APPENDIX

APPENDIX 1a

APPENDIX 2a

United States Court of Appeals for the Fifth Circuit

No. 20-40353

FERNANDO RODRIGUEZ,

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. 5:18-CV-76

ORDER:

Fernando Rodriguez, Texas inmate # 1858563, moves for a certificate of appealability (COA) to appeal the district court's denial of his petition for habeas corpus under 28 U.S.C. § 2254. In his petition, Rodriguez asserts violations of due process and that his appellate attorney, Fausto Sosa, rendered ineffective assistance.

To obtain a COA to appeal the denial of a § 2254 petition, the petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). "A petitioner satisfies this standard by demonstrating 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*, 537 U.S. at 327.

Federal courts may only grant habeas relief for a state law conviction "(1) if the state court decision was contrary to clearly established Supreme Court law; (2) if the state court decision involved an unreasonable application of clearly established Supreme Court law; or (3) if the state court decision was based on an unreasonable determination of the facts in light of the evidence presented." *Poree v. Collins*, 866 F.3d 235, 245 (5th Cir. 2017) (quoting *Bell v. Cone*, 535 U.S. 685, 694 (2002)). The district court did not err in its determination that none of these scenarios apply in Rodriguez's case; nor did it err in determining that Rodriguez's counsel, Attorney Sosa, rendered effective assistance on direct appeal. And Rodriguez fails to show "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*, 537 U.S. at 327.

Accordingly, IT IS ORDERED that Appellant's motion for a certificate of appealability is DENIED. Because a COA will not issue, Appellant's motion to proceed in forma pauperis is DENIED AS MOOT.

CORY T. WILSON
United States Circuit Judge

APPENDIX 3a

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION

FERNANDO RODRIGUEZ,	§	
	§	
Petitioner,	§	
VS.	§	**CIVIL ACTION NO. 5:18-CV-76**
	§	
LORIE DAVIS,	§	
	§	
Defendant.	§	

MEMORANDUM & ORDER

Petitioner Fernando Rodriguez, TDCJ-CID No. 1858563, is a state inmate confined by the Correctional Institutions Division of the Texas Department of Criminal Justice (TDCJ). (Dkt. 1 at 1.)[1] In February of 2013, the 341st District Court of Webb County, Texas, sentenced Petitioner to 70 years in prison following his conviction for murder. (Dkt. 22, Ex. 11 at 253–54.) The Fourth Court of Appeals of Texas affirmed Petitioner's conviction, and the Texas Court of Criminal Appeals (TCCA) denied his request for discretionary review. *Rodriguez v. State*, No. 04-13-00187-CR, 2014 WL 4437775, at *1, (Tex. App.—San Antonio Sept. 10, 2014). Petitioner did not seek a writ of certiorari from the United States Supreme Court.

In 2016, Petitioner filed an application for a state writ of habeas corpus, which the TCCA denied without written order following a factfinding remand and a hearing at the state trial court. (Dkt. 22, Ex. 61 at 68; Dkt. 22, Exs. 55, 56, 63.) Having exhausted his state-law remedies, Petitioner applied for a federal writ of habeas corpus from this Court. (Dkt. 1.) That Petition (Dkt. 1), along with Respondent TDCJ's motion for summary judgment (Dkt. 21), are now before the Court.

[1] Page number citations refer to the page numbers automatically generated by the Electronic Court Filing System (ECF). They do not track the state courts' pagination. Similarly, exhibits are referred to by their ECF labels, not their state court labels (e.g., "Ex. 1" refers to Ex. 1 in ECF).

Petitioner states three grounds for relief. First, he argues that he was denied due process of law because he discussed confidential details of his case with a public defender, Cristina Alva, who later "switched sides" and prosecuted him for murder. (Dkt. 1 at 6.) Second, he alleges that the state court erred by failing to order a new trial after this alleged conflict of interest came to light. (*Id.*) Finally, he claims that his appellate attorney, Fausto Sosa, rendered ineffective assistance by failing to raise the conflict issue on direct appeal.[2] (*Id.* at 7.) In response, the TDCJ urges deference to the state courts' legal conclusions and factual findings, arguing that the former are "reasonable" under existing Supreme Court precedent, and that Petitioner fails to rebut the latter with clear and convincing evidence. (Dkt. 21 at 5–18.)

Having carefully considered the record and the applicable law, the Court finds that (1) the state court properly denied Petitioner's due process claims regarding Attorney Alva's conflict of interest, and (2) Petitioner received effective assistance of counsel. Therefore, Respondent's motion for summary judgment (Dkt. 21) should be granted, and Rodriguez's Petition under 28 U.S.C. § 2254 (Dkt. 1) should be denied.

Background

The facts recited in this Section are drawn from the state-court record in this case (Dkt. 22).[3] Where possible, the Court restates the explicit factual findings of the state trial and appellate courts. Where such findings are unavailable—or where they are credibly contested—the Court relies on other evidence in the state court record (Dkt. 22), including state court filings, affidavits and the in-court testimony of Attorney Alva, Attorney Sosa, and Petitioner.

[2] Attorney Fausto Sosa represented Petitioner during his trial and on appeal. Petitioner does not, however, allege ineffective assistance at the trial stage. Rather, he presses a narrow claim of ineffective assistance on appeal. (*See* Dkt. 29 at 2 (arguing that "[a]ppellate counsel, Fausto Sosa, who was also [Petitioner's] trial counsel, was ineffective *on appeal*") (emphasis added).)

[3] All state court records were filed as exhibits to Docket No. 22. Accordingly, the Court will refer to them by their exhibit numbers only.

A. Arrest and Encounter with Attorney Alva

On January 30, 2011, Jose Gonzalez was shot to death outside his apartment in Laredo, Texas. (Ex. 4 at 9; Ex. 5 at 16.) One day later, Petitioner went voluntarily to the headquarters of the Laredo Police Department (LPD), where he made incriminating statements to investigators. (Ex. 10 at 132–33.) Either before or immediately after his interview at LPD headquarters, Petitioner was arrested and booked at the Webb County Jail. (Ex. 59 at 84.) On February 1, 2011, the Public Defender's Office was appointed to represent Petitioner. (*Id.* at 83.)

