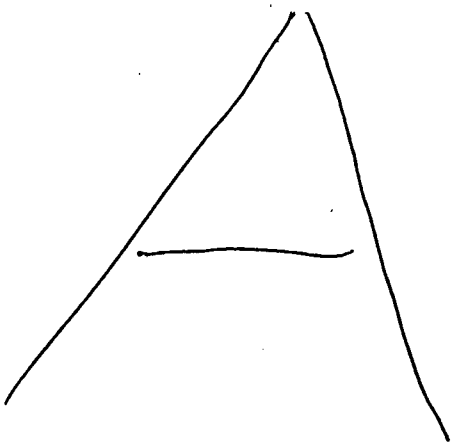
Appendix



IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-41049

JOSHUA GEORGE NOWLAND,

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 Eastern District of Texas

O R D E R:

Joshua George Nowland, Texas prisoner # 01872681, was convicted by a jury of aggravated robbery, sentenced to 28 years of imprisonment, and fined $10,000. He challenged his conviction in a 28 U.S.C. § 2254 petition, alleging that he did not receive a speedy trial; the prosecution failed to disclose exculpatory evidence; the jury engaged in misconduct; and, a prosecution witness committed perjury. Nowland seeks a certificate of appealability (COA).

To obtain a COA, Nowland must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This requires him to show that reasonable jurists would find the district court's assessment of his constitutional claims to be debatable or wrong, *Slack v. McDaniel*, 529 U.S.

473, 484 (2000), or that the issues deserve encouragement to proceed further, *see Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003).

Nowland has briefed only his speedy trial claim such that his other claims are deeded abandoned. *See Hughes v. Johnson*, 191 F.3d 607, 613 (5th Cir. 1999). Further, Nowland's argument that he was denied a speedy trial does not make the required showing. Thus, his motion for a COA is DENIED.

Signed: 7-18-2019

/s/ Catharina Haynes
CATHARINA HAYNES
UNITED STATES CIRCUIT JUDGE

18-41049

Mr. Joshua George Nowland
#01872681
CID Lynaugh Prison
1098 S. Highway 2037
Fort Stockton, TX 79735-0000

Appendix

B

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

BEAUMONT DIVISION

JOSHUA GEORGE NOWLAND	§	
VS.	§	CIVIL ACTION NO. 1:15cv273
DIRECTOR, TDCJ-CID	§	

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

Petitioner Joshua George Nowland, an inmate confined within the Texas Department of Criminal Justice, Correctional Institutions Division, proceeding *pro se,* filed this petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. This matter was referred to the undersigned magistrate judge pursuant to 28 U.S.C. § 636 and the Amended Order for the Adoption of Local Rules for the Assignment of Duties to the United States Magistrate Judge for findings of fact, conclusions of law, and recommendations for the disposition of the case.

Factual Background

In 2013, following a jury trial in the 252nd District Court of Jefferson County, Texas, petitioner was convicted of aggravated robbery. He was sentenced to 28 years of imprisonment. The conviction was affirmed by the Texas Court of Appeals for the Fourteenth District. *Nowland v. State*, 2014 WL 5780681(Tex.App.–Houston [14th Dist.] 2014). Petitioner did not file a petition for discretionary review with the Texas Court of Criminal Appeals.

Petitioner subsequently filed a state application for writ of habeas corpus. The Court of Criminal Appeals denied the application because petitioner's conviction was not final. A second application was denied by the Court of Criminal Appeals without written order.

Grounds for Review

Petitioner asserts the following grounds for review: (1) he was denied his right to a speedy trial; (2) the prosecution failed to disclose exculpatory evidence; (3) he was denied due process of law because of jury misconduct and (4) a prosecution witness committed perjury.

Evidence at Trial

On May 9, 2012, appellant visited Randy Flatau's jewelry store in Jefferson County, Texas, under the pretense of purchasing merchandise. While Flatau and appellant were discussing the merchandise, appellant pointed a handgun at Flatau and told him that he planned to rob the jewelry store. Appellant led Flatau's wife and a customer to the back of the jewelry store and made them lie face down in the office. Flatau informed appellant that a shoulder injury prevented him from lying down. Appellant initially permitted Flatau to remain on one knee unrestrained while appellant filled a satchel with merchandise from the store safe. At some point during the robbery, appellant decided to restrain Flatau. While attempting to restrain Flatau, appellant shot Flatau in the leg. After shooting Flatau, appellant continued filling the satchel with the contents of the store safe.

