Appendix A

Editorial History

12/30/20 U.S. Court of Appeals
19-20612 Fifth Circuit
600 S. Maestri Place
New Orleans, LA 70130-3408
Certificate of Appealability Denied

8/12/19 U.S.D.C. Southern Dist. of Tex.
4:15-CV-3411 Houston Div.
Habeas 2254 P.O. Box 61010
Houston, Tx. 77208
Dismissed with prejudice

6/12/15 T.C.C.A.
WR82,999-01 Capitol Station
Habeas 11.07 P.O. Box 12308
Austin, Tx. 78711
Denied without written order

5/5/14 T.C.C.A.
PD 1709-13
P.D.R. Refused

12/5/13 14th C.O.A. Houston, Tx
14-12-00767CR
Direct Appeal
Affirmed in part / Reversed in part

4/30/12 179th Judicial Dist., Houston, Tx
No. 1286119 Trial Guilty plea

Appendix A

STATE

14-12-00767 The 14th COA PDR contained
The Court of Appeals erred in
1) Holding it was not error that the PSI failed to include required components; that
2) The defendant waived his complaint of a predetermination of sentence by not objecting
Affirmed in part / Reversed in part
PDR Refused

WR 82,999-01 11.07 I A T C
1) A. Trial counsel failed to object to inadmissable and prejudicial victim impact statements
B. Trial counsel failed to preserve error by failing to object to court sentencing Applicant in absense of a complete, statutorily required PSI
C. Trial counsel failed to object to Judges pre-determination of Applicants Life sentence prior to punishment
D. Trial counsel failed to conduct an adequate investigation in to the facts of the case for guilt/innocense and/or punishment purposes

There is a reasonable probability that, had counsel not committed the above deficient act(s) and/or ommissions the outcome of trial and/or punishment proceedings would have been different

2) I A A C (Appeal)
E. Appellate counsel failed to file motion for new trial pursuant to T.R.A.P. Rule 21, raising the factual and legal arguments alleged in point of error(s) A. through D. of ground 1)

There is a reasonable probability that, had counsel not committed the above deficient act(s) and/or ommission(s) the outcome of the appellate proceeding would have been different

Denied Without Written Order

Appendix A

FEDERAL

4:15-cv-3411

A. I A T C

1) Trial counsel failed to object it victim impact statements made before sentencing and as entered into the record as evidence

2) Trial counsel failed to object to trial courts' pre-determination of sentence prior to completed PSI and punishment hearing.

3) Trial counsel failed to object to the trial court sentencing the petitioner in the absense of an inquiry as to compentency and drug/alcohol evaluation

4) Trial counsel failed to make a reasonable investigation into the case, and failed to object to inadmissable extraneous evidence.

B. I A A C (Appellate)

1) Appellate counsel failed to file motion for new trial

2) Appellate counsel failed to raise issues clearly stronger than those appealed which include:

(A) the trial court allowing impact statements before sentencing and allowing them to be entered into the record as evidence;

(B) trial counsel's clear ineffectiveness for failing to object to the improper statements before sentencing;

(C) Trial counsels ineffectiveness for failing to investigate and failing to object to inadmiss-able extreneous evidence

C. The Trial Court Abuse Discretion, prejudicing applicant in a clearly unfair trial environment

1) The trial court permitted victim impact statements before sentencing and entered into the record as evidence

2) The trial court predetermined petitioners sentence before a completed P.S.I and punishment hearing

Appendix A

FEDERAL (cont.)

4:15-cv-3411

3) Trial court allowed extraneous evidence clearly more prejudicial than probative

United States Court of Appeals for the Fifth Circuit

No. 19-20612

WILLIAM EDWARD ERICKSON,

Petitioner—Appellant,

versus

BOBBY LUMPKIN, *Director, Texas Department of Criminal Justice, Correctional Institutions Division*,

Respondent—Appellee.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:15-CV-3411

ORDER:

William Edward Erickson, Texas prisoner # 1805402, pleaded guilty to murder and was sentenced to life imprisonment. He now moves for a certificate of appealability (COA) to challenge the district court's denial of his 28 U.S.C. § 2254 petition on procedural grounds and on the merits.

To obtain a COA, Erickson must make a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Where the district court has denied relief on procedural grounds, he must show "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*, 529 U.S. at 484. Where the district court has rejected constitutional claims on their merits, a COA should issue only if Erickson "demonstrat[es] that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). Erickson has not made the requisite showing. *See id.*; *Slack*, 529 U.S. at 484.

Accordingly, Erickson's motion for a COA is DENIED.