In February of 2011, Attorney Alva was an employee of the Public Defender's Office assigned to work on the bonds of persons confined in the Webb County Jail. (Ex. 46 at 22.) In this capacity, she met with Petitioner at least once in February of 2011.[4] (Ex. 59 at 100.) Parties differ in their account of this meeting (or meetings). At an April 4, 2017 hearing held to address his state habeas petition, Petitioner testified that, over the course of two meetings, Attorney Alva asked not only for Petitioner's personal and financial information, but also "about the facts of the case." (Ex. 60 at 140–41.) Specifically, she wanted to know "what happened . . . . where [the shooting] happened . . . . [and whether] there were some other people involved in the case." (*Id.*) Petitioner further testified that Attorney Alva returned to the jail "two or three weeks" after the February 1, 2011 conversation to "ask . . . [about] the facts of the case, like—more—[and] said that she needed the facts of the case . . . to work on bond," and that he "tried to call her . . . a couple of times" to follow up after these meetings. (*Id.* at 141–142.)

For her part, Attorney Alva testified that she did not remember any specific conversations with Petitioner. (*Id.* at 129–30; *see also* Ex. 59.) She stated, however, that her consultations with

[4] At a hearing on April 4, 2017, Petitioner testified that he met with Attorney Alva once on February 1, 2011 and again "two or three weeks later." (Ex. 60 at 140–41.) Attorney Alva testified that she did not remember ever meeting Petitioner while working as a public defender. (*Id.* at 129–30.)

inmates usually proceeded as follows:

> We were to meet with [the inmates,] let them know the charges that were being brought against them, let them know that we were in charge at this point on [*sic*] working on their bond, and if, well, we went over, [Section] 17.151 [of the Texas Code of Criminal Procedure] for example . . . We also asked them for family member information.

(Ex. 60 at 122.) She also explained that she would immediately cease communication with an inmate "if there [was] any indication that [the inmate] already had a private attorney." (*Id.* at 127.)

The state court appears to have credited Attorney Alva's general testimony over Petitioner's more specific account of the February 2011 meeting. (*See* Ex. 59 at 99.) In an April 7, 2017 report to the TCCA (Ex. 59 at 99), Judge Beckie Palomo of the 341st District Court of Webb County (hereinafter the "trial court" or "state trial court")[5] found "that Ms. Alva did speak to [Petitioner]" during her time as a Public Defender, "but [that] any such communications were merely to gather personal information and ceased after [Petitioner] informed [Attorney Alva] that he had a private attorney."[6] (*Id.* at 100.) Judge Palomo further concluded that the communications between Attorney Alva and Petitioner do not "constitute [*sic*] attorney-client privilege." (*Id.*)

B. Merits Trial and Appellate Court Proceedings

[5] Unless otherwise stated, the terms "trial court" and "state trial court" refer to the court convened by order of the TCCA to evaluate Petitioner's habeas claims. (*See* Exs. 56, 63.) That court consisted of Webb County District Judges Beckie Palomo and Monica Notzon. (*See* Exs. 59–60.) The terms do not refer to the court that conducted Petitioner's merits trial, over which Judge Palomo also presided. *See Rodriguez*, 2014 WL 4437775, at *1.

[6] Although Judge Palomo does not say so directly, she appears to have based her conclusion—that Petitioner in fact "informed [Attorney Alva] that he had a private attorney"—on a handwritten note on the Public Defender's "Client Interview Sheet" and an affidavit that Attorney Sosa submitted to the trial court on March 1, 2017. (*See* Ex. 60 at 166, 168.) The note states that Petitioner "has private attorney: Fausto Sosa." (*Id.* at 166.) In the affidavit, Attorney Sosa avers that, "at the initial interview, [Petitioner] stated he had hired private counsel Mr. Sosa, and at that point the interview ceased." (*Id.* at 170.) Attorney Sosa declares that this account of the interview is "undisputed" and based on "personal knowledge." (*Id.*)

On April 6, 2011—a little over two months after Petitioner first met with Attorney Alva—Attorney Sosa was officially appointed to represent Petitioner.[7] (Ex. 60 at 167.) On May 31, 2011, Petitioner was formally indicted, and Assistant District Attorney Claudia Sandoval began to prosecute the case against him. (Ex. 10 at 13, 24.) Attorney Alva joined the prosecution team sometime after becoming an Assistant District Attorney in September of 2011 and first appears as a state attorney of record on April 3, 2012. (Ex. 46 at 22; Ex. 10 at 24.) Over the course of the next two years, Attorney Alva performed a range of work on Petitioner's case, ultimately giving closing arguments in his February 2013 jury trial. (Exs. 10–11 (showing multiple appearances by Attorney Alva); Ex. 44 (showing Attorney Alva's closing arguments to the jury).) Attorney Alva's prosecution was successful: Petitioner was convicted and sentenced to 70 years imprisonment on February 15, 2013. (Ex. 11 at 253–54.)

Co-Defendant hearing @ CF was Not Present. I could Not See Her

At no point during the nearly two years that elapsed between indictment and sentencing did Attorney Sosa or Petitioner object to Attorney Alva's participation in the proceedings. Rather, Attorney Sosa raised the issue of a possible conflict for the first time at a March 28, 2013 hearing held to address Petitioner's motion for a new trial.[8] (Ex. 45.) At that hearing, Attorney Sosa informed the Court that he "just found out that . . . the first person [Petitioner] spoke with

I never Seen Her in any hearing Befor trial How is Fair to Sosa going to raised the issue if we did Not Now that She was on my case?

