APPENDIX A

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

JUDGMENT RENDERED JUNE 3, 2016

NO. 03-15-00154-CR

Frank Henderson Brown, Appellant

v.

The State of Texas, Appellee

**APPEAL FROM 147TH DISTRICT COURT OF TRAVIS COUNTY
BEFORE JUSTICES PURYEAR, GOODWIN, AND FIELD
AFFIRMED -- OPINION BY JUSTICE PURYEAR**

This is an appeal from the judgment of conviction rendered by the trial court. Having reviewed the record and the parties' arguments, the Court holds that there was no reversible error in the trial court's judgment. Therefore, the Court affirms the trial court's judgment of conviction. Because appellant is indigent and unable to pay costs, no adjudication of costs is made.

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-15-00154-CR

Frank Henderson Brown, Appellant

v.

The State of Texas, Appellee

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 147TH JUDICIAL DISTRICT
NO. D-1-DC-14-200998, HONORABLE CLIFFORD A. BROWN, JUDGE PRESIDING

MEMORANDUM OPINION

After an undercover police officer, Officer Michael Fickel, saw the driver of a car engage in some suspicious activity in the parking lot of a hotel and after seeing Frank Henderson Brown get into the passenger side of that car, Officer Fickel followed the car after it left the parking lot and later witnessed the driver of the car commit several traffic violations. Officer Fickel relayed his observations to members of his unit, and some of the officers initiated a traffic stop of the vehicle. During the traffic stop, the officers discovered that Brown had a gun in his waistband. Ultimately, Brown was arrested and charged with the unlawful possession of a firearm by a felon. *See* Tex. Penal Code § 46.04(a) (setting out elements of offense), (e) (stating that offense is third-degree felony). In addition, the indictment contained two enhancement paragraphs alleging that Brown had previously been convicted twice of burglary of a habitation. *See id.* § 30.02(a) (listing elements of offense of burglary of habitation), (c)(2) (providing that offense is second-degree

felony). At the end of the first phase of the trial, the jury found Brown guilty of the charged offense. Brown elected to have the district court assess his punishment, and the district court found the two enhancement allegations to be true. At the end of the punishment phase, the district court imposed a sentence of 25 years' imprisonment. *See id.* § 12.34 (listing permissible punishment range for third-degree felony), .42(d) (enhancing permissible punishment range for individual convicted of felony if he "has previously been finally convicted of two felony offenses, and the second previous felony conviction is for an offense that occurred subsequent to the first previous conviction having become final"). In three issues on appeal, Brown contends that the district court erred by allowing the State to present hearsay evidence, that his attorney provided ineffective assistance of counsel, and that the State "committed misconduct during closing argument." We will affirm the district court's judgment of conviction.

DISCUSSION

Hearsay

In his first issue on appeal, Brown contends that the district court erred when it allowed Officer Fickel "to present hearsay evidence that [Brown] was found in a location known for higher criminal activity."

When reviewing a trial court's ruling on the admission of evidence, appellate courts use an abuse-of-discretion standard of review. *Davis v. State*, 329 S.W.3d 798, 803 (Tex. Crim. App. 2010). Under that standard, a trial court's ruling will only be deemed an abuse of discretion if it is so clearly wrong as to lie outside the zone of reasonable disagreement, *Lopez v. State*, 86 S.W.3d 228, 230 (Tex. Crim. App. 2002), or is arbitrary or unreasonable, *State v. Mechler*,

153 S.W.3d 435, 439 (Tex. Crim. App. 2005). Moreover, the ruling will be upheld provided that the trial court's decision "is reasonably supported by the record and is correct under any theory of law applicable to the case." *Carrasco v. State*, 154 S.W.3d 127, 129 (Tex. Crim. App. 2005).

Turning to the testimony at issue, Officer Fickel described the circumstances leading up to Brown's arrest. Specifically, he explained that his unit was patrolling "the I-35 corridor, the hotel district in particular to the north and south." When the State asked whether there was "anything that had prompted that specific focus that day," Brown objected and stated as follows:

> Judge, I believe that that question is going to encourage the statement that there had been some complaints or he had received some complaints or he was acting on some reports all of which is hearsay in which I believe Mr. Popper, the previous attorney, had requested documentation of any corroboration of any of these complaints and there is none that the State could provide, so this is simply eliciting hearsay testimony which is improper.
>
> . . .
>
> And I'm assuming that the officer is going to respond that we had received complaints from Holiday Inn and about the Travel Lodge and that has not been documented by any proof or anything; and Mr. Popper had asked for records or any kind of documentation to verify that and there has been none.

After listening to Brown's objection, the district court ruled that it would allow Officer Fickel to answer the question. When the questioning resumed, the State asked Officer Fickel if there was "any particular reason that you focused your attention on that area that particular day," and the officer responded, "Yes, ma'am. I had received a tip." Immediately after Officer Fickel answered the question, Brown stated, "Objection, Your Honor, hearsay. That's exactly the objection I made at the bench." In response to the objection, the district court instructed the witness, "Okay. You may answer the question, but I would instruct the witness to answer the question generally, not

something that someone else told you, specifically, words." The Officer then explained that he had received some information that had focused his attention to that area.

After providing that answer, Officer Fickel continued to answer questions on a range of topics, including describing where he was on the day in question, what the buildings looked like in the area, and whether he noticed any unusual activity. Following those questions, the State asked Officer Fickel, "In terms of that specific I-35 business corridor that goes through your region, what's been your experience kind of, generally, with the level of crime that's going on in that," and Brown objected "to the relevance of that question because it has nothing to do with the facts of this case." After Brown made his objection, the district court ruled that it would allow Officer Fickel to answer the question. Once the district court made its ruling, Officer Fickel testified as follows:

> The particular hotels, the reason we were run[ning] this operation, besides our tips, is because those hotels are a common place for people to commit activities that they don't want to do at their house. So if you are checking in to a hotel on the I-35 district and you have a car there that returns to an address in Austin and you stayed at the hotel for one day increments over the past couple of months, that usually sends up a flag to us.

Immediately after Officer Fickel answered the question, Brown asked "to take the witness on voir dire in regards to those last statements, because otherwise the statements are irrelevant," but the district court denied the request and overruled the objection. On appeal, Brown contends that the portions of Officer Fickel's testimony in which he stated that he was patrolling in the area at issue because he had received a tip and that it was common for people to use the hotels in that area for activities that they do not want to undertake at their homes were hearsay under Rule of Evidence 801(d). *See* Tex. R. Evid. 801(d).

Testimony Regarding Tip Received by the Police

As discussed previously, Brown asserts that the portion of Officer Fickel's testimony in which he related that the police had received a tip regarding misconduct in the area was improper hearsay. As a preliminary matter, we note that after the district court made its ruling, Officer Fickel mentioned in his testimony several more times that the police had received a tip, and Brown did not request a running objection and made no objection to that subsequent testimony. *See Trung The Luu v. State*, 440 S.W.3d 123, 127 (Tex. App.—Houston [14th Dist.] 2013, no pet.) (providing that party must object every time inadmissible evidence is offered or request running objection and that any error in admission of evidence is cured when evidence comes in without objection). Even assuming that Brown's failure to object to the later portions of Officer Fickel's testimony did not waive any alleged error, we would still be unable to conclude that the district court abused its discretion by overruling Brown's hearsay objection.

Hearsay is a statement that "the declarant does not make while testifying at the current trial or hearing" and that "a party offers in evidence to prove the truth of the matter asserted in that statement." Tex. R. Evid. 801(d). Moreover, "extra-judicial statements [are] not inadmissible hearsay" if "they are admitted not to prove the truth of the matter asserted, but rather to explain how the defendant came to be a suspect." *Dinkins v. State*, 894 S.W.2d 330, 347 (Tex. Crim. App. 1995). Stated differently, "[a]n officer's testimony is not hearsay when it is admitted, not for the truth, but to establish the course of events and circumstances leading to the arrest." *Thornton v. State*, 994 S.W.2d 845, 854 (Tex. App.—Fort Worth 1999, pet. ref'd). In fact, "it is permissible for a police officer to testify that he was acting in response to information received" and "may explain their presence and conduct." *Id.*; *see also Poindexter v. State*, 153 S.W.3d 402, 408 n.21 (Tex. Crim.

App. 2005) (stating that, in general, "testimony by an officer that he went to a certain place or performed a certain act in response to generalized 'information received' is normally not considered hearsay because the witness should be allowed to give some explanation of his behavior"), *overruled in part on other grounds by Robinson v. State*, 466 S.W.3d 166, 173 & n.32 (Tex. Crim. App. 2015).

In the portion of Officer Fickel's testimony at issue leading up to Brown's objection, Officer Fickel explained that his unit was focused in a particular region of the City of Austin and that the unit was paying particular attention to the hotel district in that region in response to a tip that they had received, but Officer Fickel provided no further information regarding the alleged tip. In light of the record before the district court at the time that it made the ruling, *see Willover v. State*, 70 S.W.3d 841, 845 (Tex. Crim. App. 2002) (explaining that "an appellate court must review the trial court's ruling in light of what was before the trial court at the time the ruling was made"), we must conclude that the district court did not abuse its discretion by determining that the testimony at issue was not inadmissible hearsay because it helped to explain Officer Fickel's presence in the area and to describe the events leading up to Brown's arrest, because it did not reveal any content of the alleged tip given to the police regarding criminal activity in the area and was not offered to prove the truth of that tip, and because the testimony was "a general description of possible criminality" and not "a specific description of the defendant's purported involvement or link to that activity," *see Poindexter*, 153 S.W.3d at 408 n.21.

