United States Court of Appeals for the Fifth Circuit

No. 20-20357

ARTHUR R. HOLLOWAY, 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 Southern District of Texas
USDC No. 4:19-CV-1711

ON MOTION FOR RECONSIDERATION AND REHEARING EN BANC

Before ELROD, OLDHAM, and WILSON, *Circuit Judges.*

PER CURIAM:

The motion for reconsideration is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (FED. R. APP. P. 35 and 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.

United States Court of Appeals
for the Fifth Circuit

Certified as a true copy and issued as the mandate on Jun 21, 2021

Attest: Lyle W. Cayce
Clerk, U.S. Court of Appeals, Fifth Circuit

No. 20-20357

United States Court of Appeals
Fifth Circuit
FILED
May 28, 2021
Lyle W. Cayce
Clerk

ARTHUR R. HOLLOWAY, 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 Southern District of Texas
USDC No. 4:19-cv-1711

ORDER:

Arthur Roger Holloway, Jr., Texas prisoner #02037836, was convicted of capital murder and sentenced to life imprisonment. He seeks a certificate of appealability (COA) under 28 U.S.C. § 2253(c). Holloway argues that jurists of reason could debate his claim that the State withheld exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

A COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Buck v. Davis*, 137 S. Ct. 759, 773 (2017). When the district court rejects

constitutional claims on their merits, a COA should issue only if the petitioner "demonstrate[es] that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell,* 537 U.S. 322, 327 (2003). In light of the record and 28 U.S.C. § 2254, Holloway has failed to meet the required showing.

Accordingly, the motion for a COA is DENIED. Holloway's motion to remand is DENIED as moot, and his motion for judicial notice of the record and applicable law in support of his COA motion is DENIED as unnecessary.

ANDREW S. OLDHAM
United States Circuit Judge

Doc #69

United States District Court
Southern District of Texas
ENTERED
June 23, 2020
David J. Bradley, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ARTHUR ROGER HOLLOWAY JR.,	§	
	§	
Petitioner,	§	
VS.	§	CIVIL ACTION NO. 4:19-CV-1711
	§	
LORIE DAVIS,	§	
	§	
Respondent.	§	

FINAL JUDGMENT

For the reasons set forth in the Court's *Memorandum and Order* of even date, this case is DISMISSED with prejudice.

This is a FINAL JUDGMENT.

SIGNED on this 22nd day of June, 2020.

Kenneth M. Hoyt
United States District Judge

United States District Court
Southern District of Texas
ENTERED
June 23, 2020
David J. Bradley, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ARTHUR ROGER HOLLOWAY JR.,	§	
	§	
Petitioner,	§	
VS.	§	CIVIL ACTION NO. 4:19-CV-1711
	§	
LORIE DAVIS,	§	
	§	
Respondent.	§	

MEMORANDUM AND ORDER

Petitioner Arthur Roger Holloway, Jr. was convicted of capital murder by a jury in the 177th District Court of Harris County, Texas. That court sentenced him to life imprisonment.

This case is before the Court on Holloway's amended petition for a writ of habeas corpus and respondent Lorie Davis' motion for summary judgment. Having carefully considered the petition and the motion, all the arguments and authorities submitted by the parties, and the entire record, the Court is of the opinion that respondent's motion should be granted.

I. Background

Texas' Fourteenth Court of Appeals summarized the evidence:

> On April 24, 2013, an armed robbery occurred at a Phillips 66 gas station in southwest Houston. There were three robbers, one of whom shot the cashier with a high-powered rifle, an AK–47 or an SKS. The cashier survived and told police that he recognized one of the suspects, later identified as Korey Magee, as a regular customer.
>
> Several days later, the getaway car was identified as belonging to [Le Duy] Nguyen. Before the robbery, Nguyen had reported the car stolen and claimed he had recovered it himself. Nguyen did not provide any information to police about the robbery and was ruled out as a suspect because he was Asian and all of the robbers had been described as African–American. The police learned Nguyen was a crack addict and loaned his car to dealers in exchange for drugs.

The investigation of the neighborhood around the gas station led police to identify Magee as a suspect in the robbery, and the cashier identified Magee from a photo lineup. Police arranged for surveillance at the home of Magee's girlfriend, Crystal Dixon, to apprehend him. On May 10, Nguyen arrived and conducted a hand-to-hand transaction with someone who looked like Magee. Police stopped Nguyen when he drove away and searched his car for drugs but none were found. Subsequently, police entered Crystal's home and arrested Magee.