/s/ Leslie H. Southwick
LESLIE H. SOUTHWICK
United States Circuit Judge

A True Copy
Certified order issued Dec 30, 2020

Tyle W. Cayce
Clerk, U.S. Court of Appeals, Fifth Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

WILLIAM EDWARD ERICKSON, TDCJ# 1805402,	§	
Petitioner,	§	
v.	§	CIVIL ACTION NO. H-15-3411
LORIE DAVIS, *Director, TDCJ-CID*	§	
Respondent.	§	

OPINION AND ORDER

State inmate William Edward Erickson (TDCJ #1805402) filed a petition for a writ of habeas corpus by a prisoner in state custody under 28 U.S.C. § 2254. Respondent filed a motion for summary judgment. Petitioner filed a response. For the reasons below, Respondent's motion for summary judgment is granted.

I. Background and Petition

On November 20, 2010, a Harris County grand jury returned an indictment against Petitioner in Case No. 1620292, charging him with one count of murder. Dkt. #8-13 at 82. After pleading guilty on August 22, 2012, the 179th District Court in Harris County, Texas, entered a judgment against Petitioner and sentenced him to a term of life imprisonment with the trial court's costs assessed to Petitioner. *Id.* at 86.

The judgment was affirmed on December 5, 2013, but the appellate court reversed the trial court's assessment of its costs to Petitioner. *See* Dkt. #7-17. The court of appeals summarized the facts of the offense, which were documented in a Pre-sentence Investigation ("PSI") as follows:

> According to the PSI, on November 20, 2010, Erickson and others went to a motel room where the complainant was administering tattoos. Several witnesses related that Erickson and the complainant argued over the price of the tattoo at which time Erickson shot the complainant between two and four times killing him. According to Erickson, the disagreement with the complainant stemmed from the price of Xanax pills, not the tattoo. At the time of this offense, Erickson was on deferred adjudication probation for evading arrest and attempted aggravated assault. The evading arrest charge arose from an attempted traffic stop in which Erickson fled because he had an outstanding arrest warrant for criminal mischief. Erickson admitted that on the night of the offense he had been drinking beer, taking pills, and using "crystal meth."
>
> The PSI lists Erickson's prior criminal record dating back to 1997. Erickson's record reflects convictions for driving while intoxicated, theft of a firearm, possession of marijuana, evading arrest with a motor vehicle, burglary of a motor vehicle, assault causing bodily injury, and criminal mischief.
>
> In a section entitled, "Mental health," the PSI reports that Erickson was evaluated while incarcerated in the Harris County Jail and was diagnosed with Attention Deficit Hyperactivity Disorder (ADHD), Bipolar Disorder, and Panic Disorder with Agoraphobia. Erickson reported that he had been previously prescribed Risperdal and Trileptal, but was currently not taking any medications.
>
> In a section entitled, "Alcohol/Drug Usage," the PSI reported that Erickson reported drinking alcohol and using marijuana since he was fifteen years old, but stopped using marijuana when he was twenty-eight years old. He began using cocaine at the age of sixteen

> and has never stopped using it. Erickson began using methamphetamines when he was twenty-four years old and admitted to using methamphetamines the night of the offense. Erickson began using LSD at the age of sixteen, but stopped when he was twenty years old. At the age of twenty-one, Erickson began using Ecstasy, but stopped when he was twenty-nine. Erickson stated he began using Xanax when he was twenty years old, but stopped in 2010, at the age of thirty. Erickson attended an inpatient treatment program in 1997 for drug addiction, but left due to "financial problems." Erickson reported attending twelve-step meetings while in the Harris County Jail.
>
> Under "Sentencing Options" the report stated:
>
> > Due to the nature of the charges currently pending against the defendant and the subsequent cases pending in Polk County, Texas, the defendant is not considered appropriate for supervision either in the community or within a community based program. Accordingly, this section has been omitted.
>
> At the PSI hearing, the complainant's parents and sister testified to the impact of the complainant's death on their lives. Stephen Wyatt testified that Erickson and a friend attempted to steal his truck outside of a convenience store in Polk County. When Wyatt tried to stop them, Erickson drove the truck into the convenience store hitting Wyatt and breaking his leg. Deputy Vance Berry of the Polk County Sheriff's Department testified that Erickson was arrested after the incident in Polk County. After hearing closing arguments the trial court sentenced Erickson to life in prison.

See Erickson v. State of Texas, Nos. 14-12-00767-CR, 2013 WL 6405476, at *1–2 (Tex. App.–Houston [14th Dist.] Dec. 5, 2013); Dkt. #7-17.

The State of Texas filed a petition for discretionary review, which was granted, and the Texas Court of Criminal Appeals reversed the intermediate appellate court's determination that trial court costs should not have been assessed

to Petitioner. Dkt. #8-2. On remand, the intermediate court of appeals affirmed the trial court's judgment in its entirety on May 29, 2014. Dkt. #7-16. Petitioner did not file a petition for discretionary review.

Petitioner filed a state application for habeas corpus relief alleging that both his trial counsel and appellate counsel provided ineffective assistance. *See* Dkt. #8-12 at 10-11. The Texas Court of Criminal Appeals denied that application without written order or a hearing on June 3, 2015. Dkt. #8-9.