Testimony Regarding Crime in Area

As set out above, Brown also contends on appeal that the district court erred by overruling his hearsay objection to the testimony from Officer Fickel in which the Officer related

that "those hotels are a common place for people to commit activities that they don't want to do at their house." However, as pointed out by the State, Brown did not raise a hearsay objection to this portion of Officer Fickel's testimony. *See* Tex. R. App. P. 33.1(a) (stating that to preserve error for appeal, record must show that complaint was made to trial court and that trial court ruled on request or refused to rule and that "complaining party objected to the refusal"). Although the record shows that Brown made a hearsay objection to earlier portions of Officer Fickel's testimony, Brown did not, as set out above, request a running objection to Officer Fickel's testimony on hearsay grounds, nor did he raise a hearsay objection to the testimony at issue. *See Lane v. State*, 151 S.W.3d 188, 193 (Tex. Crim. App. 2004) (explaining that "'to preserve error in admitting evidence, a party must . . . object each time the inadmissible evidence is offered or obtain a running objection. An error [if any] in the admission of evidence is cured where the same evidence comes in elsewhere without objection'" (quoting *Valle v. State*, 109 S.W.3d 500, 509 (Tex. Crim. App. 2003), with alteration in *Lane*)); *Ethington v. State*, 819 S.W.2d 854, 859-60 (Tex. Crim. App. 1991) (providing that objection to testimony was waived when defense counsel objected to first question but did not ask for running objection or "hearing out of the jury's presence so he would not have to constantly object" and witness continued to provide "detailed testimony" on topic). Instead, Brown argued to the district court that the testimony at issue was not relevant to the facts of the current case. *See Yazdchi v. State*, 428 S.W.3d 831, 844 (Tex. Crim. App. 2014) (stating that "the point of error on appeal must comport with the objection made at trial"); *Broxton v. State*, 909 S.W.2d 912, 918 (Tex. Crim. App. 1995) (noting that objection stating one legal theory may not be used to support different legal theory on appeal); *cf. Webb v. State*, No. 01-14-00174-CR, 2015 WL 5315332, at *3 (Tex. App.—Houston [1st Dist.] Sept. 10, 2015, pet. ref'd) (mem. op., not designated for publication)

(declining to address merits of argument that "may (or may not) be a relevance issue" because defendant only objected on hearsay grounds). Accordingly, we must conclude that Brown did not preserve any hearsay complaint regarding this portion of Officer Fickel's testimony.

Assuming for the sake of argument that Brown's first appellate issue can be read as asserting that the district court erred by overruling his relevancy objection, we would be unable to sustain this portion of his first issue on appeal. "Evidence is relevant if . . . it has any tendency to make a fact more or less probable than it would be without the evidence" and "the fact is of consequence in determining the action." Tex. R. Evid. 401; *see id.* R. 402 (providing that "[r]elevant evidence is admissible unless" prohibited by Rules of Evidence, "other rules prescribed under statutory authority," statute, or "the United States or Texas Constitution"). Testimony regarding how an officer "happened upon the scene of a crime or accident" is "[a]lmost always . . . relevant." *Kimball v. State*, 24 S.W.3d 555, 564 (Tex. App.—Waco 2000, no pet.). In his testimony, Officer Fickel explained that the reason that he was at the hotel where he observed the suspicious activity that ultimately led to Brown's arrest was because the hotels in that area of the City were being used as a place to engage in criminal conduct and because his unit was focusing on the hotels in that area in an effort to combat that criminal activity. Accordingly, we would be unable to conclude that the district court abused its discretion when it overruled Brown's relevancy objection.[1]

[1] Although we need not further address the matter, we note that even if Brown had raised a hearsay objection to the testimony at issue and even if the district court had overruled the objection, we would be unable to conclude that the district court abused its discretion because, as set out above, the testimony was not offered for the truth of the matter asserted but instead to show how Brown became a suspect. *See Thornton v. State*, 994 S.W.2d 845, 854 (Tex. App.—Fort Worth 1999, pet. ref'd).

For all these reasons, we overrule Brown's first issue on appeal.

Effectiveness of Counsel

In his second issue on appeal, Brown insists that his trial attorney provided ineffective assistance of counsel by referring to him "as a 'bad guy' during closing argument" in the first phase of the trial. Specifically, Brown is referring to the following portion of his trial attorney's closing argument in which his attorney stated that he was "not a good guy":

> What the State is doing is, the State is waiving a scary gun at you and saying this man is a bad man, so don't worry about anything else. That's what the State is doing. Yeah, we saw on the video, he had that gun. *He's not a good guy. I'm going to say it. I'm not hiding anything*, but I'm also not hiding page 3, paragraph five; and that says that you are instructed that before an officer has the right to make a temporary investigative detention, traffic stop, the officer must have a reasonable suspicion that a violation of the law is occurring or has occurred. So that's where everything begins and ends. Because if you're convinced beyond a reasonable doubt that there was a traffic violation at any point, then you convict him. I'm sorry, if you have a reasonable doubt, you don't convict him. If you don't have any reasonable doubt, then you convict him. So that's what you focus on, and that's not an easy thing to do.

(Emphasis added.) In light of this portion of his trial attorney's closing argument, Brown asserts that his lawyer's decision to describe him in that manner could not have been the result of a reasonable trial strategy because "[t]here was no evidentiary benefit to be gained from the statement." Similarly, Brown contends that his trial attorney's actions likely affected the jurors in this case by encouraging them to convict and, therefore, prejudiced his defense.

To succeed on an ineffectiveness claim, a defendant must overcome the strong presumption that his trial "counsel's conduct falls within the wide range of reasonable professional assistance" and must show that the attorney's "representation fell below an objective standard of

reasonableness . . . under prevailing professional norms" and that "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, 689, 694 (1984). "[A]n appellant's failure to satisfy one prong of the *Strickland* test negates a court's need to consider the other prong." *Garcia v. State*, 57 S.W.3d 436, 440 (Tex. Crim. App. 2001). Evaluations of effectiveness are based on "the totality of the representation," *Frangias v. State*, 450 S.W.3d 125, 136 (Tex. Crim. App. 2013); *see also Davis v. State*, 413 S.W.3d 816, 837 (Tex. App.—Austin 2013, pet. ref'd) (providing that assessment should consider "cumulative effect" of counsel's deficiencies), and allegations of ineffectiveness must be firmly established by the record, *Mallett v. State*, 65 S.W.3d 59, 63 (Tex. Crim. App. 2001). Furthermore, even though a defendant is not entitled to representation that is error-free, a single error can render the representation ineffective if it "was egregious and had a seriously deleterious impact on the balance of the representation." *Frangias*, 450 S.W.3d at 136.

In general, direct appeals do not provide a useful vehicle for presenting ineffectiveness claims because the record for that type of claim is usually undeveloped. *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005); *see also Mallett*, 65 S.W.3d at 63 (stating that in majority of cases, "the record on direct appeal is undeveloped and cannot adequately reflect the motives behind trial counsel's actions"). In addition, before their representation is deemed ineffective, trial attorneys should be afforded the opportunity to explain their actions. *Goodspeed*, 187 S.W.3d at 392 (stating that "counsel's conduct is reviewed with great deference, without the distorting effects of hindsight"). If that opportunity has not been provided, as in this case, an appellate court should not determine that an attorney's performance was ineffective unless the conduct at issue "was so outrageous that no competent attorney would have engaged in it." *See Garcia*, 57 S.W.3d at 440.

As a preliminary matter, we note that the record does not contain any information regarding why Brown's attorney elected to characterize his client in the manner that he did. *Cf. Mallett*, 65 S.W.3d at 64-65 (stating that "speculation on counsel's strategy is immaterial to our determination that counsel has not been proven ineffective" when record is silent). However, we also note that his attorney explained to the district court in a hearing outside the presence of the jury that the overall trial strategy was to challenge the propriety of the traffic stop rather than attack the evidence of the charged offense, and his attorney's questioning of the State's witnesses and argument were consistent with that strategy. Moreover, given that the State was able to present evidence of the charged offense through the testimony of several police officers who testified that Brown had a weapon on him and attempted to flee from the officer who searched him but also through a video recording of the incident, Brown's trial attorney's strategy to attack the lawfulness of the traffic stop seems reasonable. In addition, Brown's trial attorney made the comments at issue after the jury had already been presented with evidence establishing that Brown had previously been convicted of a state-jail felony "for attempted evading arrest serious bodily injury." Accordingly, Brown's trial attorney may have determined that acknowledging Brown's criminal past in the manner that he did might establish credibility with the jury when asking the jury to ignore Brown's prior criminal behavior and focus on whether there was a proper basis for the traffic stop in accordance with the overarching trial strategy. *Cf. West v. State*, 474 S.W.3d 785, 791 (Tex. App.—Houston [14th Dist.] 2014, no pet.) (determining that trial counsel's references to his client "as a 'bad guy' and a 'criminal generally' who 'traded drugs for the use of this car'" "may have been part of defense counsel's strategy to provide an alternative explanation of how appellant gained possession of the stolen vehicle" and did "not necessarily rise to the level of ineffective assistance of counsel").

For all of these reasons, we must conclude that the record is not sufficiently developed to evaluate whether Brown's attorney's decision to characterize Brown in the manner that he did was part of reasonable trial strategy because his attorney has not "been given an opportunity to respond to" the claims, *see Goodspeed*, 187 S.W.3d at 392, 394, that Brown has failed to overcome the presumption of reasonably professional assistance, and that Brown has not demonstrated that his trial attorney's alleged mistake was so outrageous that no competent attorney would have made that mistake.

Having determined that Brown has not shown that his trial attorney provided ineffective assistance of counsel on the grounds alleged above, we need not further address the matter, but we do emphasize that ineffectiveness challenges are considered in light of "the totality of the representation" provided by the attorney. *See Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999); *see also Simmons v. State*, Nos. 03-11-00229-CR, -00230, 2012 WL 3629864, at *4 (Tex. App.—Austin Aug. 22, 2012, pet. ref'd) (mem. op., not designated for publication) (determining that "[t]he critical weakness" in ineffectiveness claim was "its failure to consider the totality of trial counsel's representation"). Moreover, we note that during voir dire Brown's attorney discussed the presumption of innocence and the State's burden, went over the defendant's right to remain silent, asked the panel members whether they would hold it against Brown if he did not testify, inquired into any potential biases that the panel members might have, moved successfully to exclude several panelists for cause, and exercised peremptory challenges. During the trial, Brown's attorney cross-examined the State's witnesses, objected successfully to the admission of a video recording during the testimony of Officer Fickel, and made other objections to the State's witnesses'

testimonies. In the jury-charge conference, Brown's attorney successfully moved to include an instruction under article 38.23 of the Code of Criminal Procedure explaining that the jury could not consider evidence if it determined that the evidence was obtained unlawfully. *See* Tex. Code Crim. Proc. art. 38.23(b). In his closing arguments during the guilt-or-innocence phase, Brown's attorney emphasized the State's burden and asserted that there was insufficient evidence establishing that the traffic stop was proper. During the punishment phase, Brown's attorney called Brown's mother to the stand, and she testified regarding Brown's tumultuous upbringing and asked the district court to help Brown rather than lock him away. Finally, in his closing argument during the punishment phase, Brown's attorney asked for the minimum sentence possible.

