

Appendix A
Decision of U.S. Court of Appeal
5th circuit

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

No. 19-50468
Summary Calendar

FILED
July 9, 2020

Lyle W. Cayce
Clerk

ANTHONY KINTA WEBB,

Petitioner-Appellant,

versus

LORIE DAVIS, Director,
Texas Department of Criminal Justice, Correctional Institutions Division,

Respondent-Appellee.

Appeal from the United States District Court
for the Western District of Texas
No. 6:18-CV-270

Before HIGGINBOTHAM, SMITH, and OLDHAM, Circuit Judges.

PER CURIAM:*

Anthony Webb, Texas prisoner #2077771, moves for a certificate of

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

appealability (“COA”) to appeal the denial of his 28 U.S.C. § 2254 petition challenging his conviction of assault by occlusion and the associated sentence. To obtain a COA, a petitioner must make “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2); *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). If the district court denies relief on the merits, the petitioner must establish that reasonable jurists would find the district court’s assessment of the claims debatable or wrong. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). If relief is denied on procedural grounds, a COA should issue if the petitioner demonstrates, at least, that jurists of reason would find it debatable whether the application “states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Id.*

Webb contends that his right to a speedy trial was violated and that the trial court violated his due process rights by failing to instruct the jury on a lesser-included offense. He maintains that the evidence was insufficient to support his conviction and that the district court erred in dismissing his claim of insufficient evidence on procedural grounds. Webb asserts that trial counsel was ineffective in several respects and that appellate counsel was ineffective for failing to challenge the enhancement of his sentence on account of a prior conviction. He also asserts that the prosecution violated his due process rights by failing to correct false testimony and violated *Brady v. Maryland*, 373 U.S. 83 (1963). Because he has failed to make the requisite showing on any of the above claims, the request for a COA is DENIED. See *Slack*, 529 U.S. at 484.

Webb also contends that the district court erred by failing to conduct an evidentiary hearing. To the extent that Webb seeks a COA on that issue, his request is construed “as a direct appeal from the denial of an evidentiary hearing.” *Norman v. Stephens*, 817 F.3d 226, 234 (5th Cir. 2016). Because

Webb has failed to demonstrate that the district court abused its discretion in denying an evidentiary hearing, we AFFIRM. *See Cullen v. Pinholster*, 563 U.S. 170, 185–86 (2011); *Norman*, 817 F.3d at 235. Webb’s motion for the appointment of counsel is DENIED.

Appendix B
Decision of U.S. District Court
for the Western District of Texas
WACO Division

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION**

ANTHONY KINTA WEBB #2077771

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V.

W-18-CA-270-ADA

LORIE DAVIS

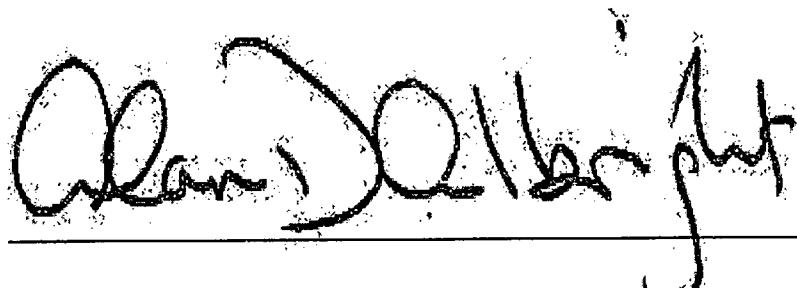
FINAL JUDGMENT

Before the Court is the above styled and numbered cause. On this date, the Court denied Petitioner Anthony Kinta Webb's Application for Habeas Corpus Relief and determined that a certificate of appealability shall not be issued. Accordingly, as all issues in this cause have been resolved, the Court renders the following Final Judgment pursuant to Federal Rule of Civil Procedure 58.

It is therefore **ORDERED** that Petitioner Anthony Kinta Webb's Application for Habeas Corpus Relief is hereby **DENIED**.