On November 12, 2015, Petitioner filed the instant § 2254 petition, asserting three claims.[1] Petitioner alleges in claim one that his trial counsel was constitutionally ineffective for failing to: (a) object to victim impact statements that were made before sentencing and entered into the record as evidence; (b) object to the trial court's pre-determination of his sentence prior to the completion of his PSI and conclusion of his sentencing hearing; (c) object to the trial court sentencing the Petitioner without inquiring into his competency and Drug/Alcohol evaluation; and (d) otherwise perform to a constitutional standard. *See* Dkt. #1 at 6; Dkt. #35 at 8-9. Specifically, Petitioner further alleges that his counsel failed to: (d)(i) investigate the underlying facts of the murder, rendering his plea involuntary; (d)(ii) investigate competing witness accounts of the murder, which could have

[1] Petitioner appears to agree with Respondent's characterization of his claims and responds to Respondent's motion for summary judgment using Respondent's characterization and number system. *See* Dkt. #38 at 5, 7 (adopting the numbering system of Respondent when presenting his claims in his response to Respondent's motion for summary judgment and using Respondent's numbering system when discussing his claims). Therefore, for the sake of clarity, the Court will use discuss the claims as presented by Respondent.

been used to obtain a lesser sentence; and (d)(iii) object to the testimony of Detective Vance Berry and Mr. Steve Wyatt at sentencing, who described an unadjudicated offence committed in Polk County. *Id.*

Petitioner argues in claim two that his appellate counsel was ineffective because he failed to: (a) file a motion for a new trial; and (b) raise meritorious legal issues. *Id.* Petitioner alleges his appellate counsel should have raised the following issues: (b)(1) trial court error in allowing victim impact statements before the completion of the sentencing hearing and allowing these statements to be entered into the record as evidence; and (b)(2) trial counsel's ineffectiveness for failing to object to the victim impact statements, investigate his case, and object to inadmissible extraneous evidence. *Id.*

In claim three, Petitioner alleges that the trial court abused its discretion and prejudiced him in a "clearly unfair trial environment." *Id.* at 7. Specifically, Petitioner alleges that the trial court abused its discretion by: (a) permitting victim impact statements before completing his sentencing hearing and entering the statements into the record as evidence; (b) pre-determining Petitioner's sentence before the PSI was completed and the sentencing hearing concluded; and (c) allowing extraneous evidence that was "clearly more prejudicial and probative." *Id.*

Respondent filed a motion for summary judgment, contending that claims

1(c) and 1(d)(iii), claim 2, and claims 3(a) and 3(c) are unexhausted and procedurally barred, and that the remaining claims lack merit. Dkt. #35 at 10.

In his response to the motion for summary judgment, Petitioner abandons claim 2 and claims 3(a) and 3(c). Dkt. #38 at 7. Petitioner argues that the remaining claims are exhausted and otherwise have merit because the state habeas court's findings were objectively unreasonable. *See generally id.* at 10-20. Because Petitioner agrees with Respondent as to claim 2 and claims 3(a) and 3(c), the Court will deny these claims for relief as unexhausted and discuss only the disputed claims.

II. Standard of Review

To be entitled to summary judgment, the pleadings and summary judgment evidence must show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(a). The Court may grant summary judgment on any ground supported by the record, even if the ground is not raised by the movant. *United States v. Houston Pipeline Co.*, 37 F.3d 224, 227 (5th Cir. 1994). While Rule 56 of the Federal Rules regarding summary judgment applies generally "with equal force in the context of habeas corpus cases," *Clark v. Johnson,* 202 F.3d 760, 764 (5th Cir. 2000), it applies only to the extent that it does not conflict with the habeas rules. *Smith v. Cockrell,* 311 F.3d 661, 668 (5th Cir. 2002), *abrogated on other grounds by Tennard v. Dretke,*

542 U.S. 274 (2004).

The writ of habeas corpus provides an important, but limited, examination of an inmate's conviction and sentence. *See Harrington v. Richter,* 562 U.S. 86, 103 (2011) (noting that "state courts are the principal forum for asserting constitutional challenges to state convictions"). The Anti-terrorism and Effective Death Penalty Act (the "AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (1996), codified as amended at 28 U.S.C. § 2254(d), "imposes a highly deferential standard for evaluating state-court rulings and demands that state-court decisions be given the benefit of the doubt"; it also codifies the traditional principles of finality, comity, and federalism that underlie the limited scope of federal habeas review. *Renico v. Lett,* 559 U.S. 766, 773 (2010) (quotations omitted).

