APPENDIX- A

THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT'S OPINION

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 18-40943

T'CHALLA RHASHAED WASHINGTON,

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:

T'Challa Rhashaed Washington, Texas prisoner # 1773263, is serving an enhanced 78-year sentence after a jury convicted him of possessing more than one gram, but less than four grams, of cocaine with the intent to deliver it on or about August 18, 2010. He filed a 28 U.S.C. § 2254 petition challenging his conviction, but his claims were denied on the merits, and his petition was dismissed with prejudice. Washington now seeks a certificate of appealability (COA) to appeal that denial and dismissal.

In his COA motion, Washington argues the following. The admission at trial of statements he made during his arraignment hearing violated his right against self-incrimination, and trial counsel should have made this argument in the trial court. There was insufficient trial evidence to prove beyond a

reasonable doubt that he was the person who sold the drugs to the confidential informant. Trial counsel should have requested that the State be made to elect a specific drug transaction to charge him with, and he should have objected to the State's introduction of extraneous offense evidence, including evidence from other drug transactions. Appellate counsel should have raised in a merits brief on direct appeal the same arguments that Washington has presented in his COA motion.

A COA may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When a district court has rejected constitutional claims on the merits, a COA will be granted only if the applicant "demonstrate[s] that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Washington has failed to make the required showing, and his motion for a COA is therefore DENIED.

/s/Jennifer Walker Elrod
JENNIFER WALKER ELROD
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

LUFKIN DIVISION

T'CHALLA RHASHAED WASHINGTON	§	
VS.	§	CIVIL ACTION NO. 9:15-CV-133
DIRECTOR, TDCJ-CID	§	

ORDER ADOPTING THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

Petitioner, T'Challa Rhashaed Washington, an inmate formerly confined at the Eastham Unit with the Texas Department of Criminal Justice, Correctional Institutions Division, proceeding *pro se* and *in forma pauperis*, brings this petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2254.

The Court referred this matter to the Honorable Zack Hawthorn, United States Magistrate Judge, at Lufkin, Texas, for consideration pursuant to applicable laws and orders of this Court. The Magistrate Judge recommends this petition for writ of habeas corpus should be denied.

The Court has received and considered the Report and Recommendation of United States Magistrate Judge filed pursuant to such order, along with the record, and pleadings. No objections to the Report and Recommendation of United States Magistrate Judge were filed by the parties.[1]

ORDER

Accordingly, the findings of fact and conclusions of law of the Magistrate Judge are correct, and the report of the Magistrate Judge is **ADOPTED**. A final judgment will be entered in this case in accordance with the Magistrate Judge's recommendations.

Furthermore, the Court is of the opinion petitioner is not entitled to a certificate of appealability. An appeal from a judgment denying post-conviction collateral relief may not proceed unless a judge issues a certificate of appealability. *See* 28 U.S.C. § 2253. The standard for a

[1]The Magistrate Judge granted petitioner's request for an extension to file objections through September 20, 2018 (docket entry no. 27).

certificate of appealability requires the petitioner to make a substantial showing of the denial of a federal constitutional right. *See Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000); *Elizalde v. Dretke*, 362 F.3d 323, 328 (5th Cir. 2004). To make a substantial showing, the petitioner need not establish that he would prevail on the merits. Rather, he must demonstrate that the issues are subject to debate among jurists of reason, that a court could resolve the issues in a different manner, or that the questions presented are worthy of encouragement to proceed further. *See Slack*, 529 U.S. at 483-84. Any doubt regarding whether to grant a certificate of appealability should be resolved in favor of the petitioner, and the severity of the penalty may be considered in making this determination. *See Miller v. Johnson*, 200 F.3d 274, 280-81 (5th Cir.), *cert. denied*, 531 U.S. 849 (2000).

In this case, petitioner has not shown that any of the issues would be subject to debate among jurists of reason. The questions presented are not worthy of encouragement to proceed further. Therefore, petitioner has failed to make a sufficient showing to merit the issuance of certificate of appealability. Accordingly, a certificate of appealability will not be issued.

So **ORDERED** and **SIGNED September 25, 2018.**

Ron Clark, Senior District Judge

APPENDIX - B

REPORT AND RECOMMENDATION OF U.S.

MAGISTRATE JUDGE

T'Challa Rhashaed Washington 1773263
Darrington Unit
59 Darrington Road
Rosharon, TX 77583

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

LUFKIN DIVISION

T'CHALLA RHASHAED WASHINGTON	§	
VS.	§	CIVIL ACTION NO. 9:15-CV-133
DIRECTOR, TDCJ-CID	§	

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

Petitioner, T'Challa Rhashaed Washington, an inmate formerly confined at the Eastham Unit of the Texas Department of Criminal Justice, Correctional Institutions Division, proceeding *pro se* and *in forma pauperis*, filed this petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

The above-styled action 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.

