INDEX OF APPENDICES

United States Court of Appeals
for the Fifth Circuit

No. 19-10987
Summary Calendar

JULIAN TERENCE MARTIN, JR.,

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 Northern District of Texas
USDC No. 3:17-CV-2226

Before WIENER, SOUTHWICK, and DUNCAN, *Circuit Judges*.

PER CURIAM:*

Julian Terence Martin, Jr., Texas prisoner # 2026170, appeals the dismissal of his 28 U.S.C. § 2254 application challenging his conviction for murder. He contends that the district court erred in determining that his

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

APPENDIX A

claim challenging the trial court's failure to sua sponte conduct a competency hearing was unexhausted and procedurally barred. He asserts that he raised this claim to the Texas Court of Criminal Appeals prior to the final disposition of the state habeas application. Martin also argues cause and prejudice for the default, contending that the state appellate court should have raised the issue sua sponte on direct appeal during the independent review required by *Anders v. California*, 386 U.S. 738 (1967), and that procedural default does not apply to his claim.

Because he did not fairly present this claim to the highest state court, Martin did not exhaust this issue. *See* 28 U.S.C. § 2254(b)(1)(A); *Baldwin v. Reese*, 541 U.S. 27, 29 (2004). Martin's unexhausted claim would be procedurally barred by the state courts; therefore, the claim was procedurally defaulted. *See Coleman v. Thompson*, 501 U.S. 722, 735, 750 (1991); *see also Smith v. Johnson*, 216 F.3d 521, 523-24 (5th Cir. 2000). He has not shown cause and prejudice excusing his failure to exhaust or that the failure to consider his constitutional claim will result in a fundamental miscarriage of justice. *See Coleman*, 501 U.S. at 750.

The judgment of the district court is AFFIRMED.

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
March 16, 2021
Lyle W. Cayce
Clerk

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JULIAN TERENCE MARTIN, JR.,

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BOBBY LUMPKIN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent—Appellee.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:17-CV-2226

Before WIENER, SOUTHWICK, and DUNCAN, *Circuit Judges*.

JUDGMENT

This cause was considered on the record on appeal and the briefs on file.

IT IS ORDERED and ADJUDGED that the judgment of the District Court is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

JULIAN TERENCE MARTIN, JR.,	§	
ID # 2026170,	§	
Petitioner,	§	
vs.	§	No. 3:17-CV-2226-S (BH)
	§	
LORIE DAVIS, Director,	§	
Texas Department of Criminal	§	
Justice, Correctional Institutions Division,	§	
Respondent.	§	

ORDER ACCEPTING FINDINGS AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

After reviewing all relevant matters of record in this case, including the Findings, Conclusions, and Recommendation of the United States Magistrate Judge and any objections thereto, in accordance with 28 U.S.C. § 636(b)(1), the Court is of the opinion that the Findings and Conclusions of the Magistrate Judge are correct and they are accepted as the Findings and Conclusions of the Court. For the reasons stated in the Findings, Conclusions, and Recommendation of the United States Magistrate Judge, the petition for habeas corpus filed pursuant to 28 U.S.C. § 2254 is **DENIED** with prejudice.

In accordance with Fed. R. App. P. 22(b) and 28 U.S.C. § 2253(c) and after considering the record in this case and the recommendation of the Magistrate Judge, petitioner is **DENIED** a Certificate of Appealability. The Court adopts and incorporates by reference the Magistrate Judge's Findings, Conclusions and Recommendation in support of its finding that the petitioner has failed to show (1) that reasonable jurists would find this Court's "assessment of the constitutional claims debatable or wrong," or (2) that reasonable jurists would find "it debatable whether the petition states a valid claim of the denial of a constitutional right" and "debatable whether [this Court] was correct

in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

If the petitioner files a notice of appeal, he must pay the $505.00 appellate filing fee or submit a motion to proceed *in forma pauperis* and a properly signed certificate of inmate trust account.

SO ORDERED.

SIGNED July 30 2019.

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

JULIAN TERENCE MARTIN, JR.,	§	
ID # 2026170,	§	
Petitioner,	§	
vs.	§	No. 3:17-CV-2226-S (BH)
	§	
LORIE DAVIS, Director,	§	
Texas Department of Criminal	§	
Justice, Correctional Institutions Division,	§	
Respondent.	§	

JUDGMENT

This action came on for consideration by the Court, and the issues having been duly considered and a decision duly rendered,

It is ORDERED, ADJUDGED and DECREED that:

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

2. The Clerk shall transmit a true copy of this Judgment and the Order Accepting the Findings and Recommendation of the United States Magistrate Judge to all parties.

SO ORDERED.