AEDPA "bars relitigation of any claim 'adjudicated on the merits' in state court, subject only to the exceptions in [28 U.S.C.] §§ 2254(d)(1) and (d)(2)." *Richter,* 562 U.S. at 98. "When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." *Id.* at 99. A federal court on habeas review, therefore, can only grant relief if "the state court's adjudication of the merits was 'contrary to, or involved an unreasonable application of, clearly established Federal law.'" *Berghuis v. Thompkins,* 560 U.S. 370, 378 (2010) (quoting 28

U.S.C. § 2254(d)(1)). The focus of this well-developed standard "is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable—a substantially higher threshold." *Schriro v. Landrigan,* 550 U.S. 465, 473 (2007). Where a claim has been adjudicated on the merits by the state courts, relief is available under § 2254(d) only in situations in which there is no possibility that fair-minded jurists could disagree that the state court's decision conflicts with Supreme Court precedent. *Richter*, 562 U.S. at 102.

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

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

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

Under 28 U.S.C. § 2254(e)(1), "a determination of a factual issue made by a State court shall be presumed to be correct" and the "applicant shall have the burden of rebutting" this presumption "by clear and convincing evidence." Unlike § 2254(d), no adjudication on the merits is needed for § 2254(e)(1) to apply. *Murphy v. Davis*, 901 F.3d 578, 565 (5th Cir. 2018). Section 2254(e)(1) applies to factual determinations "made by a State court," making no distinction between trial and appellate courts. *Id.*

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

III. Discussion

Respondent argues that claims 1(c) and (1)(d)(iii) are unexhausted and procedurally barred while the remaining claims lack merit.

A. Whether Petitioner's Claims are Exhausted or Procedurally Barred

Title 28 U.S.C. § 2254(b)(1)(A) requires that federal habeas petitioners fully exhaust their available state court remedies before proceeding in federal court. The exhaustion requirement reflects the policy of federal-state comity, which is designed to provide the state courts an initial opportunity to consider and correct alleged violations of a prisoner's federal rights. *See Anderson v. Johnson*, 338 F.3d 382, 386 (5th Cir. 2003). The exhaustion requirement is satisfied when the substance of a petitioner's federal habeas claim was fairly presented to the highest state court. *Mercadel v. Cain*, 179 F.3d 271, 275 (5th Cir. 1999). A claim may be fairly presented via direct appeal or state habeas proceedings. *Orman v. Cain*, 228 F.3d 616, 620 (5th Cir. 2000). Dismissal is not required when allegations presented for the first time in a federal habeas petition supplements, but does not fundamentally alter, a claim presented to the state court. *Anderson*, 338 F.3d at 386-87 (internal quotation marks and citation omitted).

A distinct but related limit on the scope of federal habeas review is the doctrine of procedural default. If a state court clearly and expressly bases its dismissal of a prisoner's claim on a state procedural rule, and that procedural rule

provides an independent and adequate ground for the dismissal, the prisoner has procedurally defaulted his federal habeas claim. *Coleman v. Thompson*, 501 U.S. 722, 731-32 (1991); *see Harris v. Reed*, 489 U.S. 255, 262-63 (1989); *Wainwright v. Sykes*, 433 U.S. 72, 81 (1977). A procedural default also occurs when a prisoner fails to exhaust available state remedies and "the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred." *Coleman*, 501 U.S. at 735 n.1.

1. Claim 1(c)

As understood by both Petitioner and Respondent, Petitioner alleges in claim 1(c) that trial counsel provided ineffective assistance by failing to object to the trial court sentencing him in the absence of a deeper inquiry into both his competency and drug/alcohol dependency because it would have established that his prior guilty plea was involuntary. *See* Dkt. #35 at 8-9.

Claim 1(c) is unexhausted and, accordingly, is denied. In his state application, Petitioner alleged that his trial counsel provided ineffective assistance by failing to object to the trial court sentencing him with an incomplete PSI. Dkt. #8-12 at 47. Specifically, Petitioner argued that the PSI lacked a drug and alcohol evaluation and a psychological evaluation. *Id.* Petitioner argued that these evaluations signaled the need for drug and mental health treatment rather than a

life of incarceration. *See id.* at 51. This claim, however, is distinct from Petitioner's allegation in claim 1(c). Petitioner now claims that his counsel provided ineffective assistance for failing to object to the trial court sentencing him without the aid of a psychological and drug/alcohol evaluation because it would have shown his guilty plea was involuntary. While counsel's alleged error is essentially the same, the instant claim requires a court to evaluate whether the lack of drug or mental health evaluation before his sentencing hearing invalidates his guilty plea. Claim 1(c) is different from his state habeas claim, and, therefore, he did not fairly present this federal claim to the Texas Court of Criminal Appeals in a procedurally correct manner. *See Nickleson v. Stephens*, 803 F.3d 748, 753 (5th Cir. 2015) ("[W]here 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.") (internal question marks and citations omitted). The Court finds that Petitioner did not exhaust this claim.[2]

Moreover, the claim is procedurally defaulted. The Texas abuse-of-writ doctrine prohibits a second habeas petition, absent a showing of cause, if the applicant urges grounds therein that could have been, but were not, raised in his first habeas petition. *See Ex parte Barber*, 879 S.W.2d 889, 891 n.1 (Tex. Crim. App. 1994) (en banc) (plurality opinion). That doctrine represents an adequate