[7] The Court considers April 6, 2011 the date of Attorney Sosa's appointment because the state court lists this date on its "Order Appointing/Denying Attorney" (Ex. 60 at 167). While the handwritten note and affidavit discussed above (*see* n.6) provide some support for an earlier *retention* date, it is unclear whether the note was written when the "Client Interview Sheet" was filled out, or if it was added later. (*See id.* at 119–25 (discussing division of labor involved in completing client intake forms, noting involvement of multiple people in the client intake process); *but see id.* at 168–70 (averring that Petitioner had private counsel in February 2011).) Moreover, it is entirely possible that Attorney Sosa had been retained before the formal appointment order was entered. *(Id.* at 168–70 (averring that Petitioner stated he had private counsel in February 2011).) In light of the ambiguity of the record, the Court chooses to rely on the state court's appointment order (Ex. 60 at 167).

[8] The seemingly *pro forma* motion that precipitated the hearing (Ex. 11 at 238) fails to mention Attorney Alva, focusing instead on evidentiary issues.

was . . Ms. Alva" and alleged that Attorney Alva "had two conversations [with Petitioner, and they] talked about everything having to do with [Petitioner's] case." (*Id.* at 6.) On April 2, 2013, Attorney Sosa re-urged his motion at a second hearing, during which the state trial court heard testimony on Attorney Alva's alleged conflict from Attorney Alva, Petitioner, and then Webb County Public Defender Hugo Martinez. (Ex. 46.) Following this hearing, the state trial court orally denied Petitioner's motion for a new trial. (*Id.* at 74.) Attorney Sosa preserved the issue of Attorney Alva's conflict for appeal but did not raise it in his appellate brief. (*Id.* at 12; *see also* Ex. 4.)

Petitioner's appeal was ultimately unsuccessful. The Fourth Court of Appeals affirmed his conviction on September 10, 2014, making no mention of Attorney Alva or her alleged conflict. *See Rodriguez*, 2014 WL 4437775, at *1. The TCCA denied Petitioner's "Petition for Discretionary Review." *Id.*

C. State Habeas Proceedings

On February 20, 2016, Petitioner filed an application for a writ of habeas corpus with the TCCA. (Ex. 61 at 68.) Petitioner, now represented by Attorney Roberto Balli, stated three grounds for relief: (1) that his Fourteenth Amendment right to due process was violated when Attorney Alva "switched sides"; (2) that the state trial court improperly denied his motion for a new trial; and (3) that Attorney Sosa rendered ineffective assistance by failing to raise the issue of Attorney Alva's conflict on appeal. (*Id.* at 73–77.) After considering Petitioner's application, the TCCA declared that Petitioner had alleged facts, which "if true, might entitle him to relief." (Ex. 63 at 2.) Accordingly, the TCCA ordered the trial court to conduct a hearing and determine: (1) "whether the prosecutor [Attorney Alva] spoke with [Petitioner] at the magistration [bond hearing] level and, if so, whether the communications were covered by attorney-client privilege";

and (2) "whether the performance of [Petitioner's] appellate counsel [Attorney Sosa] was deficient, and if so, whether counsel's deficient performance prejudiced applicant." (*Id.*)

In response, the state trial court held the April 4, 2017 hearing mentioned above, at which Attorney Alva and Petitioner testified. (Ex. 59 at 100; Ex. 60.) The trial court also reviewed an affidavit from Attorney Sosa, in which he explained his decision not to raise the conflict issue on appeal. (Ex. 59 at 100; *see also* Ex. 60 at 168.) After the hearing, the trial court prepared a report, which contained nine "findings of fact and conclusions of law," along with a recommendation that the TCCA deny Petitioner's habeas application. (Ex. 59 at 99–102.) These findings are reproduced below in abbreviated form:

1. "On February 1, 2011, the Webb County Public Defender's Office was appointed to represent Petitioner."
2. "During February 2011, the then Assistant Public Defender, Cristina Alva, was assigned to perform bond reduction hearings at the magistration level."
3. "Ms. Alva did speak to [Petitioner] but any such communications were merely to gather personal information and ceased after [Petitioner] informed her that he had a private attorney."
4. "[The] communications between Ms. Alva and [Petitioner] do not constitute attorney client privilege and as such, do not rise to the level of a due process violation."
5. "On April 2, 2013, the trial court held a hearing on [Petitioner's] motion for a new trial."
6. "The trial court denied that motion after a careful review of the exhibits and after finding that the testimony provided by the State's witnesses was credible, consistent and corroborated."
7. Petitioner's testimony at the same hearing was "nebulous."
8. "Attorney Sosa was effective in his legal representation of [Petitioner]."
9. "[Petitioner] fails to successfully demonstrate deficient performance and [even] if a deficiency may be considered by the sole failure to include the 'conflict of interest' argument on appeal . . . said alleged deficient performance [did] not prejudice applicant as [the conflict of interest argument] cannot guarantee a favorable result."

(*Id.*)

Upon receipt of the trial court's findings and recommendation, the TCCA denied Petitioner's application without a written order. (Ex. 55.) Judges Walker, Richardson and Keel filed a dissenting opinion, in which they argued that the trial court (and thus also the TCCA)

failed to adequately support or explain its credibility determinations and factual conclusions. (Ex. 58.) They urged the majority to remand the case for additional factfinding and dissented in light of their colleagues' refusal to do so. (*Id.*)

Legal Standards

A. Federal Habeas Review

The Court reviews a petition for a federal writ of habeas corpus under the federal habeas statute, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). 28 U.S.C. § 2254; *Harrington v. Richter*, 562 U.S. 86, 98 (2011). The Court follows the standards of review set forth in subsections 2254(d)(1) and (2) of the AEDPA when considering a state court's adjudication on the merits of questions of fact, questions of law or mixed questions of fact and law. *Id.* An adjudication on the merits "is a term of art that refers to whether a court's disposition of the case is substantive as opposed to procedural." *Miller v. Johnson*, 200 F.3d 274, 281 (5th Cir. 2000).