It is finally **ORDERED** that the above styled and numbered cause is hereby **CLOSED**.

SIGNED on May 9, 2019



**ALAN D ALBRIGHT
UNITED STATES DISTRICT JUDGE**

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION**

ANTHONY KINTA WEBB #2077771

V.

LORIE DAVIS

**§
§
§
§
§**

W-18-CA-270-ADA

ORDER

Before the Court is Petitioner's Application for Habeas Corpus under 28 U.S.C. § 2254 (#1), Petitioner's Memorandum in Support (#2), Petitioner's Amended Application for Habeas Corpus under 28 U.S.C. § 2254 (#16), Petitioner's Amended Memorandum in Support (#17), Respondent's Response (#11), Petitioner's Reply (#14), Respondent's Amended Response (#22), and Petitioner's Reply (#23). Petitioner is proceeding pro se and in forma pauperis. For the reasons set forth below, Petitioner's application for writ of habeas corpus is denied.

STATEMENT OF THE CASE

A. Petitioner's Criminal History

According to Respondent, the Director has lawful and valid custody of Petitioner pursuant to a judgment and sentence of the 19th District Court of McLennan County, Texas for assault family violence by occlusion, enhanced by a prior conviction for aggravated assault. *Ex parte Webb*, App. No. 88474-01 (SHCR (#12-26) at 62-63. Petitioner pleaded "not guilty" to the offense, but "true" to the enhancement. *Id.* A jury

found Petitioner guilty of the offense, and on June 17, 2016, the court sentenced Petitioner to 15 years of imprisonment. *Id.*

Petitioner appealed to the Tenth Court of Appeals which affirmed the trial court's judgment. *Webb v. State*, No. 10-16-00212-CR, 2017 WL 4543660, at *4 (Tex. App.—Waco 2017, pet. ref'd) (SHCR (#12-26) at 67-76). Petitioner filed a petition for discretionary review, which was refused by the Texas Court of Criminal Appeals on February 28, 2018.

On March 19, 2018, Petitioner signed his first state habeas application. SHCR (#12-26) at 18. The Texas Court of Criminal Appeals dismissed this application on June 13, 2018, because Petitioner's conviction was not yet final. *See* SHCR (#12-25). On June 26, 2018, Petitioner signed his second state habeas application and on September 26, 2018, the Texas Court of Criminal Appeals denied this application without written order on the findings of the trial court. Resp. Ex. A (#21-1). Petitioner signed his federal habeas petition on September 12, 2018, and his amended federal petition on November 26, 2018.

B. Factual Background

The Tenth Court of Appeals summarized the victim's testimony as follows:

Willis testified that she and Webb lived together in an apartment and that they had previously dated one another. On the night in question, Webb was playing an Xbox video game in the master bedroom where Willis slept. Willis repeatedly asked Webb to turn off the game and go to the living room, so she could go to sleep. Webb refused. Subsequently, Willis got up to unplug the Xbox, and Webb "leaned across the bed, grabbed [her] neck, and that's what started it." Willis described the incident as Webb placing his "hands around [her] neck . . . but then he proceeded to grab—you know, moved his hand down and was pinching the windpipe." Because Webb was pinching her windpipe, Willis was unable to breathe.

Willis could not recall how long the choking took place but that she began to see stars and "little bursts of whiteness." Later, Willis showed the jury a scar on her neck that was caused by the incident. . . . Webb denied ever touching Willis and asserted that Willis had kicked him in the ribs.

Webb, 2017 WL 4543660, at *8-9 (SHCR (#12-26) at 67-76).