[2] Regardless, even if the claim were exhausted, the PSI contained both a drug use and mental health history. *See* Dkt. #7-8 at 5-9. Thus, this information was available to the trial court for consideration at sentencing.

state procedural bar for purposes of federal habeas review. *Fearance v. Scott*, 56 F.3d 633, 642 (5th Cir. 1995). Since Petitioner has not provided any argument for cause as to his failure to raise this claim in his initial state habeas petition, the Texas abuse-of-writ doctrine would constitute an independent and adequate bar to a successive habeas petition. Therefore, the claim is procedurally defaulted.

2. Claim 1(d)(iii)

Petitioner alleges in claim 1(d)(iii) that his trial counsel provided ineffective assistance by not objecting to the testimony of Detective Berry and Mr. Wyatt at his sentencing hearing because they discussed an unadjudicated offense Petitioner committed in Polk County. Dkt. #35 at 9.

This claim is not specifically included in Petitioner's state application. *See generally* Dkt. #8-12 at 5-70. Petitioner did include a claim on state habeas review that his trial counsel provided ineffective assistance by not objecting to the trial court's acceptance of victim impact statements that contained inflammatory information. *See id.* at 34-38. However, that claim does not address the testimony of Detective Berry or Mr. Wyatt at Petitioner's sentencing hearing and appears to dispute only the victim impact statements discussed in the PSI. Moreover, Petitioner has not shown cause as to why he did not present the claim in his habeas petition. Therefore, the claim is unexhausted and procedurally defaulted. The claim is denied.

B. Whether Petitioner's Remaining Claims Lack Merit

The following remaining claims are presented for consideration. In claim 1, whether Petitioner's trial counsel provided ineffective assistance by failing to: (1) object to the victim impact statements; (2) object to the trial court's pre-determination of his sentence before the sentencing hearing; and (3) make a reasonable investigation into the underlying facts of the murder. Dkt. #35 at 8-9. Petitioner alleges that counsel's alleged failure to make a reasonable investigation renders his guilty plea involuntary and that Petitioner would have been sentenced more leniently. *Id.* at 9. In claim three, Petitioner alleges that the trial court erred by pre-determining his sentence before Petitioner's PSI and sentencing hearing was completed. *Id.* at 10.

1. Claim 1- Ineffective Assistance of Trial Counsel

A criminal defendant has a constitutional right to the effective assistance of counsel at trial and on a first appeal as of right. *Evitts v. Lucey*, 469 U.S. 387, 393-95 (1985); *Strickland v. Washington*, 466 U.S. 668, 688 (1984); *Anders v. California*, 386 U.S. 738, 744 (1967). An ineffective assistance of counsel claim is governed by the standard set forth in *Strickland v. Washington*, 466 U.S. at 688. *See also Styron v. Johnson*, 262 F.3d 438, 450 (5th Cir. 2001) (applying the *Strickland* standard to ineffective assistance claims against appellate counsel). To establish a claim of ineffective assistance of counsel, a petitioner must show that:

(1) counsel's performance fell below an objective standard of reasonableness; and (2) but for counsel's deficient performance, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 688.

A reviewing court holds a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance or sound trial strategy. *Id.* at 688-89. Judicial scrutiny of counsel's performance is highly deferential, and every effort is made to eliminate the distorting effects of hindsight. *Id.* at 689. Where a petitioner's ineffective assistance claims were reviewed on the merits under the *Strickland* standard, and denied by the state court, federal habeas relief will be granted only if the state court's decision is contrary to or is an unreasonable application of *Strickland*, or if the decision is based on an unreasonable determination of the facts considering the evidence presented. *Bell v. Cone*, 535 U.S. 685, 698-99 (2002); *Haynes v. Cain*, 298 F.3d 375, 379-82 (5th Cir. 2002).

a. Claim 1(a) Failure to Object to Victim-Impact Statements

Petitioner alleges that his trial counsel provided ineffective assistance by failing to object to the victim impact statements made at his sentencing hearing and admitted into evidence. *See* Dkt. #1 at 6. Specifically, Petitioner alleges that these statements may only be made after the sentencing court has announced the sentence and its terms, citing *Johnson v. State*, 286 S.W.3d 346 (Tex. Crim. App.

2009). *See* Dkt. #2 at 9.

In *Johnson*, the Texas Court of Criminal Appeals discussed the effect of Article 42.03 of the Texas Rules of Criminal Procedure. Article 42.03 allows a victim to make unsworn and uncross-examined impact testimony after the sentencing court announces the terms and conditions of the sentence. *See Johnson*, 286 S.W.3d at 349. The provision's purpose is to "protect the trial judge from any implicit or explicit accusations that he could be influenced by the victim-allocution statement." *Id.* at 351.