Procedural Background

On March 22, 2012, in Cause Number 21808 in the 411th Judicial District Court of Polk County, Texas, petitioner was found guilty of possession with intent to deliver between one and four grams of cocaine, enhanced to a first degree felony by a prior conviction for robbery. Petitioner was sentenced to a seventy-eight year term of imprisonment. State Court Records, pg. 2 & 65 (docket entry no. 24-1).

Petitioner timely filed a Notice of Appeal. *Id.*, pg. 2. On November 26, 2013, the First Court of Appeals affirmed the conviction. *Washington v. State*, 01-12-00460-CR (Tex. App. -- Houston, 2013), pg. 9 (docket entry no. 24-24). Petitioner filed a petition for discretionary review which was

refused on April 9, 2014. *Washington v. State*, PDR No. 1810-13. Petitioner filed a state writ of habeas corpus on August 1, 2014, which was denied without written order by the Texas Court of Criminal Appeals on November 26, 2014. *Ex parte Washington*, 21-808-A, pgs. 18-35 (docket entry no. 24-24); pg. 1 (docket entry no. 24-22).

Petitioner filed the above-referenced federal petition for writ of habeas corpus on August 13, 2015. Federal Writ, pg. 11 (docket entry on. 1).

Factual Background[1]

[Petitioner] was indicted for the possession of more than one gram but less than four grams of cocaine with the intent to deliver said controlled substance.

[Petitioner] pleaded not guilty to this allegation before a jury.

The state presented nine witnesses whose testimony was uniformly consistent. These witnesses testified to the following chronology of the events relevant to the offense:

Prior to August 18, 2010, Samantha Simons approached deputies of the Polk County Sheriff's Department wishing to help the department get rid of drug dealers. Her mother, who had drugs problems, was being released from prison and she wanted to remove her suppliers. Ms. Simons worked as a "cooperating individual" for the department making about 20 undercover buys of illegal controlled substances.

On August 18, 2010, Ms. Simon met with Anthony Lowrie and Howard Smith of the narcotics unit of the Sheriff's Department. She initially called [Petitioner] and told him that she needed to purchase drugs. She and her vehicle were searched by the deputies, she was given $200 and fitted with a body microphone and a video recorder. She drove to the apartment complex where

[1]As outlined in Petitioner's Appellant Brief, pgs. 11-14 (docket entry no. 24-14).

[Petitioner] lived at the time. [Petitioner] arrived about 5 minutes later. She gave the $200 to [Petitioner] who gave a substance to Ms. Simons. She returned to the deputies, who had been listening to the transmission from the body microphone, and handed the substance to Deputy Smith.

Upon reviewing the video recording of the event, the deputies discovered that, although the audio recording was reasonably clear, the video was not. The face of the person was not visible and the entire recording was upside down.

Deputy Lowrie testified that he recognized [Petitioner's] voice on the recording. The recording was also played for Byron Lyons, the Sheriff's Department Chief Deputy, and Ronnie Bogany, a Livingston Police Department officer, who had known [Petitioner] for many years. Each was able to identify the voice on the recording as being that of [Petitioner].

Additionally, Officer Bogany was asked to drive his patrol unit through the apartment complex to see if [Petitioner] was still present. Officer Bogany saw [Petitioner] and recorded him on the video recording system installed in his patrol vehicle. The clothes being worn by [Petitioner] in the Bogany recording matched that shown in the recording made by Ms. Simons at the time of the sale.

Deputy Smith turned the substance over to Deputy Randy Turner who delivered the substance to the Department of Public Safety Crime Lab in Houston. The substance was originally tested by a chemist at the lab who was unavailable to testify because he had taken time off for personal reasons. The substance was again taken to the lab two weeks before the trial and was retested, this time by Minh Nguyen, a chemist at the laboratory. Mr. Nguyen testified that the substance weighed 1.33 grams and tested positive for cocaine.

After being arrested two months later for this offense, [Petitioner] was interviewed at the

Sheriff's office by Deputy James Michael Nettles. Deputy Nettles advised [Petitioner] of his statutory rights, commonly referred to as *Miranda* rights and [Petitioner] waived those rights and spoke to Deputy Nettles. During the interview, which was recorded and identified during the trial as State's Exhibit 12, [Petitioner] admitted that he had sold drugs in the past but did not do so anymore. When asked when he had stopped selling drugs, [Petitioner] responded "obviously not soon enough."

Also introduced during the trial was evidence that [Petitioner] had sold cocaine to Ms. Simons on two other occasions.

The jury found [Petitioner] guilty of possessing more than one gram but less than four grams of cocaine with the intent to deliver same.

During the punishment hearing, [Petitioner] testified that he had committed the charged offense and was guilty.