C. Petitioner's Grounds for Relief

Petitioner raises the following grounds for relief:

1. Petitioner was denied the right to a speedy trial.
2. The trial court erred by denying Petitioner's requested lesser included offense instruction.
3. Petitioner was denied the effective assistance of trial counsel because his trial counsel failed to
 - a. hire a medical expert;
 - b. present exculpatory evidence;
 - c. impeach the complainant.
4. Petitioner was denied effective assistance of appellate counsel because his appellate counsel failed to raise the following grounds in his direct appeal:
 - a. the sentence enhancement violated his right to a jury trial;
 - b. prosecutorial misconduct;
 - c. ineffective assistance of trial counsel.
5. The prosecution erred by relying on false testimony and violated *Brady*.
6. The evidence is insufficient to support his conviction.

Am. Pet. (#16) at 6-7, 11; Am. Mem. (#17) at 2-3.

D. Request for Evidentiary Hearing

Petitioner asserts that his application for habeas relief raises factual questions, which have not been addressed by the state courts and that the state has failed to provide Petitioner with a full and fair hearing concerning his application. Petitioner concludes that he is entitled to an evidentiary hearing to resolve the factual questions left unresolved by the state courts.

DISCUSSION AND ANALYSIS

A. The Antiterrorism and Effective Death Penalty Act of 1996

The Supreme Court has summarized the basic principles that have grown out of the Court's many cases interpreting the 1996 Antiterrorism and Effective Death Penalty Act. *See Harrington v. Richter*, 562 U.S. 86, 97–100 (2011). The Court noted that the starting point for any federal court in reviewing a state conviction is 28 U.S.C. § 2254, which states in part:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
- (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). The Court noted that “[b]y its terms § 2254(d) bars relitigation of any claim ‘adjudicated on the merits’ in state court, subject only to the exceptions in §§ 2254(d)(1) and (d)(2).” *Harrington*, 562 U.S. at 98.

One of the issues *Harrington* resolved was “whether § 2254(d) applies when a state court’s order is unaccompanied by an opinion explaining the reasons relief has been denied.” *Id.* Following all of the Courts of Appeals’ decisions on this question, *Harrington* concluded that the deference due a state court decision under § 2554(d) “does not require that there be an opinion from the state court explaining the state court’s reasoning.” *Id.* (citations omitted). The Court noted that it had previously

concluded that "a state court need not cite nor even be aware of our cases under § 2254(d)." *Id.* (citing *Early v. Packer*, 537 U.S. 3, 8 (2002) (per curiam)). When there is no explanation with a state court decision, the habeas petitioner's burden is to show there was "no reasonable basis for the state court to deny relief." *Id.* And even when a state court fails to state which of the elements in a multi-part claim it found insufficient, deference is still due to that decision, because "§ 2254(d) applies when a 'claim,' not a component of one, has been adjudicated." *Id.*

As *Harrington* noted, § 2254(d) permits the granting of federal habeas relief in only three circumstances: (1) when the earlier state court's decision "was contrary to" federal law then clearly established in the holdings of the Supreme Court; (2) when the earlier decision "involved an unreasonable application of" such law; or (3) when the decision "was based on an unreasonable determination of the facts" in light of the record before the state court. *Id.* at 100 (citing 28 U.S.C. § 2254(d); *Williams v. Taylor*, 529 U.S. 362, 412 (2000)). The "contrary to" requirement "refers to the holdings, as opposed to the dicta, of . . . [the Supreme Court's] decisions as of the time of the relevant state-court decision." *Dowthitt v. Johnson*, 230 F.3d 733, 740 (5th Cir. 2000) (quotation and citation omitted).

Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that 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.

Id. at 740-41 (quotation and citation omitted). Under the "unreasonable application" clause of § 2254(d)(1), a federal court may grant the writ "if the state court identifies

the correct governing legal principle from . . . [the Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 741 (quotation and citation omitted). The provisions of § 2254(d)(2), which allow the granting of federal habeas relief when the state court made an "unreasonable determination of the facts," are limited by the terms of the next section of the statute, § 2254(e). That section states that a federal court must presume state court fact determinations to be correct, though a petitioner can rebut that presumption by clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1). But absent such a showing, the federal court must give deference to the state court's fact findings. *Id.*

B. Evidentiary Hearing

Section 2254(e)(2) provides:

If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that-

(A) the claim relies on--

- (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
- (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

Petitioner has failed to plead any allegations that would entitle him to a hearing. He only asserts his claims for relief and that he is entitled to an evidentiary hearing because the state court factual determination was not supported by the record. Accordingly, Petitioner's request for an evidentiary hearing is denied.