After obtaining the merchandise from the safe, appellant proceeded towards the store exit. By that time, Flatau had retrieved a revolver that was hidden under a display counter. Flatau ordered appellant to stop. Appellant pointed his gun at Flatau. Flatau opened fire, emptying the revolver. Flatau then activated the store's electronic alarm system, went to his office, acquired a second gun, and opened fire again. Flatau shot appellant multiple times, disabling him. Flatau then held appellant at gunpoint until police arrived.

Standard of Review

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

law only if this application is also objectively unreasonable. *Id.* at 409-411. "A state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Harrington v. Richter*, 131 S.Ct. 770, 786 (2011) (citation omitted). "[E]ven a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Id.* The Supreme Court has noted that this standard is difficult to meet "because it was meant to be." *Id.*

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

Analysis

Denial of Speedy Trial

Initially, petitioner contends he was denied a speedy trial. The Supreme Court has identified four factors that must be balanced when evaluating speedy trial claims: (1) the length of the delay; (2) reasons for the delay; (3) the defendant's diligence in asserting his rights and (4) prejudice to the defendant caused by the delay. *Barker v. Wingo*, 407 U.S. 514, 530 (1972).

The *Barker* analysis "eschews rigid rules and mechanical factor-counting in favor of a difficult and sensitive balancing process." *Amos v. Thornton*, 646 F.3d 199, 205 (5th Cir. 2011). On habeas review, a federal court must "give the widest of latitude to a state court's conduct of its speedy-trial analysis." *Id.* As long as there is any objectively reasonable basis on which the state court could have denied relief, the decision of the state court must be respected. *Id.*

Judge Walker Impeached for Judicial Misconduct

"A defendant's speedy-trial attaches at the time of the arrest or indictment, whichever comes first." *Id.* at 206. "The bare minimum required to trigger a *Barker* analysis is one year." *Id.* If that element is met, the extent to which the delay extended beyond the minimum is examined because "the presumption that pretrial delay has prejudiced the accused intensifies over time." *Goodrum v. Quarterman*, 547 F.3d 249, 258 (5th Cir. 2008).

In this case, there was a delay of 14 months between petitioner's arrest and his trial. As a result, a full *Barker* analysis must be conducted, and the first factor weighs slightly in favor of petitioner. *Laws v. Stevens*, 536 F. App'x 409, 412 (5th Cir. 2013) (delay of 23 months between arrest and trial weighed, "at most, only slightly" in the petitioner's favor); *Amos*, 646 F.3d at 206-07 (delay of less than 30 months precluded the conclusion that the first *Barker* factor strongly favored the accused).

Under the second *Barker* factor, the reasons for the delay are examined. The burden is on the respondent to proffer reasons to justify the delay. *Amos*, 646 F.3d at 207. "The weight assigned to a state's reasons for post-accusation delay depends on the reasons proffered." *Goodrum*, 547 F.3d at 258. "[A] deliberate delay to disadvantage the defense is heavily weighed against the state." *Id.* "[D]elays explained by valid reasons or attributable to the conduct of the defendant weigh in favor of the state." *Id.* "[U]nexplained or negligent delays . . . weigh against the state, but not heavily." *Id.*

In this case, it appears the delay experienced by petitioner was to some extent the result of actions by the defense. Petitioner was arrested on May 9, 2012, and the indictment was returned against him on May 24. On May 25, the case was reset for review until July 30. On July 6, 2012, the defense filed a motion to appoint a psychologist or psychiatrist to evaluate petitioner's competency to stand trial. On July 10, the case was reset for review until August 20 with the notation that Dr. Douget was to evaluate petitioner. On July 19, a report regarding petitioner's competency to stand trial was filed with the court. The case was reset on August 20 until September 17 with the notation that Dr. Douget would also evaluate petitioner's sanity. A report regarding

I was not aware of, present at or had opportunity to object to any of the motions of continuance. All continuances were done behind closed doors without my knowledge, consent (or presence).

Barker v Wingo p2195

The Supreme Court stated "From the commonwealths point of view it is fortunate that the case was set for early trial (3 months from arrest) and that postponements took place only upon formal request to which Barker had opportunity to object."

petitioner's sanity was filed with the court on August 27. On September 18, the case was reset for trial on January 7, 2013. On January 7, the defense requested a continuance based on the need to review petitioner's medical records. On January 7, the case was reset for trial on April 15. On April 15, the case was reset for trial on July 8. *Voir dire* commenced on July 8.

Approximately 170 days of the delay petitioner experienced was the result of actions by the defense. The remaining approximately 255 days of the delay is unexplained. It does not appear that any of the delay was caused by actions of the prosecution. As a result, this factor also weighs slightly in favor of petitioner.