The Petition

Petitioner asserts the following grounds for review in the present federal writ of habeas corpus:

1. He was compelled to be a witness against himself by the trial judge against his right against self-incrimination;

2. He received ineffective assistance of counsel when his attorney:

   a. failed to make the proper objections to the State being allowed to use petitioner's uncounseled answers to the judge in support of appointment of indigent counsel in violation of petitioner's right to due process;

   b. failed to request that the State be made to elect which drug transaction it was submitting to the jury;

   c. failed to object to a series of highly inflammatory and

prejudicial extraneous offenses and acts introduced by the State in its case-in-chief even though the State had given no notice as required and was, therefore, inadmissible.

3. The evidence was legally insufficient to support his conviction.

4. He was denied effective assistance of counsel on appeal when his attorney was allowed to withdraw without raising any trial court errors claims.

See Original Petition (docket entry no. 1).

The Response

Respondent was ordered to show cause on October 17, 2016 (docket entry no. 7). Respondent filed a Response on January 27, 2017 (docket entry no. 15). Respondent argues: (1) petitioner's claim concerning self-incrimination is procedurally barred and, alternatively, lacks merit; (2) petitioner's claims of ineffective assistance of counsel lack merit; (3) the evidence was sufficient to support his conviction; and (4) petitioner has failed to show he received ineffective assistance of counsel on appeal.

Analysis

Title 28 U.S.C. § 2254 authorizes the 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 ground for review 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 the state court. 28 U.S.C. § 2254(d). A decision is contrary to clearly established federal law if the state 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 set of materially indistinguishable 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.*

This Court must accept as correct any factual determinations made by the state courts unless the petitioner rebuts the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e). The presumption of correctness applies to both implicit and explicit factual findings. *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 the 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 (holding that a full and fair hearing is not a precondition according to § 2254(e)(1)'s presumption of correctness to state habeas court findings of fact nor to applying Section § 2254(d)'s standards of review). A "paper hearing" is sufficient to afford a full and fair hearing on factual issues especially where the trial court and state habeas court were the same. *See Hill v. Johnson*, 210 F.3d 481, 489 (5th Cir. 2000); *Murphy v. Johnson*, 205 F.3d 809, 816 (5th Cir. 2000). Furthermore, a denial, even though it does not contain a written opinion, is not silent or ambiguous. *See Ex parte Torres*, 943 S.W.2d 469, 472 (Tex. Crim. App. 1997) (holding a "denial" signifies an adjudication on the merits). It is a decision on the merits and is entitled to the Anti-Terrorism and Effective Death Penalty Act's ("AEDPA") deference. 28 U.S.C. § 2254(d); *see also Neal v. Puckett*, 239 F.3d 683, 686 (5th Cir. 2001) (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."). The Supreme Court reconfirmed that § "2254(d) does not require a state court to give reasons before its decision can be deemed to have been 'adjudicated on the merits.'" *Harrington v. Richter*, 562 U.S. 86 (2011). Even if "a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief." *Id.* at 784. Moreover, "[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." *Id.* at 785 (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). This standard is difficult to meet, and the Supreme Court has affirmed that, "it was meant to be" so. *Harrington*, 131 S.Ct. at 786.

Finally, the Supreme Court also recently held that "review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits. *Cullen v. Pinholster*, 131 S.Ct. 1388, 1398 (2011). Perhaps more compelling, the Supreme Court made clear that § 2254(e)(2) – the statutory mechanism through which Congress limited a petitioner's ability to obtain a federal evidentiary hearing (and to expand the federal habeas record) – has no application when a federal court reviews claims pursuant to § 2254(d), whether or not a petitioner might meet the technical requirements of § 2254(e)(2). *See Pinholster*, 131 S.Ct. at 1400-01 (showing that the Supreme Court explicitly rejected the proposition that § 2254(d)(1) has no application when a federal court admits new evidence under § 2254(e)(2)); *see also id.* at 1411 n. 20 ("Because Pinholster has failed to demonstrate that the adjudication of his claim based on the state-court record . . . [violated § 2254(d)(1)] our analysis is at an end. We are barred from considering the evidence

Pinholster submitted in the District Court that he contends additionally supports his claim."). The Supreme Court reasoned:

> Today, we . . . hold that evidence introduced in federal court has no bearing on § 2254(d)(1) review. If a claim has been adjudicated on the merits by a state court, a federal petitioner must overcome the limitation of § 2254(d)(1) on the record that was before that state court.

Pinholster, 131 S.Ct. at 1400. Therefore, the Court must review the reasonableness of the state court determinations under § 2254(d), with only reference to the record actually before the state court.