C. Unexhausted and Procedurally Barred Claims

Respondent asserts that Petitioner failed to properly exhaust his state court remedies with respect to his claims that (1) he was denied effective assistance of appellate counsel because his appellate counsel failed to raise the issues of prosecutorial misconduct and ineffective assistance of trial counsel in Petitioner's direct appeal; (2) the prosecution erred by relying on false testimony and violated *Brady*, and (3) the evidence was insufficient to support his conviction. Petitioner argues that he has exhausted, but where it is unclear, he argues his failure to exhaust should be excused.

The exhaustion doctrine requires that the state courts be given the initial opportunity to address and, if necessary, correct alleged deprivations of federal constitutional rights. *Castille v. Peoples*, 489 U.S. 346, 349 (1989). In order to satisfy the exhaustion requirement, a claim must be presented to the highest court of the state for review. *Richardson v. Procunier*, 762 F.2d 429, 431 (5th Cir. 1985). Moreover, all of the grounds raised in a federal application for writ of habeas corpus must have been "fairly presented" to the state courts prior to being presented to the federal courts. *Picard v. Conner*, 404 U.S. 270, 275 (1971). In other words, in order for a claim to be exhausted, the state court system must have been presented with the same facts and legal theory upon which the petitioner bases his assertions. *Id.* at 275–77. Where a "petitioner advances in federal court an argument based on a legal theory distinct from that relied upon in the state court, he fails to satisfy the exhaustion requirement." *Wilder v. Cockrell*, 274 F.3d 255, 259 (5th Cir. 2001) (citing *Vela v. Estelle*, 708 F.2d 954, 958 n.5 (5th Cir. 1983)).

It is somewhat unclear from the state court records whether Petitioner exhausted his claim of prosecutorial misconduct. In a document entitled "Applicant's Proposed Finding of Facts and Conclusions Pursuant to Court Order as of 7-19-18 Made Returnable to the Texas Court of Criminal Appeals," that was submitted by Respondent as part of the records from Petitioner's state habeas application, Petitioner does assert that there was prosecutorial misconduct relating to allegedly false testimony and *Brady* violations. SHCR (#12-28) at 23-27. It is unclear whether this document was considered by the state trial court or the Texas Court of Criminal Appeals prior to the denial of Petitioner's state habeas claim. In other words, there is some indication that Petitioner did exhaust his claim that the prosecution erred by relying on false testimony and violated *Brady*. Therefore, the Court will address that claim on the merits. It is clear, however, that Petitioner failed to exhaust his claim for ineffective assistance of appellate counsel for appellate counsel's failure to raise the issues of prosecutorial misconduct and ineffective assistance of trial counsel in Petitioner's direct appeal. Petitioner has also failed to exhaust his claim regarding the sufficiency of the evidence.¹

As a consequence of Petitioner's failure to exhaust, Petitioner is procedurally barred from federal habeas corpus review. Even where a claim has not been reviewed by the state courts, this Court may find that claim to be procedurally barred. *Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991). If a petitioner has failed to exhaust his state court remedies and the state court to which he would be required to present his

¹ Even if Petitioner had exhausted his sufficiency of the evidence claim, he has not shown that, viewing the evidence in the light most favorable to the prosecution, no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

unexhausted claims would now find those claims to be procedurally barred, the federal procedural default doctrine precludes federal habeas corpus review. *Id.*; *see Nobles v. Johnson*, 127 F.3d 409, 423 (5th Cir. 1997) (finding unexhausted claim, which would be barred by the Texas abuse-of-the-writ doctrine if raised in a successive state habeas petition, to be procedurally barred).