A state-court determination of questions of law and mixed questions of law and fact is reviewed under 28 U.S.C. § 2254(d)(1). The Court must defer to the state court's determination unless it "was contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States." *Hill v. Johnson*, 210 F.3d 481, 485 (5th Cir. 2000). A state-court decision is contrary to Supreme Court precedent if: (1) the state-court's conclusion is "opposite to that reached by [the Supreme Court] on a question of law," or (2) the "state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent" yet arrives at a contrary result. *Williams v. Taylor*, 529 U.S. 362, 405–08 (2000). A state-court decision involves an unreasonable application of a Supreme Court precedent if it applies the correct Supreme Court rule in an objectively unreasonable manner, or

if the state court "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." *Id.* at 406–07. A state-court adjudication is not, however, unreasonable simply because the federal habeas court would have reached a different conclusion, nor can a decision be deemed unreasonable for failing to cite or be aware of relevant Supreme Court precedent. *Gardener v. Johnson*, 247 F.3d 551, 559 (5th Cir. 2001); *see also Richter*, 562 U.S. at 98 (citing *Early v. Packer*, 537 U.S. 3, 8 (2002)). Rather, reversal is only appropriate where a state court has applied the correct legal rule in a manner "so patently incorrect" as to be objectively unreasonable. *Gardener*, 247 F.3d at 560.

A state court's factual findings are likewise entitled to deference on federal habeas review and will be presumed correct unless a petitioner rebuts them with "clear and convincing evidence." *See* 28 U.S.C. § 2254(e)(1); *Garcia v. Quarterman*, 454 F.3d 441, 444 (5th Cir. 2006). This deference extends to a state court's "implicit" findings and applies even when a state court offers little or no explanation for a factual ruling. *Richter*, 562 U.S. at 100; *Garcia*, 454 F.3d at 444–45. Further, the Court's review of state court factual findings is "limited to the record that was before the state court that adjudicated the claim on the merits." *Cullen v. Pinholster*, 563 U.S. 170, 181–82 (2011).

B. *Pro Se* Habeas Petitioner

Where a petitioner proceeds *pro se*, the reviewing court must liberally construe his habeas corpus petition. *Guidroz v. Lynaugh*, 852 F.2d 832, 834 (5th Cir. 1988). The reviewing court may consider any issue to which the facts stated in a *pro se* petition "give rise." *Id.*

C. Summary Judgment on Habeas Claims

Federal Rule of Civil Procedure 56 "mandates the entry of summary judgment, after

adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *see* Fed. R. Civ. P. 56. Summary judgment is proper if there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). "A fact is 'material' if its resolution in favor of one party might affect the outcome of the lawsuit under governing law." *Sossamon v. Lone Star State of Tex.*, 560 F.3d 316, 326 (5th Cir. 2009) (quoting *Hamilton v. Segue Software Inc.*, 232 F.3d 473, 477 (5th Cir. 2000)). "An issue as to a material fact is genuine 'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" *Seacor Holdings, Inc. v. Commonwealth Ins. Co.*, 635 F.3d 675, 680 (5th Cir. 2011) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

Parties are permitted to move for summary judgment on habeas claims. *Clark v. Johnson*, 202 F.3d 760, 764 (5th Cir. 2000). However, the Federal Rules of Civil Procedure (and the related caselaw rules discussed above) apply to habeas proceedings only to the extent that they do not conflict with federal habeas rules. *Smith v. Cockrell*, 311 F.3d 661, 668 (5th Cir. 2002) (overruled on other grounds, *Tennard v. Dretke*, 542 U.S. 274, 274 (2004)); Rule 12 of the Rules Governing Section 2254 Cases. Among the rules displaced is the summary judgment rule that all disputed facts must be construed in the light most favorable to the nonmoving party. *Smith*, 311 F.3d at 668; *see* 28 U.S.C. § 2254(e)(1) (stating factual presumptions in habeas cases). In place of this rule, the federal habeas court must presume the state court's factual findings are correct and accept them unless a petitioner can "[rebut] the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

This deferential standard applies even where a state court of last resort denies relief

without written order. *Santellan v. Cockrell*, 271 F.3d 190, 193 (5th Cir. 2001) (explaining that "[if] a state court denies a prisoner's claim without reasoning of any sort, [the federal court's] authority under [the] AEDPA is still limited to determining the reasonableness of the ultimate decision"). In such cases, the federal court assumes that the state court applied the proper, clearly established federal law and determines whether its decision was contrary to or an objectively unreasonable application of that law. *Schaetzle v. Cockrell*, 343 F.3d 440, 443 (5th Cir. 2003); *see generally Richter*, 562 U.S. at 99 (justifying deference to state court orders issued without opinion on federalism grounds). Moreover, if a lower state court issued a "reasoned decision" that was later affirmed, the affirmance is held to rest on the same ground as "the last related state court decision that [provides] a relevant rationale." *Wilson v. Sellers*, 138 S. Ct. 1188, 1188 (2018); *see also Bledsue v. Johnson*, 188 F.3d 250, 256 (5th Cir. 1999) ("When one reasoned state court decision rejects a federal claim, subsequent unexplained orders upholding that judgment or rejecting the same claim are considered to rest on the same ground as the reasoned state judgment").

D. Ineffective Assistance of Counsel

The Sixth Amendment to the federal Constitution guarantees the effective assistance of counsel at all critical stages of a criminal proceeding, including the first appeal of right. U.S. Const. amend. VI; *United States v. Williamson*, 183 F.3d 458, 462 (5th Cir. 1999). To prevail on an ineffective assistance of counsel claim, the petitioner must show that (1) his "counsel's representation fell below an objective standard of reasonableness," and (2) "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984). Failure to establish

either requirement defeats an ineffective assistance claim in its entirety. *Smith v. Puckett*, 907 F.2d 581, 584 (5th Cir. 1990).