1. *Self-Incrimination*

Petitioner argues he was compelled to be a witness against himself by the trial judge against his right against self-incrimination. Petitioner specifically states:

> Several months prior to trial. Petitioner appeared at his arraignment hearing. Petitioner was unrepresented by counsel. The State was represented by two prosecutors. The Honorable Robert Hill Trapp was the judge. At that time. Petitioner requested appointment of counsel. In qualifying Petitioner for indigent counsel, the following colloquy ensued:
>
> THE COURT: What type of work do you do?
>
> PETITIONER: Nothing now. I can't get any at the moment. None . . .
>
> THE COURT: What did you do in the past that you made a living off of?
>
> PETITIONER: I sold drugs at one time in the past.
>
> Following this colloquy. Petitioner was appointed counsel.
>
> At trial during opening arguments the prosecutor informed the jury:
>
> "Later on in. I believe. July of 2011. The defendant was brought into this courtroom before Judge Trapp for his arraignment and was asked questions about how he earned a living for purposes of his ability to hire or have a

> court-appointed attorney. And in open court when asked by this judge what he did for a living he admitted he is a drug dealer. So you will have that evidence before you as well." (3 RR 17. lns. 18-24).
>
> At the conclusion of the state's case-in-chief the prosecutor moved to admit certified transcripts containing Petitioner's answer to Judge Trapp's questions during the arraignment hearing. (3 RR 160).
>
> Trial counsel objected based on the prosecutor's failure to establish proper predicate and foundation. (3 RR 160, lns. 11-13). Judge Trapp ruled "for the record State's Exhibit No. 13 is admitted in over any objection." (3 RR 160, lns. 25 thru 3 RR 161). The transcripts of petitioner's answer to Judge Trapp was then read for the jury. (3 RR 161, lns. 12-22). Prior to the reading, the prosecutor made sure to inform the jury "that would be Judge Trapp talking." (3 RR 161).
>
> In closing arguments the prosecutor told the jury:
>
> "Without a doubt this defendant had admitted in this courtroom that he is a drug dealer and the evidence in this case supports it is in every respect." (3 RR 179, lns. 14-16).
>
> Petitioner chose not to testify during the guilt/innocence phase. Therefore, the prosecutor's statement was directed directly to the answers given by Petitioner to Judge Trapp's questions during the arraignment hearing.

Petitioner's Traverse, pgs. 2-3 (docket entry no. 18).

Respondent argues this claim is procedurally barred as petitioner's trial counsel did not properly object to this testimony as a violation of petitioner's right to the protection against self-incrimination or, alternatively, lacks merit.[2] Petitioner responds stating that this claim is not procedurally barred as the Texas Court of Criminal Appeals denied his state application for writ of habeas corpus on the merits.[3] Petitioner argues, alternatively, that he has shown cause and prejudice as his appellate counsel was ineffective for failing to raise this issue on appeal.

---

[2]Counsel objected on the ground that no predicate had been laid. 3 RR 161.

[3]Petitioner argued this claim for the first time in his state writ of habeas corpus.

Where the Texas Court of Criminal Appeals denies an application without written order, offering no explanation, the denial is on the merits, regardless of a potential procedural bar. *Bledsue v. Johnson,* 188 F.3d 250, 255 (5th Cir.1999); *cf Ex parte Grigsby*, 137 S.W.3d 673, 674 (Tex. Crim. App. 2004) (noting exception with sufficiency of the evidence claim as that claim may not be raised in state collateral proceedings). This is based on Texas precedent stating that a "denial" of state habeas relief means that the claim had been reviewed on the merits, while "dismissal" means that the claim was not considered for reasons unrelated to the merits. *Id.* Contrary to the argument by respondent, this claim does not appear to be procedurally barred.

This claim does, however, lack merit as the alleged self-incriminatory evidence was cumulative to other evidence presented at trial. An error in admitting evidence is harmless when the evidence is cumulative, if substantial evidence supports the same facts and inferences as those erroneously admitted. *United States v. El-Mezain*, 664 F.3d 467, 526 (5th Cir. 2011); *see also United States v. Griffin*, 324 F.3d 330, 348 (5th Cir. 2003) (where objected to testimony is cumulative of other testimony that has not been objected to, the error that occurred is harmless).

In this case, Officer Nettles testified he interviewed petitioner after his arrest on October 29, 2010, for several different drug charges from August to September 2010. 3 R 152-154 (docket entry no. 24-4). Petitioner waived his *Miranda* rights and agreed to speak to Officer Nettles. 3 RR 154; State's Exhibit 11. In the interview, petitioner stated he sold drugs in the past. 3 RR 157-158. When Officer Nettles asked him when he stopped, he stated, "[o]bviously not soon enough." 3 R 157. Because the jury had already heard this information both through the videotape of his interview with Officer Nettles and through Nettle's testimony, any error in admitting the testimony from the arraignment hearing was harmless. Petitioner cannot show that the error "had a substantial

and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). Furthermore, petitioner has failed to show the decision by the Texas Court of Criminal Appeals was contrary to, or involved an unreasonable application of, clearly established federal law, or resulted in a decision based on an unreasonable determination of the facts in light of the evidence presented in the state court. 28 U.S.C. § 2254(d). This claim should be denied.