Here, if the Court required Petitioner to present his unexhausted claims to the Texas Court of Criminal Appeals to satisfy the exhaustion requirement, the Texas Court of Criminal Appeals would find his claim to be procedurally barred under the Texas abuse-of-the-writ doctrine. *See Fearance v. Scott*, 56 F.3d 633, 642 (5th Cir. 1995) ("[T]he highest court of the State of Texas announced that it would as a 'rule' dismiss as abuse of the writ 'an applicant for a subsequent writ of habeas corpus rais[ing] issues that existed at the time of his first writ.'") (quoting *Ex Parte Barber*, 879 S.W.2d 889, 892 n. 1 (Tex. Crim. App. 1994)). Further, the Texas habeas corpus statute prohibits a Texas court from considering the merits of, or granting relief based on, a subsequent writ application filed after the final disposition of an inmate's first application unless he demonstrates the statutory equivalent of cause or actual innocence. Tex. Code Crim. Proc. Ann. art. 11.07 § 4 (West Supp. 1996). In order for this Court to reach the merits of his claim, Petitioner "must establish cause and prejudice from [the court's] failure to consider his claim." *Fearance*, 56 F.3d at 642 (citations omitted).

Consequently, Petitioner's claims that he was denied effective assistance of appellate counsel because his appellate counsel failed to raise the issues of

prosecutorial misconduct and ineffective assistance of trial counsel in Petitioner's direct appeal and his claim that the evidence was insufficient to support his conviction are unexhausted and procedurally barred.

D. Speedy Trial

Petitioner contends he was denied his right to a speedy trial. Specifically, Petitioner argues that the time from his indictment on February 20, 2013, to trial on October 6, 2015, was uncommonly long and prejudicial. He asserts that the trial court failed to inquire into the reasons for the delay. He alleges that the judge referenced an "overcrowded" court docket that led to a delay. Furthermore, Petitioner argues that the length of the delay entitles him to a presumption of prejudice, though he fails to specify any prejudice that may have resulted. Petitioner raised this same issue in his state habeas application and the TCCA rejected the merits of Petitioner's claim. As such, the AEDPA limits the scope of this Court's review to determining whether the adjudication of Petitioner's claim by the state court either (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

In *Barker v. Wingo*, 407 U.S. 514 (1972), the Supreme Court established a four-part balancing test for determining whether a defendant received a speedy trial within the meaning of the Sixth Amendment. Under *Barker*, a court must consider: (1) the length of the delay; (2) whether the defendant asserted his right; (3) the reason for the

delay; and (4) the prejudice to the defendant. *Id.* at 530. As a threshold inquiry, the petitioner must demonstrate that the length of the delay is presumptively prejudicial. *Id.* "Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance." *Id.*

When post-accusation delay approaches one year, most courts have held it triggers the speedy trial inquiry. *Doggett v. United States*, 505 U.S. 647, 651-52 (1992). Because the delay in Petitioner's case is approximately 32 months (from indictment on February 20, 2013, to trial on October 6, 2015), it is presumptively prejudicial. Thus, the Court will consider the remaining three factors.

The second factor under the *Barker* test is the reason for the delay. To determine whether Petitioner's right to a speedy trial has been violated the conduct of the government must be weighed against the conduct of the petitioner. *Barker*, 407 U.S. at 530. The Supreme Court explained different weights should be assigned to different reasons. *Id.* at 531. For example, a deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government, whereas a more neutral reason such as negligence or overcrowded courts should be weighted less heavily against the government. *Id.* Additionally, the government should not be held responsible for delays resulting from the defendant's actions. *See Bell v. Lynaugh*, 828 F.2d 1085, 1095 (5th Cir. 1987) (holding an eight-year delay did not violate the right to a speedy trial because most of the delay was attributable to the defendant).