The first *Strickland* prong—constitutional deficiency—"is necessarily linked to the practice and expectations of the legal community." *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010). A defendant is entitled not to perfect representation but to a performance that is "reasonable under prevailing professional norms" and "all the circumstances" of the case. *Hinton v. Alabama*, 571 U.S. 263, 273 (2014) (quoting *Strickland*, 466 U.S. at 688). In evaluating claims of ineffective assistance, courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Murray v. Maggio*, 736 F.2d 279, 281 (5th Cir. 1984) (per curiam) (quoting *Strickland*, 466 U.S. at 689); *see Tijerina v. Estelle*, 692 F.2d 3, 7 (5th Cir. 1982).

To demonstrate prejudice, a defendant alleging ineffective assistance on appeal must show that, "had counsel performed differently, there would have been revealed issues and arguments *of merit* on the appeal." *Sharp v. Puckett*, 930 F.2d 450, 453 (5th Cir. 1991) (emphasis added). In other words, the defendant "must show a reasonable probability that, but for his counsel's unreasonable [performance], he would have prevailed on his appeal." *Smith v. Robbins*, 528 U.S. 259, 285 (2000).

Further, because "the standards created by *Strickland* and § 2254(d) are both highly deferential," the court applies a "doubly deferential" standard of review when reviewing ineffective assistance of counsel claims raised in a § 2254 petition. *Richter*, 562 U.S. at 105; *see also Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009). As the Supreme Court explained in *Harrington v. Richter*: "When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is *any reasonable argument* that counsel satisfied

Strickland's deferential standard." 562 U.S. at 105 (emphasis added).

Discussion

In his Petition (Dkt. 1), Petitioner states three grounds for relief: (1) that he was "denied due process [under the] Fifth Amendment when [his] former attorney [Cristina Alva] later prosecuted him;" (2) that he was denied due process when the trial court failed to order a new trial after learning of the conflict; and (3) that his attorney (Fausto Sosa) rendered ineffective assistance by failing to raise the issue of Attorney Alva's alleged conflict on appeal. (Dkt. 1 at 6–7; *see also* Dkt. 29.) In response, Respondent argues that, (1) Petitioner fails to identify any Supreme Court rule that the state courts applied unreasonably; (2) Supreme Court precedent on the related issues of multiple/joint representation and government informants actually supports the TCCA's decision not to disqualify Attorney Alva or conduct a new trial; and (3) Attorney Sosa's decision not to raise the conflict claim on appeal was reasonable in light of that claim's lack of merit. (Dkt. 21 at 7–17.) Respondent also highlights areas of factual disagreement between Petitioner and the state courts, urging deference to the latter.

In its discussion below, the Court first addresses the due process argument at the heart of Petitioner's first and second claims for relief. Rejecting this argument, the Court denies these claims and proceeds to Petitioner's legally distinct claim of ineffective assistance, which it also denies.

A. Petitioner's Due Process Claims and Attorney Alva's Alleged Conflict

1. The state courts' decision was not "contrary to" established federal law

As a preliminary matter, the Court finds that Petitioner fails to identify any Supreme Court precedent that is "materially indistinguishable" from the present case, or to uncover a rule of law "opposite" to the one applied by the state courts. *See Taylor*, 529 U.S. at 406–08.

Petitioner's contention that *Holloway v. Arkansas*, 435 U.S. 475, 475 (1978), is such a case is without merit. In *Holloway*, the Supreme Court held that "whenever a district court improperly requires joint-representation over timely objection, reversal is automatic," even absent a showing of prejudice. *Id.* at 488. The case involved an attorney appointed to represent three co-defendants at trial, whose conflicting loyalties "more or less muzzled [the attorney] on cross-examination." *Id.* at 479. While Petitioner is correct that *Holloway* bears some resemblance to his situation insofar as Justice Burger was concerned with preventing attorneys from improperly disclosing their clients' confidential information to persons with adverse interests, this similarity is insufficient to transform a case about improper joint representation into one about prosecutorial conflicts of interest. *See id.* at 485, 493. Moreover, the *Holloway* majority's decision appears to have been motivated primarily by its concern that improper joint representation prevented defense attorneys from effectively aiding their clients. *See id.* at 489–91 (discussing relationship between conflict of interest rules and the Sixth Amendment right to effective assistance of counsel). Here, by contrast, there is no allegation that Attorney Sosa's trial performance—and thus the effectiveness of Petitioner's representation—was in any way impaired by Attorney Alva's conflict.[9] The Court therefore finds that Petitioner's case is not "materially indistinguishable" from *Holloway*, and *Holloway* did not propound a rule "opposite" to the one applied by the state courts in this case. *See Taylor*, 529 U.S. at 406–08.

For the sake of completeness, the Court identifies two additional Supreme Court precedents which, though not cited by Petitioner, are somewhat similar to his case. *See Guidroz*, 852 F.2d at 834 (requiring liberal construction of *pro se* habeas claims). First, in *Young et al. v.*

[9] As noted above, Petitioner claims that Attorney Sosa was ineffective *on appeal*. He does not, however, allege that Attorney Alva's alleged conflict in any way reduced his counsel's effectiveness at trial.

United States ex. rel. Louis Vuitton et Fils, S.A. (*Louis Vuitton*), 481 U.S. 785, 785 (1987), the Supreme Court held that an attorney who represented a party with an interest in a criminal case's outcome could not serve as a special prosecutor in that criminal matter. *Id.* at 788. In reaching this decision, the Supreme Court emphasized that a prosecutor must be "disinterested" and cited "the threat of prosecution [being] used as a bargaining chip in civil negotiations" as a reason for disqualifying a conflicted prosecutor. *Id.* Here, however, there is no intimation that Attorney Alva prosecuted Petitioner for improper motives nor that she was anything but impartial. Rather, Petitioner's primary concern appears to be that Attorney Alva had access to confidential information that gave the prosecution an unfair advantage at trial. (*See* Dkt. 1 at 6.) Because Attorney Alva's impartiality is not at issue, the Court finds that *Louis Vuitton* is readily distinguishable from the case at hand, and the state courts did not err by failing to apply the rule it propounds.

