IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
March 8, 2019
Lyle W. Cayce
Clerk

No. 16-20283
Summary Calendar

JORGE ALBERTO RAMIREZ,

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
USDC No. 4:14-CV-1403

Before JOLLY, COSTA, and HO, Circuit Judges.

PER CURIAM:*

Jorge Alberto Ramirez, Texas prisoner # 1514006, was convicted in a Texas state court of the capital murder of Torrin Farrow, and he was sentenced to life in prison without parole. After unsuccessful state habeas proceedings, Ramirez sought relief in federal court under 28 U.S.C. § 2254. The district

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

Appendix A

court denied relief, and Ramirez timely appealed. We granted Ramirez a certificate on the sole issue of ineffective assistance of counsel discussed below.

By all accounts, Noel Alvarez, a friend of Ramirez's, called Farrow on the telephone numerous times to arrange for Farrow to pick up Alvarez and Ramirez so they could buy Xanax from Farrow. Alvarez sat in the front passenger seat next to Farrow, and Ramirez sat in the rear seat behind Farrow. Farrow handed a bag containing Xanax pills to Alvarez in the vehicle. Farrow sustained a fatal gunshot wound to the back of his head. The shell casing found in the right, rear seat of Farrow's car indicated that he was shot with a .380 caliber handgun. Both Ramirez and Alvarez contended that the other was the shooter.

Alvarez was an admitted user of Xanax and had a prior drug conviction. He testified that he was looking ahead when he heard a gunshot near his left ear. He never saw Ramirez with a gun, but he surmised that Ramirez had shot Farrow. In the few months before the shooting, Alvarez had been seen with a .380 caliber handgun in his possession. Alvarez testified he had never heard of Christopher Figueroa.

Christopher Figueroa testified that he was locked up for approximately three months with Ramirez in a county jail. Figueroa knew Alvarez's name because Ramirez told him about the offense. According to Figueroa, Ramirez told him the following. Ramirez and Alvarez had no money to buy drugs and had planned to rob Farrow and then shoot him. After Alvarez received the Xanax from Farrow, Ramirez shot him in the back of the head. Ramirez planned to pin the murder on Alvarez by stating that Alvarez had distracted him and Farrow, causing them to look to the left out of the window, so that Alvarez could shoot Farrow in the back of the head.

The State introduced testimony from a weapons expert indicating that, because most people are right-handed, most .380 caliber handguns are designed with their ejection ports on the right, so that their shell casings eject up and to the right. Trial counsel did not call any expert to discuss ways that the shell casing could have ended up in the right, rear seat if Alvarez had been the shooter. Nor did he elicit such testimony from the State's own weapons expert. Ramirez argues that counsel was ineffective for failing to do so. He argues that if the handgun had been held in a canted position, *i.e.*, one where the palm and knuckles are rotated horizontally to the ground so that the ejection port faces up when the gun is fired, the evidence would have supported his theory that Alvarez was the shooter. Because counsel did not elicit such testimony, Ramirez argues, the jury would only have imagined that the gun was held in a conventional matter, and the location of the shell casing inevitably led the jury to draw the inference that he was the shooter based on where he sat in the car.

To prevail on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that his defense was prejudiced by the deficiency. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). To show prejudice, the defendant must show a reasonable probability that, but for counsel's errors, the trial's outcome would have been different. *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome" of the criminal proceeding. *Id.* Ramirez contends that he has far exceeded this standard for establishing prejudice. He discounts the effect of the testimony given by Alvarez and Figueroa, asserting that those two men had substantial credibility issues. He therefore contends that, had counsel presented the jury with some plausible

explanation of how the shell casing could have ended up in the right rear seat if Alvarez was the shooter, he likely would not have been convicted.

The question here is not whether Ramirez has shown sufficient prejudice to establish a *Strickland* claim. On federal habeas review, the question is whether the state habeas court's decision that Ramirez did not make the necessary showing under *Strickland* was contrary to or an unreasonable application of *Strickland*. *See Schaetzle v. Cockrell*, 343 F.3d 440, 444 (5th Cir. 2003). "Under § 2254(d)(1)'s 'unreasonable application' clause, . . . a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Williams v. Taylor*, 529 U.S. 362, 411 (2000). "[E]ven a strong case for relief does not mean that the state court's contrary conclusion was unreasonable." *Harrington v. Richter*, 562 U.S. 86, 102 (2011). Having carefully considered the trial transcript, and given the substantial range of reasonable applications of the *Strickland* standard as well as the deference owed to the state habeas court's decision, we are not persuaded that Ramirez is entitled to relief under § 2254(d)(1). *See Richter*, 562 U.S. at 105. Accordingly, the judgment of the district court is AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JORGE ALBERTO RAMIREZ, TDCJ #1514006,	§	
Petitioner,	§	
VS.	§	CIVIL ACTION NO. H-14-1403
WILLIAM STEPHENS,	§	
Respondent.	§	

MEMORANDUM AND ORDER

Petitioner Jorge Alberto Ramirez (TDCJ No. 1514006), a state inmate, has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging his conviction for capital murder. (Docket Entry No. 1). Respondent has filed a Motion for Summary Judgment (Docket Entry No. 20), to which Petitioner has filed a response (Docket Entry No. 23). After considering all of the pleadings, the record, and the applicable law, the Court will grant Respondent's motion for summary judgment and dismiss this habeas petition.