The state habeas court found that the record reflected that Petitioner had asked for multiple resets and passes, and thus any delay was due to the Petitioner's own actions, not the actions of the State. Specifically, the state habeas court cited the term "Court Pass" in the docket sheets which it said was "entered when a defendant asks for a case to be passed." Petitioner contends that the term "Court Pass" is a "sham" and that the delays were due to the State's negligence in pursuing Petitioner.

Having independently reviewed the entire state court record, this Court finds nothing unreasonable in the state court's application of clearly established federal law or in the state court's determination of facts in light of the evidence. The Fifth Circuit has held the "speedy trial clock is properly tolled in cases where responsibility for the delay lies with the defendant rather than the state." *Nelson v. Hargett*, 989 F.2d 847, 852 (5th Cir. 1993). Petitioner has failed to meet his burden to rebut the state court's factual findings.

The final factor under the *Barker* test is the degree of prejudice to the defendant resulting from the delay. If the first three factors weigh so heavily in the defendant's favor that prejudice may be presumed, "the Government can overcome that by showing that the presumption is extenuated . . . or rebutting the presumption with evidence." *United States v. Frye*, 372 F.3d 729, 736 (5th Cir. 2004). However, if the first three factors do not weigh so heavily as to justify a presumption of prejudice, then the defendant bears the burden of both establishing actual prejudice and demonstrating that such prejudice is sufficient to outweigh the other three factors. *United States v. Serna-Villarreal*, 352 F.3d 225, 231 (5th Cir. 2003).

In this case the first three factors do not weigh heavily against the state. Therefore, Petitioner is required to make an affirmative showing of actual prejudice. Although Petitioner makes conclusory allegations of prejudice, he fails to specify how his defense was impaired. Because Petitioner has failed to demonstrate prejudice sufficient to establish a constitutional violation, Petitioner's speedy trial claim does not warrant federal habeas corpus relief.

E. Lesser Included Offense Instruction

Petitioner claims that the trial court erred by denying Petitioner's requested lesser included offense instruction for misdemeanor assault. Petitioner's allegation does not state a ground for federal habeas corpus relief. "In a non-capital murder case, the failure to give an instruction on a lesser included offense does not raise a federal constitutional issue." *Valles v. Lynaugh*, 835 F.2d 126, 127 (5th Cir. 1988); *Alexander v. McCotter*, 775 F.2d 595, 601 (5th Cir. 1985). Accordingly, Petitioner's claim does not warrant federal habeas corpus relief.

F. Prosecutorial Misconduct

As discussed above, it is not clear that Petitioner's claim that the prosecution erred by relying on false testimony and violated *Brady* is unexhausted. Consequently, the Court will address the claim on the merits. Petitioner contends that during trial the prosecutor was aware that the testimony of Officer Carpenter was false. In addition, Petitioner contends that the prosecutor withheld the internal investigation of the arresting officer from the defense.

Habeas relief may be granted on a claim of prosecutorial misconduct only where the errors committed by the prosecutor "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). A criminal defendant is denied due process when the prosecution knowingly uses perjured testimony at trial or allows untrue testimony to go uncorrected. *Giglio v. United States*, 405 U.S. 150 (1972); *Faulder v. Johnson*, 81 F.3d 515, 519 (5th Cir. 1996). To obtain relief on such a claim, a petitioner must show that (1) the testimony was actually false, (2) the prosecutor knew it was false, and (3) the testimony was material. *Kirkpatrick v. Whitley*, 992 F.2d 491, 497 (5th Cir. 1993). Perjured testimony is only material if it is also shown that there was a reasonable likelihood that it affected the jury's verdict. *Giglio*, 405 U.S. at 153–154. "Conflicting or inconsistent testimony is insufficient to establish perjury." *Kutzner v. Johnson*, 242 F.3d 605, 609 (5th Cir. 2001).

