United States Court of Appeals for the Fifth Circuit

No. 20-40121

A True Copy
Certified order issued Aug 04, 2020

Clerk, U.S. Court of Appeals, Fifth Circuit

JOE ANGEL ACOSTA, III,

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 Southern District of Texas

ORDER

Joe Angel Acosta, III, Texas prisoner # 1844468, moves for a certificate of appealability (COA) to appeal the dismissal, as time barred, of his 28 U.S.C. § 2254 petition challenging his conviction for aggravated assault with a deadly weapon. He also moves for the appointment of counsel on appeal. Acosta argues that (1) his otherwise untimely 2018 habeas petition related back to his timely 2016 habeas petition, which was dismissed without prejudice for lack of exhaustion; (2) the dismissal of his 2016 petition was an unconstitutional suspension of the writ of habeas corpus; (3) he is entitled to equitable tolling of the 28 U.S.C. § 2244(d) limitation period due to misleading statements by the district court and the State; (4) his misconduct

complaint against the trial court reporter was a collateral review application that tolled the § 2244(d) limitation period; and (5) he is actually innocent.

To obtain a COA, Acosta must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To meet that burden, he must show "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." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Acosta fails to make the required showing. Accordingly, the motion for a COA is DENIED. The motion for appointment of counsel is DENIED AS MOOT.

/s/ Leslie H. Southwick
LESLIE H. SOUTHWICK
UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

JOE ANGEL ACOSTA III,	§	
	§	
Petitioner,	§	
VS.	§	CIVIL ACTION NO. 2:19-CV-00008
	§	
LORIE DAVIS,	§	
	§	
Respondent.	§	

MEMORANDUM AND RECOMMENDATION

Petitioner Joe Angel Acosta III is an inmate in the Texas Department of Criminal Justice - Correctional Institutions Division and is currently incarcerated at the Clements Unit in Amarillo, Texas. Proceeding *pro se*, Acosta filed an original habeas corpus petition pursuant to 28 U.S.C. § 2254 on December 28, 2018.[1] (D.E. 1). Acosta's claims fall into three broad categories: (1) there was insufficient evidence to support his conviction; (2) trial and appellate counsel rendered ineffective assistance in several respects; and (3) the trial court erred by not including a lesser-included offense instruction. Respondent filed a motion for summary judgment contending that the § 2254 petition was untimely, to which Acosta has responded. (D.E. 26, 36). As discussed more fully below, it is respectfully recommended that Respondent's motion for summary judgment be granted and Acosta's habeas corpus petition be dismissed as untimely. It is further recommended that a Certificate of Appealability ("COA") be denied.

[1] Acosta stated under penalty of perjury that he placed his petition in the prison mail system on December 28, 2018, and it is considered filed as of that date. *See Spotville v. Cain*, 149 F.3d 374, 376 (5th Cir. 1998), and Rule 3, Rules Governing Section 2254 Cases (discussing the mailbox rule).

I. JURISDICTION

This court has jurisdiction pursuant to 28 U.S.C. § 1331 and venue is appropriate because Acosta was convicted in Nueces County, Texas. 28 U.S.C. § 2254(a); 28 U.S.C. § 124(b)(6); *Wadsworth v. Johnson*, 235 F.3d 959, 961 (5th Cir. 2000).

II. BACKGROUND

a. Petition and Claims

In his § 2254 petition, Acosta raises 21 claims. (D.E. 1 at 10, 18-52).[2] Broadly speaking, Acosta claims that: (1) there was insufficient evidence to support his conviction (Grounds 1-2); (2) trial and appellate counsel rendered ineffective assistance throughout the trial, sentencing, and appeal proceedings in several respects (Grounds 3-4, 6-21); and (3) the trial court erred by failing to give the jury an instruction on a lesser-included offense (Ground 5). (*Id.*).[3] Acosta indicates that his petition is timely because the Court dismissed a prior § 2254 petition without prejudice so that he could exhaust his claims in state court. (*Id.* at 12).

b. State Court Records

In May 2012, Acosta was charged in an indictment with one count of aggravated assault, in violation of Texas Penal Code § 22.02. (D.E. 27-1 at 9). In addition, because Acosta had two prior felony convictions, he was charged as a habitual felony offender.

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[2] Acosta raised an additional claim regarding a disciplinary case in prison that was severed and transferred to the Northern District of Texas, Amarillo Division. (D.E. 1 at 52-54; D.E. 5 at 1-3).

[3] Acosta discusses his claims in extensive detail. (*See generally* D.E. 1). However, because the merits of Acosta's claims are not currently at issue, this memorandum does not recount the specifics of each of Acosta's claims.

(*Id.* at 9-10). A jury found Acosta guilty, and he received a sentence of 60 years' imprisonment. (*Id.* at 119). The state trial court entered judgment on March 5, 2013. (*Id.*).

On appeal, the Thirteenth District Court of Appeals for Texas affirmed Acosta's conviction and sentence. (D.E. 27-4 at 1-16). Acosta subsequently filed a petition for discretionary review in the Texas Court of Criminal Appeals ("TCCA"). (D.E. 27-7 at 1-6). The TCCA refused Acosta's petition on February 4, 2015. (D.E. 27-9 at 1). Acosta did not petition for a writ of *certiorari* with the United States Supreme Court. (*See* D.E. 1 at 3).

In September 2015, Acosta filed an application for a writ of habeas corpus in state court under Article 11.07 of the Texas Code of Criminal Procedure. (D.E. 27-19 at 5-37). Acosta challenged his aggravated assault conviction and sentence. (*See id.*). The trial court recommended dismissing Acosta's application as noncompliant with Texas Rule of Appellate Procedure 73.1, and the TCCA dismissed the application on that ground on December 9, 2015. (D.E. 27-17 at 1; D.E. 27-19 at 53).

In November 2015, Acosta challenged a separate June 2006 conviction for driving while intoxicated in a second Article 11.07 application. (D.E. 27-22 at 4-14). The trial court recommended that the application be dismissed because it challenged a misdemeanor conviction, and the TCCA dismissed the application on that ground on February 3, 2016. (D.E. 27-20 at 1; D.E. 27-22 at 24).

In February 2016, Acosta challenged his aggravated assault conviction and sentence in a third Article 11.07 application. (D.E. 28-3 at 5-76). The trial court

recommended dismissing Acosta's application as noncompliant with Texas Rule of Appellate Procedure 73.1, and the TCCA dismissed the application on that ground on May 4, 2016. (D.E. 28-1 at 1; D.E. 28-3 at 102).

