No. 21-5224 ORIGINAL

SUPREME COURT OF the UNITED STATES

JULIAN TERENCE MARTIN, JR., Petitioner-Appellant,

Versus

BOBBY LUMPKIN, Director, Texas Department of Criminal Justice, Correctional Institutions Divison, Respondent-Appelle.

On Petition for Writ of Certiorari from the United States Court of Appeals for the Fifth Circuit.

PETITION FOR WRIT OF CERTIORARI

Julian Terence Martin Jr., TDCJ # 2026170,
3899 State Hwy 98 New Boston, Tx. 75570.

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QUESTIONS PRESENTED

1. When a state court grants a motion for a competency haering, but convicts a defendant without holding one, is a defendant's due process of law denied under the 14th Amendment?

2. Is a state appellate court's unexplained decision to allow appellant's counsel to withdraw, pursuant to Anders' Brief a denial of due process, under the 14th Amendment, when a substantive due process claim is presented in the record?

3. Does the procedural default rule operate to preclude a petitioner federal review, when a question of competency was apparent from the record?

PARTIES

Petitioner, pro se:

Julian Terence Martin, Jr., #2026170, 3899 State Hwy 98, New Boston, Tx., 75570.

For Respondent Bobby Lumpkin:

Texas Attorney General Casey Solomon, assitance counsel of record P.O. Box 12548, Austin, Tx. 78711-2548.

PRIOR OPINIONS AND ORDERS

Oct. 30, 2014 Order: Granted motion for competency evaulation, (Clerk's Record pg. 11),Dallas County, Tx., F13-59221-X;

Sept. 23, 2015 Conviction, Murder, Dallas County, Tx., F13-59221-X;

July, 29, 2016 Direct Appeal, Affirmed, Martin v. State 5th Court - of Appeal, No.05-15-01306-CR (Tex.App.Dallas 2016);

June 7, 2017 Petition for 11.07 writ of habeas corpus Denied, Texas Court of Criminal Appeals, WR-85,758-02;

July 5, 2017 Motion for Rehearing Dismissed, Texas Court of Criminal Appeals, No. W13-59221-X(B);

May 7, 2019 The Magistrate Issued Opinion: Findings, Conclusions, and Recommendation, Recommending Petition be Denied with Prejudice, (USDC-Dall. Div. No. 3:17-CV-2226);

July 30, 2019 Petition for 2254 writ of habeas corpus Denied, USDC Dall. Div. 3:17-CV-2226.

Sept. 6, 2019 Order: Granted, to proceed on appeal in forma pauperis, (USDC No. 3:17-CV-2226);

Sept. 24, 2020 Order: Certificate of Appealability, Granted, in part, United States Court of Appeals, Fifth Circuit No. 19-10987;

March 16, 2021 United States Court of Appeals, Fifth Circuit, Affirmed, No. 19-10987.

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BASIS OF JURISDICTION

Seeking U.S. Supreme Court review of the denial of permission of claim to be heard on federal review, in a 28 U.S.C. § 2254 Writ of Habeas Corpus for relief under 28 under 28 U.S.C. § 2254(b)(1)(A); denial was by the United States Court of Appeals for the Fifth Circuit on March 16, 2021.

Petition for Rehearing was not timely filied within (14) days, which on April 7, 2021, United States Court of Appeals for the Fifth Circuit, Affirmed, which renders it final.

Jurisdiction is conferred on this Court by U.S. Sup. Ct. Rules 10(c) and 13(1). The U.S. Court of Appeals for the Fifth Circuit decision was final adjudication, and the denial conflicts with the Due Process Clause of the U.S. 14th Amendment as read in Patev. Robinson, 383 U.S. 375 (1966).

CONSTITUTIONAL PROVISIONS AND STATUTES

United States Constitution, Amendment XIV.