2. *Ineffective Assistance of Counsel*

In order to show that counsel was ineffective, a petitioner must demonstrate:

> first . . . that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

See Strickland v. Washington, 466 U.S. 668 (1984); *see also United States v. Grammas*, 376 F.3d 433, 436 (5th Cir. 2004). In order to prove the prejudice prong, a petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Day v. Quarterman* 566 F.3d 527, 536 (5th Cir. 2009). The petitioner must "affirmatively prove," not just allege, prejudice. *Id.* If the petitioner fails to prove the prejudice component, the court need not address the question of counsel's performance. *Id.* A reviewing court "must strongly presume that trial counsel rendered adequate assistance and that the challenged conduct was the product of a reasoned trial strategy." *Wilkerson v. Collins*, 950 F.2d 1054, 1065 (5th Cir. 1992), *cert. denied*, 509 U.S. 921 (1993).

The burden of proof in a habeas corpus proceeding attacking the effectiveness of trial

counsel is upon petitioner, who must demonstrate counsel's ineffectiveness by a preponderance of the evidence. *Martin v. Maggio*, 711 F.2d 1273, 1279 (5th Cir. 1983), *cert. denied*, 469 U.S. 1028 (1984). In determining the merits of an alleged Sixth Amendment violation, a court "must be highly deferential" to counsel's conduct. *See Strickland* 466 U.S. at 687. The alleged deficiency in representation is measured against an objective standard of reasonableness. *See Kitchens v. Johnson*, 190 F.3d 698, 701 (5th Cir. 1999).

Trial counsel's failure to object does not constitute deficient performance unless a sound basis exists for objections. *See Emery v. Johnson*, 139 F.3d 191, 198 (5th Cir. 1997) (a futile or meritless objection cannot be grounds for a finding of deficient performance). Even with a sound basis for objection, an attorney may still render effective assistance when the failure to object is a matter of trial strategy. *See Burnett v. Collins*, 982 F.2d 922, 930 (5th Cir. 1993) (noting that a failure to object may be a matter of trial strategy as to which courts will not second guess counsel). To succeed on such a claim, a petitioner must show that the trial court would have sustained the objection and that it would have actually changed the result of the trial. *Strickland*, 466 U.S. at 694. Failure to make frivolous objections does not cause counsel's performance to fall below an objective standard of reasonableness. *See Green v. Johnson*, 160 F.3d 1029, 1037 (5th Cir. 1998). On habeas review, federal courts do not second guess an attorney's decision through the distorting lens of hindsight, but rather, the courts presume that counsel's conduct falls within the wide range of reasonable professional assistance and, under the circumstances, that the challenged action might be considered sound trial strategy. *Strickland*, 466 U.S. at 689.

A. *Failure to Object to Violation of Right Not to Incriminate Himself*

Petitioner argues his trial counsel was ineffective for not objecting to the state's admission

of his uncounseled answers to the judge at the arraignment hearing. As previously outlined, the challenged evidence was cumulative to other evidence already admitted at trial. Thus, petitioner has failed to show any such objection would have changed the result of the trial. *Strickland*, 466 U.S. at 694. Petitioner has failed to show the decision by the Texas Court of Criminal Appeals was contrary to, or involved an unreasonable application of, clearly established federal law, or resulted in a decision based on an unreasonable determination of the facts in light of the evidence presented in the state court. 28 U.S.C. § 2254(d). This claim should be denied.

B. *Failure to Request State to Elect Drug Transaction*

Petitioner next alleges his counsel was ineffective for failing to request the State be made to elect which drug transaction it was submitting to the jury. Petitioner argues this violated his right to double jeopardy, due process and Texas state laws.

The Texas Code of Criminal Appeals requires an indictment to charge the commission of an offense in "ordinary and concise language in such a manner as to enable a person of common understanding to know what is meant." TEX. CODE CRIM. PROC. ANN. art. 21.11.

In the present case, the indictment states that petitioner is being charged with the offense of possession of more than one gram but less than four grams of cocaine which occurred on or about August 18, 2010. Indictment, pg. 6 (docket entry no. 24-1). The Indictment was read to the jury which again stated the offense occurred on August 18, 2010, and that the amount of cocaine was between one and four grams. 3 RR 11-12.

During the trial, the jury heard evidence of three instances in which petitioner committed the offense of possession with intent to deliver or delivery of cocaine on August 18th, August 19th, and September 17th of 2010. 3 RR 30; 68-69 (Detective Anthony Lowrie); 3 RR 78-83

(Confidential Informant); 3 RR 128-129 (Detective Howard Smith). During the direct examination of Detective Lowrie, the prosecutor reemphasized that the August 18th transaction was the subject of the indictment. 3 RR 111.[4] The State's Exhibit 30 was the cocaine that was seized as a result of August 18th transaction. 3 RR 129; 145-147.