I. Background and Procedural History

Jorge Alberto Ramirez ("Ramirez") is currently incarcerated in Texas Department of Criminal Justice, Correctional Institutions Division (TDCJ-CID) as a result of a 2008 capital murder conviction.[1] Ramirez was charged with that offense on February 7, 2008, with an indictment alleging the following:

> Defendant, heretofore on or about JULY 19, 2007, did then and there unlawfully, while in the course of committing and attempting to commit the ROBBERY of TORIN FARROW, intentionally cause the death of TORIN FARROW by SHOOTING HIM WITH A DEADLY WEAPON, NAMELY A FIREARM.[2]

[1] *See* Petition, Docket Entry No. 1, at 2.

[2] Indictment, Docket Entry No. 16-4, at 17.

Ramirez pled not guilty and proceeded to trial in the 177th District Court, Harris County, Texas in cause number 1,139,958.[3] On June 27, 2008, a jury found Ramirez guilty of capital murder, and he was sentenced to life without parole.[4]

On direct appeal, Ramirez argued: (1) the trial court committed reversible error when it refused to allow admission of the testimony regarding the out-of-court statement of Noel Alvarez that implied that he committed the offense; (2) the trial court's sustaining prosecutorial objections to defense cross-examination denied Ramirez his right to confront the witnesses against him; (3) the trial court committed reversible error in overruling timely defense objection to the charge to the jury; (4) the trial court erroneously denied Ramirez's right to argue in final argument that there were shortcomings in the State's proof by sustaining the State's improper objections; (5) the court's overruling defense objections to improper jury argument by the prosecutor denied Ramirez a fair trial; (6) the evidence brought to trial by the State was legally insufficient to establish Ramirez's guilt beyond a reasonable doubt; (7) the evidence brought to trial by the State was factually insufficient to establish Ramirez's guilt beyond a reasonable doubt. An intermediate court of appeals rejected Ramirez's arguments and affirmed the conviction after summarizing the evidence at trial, as follows:

> Houston Police Department ("HPD") Homicide Sergeant J. Wood testified that on July 19, 2007, he was dispatched to an apartment complex to investigate the murder of the complainant, Torrin Farrow. Upon his arrival, Wood saw the complainant's green four-door Cadillac up against a fence with the driver's door open. The body of the complainant, who had been shot in the head, had been removed from the car by emergency services personnel. Inside the car, Wood saw blood and other "bodily fluids" on the driver's seat, a drop of blood on the back seat, a small blood spatter on the arm rest of driver's door, and a few drops of

[3] Petition, Docket Entry No. 1, at 2.

[4] *Id.*

blood spatter on the bottom part of the dashboard to the left of the steering wheel. There was no blood spatter in the front passenger seat area. Wood opined that the blood spatter indicated that the complainant's body had been thrown forward and then jerked backward when his car hit the fence. He noted that the blood found on the dashboard, driver's seat, and backseat could have come from such a motion. Wood recovered a cellular telephone and a baggie of pills lying on the ground outside of the complainant's car.

On cross-examination, Wood explained that he found no blood on the windshield, the top of the dashboard, or the console of the complainant's car. Also, because there was no exit wound on the complainant's head to create forward spatter, Wood could not determine the direction from which the shot that killed the complainant was fired.

HPD Officer D. Lambright testified that he inspected the complainant's car and recovered, from the back seat behind the front passenger seat, a ".380 cartridge casing" and, from the center console, a prescription bottle in the name of Jackie Farrow, the complainant's mother, containing thirty Xanax pills.

HPD Homicide Sergeant T. Huynh testified that he watched a videotape made by the apartment complex's security system. The videotape shows the complainant's car arriving at the complex, braking briefly, and then continue moving. It then shows a person jumping out of the door from behind the driver. Huynh determined that the cellular telephone recovered from the scene belonged to the complainant and noted that in the three hours before the complainant had been shot twenty-two calls were made from or received by the telephone and another telephone owned by Noel Alvarez.

Sergeant Huynh later interviewed [Ramirez], who told Huynh that he did not take Xanax because it gave him seizures. [Ramirez] stated that on the day that the complainant was shot, he and Alvarez had met with the complainant in his car so that Alvarez could buy Xanax from the complainant. Although he admitted that he had been in the back seat of the complainant's car while Alvarez sat in the front passenger seat next to the complainant, he stated that he sat behind Alvarez, not the complainant. [Ramirez] also stated that he and Alvarez were not with the complainant when he was shot. He explained that he had learned about the complainant's death from a friend the day after the shooting. [Ramirez] maintained that he and Alvarez were together that whole day and neither he nor Alvarez had shot the complainant.

Alvarez testified that he was with [Ramirez] and the complainant at the time of the shooting. Alvarez explained that he had been buying Xanax from the complainant and on July 19, 2007, he was at [Ramirez's] apartment when [Ramirez] told Alvarez that he wanted some Xanax. Alvarez called the complainant from his cellular telephone to set up the transaction for [Ramirez] .