While in jail, Magee made several phone calls. Officer Daniel Costin, who listened to tapes of the phone calls, testified that it was his opinion the other voice on those calls was Lynell Jordan, an associate of Magee's. These calls revealed Magee believed Nguyen had brought the police to Crystal's house to arrest him and that Magee thought he had been "snitched on" by Nguyen. In one call, Jordan told Magee that "Art," a name Magee used for [Holloway], was coming to town. In another call, Magee asked Jordan to ensure Nguyen did not come to court and was told Nguyen would be "baptized."

On May 12, [Holloway] arrived from New Orleans. The following night, Khaundrica Williams, a friend of his and Magee's, drove [Holloway] to the home of her friend, Leslie Bullock.

Renchelle Dixon testified that on the morning of May 14, she had a conversation with her sisters Crystal and Christair. They then took a walk and saw a body. One of them called 911. Police arrived and determined the body, identified as Nguyen, had been shot twice—once in the abdomen and once in the head. Sergeant Hector Garcia testified "because it was so difficult to see the body from the street, that they had to have had previous knowledge that the body was there."

Also on the morning of May 14, Bullock saw Williams and [Holloway] watching a video on Bullock's computer. Williams and [Holloway] asked Bullock to drive them to southwest Houston. [Holloway] gave Bullock directions and they eventually drove near enough to Nguyen's house to see it was surrounded by police cars and crime scene tape. [Holloway] commented, "They must have found him."

When they returned to Bullock's house, she recalled the browser history on her computer and found the video from the robbery as well as the incident on the street they had just driven past. Bullock

heard [Holloway] talking to Williams. [Holloway] said, "something about going to somebody's house and somebody was being shot...." Based on the conversation she heard, Bullock thought it was [Holloway] who did the shooting. Bullock testified, "I heard him saying something about the door was being knocked on and he went to shoot... I only can say what I heard him say. So somebody knocked at the door and he shot a couple of times and somebody got shot." Bullock saw [Holloway] make a hand gesture like he was holding a rifle and heard him say, "When he opened the door, I smashed him. I hit him, so he out of there." Bullock heard [Holloway] tell Williams about going to the jail and speaking with someone regarding the crime scene they had driven past. Bullock recalled hearing Nguyen's name. Officer Costin testified that when Magee learned of Nguyen's death, he "was ecstatic."

Williams and [Holloway] were arrested after buying gas at the same Phillips 66. Capital murder charges were filed against [Holloway], Williams, Jordan, and Magee. Williams testified against [Holloway] at trial.

* * *

In addition to the evidence set forth above, the jury heard the testimony of accomplice witness Khaundrica Williams. According to Williams, on May 13, [Holloway] called her for a ride. Late than night, [Holloway] asked Williams for her car keys; she refused because she thought [Holloway] was intoxicated. Instead, Williams drove Jordan and [Holloway] to a "trap house" that Magee and his gang used for dealing drugs. [Holloway] and Jordan entered the house while Williams, high on Xanax, remained in the car.

When Jordan and [Holloway] returned, Jordan was carrying a rifle like the one Williams had seen in a video released to the media of the Phillips 66 robbery. [Holloway] directed Williams to drive to an alley near Nguyen's home. [Holloway] exited the car with the rifle and walked off. A short time later Williams heard two gunshots. [Holloway] returned to the car with the gun. [Holloway] and Jordan told Williams to drive away but she was afraid and refused. Williams got into the backseat and Jordan drove them back to the trap house.

After [Holloway] and Jordan exited the car, Jordan left and [Holloway] carried the rifle into the house. [Holloway] then returned to the car without the rifle. One of Magee's other

associates emerged from the house and signaled Williams to remain quiet.

Holloway v. State, No. 14-15-00972-CR, 2017 WL 1181315, at *1–3 (Tex. App.–Houston [14th Dist.] Mar. 30, 2017).

The jury convicted Holloway of capital murder. He was sentenced to life imprisonment. The Fourteenth Court of Appeals affirmed.

Holloway subsequently filed a state habeas corpus application. It was denied without written order on the findings of the trial court.