28 U.S.C. § 2254 (b)(1)(A)

STATEMENT OF THE CASE

Martin was granted a motion for competency evaulation on October 30, 2014 Trial court failed to hold a competency hearing, Martin was convicted of murder on Septemller 23, 2015. On direct appeal, Martin's appellate counsel filed a motion to withdraw pursuant to Anders v. California, 386 U.S. 738 (1967). The 5th Court of Appeals granted the motion and affirmed Martin's conviction. Martin filed his state writ application and was denied June 7, 2017, and motion for rehearing was dismissed on July 5, 2017.

Martin filed his federal petition for writ of habeas corpus and was denied on July 30, 2019, The district court found that Martin did not raise his Pate Claim in state court. Martin was granted a Certificate of Appealability on this issue. The United States Court of Appeals for the Fifth Circuit, Affirmed on March 16, 2021 stating Martin did not fairly present this claim to the highest state court being procedurally barred from federal review.

REASONS for GRANTING the PETITION of CERTIORARI

The Petitioner herein after [Martin], states the nature of his claim is not that he was denied the due process of a statutory procedure, but that he went to trial while mentally incompetent, he does not contend that the State deprived him of a procedural right, but that it committed a fundamentally unfair act, depriving him of his substantive right to due process. U.S. Courts of Appeals have ruled substantive due process claims are not procedurally barred. Martin contends that he presented the claim from the record. Trial counsel submitted a post conviction affidavit, stating his actions where "trial strategy" and he and [M]artin had agreed to after in depth consultations. Martin rebutted this presumption by filing objections and bringing to the Texas Court of Criminal Appeals herein after TCCA attention, a pretrial motion that had been filied by trial counsel. Martin argues that trial counsel's post conviction affidavit, and trial counsel's pretrial motion are so contrary to each other, well enough for the trial court and TCCA to have made a determination to have a 'evidentiary hearing', because Martin's comptency was questionable from the record, bringing his claim before the habeas trial court and TCCA. Martin was also injured in direct appeal, the Appellate Court allowed appellant's counsel to withdraw, to have the effect of relieving the court of its independent review of the record, making an absence of the state corrective process or existence of circumstances rendering such process ineffective to protect the rights of the prisoner. The conflation of cause Martin's incompetence and prejudice in the substantive due process claim presented in the record of this case, are compelling reasons for the United States Supreme Court to exercise its discretionary jurisdiction to decide the questions involved.

ARGUMENT

Petitioner-Appellant, herein after Martin was denied due process of law, when the State Court failed to, Sue Sponte, order a competency hearing. Martin's trial counsel informed the Court via, a motion for appointment of expert witness that it was his belief that Martin was not competent to stand trial and that he lacked a rational as well as actual understanding of the trial proceeding and inability to assist in his defence. (Clerk's Record herein after CR. at pgs. 61-64). The Court granted the motion for Martin at CR. pg. 11 to be evaluted for competency, but failed to follow up on the issue, and instead allowed Martin to be tried without resolving the question of his incompetency to stand trial. See: Pate v. Robinson, 383 US. 375 (1966). In State habeas proceedings, in response to Martin's State writ, the State habeas court issued an order designating grounds two through four as in need of resolution:

> 2. Trial Counsel was ineffective for failing to request either a curative instruction or a mistrial based on the prosecutor's improper closing arguments;
>
> 3. Trial Counsel was ineffective for failing to request a sudden passion instruction;
>
> 4. Trial Counsel was ineffective for failing to object to the State's constructive amendment of the indictment.

Moreover, in the State's order designating issues, the habeas court appointed an "Independent Counsel" to investigate and resolve the claims. Martin requested time to respond to any findings and conclusions made by independent counsel. The habeas court ignored Martin's motions and requests. The independent counsel subsequently made findings and conclusions recommending the writ be denied based on facts

stated in a post-conviction affidavit filed by trial counsel. In trial counsel's affidavit he said his actions were a "trial strategy", he and Martin had agreed to after in depth consultations. Martin filed objections and directed the Texas Criminal Court of Appeals herein after TCCA attention to a motion filed back at trial, by trial - counsel which stated, in relevant part:

> "I have had several opportunties to meet with [Martin] and discuss the facts of his case, possible defences, case strategy and other matters. [Martin] has exhibited confused and fragmented - thought processes. He also exhibits a blunted affect, emotional withdrawal, confusion and limited ability to concentrate." CR.- at pg. 61.