In considering the third *Barker* factor, courts ask whether a petitioner diligently asserted his right to a speedy trial. *Amos*, 535 F.3d at 207. A petitioner's assertion of his right "receives strong evidentiary weight, while failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial." *Id.*

Petitioner states he wrote four motions seeking a speedy trial. He states that in September, 2012, and November, 2012, he wrote motions for a speedy trial and gave them to his attorney. She told him she would not file the motions. Petitioner states that in January, 2013, and April, 2013, he wrote additional speedy trial motions and turned them in *pro se*. However, the motions filed in January and April did not request a speedy trial. Instead, they sought to have the charge against petitioner dismissed for lack of a speedy trial. An assertion that charges be dismissed based upon a speedy trial violation is not a value protected under *Barker*. *Cowart v. Hargett*, 16 F.3d 642, 647 (5th Cir. 1994); *Hill v. Wainwright*, 617 F.2d 375, 379 (5th Cir. 1980).

The motions petitioner actually filed with the court did not constitute an attempt to assert his right to a speedy trial. Giving petitioner the benefit of the doubt, however, it appears he did make some attempt to assert his right to a speedy trial in September, 2012, approximately four months after he was first incarcerated. This factor therefore weighs in petitioner's favor.

Under the fourth *Barker* prong, unless the first three factors weigh heavily in favor of the defendant or the delay is at least five years, the burden is on the petitioner to put forth evidence of

This is not Divers v Cain

Length of Delay
Reason for Delay
Petitioner's assertion of right

actual prejudice. *Divers v. Cain*, 698 F.3d 211, 219 (5th Cir. 2012). As the delay in this case was shorter than five years and the first three factors do not weigh heavily in favor of petitioner, he has the burden to show prejudice. In considering the prejudice element, courts are to bear in mind the factors meant to be protected by a speedy trial: "(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." *Barker*, 407 U.S. at 532. The third interest is "the most serious . . . because the inability of a defendant adequately to prepare his case skews the unfairness of the entire system." *Id.*

In this case the first three factors do not weigh heavily in petitioner's favor and the delay he experienced was less than five years. As a result, petitioner must show actual prejudice. Petitioner states that during the trial most of the witnesses suffered from varying degrees of dimming memories. Petitioner also asserts that the surveillance video from inside the store degraded because of the delay. Finally, petitioner states he was very anxious and preoccupied about whether he would ever be brought to trial.

Four fact witnesses testified at trial. Mr. Flatau, when asked on cross-examination whether he had told the police that petitioner's "gun went off," said he did not remember. He also stated he did not remember shooting petitioner in the head and that he did not recall exactly how long after the robbery he conducted an accounting of the items petitioner attempted to steal. Theresa Flatau, Mr. Flatau's wife, testified she did not remember whether she used the word accident to describe the gunshots when she called the police for assistance. Donna Rizzotto was a customer in the jewelry store at the time of the robbery. Defense counsel instructed her to read the statement she gave to the police to see if it refreshed her memory. After looking at the statement, she said it did not help her remember whether Mr. Flatau told petitioner he would kill him. Finally, Beaumont Police Officer Jarrett Pantallion, who responded to the scene of the incident, referred to his report to refresh his memory while testifying.

It is Clear Error that Judge Hawthorn did not consider or address to the first two factors in Prejudice to Defense. These factors 1) To prevent oppressive pretrial incarceration and 2) to Minimize anxiety and concern.

Did not examine prejudice 1) To prevent oppressive pretrial incarceration & 2) To minimize anxiety and concern.

either of which by itself could become to — speedy Trial Dismissal

In addition, petitioner's statement that the surveillance tape had degraded is not supported by the record. The trial transcript reflects that the tape admitted into evidence at trial was an exact duplicate of the original and that the technology used when the tape was made caused the tape to appear "superimposed" or "super fast" when played in court. There is no indication that the tape degraded as a result of the passage of time.

The instances where the witnesses related an inability to recall what happened during the robbery concerned relatively minor matters and made up a very small portion of their testimony. Nor does the record indicate that the delay in bringing petitioner to trial caused the surveillance tape to become degraded. As a result, petitioner has not demonstrated that the delay resulted in actual prejudice. This ground for review is therefore without merit and the Court of Criminal Appeals' rejection of this ground for review was not contrary to, or an unreasonable application of, clearly established federal law.

Failure to Disclose Exculpatory Evidence

Petitioner states he filed four motions for discovery. However, his motions were ignored and he did not see any of the evidence against him until trial, except for the police report.