For all of these reasons, we overrule Brown's second issue on appeal.

Exceeding Scope of Permissible Jury Argument

In his final issue on appeal, Brown urges that the State improperly exceeded the scope of permissible closing argument in the guilt-or-innocence phase "by arguing with facts not in evidence." In particular, Brown refers to the following exchange during the State's closing:

> Ladies and gentlemen, I'm going to stand right here and I'm going to pull up the camera function on my iPhone and I'm going to take a picture of the Judge right here. In that photograph, you see the Judge, but you do not see the lovely Kim Lee who is sitting to his right. Although I hope that you all will agree with me, that as we are sitting here today all facing the same general direction, that we all can see the Judge and Ms. Kim Lee. I would submit to you that that is the source of a lot of the issues that [Brown] wants you to focus on in this case here today.

Following that exchange, the State criticized Brown's arguments suggesting that the jury should not consider the recording admitted into evidence and played for the jury in which

Officer Fickel can be heard describing his observations of the car that Brown was riding in because the actual alleged traffic violation purportedly described by Officer Fickel was not captured on the video portion of the recording. Further, the State emphasized that the officers who testified as witnesses related that they saw the traffic violation and that they were able to see the violation occur because they had a different vantage point.

In this issue, Brown asserts that the State "created demonstrative evidence, using her cell phone to demonstrate her opinion that the police camera was similarly situated, and therefore unable to capture the unfolding events." In addition, Brown notes that "[t]here was no testimony presented at trial involving cell phones, or any similarity between taking cell phone photographs or film." Further, Brown argues that "[b]y creating the demonstrative evidence, the [State] has unfairly used unsworn testimony to argue" its position and exceeded the permissible scope of jury argument. *See Brown v. State*, 270 S.W.3d 564, 570 (Tex. Crim. App. 2008) (setting out four types of permissible jury argument); *McKay v. State*, 707 S.W.2d 23, 37 (Tex. Crim. App. 1985) (explaining that "the prosecutor may argue his opinions concerning issues in the case so long as the opinions are based on the evidence in the record and not as constituting unsworn testimony").

Although Brown urges on appeal that the State exceeded the scope of permissible jury argument, Brown did not raise an objection during the trial. To preserve for appellate review an issue regarding allegedly improper jury argument, a defendant must object to the jury argument and pursue the objection to an adverse ruling. *See Estrada v. State*, 313 S.W.3d 274, 303 (Tex. Crim. App. 2010); *see also* Tex. R. App. P. 33.1(a) (discussing preservation for appellate review). In other words, a defendant must make a contemporaneous objection to the argument, ask the trial

court to instruct the jury to disregard the argument if the objection is sustained, and request a mistrial if the court instructs the jury to disregard the statement. *See Cook v. State*, 858 S.W.2d 467, 473 (Tex. Crim. App. 1993). If a defendant fails to make an objection to the argument or fails to pursue an adverse ruling to his objection, the defendant forfeits his ability to challenge the jury argument on appeal. *Cockrell v. State*, 933 S.W.2d 73, 89 (Tex. Crim. App. 1996). Even in circumstances in which the error was so egregious that it could not be cured by an instruction to disregard, a defendant must still object and request a mistrial. *Mathis v. State*, 67 S.W.3d 918, 926-27 (Tex. Crim. App. 2002).

Because Brown failed to object to the allegedly improper jury argument and to pursue the objection to an adverse ruling, he has failed to preserve any error relating to the jury argument. Accordingly, we overrule Brown's third issue on appeal.

CONCLUSION

Having overruled all of Brown's issues on appeal, we affirm the district court's judgment of conviction.

David Puryear, Justice

Before Justices Puryear, Goodwin, and Field

Affirmed

Filed: June 3, 2016

Do Not Publish

APPENDIX B-C

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS
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STATE OF TEXAS
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PRIVATE USE

PRESORTED FIRST CLASS

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COA No. 03-15-00154-CR

BROWN, FRANK **Tr. Ct. No. D-1-DC-14-200998** **PD-0693-16**

On this day, the Appellant's Pro Se petition for discretionary review has been refused.

DIC-W4

Abel Acosta, Clerk

FRANK HENDERSON BROWN
ELLIS I UNIT - TDC # 1980921
1697 FM 980
HUNTSVILLE, TX 77343

MIUNGB 77320

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BROWN, FRANK **Tr. Ct. No. D-1-DC-14-200998-A** **WR-88,733-01**

This is to advise that the Court has denied without written order the application for writ of habeas corpus.

Dear a Williamson, Clerk

J24-2

FRANK BROWN
ELLIS I UNIT - TDC # 1980921
1697 FM 980
HUNTSVILLE, TX 77343

DMIWNAB 77320

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

FRANK HENDERSON BROWN, §
TDCJ NO. 01980921, §
PETITIONER, §
§
V. §
§ CAUSE NO. 1:18-CV-1054-LY
LORIE DAVIS, DIRECTOR, TEXAS §
DEPARTMENT OF CRIMINAL §
JUSTICE, CORRECTIONAL §
INSTITUTIONS DIVISION, §
RESPONDENT. §

FINAL JUDGMENT

Before the court is the above-styled and numbered cause. On this date, the court rendered an order denying *pro se* Petitioner Frank Henderson Brown's Petition for a Writ of *Habeas Corpus* by a Person in State Custody filed December 6, 2018 (Doc. #1). As nothing remains to resolve, the court renders the following Final Judgment pursuant to Federal Rule of Civil Procedure 58.

IT IS ORDERED that the case is hereby **CLOSED**.

SIGNED this 22nd day of July, 2020.

LEE YEAKEL
UNITED STATES DISTRICT JUDGE

APPENDIX E

United States Court of Appeals for the Fifth Circuit

No. 20-50651

United States Court of Appeals
Fifth Circuit
FILED
August 11, 2021
Lyle W. Cayce
Clerk

FRANK HENDERSON BROWN,

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 Western District of Texas
USDC No. 1:18-CV-1054

ORDER:

IT IS ORDERED that appellant's motion for clarification of the Court's order denying a certificate of appealability is GRANTED. The court's previous order is withdrawn, and it is substituted with the following.

Frank Henderson Brown is currently serving a sentence for a Texas conviction for possession of a firearm as a felon. He seeks a certificate of appealability to challenge the district court's denial of his application for writ of habeas corpus under 28 U.S.C. § 2254.

Brown asserted twenty-six claims for relief before the district court—twenty of which he now seeks to appeal. His claims can be summarized broadly as claims of trial court error, prosecutor error, ineffective assistance of trial counsel, and ineffective assistance of appellate counsel. The district court rejected each claim and declined to issue a certificate of appealability.

We may issue a certificate of appealability "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This means that for each of the twenty claims on which he wants to appeal, Brown must "demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003). For the one claim of the twenty raised on appeal that was dismissed as procedurally defaulted—Brown's claim that the district court erred by allowing the prosecutor to argue facts not in evidence during closing argument—Brown must also show "that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Brown has not shown that jurists of reason could debate the district court's assessment of his constitutional claims or the district court's dismissal of one of his claims as procedurally barred.

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

/s/ Jennifer Walker Elrod
JENNIFER WALKER ELROD
United States Circuit Judge

APPENDIX F

EXHIBIT D

out is when it happens. In other words, he didn't say that's when I saw it. He said, so as the officer calls it out is when it happens. Because all he's doing is, he's parroting what the other people are saying. Why? Because that's been good enough in the past. I urge you to consider whether that is good enough today and whether that will be good enough tomorrow and every other tomorrow after that.

I thank you for your consideration.

THE COURT: Thank you, Mr. Espersen.

Ms. Edwards?

STATE'S CLOSING STATEMENT

MS. EDWARDS: Ladies and gentlemen, I'm going to stand right here and I'm going to pull up the camera function on my iPhone and I'm going to take a picture of the Judge right here. In that photograph, you see the Judge, but you do not see the lovely Kim Lee who is sitting to his right. Although I hope that you all will agree with me, that as we are sitting here today all facing the same general direction, that we all can see the Judge and Ms. Kim Lee. I would submit to you that that is the source of a lot of the issues that Mr. Espersen wants you to focus on in this case here today.

Mr. Espersen wants you to disregard the

EXHIBIT 38.23

giving the case to you this afternoon.

So if you would recess now, we will take that matter up and we will be back out as soon as we can to charge you with the law and have the parties argue their case to you. Thank you.

(Open court, defendant, no jury)

THE COURT: All right. The defense has made the request for a 38.23 charge. Would you like to comment on it, or do you have any other specific charges that you would like as well?

MS. EDWARDS: Judge, we would oppose the request for a 38.23 instruction. It's our understanding that there needs to be a fact issue that's raised in order to justify that instruction.

In the case of *Madden versus State* from 2007 from the Court of Criminal Appeals, there is some analysis there on whether -- when a true fact dispute that calls for a 38.23 instruction is raised by any potential conflict between what's seen or able to be seen on a video and what the testimony is from the officers. That case says that unless the DMAV clearly would have shown the failure to signal if it had happened, then that's what's required in order to raise that fact issue.

Judge, it's the State's contention that

that's not the situation here with this DMAV, and that the officers testified about the limited scope of the camera, that it happened out of that scope, and you could not physically see it on the DMAV. It's not a situation where the DMAV would have shown it if it had happened.

The additional thing is, whatever fact is disputed has to also be material as to whether the stop was legal or not. In this situation, I believe if there's a fact issue, it's only as to that last traffic violation. We've got uncontested testimony from Officer Fickel about the numerous violations that occurred as he's following this vehicle. We have uncontested testimony from all three of those officers about running the red light at 38 1/2 and the southbound service road. So the stop is legal based on those. So based on that and based on this Madden case, we would request that that 38.23 instruction stay out.