Here, Petitioner has not shown that Officer Carpenter's testimony was false, much less that prosecutors knew that the testimony was false and that the testimony was material. Furthermore, Petitioner's claim that certain evidence was withheld is wholly conclusory. Petitioner fails to argue what the allegedly withheld evidence would have shown or how it would have affected the outcome of the trial. Accordingly, Petitioner's claim does not warrant federal habeas relief.

Having independently reviewed the entire state court record, this Court finds nothing unreasonable in the state court's application of clearly established federal law or in the state court's determination of facts in light of the evidence. Accordingly, the

Court is of the opinion that 28 U.S.C. § 2254, as amended by the AEDPA, bars habeas corpus relief on Petitioner's claims of prosecutorial misconduct.

G. Ineffective Assistance of Trial Counsel

1. AEDPA Impact

Petitioner claims that his trial counsel was ineffective for failing to (1) hire a medical expert; (2) present exculpatory evidence; and (3) impeach the complainant. Petitioner raised these same issues in his state habeas application and the Court of Criminal Appeals rejected the merits of Petitioner's claims. As such, the AEDPA limits the scope of this Court's review to determining whether the adjudication of Petitioner's claims by the state court either (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

2. Standard of Review

Ineffective assistance of counsel claims are analyzed under the well-settled standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984):

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. Unless a defendant can make 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.

Id. at 687. In deciding whether counsel's performance was deficient, the Court applies a standard of objective reasonableness, keeping in mind that judicial scrutiny of counsel's performance must be highly deferential. *Id.* at 686-689. "A fair assessment of attorney performance requires that every effort be made 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. "Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* (citation omitted). Ultimately, the focus of inquiry must be on the fundamental fairness of the proceedings whose result is being challenged. *Id.* at 695-97. Accordingly, in order to prevail on a claim of ineffective assistance of counsel, a convicted defendant must show that (1) counsel's representation fell below an objective standard of reasonableness, and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 687.

3. Medical Expert and Exculpatory Evidence

Petitioner argues that his trial counsel was ineffective for failing to hire a medical expert and present exculpatory evidence. These two claims are intertwined because Petitioner asserts that a medical expert could have presented evidence calling into

question the testimony of the victim that the scar on her neck was caused by Petitioner's actions.

When a petitioner questions counsel's failure to call a witness, counsel's decision is considered to be essentially strategic, and "speculations as to what [uncalled] witnesses would have testified is too uncertain." *Alexander v. McCotter*, 775 F.2d 595, 602 (5th Cir. 1985). A petitioner who alleges ineffective assistance of counsel based on counsel's failure to call either a "lay or expert witness" must "name the witness, demonstrate that the witness was available to testify and would have done so, set out the content of the witness's proposed testimony, and show that the testimony would have been favorable to the particular defense." *Day v. Quarterman*, 566 F.3d 527, 538 (5th Cir. 2009) (citations omitted).

Here, Petitioner fails to name any alleged expert witness who should have been called, fails to indicate any alleged expert witness was available, and only explains the alleged testimony of such a witness in the vaguest of terms. Even assuming that a medical expert would have testified that the small scar the victim indicated on her neck was not the result of strangulation, there is no indication that this would have changed the results of Petitioner's trial. At most it might have called into question the physical evidence of the strangulation. Petitioner simply has not met his burden to show that counsel was unreasonable for failing to hire a medical expert or utilize such an expert to present exculpatory evidence.

Having independently reviewed the entire state court record, this Court finds nothing unreasonable in the state court's application of clearly established federal law

or in the state court's determination of facts in light of the evidence. Accordingly, the Court is of the opinion that 28 U.S.C. § 2254, as amended by the AEDPA, bars habeas corpus relief on Petitioner's claims that his trial counsel was ineffective for failing to failing to hire a medical expert and present exculpatory evidence.