Alvarez and [Ramirez] then met the complainant, who had driven his car to [Ramirez]'s apartment complex. Alvarez got into the front seat of the complainant's car, and [Ramirez] got into the back seat behind the complainant. The complainant then gave a "little Ziploc" baggie of Xanax to Alvarez, and he passed it to [Ramirez]. [Ramirez] told the complainant to drive his car into the parking lot of another apartment complex. As the complainant drove through the parking lot, Alvarez heard a gunshot. He explained that he had been looking forward. The complainant had also been looking forward with his head turned a little to the right. When Alvarez turned towards the sound, he saw the complainant lean forward and raise up his hands, but did not see [Ramirez] with a gun. [Ramirez], with the baggie of Xanax, jumped out of the car while it was still moving, and Alvarez did the same.

As they ran towards [Ramirez]'s apartment, Alvarez was "real nervous" and asked [Ramirez] why he shot the complainant. [Ramirez] told Alvarez to calm down, and, when they went inside [Ramirez]'s apartment, Alvarez saw [Ramirez] hide "like, a .380 automatic" in a suitcase in his closet.

Alvarez conceded that he initially told Sergeant Huynh that he did not know who had shot the complainant, but later stated that [Ramirez] was the shooter. Alvarez admitted that he had a state jail felony conviction for possession of cocaine, did not want to go back to jail, and would "do anything to avoid going to prison for the rest of his life," but he denied that he would lie.

Christopher Figueroa testified that he and [Ramirez] were held in the same cell block in the Harris County Jail pending trial of their respective cases. [Ramirez] told Figueroa about the shooting, explaining that he and Alvarez wanted to "get high." Because they had no money, they planned to rob the complainant by Alvarez taking his "Xanax, his money, and his jewelry," and [Ramirez] shooting him. After they set up a meeting to buy a bottle of Xanax, they joined the complainant in his car. The complainant handed a bottle of Xanax to Alvarez, and [Ramirez] pulled a gun from "his pocket" and shot the complainant once in the back of the head. [Ramirez] then jumped out of the car from behind the complainant and ran away. [Ramirez] explained that he killed the complainant because he would have been able to identify who had robbed him. Figueroa admitted that, at the time of his testimony, he was under indictment, accused of committing three separate offenses of aggravated robbery, and facing five years to life in prison. He also admitted that he had initiated contact with the district attorney through his attorney to discuss [Ramirez]'s admissions rather than contacting HPD directly.

HPD Officer J. Sanchez testified that he arrested [Ramirez] at his apartment. While searching [Ramirez]'s bedroom, Sanchez found forty-five nine millimeter rounds of ammunition and a pill bottle with "three or four" Xanax pills.

Harris County Assistant Medical Examiner Dr. Albert Chu testified that he conducted an autopsy on the complainant's body. He noted a gunshot entrance wound on "the right side back" of the complainant's head, but no exit wound. An x-ray of the complainant's skull revealed a bullet fragment with jacket attached lodged in his brain. Dr. Chu explained that the bullet traveled from back to front and right to left from its entry point, which was slightly to the right of the center of the back of the complainant's head. Dr. Chu could not opine about the position of the complainant's head or its distance from the firearm when it was fired.

HPD firearms specialist M. Al–Mohamed testified that the casing recovered from the back seat of the complainant's car was a "fired .380 auto cartridge case." He explained that most semi-automatic pistols, like the .380 handgun, "eject [their casings] to the right" because "the majority of people are right-handed" and a casing's trajectory may be altered by objects in its path.

Sacramento Soria, a friend of [Ramirez], testified that he saw Alvarez twice with what might have been a .380 handgun in May or June of 2007. Soria admitted that he was serving five years on community supervision for the offense of possession of narcotics with intent to deliver. Gabriel Guzman, also a friend of [Ramirez], testified that in July 2007, after the complainant had been shot, Alvarez and [Ramirez] met with him. He stated that Alvarez, who had brought a .380 handgun concealed in a shoe box, offered to sell the handgun to him.

[Ramirez] testified that he had seen Alvarez, who took Xanax "three or four times a week," buy Xanax from the complainant every other week. [Ramirez] explained that he did not take Xanax because it gave him seizures. He noted that on the day of the shooting, Alvarez had arranged to buy Xanax from the complainant, [Ramirez] had "just followed" along, and [Ramirez] did not know that Alvarez intended to rob the complainant. Alvarez called the complainant "several times" on his cellular telephone to provide directions to [Ramirez]'s apartment. The two met the complainant in his car on the street behind [Ramirez]'s apartment complex, where Alvarez got into the front passenger's seat and [Ramirez] got into the back seat behind the complainant. The complainant then handed Alvarez a bag of pills. As the complainant drove his car, Alvarez pointed to his left towards the complainant, who turned his head to look. [Ramirez] then heard a gunshot from inside the car. [Ramirez] saw the complainant "lift his hands and [fall] forward." [Ramirez] immediately jumped out of the car while it was still moving and ran towards his apartment. As he was running, Alvarez caught up with him. When [Ramirez] asked why Alvarez had shot the complainant, Alvarez replied, "I told you I got you, man." Back at his apartment, [Ramirez] saw Alvarez with the bag of Xanax and a handgun. [Ramirez] denied owning a .380 handgun, admitted to owning a nine millimeter handgun, and noted that he had seen Alvarez with a .380 handgun a "few times."

[Ramirez] denied owning the bottle of Xanax recovered by Officer Sanchez

> during his arrest, but admitted that he may have told Sergeant Huynh that his seizures might be caused by the marijuana he smoked daily rather than Xanax. [Ramirez] also denied telling Figueroa that he and Alvarez had planned to rob the complainant and telling anyone that he had killed the complainant.