Holloway filed his federal petition for a writ of habeas corpus on May 7, 2019 and amended the petition on June 25, 2019. He has also filed several affidavits in support of his amended petition. Respondent moved for summary judgment on October 21, 2019. Holloway filed his response on November 19, 2019, and has filed several additional affidavits, and supplements and amendments to his response.

II. Applicable Legal Standards

A. The Anti-Terrorism and Effective Death Penalty Act

This federal petition for habeas corpus relief is governed by the applicable provisions of the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"). *See Woodford v. Garceau*, 538 U.S. 202, 205-08 (2003); *Lindh v. Murphy*, 521 U.S. 320, 335-36 (1997). Under the AEDPA, federal habeas relief based upon claims that were adjudicated on the merits by the state courts cannot be granted unless the state court's decision (1) "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) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); *Early v. Packer*, 537 U.S. 3, 7-8 (2002); *Cobb v. Thaler*, 682 F.3d 364, 372-73 (5th Cir. 2012).

For questions of law or mixed questions of law and fact adjudicated on the merits in state court, this Court may grant habeas relief under 28 U.S.C. § 2254(d)(1) only if the state court decision "was contrary to, or involved an unreasonable application of, clearly established [Supreme Court precedent]." *See Kittelson v. Dretke*, 426 F.3d 306, 318 (5th Cir. 2005). Under the "contrary to" clause, this Court may afford habeas relief only 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 differently than . . . [the Supreme Court] has on a set of materially indistinguishable facts.'" *Dowthitt v. Johnson*, 230 F.3d 733, 740-41 (5th Cir. 2000) (quoting *Williams v. Taylor*, 529 U.S. 362, 406 (2000).

The "unreasonable application" standard permits federal habeas relief only if a state court decision "identifies the correct governing legal rule from [the Supreme Court] cases but unreasonably applies it to the facts of the particular state prisoner's case." *Williams*, 529 U.S. at 406. "In applying this standard, we must decide (1) what was the decision of the state courts with regard to the questions before us and (2) whether there is any established federal law, as explicated by the Supreme Court, with which the state court decision conflicts." *Hoover v. Johnson*, 193 F.3d 366, 368 (5th Cir. 1999). A federal court's "focus on the 'unreasonable application' test under Section 2254(d) should be on the ultimate legal conclusion that the state court reached and not on whether the state court considered and discussed every angle of the evidence." *Neal v. Puckett*, 239 F.3d 683, 696 (5th Cir. 2001), *aff'd*, 286 F.3d 230 (5th Cir. 2002) (en banc); *see also Pape v. Thaler*, 645 F.3d 281, 292-93 (5th Cir. 2011). The focus for a federal court under the "unreasonable application" prong is "whether the state court's determination is 'at least minimally consistent with the facts and circumstances of the case.'" *Id.* (quoting *Neal*, 239 F.3d at 696, and *Hennon v. Cooper*, 109 F.3d 330, 335 (7th Cir. 1997)); *see*

also Gardner v. Johnson, 247 F.3d 551, 560 (5th Cir. 2001) ("Even though we cannot reverse a decision merely because we would reach a different outcome, we must reverse when we conclude that the state court decision applies the correct legal rule to a given set of facts in a manner that is so patently incorrect as to be 'unreasonable.'")

The AEDPA precludes federal habeas relief on factual issues unless the state court's adjudication of the merits was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. *See* 28 U.S.C. § 2254(d)(2); *Martinez v. Caldwell*, 644 F.3d 238, 241-42 (5th Cir. 2011). The state court's factual determinations are presumed correct unless rebutted by "clear and convincing evidence." 28 U.S.C. § 2254(e)(1); *see also Jackson v. Anderson*, 112 F.3d 823, 824-25 (5th Cir. 1997). This Court may only consider the factual record that was before the state court in determining the reasonableness of that court's findings and conclusions. *Cullen v. Pinholster*, 563 U.S. 170 (2011). Review is "highly deferential," *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (*per curiam*), and the unreasonableness standard is "difficult [for a petitioner] to meet." *Harrington v. Richter*, 562 U.S. 86, 102 (2011).