Respondent notes, however, that Article 37.07 of the Texas Code of Criminal Procedure also affects the state trial court's determination of a sentence. Article 37.07 provides the state trial court with discretion to take testimony presented by the parties that it deems relevant to sentencing. *See Gifford v. State*, 980 S.W.2d 791, 793 (Tex. App. – Houston [14th Dist.] Sept. 17, 1998). The testimony, however, must be sworn and be available for cross examination. *Id.* The testimony must also have "'some bearing on the defendant's 'personal responsibility and moral guilt.'" *Stavinoha v. State*, 808 S.W.2d 76, 79 (Tex. Crim. App. 1991). In reviewing a trial court's relevancy decision, so long as the trial court's ruling was within "the zone of reasonable disagreement," a reviewing court will not replace its judgment for that of the trial court. *See Ford v. State*, 919 S.W.2d 107, 115 (Tex. Crim. App. 1996).

The Texas Court of Criminal Appeals, through the trial court's findings of fact, found that the victim impact testimony was admissible and that, had Petitioner's trial counsel objected, the trial court would not have sustained the objection or would have committed error in overruling the objection. *See* Dkt. #8-13 at 48. Through adopting the findings of fact in this case, the Texas Court of Appeals necessarily found that the evidence was admissible. On review, a federal habeas court must defer to a state court's interpretation of its own law, particularly regarding evidentiary rulings. *See Garza v. Stephens*, 738 F.3d 669, 677 (5th Cir. 2013).

Petitioner also does not provide support for his contention that the testimony was inadmissible. The witnesses at issue were placed under oath and Petitioner's counsel had the opportunity to cross examine them. *See* Dkt. #7-5 at 33-49. Additionally, the state elicited the testimony to describe the victim's life and goals, rather than to afford them the opportunity to "vent" about their views about the offense, the defendant, and the effect of the offense. *See id.*; *Johnson*, 286 S.W.3d at 349 n.12 (indicating that Article 42.03 describes statements not intended to be evidence and allows victims or their family to air their concerns regarding the defendant and the crime); *Bray v. State*, 1996 WL 460029 *7 (Tex. App. – San Antonio [4th Dist.] Aug. 14, 1996) ("Nowhere in appellant's brief does he demonstrate, or even argue, that the 'victim impact' evidence was not relevant to

sentencing or that the trial court's ruling was an abuse of discretion. We decline to hold that the trial court abused its discretion by ruling that the evidence was relevant to the jury's assessment of punishment."). Finally, Petitioner has not shown that he was prejudiced by the testimony because, at his sentencing hearing, the trial court only discussed the testimony of Mr. Wyatt when it determined that Petitioner was a danger to society. *See* Dkt. #7-5 at 54-55. The claim is denied.

b. Claim 1(b)- Failure to Object to Pre-determined Sentence

Petitioner alleges that his counsel provided ineffective assistance by failing to object to the state trial court's alleged pre-determination of his sentence. Petitioner claims that a notation on his plea agreement paperwork shows that the state trial court determined that his sentence would be life in prison before his sentencing hearing. *See* Dkt. #2 at 17-18. Specifically, Petitioner alleges that after the State, the trial judge, and his attorney signed the plea paperwork, but before his sentencing hearing, the state trial judge made a notation on the plea agreement paperwork. *Id.* On a portion of the form set aside for the State's recommendation as to punishment, there is a handwritten notation of "life sentence," that is initialed by the trial court, Judge Randy Roll. Petitioner alleges that the notation was made on the same date he pleaded guilty because the document is date stamped elsewhere on the page. *Id.* Counsel's alleged failure to review the record and

object to the notation is the basis of Petitioner's ineffective assistance of counsel claim. *Id.*

The issue of whether Petitioner's sentence was improperly pre-determined by the trial court was raised and rejected on direct appeal. In concluding that the claim was without merit, the appellate court viewed all of the documentation and found no support for Petitioner's claim:

> [A]ppellant contends the trial court improperly predetermined appellant's life sentence. Appellant argues that a notation on the plea papers reflects the trial court's predetermination. On the second page of appellant's "Plea of Guilty" there is a paragraph, which states, "I intend to enter a plea of guilty and the prosecutor will recommend that my punishment should be set at _____." Handwritten in the blank is the notation, "Without Agreed Recommendation — PSI." Also handwritten in the blank is the notation, "Life Sentence RR." Appellant contends that the trial court made the notation concerning the life sentence at the time he signed the plea papers, thus predetermining appellant's sentence before reviewing the PSI or hearing evidence.
>
> . . . .
>
> Moreover, there is no evidence in the record indicating when this notation was made or for what purpose. The court's docket sheet reflects that on April 30, 2012:
>
> > Defendant ERICKSON, WILLIAM EDWARD appeared in person with Counsel GONZALEZ, RICARDO N. AARON BURDETTE appeared for the State.
> > Judge Presiding: ROLL, RANDOLPH EARL
> > Defendant waived indictment; Felony Information filed.
> > Defendant waived arraignment and entered a plea of GUILTY.
> > Defendant, appearing to the Court to be sane, is admonished by the Court of the consequences of said plea.