SIGNED July 30, 2019.

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

JULIAN TERENCE MARTIN, JR., ID # 2026170, Petitioner,	)	
vs.	)	**No. 3:17-CV-2226-S (BH)**
LORIE DAVIS, Director, Texas Department of Criminal Justice, Correctional Institutions Division, Respondent,	)	**Referred to U.S. Magistrate Judge**

FINDINGS, CONCLUSIONS, AND RECOMMENDATION

By *Special Order 3-251*, this habeas case has been referred for findings, conclusions, and recommendation. Based on the relevant findings and applicable law, the petition for writ of habeas corpus under 28 U.S.C. § 2254 should be **DENIED** with prejudice.

I. BACKGROUND

Julian Terence Martin, Jr. (Petitioner), an inmate currently incarcerated in the Texas Department of Criminal Justice-Correctional Institutions Division (TDCJ-CID), filed a § 2254 petition for writ of habeas corpus challenging his conviction for murder. The respondent is Lorie Davis, Director of the Texas Department of Criminal Justice (TDCJ), Correctional Institutions Division (Respondent).

A. State Court Proceedings

Petitioner was indicted for murder in Cause No. F13-59221 in Criminal District Court No. 6 of Dallas County, Texas, on September 25, 2013. (*See* doc. 13-13 at 21.)[1] On October 7, 2014, counsel filed a motion for the appointment of an expert to examine Petitioner for competency and

[1] Page citations refer to the CM/ECF system page number at the top of each page rather than the page numbers at the bottom of each filing.

for a competency hearing. It stated that 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.) On October 30, 2014, the court appointed an expert to evaluate Petitioner's competency. (doc. 13-13 at 61, 129.) The record does not contain anything else about Petitioner's competency or show that there was a competency hearing.

Petitioner pleaded not guilty, and the case was tried before a jury on September 21-24, 2015. Before jury selection, on September 21, 2015, the prosecutor abandoned the allegation in the indictment that Petitioner caused the death of the victim by stabbing and cutting him with a knife, a deadly weapon. The prosecutor proceeded with the allegation that Petitioner intended to cause serious bodily injury to the victim and committed an act clearly dangerous to human life by stabbing and cutting the victim with a knife, a deadly weapon, and thereby caused his death. (docs. 13-13 at 22; 13-15 at 6.)

According to the evidence at trial, on August 17, 2013, Petitioner and a friend were at a bar. The friend was ejected for taking off his shirt and being aggressive, and he and Petitioner left the bar. (doc. 13-16 at 81-83, 89-90.) Outside the bar, the friend got into a fight with two men, and Petitioner then hit one of the men. (*Id.* at 102-03.) The victim, who had been in the bar, tried to calm the situation and said that there was no need for them to be fighting. (*Id.* at 104-05.) Then the victim and one of the men began fighting. (*Id.* at 108.) The victim unbuttoned his shirt, and then he and Petitioner began fighting. (*Id.* at 107, 128.) A witness video-recorded the incident. (*Id.* at 128.) The recording shows that Petitioner pulled a knife out of his pocket and appeared to stab the victim. (*Id.* at 130, 132-33.) The witness who video-recorded the incident saw blood on the victim's chest,

realized that he had been stabbed, and called 911. (*Id.* at 129, 145.) The victim died as a result of a stab wound through the heart. (doc. 13-17 at 53.) The wound was five inches deep. (*Id.*)

Petitioner was arrested the next day, and a pocket-knife with a three-inch blade was recovered from his apartment. (*Id.* at 40, 41.) DNA consistent with the victim's was on the knife. (*Id.* at 85.)

In closing argument, counsel asked the jury, "Did that three and a half inch knife make the five-inch stab wound that killed [the victim]? ... Where did the five-inch knife go? We don't know." (*Id.* at 107-108.) The prosecutor then argued:

> And, ladies and gentlemen, with regards to the wound, I think the detective said three and a half inches. We didn't ask the medical examiner, you know, how does it make a five-inch – five-inch hole into [the victim's] body. But you saw the force that the defendant was doing with his arm like this, and you saw the drive. And when you get a knife three and a half inches in flesh and you keep pushing, it goes further than the blade.

(*Id.* at 118.) Counsel objected that it was outside the record, and the court sustained the objection. Counsel did not request an instruction to disregard or move for a mistrial. (*Id.*) The prosecutor continued, "Ladies and gentlemen, use your common sense. That's what you're here for. The size of this entire knife is about seven inches. I'd say about eight or nine inches, actually." (*Id.*)

At the guilt phase, out of the jury's presence, Petitioner acknowledged that he had numerous opportunities to discuss with counsel the possibility of him testifying. He understood that he had a right to testify, but he did not want to testify. (*Id.* at 71.)