Ramirez v. State, No. 01-08-00535-CR, 2010 WL 2306112 (Tex. App.—Houston [1st Dist.], June 10, 2010, pet. ref'd). The Texas Court of Criminal Appeals subsequently refused his petition for discretionary review on November 10, 2010.[5] Petitioner filed a petition for writ of certiorari with the United States Supreme Court, which was denied on June 27, 2011.[6]

On or around June 15, 2012, Ramirez filed a state application for writ of habeas corpus in the 177th District Court, in cause number WR-80,625-02.[7] The State filed a Motion Requesting Designation of Issues, which the trial court granted on October 9, 2012. On November 2, 2012, the State filed its "Original State's Answer" and its "State's Proposed Order Designating Issues and for Filing Affidavit."[8] On November 14, 2012, the state habeas court adopted the State's proposed order, thereby ordering Ramirez's trial counsel to submit an affidavit in response to Ramirez's ineffective assistant allegations by December 14, 2012.[9]

On December 10, 2012, before trial counsel's affidavit was due, Ramirez filed a Motion to Withdraw the habeas court's November 14, 2012 order, seeking an evidentiary hearing, which was denied.[10] On January 15, 2014, in response to Ramirez's application for a writ of

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[5] Petition, Docket Entry No. 1, at 3.

[6] *Id.*

[7] *Id.*

[8] Docket Entry No. 23-1 at 8-15.

[9] *Id.* at 15.

[10] *Id.* at 27-30.

mandamus, the Texas Court of Criminal Appeals issued an order requiring the trial court either to transmit Ramirez's application to that court or to resolve the issues and transmit the application.[11] On or around March 13, 2014, the state habeas court transmitted the application to the Texas Court of Criminal Appeals without findings of fact or conclusions of law and without an affidavit from counsel.[12] The Court of Criminal Appeals denied the application without written order on May 7, 2014.[13] This § 2254 proceeding, filed on May 19, 2014, followed.

Respondent has filed a Motion for Summary Judgment, to which Ramirez has filed a response in opposition. The § 2254 proceeding is ripe for adjudication.

III. Claims

Construing Ramirez's claims and allegations broadly, he asserts the following claims:

1. Ineffective assistance of trial counsel for the following:
    a. failing to object to the inclusion of the 9 mm bullets and the Xanax found in Petitioner's room pursuant to a legal search;
    b. failing to request a reasonable doubt instruction regarding the Xanax tablets;
    c. failing to investigate facts and develop a defense regarding the position of the .380 shell casing in the car and to investigate the ownership of the Xanax recovered from Petitioner's room.
2. The cumulative effect of trial counsel's errors prejudiced Ramirez.

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[11] *In re Jorge Alberto Ramirez*, Cause No. WR-80,625-01 (Tex. Crim App. 2012), Docket Entry No. 23-2 at 25.

[12] Docket Entry No. 23-2 at 27-28.

[13] Action Taken Sheet, Docket Entry No. 17-21.

3. Ineffective assistance of appellate counsel in properly arguing trial court error on direct appeal.

Respondent argues that no relief is available on any of these claims under the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 29 U.S.C. § 2254(d), because the state courts' adjudication of the claims is not contrary to, or based on an unreasonable application of, clearly established federal law, nor was it based on an unreasonable determination of the facts in light of the evidence. Respondent also argues that these claims fail on the merits because Ramirez cannot establish both prongs under *Strickland*[14] for any of his ineffective assistance of counsel claims.

Ramirez contends that AEDPA does not apply to his ineffective assistance of counsel claims and that this Court should not apply implicit findings based on the Texas Court of Criminal Appeals' denial of his state habeas petition because the state court did not make express findings. Ramirez contends further that the implicit findings urged by Respondent are not legitimate or are not subject to AEDPA.

IV. Standard of Review

To be entitled to summary judgment, the pleadings and summary judgment evidence must show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(a). The moving party bears the burden of initially raising the basis of the motion and identifying the portions of the record demonstrating the absence of a genuine issue for trial. *Duckett v. City of Cedar Park, Tex.*, 950 F.2d 272, 276 (5th Cir.1992). Thereafter, "the burden shifts to the nonmoving party to show with 'significant probative evidence' that there exists a genuine issue of material fact." *Hamilton v. Seque*

[14] *Strickland v. Washington*, 466 U.S. 668, 685 (1984).

Software, Inc., 232 F.3d 473, 477 (5th Cir. 2000) (quoting *Conkling v. Turner*, 18 F.3d 1285, 1295 (5th Cir.1994)). The Court may grant summary judgment on any ground supported by the record, even if the ground is not raised by the movant. *United States v. Houston Pipeline Co.*, 37 F.3d 224, 227 (5th Cir.1994).

While Rule 56 of the Federal Rules regarding summary judgment applies generally "with equal force in the context of habeas corpus cases," *Clark v. Johnson*, 202 F.3d 760, 764 (5th Cir. 2000), it applies only to the extent that it does not conflict with the habeas rules. *Smith v. Cockrell*, 311 F.3d 661, 668 (5th Cir. 2002), *abrogated on other grounds by Tennard v. Dretke*, 542 U.S. 274 (2004).

