United States Court of Appeals for the Fifth Circuit

A True Copy
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Jyle W. Cayce
Clerk, U.S. Court of Appeals, Fifth Circuit

No. 21-40704

JEREMY P. SPENCER,

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 Eastern District of Texas
USDC No. 1:19-CV-362

Before SMITH, HIGGINSON, AND WILLETT, *Circuit Judges.*

PER CURIAM:

This court must examine the basis of its jurisdiction, on its own motion if necessary. *Hill v. City of Seven Points*, 230 F.3d 167, 169 (5th Cir. 2000). In this habeas corpus case, Petitioner filed a notice of appeal on September 16, 2021.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

BEAUMONT DIVISION

JEREMY PIERRE SPENCER	§	
VS.	§	CIVIL ACTION NO. 1:19-CV-362
DIRECTOR, TDCJ-CID	§	

MEMORANDUM ORDER OVERRULING PETITIONER'S OBJECTIONS AND ADOPTING THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

Petitioner Jeremy Pierre Spencer, a prisoner confined at the Michael Unit of the Texas Department of Criminal Justice, Correctional Institutions Division, brought this petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

The court ordered that this matter be referred to the Honorable Zack Hawthorn, United States Magistrate Judge, for consideration pursuant to applicable laws and orders of this court. The magistrate judge has submitted a Report and Recommendation of United States Magistrate Judge. The magistrate judge recommends denying the petition.

The court has received and considered the Report and Recommendation of United States Magistrate Judge, along with the record and the pleadings. The petitioner filed objections to the magistrate judge's report and recommendation.

The court has conducted a *de novo* review of the objections in relation to the pleadings and the applicable law. *See* FED. R. CIV. P. 72(b). After careful consideration of all the pleadings and the relevant case law, the court concludes that the petitioner's objections lack merit.

Further, the petitioner is not entitled to the issuance of a certificate of appealability. An appeal from a judgment denying federal habeas corpus relief may not proceed unless a judge issues

a certificate of appealability. *See* 28 U.S.C. § 2253; FED. R. APP. P. 22(b). The standard for granting a certificate of appealability, like that for granting a certificate of probable cause to appeal under prior law, requires the petitioner to make a substantial showing of the denial of a federal constitutional right. *See Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000); *Elizalde v. Dretke*, 362 F.3d 323, 328 (5th Cir. 2004); *see also Barefoot v. Estelle*, 463 U.S. 880, 893 (1982). In making that substantial showing, the petitioner need not establish that he should prevail on the merits. Rather, he must demonstrate that the issues are subject to debate among jurists of reason, that a court could resolve the issues in a different manner, or that the questions presented are worthy of encouragement to proceed further. *See Slack*, 529 U.S. at 483-84; *Avila v. Quarterman*, 560 F.3d 299, 304 (5th Cir. 2009). If the petition was denied on procedural grounds, the petitioner must show that jurists of reason would find it debatable: (1) whether the petition raises a valid claim of the denial of a constitutional right, and (2) whether the district court was correct in its procedural ruling. *Slack*, 529 U.S. at 484; *Elizalde*, 362 F.3d at 328. Any doubt regarding whether to grant a certificate of appealability is resolved in favor of the petitioner, and the severity of the penalty may be considered in making this determination. *See Miller v. Johnson*, 200 F.3d 274, 280-81 (5th Cir. 2000).

Here, the petitioner has not shown that any of the issues raised by his claims are subject to debate among jurists of reason, or that a procedural ruling was incorrect. In addition, the questions presented are not worthy of encouragement to proceed further. Therefore, the petitioner has failed to make a sufficient showing to merit the issuance of a certificate of appealability.

ORDER

Accordingly, the petitioner's objections (document no. 26) are **OVERRULED**. The findings of fact and conclusions of law of the magistrate judge are correct, and the report of the magistrate

judge (document no. 24) is **ADOPTED**. A final judgment will be entered in this case in accordance with the magistrate judge's recommendation. A certificate of appealability will not be issued.

SIGNED this the 7 day of **March, 2022.**

Thad Heartfield
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

BEAUMONT DIVISION

JEREMY PIERRE SPENCER	§	
VS.	§	CIVIL ACTION NO. 1:19-CV-362
DIRECTOR, TDCJ-CID	§	

FINAL JUDGMENT

This action came on before the Court, Honorable Thad Heartfield, District Judge, presiding, and, the issues having been considered and a decision having been rendered, it is

ORDERED and **ADJUDGED** that this petition for writ of habeas corpus is **DENIED**. All motions not previously ruled on are **DENIED**. A certificate of appealability will not be issued.