In *Brady v. Maryland*, 373 U.S. 83, 87 (1963), the Supreme Court held that "the suppression by the prosecution of evidence favorable to the accused . . . violated due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." To establish that *Brady* was violated, a habeas petitioner must demonstrate that (1) the prosecution suppressed evidence; (2) the evidence was favorable to the petitioner and (3) the evidence was material. *United States v. Ellender*, 947 F.2d 748, 756 (5th Cir. 1991). "[E]vidence is material only 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). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

The prosecutions main witness Randell Flatau stated that Items had been moved, On page 10 of the Report by the Magistrate Judge Zack Hawthorn it states that Randall Flatau testified 2) items had been added, and 4) some of the evidence had been moved and altered.

Misstatement of law see Moore v. Arizona 94S S.Ct 189 Petitioner does not have to demonstrate actual Prejudice

Haines vs Kerner change to ineffective assist of Counsel

I want to see all tapes. Inside and outside building. Evidence was moved by officers, added and removed.

[redacted] the owner shot me and planted evidence at the scene.

Outside cameras will show that someone planted gold and a pistol beside me as I was bleeding out on the sidewalk.

Petitioner has not identified any exculpatory evidence that was suppressed or explained how any suppressed evidence would have been material. He has therefore not established a *Brady* violation. Accordingly, the rejection of this ground for review by the state courts was not contrary to, or an unreasonable application of, clearly established federal law.

Jury Misconduct

Petitioner states that following trial, a newspaper reported that a juror stated the jury settled on a sentence of 28 years of imprisonment after compromising amongst themselves. The juror was reported as stating that while some jurors thought this sentence was too harsh, other jurors explained that the possibility of early release on parole and having a sentence reduced based upon good behavior had to be taken into account. Petitioner states this was improper because the jury was told to reach a unanimous decision regarding sentencing and not to compromise. The jury was also told not to take the possibility of early release on parole into consideration.

Federal Rule of Evidence 606(b)(1) provides that:

(b) During an Inquiry Into the Validity of a Verdict or Indictment.

> (1) Prohibited Testimony or Other Evidence. During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.

The post-trial statement of the juror cited by petitioner is therefore inadmissible under Rule 606(b)(1). *Austin v. Davis*, 876 F.3d 757, 791 (5th Cir. 2017). As petitioner has no other evidence of juror misconduct, this ground for review does not provide him with a basis for relief.

Moreover, even if the juror's post-trial statement was admissible, it would still not entitle petitioner to relief. Petitioner is mistaken about the court's instructions. The court did not instruct the jury not to take the possibility of early release on parole into consideration. Instead, the court told the jury:

> Good time credit and parole. Under the law applicable in this case [if] the Defendant is sentenced to a term of imprisonment [he] may earn time off the period of incarceration imposed through the award of good conduct time. Prison authorities

> may award good conduct time to a prisoner who exhibits good behavior, diligence in carrying out prison work assignment[s] and attempts at rehabilitation. If a prisoner engages in misconduct the prison authorities may also take away all or part of any good conduct time earned by the prisoner. It is also possible that the length of time for which the Defendant will be imprisoned might be reduced by the award of parole.
>
> Under the law applicable in [this] case if the Defendant is sentenced to a term of imprisonment he will not become eligible parole until the actual time served equals one half of the sentence imposed or 30 years, whichever is less, without consideration of any good conduct time he may earn.
>
> If the defendant is sentenced to a term of less than four years he must serve at least two years before he is eligible for parole. Eligibility for parole does not guarantee that parole be granted. It cannot accurately be predicted how the parole law and good conduct time might be applied to this Defendant if he is sentenced to a term of imprisonment because the application of these laws will depend on decisions made by prison and parole authorities. You may consider the existence of the parole law and good conduct time. However, you are not to consider the extent to which good conduct time may be award to or forfeited by this particular Defendant. You are not to consider the manner in which the parole law may be applied to this particular Defendant.

Reporter's Record, Vol. 5 at 6-8.

A copy of the article cited by petitioner is attached to a memorandum he filed in support of his petition. The juror quoted in the article stated: "But then we were like, No, you have to think of the parole and good behavior cutting that off. So we finally got to 28." This quote indicates the jurors considered the effect of parole laws generally rather than the manner in which they might be applied to petitioner specifically. As a result, there is no indication that the jury's discussion regarding parole violated the court's instructions. Moreover, while the court instructed the jury that its verdict was to be unanimous and that it was not to fix the punishment imposed by any system of averaging, it did not instruct the jury not to compromise. The juror's statement that the "jurors eventually settled on 28 years after compromising amongst themselves," therefore does not demonstrate that the court's instructions were violated.