The writ of habeas corpus provides an important, but limited, examination of an inmate's conviction and sentence. *See Harrington v. Richter*, 562 U.S. 86, 103 (2011) (noting that "state courts are the principal forum for asserting constitutional challenges to state convictions"). AEDPA, codified as amended at 28 U.S.C. § 2254(d), "imposes a highly deferential standard for evaluating state-court rulings and demands that state-court decisions be given the benefit of the doubt"; it also codifies the traditional principles of finality, comity, and federalism that underlie the limited scope of federal habeas review. *Renico v. Lett*, 559 U.S. 766, 773 (2010) (quotations omitted).

AEDPA "bars relitigation of any claim 'adjudicated on the merits' in state court, subject only to the exceptions in [28 U.S.C.] §§ 2254(d)(1) and (d)(2)." *Richter*, 562 U.S. at 98. "When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." *Id.* at 99. For AEDPA to apply, a state court need not state its reasons for its denial, nor must it issue findings, nor need it specifically state

that the adjudication was "on the merits." *Id.* at 98-99.

Thus, contrary to Ramirez's assertions, the Texas Court of Criminal Appeals adjudicated his claims on the merits on direct appeal and habeas review. This Court, therefore, can only grant relief if "the state court's adjudication of the merits was 'contrary to, or involved an unreasonable application of, clearly established Federal law.'" *Berghuis v. Thompkins,* 560 U.S. 370, 378 (2010) (quoting 28 U.S.C. § 2254(d)(1)). The focus of this well-developed standard "is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable—a substantially higher threshold." *Schriro v. Landrigan,* 550 U.S. 465, 473 (2007). Where a claim has been adjudicated on the merits by the state courts, relief is available under § 2254(d) *only* in those situations "where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with" Supreme Court precedent. *Richter*, 562 U.S. at 102.

Whether a federal habeas court would have, or could have, reached a conclusion contrary to that reached by the state court on an issue is not determinative under § 2254(d). *Id.* ("even a strong case for relief does not mean that the state court's contrary conclusion was unreasonable."). Thus, AEDPA serves as a "guard against extreme malfunctions in the state criminal justice systems," not as a vehicle for error correction. *Id.* (citation omitted); *see also Wilson v. Cain,* 641 F.3d 96, 100 (5th Cir. 2011). "If this standard is difficult to meet, that is because it was meant to be." *Richter*, 562 U.S. at 102.

"Review under § 2254(d)(1) focuses on what a state court knew and did." *Cullen v. Pinholster,* 563 U.S. 170, 182 (2011). Reasoning that "[i]t would be strange to ask federal courts to analyze whether a state court's adjudication resulted in a decision that unreasonably applied federal law to facts not before the state court," *Pinholster* explicitly held that "[i]f a claim has

been adjudicated on the merits by a state court, a federal habeas petitioner must overcome the limitation of § 2254(d)(1) on the record that was before that state court." *Id.* at 185. Thus, "evidence introduced in federal court has no bearing on § 2254(d)(1) review." *Id.*

Courts construe pleadings filed by *pro se* litigants under a less stringent standard than those drafted by attorneys. *Haines v. Kerner,* 404 U.S. 519 (1972); *Bledsue v. Johnson,* 188 F.3d 250, 255 (5th Cir.1999). Thus, *pro se* pleadings are entitled to a liberal construction that includes all reasonable inferences that can be drawn from them. *Haines,* 404 U.S. at 521. Nevertheless, "the notice afforded by the Rules of Civil Procedure and the local rules" is considered "sufficient" to advise a *pro se* party of his burden in opposing a summary judgment motion. *Martin v. Harrison County Jail,* 975 F.2d 192, 193 (5th Cir.1992).

V. Discussion

The Constitution guarantees a fair trial for criminal defendants through the Due Process Clause, but the basic elements of a fair trial are defined largely by the Sixth Amendment, which conveys the right to have the effective assistance of counsel. *See* U.S. CONST. amend. VI; *Strickland v. Washington*, 466 U.S. 668, 685 (1984); *see also McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970) (observing that "the right to counsel is the right to the effective assistance of counsel"). Claims for ineffective assistance of counsel are analyzed under the following two-prong standard:

> First, the defendant must show 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.

Strickland, 466 U.S. at 687. Thus, to prevail under the *Strickland* standard, a defendant must

demonstrate both constitutionally deficient performance by counsel and actual prejudice as a result of the alleged deficiency. *See Williams v. Taylor*, 529 U.S. 390, 390-91 (2000).

The first prong of the governing standard is only satisfied where the defendant shows that "counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 687. Scrutiny of counsel's performance must be "highly deferential," and a reviewing court must make every effort "to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689. There is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *See United States v. Molina-Uribe*, 429 F.3d 514, 518 (5th Cir. 2005) (citing *Strickland*, 466 U.S. at 687-88), *cert. denied*, 547 U.S. 1041 (2006).

To prove prejudice, the second prong under *Strickland*, a defendant must demonstrate a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

Ineffective-assistance claims lodged against appellate counsel are also governed by the *Strickland* standard. *See Smith v. Murray*, 477 U.S. 527, 535-36 (1986). To establish that appellate counsel's performance was deficient in this context, the defendant must show that his attorney was objectively unreasonable in failing to find arguable issues to appeal. *Smith v. Robbins*, 528 U.S. 259, 285 (2000). In other words, a defendant must show that counsel unreasonably failed to discover non-frivolous issues and raise them. *Id.* If the defendant 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.*

A. Count One: Ineffective Assistance of Trial Counsel

Ramirez alleges that his trial counsel, Mr. Don D. Becker,[15] was ineffective because he: (1) did not object to the admission at trial of 9 mm ammunition recovered in his bedroom pursuant to a consensual search; (2) did not object to the introduction of the Xanax pills recovered in his bedroom into evidence and/or did not investigate the facts and present evidence in relation to the Xanax pills, which would have revealed that the pills belonged to Petitioner's brother Raul; (3) did not request a reasonable doubt instruction regarding the Xanax pills; and (4) did not investigate to see if holding the gun vertically would have caused the shell casing to fall behind the seat if Alvarez shot the victim with that grip, which would have supported Ramirez's defense that Alvarez was the shooter. The Court will address each of these in turn.