Martin pointed out trial counsel's request for a competency examination and trial. Martin also pointed out to the TCCA where trial counsel stated in his motion how, in his estimation, Martin had no rational understanding of the trial proceedings or ability to assist in his own defense. In accord with Penson v. Ohio, 488 US. 75, 83-84 - (1988), ("A determination that arguable issues were presented by the record creates a constitutional imperative"). Martin was only required to provide the TCCA with a "fair opportunity to apply controlling legal principles to the facts bearing upon [his] constitutional - claim." Rocha v. Thaler, 626 F.3d 815, 820 (5th Cir. 2010). Moreover, the TCCA's own precedent allowed Martin to raise a supplemental claim filed before its final ruling. See: Ex Parte Saenz, 491 SW.3d 819, 823 (Tex. Crim.App.2016). Martin also relied upon the Supreme Court's decision in Dye v. Hofbauer, 546 US. 1,3 (2005), which decided that the "[f]ailure of a State Appellate Court to mention a federal claim - does not mean the claim was not presented to it". The TCCA simply declined to address the issue, the TCCA issued an order denying relief

without a hearing or written opinion based on the findings and conclusions filed by the independent counsel. The Court never addressed the issue of there being nothing in the record of trial indicating that Martin was examined for competency prior to trial. Nor was there evidence that a competency hearing had been held. Martin also argued that the claim should not be procedurally barred based on cause and prejudice, by virtue of the fact that the State direct appeal court allowed appellate counsel to withdraw pursuant to Anders v. California, 386 US. 738 (1967). The United States Court of Appeals for the Fifth Circuit misses the enormous evidentiary value of the State Appellate Court's 'Independent Review of the Record as required under Anders, and brushes it aside. While there is no constitutional right, to require states to provide a system of appellate review, at all, but when a state elects to provide an avenue for appellate review, the process must comport with the protections of the Fourteenth Amendment, Id. Evitts' Court used much of the same reasoning guides that criminal defendant's have a right to effective assistance of counsel in direct appeals at Evitts, 105 S. Ct. 830 (1985) ("When a state opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with Due Process Clause"). See; Pennsylvannia v. Finley, 481 US. 551 (1987). The nature of Martin's claim is not that he was denied the due process of a statutory procedure, but that he went to trail while mentally incompetent, he does not contend that the State deprived him of a procedural right, but that it committed a fundamentally unfair act, depriving him of his substantive right to due process. The remedy sought by Martin is an elaboration of the right recognized in McCoy v. Court of Appeals of Wisconsin, 486 US. 429, 443 (1988),

Wherein if an attorney advises the Court that an apppeal is frivolous then no constitutional deprivation occurs when the attorney explains the basis for that conclusion. ("Once the Court is satisfied both that counsel has been diligent in examining the record for mertorious issues and that the appeal is frivolous, federal concerns are satified and the case may be disposed of in accordance with state law"). Wherein the record is not reviewed by an attorney only, but also of the Appellate Court, before allowing appellate counsel to withdraw; Review of record shows the direct appeal court did not give full consideration to the substantial evidence set forth in the record. A motion had been granted on a competency hearing, and that the record was void of such a hearing, the defendant went to trial and was convicted while being incompetent to stand trial. ("A determination that arguable issues were presented by the record creates a constitutional imperative"). In Penson v. Ohio, 488 US. 75, 83-84 (1988). This is a competency to stand trial claim, an aspect of substantive due process. The Due Process Clause of the Fourteenth Amendment prohibits the Appellate Court from making use of Anders v. California, 386 US. 738 (1967), to have the effect of relieving the appellate court of the burden of its independent review of the record making an absence of the state corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner. Because of the conflation of cause (Martin's incompetence) and prejudice in the substantive due process claim presented in the record of this case, Martin has shown cause and prejudice the United States Court of Appeals, for the Fifth Circuit decision conflicts with decisions of the United States Supreme Court, Pate v. Robinson, 383 US. 375 (1966), Anderr v. California, 386 US. 738 (1967).