SIGNED this the 7 day of **March, 2022.**

Thad Heartfield
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

BEAUMONT DIVISION

JEREMY PIERRE SPENCER	§	
VS.	§	CIVIL ACTION NO. 1:19-CV-362
DIRECTOR, TDCJ-CID	§	

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

Petitioner Jeremy Pierre Spencer, a prisoner currently confined at the Michael Unit of the Texas Department of Criminal Justice, Correctional Institutions Division, proceeding *pro se*, filed this petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

The petition was referred to the undersigned magistrate judge pursuant to 28 U.S.C. § 636 for findings of fact, conclusions of law, and recommendations for the disposition of the case.

Factual Background

The petitioner is in custody pursuant to a judgment entered in the 252nd Judicial District Court of Jefferson County, Texas. On May 20, 2015, the petitioner was charged in cause number 15-22350 with the first degree felony offense of aggravated assault. The indictment alleged that, on April 2, 2015, the petitioner "intentionally and knowingly and recklessly cause[d] serious bodily injury to JACQUELINE MASON... a person whose relationship and association with the Defendant is described by Section 71.0021(b) of the Texas Family Code, by stabbing and cutting the Complainant with a deadly weapon, to-wit: a knife." On February 21, 2017, the first day of trial, the State abandoned, without objection, the allegation that the victim was a person described by Section 71.0021(b) of the Texas Family Code, which reduced the charge to a second degree felony. A jury

found the petitioner guilty of aggravated assault and assessed a punishment of 20 years of imprisonment. The judgment was affirmed on appeal. The petitioner filed a petition for discretionary review, which the Texas Court of Criminal Appeals refused on March 20, 2019.

The petitioner filed a state application for habeas relief. On July 3, 2019, the Texas Court of Criminal Appeals denied the application without written order.

The Petition

The petitioner alleges his trial attorney provided ineffective assistance by: (1) failing to hire an investigator; (2) failing to call character witnesses to testify on the petitioner's behalf; (3) forcing the petitioner to testify; and (4) failing to argue that the petitioner was incompetent to stand trial. The petitioner contends he was denied due process when the indictment was amended on the day of trial, he was handcuffed in front of the jury, and he was assaulted by the bailiff in front of the jury. The petitioner asserts there was insufficient evidence to support his conviction. The petitioner alleges he was denied his right to a speedy trial. Finally, the petitioner contends that cumulative errors affected the fairness of the criminal proceeding.

Standard of Review

Title 28 U.S.C. § 2254 authorizes the district court to entertain a petition for writ of habeas corpus on behalf of a person in custody pursuant to a state court judgment if the prisoner is in custody in violation of the Constitution or laws or treaties of the United States. 28 U.S.C. § 2254(a). The court may not grant relief on any claim that was adjudicated in state court proceedings unless the adjudication: (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;[1] or (2) resulted in a decision based on an unreasonable determination of the facts in light of the evidence presented in the state court. 28 U.S.C. § 2254(d). A decision is contrary to clearly established federal law if the state court reaches a conclusion opposite to a decision reached by the Supreme Court on a question of law, or if the state court decides a case differently than the Supreme Court has on a set of materially indistinguishable facts. *Williams v. Taylor*, 529 U.S. 362, 412-13 (2000). An application of clearly established federal law is unreasonable if the state court identifies the correct governing legal principle, but unreasonably applies that principle to the facts. *Id.* State court decisions must be given the benefit of the doubt. *Renico v. Lett*, 559 U.S. 766, 773 (2010).

The question for federal review is not whether the state court decision was incorrect, but whether it was unreasonable, which is a substantially higher threshold. *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007). If the decision of the highest state court is not accompanied by an explanation of the court's reasoning, federal courts must look to the last state court decision that does provide an explanation for the decision. *Wilson v. Sellers*, _ U.S. _ , 138 S. Ct. 1188, 1192 (2018). There is a rebuttable presumption that the unexplained ruling adopted the same reasoning. *Id.* "Where a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief." *Harrington v. Richter*, 562 U.S. 86, 98 (2011); *see also Johnson v. Williams*, 568 U.S. 289, 293 (2013) (holding there is a rebuttable presumption that the federal claim was adjudicated on the merits when the state court addresses some claims, but not others, in its opinion).

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[1] In making this determination, federal courts may consider only the record before the state court that adjudicated the claim on the merits. *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011).

This court must accept as correct any factual determinations made by the state courts unless the petitioner rebuts the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e). The presumption of correctness applies to both implicit and explicit factual findings. *Young v. Dretke*, 356 F.3d 616, 629 (5th Cir. 2004); *Valdez v. Cockrell*, 274 F.3d 941, 948 n. 11 (5th Cir. 2001) ("The presumption of correctness not only applies to explicit findings of fact, but it also applies to those unarticulated findings which are necessary to the state court's conclusions of mixed law and fact."). Deference to the factual findings of a state court is not dependent upon the quality of the state court's evidentiary hearing. *See Valdez*, 274 F.3d at 951 (holding that "a full and fair hearing is not a precondition to according § 2254(e)(1)'s presumption of correctness to state habeas court findings of fact nor to applying § 2254(d)'s standards of review.").