On May 3, 2016, Acosta filed a § 2254 petition challenging his aggravated assault conviction and sentence. (Case No. 2:16-cv-00149, D.E. 1 at 1-15). Respondent moved for summary judgment, contending that Acosta's petition should be dismissed as a mixed petition because it included both exhausted and unexhausted claims. (*Id.*, D.E. 24 at 13-15). Alternately, Respondent asserted that Acosta could abandon his unexhausted claims and proceed only on the exhausted claims. (*Id.* at 15). In a memorandum and recommendation ("M&R") Magistrate Judge Jason B. Libby recommended granting the motion for summary judgment, dismissing Acosta's petition without prejudice as a mixed petition, and denying a stay to exhaust in state court because Acosta had been granted a stay previously and did nothing to exhaust his claims. (*Id.*, D.E. 27 at 7-16). On January 31, 2018, the district court adopted the M&R and dismissed Acosta's petition. (*Id.*, D.E. 48 at 1-2).

In December 2016, Acosta challenged his aggravated assault conviction and sentence in a fourth Article 11.07 application. (D.E. 27-14 at 4-54). The trial court recommended dismissing Acosta's application because his § 2254 petition was pending and needed to be either stayed or resolved before filing in state court. (*Id.* at 91). The TCCA dismissed Acosta's application without written order on April 5, 2017. (D.E. 27-12 at 1).

Finally, in February 2018, Acosta challenged his aggravated assault conviction and sentence in a fifth Article 11.07 application. (D.E. 28-24 at 4-53). After a review of the record, the trial court recommended denying Acosta's petition on the merits because he failed to show that either trial or appellate counsel were ineffective or that he was entitled to relief on any other ground. (D.E. 28-21 at 16). The TCCA denied Acosta's application without written order on October 31, 2018. (D.E. 28-7 at 1).

III. DISCUSSION

In her motion for summary judgment, Respondent argues that Acosta's § 2254 petition is untimely. (D.E. 26 at 7-13). Specifically, she argues that Acosta's conviction became final on May 5, 2015, or 90 days after his petition for discretionary review was refused, and that the one-year limitation period for a § 2254 petition accordingly expired on May 5, 2016. (*Id.* at 9). Respondent contends that Acosta is not entitled to statutory tolling because he did not properly file a state habeas petition concerning this conviction until December 2016, seven months after the limitation period expired. (*Id.* at 9-11). Finally, Respondent asserts that Acosta is not entitled to equitable tolling because he has not identified any rare or exceptional circumstances that prevented him from timely filing his § 2254 petition, nor was he diligent in pursuing his rights where he waited seven months after the refusal of his petition for discretionary review to file his first state habeas application. (*Id.* at 11-13).

Acosta first responds that his petition is timely because it "relates back" to his original § 2254 petition under Federal Rule of Civil Procedure 15(c). (D.E. 36 at 1-2). Second, Acosta moves for relief from judgment in his prior § 2254 proceedings under

Federal Rule of Civil Procedure 60(b), contending that: (1) his second Article 11.07 application was properly filed and tolled the limitation period; (2) he was not allowed to amend his § 2254 petition; (3) he was denied a stay; (4) he was actually innocent; and (5) he was unable to file a notice of appeal because prison authorities denied him access to the courts. (*Id.* at 2-7). As to timeliness, Acosta argues that his petition is timely under 28 U.S.C. § 2244(d)(1)(B) because State Counsel for Offenders ("SCFO") indicated that they would file his state application, but then declined to do so, causing an impediment to his timely filing. (*Id.* at 9). Further, he argues that § 2244(d)(1)(D) applies because the state court's denial of his habeas application on the merits was a factual predicate of his claim. (*Id.*). Finally, Acosta contends that he is entitled to equitable tolling because he has diligently pursued his rights and was denied a stay in his previous § 2254 proceedings, which was an extraordinary circumstance that stood in his way. (*Id.* at 10).

A one-year limitation period applies to an application for a writ of habeas corpus filed by a person in custody pursuant to a state court judgment. 28 U.S.C. § 2244(d)(1). The limitation period runs from the latest of either: (1) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review; (2) the date on which the impediment to filing an application created by state action in violation of the Constitution or laws of the United States was removed; (3) the date on which the constitutional right asserted was initially recognized by the Supreme Court; or (4) the date on which the factual predicate of the claim presented could have been discovered through the exercise of due diligence. *Id.* § 2244(d)(1).

For § 2244 purposes, where a petitioner has sought review by the state's highest court, a conviction becomes final 90 days after his claim is rejected, when the time to file a petition for a writ of *certiorari* with the Supreme Court has expired. *Roberts v. Cockrell*, 319 F.3d 690, 693-95 (5th Cir. 2003). In Texas, the Court of Criminal Appeals may review the decisions of a court of appeals. Tex. Code of Crim. Proc. art. 44.45(b)(2). A petition for discretionary review to the Texas Court of Criminal Appeals must be filed within 30 days after either the day the court of appeals rendered judgment or the day the last timely motion for rehearing or *en banc* reconsideration was overruled. Tex. R. App. Proc. 68.2(a).

The time during which a properly filed state collateral review application is pending is not counted toward the limitation period. 28 U.S.C. § 2244(d)(2). A state habeas petition filed after the limitation period ends does not toll the limitation period under § 2244(d)(2). *Scott v. Johnson*, 227 F.3d 260, 263 (5th Cir. 2000). A Texas habeas petition that is dismissed under Texas Rule of Appellate Procedure 73.1 was not properly filed. *Davis v. Quarterman*, 342 F. App'x 952, 953 (5th Cir. 2009) (unpublished). A state habeas petition that challenges a different conviction does not toll the deadline where it is "impossible" to construe that application as challenging a pertinent judgment. *Godfrey v. Dretke*, 396 F.3d 681, 686-87 (5th Cir. 2005). An application for federal habeas review is not an "application for State post-conviction or other collateral relief" under § 2244(d)(2) and does not toll the limitation period. *Duncan v. Walker*, 533 U.S. 167, 181-82 (2001).

The timeliness provision in § 2244(d) is also subject to equitable tolling. *Holland v. Florida*, 560 U.S. 631, 634 (2010). A petitioner is entitled to equitable tolling only if he can show that: (1) he has been diligently pursuing his rights; and (2) some extraordinary circumstance stood in his way. *Id.* at 649. Such a circumstance exists where, for example, the plaintiff was misled by the defendant about the cause of action or was otherwise prevented in some extraordinary way from asserting his rights. *Lookingbill v. Cockrell*, 293 F.3d 256, 264 (5th Cir. 2002). A standard claim of excusable neglect is insufficient. *Id.* Ignorance of the law generally does not excuse prompt filing, even for a *pro se* prisoner. *Felder v. Johnson*, 204 F.3d 168, 172 (5th Cir. 2000). The failure to satisfy the limitation period must result from "external factors" beyond the petitioner's control, and delays caused by the petitioner do not qualify. *In re Wilson*, 442 F.3d 872, 875 (5th Cir. 2006).