and the Court's decision conflicts with the authoritative decisions of its own precedent and other United States Courts of Appeals that have addressed the issue before the Supreme Court: Zapata v. Estelle, 588 F.2d. 1017. 1021 (5th Cir. 1979), Vogt v. United States, F.3d. 587, 590-591 (8th Cir. 1996). Sena v. New Mexico, 109 F.3d. 652, 654-655 (10th Cir. 1997), and James v. Singletary, 957 F.2d. 1562 (11th Cir. 1992).

CONCLUSION

Executed on June 4, 2021

Respectfully submitted,

Julian T. Martin, Jr.

U.S.C. § 2254(b). To exhaust under § 2254, a petitioner must fairly present the factual and legal basis of any claim to the highest available state court for review prior to raising it in federal court. *See Deters v. Collins*, 985 F.2d 789, 795 (5th Cir. 1993); *Richardson v. Procunier*, 762 F.2d 429, 432 (5th Cir.1985); *Carter v. Estelle*, 677 F.2d 427, 443 (5th Cir.1982). In Texas, a prisoner must present his claim to the Texas Court of Criminal Appeals in a petition for discretionary review or an application for writ of habeas corpus. *See Bautista v. McCotter*, 793 F.2d 109, 110 (5th Cir. 1986); *Richardson*, 762 F.2d at 432. A federal district court may raise the lack of exhaustion *sua sponte*. *Shute v. State*, 117 F.3d 233, 237 (5th Cir. 1997).

Petitioner did not file a petition for discretionary review, and he did not raise this claim in his state habeas application. (*See* doc. 13-28 at 10-18.) The competency claim is therefore unexhausted.

B. Procedural Bar

Notwithstanding the lack of exhaustion, the claim is also procedurally barred from federal habeas review. *See Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991). The normal rule that a state court must explicitly apply a procedural bar to preclude federal review does not apply to those cases where a petitioner has failed to exhaust his state court remedies, and the state court to which he would be required to present his unexhausted claims would now find those claims to be procedurally barred. *Id.* In those cases, the federal procedural default doctrine precludes federal habeas corpus review. *Id.*; *see also Nobles v. Johnson*, 127 F.3d 409, 423 (5th Cir. 1997) (finding unexhausted claim that would be barred by the Texas abuse-of-the-writ doctrine if raised in a successive state habeas petition, to be procedurally barred).

Here, if Petitioner brought his unexhausted claim in a subsequent state habeas corpus

application, the Court of Criminal Appeals would consider the claim to be procedurally defaulted as a successive state habeas application under Article 11.07 § 4 of the Texas Code of Criminal Procedure, so his competency claim is also procedurally barred from federal habeas review. *See Nobles v. Johnson*, 127 F.3d at 423.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

The Sixth Amendment to the United States Constitution provides in relevant part that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. Const. art. VI. It guarantees a criminal defendant the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668 (1984). To successfully state a claim of ineffective assistance of counsel, the prisoner must demonstrate that counsel's performance was deficient and that the deficient performance prejudiced his or her defense. *Id.* at 687. A failure to establish either prong of the *Strickland* test requires a finding that counsel's performance was constitutionally effective. *Id.* at 696. The Court may address the prongs in any order. *Smith v. Robbins*, 528 U.S. 259, 286 n.14 (2000).

In determining whether counsel's performance is deficient, courts "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable assistance." *Strickland*, 466 U.S. at 689. "The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." *Id.* at 691. To establish prejudice, a Petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694; *Williams v. Taylor*, 529 U.S. 362, 393 n.17 (2000) (inquiry focuses on whether counsel's deficient

performance rendered the result of the trial unreliable or the proceeding fundamentally unfair). Reviewing courts must consider the totality of the evidence before the finder of fact in assessing whether the result would likely have been different absent counsel's alleged errors. *Strickland*, 466 U.S. at 695-96.

