

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
October 27, 2021

Lyle W. Cayce
Clerk

Petitioner—Appellant,

versus

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

Respondent—Appellee.

Application for Certificate of Appealability
from the United States District Court
for the Northern District of Texas
USDC No. 5:17-CV-266

ORDER:

IT IS ORDERED that Appellant's motion for a certificate of
appealability is DENIED.

/s/ James F. Graves, Jr.
JAMES F. GRAVES, JR.
United States Circuit Judge

Appendix A

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

AMADOR RODRIGUEZ,	§	
	§	
Petitioner,	§	
	§	
	§	
	§	
	§	
	§	
DIRECTOR TDCJ-CID,	§	
	§	
	§	
	§	
	§	
Respondent,	§	

CIVIL ACTION NO. 5:17-CV-00266-C

ORDER

Petitioner, Amador Rodriguez, proceeding pro se, filed a Petition for a Writ of Habeas Corpus by a Person in State Custody on November 15, 2017. Respondent filed an Answer with Brief in Support and relevant records. Petitioner filed a reply. As explained below, the Court finds that the Petition should be denied and dismissed with prejudice.

I. BACKGROUND

Respondent has lawful custody of Petitioner pursuant to a judgment of conviction from the 140th District Court of Lubbock County, Texas. In Cause No. 2014-402,814, styled *State of Texas vs. Amador Rodriguez*, Petitioner was charged by indictment with the felony offense of evading arrest in a vehicle, with an allegation that the vehicle was a deadly weapon. The indictment also alleged two prior felony convictions for enhancement purposes.

Petitioner pleaded not guilty. A jury found Petitioner guilty of evading arrest in a vehicle and made an affirmative finding on the deadly weapon issue. After Petitioner pleaded true to the enhancements, the jury sentenced him to 45 years' incarceration in the Texas Department of Criminal Justice.

Petitioner appealed his conviction, but the Amarillo court of appeals affirmed the judgment. The Texas Court of Criminal Appeals (TCCA) later refused his petition for

- (1) his due process rights were violated when the state pleaded the deadly weapon allegation in the conjunctive ("use and exhibit . . . a motor vehicle that in the manner of its use and intended use was capable of causing death and serious bodily injury), but instructed the jury in the disjunctive ("use or exhibit," "use or intended use," "death or bodily injury");
- (2) his sentence is illegal because there was insufficient evidence that Petitioner both used and exhibited a deadly weapon and insufficient evidence that he both used and intended to use the vehicle in a manner that was capable of causing both death and serious bodily injury;
- (3) he received ineffective assistance of counsel when his trial attorney failed to object to the variance between the conjunctive language in the indictment and the disjunctive language in the jury charges;
- (4) he received ineffective assistance of counsel when his appellate counsel failed to challenge the variance between the conjunctive language in the indictment and the disjunctive language in the jury charges; and

Petitioner to raise the following grounds for review in his federal petition:

Petitioner filed his federal petition on November 15, 2017. The Court understands application without written order on the findings of the trial court without a hearing. rendering his trial unfair. But on September 20, 2017, the TCCA denied Petitioner's indictment and the jury instructions, and (5) the prosecutors made improper jury arguments, counsel rendered ineffective assistance by failing to challenge the variance between the object to the indictment as amended and variance in the jury instructions, (4) his appellate exhibit a deadly weapon," (3) his trial counsel rendered ineffective assistance by failing to charged in the indictment as far as the deadly weapon allegation (with the conjunctive "use and allegation in the disjunctive, (2) there was insufficient evidence to support his conviction as deadly weapon allegation in the conjunctive, but charged the jury on the deadly weapon raised five grounds for relief: (1) his right to due process was violated when the state pleaded the discretionary review. Petitioner then filed a state application for habeas corpus in which he

The Court has reviewed Petitioner's pleadings, Respondent's answer, and the state court records submitted by Respondent. The Court finds that an evidentiary hearing is not necessary to resolve the instant petition. *See Young v. Herring*, 938 F.2d 543, 560 n. 12 (5th Cir. 1991) ("[A] petitioner need not receive an evidentiary hearing if it would not develop material facts relevant to the constitutionality of his conviction."). Based upon the facts and law clearly set forth in Respondent's answer, the Court finds that to the extent that Petitioner's grounds were properly presented to the state high court, he has failed to demonstrate that the adjudication of his claims resulted in a decision contrary to clearly established federal constitutional law or resulted in a decision based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. 28 U.S.C. § 2254(d). Additionally, as explained in Respondent's Answer, to the extent Petitioner's grounds were not properly presented to the state high court, they are now procedurally defaulted, and in any event, are without merit. Therefore, the petition

II. DISCUSSION AND CONCLUSION

was not presented in his state collateral proceedings. Petitioner's fifth ground for relief is partially unexhausted and procedurally defaulted because it ground is procedurally defaulted because it was not properly raised in the TCCA, and deferential standard imposed by AEDPA.¹ Additionally, Respondent argues Petitioner's second Respondent argues that Petitioner's claims are all without merit and fail to overcome the the prosecutors made improper jury arguments based on the disjunctive jury instructions and argued things that were not in evidence.

(5)

for a writ of habeas corpus is DENIED, and this case is DISMISSED with prejudice. Any

pending motions are denied.

Pursuant to Rule 22 of the Federal Rules of Appellate Procedure and 28 U.S.C.

§ 2253(c), this Court finds that a certificate of appealability should be denied. Petitioner has

failed to show that reasonable jurists would find (1) this Court's "assessment of the constitutional

claims debatable or wrong," or (2) "it debatable whether the petition states a valid claim of the

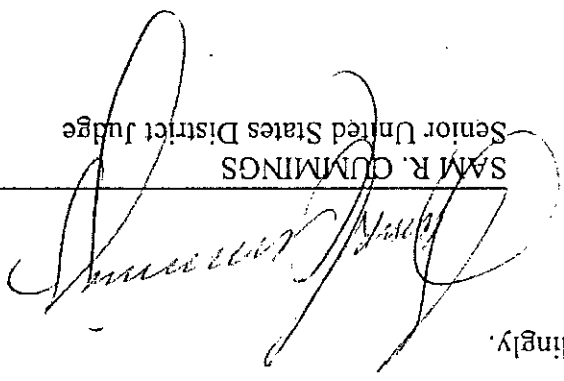
denial of a constitutional right" and "debatable whether [this Court] was correct in its procedural

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

SO ORDERED.

Judgment shall be entered accordingly.

Dated December 14, 2020.


SAM R. CUMMINGS
Senior United States District Judge