Here, as an initial matter, Rule 15(c) is not applicable to Acosta's present § 2254 petition because it is a new petition, not an amendment to his May 2016 petition. *See* Fed. R. Civ. P. 15(c). Final judgment was entered on Acosta's previous petition on January 31, 2018, and he neither appealed the dismissal of that petition nor sought relief from judgment. (Case No. 2:16-cv-00149, D.E. 49 at 1). To the extent that Acosta argues that he did not file a notice of appeal because he was denied access to the courts, that is an argument he could have made in a motion in his original § 2254 proceedings or in a separate civil rights suit under 42 U.S.C. § 1983. (*See* D.E. 36 at 6-7). Further, to the extent that Acosta's response purports to be a Rule 60(b) motion for relief from judgment in his original § 2254 proceedings, he must seek such relief in that case rather

than as a defense against summary judgment on a separate § 2254 petition. (*See id.* at 2-7); Fed. R. Civ. P. 60(b).

Acosta's § 2254 petition is untimely, and he has not established that he is entitled to statutory or equitable tolling. The TCCA refused his petition for discretionary review on February 4, 2015, and he had 90 days from that point to petition for a writ of *certiorari* with the Supreme Court. (D.E. 27-9 at 1); *Roberts*, 319 F.3d at 693-95. Because he did not petition for a writ of *certiorari*, his conviction became final at the expiration of those 90 days on May 5, 2015. (*See* D.E. 1 at 3). Thus, under § 2244(d)(1)(A), his time to file a § 2254 petition expired one year later on May 5, 2016.

None of the other potential triggering dates under § 2244(d)(1) apply to Acosta's petition. To the extent that Acosta argues that the SCFO's decision not to help him file an Article 11.07 application was a state-created impediment under § 2244(d)(1)(B), he has not identified how that action violated "the Constitution or laws of the United States." *See* 28 U.S.C. § 2244(d)(1)(B). Further, the state did not impede Acosta's timely filing given that he had already filed several Article 11.07 applications on his own before he contacted the SCFO. (*See* D.E. 27-19 at 5-37; D.E. 27-22 at 4-14; D.E. 28-3 at 5-76). Finally, to the extent that Acosta contends that § 2244(d)(1)(D) applies, the exhaustion of his claims and the state court's denial of his claims are not "factual predicates" of his claims. *See* 28 U.S.C. § 2244(d)(1)(D). Rather, the factual predicates are the events at trial and on direct appeal that gave rise to the claims. Thus, Acosta's present § 2254 petition, filed on December 28, 2018, is untimely by over two years unless he can show entitlement to statutory or equitable tolling.

As to statutory tolling, Acosta filed three Article 11.07 applications before May 5, 2016, that, if properly filed, could have tolled the limitation period. (D.E. 27-19 at 5-37; D.E. 27-22 at 4-14; D.E. 28-3 at 5-76). However, Acosta's September 2015 and February 2016 applications were not properly filed because they were dismissed as noncompliant with Texas Rule of Appellate Procedure 73.1. (D.E. 27-17 at 1; D.E. 28-1 at 1); *Davis*, 342 F. App'x at 953. Although Acosta contends that his February 2016 application was, in fact, compliant with Rule 73.1, that application included legal argument, was over 70 pages long, and did not raise each ground "in summary fashion" as required by Rule 73.1. (*See* D.E. 28-3 at 5-82); Tex. R. App. P. 73.1(d). Moreover, his November 2015 application could not toll the limitation period because he challenged an unrelated misdemeanor conviction for driving while intoxicated. (D.E. 27-22 at 4-5, 9-12); *Godfrey*, 396 F.3d at 686-87. Acosta's two remaining Article 11.07 applications do not entitle him to tolling because they were filed in December 2016 and February 2018, which was after the expiration of the limitation period. (D.E. 27-14 at 54; D.E. 28-24 at 53); *Scott*, 227 F.3d at 263. Finally, Acosta's previous § 2254 petition did not toll the limitation period because it was not an "application for State post-conviction or other collateral relief" under § 2244(d)(2). *Duncan*, 533 U.S. at 181-82.

Further, Acosta is not entitled to equitable tolling because he has not shown any extraordinary circumstance that prevented him from filing his § 2254 petition earlier. *Holland*, 560 U.S. at 649. A brief review of the timeline shows that, during the one-year limitation period, Acosta filed two Article 11.07 applications that were dismissed under Rule 73.1 and a third Article 11.07 application on an unrelated misdemeanor conviction.

(*See* D.E. 27-19 at 5-37; D.E. 27-22 at 4-14; D.E. 28-3 at 5-76). Then, two days before the expiration of the limitation period, rather than filing a compliant Article 11.07 application that would toll the limitation period, he filed his first § 2254 petition that was subsequently dismissed without prejudice as a mixed petition that contained unexhausted claims. (Case No. 2:16-cv-00149, D.E. 1 at 1-15). Ignorance of the law does not generally excuse prompt filing, even for *pro se* prisoners, and Acosta's failure to file a compliant Article 11.07 application was not an extraordinary circumstance that was outside of his control. *See Felder*, 204 F.3d at 172. Moreover, the denial of a stay in his initial § 2254 proceedings was not an extraordinary circumstance, particularly where Acosta's petition was only dismissed after he failed to take advantage of a temporary stay allowing him to exhaust his claims. (*See* Case No. 2:16-cv-00149, D.E. 27 at 7-16).

Finally, even if Acosta could show an extraordinary circumstance, he has not shown that he was diligently pursuing his rights where he waited seven months from the denial of his last Article 11.07 application to file the present § 2254. *See Holland*, 560 U.S. at 649. Thus, Acosta's § 2254 petition is untimely and he is not entitled to any form of tolling.

IV. 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). Although Acosta has not yet filed a notice of appeal, the issue of whether he is entitled to a COA will be addressed. *See Alexander v. Johnson*,

211 F.3d 895, 898 (5th Cir. 2000) (stating that a district court may *sua sponte* rule on a COA).

A COA "may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "The COA determination under § 2253(c) requires an overview of the claims in the habeas petition and a general assessment of their merits." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). Where a district court rejects the claims on procedural grounds, a petitioner must show that jurists of reason would find it debatable whether: (1) the petition states a valid claim of the denial of a constitutional right; and (2) the district court was correct in its procedural ruling. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Here, reasonable jurists would not find it debatable that Acosta's claims are time-barred. Therefore, it is further recommended that any request for a COA be denied because he has not made the necessary showing for such issuance.