To show prejudice in the sentencing context, the Petitioner must demonstrate that the alleged deficiency of counsel created a reasonable probability that his or her sentence would have been less harsh. *See Glover v. United States*, 531 U.S. 198, 200 (2001) (holding "that if an increased prison term did flow from an error [of counsel] the petitioner has established *Strickland* prejudice"). One cannot satisfy the second prong of *Strickland* with mere speculation and conjecture. *Bradford v. Whitley*, 953 F.2d 1008, 1012 (5th Cir. 1992). Conclusory allegations are insufficient to obtain relief under § 2255. *United States v. Woods*, 870 F.2d 285, 288 n.3 (5th Cir. 1989); *United States v. Daniels*, 12 F. Supp. 2d 568, 575-76 (N.D. Tex. 1998); *see also Miller v. Johnson*, 200 F.3d 274, 282 (5th Cir. 2000) (holding that "conclusory allegations of ineffective assistance of counsel do not raise a constitutional issue in a federal habeas proceeding").

A. Competency

In his second ground, Petitioner contends that counsel was ineffective for allowing him to stand trial despite evidence of his incompetency and for failing to ensure that his competency was adequately investigated or that a competency hearing was held.

1. Exhaustion and Procedural Bar

Respondent argues that this claim is unexhausted and procedurally barred.

Petitioner did not raise this claim in his state habeas application. (*See* doc. 13-28 at 10-18.) It is therefore unexhausted. *See Deters v. Collins*, 985 F.2d at 795. If Petitioner brought his

unexhausted claim in a subsequent state habeas corpus application, the Court of Criminal Appeals would consider the claim to be procedurally defaulted as a successive state habeas application under Article 11.07 § 4 of the Texas Code of Criminal Procedure, so this claim is also procedurally barred from federal habeas review. *See Nobles*, 127 F.3d at 423.

Nevertheless, the Texas bar on successive or subsequent state habeas applications "will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." *Trevino v. Thaler*, 569 U.S. 413, 429 (2013) (citing *Martinez v. Ryan*, 566 U.S. 1 (2012)). A substantial claim is one that has some merit. *Ibarra v. Davis*, 738 F. App'x 814, 817 (5th Cir. 2018). An insubstantial claim is one that does not have any merit or is "wholly without factual support." *Id.*

2. *Merits*

Due process requires that a criminal defendant be competent to stand trial before he is prosecuted. *Cooper v. Oklahoma*, 517 U.S. 348, 354 (1996). The appropriate test is whether a defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402, 402 (1960); *see also* Tex. Code Crim. Proc. art. 46B.003. To prove prejudice for counsel's failure to raise an issue that the petitioner was incompetent, he must demonstrate that there is a reasonable probability that but for counsel's failure to raise the issue, he would have been found incompetent to stand trial. *See Felde v. Butler*, 817 F.2d 281, 282, 283 (5th Cir. 1987).

Counsel's motion for the appointment of an expert to evaluate whether Petitioner was

competent suggested that Petitioner may not have been competent to stand trial because he "exhibited confused and fragmented thought processes[, ... a blunted affect, emotional withdrawal, confusion, and a limited ability to concentrate[, and he] does not appear [to] exhibit an intellectual capacity consistent with his physical age." (doc. 13-13 at 61.) It did not assert that Petitioner lacked the ability to consult with counsel with a reasonable degree of rational understanding, or that he lacked a rational and factual understanding of the proceedings against him. The state court granted the motion, but the record does not indicate whether the evaluation occurred or any findings by the expert. The record does show that during trial, counsel and the court explained to Petitioner his right to testify, and he acknowledged that he discussed the matter with counsel and ultimately decided that he was not going to testify. He also understood that he had been found guilty. The record shows that Petitioner understood the proceedings against him and that he was able to have discussions with counsel about the case; it does not indicate that he was incompetent. Petitioner has not shown that he was or would have been found to be incompetent. Because this unexhausted claim of ineffective assistance of counsel does not have merit, it is not a substantial claim that excuses the procedural bar. *See Ibarra*, 738 F. App'x at 817.