1. The 9 mm ammunition

Ramirez complains that trial counsel should have objected to the admission of evidence regarding the rounds of 9 mm ammunition which were recovered from his bedroom pursuant to a consensual search at the time of his arrest. Ramirez contends that the 9 mm rounds were irrelevant and did not serve any purpose other than to impugn his character as a gun owner. Ramirez testified that he gave consent for the search and that 9 mm shells found in his bedroom

[15] Ramirez offers evidence that he filed grievance(s) against Mr. Decker with the State Bar of Texas and that Mr. Decker was disciplined for not timely producing Ramirez's file to him. Docket Entry No. 23-1 at 36-40. Ramirez also complains that Mr. Decker did not submit an affidavit stating his reasons for his trial decisions. The record indicates that Ramirez filed a motion for the habeas court to withdraw the order requiring Mr. Decker to submit an affidavit because Petitioner wanted an evidentiary hearing instead. Docket Entry No. 23-1 at 27-30. To the extent Petitioner complains of infirmities in his state habeas proceedings, such infirmities are not grounds for federal habeas relief. *Brown v. Dretke*, 419 F.3d 365, 378 (5th Cir. 2005); *see also Moore v. Dretke*, 369 F.3d 844, 846 (5th Cir. 2004) ("It is axiomatic that infirmities in state habeas proceedings do not constitute grounds for federal habeas relief. [] This is because an attack on the state habeas proceeding is an attack on a proceeding collateral to the detention and not the detention itself." (citations omitted)).

belonged to him.[16]

As the State pointed out to the state habeas court, it could have been trial strategy for petitioner "to buttress his story that he has never owned a .380 pistol – which is the caliber of the murder weapon. If the State had not offered the 9mm ammunition into evidence, surely defense counsel would have, precisely to corroborate the applicant's assertion that the pistol he owned was a 9 mm and not a .380."[17]

Under *Strickland*, judicial scrutiny of counsel's performance is highly deferential, and there is a strong presumption that "trial counsel rendered adequate assistance and that the challenged conduct was the product of reasoned trial strategy." *Wilkerson v. Collins*, 950 F.2d 1054, 1065 (5th Cir. 1992)(citing *Strickland*), *cert. denied*, 509 U.S. 921 (1993). In order to overcome the presumption of competency, a petitioner "must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." *Strickland*, 466 U.S. at 690. Ramirez does not overcome the presumption that his trial counsel's decision not to object was reasonable trial strategy, therefore, he does not demonstrate deficient performance. *Strickland*, 466 U.S. at 689.

Ramirez does not otherwise establish that the result of the proceeding would have been different if the 9 mm ammunition had been excluded. Therefore, he does not demonstrate actual prejudice. *Id.* at 693-94. Accordingly, absent a showing of deficient performance and actual prejudice, Ramirez does not demonstrate that the state court's application of *Strickland* was unreasonable or that he is entitled to relief on this claim.

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[16] Ramirez Testimony, Trial Transcript, Docket Entry No. 18-2, at Bates 00325, 00356-357.

[17] State's Original Answer, Docket Entry No. 23-1, at 10-11.

2. The Xanax pills

Ramirez next complains that his trial counsel should have objected to the admission of the Xanax pills which were recovered from his bedroom pursuant to a consensual search at the time of his arrest. In particular, Ramirez contends that the Xanax pills were not his and that a reasonable investigation would have shown that they belonged to his twin brother, Raul. Ramirez alleges that his counsel should have submitted evidence or testimony from his brother Raul. Ramirez submits an affidavit from Raul that he had attached to his state habeas application, wherein Raul testifies that he owned the Xanax and that he would have testified to that effect at trial if called.[18]

The Xanax pills were relevant to the offense. Ramirez does not show that counsel had a meritorious objection to make. "Counsel is not required to make futile motions or objections." *Koch v. Puckett*, 907 F.2d 524, 527 (5th Cir. 1990). The "failure to raise meritless objections is not ineffective lawyering; it is the very opposite." *Clark v. Collins*, 19 F.3d 959, 966 (5th Cir. 1994) (trial counsel's failure to object to the admission of extraneous offenses during the penalty phase, where such evidence is generally admissible, was not ineffective assistance of counsel).

Ramirez also does not show that Raul's testimony would have helped his defense or that Raul was actually available to testify at the time of the trial in 2008.[19] Ramirez testified on his own behalf and explained to the jury that the Xanax pills were not his and that he did not know

[18] Affidavit of Raul Ramirez, Docket Entry No. 23-2, at 30-31.