V. RECOMMENDATION

Based on the foregoing, it is respectfully recommended that Respondent's motion for summary judgment (D.E. 26) be GRANTED. Acosta's § 2254 petition should be DISMISSED as untimely. In addition, it is further recommended that any request for a Certificate of Appealability be DENIED.

Respectfully submitted this 25th day of July, 2019.

B. JANICE ELLINGTON
UNITED STATES MAGISTRATE JUDGE

NOTICE TO PARTIES

The Clerk will file this Memorandum and Recommendation and transmit a copy to each party or counsel. Within FOURTEEN (14) DAYS after being served with a copy of the Memorandum and Recommendation, a party may file with the Clerk and serve on the United States Magistrate Judge and all parties, written objections, pursuant to Fed. R. Civ. P. 72(b), 28 U.S.C. § 636(b)(1), General Order No. 2002-13, United States District Court for the Southern District of Texas.

A party's failure to file written objections to the proposed findings, conclusions, and recommendation in a magistrate judge's report and recommendation within FOURTEEN (14) DAYS after being served with a copy shall bar that party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court. *Douglass v. United Servs. Auto Ass'n*, 79 F.3d 1415 (5th Cir. 1996) (*en banc*).

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

JOE ANGEL ACOSTA III,	§	
	§	
Petitioner,	§	
VS.	§	CIVIL NO. 2:19-CV-8
	§	
LORIE DAVIS,	§	
	§	
Respondent.	§	

ORDER

The Court is in receipt of the Magistrate Judge's Memorandum and Recommendation ("M&R"), Dkt. No. 37. The Court is also in receipt of Petitioner Joe Angel Acosta III's ("Acosta") Objections to the M&R, Dkt. No. 42.

I. Background

Acosta is incarcerated at the Clements Unit in Amarillo, Texas by the Texas Department of Criminal Justice – Correctional Institutions Division. Dkt. No. 37. Acosta filed a habeas corpus petition pursuant to 28 U.S.C. § 2254 on December 28, 2018 that challenged the sufficiency of evidence of his conviction, the effectiveness of his counsel and the adequacy of the jury charge. *Id.*; *see* Dkt. Nos. 1, 28. The M&R recommends that respondent's motion for summary judgment be granted and Acosta's habeas corpus petition be dismissed as untimely. Dkt. No. 37 at 1. Acosta filed objections to the M&R. Dkt. No. 42. The Court reviews objected-to portions of a Magistrate Judge's proposed findings and recommendations de novo. 28 U.S.C. § 636(b)(1). But if the objections are frivolous, conclusive or general in nature the court need not conduct a de novo review. *Battle v. United States Parole Comm'n*, 834 F.2d 419 (5th Cir. 1987).

II. M&R

The Magistrate Judge recommends dismissing the case on the grounds that Acosta's 2254 petition is untimely by over two years and he is not entitled to

statutory or equitable tolling. Dkt. No. 37 at 9-10. The Magistrate Judge determined Acosta's Article 11.07 applications in Texas state court were dismissed as non-compliant and therefore did not toll the statute of limitations. Dkt. No. 37 at 10. The Magistrate Judge also determined that Acosta's previous § 2254 petition did not toll the limitation period. *Id.* "Then, two days before the expiration of the limitation period, rather than filing a compliant Article 11.07 application that would toll the limitation period, he filed his first § 2254 petition that was subsequently dismissed without prejudice as a mixed petition that contained unexhausted claims." *Id.* at 11. The M&R concluded with an analysis that recommends denying Acosta a certificate of appealability because it is not debatable that his claims are time-barred. *Id.* at 12.

III. Objections

Acosta objects on numerous grounds including an incorrect time period stated by the M&R, the arbitrary dismissal of his 11.07 application, application of statutory and equitable tolling, application of Rule 15c, and the improper recommendation of a denial of a certificate of appealability. Dkt. No. 42. These arguments were also raised in Acosta's response to the summary judgment motion. Dkt. No. 36.

After the issuance of the M&R, Acosta was allowed to supplement his petition. Dkt. No. 41. The supplemented petition raised many of the objections that Acosta raised in his objections to the M&R. *See* Dkt. Nos. 36, 41, 42. In granting the supplement, the Magistrate Judge considered Acosta's objections and determined they do not alter the conclusion of the M&R that his petition should be dismissed as untimely. Dkt. No. 41.

> First, as to equitable tolling, Acosta's new arguments regarding his diligence in pursuing his rights do not alter the recommendation in the M&R because, regardless of diligence, he has failed to show any exceptional circumstance warranting equitable tolling. (See D.E. 37 at 10-11); *Holland v. Florida*, 560 U.S. 631, 649 (2010). Acosta raised the same arguments under *Rhines* in his initial § 2254 proceedings, and the district court adopted the magistrate judge's recommendation that a stay was inappropriate because Acosta had not shown: (1) good cause for his failure to exhaust; (2) that his claims were potentially meritorious; or (3) that he had not engaged in intentionally dilatory litigation tactics. (Case No. 2:16-cv00149, D.E. 27 at 9, D.E. 48 at 2). The district court also

> adopted the recommendation that, under the circumstances, it was inappropriate to dismiss only the unexhausted claims and retain the exhausted claims. (Id., D.E. 27 at 16, D.E. 48 at 1). Acosta did not appeal the dismissal of his petition.

Dkt. No. 41 at 3.

After review of Acosta's supplemented petition, and his objections to the M&R this Court finds the objections and arguments are frivolous and/or a repetition of his arguments in response to the motion for summary judgment. *See* Dkt. Nos. 36, 41, 42. Those arguments have been sufficiently addressed in the M&R and supplement order. Dkt. No. 37, 41.

After independently reviewing the record and considering the applicable law, the Court **ADOPTS** the M&R in its entirety, Dkt. No 37. The Court **OVERRULES** Plaintiff's objections, Dkt. No. 42. The Court **DISMISSES WITH PREJUDICE** Plaintiff's claims.

The Court will issue an order of final judgment separately.

SIGNED this 13th day of January, 2020.

Hilda Tagle
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

JOE ANGEL ACOSTA III,	§	
	§	
Petitioner,	§	
VS.	§	CIVIL NO. 2:19-CV-8
	§	
LORIE DAVIS,	§	
	§	
Respondent.	§	

FINAL JUDGMENT

On January 13, 2020, the Court dismissed this case. The Court hereby **DIRECTS** the Clerk of the Court to enter Final Judgment. The Court further **DIRECTS** the Clerk of the Court to close this case.

SIGNED this 13th day of January, 2020.

Hilda Tagle
Senior United States District Judge

NO. _____

IN THE

United States Supreme Court

Joe Angel Acosta III - Petitioner

V.