In addition, the judge read the charge to the defendant in front of the jury stating, "[n]ow, if you find from the evidence beyond a reasonable doubt that on or about the 18th day of August, 2010, in Polk County, Texas, the defendant, T'Challa Rhashaed Washington, did intentionally or knowingly possess a controlled substance, namely cocaine, of more than one gram but less than four grams, including any adulterants or dilutants with intent to deliver said controlled substance, then you will find the defendant guilty as charged. 3 RR 167. The charge instructed the jury not to consider evidence that the defendant committed other wrongs or bad acts other than that for which he is on trial, unless it found from the evidence that petitioner committed those offenses beyond a reasonable doubt. 3 RR 168; CR 53 (docket entry no. 24-1). Furthermore, the charge stated that the extraneous offenses could only be considered "as evidence of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake in relation to the offense for which the defendant is on trial." *Id.* Moreover, in closing arguments, counsel for the prosecution and defense repeatedly emphasized that the transaction for which petitioner was being tried was the one that occurred on August 18, 2010. 3 RR 176, 178, 180, 182, 184, 186 & 187.

As outlined above, the indictment and the jury charge clearly specify which offense petitioner was charged with and the jury charge provided the limiting instruction with regard to

---

[4]Q. Okay. You can -- I know it's marked on some of the exhibits; but if you can, for the record, the one that happened on August 18th of 2010, which is actually the subject of this indictment, what was the case number assigned to that?" 3 RR 111.

extraneous offenses. A request or motion from petitioner's attorney that the prosecutor elect which drug transaction was being submitted to the jury would have been futile. *See United States v. Gibson*, 55 F.3d 173, 179 (5th Cir. 1995) ("Counsel is not required by the Sixth Amendment to file meritless motions"). The evidence at trial "clearly gave *de facto* notice to the [defendant] as to which act [ ] the State would rely upon for conviction." *See, e.g. Phillips v. State*, 193 S.W.3d 904, (Tex. Crim. App. 2006). Petitioner has failed to establish deficient performance or prejudice under *Strickland*. Petitioner has also failed to show the decision by the Texas Court of Criminal Appeals was contrary to, or involved an unreasonable application of, clearly established federal law, or resulted in a decision based on an unreasonable determination of the facts in light of the evidence presented in the state court. 28 U.S.C. § 2254(d). This claim should be denied.

C. *Failure to Object to State's Admission of Extraneous Offense Evidence*

Petitioner also alleges his trial counsel was ineffective for failing to object to the state's admission of extraneous offense evidence for lack of notice.[5] This claim should be denied as the record belies this assertion. Prior to the beginning of trial, the following exchange took place:

MR. LEWIS: (Defense counsel)	When I got back to the office, I received a supplemental witness list from Mr. Hon adding Officer Nettles. I'm assuming that's for the interview?
MR. HON: (Prosecutor)	That's right.
MR. LEWIS:	On that video they discuss each of the possession cases.

[5]The extraneous offense evidence complained of is as follows: (1) petitioner was the target of the sheriff's narcotics investigators for nearly a year (3 RR 28, lns.13-23); (2) petitioner was arrested on several different charges involving the distribution of drugs that occurred, "I guess, between August and September of that year, 2010?" (3 RR 153); (3) petitioner admitted selling drugs in the past (3 RR 157, lns 10-14); and (4) petitioner told Judge Trapp that he sold drugs in the past (3 RR 17, 161, 179).

THE COURT: Yes, sir.

MR. LEWIS: And I was going to -- if there was a way that we could -- I'm definitely going to object to that portion of the video being heard by the jury if we do that portion.

MR. HON: Let me mention one thing, Judge. I am aware of his concern; and there is some other stuff on that video that I'm going to mute out. For example, the instances he had on probation. We're not going to go into that.

To give you a heads up, this case involves four separate deliveries that occurred in August and September of 2010. And the one that is in this indictment happened on August the 18th of 2010. There was one that happened on August 10th, and there was one that happened on August 19th. And the one that happened on September 10th are all involving the same confidential informant and the same defendant. So he had four separate charges of the same offense.[6]

THE COURT: Right.

MR. HON: While, you know, it's certainly our intent to focus in on the event that happened on August 18th that is in the indictment, I think the charges are so interwoven with each other it's going to be hard to try the case without there being some mention of the others.

THE COURT: I have never heard the tape before. What does it come down to in the tape? What is said there?

MR. HON: He was arrested on, I think, like, October 20th or something like that.

THE COURT: 2010?

MR. HON: Right. Mike Nettles interviewed him at the sheriff's department. And it's a very general interview where

[6]It is unclear if this is a mistatement from the prosecutor as this Court cannot find any testimony elicited regarding an August 10th transaction.

he had four charges pending against him at the time and he pretty much admits that "I'm a drug dealer. I have been selling drugs," you know, this kind of stuff. He never really speaks specifically about any of the individual incidents that this CI did with him.

THE COURT: Did Mr. Nettles question him about like this one is --

MR. HON: No. He was not interviewed specifically, you know, on August 18th did you sell. It's more along the lines of, you know, "Have you been selling drugs?"

"Yes, I have. I'm not going to deny it. I accept responsibility for what I have done. You know, whoever came and bought from me, it's not their fault. You know, it's -- I did it."