THE COURT: Having heard the testimony, I feel that Mr. Espersen has raised the issue sufficient in that it's not just a question as to Officer Mason or Officer Stevenson in the last traffic violation. I think the jury certainly could possibly believe factually Officer Fickel or not, particularly

in light of the fact that Mr. Espersen has raised the fact that all of his transmissions that were called out over the radio were not recorded in any way.

I think in light of the fact that he's called into question the plausibility of the collision and the manner in which it was made, I think a reasonable jury could factually believe that or not believe that. I think that the issue has been raised sufficiently for them to factually believe or not believe the officers. So based on that, I think he would be entitled to the 38.23 instruction, so I am going to give that, but the instruction will be as to the stop, not the arrest. It will be for the reasonable suspicion for the stop to begin with, and they will make that factual determination, and you will argue that fact.

Are there any other charges that the State would like, any other specific things other than that,

MS. READ: Judge, we would ask, that if you are going to give the 38.23, that you would take a look at the language in Madden in footnote six and consider possibly using that language for the instruction to the jury.

THE COURT: I have a good idea of what

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

FRANK HENDERSON BROWN, TDCJ NO. 01980921, PETITIONER,	§	
V.	§	
	§	CAUSE NO. 1:18-CV-1054-LY
LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, RESPONDENT.	§	

ORDER ADOPTING REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

Before the court in the above-styled and numbered cause are *pro se* Petitioner Frank Henderson Brown's Petition for a Writ of *Habeas Corpus* by a Person in State Custody filed December 6, 2018 (Doc. #1), Respondent Lorie Davis's response filed November 4, 2019 (Doc. #18), and Brown's reply filed January 15, 2020 (Doc. #24).

The case was referred to a United States Magistrate Judge for report and recommendation. *See* 28 U.S.C. § 636(b); Fed. R. Civ. P. 72; Loc. R. W.D. Tex. Appx. C, R. 1(e). The magistrate judge signed a report and recommendation on April 28, 2020 (Doc. #30), recommending that this court should not grant Brown's federal *habeas corpus* petition under the standards prescribed by the Antiterrorism and Effective Death Penalty Act of 1996, *see* 28 U.S.C. § 2254(d), and that Brown should also be denied a certificate of appealability.

A party may serve and file specific written objections to the proposed findings and recommendations of a magistrate judge within 14 days after being served with a copy of the report and recommendation and thereby secure *de novo* review by the district court. *See* 28 U.S.C. § 636(b); Fed. R. Civ. P. 72(b).

A party's failure to timely file written objections to the proposed findings, conclusions, and recommendation in a report and recommendation bars that party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court. *See Douglass v. United Servs. Auto Ass'n*, 79 F.3d 1415 (5th Cir. 1996) (en banc). The record shows that all parties had notice of the report and recommendations by May 8, 2020 and that objections were due on or before May 22, 2020. Brown moved for three extensions of time to file objections (Docs. #32, 40, 42), all of which this court granted (Docs. #34, 36, 43). Brown filed objections to the report and recommendation on July 20, 2020 (Doc. #44). In light of the objections, the court undertakes a *de novo* review of the record and applicable law.

The court is of the opinion that the objections do not raise any issues that were not adequately addressed in the report and recommendation. Therefore, finding no error, the court will accept and adopt the report and recommendation as filed for substantially the reasons stated therein. Accordingly,

IT IS ORDERED that Brown's objections to the report and recommendation of the United States Magistrate Judge are **OVERRULED.**

IT IS FURTHER ORDERED that the report and recommendation of the United States Magistrate Judge filed April 28, 2020 (Doc. #30) is **ACCEPTED AND ADOPTED** by the court.

IT IS FURTHER ORDERED that Brown's Petition for a Writ of *Habeas Corpus* by a Person in State Custody filed December 6, 2018 (Doc. #1) is **DENIED.** Further, this court will not issue Brown a certificate of appealability. *See* 28 U.S.C. § 2253(c)(1)(A).

SIGNED this 22nd day of July, 2020.

LEE YEAKEL
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

FRANK HENDERSON BROWN,	§	
TDCJ No. 01980921,	§	
	§	
Petitioner,	§	
	§	
v.	§	**A-18-CV-1054-LY**
	§	
LORIE DAVIS, Director,	§	
Texas Department of Criminal Justice,	§	
Correctional Institutions Division,	§	
	§	
Respondent.	§	

REPORT AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE

TO: THE HONORABLE LEE YEAKEL
UNITED STATES DISTRICT JUDGE

The Magistrate Judge submits this Report and Recommendation to the District Court pursuant to 28 U.S.C. § 636(b) and Rule 1(e) of Appendix C of the Local Court Rules of the United States District Court for the Western District of Texas, Local Rules for the Assignment of Duties to United States Magistrates Judges.

Before the Court are *pro se* Petitioner's Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (ECF No. 1), Respondent Davis's Response (ECF No. 18), and Petitioner's Reply (ECF No. 24). Having reviewed the record and pleadings submitted by both parties, the undersigned concludes Petitioner's federal habeas corpus petition should not be granted under the standards prescribed by the Antiterrorism and Effective Death Penalty Act of 1996

(AEDPA). *See* 28 U.S.C. § 2254(d). The undersigned also recommends the Court deny Petitioner a certificate of appealability.

I. Background

Below is a brief summary of the factual background for Petitioner's conviction:

> After an undercover police officer, Officer Michael Fickel, saw the driver of a car engage in some suspicious activity in the parking lot of a hotel and after seeing Frank Henderson Brown get into the passenger side of that car, Officer Fickel followed the car after it left the parking lot and later witnessed the driver of the car commit several traffic violations. Officer Fickel relayed his observations to members of his unit, and some of the officers initiated a traffic stop of the vehicle. During the traffic stop, the officers discovered that Brown had a gun in his waistband.

Brown v. State, No. 03-15-00154-CR, 2016 WL 3144338, at *1 (Tex. App.--Austin June 3, 2016, pet. ref'd).

Petitioner was charged by indictment with unlawful possession of a firearm by a felon before fifth anniversary of release. The indictment included two enhancement paragraphs for Petitioner's 2008 and 2004 convictions for burglary of habitation. (ECF No. 8-3 at 12-13.) On February 4, 2015, a jury convicted Petitioner of the offense, he pleaded true to both enhancements, and the judge assessed punishment at twenty-five years imprisonment. *State v. Brown*, No. D-1-DC-14-200998 (147th Dist. Ct., Travis Cnty., Tex. Feb. 4, 2015) (ECF No. 8-3 at 150). On June 3, 2016, Petitioner's direct appeal was affirmed by the Third Court of Appeals of Texas. *Brown v. State*, No. 03-15-00154-CR, 2016 WL 3144338 (Tex. App.--Austin June 3, 2016, pet. ref'd). On November 2, 2016, the Texas Court of Criminal Appeals (TCCA) refused Petitioner's petition for discretionary review (PDR). *Brown v. State*, No. PD-0693-16 (Tex. Crim. App. Nov. 2, 2016). On January 23, 2017, Petitioner filed a petition for a writ of certiorari in the United States

Supreme Court, which the Court denied on June 5, 2017. *Brown v. Texas*, 137 S. Ct. 2218 (June 5, 2017).

On May 21, 2018, Petitioner filed his state habeas corpus application. Petitioner's complete application, including the amendments he filed on June 19, 2018 (ECF No. 8-44 at 75-81), listed the following twenty-six grounds for relief:

A. The trial court erred
   1. by denying Petitioner's motion to suppress evidence;
   2. by denying Petitioner's trial counsel's motion to withdraw;
   3. by failing to conduct a hearing on trial counsel's motion to withdraw;
   4. by permitting the prosecutor to ask improper voir dire questions;
   5. by allowing Officer Fickel to present hearsay evidence; and
   6. by allowing the prosecutor to argue facts not in evidence.

B. The prosecutor erred
   7. by asking improper voir dire questions;
   8. by withholding favorable evidence from Petitioner;
   9. by improperly arguing to the jury during closing arguments
   10. by arguing facts not in evidence during closing arguments;
   11. by "vouching" for the credibility of Officer Fickel; and
   12. by striking at the applicant over his trial counsel's shoulders.

C. Trial counsel provided ineffective assistance when counsel
   13. failed to object to the prosecutor's improper voir dire questions;
   14. failed to object to the prosecutor's improper closing argument;
   15. failed to object to the prosecutor vouching for Officer Fickel's credibility;
   16. failed to represent Petitioner adequately after his motion to withdraw was denied;
   17. referred to Petitioner as a "bad guy" during closing arguments;
   18. failed to object to the prosecutor arguing facts not in evidence during closing; and
   19. failed to object when the prosecutor struck at Petitioner over counsel's shoulders.

D. Appellate counsel provided ineffective assistance when counsel failed
   20. to raise the trial court's error in denying Petitioner's motion to suppress;
   21. to investigate the reasons behind trial counsel's motion to withdraw;
   22. to argue the trial court abused its discretion denying counsel's motion to withdraw;
   23. to raise the issue of the prosecutor's improper voir dire questions;
   24. to raise the issue of the prosecutor's improper argument;
   25. to raise the issue of the prosecutor's vouching for Officer Fickel; and
   26. to raise the issue of prosecutorial misconduct.

(ECF Nos. 8-36 at 122-38; 8-37 at 1-31.)

On November 21, 2018, the TCCA denied Petitioner's state habeas corpus application without written order. *Ex parte Brown*, No. WR-88,733-01.

Petitioner filed the instant federal habeas petition on December 6, 2018. (ECF No. 1.) In it, he raises the same claims that were raised and rejected in his state habeas corpus application and adds an additional ground for relief: that the TCCA's decision should not be given deference because the trial and state habeas court failed to conduct a live evidentiary hearing or obtain affidavits from the parties, and thus the TCCA's decision was not "based off a presumption of correctness." (*Id.* at 19.) On November 4, 2019, Respondent filed an answer to Petitioner's federal habeas petition, to which Petitioner responded on January 15, 2020. (ECF Nos. 18, 24-26.)