Lorie Davis - Respondents

*Petitioners Supplemental "Opinions Below" *

On 11-5-20 petitioner submitted the "original" "opinions Below" (1pg) to this Court with the following: 1 page cover page; 1 page list of Parties; 1 page Table of Contents; 1 page Table of Authorities; 1 page Jurisdiction; 1 page constitutional and statutory provisions involved; 2 page Statement of Case; 5 page reasons for granting the petition; 1 page conclusion; 1 page proof of service.

ON 11-25-20

Petitioner was sent to the Estelle Unit of TDCJ, which is a Regional Medical facility, to be temporarily assigned - so that I may be taken to University of Texas Medical Branch (UTMB) in Galveston, TX for a Cornea Transplant. The surgery was done 12-1-20 and I remained at Estelle until 12-25-20. I was then returned to this Unit (Ferguson) where this petition was filed.

ON 1-7-21 Mailroom Supervisor S. Anthony brought me legal mail held while I was away. Among it was this Court Clerk's 1 page (dated 11-30-20) correspondence telling me I had 60 days from the date of the letter to make Corrections.

The Clerk returned my Petition for writ of Certiorari Im resubmitting today. The clerk requires the lower Court opions.

IN MY original "opinions Below" - marked by me in upper right corner as (E) - states there is NO "opinion" from the district Court or Court of Appeals. Petitioner is Confused. The Clerk appears to require final Judgements? I do have copies of final Judgements from the United States District Court and Court of Appeals.

But I have NO access to copy machines. The prison does not give us access to copy machines, we must pay the Texas State Law Library in Austin, TX for legal copies or have someone outside do it. I have NO money. The state Law Library is not a division of TDCJ. And they dont do free copies. TDCJ does not Give us copy service.

I have No family or friends to make copies for me. And I have NO attorney - only Death Row prisoners get appellate attorneys appointed.

Since recieving the clerks letter dated 11-30-20 on 1-7-21, Ive struggled with my eye-sight. Some days I cant read or write; my vision is still adjusting from the surgery. I was not issued eye-glasses. This cant be done until after the stitches are removed from my Eye-ball.

ON 1-26-21 I was called for medical transport. I packed my legal material, but the gaurd took out some folders for unknown reasons. Im an administrative segregation inmate. We pack it in our cell - but the gaurd comes get it and upacks it to search / inventery. On this particular day I was taken to Estelle for a hearing test and brought right back. Because of this I was not allowed to take my 1 bag of property we are allowed to take. (The rest is stored in the property Room), I was only gone an hour. I came back and was given my 1 bag of property the next day. To date I have not recieved the rest of my property thats in the property room. My deadline is January 30, 2021.

Because of this - I dont have all my "final Judgements" I had ready to send the court today. TDCJ policy says we get our property within 24 hours of return - But this unit does what they want. I dont know when Ill get it.

What I do have is: ① 15 Page Final Judgement for my Direct appeal - Accsta v. State No. 13-13-00170CR - 13th Court of Appeals of Texas ② 2 page Final Judgemnt for my 5th Circuit denial of COA - Acosta v. Davis No. 20-40121.

I hope the court clerk will either accept these two final Judgements - which are my only personal copies. (The Defendant has these on file from my 2 previous 2254 attempts in the Southern District of Texas - Acosta v. Davis 2:16-CV-00149 and 2:19-CV-00008).

Alternatively I ask the Court clerk to Grant me additional time to get my property returned, so I can send the rest of what I have.

I urge the clerk to note from the time I Got the clerks letter dated November 30 2020 - to now Ive struggled to write this. Its physically Challenging. And is why I didnt mail it sooner. We are not told our medical appointment dates for security reasons. They just come get us. Therefore I had no way to expect

this Problem. MY intent was to send the Court all MY final Judgements and a different "Supplemental opinions Below". This is out of my control.

However, I told the Court in MY original "opinion below" that NO Court has reached the merits of my case, Therefore there are NO opinions to send - as I understand.

The 15 Page Judgment from the 13th Court of Appeals IM Sending today is the error in Question here for this writ of certerari, The 13th Court of appeals affirmed my conviction for "serious bodily injury" - which I was never indicted or Tried for.

The 2 Page Judgement from the 5th circuit is the reason Im in this Court today, This is what the appellate Court gave me for Acosta v. Davis NO. 20-40121 - which is a petition for C.O.A from Acosta v. Davis 2:19-CV-00008 in the Southern District of Texas.

This is all I have right Now and Im forced to send what I have. Please give me a chance to send the rest - if you Cant accept this.

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* Affidavit *

Pursuant to 28 USC § 1746, I attest under penalty of perjury the foregoing 3 page "Supplemental opinions Below" is true and correct.

Executed this the 29th day of January 2021 — Joe Angel Acosta III
Petitioner Pro se

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* Certificate of service *

I certify a true and correct copy of the foregoing 3-Page "Supplemental opinions Below" and attached 15 page final Judgment of the 13th Court of appeals for Acosta v. state NO. 13-13-00170-CR and 2-Page final Judgement of the 5th circuit of appeals for Acosta v. Davis NO. 20-40121 has been sent with my original 20 page Petition for writ of certiorari to us Supreme Court dated 11-5-20, to: United States Supreme Court Clerk - Washington, DC 20543 —— And the 3 page copy of "Supplemental opinions Below" (without 13th Court of appeals and 5th Circuit final Judgements - Defendant has these on file for Acosta v. Davis 2:16-CV-00149 and 2:19-CV-00008 in the Southern District of Texas) has been sent to: Attorney General of Texas - P.O. Box 12548 - Austin, TX. 78711 - today the 29th day of January 2021 (via TDCJ Law Library Indigent Mail).

Executed this the 29th day of January 2021 — Joe Angel Acosta III
Petitioner Pro se

Joe Angel Acosta III
#1844468 - Ferguson Unit
12120 Savage Drive
Midway, TX. 75852

THE THIRTEENTH COURT OF APPEALS

13-13-00170-CR

JOSE ANGEL ACOSTA A/K/A JOE ANGEL ACOSTA
v.
THE STATE OF TEXAS

On Appeal from the
28th District Court of Nueces County, Texas
Trial Cause No. 12-CR-0279-A (S1)

JUDGMENT

THE THIRTEENTH COURT OF APPEALS, having considered this cause on appeal, concludes that the judgment of the trial court should be AFFIRMED. The Court orders the judgment of the trial court AFFIRMED.

We further order this decision certified below for observance.

September 4, 2014

Acosta contends: (1) there is insufficient evidence to support that he used a knife during the assault; (2) there is insufficient evidence to sustain the enhancement of his offense from a second-degree felony to a habitual offender felony; (3) the trial court erred when it omitted a lesser-included offense jury instruction; and (4) he was denied effective assistance of counsel. We affirm.