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Second, in *Smith v. Phillips*, 455 U.S. 209, 209 (1982), the Supreme Court held that due process did not require a new trial for a defendant after prosecutors failed to disclose that a juror had applied for employment with the state attorney's office while jury deliberations in that defendant's trial were ongoing. *Id.* In reaching this conclusion, the Supreme Court emphasized that "the touchstone of due process analysis in cases of prosecutorial misconduct is [the] fairness of the trial, not the culpability of the prosecutor" and declared that "posttrial hearings were sufficient" to determine whether a prosecutor's misconduct had unduly prejudiced a jury. *Id.* Were the Court to apply these principles to Petitioner's due process argument, it would be required to deny his claims in light of the numerous posttrial hearings conducted in the state courts and Petitioner's failure to demonstrate prejudice from Attorney Alva's conflict. (*See, e.g.*, Exs. 45–46, 60 (showing multiple posttrial hearings).) The Court declines to do so, however,

because the significant differences between the role of the juror and that of the prosecutor ensure that *Phillips* bears at most a superficial resemblance to the present matter. *Phillips* is therefore not materially indistinguishable from the present case, and the state courts did not err by failing to apply the rule it propounds.

For the foregoing reasons, the Court finds (1) that the state court did not reach a conclusion "opposite to that reached by [the Supreme Court] on a question of law," and (2) that it did not "confront facts that are materially indistinguishable from a relevant Supreme Court precedent" yet arrive at a contrary result. *Taylor*, 529 U.S. at 406–08. Accordingly, the TCCA's decision is not "contrary" to federal law.

2. The state courts did not "unreasonably apply" Supreme Court precedent to Petitioner's due process claims

Because the Court finds that neither the state trial court nor the TCCA applied a rule "contrary to" federal law when evaluating Petitioner's due process claim, the Court must also decide whether the state court "unreasonably applied" any Supreme Court precedent. As stated above, a state court decision involves an unreasonable application of a Supreme Court precedent if it applies the correct Supreme Court rule in an objectively unreasonable manner, or if the state court "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." *Taylor*, 529 U.S. at 407. Applying this standard to the present case, the Court assumes the state trial court and TCCA applied the correct Supreme Court rules (if any) and asks whether these rules were applied in an "objectively unreasonable" manner. *See Gardener*, 247 F.3d at 560.

Here, the TCCA does not appear to have explicitly relied on any particular Supreme

Court case or rule in reaching its decision.[10] Instead, the TCCA and state trial court seem to have relied on a line of state court cases interpreting Texas law on conflicts of interest and due process.[11] (*See* Ex. 59 at 100 (citing *Landers v. State*, 256 S.W.3d 295, 304 (Tex. Crim. App. 2008).) Of course, the Court may not dispute the reasonableness of the TCCA's interpretation of Texas state law and its own caselaw on federal habeas review. *See Swarthout v. Cooke*, 562 U.S. 216, 219 (2011) (holding that "federal habeas relief does not lie for violations of state law"). Accordingly, the bulk of the state courts' legal reasoning lies beyond the scope of the Court's review and must be allowed to stand. Nonetheless, the Court finds that the *Louis Vuitton* matter discussed above applies in principle to the state court's ruling on Attorney Alva's conduct.[12] *See* Bruce Green & Rebecca Roiphe, *Rethinking Prosecutors' Conflicts of Interest*, 58 B.C. L. Rev. 463, 489 (March 2017) (noting that *Louis Vuitton* is the "leading Supreme Court decision" on prosecutorial conflicts of interest). The Court therefore reviews the state court's implicit application of the conflict rules in *Louis Vuitton* to Attorney Alva's alleged conflict of interest.

As previously explained, in *Louis Vuitton*, the Supreme Court found reversible error in a district court's decision to appoint a special prosecutor who represented parties with a financial interest in a criminal case's outcome. *See Louis Vuitton*, 481 U.S. at 785. Yet unlike the Texas

[10] Because the TCCA majority affirmed without opinion, the Court applies the "Look-Through Doctrine" to reconstruct the TCCA's reasoning. *See Sellers*, 138 S. Ct. at 1188 (discussing the "Look-Through Doctrine"). Under this doctrine, the Court assumes that the TCCA's affirmance was based on the "last related state court decision that provides a relevant rationale." *Id.* Here, that decision is the state trial court's "Finding of Facts, Conclusions of Law and Recommendations" (Ex. 59 at 99), which the TCCA appears to have implicitly adopted. (*Cf.* Dkt. 58 (dissenting at the TCCA level from reasoning in the trial court's "Findings of Fact, Conclusions of Law and Recommendations").)

[11] The majority of cases dealing with prosecutorial conflicts of interest appear to arise in state courts and "lower federal courts" rather than the Supreme Court. *See generally* Bruce Green & Rebecca Roiphe, *Rethinking Prosecutors' Conflicts of Interest*, 58 B.C. L. Rev. 463, 488–89 (March 2017) (collecting cases on due process and prosecutorial conflicts of interest).

[12] *Phillips*, 455 U.S. at 209, and *Holloway*, 435 U.S. at 475, do not apply even in principle. The former addressed issues related to juror bias and the latter dealt with multiple representation. *Id.*

courts that have analyzed prosecutorial conflicts of interest, the Supreme Court did not base its holding on a defendant's theoretical due process right to face a disinterested (i.e. unconflicted) prosecutor, but rather on broad concerns of judicial propriety. *Compare id.* at 811 (justifying reversal based on "society's interest" that "justice satisfy the appearance of justice") *with id.* at 814 (Blackmun, J., concurring) (arguing that majority should have "gone further" and found that defendant's due process rights were violated); *see also Ex Parte Spain*, 589 S.W.2d 132, 134 (Tex. Crim. App. 1979) (finding "clear and obvious" violation of due process rights where prosecutor sought to revoke parole of previously represented client). Accordingly, the Court finds that the state court did not "unreasonably apply" *Louis Vuitton* or any other Supreme Court rule when it determined that the conversations between Attorney Alva and Petitioner "do not rise to the level of a due process violation." (Ex. 59 at 100–101.) If anything, the state court's ruling suggests that it applied the Supreme Court's more forgiving rule at the expense of the Texas due process standard it claims to have employed. (*See* Ex. 58 (dissenting from majority ruling on the basis of *Ex Parte Spain* and other Texas conflicts cases).)