B. Jury Instruction

In his fourth ground, Petitioner contends that counsel failed to request a jury instruction on sudden passion in the punishment phase.

Under Texas law, if a defendant is convicted of murder, he may raise sudden passion as an issue at punishment. If it is proven by a preponderance of the evidence that he caused the death while under the immediate influence of sudden passion, the murder conviction will be lowered from a first-degree felony to a second-degree felony. *See* Tex. Penal Code § 19.02(d). "Sudden passion"

means "passion directly caused by and arising out of provocation by the individual killed ... which passion arises at the time of the offense and is not solely the result of former provocation." Tex. Penal Code § 19.02(a)(2). "Adequate cause" means "cause that would commonly produce a degree of anger, rage, resentment, or terror in a person of ordinary temper, sufficient to render the mind incapable of cool reflection." Tex. Penal Code § 19.02(a)(1). An instruction on sudden passion is warranted if it is supported by "some evidence," even if that evidence is "weak, impeached, contradicted, or unbelievable." *Beltran v. State*, 472 S.W.3d 283, 290 (Tex. Crim. App. 2015).

Counsel submitted an affidavit in state habeas. He stated:

> 13. [The victim] was sitting with some friends on the porch of the [bar] observing the fight and left the porch to try to break up the fight. There was a particularly disturbing cell phone video of the ensuing encounter between [the victim] and [Petitioner] in which [Petitioner] appeared very much the aggressor. This combined with witness statements that confirmed [the victim] was indeed merely trying to stop the fight and that he indicated he did not intend or want to fight [Petitioner]. We had discussed this matter with [Petitioner] prior to trial, however he indicated that he did not wish to view the video.
>
> 14. I discussed possible defense strategies with all of the other attorneys involved and we all agreed that the statements and the tape, especially the one referenced above, would make it impractical to assert certain defenses and that attempting to do so after [the] jury had viewed the videos would only serve to cost us credibility and perhaps sympathy as well during the punishment phase.
>
> 15. We specifically discussed every defense; mitigation issue and potential lesser included offenses. Both before trial and before the charge conference we discussed the possibility of a sudden passion instruction—I am fairly sure that we discussed the matter with [Petitioner] specifically. [Petitioner] always maintains that he was acting out of fear.
>
> . . .
>
> 17. Based on discussions among ourselves, facts related to us by [Petitioner], the tapes - and the one tape in particular - and the witness statements we did not believe the facts would support a finding of sudden passion nor that this should be our focus. The evidence adduced at trial in no way changed this and we felt that it simply did not indicate that [the victim] was the aggressor, that he initially provoked [Petitioner] or an absence of former provocation.

> 18. I believe we discussed the matter and believed that it was doubtful the evidence would even support a charge on sudden passion. We had all watched the one particular tape numerous times before trial and agreed that [Petitioner] looked aggressive and even frightening (we had extensive discussions on the mater). On the other hand, the State was presenting [the victim] as a good Samaritan who was merely trying to break up a fight before anyone was seriously injured.
>
> 19. Aside from the fact that the evidence did not support an argument that [the victim] was the initial aggressor, we were concerned about the jury perceiving our position as "Mr. Good Samaritan butted his nose in someone else's business and therefore got what he deserved, or at least can't complain." We elected to take another approach that we felt was more sustainable based on the evidence presented and what we perceived to be the juries' reactions to that evidence.
>
> 20. [Petitioner's] Petition seems to confuse several things. First he confuses the evidence and charges at the Guilt-Innocence and Punishment phases. Second, he apparently, mistakenly fear from the earlier fights with sudden passion if I understand his argument. We felt like it would be a mistake (and unsupportable) to argue [the victim] was the initial aggressor. If I recall correctly (and [Petitioner] appears to confirm that) we did argue that he was in several fights, a number [of] people were involved, that he was fearful (or perhaps even panicked) when [the victim] appeared.

(doc. 13-28 at 102-03.)