II. Standard of Review

Petitioner's federal habeas petition is governed by the heightened standard of review provided by AEDPA. *See* 28 U.S.C. § 2254. Under § 2254(d), a petitioner may not obtain federal habeas corpus relief on any claim that was adjudicated on the merits in state court proceedings unless the adjudication of that claim either: (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. *Brown v. Payton*, 544 U.S. 133, 141 (2005). This demanding standard stops just short of imposing a complete bar on federal court re-litigation of claims already rejected in state proceedings. *Harrington v. Richter*, 562 U.S. 86, 102 (2011) (citing *Felker v. Turpin*, 518 U.S. 651, 664 (1996)).

A federal habeas court's inquiry into unreasonableness should always be objective rather than subjective, with a focus on whether the state court's application of clearly established

federal law was "objectively unreasonable" and not whether it was incorrect or erroneous. *McDaniel v. Brown*, 558 U.S. 120 (2010); *Wiggins v. Smith*, 539 U.S. 510, 520-21 (2003). Even a strong case for relief does not mean the state court's contrary conclusion was unreasonable. *Richter*, 562 U.S. at 102. A petitioner must show that the state court's decision was objectively unreasonable, which is a "substantially higher threshold." *Schriro v. Landrigan,* 550 U.S. 465, 473 (2007); *Lockyer v. Andrade*, 538 U.S. 63, 75-76 (2003). "A state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Richter*, 562 U.S. at 101 (citation omitted). As a result, to obtain federal habeas relief on a claim previously adjudicated on the merits in state court, Petitioner must show that the state court's ruling "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id.* at 103; *see also Bobby v. Dixon*, 565 U.S. 23, 24 (2011).

III. Analysis

A. Trial Court Errors (claims 1-6)

Petitioner lists six grounds for habeas relief based on errors he claims were committed by the trial court: (1) denying Petitioner's motion to suppress evidence; (2) denying Petitioner's trial counsel's motion to withdraw; (3) failing to conduct a hearing on trial counsel's motion to withdraw; (4) permitting the prosecutor to ask improper voir dire questions; (5) allowing Officer Fickel to present hearsay evidence; and (6) allowing the prosecutor to argue facts not in evidence.

1. Motion to Suppress

In ground 1, Petitioner argues the trial court erred in denying his pretrial motion to suppress. In that motion, Petitioner argued that there was no reasonable suspicion for the traffic

stop that resulted in his arrest for being a felon in possession. During a hearing on the motion, three police officers testified about the traffic stop in question; afterward, the court concluded "there was reasonable suspicion to make the traffic stop" and denied the motion to suppress. (ECF No. 8-39 at 3.)

Petitioner is not entitled to relief on this claim. A habeas petitioner asserting a Fourth Amendment violation is not eligible for relief on the ground that evidence introduced at trial was obtained during an unconstitutional search and seizure if the petitioner had a full and fair opportunity to litigate the claim in the state courts. *Stone v. Powell*, 428 U.S. 465, 494-95 (1976). Further, "[e]rrors in adjudicating Fourth Amendment claims are not an exception to *Stone*'s bar." *Moreno v. Dretke*, 450 F.3d 158, 167 (5th Cir. 2006). *See also Swicegood v. Alabama*, 577 F.2d 1322, 1324 (5th Cir. 1978) (*Stone* bar applies despite any error made by state court in deciding the merits of a Fourth Amendment claim). Petitioner does not argue that he did not have a full and fair opportunity to litigate his motion to suppress before the state court; rather, he argues that the court erred in denying it. Accordingly, he is not entitled to federal habeas relief on this ground.

2. Trial Counsel's Motion to Withdraw

In grounds 2-3, Petitioner argues that the trial court erred in denying his trial counsel's motion to withdraw and in failing to conduct a hearing on the motion. The record shows that Petitioner was appointed counsel on February 21, 2014. (ECF No. 8-3 at 8.) Petitioner then moved to dismiss his appointed counsel due to lack of communication and he was appointed new counsel, Charles Popper. Mr. Popper represented Petitioner through his pretrial motions, including the motion to suppress. However, on January 16, 2015, Petitioner was assigned new counsel, Mr. Raymond M. Espersen. (ECF No. 8-3 at 75.)

Four days later, and one week before the start of Petitioner's criminal trial, Mr. Espersen filed eight motions: a motion for exculpatory evidence, an application for community

supervision, a request for notice of intent to offer extraneous conduct, an election as to punishment, a motion for a new trial, a motion to suppress evidence, a motion in limine, a motion for discovery and inspection, and a motion to withdraw as counsel. Mr. Espersen dated all the motions January 17, 2015—one day after his appointment—and they can all be described as "boilerplate." (ECF No. 8-3 at 77-111.)

Petitioner's trial began on February 2, 2015. Before voir dire began, the prosecutor asked Mr. Espersen if he had anything he would like to take up regarding defense's motion in limine, noting that it was "just a boiler plate motion, very basic." Mr. Espersen responded "No. I have gotten full discovery through the open file as well as have seen Charles Popper's file which contained all the documents that I received from the State. I did get a few other things from the State after receiving Mr. Popper's file, but we're ready to go." (ECF No. 8-5 at 4-5.) At no time during voir dire, or duing the trial did Mr. Espersen reference his motion to withdraw, or specifically ask to withdraw as counsel. On February 4, Petitioner was found guilty and sentenced; that same day, the trial court granted Mr. Espersen's motion to withdraw and Petitioner was appointed appellate counsel. (ECF No. 8-3 at 146, 154.)

Petitioner now argues the trial court erred in denying Mr. Espersen's motion to withdraw. However, it appears from the record that Mr. Espersen's motion to withdraw, which he filed one day after his appointment along with seven other boilerplate motions, was intended for *after* Petitioner's trial ended. This reading of the record is further bolstered by the discussion between Mr. Espersen and the prosecutor on the first day of trial, where she asks if he needs to add anything to defense's motion in limine, and he replies "we're ready to go." Outside of the motion he filed on January 27, there is no evidence in the record that Mr. Espersen wanted to withdraw

as Petitioner's counsel prior to the commencement of trial. Accordingly, the court concludes that factual basis for Petitioner's grounds 2-3 is not supported by the record.

However, even assuming that the trial court erred in denying the motion, Petitioner is still not entitled to relief because the error was harmless. The test for harmless error on federal habeas review is "whether the error 'had substantial and injurious effect or influence in determining the jury's verdict.'" *Fry v. Pliler*, 551 U.S. 112, 121-22 (2007) (citing *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993)); *see also Davis v. Ayala*, 135 S. Ct. 2187, 2197-98 (2015) (in collateral proceeding, habeas petitioners "are not entitled to habeas relief based on trial error unless they establish it resulted in 'actual prejudice'"; relief is proper only if the federal court has "grave doubt about whether a trial error of federal law had 'substantial and injurious effect or influence in determining the jury's verdict.'").

Petitioner has failed to make such a showing, particularly as it appears the trial court did not countenance Mr. Espersen's motion to withdraw until after the trial ended. Further, given that Mr. Espersen continued to represent Petitioner over the course of the trial, the Court concludes that any trial court error was harmless and did not result in actual prejudice.

3. Voir Dire

In ground 4, Petitioner argues the trial court erred when it allowed the prosecutor to ask improper questions during voir dire. Specifically, Petitioner argues the prosecutor should not have been permitted to ask a hypothetical question[1] or a question regarding whether jurors could "commit" to deciding the case based on what was presented in court[2]. (ECF No. 24 6-8.)

1 The prosecutor asked the following: "Let me give you all a hypothetical. Let's say that the 12 of y'all--we are just going to go with the first 12 on this very first row. Let's say the 12 of y'all somehow miraculously ended up all getting picked, and we send you home for the evening and you are walking back out to your cars together and as you're leaving the building, you are all standing together and you see a car wreck. If an officer came out and took your

A trial court has broad discretion over the jury selection process. *United States v. Flores*, 63 F.3d 1342, 1352 (5th Cir. 1995) (citation omitted). Under Texas law, "control of the voir dire examination is within the sound discretion of the trial judge [who] is given wide discretion in this area." *Atkins v. State*, 951 S.W.2d 787, 790 (Tex. Crim. App. 1997) (en banc). The trial judge must not exceed this discretion, however, by allowing an improper question and must determine if a hypothetical question is being used to explain the law or commit the venire to specific facts of the case. *Id.* A trial court abuses its discretion and creates reversible error by allowing a question that is used for anything other than explaining the law. *Id.*

The petitioner must show that a trial court's error had "substantial and injurious effect or influence in determining a jury's verdict." *Fry*, 551 U.S. at 121-22. The Court concludes that these two voir dire questions did not commit the venire to specific facts of the case, but rather explained the law and sought to ensure the jury's commitment to adjudicating the case based solely on the facts put before it. Accordingly, the trial court did not abuse its discretion in permitting the questions, and thus the state habeas court's denial of this claim is not objectively unreasonable.

4. Procedural Default

In grounds 5-6, Petitioner argues that the trial court erred in admitting hearsay testimony from Officer Fickel and by allowing the prosecutor to argue facts not in evidence during closing

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statements about that car wreck right then, how many versions of that car wreck do you think that I would get?" (ECF No. 8-5 at 32.)

2 The prosecutor asked the following: "I guess my bottom line in this discussion is, like the judge said, both sides, both the defense and the State deserve a fair trial in this case, so what I really need to know from each and every one of you is if you are going to hold, whether it's me, whether it's my second chair, Ms. Reaud, or whether it is any police officer witnesses we might call, whether you are going to hold us responsible for the failings that other law enforcement agencies may have, or whether you are going to judge us on our own performance and judge the witnesses on their own testimony and their credibility and their experience? Is everybody going to be able to judge me and my witnesses based on our performance in court, based on our testimony, and do your best to keep that separate from the events that are going on in the rest of the world right now? Aside from the folks who have already said no, is there anybody else who is not able to make that commitment?" (ECF No. 8-5 at 48-49.)

arguments. Specifically, Petitioner argues the court erred in allowing Officer Fickel to testify that he had "received a tip" when the prosecutor asked him why he was in the same hotel parking lot as Petitioner, which ultimately led to Petitioner's traffic stop and arrest. Petitioner also argues that the court erred in allowing the prosecutor to use her cell phone during closing arguments to demonstrate how a police camera might be unable to capture the totality of the moments leading up to the traffic stop. Respondent argues that Petitioner procedurally defaulted these claims when he failed to object to them during trial. The Court agrees.