[19] Although Ramirez submits Raul's affidavit, there is no indication that, at the time of the trial, anyone knew that Raul, Ramirez's twin brother, owned the Xanax. Ramirez testified that he did not know to whom the Xanax belonged. It is not until 2012, almost four years later on state habeas review, that the information about Raul's ownership of the Xanax is presented, and Raul states in his affidavit that he did not know that the Xanax was important to Ramirez's case and does not indicate that he attended his twin brother's trial. *See* Affidavit of Raul Ramirez, Docket Entry No. 23-2, at 30-31.

to whom they belonged.[20] Ramirez also testified that Xanax causes him seizures and that it was Alvarez who was going to make the purchase.[21] The jury also heard from Alvarez, who admitted that he regularly uses Xanax and that he and Ramirez had met with the victim to buy Xanax on the day of the murder.[22] Ramirez admitted that he had gone with Alvarez to meet the victim to buy Xanax.[23] The jury heard Ramirez's evidence that the Xanax was not his; they were able to form their conclusions from his testimony. Ramirez cannot show that there was a reasonable probability that the exclusion of the Xanax pills would have made a difference in the result of the proceedings, and thus he does not show prejudice under *Strickland*. 446 U.S. at 693-94. Ramirez cannot show that he is entitled to relief on this claim.

3. Reasonable Doubt instruction for the Xanax pills

Ramirez next argues that trial counsel was deficient for not requesting a reasonable doubt instruction for the Xanax pills. Ramirez does not allege that the jury charge omitted "reasonable doubt" language for the adjudication of guilt or that the charge did not require the jury to find him guilty beyond a reasonable doubt. Further, Ramirez does not explain how the jury charge was constitutionally infirm or contrary to state or federal law. *See, e.g., Olivas v. State*, 202 S.W.3d 137 (Tex. Crim. App. 2006) (holding that there was no fundamental error where the charge did not contain a separate "beyond reasonable doubt" instruction for the deadly weapon special issue). Thus, Ramirez does not show "that the state court's ruling on the claim being

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[20] Ramirez Testimony, Trial Transcript, Docket Entry No. 18-2, at Bates 00327-328.

[21] *Ramirez*, 2010 WL 2306112, at *2; Ramirez Testimony, Trial Transcript, Docket Entry No. 18-1, at Bates 00283.

[22] *Ramirez*, 2010 WL 2306112, at *2.

[23] Ramirez Testimony, Trial Transcript, at Docket Entry No. 18-1, at Bates 00282-283.

presented in federal court [is] so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility of fairminded disagreement." *Richter*, 562 U.S. at 103. Ramirez is not entitled to habeas relief on this claim regarding the performance of his trial counsel.

4. Failure to investigate and present an alternative theory of the bullet casing trajectory.

Ramirez also contends that trial counsel was ineffective because counsel did not adequately investigate the bullet casing trajectory and have an expert testify that Alvarez could have been the shooter if Alvarez had turned the gun to the side and shot the victim at an angle, causing the bullet casing to ricochet off the ceiling and come to rest to the right of Ramirez.

Ramirez's theory— that the bullet casing could have landed where it did if Alvarez had shot the weapon by holding it in a particular unconventional position—is undermined by the record. Ramirez himself testified that he did not see Alvarez with a gun and did not see the victim get shot.[24] Thus Ramirez's theory is based solely on speculation of how the casing might have come to rest where it did; he did not even see Alvarez use the special grip upon which his theory depends. It is not deficient performance for counsel to opt not to try to pursue wholly speculative theories that are not based on any evidence. *Chanthakoummane v. Stephens*, — F.3d — , 2016 WL 760912, at *5 (5th Cir. Feb. 25, 2016) (citing *Moore v. Johnson*, 194 F.3d 586, 616 (5th Cir. 1999) ("Counsel is 'not required to pursue every path until it bears fruit or until all hope withers.'" (quoting *Lovett v. Florida*, 627 F.2d 706, 708 (5th Cir. 1980))).

Likewise, Ramirez does not identify the expert who would support his theory, nor does he state the substance of the expert's opinion. His claim is conclusory. Conclusory allegations

[24] Ramirez Testimony, Trial Transcript, Docket Entry No. 18-2, at Bates 00305.

are insufficient to demonstrate deficient performance or actual prejudice. *See Day v. Quarterman*, 566 F.3d 527, 540-41 (5th Cir. 2009); *see also Lincecum v. Collins*, 958 F.2d 1271, 1279 (5th Cir. 1992) (denying habeas relief where petitioner "offered nothing more than the conclusory allegations in his pleadings" to support claim that counsel was ineffective for failing to investigate and present evidence). A habeas corpus petitioner who alleges a failure to investigate on the part of his counsel must state with specificity what the investigation would have revealed and how it would have changed the outcome of his trial. *See Miller v. Dretke*, 420 F.3d 356, 361 (5th Cir. 2005) (citing *United States v. Green*, 882 F.2d 999, 1003 (5th Cir. 1989)).

Moreover, in order for a petitioner to demonstrate prejudice under *Strickland*, he must show not only that the witness's testimony would have been favorable, but also that the witness would have testified at trial. *Alexander v. McCotter*, 775 F.2d 595, 602 (5th Cir. 1985). Ramirez makes no such showing. Ramirez also cannot show that the jury would have disbelieved the State's expert (whose casing trajectory theory tended to support that Ramirez was the shooter) and believed Ramirez's unidentified expert, if one could be found, who would testify to support Ramirez's theory. Thus, Ramirez does not meet either prong under *Strickland* regarding the failure of counsel to obtain an expert on the bullet casing trajectory.