I. BACKGROUND FACTS

On the night of January 18, 2012, David Dee agreed to give Ashley Barrera a ride from her home. Barrera was temporarily staying at an apartment shared by her mom, Teresa Moreno, and Acosta. Acosta and Moreno were in a relationship and living together. That night, however, Acosta and Moreno were arguing so Barrera wanted to leave their apartment. When Dee arrived, Barrera was standing outside with her possessions. Dee stated that he heard "a bunch of yelling and screaming going on." Barrera loaded her things into the bed of Dee's blue Ford Ranger pickup when Moreno came outside and said she wanted to leave, too. Moreno loaded her quickly-packed possessions into the pickup and then got into the truck.

Dee testified that Acosta came outside as Moreno got into the passenger side of the truck. According to Dee, Acosta "punched and kicked" his passenger side door and continued to argue with Moreno. Then, Acosta walked around the front of the truck as Dee attempted to put his truck into gear. Dee's driver side window was down approximately six inches. Acosta punched that window four or five times, then stuck his arm through the window opening. Dee reported seeing "something silver because it was dark." Dee finally got his truck into gear when Barrera told him, "You're bleeding!" Dee said that, at that moment, "blood squirted from under [his] eye and across [his] nose up

over [his] head. . . ." The bleeding impaired his vision. He drove to the end of the street and called the police.

Dee testified that, by the time police and EMS arrived ten minutes later, he had already filled a rag with blood from the cut on his face. He required stitches to repair the wound, and now he has a visible scar across his nose. He testified that his treating doctor told him that if the cut had been a "quarter of an inch higher, the eyeball would have rolled out of [its] socket."

Dee testified that he received a letter from Acosta after the incident, wherein Acosta apologized and explained that he "blacked out" during his attack. Dee characterized the letter as follows: "it looks like he was saying he was sorry and then the rest of it is about having pity on [him]." In this letter, Acosta urged Dee to drop the charges or, in the alternative, "ask for the minimum of five years and ask the DA to drop the enhancement back to a second degree felony which is two to twenty." Acosta sent another letter to Dee and also had a church elder call Dee to encourage him to forgive and be lenient on Acosta.

Moreno testified that Acosta was her ex-boyfriend. She stated that she and Acosta were fighting in their apartment the night of the incident. Moreno's daughter Barrera was staying with them for a few days and witnessed the fight. Moreno testified that when Barrera saw Acosta hit her mother, Barrera said, "Mom, you're not staying here, you're going to go with me." The women ran outside to where Dee was waiting in his blue pickup truck. She stated that Acosta followed them, and that Acosta hit her one more time outside. Moreno then got into the truck. She testified that the following happened next:

> [Acosta] went around and all I saw was his hand in and out of the window because [Dee] had the window open so much. I just saw the hand go in and out and that was it. As we were leaving—we were barely going to leave when my daughter was like, "David!" And I looked, by the time I turned around there's blood all over the windshield. We made the corner and we called 911.

Moreno testified that she had known Acosta for a couple of years and that he "would always carry [a knife] for work." She described the knife as "a little blade, pocket knife" that was black and silver.

Acosta testified on his own behalf. He stated that he takes medication for schizophrenia, Hepatitis C, and blood cancer. Acosta also stated that he was recently in a car accident and needs to have surgery on his intestines. He testified that he blacked out the evening of the incident and doesn't remember most of that night. Acosta testified that he wrote letters to Dee apologizing for what happened to Dee, but never admitted any wrongdoing because he does not remember doing anything wrong. Acosta also testified that, by the night of the accident, he no longer carried a pocket knife.

The jury found Acosta guilty of aggravated assault with a deadly weapon, which was enhanced from a second-degree felony to a habitual felony offender offense after he pleaded true to two enhancement felonies. *See id.* § 12.33 (West, Westlaw through 2013 3d C.S.) (outlining the punishment range for a second-degree felony); *id.* § 12.42(d) (West, Westlaw through 2013 3d C.S.) (explaining that a second-degree felony can be enhanced to a habitual felony offense if the defendant has two prior felony convictions, where the range of punishment is twenty-five to ninety-nine years in prison, or life). Acosta was sentenced to sixty years' imprisonment in the TDCJ—ID. Acosta appealed.

II. Sufficiency of the Evidence

A. Applicable Law

In reviewing the sufficiency of the evidence to support a conviction, we consider all of the evidence in the light most favorable to the verdict and determine whether, based on that evidence and reasonable inferences therefrom, a rational fact finder could have found the essential elements of the crime beyond a reasonable doubt. *Winfrey v. State*, 393 S.W.3d 763, 768 (Tex. Crim. App. 2013); *Gear v. State*, 340 S.W.3d 743, 746 (Tex. Crim. App. 2011) (citing *Jackson v. Virginia*, 443 U.S. 307, 318–19 (1979)); *see Brooks v. State*, 323 S.W.3d 893, 895 (Tex. Crim. App. 2010) (plurality op.). In viewing the evidence in the light most favorable to the verdict, we defer to the jury's credibility and weight determinations because the jury is the sole judge of the witnesses' credibility and the weight to be given to their testimony. *Brooks*, 323 S.W.3d at 899. It is unnecessary for every fact to point directly and independently to the guilt of the accused; it is enough if the finding of guilty is warranted by the cumulative force of all incriminating evidence. *Winfrey*, 393 S.W.3d at 768 (citations omitted).

The elements of the offense are measured as defined by a hypothetically correct jury charge. *Villarreal v. State*, 286 S.W.3d 321, 327 (Tex. Crim. App. 2009) (citing *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997)). Such a charge is one that accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried. *Id.* Here, a person commits aggravated assault with a deadly weapon when the person causes serious bodily injury to another while using or exhibiting a deadly weapon

during the commission of the assault. *See* TEX. PENAL CODE ANN. § 22.02. A deadly weapon other than a firearm is "anything that in the manner of its use or intended use is capable of causing death or serious bodily injury." *See id.* § 1.07(a)(17) (West, Westlaw through 2013 3d C.S.).

B. Discussion

1. Evidence Regarding Acosta's Conviction

By his first issue, Acosta argues that the evidence was insufficient to sustain his conviction of aggravated assault because the State did not prove that he injured Dee with a knife. Acosta was indicted as follows:

> That Jose Angel Acosta aka Joe Angel Acosta, defendant, on or about January 18, 2012, in Nueces County, Texas, did then and there intentionally, knowingly, or recklessly cause bodily injury to David Dee by cutting the said David Dee with a knife on the face . . . .