> Penalty recommendation of the State is: WITHOUT AGREED RECOMMENDATION—PSI HEARING.
>
> The docket sheet further reflects, on August 22, 2012:
>
> August 22, 2012 (Wed)
> Defendant: William Edward Erickson
> With counsel: Ricardo Gonzalez
> For State: Joseph Allard
> Court reporter, Myrna Hargis
> Judge Presiding: Randy Roll
> At 11:30 am PSI hearing came to be heard. All parties present.
> Witnesses were sworn. Both sides presented its evidence.
> At 12:30 pm Court sentenced defendant to LIFE in prison.
> Notice of Appeal was filed at this time.
> Appeal bond set at No Bond
>
> The record reflects that the court accepted appellant's guilty plea without an agreed recommendation on April 30, 2012. Almost four months later, on August 22, 2012, after holding a PSI hearing, the court sentenced appellant to life in prison. The record reflects that the trial judge's initials are "R.R." and at some time the notation, "Life Sentence R.R." was written on appellant's plea papers. The record does not reflect, as appellant suggests, that the trial court made this notation "when he signed off on the plea papers — after it had left the hands of the defense." We will not accept as fact assertions made in appellant's brief that are not supported by the record.

Erickson, 2013 WL 6405476 at *4-5; Dkt. #7-17 at 6-9. While the appellate court ultimately dismissed the claim because his trial counsel did not object to the notation, the appellate court made a factual finding that the record did not show the state trial court made the notation on the same date Petitioner pleaded guilty. *Id.*

Petitioner fails to present evidence overcoming the presumption of

correctness regarding the factual issue determined by the state habeas and appellate courts. For example, Petitioner offers no evidence apart from the notation itself that the state trial judge made the notation at the time he pleaded guilty. Moreover, Petitioner does not show that his counsel would have been aware of the notation, even if it had been made that day. According to Petitioner, the plea agreement paperwork was in the trial court's possession after it was signed. Since Petitioner's counsel would have had no reason to review the signature page of the plea agreement paperwork to prepare for Petitioner's sentencing hearing, Petitioner has not established that counsel: (1) had an opportunity to object; or (2) that he was ineffective in failing to raise the issue. Because Petitioner does not point to any evidence showing that the trial court pre-determined his sentence before the PSI process was completed, he does not show that his counsel had, but failed to make, a valid objection. In sum, Petitioner fails to demonstrate that his counsel's performance was deficient. Therefore, Petitioner's claim for relief is denied.

c. Claims 1(d)(i) and 1(d)(ii)

Finally, Petitioner alleges that his counsel provided ineffective assistance by failing to properly investigate the facts of his crime and competing accounts by witnesses to the offense. Specifically, Petitioner alleges that his counsel failed to investigate the facts or the law in Petitioner's case and that "[i]t is clear counsel failed to examine the facts involving his client in the incident that occurred at the

Normandy Hotel, but relied only on notes from the prosecutor and police reports." Dkt. #2 at 22-23. Petitioner alleges that six other eye-witnesses' accounts of the crime were significantly different than Petitioner's version of events and that his cousin's story matches his statement. *Id.* Petitioner alleges that counsel's failure to investigate caused him to be sentenced to life in prison. *Id.*

To the extent that Petitioner may be alleging that his guilty plea is invalid because counsel's failed to investigate the case, Petitioner's guilty plea waives all non-jurisdictional claims that are not directly related to the voluntary nature of the plea. *See United States v. Glinsey*, 209 F.3d 386, 392 (5th Cir. 2000). Petitioner does not appear to allege he would not have pleaded guilty but for counsel's ineffective investigation. Nor does he claim that, but for his counsel's errors he would have changed his plea and insisted on a trial. *See Lee v. United States*, 137 S. Ct. 1958, 1965 (2017) ("[W]hen a defendant claims that his counsel's deficient performance deprived him of a trial by causing him to accept a plea, the defendant can show prejudice by demonstrating a 'reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'") Instead, Petitioner appears to believe that further investigation would provide mitigating evidence at sentencing. Petitioner also does not offer evidence that the guilty plea was involuntary and that he did not understand the sentence he could receive or the evidence against him. Finally, Petitioner's own

sworn written statements regarding his guilt in his plea agreement would contradict allegations to the contrary. *See* Dkt. #8-13 at 76.