MR. LEWIS: My concerns are the mentioning of the amount of cases and listing of actual charges because Mike Nettles does list out the actual charges.

MR. HON: I think I can probably edit out the fact that he had four pending charges against him at the time. With that said, the discussion is going to be very general. And I don't mind playing it, if you want to see it. It's not long.

3 RR 7-9. Petitioner's trial counsel clearly had notice of extraneous offense conduct and any objection for lack of notice would have been futile. *Emery v. Johnson*, 39 F.3d 191, 198 (5th Cir. 1997) (A futile or meritless objection cannot be grounds for a finding of deficient performance).

To the extent petitioner is arguing ineffective assistance of counsel for failure to object to the introduction of the extraneous offense evidence, this claim also lacks merit. Extraneous offense evidence is admissible under Texas Rule of Evidence 404(b) which allows for the admission of other crimes and bad acts to show "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon timely request by the accused in a criminal case, reasonable notice is given in advance of trial of intent to introduce in

the State's case-in-chief such evidence other than that arising in the same transaction." TEX. R. EVID. 404(b). These offenses were admitted pursuant to Rule 404(b) to show identity as identity was an issue in this case. *Moore v. State*, 700 S.W.2d 193, 201 (Tex. Crim. App. 1985) (extraneous offense evidence admissible as evidence of identity only when identity is at issue). As previously outlined, the video of the August 18th transaction was backward and police were unable to capture a picture of petitioner's face. In the other two transactions, the police were able to obtain a better quality video of the same type of transaction between the same two people at the same location.[7] The extraneous offense evidence was clearly admissible and any objection would have been frivolous. *Emery*, 139 F.3d at 198. Petitioner has failed to show deficient performance. *Strickland*, 466 U.S. at 690-91.

Petitioner has also failed to show how this extraneous offense evidence was harmful to him as he admitted to selling drugs in the past in a video tape of his confession that was also admitted at trial. *Garland v. Maggio*, 717 F.2d 199, 206 (5th Cir. 1983); *Green v. Johnson*, 116 F.3d 1116, 1122 (5th Cir. 1997); *Teague v. Scott*, 60 F.3d 1167, 1172 (5th Cir. 1995). Furthermore, petitioner has failed to show that the decision by the Texas Court of Criminal Appeals was contrary to, or involved an unreasonable application of, clearly established federal law, or resulted in a decision based on an unreasonable determination of the facts in light of the evidence presented in the state court. 28 U.S.C. § 2254(d). This claim should be denied.

3. *Sufficiency of the Evidence*

Petitioner argues that no reasonable trier of fact would have found the evidence legally sufficient to prove that petitioner sold drugs to the State's confidential informant on August 18,

[7]The weight for these two transactions were less than 1.0 gram. 3 RR 149.

2010. Petitioner was charged with intentionally or knowingly possessing a controlled substance on or about August 18, 2010: namely cocaine of more than one gram, but less than four grams including any adulterants or dilutants, with intent to deliver said controlled substance. Indictment, pg. 4 (docket entry no. 24-1).

Claims regarding sufficiency of the evidence are reviewed under the standard set forth by the United States Supreme Court in *Jackson v. Virginia*, 443 U.S. 307 (1979). The inquiry to be used with such claims is "whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Id.* at 320. On federal habeas review, the district court may overturn a state court finding that the evidence was sufficient only if that finding was objectively unreasonable. *Cavazos v Smith*, 565 U.S. 1, 2 (2011).

At trial, Officer Lowrie testified that he sent a confidential informant to the apartments on Mimosa Street with $200 to try to purchase drugs from petitioner on August 18, 2010. 3 RR 32, 38-39. Officer Lowrie and Officer Smith followed the informant and listened to her conversation with petitioner over their radio transmitter. 3 RR 32, 51. Officer Lowrie overheard the confidential informant ask petitioner for $200 worth of cocaine. 3 RR 33. When the deal was done, they picked her up from Mimosa Street and recovered the crack cocaine from the confidential informant. 3 RR 33-34. They asked her to tell them what happened so they could compare it with what they heard. 3 RR 34. The confidential informant told them she had just bought drugs from petitioner, the person they targeted. 3 RR 34. Officer Lowrie confirmed with Deputy Lyons that the voice on the video was petitioner's. 3 RR 37. Officer Lowrie also identified petitioner's voice. 3 RR 37. State's Exhibit 1, a video tape of the confidential informant's transaction with petitioner on August

18, 2010 was also admitted into evidence. 3 RR 39. Police also returned to the scene and confirmed that the clothing petitioner was wearing in the video was what he was wearing at the time. 3 RR 44.

The confidential informant identified petitioner in court. 3 RR 77. She testified that on August 18, 2010, she called petitioner on her cell phone and told him she wanted to purchase some drugs. 3 RR 79-80. When petitioner showed up, she purchased $200 worth of cocaine from him in front of the apartments. 3 RR 81. The confidential informant stated that on August 19 and September 17 she also engaged in drug transactions with petitioner. 3 RR 83.