B. Summary Judgment Standard in Habeas Corpus Proceedings

In ordinary civil cases, a district court considering a motion for summary judgment is required to construe the facts of the case in the light most favorable to the non-moving party. *See Anderson v. Liberty Lobby*, 477 U.S. 242, 255 (1986) (The "evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor"). "As a general principle, Rule 56 of the Federal Rules of Civil Procedure, relating to summary judgment, applies with equal force in the context of habeas corpus cases." *Clark v. Johnson*, 202 F.3d 760, 764 (5th Cir. 2000). This principle is limited, however; Rule 56 applies insofar as it is consistent with

established habeas practice and procedure. *See Smith v. Cockrell*, 311 F.3d 661, 668 (5th Cir. 2002) (citing Rule 11 of the Rules Governing Section 2254 Cases), *overruled on other grounds by Tennard v. Dretke,* 542 U.S. 274 (2004). Therefore, § 2254(e)(1) – which mandates that findings of fact made by a state court are "presumed to be correct" – overrides the ordinary summary judgment rule that all disputed facts must be construed in the light most favorable to the nonmoving party. *See id.* However, in a habeas proceeding, unless the petitioner can "rebut[ ] the presumption of correctness by clear and convincing evidence" regarding the state court's findings of fact, those findings must be accepted as correct. *See id.* Thus, the Court may not construe the facts in the state petitioner's favor where the prisoner's factual allegations have been adversely resolved by express or implicit findings of the state courts, and the prisoner fails to demonstrate by clear and convincing evidence that the presumption of correctness in 28 U.S.C. § 2254(e)(1) should not apply. *See Marshall v. Lonberger*, 459 U.S. 422, 432 (1983); *Sumner v. Mata*, 449 U.S. 539, 547 (1981); *Emery v. Johnson*, 940 F.Supp. 1046, 1051 (S.D. Tex. 1996), *aff'd*, 139 F.3d 191 (5th Cir. 1997).

III. Analysis

Holloway's petition raises two claims for relief. He contends that the prosecution failed to disclose two items of material, exculpatory evidence – a cell phone recovered from the crime scene, and the police report. Holloway claims that the cell phone belonged to Marlon Turner who, he alleges, had expressed an intention to kill Nguyen. He contends that the offense report was disclosed too late for him to effectively prepare for trial.

"[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Banks v. Dretke*, 540 U.S. 668, 691 (2004)

(citing *Brady v. Maryland*, 373 U.S. 83, 87 (1963)). A prosecutor must disclose evidence favorable to an accused if it "is of sufficient significance to result in the denial of the defendant's right to a fair trial." *United States v. Agurs*, 427 U.S. 97, 108 (1976). Evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985). The question is not whether the result would have been different. Rather, it is whether given the non-disclosures of material evidence the verdict is less worthy of confidence. In defining the scope of the duty of disclosure, it is no answer that a prosecutor did not have possession of the evidence or that he was unaware of it. Rather, the prosecutor "has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Kyles v. Whitley*, 514 U.S. 419, 437 (1995). The Supreme Court framed the three components or essential elements of a *Brady* prosecutorial misconduct claim: "The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Banks*, 540 U.S. at 690(quoting *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999)).

A. <u>Cell Phone</u>

Holloway argues that the State suppressed evidence that two cell phones, one of which belonged to Marlon Turner, were recovered from the crime scene. He claims that Turner was known to have wanted to murder Nguyen. The state habeas court found that this claim was factually false.

Citing to the trial transcript, *see* 16 Tr. at 49-50, 53-54, the state court observed that the prosecution presented evidence that two cell phones were recovered from the crime scene,

photographed by police, and tagged into evidence. State Habeas Clerk's Record ("SHCR") (Doc. # 31-58) at Bates Number 103, Finding of Fact ("FF) 7. A photograph of one of the cell phones was entered into evidence at trial. The court also found that Holloway's claim that one of the phones belonged to Marlon Turner rests on cell phone records that Nguyen called someone identified in his phone as "Marlon Turner," but that there was no evidence either that either one of the phones found at the crime scene belonged to Marlon Turner. The court further found that there was no evidence that the "Turner" referenced in a phone call related to the case, and who allegedly wanted to kill Nguyen, referred to Marlon Turner. *Id.* at Bates Number 103-04. Testimony showed that Nguyen called "Marlon Turner" but police could not determine the identity of this person. 16 Tr. at 132-34. In the absence of any evidence that the phone belonged to Marlon Turner or that the Marlon Turner named in Nguyen's contacts is the same "Turner" mentioned in the phone call, Holloway fails to demonstrate either that evidence was suppressed, or that evidence concerning "Marlon Turner" was material. The state habeas court's conclusion on this point is reasonable based on the trial record and is entitled to deference under the AEDPA. Holloway is not entitled to relief.