The article cited by petitioner does not demonstrate the jurors violated the court's instructions while determining what punishment should be imposed. As a result, the rejection by the Court of Criminal Appeals of this ground for review was not contrary to, or an unreasonable applicable of, clearly established federal law.

Perjured Testimony Ineffective assistance of Counsel

Petitioner contends Randall Flatau, the main prosecution witness, committed perjury. He states Mr. Flattau's critical testimony was used to admit 58 photographs of the interior and exterior of the jewelry store. He states Mr. Flatau gave an affirmative answer when asked whether the photographs admitted into evidence were familiar to him, whether the photographs accurately reflected the condition of the store and whether anything had been altered. In addition, he later testified both that he had seen the photographs "time and time again" and that he had seen them "probably once." He also subsequently stated that: (1) he was not present when the photographs were taken; (2) items had been added; (3) he did not know what some of the photographs depicted and (4) some of the evidence had been moved and altered. Petitioner contends the prosecution improperly used Mr. Flatau's testimony knowing it was false.

A conviction obtained through the use of evidence known to be false by the prosecution violates the Due Process Clause of the Fifth Amendment to the Constitution. *Napue v. Illinois*, 360 U.S. 264, 269 (1959). This principle applies regardless of whether the prosecution affirmatively offered false testimony or merely permitted false testimony to go uncorrected. *Id.* To establish a violation based upon the knowing use of false testimony, a petitioner must show: (a) the testimony at issue was false; (b) the prosecutor knew the testimony was false and nonetheless permitted it to go unchallenged and (c) the testimony was material. *Creel v. Johnson*, 162 F.3d 385, 391 (5th Cir. 1998).

Mr. Flatau testified that he was not present when the photographs admitted into evidence were taken. However, he stated the photographs fairly and accurately depicted the condition of the store following the robbery. He did subsequently acknowledge that yellow markers and yellow tape shown in the photographs had been placed there by police officers and were not there at the time of the robbery.

Petitioner has not demonstrated Mr. Flatau committed perjury. Rather than deliberately testifying falsely, Mr. Flatau appears to have merely failed to originally acknowledge that items that

were obviously added by the police during their investigation were not present during the robbery. In addition, petitioner has pointed to small inconsistencies in Mr. Flatau's testimony that appear to be attempts by him to clarify his testimony in response to questions from counsel, rather than a deliberate attempt to mislead the jury.

Further, petitioner has not demonstrated the problems he identified in Mr. Flatau's testimony were material. As stated by the intermediate appellate court:

> [T]he State presented overwhelming evidence of appellant's guilt, most notably the consistent testimony of the eyewitnesses. Flatau, Flatau's wife, and a customer testified that appellant entered the store and held them at gunpoint. Flatau testified that appellant shot him. Flatau also testified that he saw appellant filling a satchel with merchandise from the store safe. The first officer on the scene observed Flatau holding appellant at gunpoint and noticed that Flatau had been shot. The police recovered a satchel from appellant that contained the stolen merchandise. Photographs of the satchel were admitted into evidence.

In light of the evidence against petitioner, there is not a reasonable probability the result of the proceeding would have been different if Mr. Flatua had not provided what petitioner describes as perjured testimony or if Mr. Flatau's testimony had not established a sufficient basis for the photographs to be admitted into evidence. Because the testimony of Mr. Flatau did not constitute perjury, and the specific portion of his testimony that is cited by petitioner was not material, the rejection by the Court of Criminal Appeals of this ground for review was not contrary to, or an unreasonable application of, clearly established federal law.

Recommendation

This petition for writ of habeas corpus should be denied.

Recieved
April 17, 2018
16?

Objections

Objections must be (1) specific, (2) in writing, and (3) served and filed within 14 days after being served with a copy of this Report and Recommendation. 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 6(a), 6(b) and 72(b).

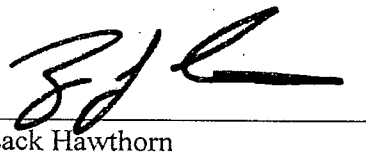
A party's failure to object bars that party from (1) entitlement to *de novo* review by a district judge of proposed findings and recommendations, *Rodriguez v. Bowen*, 857 F.2d 275, 276-77 (5th Cir. 1988), and (2) appellate review, except on grounds of plain error, of unobjected-to factual

The reviewing court can't make up reasoning for the State

Case law Appellate rules

findings and legal conclusions accepted by the district court, *Douglass v. United Serv. Auto. Ass'n.*, 79 F.3d 1415, 1429 (5th Cir. 1996) (*en banc*).

SIGNED this 9th day of April, 2018.



Zack Hawthorn
United States Magistrate Judge