"An attorney need not pursue an investigation that would be fruitless, much less one that might be harmful to the defense." *Richter*, 562 U.S. at 108. Trial counsel is "entitled to formulate a strategy that was reasonable at the time and to balance limited resources in accord with effective trial tactics and strategies." *Id.* Moreover, "a defendant who alleges a failure to investigate on the part of his counsel must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the trial." *Druery v. Thaler*, 647 F.3d 535, 541 (5th Cir. 2011). Upon a reasonable investigation, defense counsel also has an obligation to make reasonable strategic decisions regarding which witnesses and evidence he will present. *Strickland*, 466 U.S. at 690-91. "[T]he failure to present a particular line of argument or evidence is presumed to have been the result of strategic choice." *Taylor v. Maggio*, 727 F.2d 341, 347 (5th Cir. 1984). "[A] tactical decision not to pursue and present potential mitigating evidence on the grounds that it is double-edged in nature is objectively reasonable, and therefore does not amount to deficient performance." *Rector v. Johnson*, 120 F.3d 551, 564 (5th Cir. 1997).

The state habeas court determined that Petitioner's counsel conducted a thorough investigation of the case and that counsel also explained the options

available to petitioner before pleading guilty and the consequences of each option. *See* Dkt. #8-13 at 47. The state habeas court also found that Petitioner pleaded guilty freely and voluntarily with a full understanding of the evidence the State intended to use against him. *Id.* Finally, in concluding that Petitioner's counsel did not perform ineffectively by failing to pursue further investigation, the court found that petitioner did not show what further investigation would have shown or that additional defenses or witnesses were available. *Id.* at 48, 51.

The record does not support a claim that counsel's alleged ineffectiveness affected the voluntariness of Petitioner's plea agreement or that the record lacked information from the witnesses because the PSI contains statements from the witnesses Petitioner believes his counsel should have interviewed. *See* Dkt. #7-6 at 16-18, Dkt. #7-7 at 1-4. Petitioner has also not shown that his counsel failed to investigate the facts of his case to prepare for his sentencing hearing or that any failure to investigate prejudiced Petitioner. Petitioner does not provide additional statements from these witnesses. Nor does Petitioner state how any potential statement would differ from the information contained within the PSI. Likewise, Petitioner did not provide a statement from his cousin, who Petitioner says confirmed his story, that differs from the information contained in the PSI. While Petitioner does produce a statement from his mother saying that she would have made statements at his sentencing hearing regarding his drug abuse and mental

health had counsel asked, Petitioner's drug abuse and mental health history was discussed within the PSI. *See* Dkt. #7-8 at 5-9. Finally, the state trial court explicitly mentioned Petitioner's mother's statement at his sentencing hearing, which indicates that she could have made these statements. *See* Dkt. #7-5 at 54. For these reasons, Petitioner does not show that further investigation would have uncovered more facts aiding him at sentencing.

Regardless, Petitioner's version of events – that the murder was committed over the price of recreational drugs – was discussed at sentencing and within the PSI. Moreover, whether the victim was murdered because of the price of a tattoo or drugs is immaterial. Instead, the record shows that Petitioner's actions before and after the murder – nearly killing Mr. Wyatt with his own automobile while evading arrest – was the primary determinant of his sentence. *See generally* Dkt. #7-5 at 54-55. For this reason, even if the Court were to assume his counsel should have further investigated the other witnesses' statements prior to sentencing, Petitioner does not show that his counsel's actions prejudiced him.

2. Claim 3(b)- Error by Trial Court

Like his claims of ineffective assistance of counsel, Petitioner does not show the state trial court determined Petitioner's sentence before his sentencing hearing. As discussed above, Petitioner points to a notation on his plea agreement paperwork initialed by "RR" that fills in the blank with "life sentence." However,

Petitioner does not provide any evidence that the state trial judge made this notation when he signed the plea agreement paperwork. In fact, as stated by the Fourteenth Court of Appeals, the record does not support his conclusory claim that the notation was made on that date. Based on the record available to the Court and because Petitioner has not provided evidence that overcomes the strong presumption of correctness for the factual determination made by the intermediate court of appeals, the Court denies relief on claim three.

IV. Certificate of Appealability

Rule 11 of the Rules Governing Section 2254 Cases requires a district court to issue or deny a certificate of appealability when entering a final order that is adverse to the petitioner. A certificate of appealability will not issue unless the petitioner makes "a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), which requires a petitioner to demonstrate "that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Tennard v. Dretke*, 542 U.S. 274, 282 (2004) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). The petitioner must show not only that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right," but also that they "would find it debatable whether the district court was correct in its [] ruling." *Slack*, 529 U.S. at 484. Because jurists of reason would not debate whether the ruling in this case was

correct, a certificate of appealability will not issue.

V. Conclusion

Respondent's motion for summary judgment (Dkt. #35) is **GRANTED**. As a result, Petitioner's § 2254 petition (Dkt. #1) is **DENIED**. The case is **DISMISSED** with prejudice. A certificate of appealability shall not issue.

SIGNED at Houston, Texas, on August 12, 2019.

DAVID HITTNER
UNITED STATES DISTRICT JUDGE

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