Officer Nettles also testified that he was familiar with petitioner and interviewed him after his arrest. 3 RR 152-154. After petitioner was advised of and waived his *Miranda* rights, he spoke to Officer Nettles and admitted he sold drugs in the past. 3 RR 157. When Officer Nettles asked petitioner when he stopped, petitioner replied, "[o]bviously not soon enough." 3 RR 157; State's Exhibit 12.

Minh Nguyen, a chemist with the Department of Public Safety Crime Lab in Houston testified that State's Exhibit 30, the drugs from the August 18, 2010 transaction, tested positive for cocaine and weighed 1.33 grams. 3 RR 140, 146-147.

After viewing all this evidence in the light most favorable to the prosecution, it is clear that there was sufficient evidence from which a rational jury could have found beyond a reasonable doubt that petitioner intentionally or knowingly possessed more than one gram but less than four grams of cocaine on or about August 18, 2010 with the intent to deliver. On habeas review, the district court must accept all credibility determinations made by the jury. *Ramirez v. Dretke*, 398 F.3d 691, 695 (5th Cir. 2005). The district court may not reweigh the evidence and substitute the

court's judgment for that of the jury. *United States v. Cyprian*, 197 F.3d 736, 740 (5th Cir. 1999).

Furthermore, petitioner's attorney on appeal filed an *Anders* brief stating the record presented no reversible error and thus, the appeal was without merit and frivolous. *See Anders v. California*, 386 U.S. 738 (1967). The appellate court reviewed the entire record as well and petitioner's *pro se* response and concluded no reversible error existed. Petitioner raised his claim of insufficient evidence in a petition for discretionary review which was refused by the Texas Court of Criminal Appeals. Petitioner, therefore, has failed to show that the decision by the Texas Court of Criminal Appeals was contrary to, or involved an unreasonable application of, clearly established federal law, or resulted in a decision based on an unreasonable determination of the facts in light of the evidence presented in the state court. 28 U.S.C. § 2254(d). This claim should be denied.

4. *Ineffective Assistance of Counsel on Appeal*

Petitioner argues appellate counsel was ineffective for filing an *Anders* Brief and for failing to argue "numerous meritorious" claims as detailed in petitioner's objections to appellate counsel's *Anders* brief.

A habeas corpus petitioner who claims that he was denied the right to effective assistance of counsel on appeal must satisfy the *Strickland* standard by showing that his counsel's performance was deficient, and that counsel's deficient performance resulted in actual prejudice. *See Strickland v. Washington,* 466 U.S. 668 (1984); *see also Amador v. Quarterman,* 458 F.3d 397, 410–11 (5th Cir. 2006), *cert. denied,* 550 U.S. 920 (2007). Because there is no right to appellate counsel in the absence of a non-frivolous issue for appeal, a petitioner challenging the effectiveness of his appellate attorney must demonstrate deficient performance by showing that his counsel "was objectively unreasonable in failing to find arguable issues to appeal—that is, that counsel

unreasonably failed to discover non-frivolous issues and raise them." *Smith v. Robbins,* 528 U.S. 259, 285 (2000). If the petitioner succeeds in such a showing, then he must establish actual prejudice by demonstrating a "reasonable probability" that, but for his counsel's deficient performance, "he would have prevailed on his appeal." *Id.*

As previously outlined, petitioner's appellate counsel filed an *Anders* Brief stating he found the appeal to be frivolous. The First Court of Appeals agreed stating "there are no arguable grounds for review" and "therefore the appeal is frivolous." *Washington*, slip op. at 4. Petitioner has failed to point out any meritorious issues that appellate counsel should have raised. Accordingly, he has failed to show that the decision by the Texas Court of Criminal Appeals was contrary to, or involved an unreasonable application of, clearly established federal law, or resulted in a decision based on an unreasonable determination of the facts in light of the evidence presented in the state court. 28 U.S.C. § 2254(d). This claim should be denied.

Recommendation

Petitioner's request for habeas corpus relief pursuant to 28 U.S.C. § 2254 should be denied.

Objections

Within fourteen (14) days after receipt of the Magistrate Judge's report, any party may serve and file written objections to the findings of facts, conclusions of law and recommendations of the Magistrate Judge. 28 U.S.C. § 636(b)(1)(c).

Failure to file written objections to the proposed findings of facts, conclusions of law and recommendations contained within this report within fourteen (14) days after service shall bar an aggrieved party from the entitlement of *de novo* review by the district court of the proposed

findings, conclusions and recommendations and from appellate review of factual findings and legal conclusions accepted by the district court except on grounds of plain error. *Douglass v. United Services Automobile Association*, 79 F.3d 1415, 1417 (5th Cir. 1996) (en banc); 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72.

SIGNED this 23rd day of August, 2018.

Zack Hawthorn
United States Magistrate Judge

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