3. The state courts made reasonable factual determinations

Finally, Petitioner has not shown "by clear and convincing evidence" that the state trial court made incorrect factual findings regarding Petitioner's meeting with Attorney Alva and the existence of an attorney client relationship. *See* 28 U.S.C. § 2254(e); *see also Leblanc v. Lange*, 365 S.W.3d 70, 79 (Tex. App. 2011) (analyzing existence of attorney-client relationship as a fact issue). To the contrary, the Court agrees with the state trial court that Attorney Alva and Public Defender Martinez gave "credible, consistent and corroborated" testimony about the ordinary course of bond interviews between defendants and public defenders. (*See* Ex. 59 at 99–102; *see also* Ex. 46 at 24–25 (Attorney Alva's testimony); *id.* at 42 (Public Defender Martinez's

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Alva admits that Facts of the case See RR 1 of 6 Pg 25

testimony).) Importantly, both attorneys agreed that (1) a public defender would not typically discuss the merits of a defendant's case at a bond interview, and (2) a public defender would quickly end an interview with a defendant if it became apparent that the defendant had retained a private attorney. (*Compare id.* at 24–25 (Attorney Alva's testimony) *with id.* at 40–43 (Public Defender Martinez's testimony).) Additionally, Public Defender Martinez testified that a public defender conducting a bond interview would normally take notes about the details of a client's case on a "Client Interview Sheet" but would cease taking notes if he or she learned that a defendant had retained a private attorney. (*Id.* at 47–48.) In light of this testimony, the state courts could have reasonably concluded that the absence of notes discussing the facts of Petitioner's case on his "Client Interview Sheet" (Ex. 60 at 166) indicated that Attorney Alva knew Petitioner had retained a private attorney at the time of their interview, and therefore, that Attorney Alva terminated her interview with Petitioner before an attorney-client relationship could be established.

By contrast, Petitioner's testimony about the meeting was effectively undermined on cross examination. Indeed, despite Petitioner's claim that he never told Attorney Alva he had retained a private attorney, Petitioner admitted on at least one occasion that he did inform the public defender's office that he had retained a private attorney. (Ex. 46 at 35–36 (admitting that Petitioner told a "Mr. Gonzalez" of the Webb County Public Defender's Office that he had retained a private attorney).) While Petitioner maintains that this conversation took place "after" the jailhouse meeting with Attorney Alva, he provides no documentary evidence to support his claim or to establish a timeline. (*Id.*; *see also* Ex. 60 at 87; Ex. at 61 at 126 (highlighting the absence of documentary evidence and jail visitation logs in the record).) Moreover, Petitioner's testimony suggests that his memory of Attorney Alva is hazy and that his ability to identify her is

suspect. (*See* Ex. 46 at 37–39 (failing to recall Attorney Alva's presence at multiple hearings, yet recalling the presence of Attorney Alva's co-counsel and the name of the presiding judge).) In light of these facts, the state trial court and TCCA's choice to credit Attorney Alva's account of the meeting—and specifically, her claim that she would not have allowed Petitioner to share confidential information or established an attorney-client relationship with Petitioner—was (1) "reasonable in light of the record read as a whole," (2) not clearly erroneous; and (3) not rebutted with "clear and convincing evidence."[13] *See United States v. Dinh*, 920 F.3d 307, 310 (5th Cir. 2019) (internal citations omitted).

For the foregoing reasons, the Court finds that the TCCA's denial of Petitioner's due process claim was (1) not contrary to federal law as defined by the Supreme Court; (2) a reasonable application of relevant Supreme Court rules and principles; and (3) adequately supported by the factual record. Accordingly, the Court cannot grant habeas relief on Petitioner's claim that Attorney Alva's alleged conflict of interest violated his due process rights. Moreover, because the Court finds that Attorney Alva's alleged conflict of interest did not result in a violation of Petitioner's rights under the federal Constitution, the Court also rejects Petitioner's claim of entitlement to a new trial to remedy that conflict. *See generally Swarthout*, 562 U.S. at

[13] The arguments raised in the TCCA's dissenting opinion (Ex. 58) do not alter the Court's conclusion. The TCCA dissenters, ascribing more weight to Petitioner's testimony than do the state trial court and TCCA majority, argue that "it is unclear whether an attorney-client relationship was formed." (Dkt. 58 at 3.) To the extent that the dissenters claim that the evidence in this case is susceptible to multiple interpretations, the Court agrees. One certainly *could* choose to believe Petitioner's account over Attorney Alva's, but even the dissenters stop short of this conclusion. (*Id.* at 11–12 (urging remand for additional factfinding).) Moreover, the mere fact that another interpretation of the evidence is possible does not compel a finding of clear error so long as the state trial court's finding is "plausible in light of the record read as a whole." *United States v. Dinh*, 920 F.3d 307, 310 (5th Cir. 2019) (internal citations omitted). Here, Attorney Alva and Public Defender Martinez's testimony renders the state trial court's conclusions "plausible," even if they are not the only conclusions a reasonable factfinder could reach.

219 (explaining that federal habeas relief may be granted only for violations of federal constitutional law). Respondent's request for summary judgment on Petitioner's first and second claims should therefore be granted.