4. Failure to Impeach

Petitioner claims that his trial counsel failed to impeach the victim, "instead focusing on a curious series of questions." Memo. (#17) at 13. Again, Petitioner appears to assert that counsel should have sought to question the physical evidence of the scar on her neck. Counsel did, in fact, attempt to impeach her on this point, eliciting testimony that the victim "could not swear" as to what caused the scar on her neck because she did not know exactly how it happened. Tr. (#12-20) at 74. In addition, counsel elicited testimony from the victim that she was intoxicated at the time of the incident, and Petitioner's claim that the victim had kicked Petitioner was also introduced. Petitioner fails to explain what additional information should have been used to impeach the victim. Instead, Petitioner appears to simply dispute the credibility of her testimony.

Having independently reviewed the entire state court record, this Court finds nothing unreasonable in the state court's application of clearly established federal law or in the state court's determination of facts in light of the evidence. Accordingly, the Court is of the opinion that 28 U.S.C. § 2254, as amended by the AEDPA, bars habeas corpus relief on Petitioner's claims that his trial counsel was ineffective for failing to impeach the victim.

H. Ineffective Assistance of Appellate Counsel

Petitioner argues his appellate counsel was ineffective for failing to argue in the direct appeal that Petitioner's sentence enhancement violated his right to a jury trial. As with claims of ineffective assistance of trial counsel, claims of ineffective assistance of appellate counsel are reviewed under the two-part *Strickland* test. *Loden v. McCarty*, 778 F.3d 484, 501 (5th Cir. 2015). Therefore, Petitioner must show his appellate attorney's performance was deficient and the deficient performance prejudiced his defense. *Dorsey v. Stephens*, 720 F.3d 309, 319 (5th Cir. 2013). Prejudice in the context of appellate counsel error requires the petitioner to demonstrate a reasonable probability that he would have prevailed on appeal. *Smith v. Robbins*, 528 U.S. 259, 285 (2000).

Petitioner pleaded "true" to the enhancement allegation. The state habeas court found that appellate counsel "did not raise any error regarding the enhancement allegation because there was no error regarding that allegation or the finding of true regarding that allegation" and that "any appeal regarding that issue would have been frivolous." SHCR (#12-32) at 40-41. Petitioner fails to show that any unraised appellate claim would have been successful.

Having independently reviewed the entire state court record, this Court finds nothing unreasonable in the state court's application of clearly established federal law or in the state court's determination of facts in light of the evidence. Accordingly, the Court is of the opinion that 28 U.S.C. § 2254, as amended by the AEDPA, bars habeas

corpus relief on Petitioner's claim that he received ineffective assistance of appellate counsel.

CONCLUSION

Petitioner's application for writ of habeas corpus is denied.

CERTIFICATE OF APPEALABILITY

An appeal may not be taken to the court of appeals from a final order in a habeas corpus proceeding "unless a circuit justice or judge issues a certificate of appealability." 28 U.S.C. § 2253(c) (1)(A). Pursuant to Rule 11 of the Federal Rules Governing Section 2254 Cases, effective December 1, 2009, the district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant.

A certificate of appealability may issue only if a petitioner has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). The Supreme Court fully explained the requirement associated with a "substantial showing of the denial of a constitutional right" in *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). In cases where a district court rejected a petitioner's constitutional claims on the merits, "the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.* "When a district court denies a habeas petition on procedural grounds without reaching the petitioner's underlying constitutional claim, a COA should issue when the petitioner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of

the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.*

In this case, reasonable jurists could not debate the dismissal or denial of Petitioner's section 2254 petition on substantive or procedural grounds, nor find that the issues presented are adequate to deserve encouragement to proceed. *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003) (citing *Slack*, 529 U.S. at 484). Accordingly, the Court shall not issue a certificate of appealability.

It is **ORDERED** that Petitioner's application for writ of habeas corpus is **DENIED**.

It is further **ORDERED** that all other pending motions are **DISMISSED**.

It is finally **ORDERED** that a certificate of appealability is **DENIED**.

SIGNED on May 9, 2019



ALAN D ALBRIGHT
UNITED STATES DISTRICT JUDGE