The state habeas court found that counsel's affidavit was true and correct and that Petitioner did not sustain his burden of showing that sudden passion was induced by the victim's provocation. (*Id.* at 94, 97.) The court concluded that Petitioner did not show that counsel was ineffective for failing to request an instruction on sudden passion. (*Id.* at 97.)

Counsel's reasons for not requesting an instruction on sudden passion and the state court's determination of this claim are supported by the record. Petitioner has not shown that he was entitled to an instruction on sudden passion. Counsel was not ineffective for failing to make a futile request. *See Koch v. Puckett*, 907 F.2d 524, 527 (5th Cir. 1990) ("counsel is not required to make futile motions or objections"). Petitioner has not shown that the state court's rejection of this claim was unreasonable.

C. Curative Instruction/Mistrial

Petitioner's fifth ground contends that counsel failed to request a curative instruction and a mistrial after the court sustained an objection to the prosecutor's argument about how Petitioner's three-inch or three-and-one-half inch knife could have caused the five-inch stab wound.

Counsel stated in his habeas affidavit that:

> 10. During the trial of the case, the State elicited evidence that the stab wound suffered by [the victim] was five inches with respect to its depth. The State, as I recall, failed to elicit testimony from the medical examiner that this was in fact common because the skin gives way to allow the knife to puncture further than the physical length of the blade. If I recall correctly, the Medical Examiner's Office indicated to us that it would be unusual for a five inch blade to leave a five inch wound.
>
> 11. We explained this to [Petitioner] well before the closing that we would make the argument but a juror could poke himself with a finger and see the skin give way. We told him it was a throw away argument, but it was worth throwing out there. We made the argument, the State offered the explanation we anticipated although I do not recall his exact words. I do recall we objected and I think the objection was sustained (although the judge may have said something to the effect of, "The jury will recall the testimony"). I am sure [Petitioner's] contention that I did not move for a mistrial is correct. In the context of the proceedings, I would have been concerned that the jury would perceive such a request as petty.

(doc. 13-28 at 101-02.)

The state habeas court found that counsel's reason for not moving for a curative instruction or mistrial was reasonable strategy. The court noted that although hindsight might suggest that a curative instruction would have been appropriate, counsel's trial tactic of not wanting to remind the jury of the matter was reasonable, and it concluded that Petitioner did not show that counsel was ineffective. (*id.* at 96.) Counsel's reasons for not requesting a curative instruction or a mistrial are supported by the record, and Petitioner has not shown that a mistrial would have been granted. Additionally, he has not shown how he was prejudiced. There was evidence, including video

evidence, that Petitioner pulled out a knife and stabbed at the victim, and DNA found on Petitioner's knife was consistent with the victim. Petitioner has not shown that the state court's rejection of this claim was unreasonable.

D. Constructive Amendment of Indictment

In his sixth ground, Petitioner contends that counsel failed to object to the constructive amendment of the indictment on the day that the trial began by abandoning the allegation of murder under Tex. Penal Code § 19.02(b)(1) (intentionally and knowingly causing death) and proceeding on the allegation of murder under § 19.02(b)(2) (intending to cause serious bodily injury and committing an act clearly dangerous to human life that causes death). He argues that because the indictment alleged the two theories of murder in the conjunctive, the State had to prove both theories, and that abandoning one theory lessened its burden.

"[A]lthough [an] indictment may allege the differing methods of committing the offense in the conjunctive, it is proper for the jury to be charged in the disjunctive. *Kitchens v. State*, 823 S.W.2d 256, 258 (Tex. Crim. App. 1991). When alternative theories of the offense are submitted to the jury in the disjunctive, a jury may return a general verdict if the evidence is sufficient to support a finding of guilt under either theory submitted to the jury. *Id.* The State would have been required to prove only one theory of the offense to obtain a conviction. The abandonment of one theory alleged in the indictment did not lessen the State's burden and was therefore not a constructive amendment to the indictment rather than an abandonment of a legal theory. Petitioner has not shown that the state court's rejection of this claim was unreasonable.