The procedural default of a petitioner's federal habeas claim occurs when the last state court to consider a claim "clearly and expressly" dismisses it based upon a state procedural rule that provides an adequate basis for denial of relief, independent of the merits. *Maples v. Thomas*, 132 S. Ct. 912, 922 (2012); *Finley v. Johnson*, 243 F.3d 215, 218 (5th Cir. 2001). The "independent" and "adequate" requirements are satisfied where the court clearly indicates that its dismissal of a particular claim rests upon a state ground that bars relief, and that bar is strictly and regularly followed by the state courts. *Finley*, 243 F.3d at 218. This doctrine ensures that federal courts give proper respect to state procedural rules. *Glover v. Cain*, 128 F.3d 900, 902 (5th Cir. 1997); *see also Edwards v. Carpenter*, 529 U.S. 446, 451 (2000) (finding the cause and prejudice standard to be "grounded in concerns of comity and federalism"). The application of an independent and adequate state procedural bar must be honored even if the state court has, in the alternative, reached the merits of the claim. *Harris v. Reed*, 489 U.S. 264 n.10 (1989).

It is well-settled under Fifth Circuit precedent that the "Texas contemporaneous objection rule constitutes an adequate and independent state ground that procedurally bars federal habeas review of a petitioner's claims." *Rowell v. Dretke*, 398 F.3d 370, 375 (5th Cir. 2005); *Jackson v. Johnson*, 194 F.3d 641, 652 (5th Cir. 1999). Petitioner raised both these grounds in his direct

appeal before the Texas Third Court of Appeals. The Third Court overruled them, reasoning, *inter alia*, that because Petitioner had failed to request a running objection to Fickel's testimony and had failed to object during the prosecutor's closing argument, he had failed to preserve an error for appellate review. The TCCA denied Petitioner's petition for discretionary review without written order, and then also denied Petitioner's state habeas application without written order.

The last state court to consider Petitioner's claims held that they were procedurally barred because Petitioner had failed to preserve the issue for appeal. *See Ylist v. Nunnemaker*, 501 U.S. 797, 803 (1991) ("[w]here there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground.") As such, Petitioner is precluded from federal habeas review unless he can show cause for the default and resulting prejudice, or demonstrate that the court's failure to consider his claim will result in a "fundamental miscarriage of justice." *Coleman v. Thompson*, 501 U.S. 722, 750 (1991); *Busby v. Dretke*, 359 F.3d 708, 718 (5th Cir. 20014). Petitioner argues that he did object to Fickel's testimony and that it was the trial court's responsibility to stop the prosecutor from presenting demonstrative evidence to the jury during closing arguments. (ECF No. 24 at 9, 14.) Neither of these explanations amounts to a showing of cause for Petitioner's failure to object, nor does he argue that the Court's failure to consider his claims will result in a fundamental miscarriage of justice. Accordingly, Petitioner's grounds 5-6 are procedurally barred from federal habeas relief.

B. <u>Prosecutorial Misconduct (claims 7-12)</u>

Petitioner lists six grounds for habeas relief based on errors he claims were committed by the prosecutor: (7) asking improper voir dire questions; (8) withholding favorable evidence from

Petitioner; (9) improperly arguing to the jury during closing arguments; (10) arguing facts not in evidence during closing arguments; (11) "vouching" for the credibility of Officer Fickel; and (12) striking at the Petitioner over his trial counsel's shoulders.

1. Improper voir dire questions

In Ground 7, Petitioner argues that the Prosecutor asked improper voir dire questions, which committed the jury to particular facts. Petitioner further argues that two prospective jurors were stricken based on these improper questions, thus prejudicing his trial.

As noted above, a trial court has broad discretion over the jury selection process, *Flores*, 63 F.3d at 1352 (5th Cir. 1995) (citation omitted). Under Texas law, trial judges have wide discretion and control over the venire selection, but can abuse their discretion by permitting questions that are being used to commit the venire to specific facts of the case. *Atkins*, 951 S.W.2d at 790. The undersigned has already concluded that the questions at issue did not commit the venire to a particular set of facts about the case, but rather explained the law to the potential jurors. Petitioner alleges that two potential jurors were stricken based on these questions. However, Petitioner provides no evidence to support his conclusory allegations, *see Ross v. Estelle*, 694 F.2d 1008, 1012 (5th Cir. 1983) (holding "mere conclusory allegations do not raise a constitutional issue in a habeas proceeding"), and the undersigned concludes Petitioner is not entitled to federal habeas relief on this ground.

2. Withholding evidence

Petitioner contends the prosecution failed to disclose exculpatory evidence. Specifically, Petitioner alleges that the prosecution withheld evidence showing that Officer Stevenson—who was part of the police team that arrested Petitioner and testified at his trial—had not previously arrested the driver of the car Petitioner was in, despite Stevenson's testimony to the contrary. For

support, Petitioner points to Stevenson's report of Petitioner's arrest, wherein Stevenson writes "I noticed the driver from a previous arrest for narcotics but did not recognize the passenger." (ECF No. 26-7 at 3.) Petitioner also attached 35 pages of Officer Stevenson's arrests—totaling 312 arrests—which do not include any record of Stevenson arresting Frank Silva, the driver of the car. (*Id.* at 4-39.) Respondent argues that Petitioner has failed to show that the evidence was withheld, and that, even assuming it was withheld, that the evidence was favorable to the defense or material to Petitioner's guilt or innocence.

"[S]uppression 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." *Brady v. Maryland,* 373 U.S. 83, 87 (1963). In order to establish a *Brady* violation, a petitioner must demonstrate that (1) the prosecution suppressed evidence, (2) the evidence was favorable to the defense, and (3) the evidence was material to either guilt or punishment. *Banks v. Dretke*, 540 U.S. 668, 691 (2004); *Graves v. Cockrell*, 351 F.3d 143, 153-54 (5th Cir. 2003).

Petitioner has not demonstrated a *Brady* violation. First, there is no evidence in the record, outside of Petitioner's allegations, that he requested Stevenson's arrest records prior to trial and the prosecution withheld them. *See Miller*, 200 F.3d at 282; *Murphy v. Johnson*, 205 F.3d 809, 814 (5th Cir. 2000) ("Allegations that are merely 'conclusionary' or are purely speculative cannot support a *Brady* claim."). Further, although Petitioner might have used these records to impeach Officer Stevenson at trial[3], he has made no showing that this evidence was

3 Stevenson testified at trial that he originally approached the Petitioner's side of the car during the traffic stop, but only spoke to him briefly. He testified "I knew who the driver was when I seen him, because I had dealings with him before, but I had never seen the passenger before, so I spoke to him for a brief moment." The prosecutor asks "You spoke to him for a brief moment?" and Stevenson responds "Yes. Since I had knew who the driver was that I had

material to his guilt or punishment. Stevenson was not the police officer who found Petitioner with the gun—that was Officer Mason, who felt the handle of a gun sticking out from Petitioner's waistband as he frisked him. (ECF No. 8-3 at 7.)

Petitioner raised these *Brady* allegations during his state habeas proceedings and the state habeas court denied relief. Because he has not established a valid *Brady* violation, Petitioner fails to demonstrate that the state court's rejection of his claim was either contrary to, or an unreasonable application of clearly established federal law. Accordingly, relief should be denied.

3. Closing arguments

Petitioner advances two grounds for habeas relief based on the prosecutor's closing arguments. First, Petitioner argues that the prosecutor "inflamed" the jury by arguing that "people like Frank Brown cannot be trusted with guns.[4]" Second, Petitioner again takes issue with the prosecutor's use of a cell phone[5], arguing that this constituted the use of facts not in evidence and unsworn testimony. Respondent Davis argues that Petitioner has failed to show that his due process rights were violated.

On federal habeas review, the petitioner must show that a prosecutor's improper arguments "so infected the penalty phase of the trial with unfairness as to make the resulting sentence a denial of due process." *Barrientes v. Johnson*, 221 F.3d 741, 753 (5th Cir. 2000)

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arrested previously, I kind of focused my attention on him and [Officer] Mason did not know who he was, so we swapped." (ECF No. 8-6 at 101.)

4 The prosecutor ended her closing argument thusly: "There is a reason that we have this law. We have this law because, as a society, we have decided that there are certain people that we do not trust with guns, and Frank Brown is one of those people who cannot be trusted with a gun and that's why we are asking you to find him guilty of possessing a firearm as a convicted felon." (ECF No. 8-6 at 145.)

5 The prosecutor began her rebuttal argument with the following: "Ladies and gentlemen, I'm going to stand right here and I'm going to pull up the camera function on my iPhone and I'm going to take a picture of the Judge right here. In that photograph, you see the Judge, but you do not see the lovely Kim Lee who is sitting to his right. Although I hope that you all will agree with me, that as we are sitting here today all facing the same general direction, that we all can see the Judge and Ms. Kim Lee. I would submit to you that that is the source of a lot of the issues that Mr. Espersen wants you to focus on in this case here today." (ECF No. 8-6 at 153.)

(quotations and brackets omitted); *see also Darden v. Wainwright*, 477 U.S. 168, 181 (1986). The burden is on the petitioner to show "a reasonable probability 'that but for these remarks' the result would have been different." *Nichols v. Scott*, 69 F.3d 1255, 1278 (5th Cir. 1995). The statements must render the trial fundamentally unfair. *Barrientes*, 221 F.3d at 744. "A trial is fundamentally unfair if 'there is reasonable probability that the verdict might have been different had the trial been properly conducted." *Id.* (citing *Foy v. Donnelly*, 959 F.2d 1307, 1317 (5th Cir. 1992).) "[I]t is not enough that the prosecutors' remarks were undesirable or even universally condemned. . . . Moreover, the appropriate standard of review for such a claim on writ of habeas corpus is the narrow one of due process, and not the broad exercise of supervisory power." *Darden*, 477 U.S. at 181.