Acosta points out that Dee never testified that it was a knife that actually cut him. Instead, Dee testified that Acosta stuck his arm through the driver's side window opening and that Dee saw "something silver because it was dark." Similarly, Moreno did not actually recall seeing a knife the night of the incident. She saw Acosta's hand go "in and out and that was it." However, she testified that she had known Acosta for several years and knew he "would always carry [a knife] for work." She described the knife as "a little blade, pocket knife" that was black and silver. In contrast, Acosta testified at trial that he no longer carried a knife with him anymore. Acosta argued that the injury could have been caused using another bladed object, such as a boxcutter.

In a sufficiency review, we consider all of the evidence in the light most favorable to the verdict. *See Winfrey*, 393 S.W.3d at 768. We also defer to the jury's credibility

and weight determinations on evidence because the jury is the sole judge of the witnesses' credibility and the weight to be given to their testimony. *Brooks*, 323 S.W.3d at 899. Here, it appears that the jury believed the testimonial evidence Dee and Moreno provided about the knife and disbelieved Acosta. Both Dee and Moreno recalled seeing Acosta's hand slip in through the lowered driver's side window. Moreno testified that, in the years she knew Acosta, he always carried a black and silver pocket knife with him. It is undisputed that Dee was cut by something sharp because his doctors informed him that if his injury had been a "quarter of an inch higher, the eyeball would have rolled out of [his] socket." And Detective Albert Almendarez, a detective with the Corpus Christi Police Department who responded to Dee's 911 call, testified at trial that based on the amount of blood he saw that night and the stitches required on Dee's face, that it "appear[ed] that a knife was used in this case." In light of the foregoing, we hold that a rational fact finder could have found beyond a reasonable doubt that Acosta injured Dee with a knife. *See Winfrey*, 393 S.W.3d at 768.

2. Evidence Regarding Acosta's Enhancement

During the punishment phase, the State adduced evidence of two prior felony convictions to enhance Acosta's aggravated assault offense from a second-degree felony to a habitual felony offender offense: Acosta's conviction for burglary of a building in September 1991 and his conviction for retaliation in November 2006. *See* TEX. PENAL CODE ANN. §§ 30.02, 36.06 (West, Westlaw through 2013 3d C.S.). These enhancements raised his punishment range from two to twenty years' incarceration, *see id.* § 12.33, to twenty-five to ninety-nine years' incarceration or a life sentence. *See id.* § 12.42(d).

By his second issue, Acosta contends that the evidence was insufficient to sustain his enhancements because the trial court did not take Acosta's plea of "true" or "untrue" to the enhancement offense at the appropriate time. Texas Code of Criminal Procedure article 36.01(a)(1) provides that when prior convictions are alleged in an indictment for the purposes of enhancement, that portion of the indictment shall not be read until the hearing on punishment is held. *See* TEX. CODE CRIM. PROC. ANN. art. 36.01(a)(1) (West, Westlaw through 2013 3d C.S.). The enhancements should be read prior to hearing punishment evidence. *Id.*

> The correct procedure to be followed is set out in *Trammell v. State,* 445 S.W.2d 190 (Tex. Crim. App. 1969). In *Trammell v. State, supra*, at the penalty stage of the trial the State introduced evidence of the accused's prior convictions without first reading the enhancing portions of the indictment to the jury. When the error was discovered[,] the State was allowed to reopen and read the indictment to the jury. The accused objected that the State had waived the enhancement portions of the indictment. At this point[,] the State proposed to re-introduce the testimony previously offered. The accused with his counsel agreed and stipulated before the jury, in lieu of re-producing the testimony, that the evidence previously offered would be the same and could be considered by the jury. The accused and his counsel having stipulated to the evidence before the jury, this Court held the evidence was properly before the jury.

See Welch v. State, 645 S.W.2d 284, 285 (Tex. Crim. App. 1984).

Here, similarly, the court heard the punishment evidence and then realized it had not read the enhancement paragraphs to the jury. Acosta complains on appeal that: (1) the trial court improperly took Acosta's plea after all punishment evidence had been heard; (2) the trial court did not require the state to re-prove the testimony of its officers after entry of the plea; (3) there were no stipulations on the record by the parties as to the judgments; (4) the jury heard testimony about a 2011 DWI conviction, which was a class B misdemeanor and not a felony; (5) the 1991 judgment for burglary, which was admitted

into evidence, did not have Acosta's photo or fingerprints; and (6) no fingerprint expert was produced to verify that it was indeed Acosta who allegedly committed all of these crimes.

Assuming without deciding that it was error for the trial court to read the enhancements after the close of punishment evidence, we find that it was harmless error because Acosta subsequently pleaded "true" to the enhancements. These pleas alone would be enough evidence to sustain the enhancements. "Pleas to enhancement allegations are different from pleas to the guilt-innocence phase of trial because a plea of 'true' *does* constitute evidence and sufficient proof to support the enhancement allegation." *Wilson v. State*, 671 S.W.2d 524, 526 (Tex. Crim. App. 1984). Further, we note that for all of Acosta's complaints on appeal, we found no objections in the record. "As a prerequisite to presenting a complaint for appellate review, the record must show that the complaint was made to the trial court by a timely request, objection, or motion." TEX. R. APP. P. 33.1(a). And the Court of Criminal Appeals has held that any violation of article 36.01, as alleged by Acosta here, must be preserved by an objection. *See Marshall v. State*, 185 S.W.3d 899, 903 (Tex. Crim. App. 2006).

For these reasons, we overrule Acosta's second issue.

III. JURY INSTRUCTION

By his third issue, Acosta complains that the trial court erred when it did not submit a lesser-included offense of deadly conduct. A person commits deadly conduct if he "recklessly engages in conduct that places another in imminent danger of serious bodily injury." TEX. PENAL CODE ANN. § 22.05 (West, Westlaw through 2013 3d C.S.). "A person acts recklessly, or is reckless, with respect to circumstances surrounding his

conduct or the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur." *Id.* § 6.03(c) (West, Westlaw through 2013 3d C.S.). "The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint." *Id.*

"A charge on a lesser included offense is required where (1) the lesser-included offense is included within the proof necessary to establish the charged offense, and (2) there is some evidence in the record that would permit a jury to rationally find that, if the defendant is guilty, he is guilty only of the lesser included offense." *Rousseau v. State,* 855 S.W.2d 666, 672–73 (Tex. Crim. App. 1993). However, "the trial court is not required to include a lesser-included offense in the charge if the evidence only raised the issue that the accused is guilty of the greater offense, or not guilty at all." *Tave v. State*, 899 S.W.2d 1, 4 (Tex. App.—Tyler 1994, pet. ref'd) (citing *Rogers v. State,* 687 S.W.2d 337, 344 (Tex. Crim. App. 1985)).