V. SUFFICIENCY OF EVIDENCE

Petitioner's third ground contends there was no evidence that the knife used was a deadly

weapon as alleged in the indictment. Respondent argues that this claim is procedurally barred.

A claim that "no evidence" supports a conviction is the same as a challenge to the legal sufficiency of the evidence. *See Haley v. Cockrell*, 306 F.3d 257, 266–67 (5th Cir. 2002) (noting that a claim of "no evidence" is the same as a claim of insufficiency of the evidence), *vacated on other grounds*, 541 U.S. 386 (2004); *United States v. Jackson*, 86 Fed. App'x 722, 722 (5th Cir.2004) (per curiam) (applying insufficiency-of-the-evidence analysis to claim of "no evidence").

Under Texas law, it has long been held that challenges to the sufficiency of the evidence of a conviction must be raised on direct appeal. *See Ex parte McLain*, 869 S.W.2d 349, 350 (Tex. Crim. App. 1994) (holding evidentiary sufficiency claims not cognizable in post-conviction, collateral attack); *West v. Johnson*, 92 F.3d 1385, 1389 n. 18 (5th Cir. 1996) (recognizing that this is a long-standing legal principle under Texas law).

Petitioner did not present this claim to the Court of Criminal Appeals on direct review, because he did not file a petition for discretionary review. He raised a "no evidence" claim on state habeas, and the Court of Criminal Appeals denied it without written order. That decision was an adjudication on the merits. *See Singleton v. Johnson*, 178 F.3d 381, 384 (5th Cir. 1999); *Ex parte Torres*, 943 S.W.2d 469, 472 (Tex. Crim. App. 1997). When the Court of Criminal Appeals denies a state application for writ of habeas corpus without written order, it implicitly denies sufficiency claims on the procedural basis that such claims are not cognizable on state habeas review. *See Ex parte Grigsby*, 137 S.W.3d 673, 674 (Tex. Crim. App. 2004). When the last state court to review a claim clearly and expressly states that its judgment rests on a procedural bar, the procedural default doctrine generally bars federal review. *See Harris v. Reed*, 489 U.S. 255, 262 (1989); *Lowe v. Scott*, 48 F.3d 873, 875 (5th Cir. 1995).

Petitioner has procedurally defaulted any claim of insufficiency of the evidence under Texas law. This default constitutes an adequate and independent state procedural ground to bar federal habeas review of the claim. *See Reed v. Thaler*, 428 F. App'x 453, 454 (5th Cir. 2011) (citing *Busby v. Dretke*, 359 F.3d 708, 724 (5th Cir. 2004), and *Ex parte Grigsby*, 137 S.W.3d at 674)). The claim is therefore procedurally barred.

VI. EVIDENTIARY HEARING

Upon review of the pleadings and the proceedings held in state court as reflected in the state court records, an evidentiary hearing appears unnecessary. Petitioner has not shown he is entitled to an evidentiary hearing.

VII. RECOMMENDATION

The petition for habeas corpus relief under 28 U.S.C. § 2254 should be **DENIED** with prejudice.

SO RECOMMENDED this 7th day of May, 2019.

IRMA CARRILLO RAMIREZ
UNITED STATES MAGISTRATE JUDGE

INSTRUCTIONS FOR SERVICE AND
NOTICE OF RIGHT TO APPEAL/OBJECT

A copy of these findings, conclusions and recommendation shall be served on all parties in the manner provided by law. Any party who objects to any part of these findings, conclusions and recommendation must file specific written objections within 14 days after being served with a copy. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b). In order to be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and specify the place in the magistrate judge's findings, conclusions and recommendation where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the magistrate judge is not specific. Failure to file specific written objections will bar the aggrieved party from appealing the factual findings and legal conclusions of the magistrate judge that are accepted or adopted by the district court, except upon grounds of plain error. *See Douglass v. United Servs. Automobile Ass'n*, 79 F.3d 1415, 1417 (5th Cir. 1996).

IRMA CARRILLO RAMIREZ
UNITED STATES MAGISTRATE JUDGE