Petitioner has not met his burden of showing that, but for the prosecutor's statements, it is reasonably probable that the result of his trial would have been different. Regarding the prosecutor's statement that "as a society, we have decided that there are certain people that we do not trust with guns, and Frank Brown is one of those people who cannot be trusted with a gun," the Court agrees with Respondent that this argument is permissible under Fifth Circuit precedent. *See United States v. Caballero*, 712 F.2d 126, 132 (5th Cir. 1983) (construing prosecutor's statement in closing argument to "have the courage, members of the jury, to do what is right, to find each and everyone one of them guilty" as vigorous but permissible plea for law enforcement); *United States v. Ikner*, No. 02-60125, 2002 WL 31415257, at *8 (5th Cir. 2002) (court has repeatedly held that vigorous calls for law enforcement are generally permissible). Regarding the prosecutor's use of her cell phone to demonstrate the limitations of police car video cameras, the Court concludes that this was done to "facilitate the jury in properly analyzing the evidence presented at trial so that it may 'arrive at a just and reasonable conclusion based on the evidence alone, and not on any fact

not admitted in evidence.'" *Milton v. State*, 572 S.W.3d 234, 239 (Tex. Crim. App. 2019) (explaining that proper jury argument falls within summation of evidence, reasonable deduction from evidence, answer to opposing counsel, and plea for law enforcement.) Accordingly, Petitioner is not entitled to federal habeas relief on these grounds.

4. "Vouching" for Officer Fickel

Petitioner argues that the prosecutor engaged in misconduct by "vouching" for the credibility of Officer Fickle. Petitioner points to the following passage of Officer Stevenson's redirect examination for support:

> Prosecutor: Officer Stevenson, are you, as a police officer, allowed to make a traffic stop based on reliable information that you gained from another officer?
> Stevenson: Yes.
> Prosecutor: Do you have to personally witness a traffic violation in order to make a traffic stop?
> Stevenson: No. The way our unit works, that's a tactic we use often.[6]
> (*Id.* at 109.)

Although he failed to object to the question during trial, Petitioner now takes issue with the prosecutor's calling Officer Fickel's statements to his fellow officers while following Petitioner's car as "reliable."

As Respondent notes, the Supreme Court has "firmly rejected the argument 'that reasonable cause for a[n investigative stop] can only be based on the officer's personal observation, rather than on information supplied by another person." *Navarette v. California*, 572 U.S. 393, 397 (2014) (citing *Adams v. Williams*, 407 U.S. 143, 147 (1972)). Indeed, the information the officer relies upon may be based on an "informant's tip which bears sufficient

6 This redirect came after defense counsel asked Stevenson whether he had personally witnessed the traffic violation, and Stevenson testified "So as the officer calls it out is when it happens." (ECF No. 8-6 at 108.) The officer calling the violations out was Officer Fickel, who was following Petitioner's car and calling out traffic violations over the radio to Officers Stevenson and Mason. After Petitioner's car went through a red light, Officers Stevenson and Mason initiated the traffic stop.

'indicia of reliability'" such as the informant was known to the officer personally. *Carmouche v. State*, 10 S.W.3d 323, 328 (Tex. Crim. App. 2000) (citing *Adams*, 407 U.S. at 146-47.) According to federal and state law, the prosecutor did not err when describing Officer Fickel's statements as "reliable." Petitioner is not entitled to federal habeas relief on this ground.

5. Striking at Petitioner over counsel's shoulders

In his last ground based on prosecutorial misconduct, Petitioner argues the prosecutor struck at him over the shoulders of his defense counsel by impugning defense counsel's character during her second closing statement. He points to the following passage: "So, if you want to disbelieve the testimony of those three officers, that's absolutely your discretion. That y'all's discretion. But, man, for people who, as Mr. Espersen put on cross-examination, they work undercover, they professionally are convincing people of things that aren't true, man, I sure hope that they can come up with a better lie than that." (ECF No. 8-6 at 156.) Petitioner argues this statement greatly prejudiced him.

Under Texas law, "[w]hen a prosecutor makes uninvited and unsubstantiated accusations of improper conduct directed toward a defendant's attorney, in an attempt to prejudice the jury against the defendant, courts refer to this as striking a defendant over the shoulders of his counsel." *Phillips v. State*, 130 S.W.3d 343, 355 (Tex. App.--Houston 2004). Examples of this include when the prosecutor argues defense counsel has manufactured evidence, suborned perjury, or represented criminals. *Id.* Such an error is generally cured when the trial court instructs the jury to disregard the comment. *Id.*

Respondent argues the prosecutor was not making unsubstantiated accusations of improper conduct towards defendant's counsel, but rather employing Mr. Espersen's own

cross-examination argument.[7] The Court agrees. There is nothing in the record to support Petitioner's claims of prosecutorial misconduct and Petitioner has not shown the state habeas court's ruling dismissing these claims "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Richter*, 562 U.S. at 103. Accordingly, Petitioner is not entitled to federal habeas relief on these grounds.

C. Ineffective Assistance of Trial Counsel (IATC) (claims 13-19)

Petitioner raises several overlapping IATC claims in his federal petition, each one having been raised and rejected during Petitioner's state habeas proceedings. Specifically, Petitioner contends trial counsel failed to: (1) object to the prosecutor's improper voir dire questions; (2) object to the prosecutor's improper closing argument; (3) object when the prosecutor vouched for Officer Fickel's credibility; (4) represent Petitioner to the best of his ability after the judge denied his motion to withdraw; (5) referred to Petitioner as a "bad guy" during closing arguments; (6) object to the prosecutor arguing facts not in evidence during closing arguments; and (7) object when the prosecutor struck at Petitioner over counsel's shoulders. As discussed below, Petitioner fails to demonstrate the state court's rejection of these challenges was contrary to, or an unreasonable application of, Supreme Court precedent, and is therefore not entitled to federal habeas relief.

7 As Respondent points out, Mr. Espersen opened his cross-examination of Officer Stevenson with the following: "You told the prosecutor that you're currently working in an undercover capacity in the drug trade; is that fair to say?" Stevenson responded "Yes, sir." Mr. Espersen stated, "So as part of your job, you convince people of things that aren't true, is that right? Well, you're not a drug dealer?" Stevenson says "Right." Espersen asks "But you convince people that you are a drug dealer as part of your job?" Stevenson responded "Sometimes." (ECF No. 8-6 at 104-05.)

1. The Strickland *Standard*

Sixth Amendment claims concerning the alleged ineffective assistance of trial counsel are reviewed under the familiar two-prong test established in *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*, a petitioner cannot establish a violation of his Sixth Amendment right to counsel unless he demonstrates (1) counsel's performance was deficient and (2) this deficiency prejudiced his defense. *Id.* at 687-88, 690. The Supreme Court has emphasized that "[s]urmounting *Strickland*'s high bar is never an easy task." *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010).

When determining whether counsel performed deficiently, courts "must be highly deferential" to counsel's conduct, and a petitioner must show that counsel's performance fell beyond the bounds of prevailing objective professional standards. *Strickland,* 466 U.S. at 687-89. Counsel is "strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Burt v. Titlow*, 571 U.S. 12, 22 (2013) (quoting *Strickland*, 466 U.S. at 690). To demonstrate prejudice, a petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. Under this prong, the "likelihood of a different result must be substantial, not just conceivable." *Richter*, 562 U.S. at 112. A habeas petitioner has the burden of proving both prongs of the *Strickland* test. *Wong v. Belmontes*, 558 U.S. 15, 27 (2009).

IATC claims are considered mixed questions of law and fact and are analyzed under the "unreasonable application" standard of 28 U.S.C. § 2254(d)(1). *See Gregory v. Thaler*, 601 F.3d 347, 351 (5th Cir. 2010). Where, as here, the state court adjudicated the IATC claims on the merits, a federal court must review a petitioner's claims under the "doubly deferential" standards

of both *Strickland* and Section 2254(d). *See Woods v. Etherton*, 136 S. Ct. 1149, 1151 (2016) (citing *Cullen v. Pinholster*, 563 U.S. 170, 190 (2011)); *Knowles v. Mirzayance*, 556 U.S. 111, 112 (2009). In such cases, the "pivotal question" is not "whether defense counsel's performance fell below *Strickland*'s standards," but whether "the state court's application of the *Strickland* standard was unreasonable." *Richter*, 562 U.S at 101. Consequently, the question is not whether counsel's actions were reasonable, but whether "there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Id.* at 105.

2. Referring to Petitioner as a "bad guy"

Petitioner argues that defense counsel provided ineffective assistance when he referred to Petitioner as a "bad guy" during his closing arguments. He argues that the statement was not the "result of any thoroughly investigated trial strategy," was not a reasonable decision, and there was no "evidentiary benefit to be gained from the statement." Petitioner takes issue with the following section of defense counsel's closing argument:

> What the State is doing is, the State is waiving a scary gun at you and saying this man is a bad man, so don't worry about anything else. That's what the State is doing. Yeah, we saw on the video, he had that gun. *He's not a good guy. I'm going to say it. I'm not hiding anything,* but I'm also not hiding page 3, paragraph five; and that says that you are instructed that before an officer has the right to make a temporary investigative detention, traffic stop, the officer must have a reasonable suspicion that a violation of the law is occurring or has occurred. So that's where everything begins and ends. Because if you're convinced beyond a reasonable doubt that there was a traffic violation at any point, then you convict him. I'm sorry, if you have a reasonable doubt, you don't convict him. If you don't have any reasonable doubt, then you convict him. So that's what you focus on, and that's not an easy thing to do. (ECF No. 8-6 at 146-47 (emphasis added).)

When examining counsel's closing argument to determine whether it was ineffective, the court must consider the closing argument in its entirety. *Riley v. Cockrell*, 339 F.3d 308, 317 (5th Cir. 2003) (citations omitted). "To establish credibility with the jury, counsel may make a

tactical decision to 'acknowledge the defendant's culpability and may even concede that the jury would be justified in imposing the death penalty.'" *Id.* (citations omitted).