B. Offense Report

In his state habeas application, Holloway argued that the State violated a discovery order by failing to timely disclose an offense report. Holloway contended that missing portions of the report referenced the cell phone that he claims belonged to Marlon Turner. *See* SHCR (Doc. # 31-56) at Bates Number 7-8, 33-34. The state court found that Holloway failed to plead facts establishing a *Brady* violation. SHCR (Doc. # 31-58) at Bates Number 102-02, FF 6. As discussed above, the cell phone was not suppressed, and Holloway does not establish that the phone belonged to the "Turner" mentioned in the phone call. He thus fails to establish that the

cell phone was exculpatory; it follows that a reference to the cell phone in the offense report was not exculpatory. Moreover, the state habeas court's conclusion that Holloway failed to demonstrate that the alleged failure to disclose the report hindered the preparation of his defense was reasonable based on the record before that court. Holloway fails to demonstrate that he is entitled to relief on this claim.

C. Evidentiary Hearing

Holloway also filed a motion for an evidentiary hearing. An evidentiary hearing is not required if there are "no relevant factual disputes that would require development in order to assess the claims." *Michael Williams v. Taylor*, 529 U.S. 420, 436 (2000) (stating that it was "Congress' intent to avoid unneeded hearings in federal habeas corpus"); *Robison v. Johnson*, 151 F.3d 256, 268 (5th Cir. 1998), *cert. denied*, 526 U.S. 1100 (1999). "If it appears that an evidentiary hearing is not required, the judge shall make such disposition of the petition as justice shall require." Rules Governing Section 2254 Cases R. 8. Petitioner has not demonstrated any factual dispute that would entitle him to relief. *See Perillo v. Johnson*, 79 F.3d 441, 444 (5th Cir. 1996). Each of Petitioner's claims can be resolved by reference to the state court record, the submissions of the parties, and relevant legal authority. There is no basis upon which to hold an evidentiary hearing on these claims

D. Certificate of Appealability

Holloway has not requested a certificate of appealability ("COA"), but this court may determine whether he is entitled to this relief in light of the foregoing rulings. *See Alexander v. Johnson*, 211 F.3d 895, 898 (5th Cir. 2000) ("It is perfectly lawful for district court[]s to deny COA *sua sponte*. The statute does not require that a petitioner move for a COA; it merely states that an appeal may not be taken without a certificate of appealability having been issued.") A petitioner may obtain a COA either from the district court or an appellate court, but an appellate court will not consider a request for a COA until the district court has denied such a request. *See Whitehead v. Johnson*, 157 F.3d 384, 388 (5th Cir. 1988); *see also Hill v. Johnson*, 114 F.3d 78, 82 (5th Cir. 1997) ("[T]he district court should continue to review COA requests before the court of appeals does.").

A certificate may issue only if the petitioner has made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). A petitioner "makes a substantial showing when he demonstrates that his application involves issues that are debatable among jurists of reason, that another court could resolve the issues differently, or that the issues are suitable enough to deserve encouragement to proceed further." *Hernandez v. Johnson*, 213 F.3d 243, 248 (5th Cir.), *cert. denied*, 531 U.S. 966 (2000), This Court has carefully considered Holloway's amended petition and concludes that jurists of reason would not find it debatable that the State did not suppress material, exculpatory evidence. Therefore, Holloway has not made a "substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), and no certificate of appealability will issue.

IV. Conclusion

For the foregoing reasons, respondent's motion for summary judgment is granted and Holloway's amended petition for a writ of habeas corpus is dismissed.

V. Order

It is ORDERED as follows:

1. Respondent Lorie Davis' motion for summary judgment (Doc. #30) is GRANTED;

2. Holloway's amended petition for a writ of habeas corpus (Doc. # 12) is dismissed;

3. Holloway's motion for an evidentiary hearing (Doc. # 52) is DENIED; and

4. No certificate of appealability is issued.

The Clerk shall notify all parties and provide them with a true copy of this Memorandum and Order.

It is so ORDERED.

SIGNED on this 22nd day of June, 2020.

Kenneth M. Hoyt
United States District Judge