B. Ineffective Assistance of Counsel Claim

In a separate claim for relief, Petitioner argues that his counsel, Attorney Sosa, rendered ineffective assistance by failing to raise the issue of Attorney Alva's conflict on appeal. Just as it did on the due process claims, the state trial court made findings of fact and conclusions of law on Petitioner's claim of ineffective assistance, which the TCCA adopted when it adjudicated Petitioner's claim. (*See* Ex. 59 at 99–102; Ex. 55.) Accordingly, the Court reviews Petitioner's ineffective assistance claim under a "doubly deferential" standard that applies both *Strickland* deference and deference under 28 U.S.C. § 2254(d). *See Richter*, 562 U.S. at 105. Under this standard, the Court asks whether there is "any reasonable argument" that counsel rendered effective assistance under *Strickland. Id.* Thus, in the present case, the relevant inquiry is whether there is any "reasonable argument" that Attorney Sosa made a professionally responsible choice not to raise the issue of Attorney Alva's conflict on appeal, or alternatively, whether there is "any reasonable argument" that Petitioner was not prejudiced by his counsel's failure to raise the issue. *See Strickland*, 466 U.S. at 688.

Here, one can make a reasonable argument that Attorney Sosa's choice not to raise the conflict issue was professionally responsible. In an affidavit submitted to the state trial court, Attorney Sosa explained that he "felt there was no merit to [the] issue [of Attorney Alva's alleged conflict of interest]" because he believed "the evidence established that the Webb County Public Defender's Office got appointed to this case[,] but when [the Public Defenders] went to interview the Defendant[, Defendant] state [*sic*] that he had hired private counsel and thereafter

said office [of the Public Defender] did nothing with respect to the case." (Ex. 60 at 170.) This is, more or less, the account of Petitioner's meeting with Attorney Alva that the state trial court accepted as true and which this Court deemed permissible in the preceding section. (*See* Ex. 59 at 99–102.) It was therefore not unreasonable for Attorney Sosa to base his legal and strategic decisions on this account of Petitioner's meeting with Attorney Alva.

Further, assuming that Attorney Sosa believed the statements in his affidavit, it was reasonable for him to conclude that the conflict issue lacked merit. In *Landers*—the case cited in the state court's factual findings (Ex. 59 at 101)—the TCCA held that "a district attorney's prosecution of a defendant he had previously represented [in a related matter] did not [*per se*] violate [the] defendant's right to due process." *Landers*, 256 S.W.3d at 295. Rather, it found that due process would be violated only where a defendant could show "actual prejudice by virtue of the . . . prior representation," and that such prejudice would exist where "the prosecuting attorney obtained confidential information by virtue of that representation which was used to [the] defendant's disadvantage." *Id.* at 305. Here, the record suggests that Attorney Sosa believed neither that Petitioner shared confidential information with Attorney Alva, nor that Attorney Alva actually used this information against Petitioner. (*See* Ex. 60 at 170 (noting Attorney Sosa's belief that the Public Defender "did nothing" in Petitioner's case).) Based on this belief, it was reasonable for Attorney Sosa to conclude that Petitioner's due process claim lacked merit under *Landers* and that the TCCA would likely reject it. To be sure, this is not the only possible conclusion that Attorney Sosa could have reached based on the facts of Petitioner's case or even the only plausible reading of *Landers*.[14] It is, however, an undeniably reasonable application of

[14] The TCCA dissenters offer an alternative analysis of Petitioner's claim that applies the disqualification rule in *Landers* more strictly. (*See* Dkt. 58 at 2 (citing *Landers*, 256 S.W.3d at 303).)

the *Landers* "rule" to the facts of Petitioner's case as Attorney Sosa (and ultimately, the TCCA) understood them. Accordingly, the Court finds that Attorney Sosa's decision not to raise the conflict issue did not "[fall] below an objective standard of reasonableness."[15] *Strickland*, 466 U.S. at 689.

Because the Court finds that Attorney Sosa's performance was reasonable, it need not reach the issue of prejudice. *See Puckett*, 907 F.2d at 584. Nonetheless, for the sake of completeness, the Court finds that Petitioner was not prejudiced by Attorney Sosa's choice not to raise the conflict issue on appeal. To the contrary, Petitioner had the opportunity to litigate the conflict issue in his state habeas application (Ex. 61 at 68). Because the TCCA—which has supervisory authority over the court that heard Petitioner's appeal—adopted findings that explicitly rejected Petitioner's due process arguments in the application, the Court finds that Petitioner has not shown a "reasonable probability" that he would have prevailed had the issue been raised on direct appeal rather than on state habeas review. (Ex. 59 at 99–101 (addressing due process claim).) *See Strickland*, 466 U.S. at 694. At the very least, one can make a reasonable argument that Petitioner would not have prevailed on direct appeal, which is all the AEDPA's deferential standard requires. *See Richter*, 562 U.S. at 105.

In light of the foregoing, the Court finds that (1) Attorney Sosa's decision not to raise the conflict issue on direct appeal was reasonable and (2) Petitioner was not prejudiced by his counsel's performance. Accordingly, Respondent's request for summary judgment on Petitioner's third claim should be granted.

Conclusion

[15] In the alternative, the Court finds that the state courts could have reasonably concluded that Attorney Sosa rendered effective assistance. This lesser finding is implicit in the Court's primary conclusion that Attorney Sosa's decision was reasonable.

For the foregoing reasons, the Court finds that the state courts' adjudication of Petitioner's due process claim was not (1) "contrary to federal law," (2) the result of an "unreasonable application" of federal law, or (3) based on an unreasonable determination of the facts of Petitioner's case. Further, the Court finds that Petitioner's counsel, Attorney Sosa, rendered effective assistance on direct appeal. Accordingly, Respondent's Motion for Summary Judgment (Dkt. 21) is hereby GRANTED as to all grounds of relief claimed by Petitioner, and Petitioner's "Petition for a Writ of Habeas Corpus by a Person in State Custody" (Dkt. 1) is hereby DENIED.

The Clerk of Court is DIRECTED to mail Petitioner a copy of this Order by any receipted means at the address indicated in his most recent filing.

IT IS SO ORDERED.

SIGNED this 13th day of April, 2020.

Diana Saldaña
United States District Judge