At the punishment phase, Petitioner acknowledged that he understood that he had been found guilty, and he had a right to testify on punishment. He understood that there were risks with testifying, but he knowingly and voluntarily wanted to testify. (*Id.* at 4-6.) He later changed his mind and no longer wanted to testify. The court explained that it was his right, but Petitioner chose

not to testify. (*Id.* at 12-15.)

The jury convicted Petitioner of murder, and he was sentenced to 34 years' confinement. (doc. 13-13 at 188.) The judgment was affirmed on appeal. *Martin v. State*, No. 05-15-01306-CR, 2016 WL 4120671 (Tex. App.-Dallas July 29, 2016). Although Petitioner was granted an extension of time until October 28, 2016, to file a petition for discretionary review, he did not file a petition for discretionary review. (doc. 13-9); *Martin v. State*, PD-0923-16 (Nov. 22, 2016). Petitioner's state habeas application was signed on January 20, 2017, and received by the court on January 27, 2017. (doc. 13-28 at 5, 21.) On June 7, 2017, it was denied without written order. (doc. 13-25); *Ex parte Martin*, WR-85,758-02 (Tex. Crim. App. June 7, 2017).

B. Substantive Claims

Petitioner's amended habeas petition, received on September 1, 2017, raises the following grounds:

(1) The court failed to hold a competency hearing (ground 1);

(2) Petitioner was denied effective assistance of counsel for:

> (a) allowing him to stand trial despite evidence of his incompetency and failing to ensure that his competency was adequately investigated or that a competency hearing was held (ground 2);
>
> (b) failing to request a jury instruction on sudden passion (ground 4);
>
> (c) failing to request a curative instruction and a mistrial after the court sustained an objection to the prosecutor's argument (ground 5);
>
> (d) failing to object to the constructive amendment of the indictment (ground 6);

(3) There was no evidence that the knife was a deadly weapon (ground 3).

(*See* doc. 5 at 6-8.) Respondent filed a response, and Petitioner filed a reply.[2] (*See* docs. 14, 17.)

II. APPLICABLE LAW

Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. 104-132, 110 Stat. 1217, on April 24, 1996. Title I of the Act applies to all federal petitions for habeas corpus filed on or after its effective date. *Lindh v. Murphy*, 521 U.S. 320, 326 (1997). Because Petitioner filed his petition after its effective date, the Act applies.

Title I of AEDPA substantially changed the way federal courts handle habeas corpus actions. Under 28 U.S.C. § 2254(d), as amended by AEDPA, a state prisoner may not obtain relief

> with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim —
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

"In the context of federal habeas proceedings, a resolution (or adjudication) on the merits is a term of art that refers to whether a court's disposition of the case was substantive, as opposed to procedural." *Miller v. Johnson*, 200 F.3d 274, 281 (5th Cir. 2000).

Section 2254(d)(1) concerns pure questions of law and mixed questions of law and fact. *Martin v. Cain*, 246 F.3d 471, 475 (5th Cir. 2001). A decision is contrary to clearly established federal law within the meaning of § 2254(d)(1) "if the state court arrives at a conclusion opposite to that reached by [the Supreme Court] on a question of law or if the state court decides a case

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[2] Respondent's response addressed the claims raised in the original habeas petition, but not the claims raised in the amended petition. (*See* docs. 3, 5, 14.) Although some of the claims were raised in both petitions, each petition also raised claims that the other did not.

differently than [the] Court has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 412-13 (2000). As for the "unreasonable application" standard, a writ must issue "if the state court identifies the correct governing legal principle from [the] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413; *accord Penry v. Johnson*, 532 U.S. 782, 792 (2001). Likewise, a state court unreasonably applies Supreme Court precedent if it "unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Williams*, 529 U.S. at 407. "[A] federal habeas court making the 'unreasonable application' inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable." *Id.* at 409; accord *Penry*, 532 U.S. at 793.

Section 2254(d)(2) concerns questions of fact. *Moore v. Johnson*, 225 F.3d 495, 501 (5th Cir. 2000). Under § 2254(d)(2), federal courts "give deference to the state court's findings unless they were 'based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.'" *Chambers v. Johnson*, 218 F.3d 360, 363 (5th Cir. 2000). The resolution of factual issues by the state court is presumptively correct and will not be disturbed unless the state prisoner rebuts the presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

III. COMPETENCY

In his first ground, Petitioner contends that he was denied due process because the court failed to order a competency hearing.

A. Exhaustion

A petitioner must fully exhaust state remedies before seeking federal habeas relief. 28