The evidence does not demonstrate that Acosta acted recklessly, such that the lesser-included charge of deadly conduct was warranted. Acosta himself claims that he blacked out most of the evening and does not remember if he assaulted Dee. This is insufficient evidence to justify the deadly conduct instruction. *See Schroeder v. State*, 123 S.W.3d 398, 401 (Tex. Crim. App. 2003) ("Evidence of a defendant's inability to remember causing the death of the victim [did] not entitle the defendant to a charge on the lesser-included offense of manslaughter, and the trial court did not err by not submitting such a charge to the jury"). "Blacking out" does not demonstrate that Acosta

was "aware of" but consciously disregarded a substantial and unjustifiable risk to Dee. *See* TEX. PEN. CODE ANN. § 6.03(c). On the other hand, testimony from the State's witnesses revealed that Acosta's actions showed intent. Dee testified that Acosta was arguing with Moreno as she attempted to get into Dee's truck, "punched and kicked" Dee's passenger door, punched Dee's driver's side window, and then stuck his arm in through Dee's partially-open driver's side window to injure him. Moreno testified that she and Acosta were fighting and that he hit her before she got into Dee's truck. She also stated that she saw Acosta's hand go "in and out of the window."

Because there was no evidence from which a rational juror could find that Acosta is guilty "only of the lesser included offense," *Rousseau,* 855 S.W.2d at 672–73, we overrule this issue.[1]

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

By his final issue, Acosta argues that his trial counsel erred during voir dire, the cross-examination of Moreno, and the punishment phase. We analyze each issue in turn.

A. Applicable Law

We apply the two-pronged *Strickland* analysis to determine whether counsel's representation was so deficient that it violated a defendant's constitutional right to effective assistance of counsel. *Goodspeed v. State,* 187 S.W.3d 390, 392 (Tex. Crim. App. 2005); *Jaynes v. State,* 216 S.W.3d 839, 851 (Tex. App.—Corpus Christi 2006, no pet.); *see Strickland v. Washington,* 466 U.S. 668, 684 (1984). An appellant claiming a

[1] We also note that Acosta's trial counsel stated on the record that he felt the deadly conduct instruction was not warranted by the evidence and that he only requested it at his client's insistence.

Strickland violation must establish that: (1) "his attorney's representation fell below an objective standard of reasonableness, and (2) there is a reasonable probability that, but for his attorney's errors, the result of the proceeding would have been different." *Jaynes*, 216 S.W.3d at 851; *see Strickland*, 466 U.S. at 687.

We afford great deference to trial counsel's ability—"an appellant must overcome the strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance." *Jaynes*, 216 S.W.3d at 851. The appellant must prove both elements of the *Strickland* test by a preponderance of the evidence. *Munoz v. State*, 24 S.W.3d 427, 434 (Tex. App.—Corpus Christi 2000, no pet.). "A *Strickland* claim must be 'firmly founded in the record' and 'the record must affirmatively demonstrate' the meritorious nature of the claim." *Goodspeed*, 187 S.W.3d at 392.

B. Discussion

1. Voir Dire

Acosta first argues that his trial attorney was deficient by failing to ask bias questions of those venire persons who had been affected by assault and aggravated assault. However, the record shows that the prosecutor asked the jurors this question. Specifically, the prosecutor asked, "Is there anyone one of you [sic] who you yourself or a member of your family or a close personal friend who has ever been a victim of assault or any assault?" Fourteen venire persons raised their hands. Then, the prosecution asked this small group if there was anyone who could not be a fair and impartial juror in this case because of their previous experiences with assault. No hands were raised. Because the State addressed this topic in voir dire, Acosta's counsel was entitled to rely on this information and did not need to "traverse those territories to be effective." *See*

White v. State, 999 S.W.2d 895, 898 (Tex. App.—Amarillo 1999, pet. ref'd). We cannot conclude counsel performed deficiently in this regard.

Acosta also asserts that venire person eleven should have been struck when she said she could not be fair and impartial. We also find this point without merit, though, because a review of the record shows that although venire person eleven admitted that she might know a relative of Dee's, she stated that she could still be fair and impartial at trial.

2. Cross-Examination of Teresa Moreno

Acosta next contends that his trial attorney was deficient when he failed to impeach Moreno with questions regarding her prior criminal convictions and drug use. The record, however, is silent as to why Acosta's attorney did not cross-examine her on these issues. Moreno testified that her relationship with Acosta was violent. She testified that the night of the incident, Acosta struck her at least twice. She also stated at trial that she was nervous about testifying because it was the first time she had seen Acosta since that evening. We conclude that it is reasonable trial strategy for a defense attorney to choose not to strongly cross-examine a woman who had been in a violent relationship with the defendant in front of a jury.[2] Because there is a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance, we cannot say that the failure to question Moreno about her past criminal history or drug use constituted deficient performance. *See Jaynes,* 216 S.W.3d at 851. Further, Acosta

[2] We point out, however, that a review of the record shows that Acosta's attorney cross-examined Moreno on the fact that she had been drinking the night Dee was injured.

has failed to show how this line of cross-examination would have made a difference in the outcome of his case. *See id.*

3. Failure to Call Mitigating Witnesses During Punishment

Finally, Acosta posits that his trial attorney should have called a mitigating witness during the punishment phase. However, "[i]t is the trial counsel's prerogative, as a matter of trial strategy, to decide which witnesses to call." *Weisinger v. State,* 775 S.W.2d 424, 427 (Tex. App.—Houston [14th Dist.] 1989, pet. ref d). "An attorney's decision not to present particular witnesses at the punishment stage may be a strategically sound decision if the attorney bases it on a determination that the testimony of the witnesses may be harmful, rather than helpful, to the defendant." *Milburn v. State,* 973 S.W.2d 337, 344 (Tex. App.—Houston [14th Dist.] 1998), *vacated on other grounds,* 3 S.W.3d 918 (Tex. Crim. App. 1999).

Again, the record is silent on why Acosta's attorney did not present mitigating witnesses. We note, though, that during a hearing outside the presence of the jury on another matter, Acosta's attorney had advised Acosta that "if we do that and the jury seems to think that you're trying to down play whatever happened may have happened, it would only aggravate them and make them madder at you." Because this line of thinking appears to be a reasonable trial strategy, we conclude that Acosta did not "overcome the strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance" in failing to call mitigating witnesses. *See Jaynes,* 216 S.W.3d at 851. And again, Acosta failed to establish how calling certain witnesses would have changed the outcome of this case. *See id.*

We overrule Acosta's fourth issue.

V. CONCLUSION

Having overruled all of Acosta's issues, we affirm the judgment of the trial court.

GINA M. BENAVIDES,
Justice

Do not publish.
TEX. R. APP. P. 47.2 (b).

Delivered and filed the
4th day of September, 2014.