B. Count Two – Cumulative Effect of the Errors of Trial Counsel

Ramirez contends that the cumulative effect of trial counsel's alleged failures rendered his performance deficient. The Fifth Circuit has repeatedly rejected allegations of cumulative error that are unaccompanied by a valid ineffective-assistance claim. *See Pondexter v. Quarterman*, 537 F.3d 511, 525 (5th Cir. 2008) (acknowledging that "[m]eritless claims or claims that are not prejudicial cannot be cumulated, regardless of the total number raised");

Coble v. Quarterman, 496 F.3d 430, 440 (5th Cir. 2007) ("Federal habeas relief is only available for cumulative errors that are of a constitutional dimension."); *United States v. Hall*, 455 F.3d 508, 520 (5th Cir. 2006) ("Our clear precedent indicates that ineffective assistance of counsel cannot be created from the accumulation of acceptable decisions and actions."); *Yohey v. Collins*, 985 F.2d 222, 229 (5th Cir. 1993) (stating that, because certain alleged errors were not of constitutional dimension and because others were meritless, the petitioner had "presented nothing to cumulate"); *Westley v. Johnson*, 83 F.3d 714, 726 (5th Cir. 1996) ("Meritless claims or claims that are not prejudicial cannot be cumulated, regardless of the total number raised."); *Mullen v. Blackburn*, 808 F.2d 1143, 1147 (5th Cir. 1987) ("Twenty times zero equals zero."). Because Ramirez has failed to establish a valid ineffective-assistance claim against his trial counsel in this instance, Ramirez is not entitled to federal habeas corpus relief on this issue.

C. Count Three – Ineffective Assistance of Appellate Counsel

Ramirez also contends that his appellate counsel, Mr. Roland Brice Moore III, failed to construct an argument to support the contention that Alvarez's statement that he had "done something good" with a gun was admissible as a statement against Alvarez's penal interest. To amount to deficient performance on appeal, appellate counsel's failure to raise an issue on appeal will be considered deficient performance only when that decision "fall[s] below an objective standard of reasonableness." *United States v. Reinhart*, 357 F.3d 521, 524 (5th Cir. 2004) (citing *United States v. Williamson*, 183 F.3d 458, 462 (5th Cir. 2000)). This standard requires counsel "to research relevant facts and law, or make an informed decision that certain avenues will not prove fruitful." *Id.* "Solid, meritorious arguments based on directly controlling precedent should be discovered and brought to the court's attention." *Id.*

The record reflects that appellate counsel did, in fact, raise the issue that exclusion of

Alvarez's statement was erroneous because it was admissible as a statement against penal interest.[25] The state appellate court considered the argument and determined that the trial court did not err in excluding the statement. *Ramirez*, 2010 WL 2306112, at *6-7. Ramirez does not propose any other valid argument that appellate counsel could have made. Ramirez also has not shown that, but for these alleged failures, he would have prevailed on appeal. Accordingly, petitioner has not shown how appellate counsel's performance was deficient under *Strickland* and is not entitled to habeas relief on this claim.

Because the record supports a finding that neither trial nor appellate counsel's performance fell below an objective standard of reasonableness, or that there was a reasonable probability that, but for counsels' deficiencies, the result of the proceeding would have been different, Ramirez's ineffective assistance of counsel claims all fail under both § 2254(d) and *Strickland.*

III. CERTIFICATE OF APPEALABILITY

Rule 11 of the Rules Governing Section 2254 Cases requires a district court to issue or deny a certificate of appealability when entering a final order that is adverse to the petitioner. *See* 28 U.S.C. § 2253. A certificate of appealability will not issue unless the petitioner makes "a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), which requires a petitioner to demonstrate "that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Tennard v. Dretke*, 542 U.S. 274, 282 (2004) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). Under the controlling standard, this requires a petitioner to show "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the

[25] *See* Brief of Appellant, Docket Entry No. 16-2, at 15-19 (docket entry pages 24-28 of 43).

issues presented were 'adequate to deserve encouragement to proceed further.'" *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). Where denial of relief is based on procedural grounds, the petitioner must show not only that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right," but also that they "would find it debatable whether the district court was correct in its procedural ruling." *Slack*, 529 U.S. at 484.

A district court may deny a certificate of appealability, *sua sponte*, without requiring further briefing or argument. *See Alexander v. Johnson*, 211 F.3d 895, 898 (5th Cir. 2000). For reasons set forth above, this court concludes that jurists of reason would not debate whether any procedural ruling in this case was correct or whether the petitioner states a valid claim for relief. Therefore, a certificate of appealability will not issue.

IV. CONCLUSION AND ORDER

Based on the foregoing, the court **ORDERS** as follows:

1. The respondent's motion for summary judgment (Docket Entry No. 20) is **GRANTED**.

2. The habeas corpus petition is **DISMISSED** with prejudice.

3. A certificate of appealability is **DENIED**.

The Clerk shall provide a copy of this order to the parties.

SIGNED at Houston, Texas, this 31st day of March, 2016.

Melinda Harmon

MELINDA HARMON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-20283

JORGE ALBERTO RAMIREZ,

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 JOLLY, COSTA, and HO Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

ENTERED FOR THE COURT:

/s/ E. Grady Jolly
UNITED STATES CIRCUIT JUDGE