Petitioner advanced this same argument on direct appeal. After noting that this was not the best vehicle for presenting IATC claims, the appeals court noted that, in a hearing outside the presence of the jury, defense counsel explained to the court that the trial strategy was to challenge the propriety of the traffic stop rather than attack the charged offense. The appeals court further noted that, given there were several police officers who testified they saw Petitioner with a gun, along with a video of the incident, counsel's trial strategy seemed reasonable. The appeals court further speculated that Petitioner's counsel might have determined that acknowledging Petitioner's criminal past would establish credibility with the jury. The court thus concluded that Petitioner had not shown that his trial attorney had provided ineffective assistance of counsel. *Brown*, 2016 WL 3144338 at *5.

Petitioner brought this claim before the state habeas court, and it was denied on the merits. There is no affidavit in the record from Petitioner's trial counsel explaining his trial strategy. Nonetheless, the undersigned concludes the state habeas court did not unreasonably apply the *Strickland* standard when denying this claim. Given the amount of evidence supporting the charged offense against the Petitioner, it was reasonable for counsel to attempt to gain credibility with the jury by acknowledging Petitioner's criminal record. While Petitioner might not like the way his counsel characterized him before the jury, the state habeas court was not unreasonable in concluding this characterization did not rise to the level of ineffective assistance of counsel. *Cf. Carter v. Johnson*, 131 F.3d 452, 466 & n.22 (5th Cir. 1997) (counsel was not ineffective when, during closing argument, counsel "implied [petitioner] might have committed other criminal acts, questioned whether he could—and should—live in society, wondered aloud

whether death was a greater punishment than life imprisonment, and conceded that the jury could sentence him to death with a clear conscience"). Accordingly, this claim should be denied.

3. Failure to Object

The majority of Petitioner's IATC claims involve counsel's failure to object at several times during the trial: (1) when the prosecutor asked improper voir dire questions; (2) during the prosecutor's closing argument; (3) when the prosecutor argued facts not in evidence during closing arguments; (4) when the prosecutor vouched for Officer Fickel's credibility; and (5) when the prosecutor struck at Petitioner over counsel's shoulders.

To succeed on these claims, Petitioner must show counsel failed to raise meritorious objections. *See Emery v. Johnson*, 139 F.3d 191, 198 (5th Cir. 1997) (holding a futile or meritless objection does not support a claim of ineffective assistance of counsel). This is not something Petitioner can show. The Court has already examined Petitioner's claims in the context of prosecutorial misconduct and found that the state habeas court was not unreasonable in dismissing them. The same holds true in this context: there is no support in the record that these objections would have been meritorious ones. In any event, Petitioner is unable to establish that any prejudice resulted from counsel's failure to object: Petitioner has failed to show that, but for counsel's failure to object, the trial would have had a different result. Accordingly, the state court's denial of this claim was not unreasonable and federal habeas relief should be denied.

4. Failure to Provide Adequate Representation

In his final IATC claim, Petitioner argues that his trial counsel failed to represent Petitioner to his fullest ability after the judge denied his motion to withdraw. For support, Petitioner relies on the support of his prior IATC claims. The court has already concluded that the state habeas court was not unreasonable when it denied these claims on the merits. As a

result, Petitioner has no support for his claim that counsel failed to provide him constitutionally adequate representation, and he is not entitled to federal habeas relief on these grounds.

D. Ineffective Assistance of Appellate Counsel (IAAC) (claims 20-26)

Petitioner raises several IAAC claims in his federal petition, which all rely on claims the Court has concluded should be denied. Specifically, Petitioner contends his appellate counsel provided ineffective assistance when shed failed to raise on appeal: (1) the trial court's error in denying Petitioner's motion to suppress; (2) the trial court's abuse of discretion in denying trial counsel's motion to withdraw; (3) the prosecutor's improper voir dire questions; (4) the prosecutor's improper closing argument; (5) the prosecutor's vouching for Officer Fickel; and (6) prosecutorial misconduct. Petitioner also argues appellate counsel was ineffective when she failed to investigate the reasons behind trial counsel's motion to withdraw.

A criminal defendant is constitutionally entitled to effective assistance of appellate counsel when he has a right to appeal under state law. *Evitts v. Lucey*, 469 U.S. 387 (1985); *United States v. Phillips*, 210 F.3d 345, 348 (5th Cir. 2000). The *Strickland* standard for proving ineffective assistance of counsel applies equally to both trial and appellate attorneys. *Smith v. Robbins*, 528 U.S. 259, 285 (2000); *Dorsey v. Stephens*, 720 F.3d 309, 319 (5th Cir. 2013). Thus, to obtain relief on his IAAC grounds, Petitioner must demonstrate that (1) appellate counsel's conduct was objectively unreasonable under then-current legal standards, and (2) there is a reasonable probability that, but for appellate counsel's deficient performance, the outcome of Petitioner's appeal would have been different. *See Smith*, 528 U.S. at 285; *Higgins v. Cain*, 720 F.3d 255, 260-61 (5th Cir. 2015). He does neither.

Petitioner's appellate counsel, Shannon Hooks, sent him three letters prior to filing his appeal. On January 11, 2016, Ms. Hooks wrote to Petitioner explaining what issues she was

briefing for appeal and explained to Petitioner that the court of appeals does not look at new evidence on appeal and that it was permissible for the prosecutor to tell the jury at closing argument which witnesses were truthful or not. (ECF No. 8-44 at 18-19.) On February 1, 2016, Ms. Hooks responded to Petitioner's letter, explaining that it was legal for a prosecutor to ask a police officer how many traffic violations were necessary to warrant a traffic stop; that it is not the judge's responsibility to tell the jury to disregard testimony if the judge believed a witness was lying; that the prosecutor is allowed to remind the jurors during closing of their duty and to tell them that "people like Frank Brown cannot be trusted with guns"; and that, during closing arguments, a prosecutor can opine that police officers would not make up a lie involving three traffic violations rather than just one. (ECF No. 8-44 at 15-17.) Finally, on February 22, 2016, Ms. Hooks wrote Petitioner, explaining the legal elements of reasonable suspicion and the abuse-of-discretion standard of review, and stating there was not enough proof in the record to convince the court of appeals that there was no reasonable suspicion for a traffic stop. (ECF No. 8-43 at 6-7.)

There is nothing in the record to support Petitioner's claim that his appellate counsel provided him with constitutionally deficient legal assistance on appeal. To demonstrate deficiency, Petitioner must show that "counsel unreasonably failed to discover [and raise] nonfrivolous issues"; however, counsel is not required to "raise every nonfrivolous claim, but rather may select among them in order to maximize the likelihood of success on appeal." *Smith*, 528 U.S. at 286, 288. Petitioner's counsel explained what issues she was pursuing on appeal, and why the other errors Petitioner wanted to raise were frivolous and would not be successful. Further, based on its prior analysis of Petitioner's claims in the context of prosecutorial misconduct and IATC, the Court concludes that none of the issues Petitioner argues appellate

counsel should have raised were nonfrivolous. Finally, for the reasons stated above, the claim that appellate counsel was deficient for failing to investigate trial counsel's motion to withdraw is meritless.

The state habeas court was not unreasonable in dismissing Petitioner's state habeas application based on IAAC grounds. Accordingly, these claims should be dismissed.

E. TCCA decision should not receive deference (claim 27)

In his final claim, Petitioner argues that the TCCA's decision denying his state habeas application should not be afforded a "presumption of correctness" because the state habeas court failed to conduct a live evidentiary hearing and did not obtain affidavits from the parties.

Petitioner couches this as a ground upon which this Court can grant him federal habeas relief, but it is merely an argument against the federal habeas court deferring to the rulings of the state habeas court in a § 2254 action. As Respondent correctly points out, there is no requirement under AEDPA that a state habeas court give reasons for its denial of a habeas petition, and it is Petitioner's burden to show that the denial of his state habeas application was contrary to clearly established law, involved an unreasonable application of federal law, or was based on an unreasonable determination of the facts in the light of the record. *See* 28 U.S.C. § 2254(d); *Richter*, 562 U.S. at 100-02. This claim should be dismissed.

IV. Recommendation

The undersigned recommends that the District Court **DENY** Petitioner's petition for a writ of habeas corpus.

V. Certificate of Appealability

A petitioner may not appeal a final order in a habeas corpus proceeding "unless a circuit justice or judge issues a certificate of appealability." 28 U.S.C. § 2253(c)(1)(A). Pursuant to Rule

11(a) of the Rules Governing Section 2254 Cases, the district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. *See Miller-El v. Cockrell,* 537 U.S. 322, 335-36 (2003) (citing 28 U.S.C. § 2253(c)(1)).

A certificate of appealability may issue only if a petitioner has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). In cases where a district court rejects a petitioner's constitutional claims on the merits, "the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). When a district court rejects a habeas petition on procedural grounds without reaching the constitutional claims, "a COA should issue when the petitioner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.*

In this case, reasonable jurists could not debate the dismissal or denial of the Petitioner's § 2254 petition on substantive or procedural grounds, nor find that the issues presented are adequate to deserve encouragement to proceed. *Miller-El*, 537 U.S. at 327 (citing *Slack*, 529 U.S. at 484). Accordingly, the undersigned recommends that the Court should not issue a certificate of appealability.

VI. Objections

Within 14 days after receipt of the magistrate judge's report, any party may serve and file written objections to the findings and recommendations of the magistrate judge. 28 U.S.C. § 636 (b)(1)(C). Failure to file written objections to the proposed findings and recommendations contained within this report within 14 days after service shall bar an aggrieved party from de novo review by the district court of the proposed findings and recommendations and from

appellate review of factual findings accepted or adopted by the district court except on grounds of plain error or manifest injustice. *Thomas v. Arn*, 474 U.S. 140, 148 (1985); *Douglass v. United Servs. Auto. Assoc.*, 79 F.3d 1415 (5th Cir. 1996) (*en banc*); *Rodriguez v. Bowen*, 857 F.2d 275, 276-77 (5th Cir. 1988).

SIGNED this 28th day of April, 2020.

MARK LANE
UNITED STATES MAGISTRATE JUDGE