Analysis

I. Ineffective Assistance of Counsel

In order to establish an ineffective assistance of counsel claim, the petitioner must prove counsel's performance was deficient, and the deficient performance prejudiced the petitioner's defense. *Strickland v. Washington*, 466 U.S. 668 (1984). Because the petitioner must prove both deficient performance and prejudice, failure to prove either will be fatal to his claim. *Johnson v. Scott*, 68 F.3d 106, 109 (5th Cir. 1995).

Judicial review of counsel's performance is highly deferential. *Strickland*, 466 U.S. at 689. There is a strong presumption that counsel rendered reasonable, professional assistance and that the challenged conduct was the result of a reasoned strategy. *Id.* To overcome the presumption that counsel provided reasonably effective assistance, the petitioner must prove his attorney's performance was objectively unreasonable in light of the facts of the petitioner's case, viewed as of

the time of the attorney's conduct. *Id.* at 689-90. A reasonable professional judgment to pursue a certain strategy should not be second-guessed. *Jones v. Barnes*, 463 U.S. 745, 751-54 (1983).

In addition to demonstrating counsel's performance was deficient, the petitioner must also show prejudice resulting from counsel's inadequate performance. *Strickland*, 466 U.S. at 691-92. The petitioner must establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. The petitioner must show a substantial likelihood that the result would have been different if counsel performed competently. *Richter*, 562 U.S. at 112. In determining whether the petitioner was prejudiced, the court must consider the totality of the evidence before the fact-finder. *Berghuis v. Thompkins*, 560 U.S. 370, 389 (2010).

Analysis of an ineffective assistance claim on federal habeas review of a state court conviction is not the same as adjudicating the claim on direct review of a federal conviction. *Richter*, 562 U.S. at 101. The key question on habeas review is not whether counsel's performance fell below the *Strickland* standard, but whether the state court's application of *Strickland* was unreasonable. *Id.* Even if the petitioner has a strong case for granting relief, that does not mean the state court was unreasonable in denying relief. *Id.* at 102. The Court will now consider the merits of the petitioner's claims.

A. Failure to Prepare a Defense

The petitioner contends that his attorney's investigation and trial preparation were inadequate, he should have spent more time consulting with the petitioner, and he should have hired an investigator. An attorney is required to conduct a reasonable amount of pre-trial investigation.

Lockhart v. McCotter, 782 F.2d 1275, 1282 (5th Cir. 1986). However, the defense of a criminal case does not "contemplate the employment of wholly unlimited time and resources." *Smith v. Collins*, 977 F.2d 951, 960 (5th Cir. 1992). An attorney is not necessarily ineffective for failing to investigate every conceivable, potentially non-frivolous matter. *Id.* Further, "brevity of consultation time" with a client does not, by itself, rise to the level of ineffective assistance of counsel. *Murray v. Maggio*, 736 F.2d 279, 282 (5th Cir. 1984).

The petitioner has not demonstrated that counsel's pre-trial preparation was deficient. There is no indication from the record that additional investigation, preparation, or consultation with the petitioner would have located evidence or witnesses that could be used to impeach witnesses or aid the petitioner's defense. "Mere conclusory allegations in support of a claim of ineffective assistance of counsel are insufficient to raise a constitutional issue." *Green v. Johnson*, 160 F.3d 1029, 1043 (5th Cir. 1998). Therefore, the state court's conclusion that counsel provided effective assistance with respect to pre-trial investigation, preparation, and consultation is a reasonable application of *Strickland*.

B. Failure to Call Character Witnesses to Testify

The petitioner contends that his attorney should have called character witnesses, such as his employer, his priest, co-workers, friends, his M.H.M.R case worker, his doctor, and police officers to testify on his behalf. Complaints about the failure to call witnesses are disfavored in habeas petitions because allegations of potential testimony are largely speculative, and the presentation of witnesses is generally a matter of trial strategy. *Day v. Quarterman*, 566 F.3d 527, 538 (5th Cir. 2009); *Lockhart*, 782 F.2d at 1282. The petitioner must identify the witness, explain the content of the witness's proposed testimony, show the testimony would have been favorable to a particular

defense, and demonstrate that the witness would have testified at trial. *Day*, 566 F.3d at 538. Generally, relief will not be granted where the only evidence of the potential witness's testimony comes from the petitioner. *Sayre v. Anderson*, 238 F.3d 631, 635-36 (5th Cir. 2001).

The petitioner's assertion that character witness would have testified favorably to the defense is speculative. The petitioner failed to demonstrate that any of the witnesses would have testified, or that the content of their testimony would have been favorable to the petitioner. The petitioner's speculative allegations are insufficient to overcome the strong presumption that counsel provided effective assistance of counsel. Therefore, the state court's rejection of this claim is not contrary to, and did not involve an unreasonable application of, clearly established federal law. Nor did the state court's findings result in a decision based on an unreasonable determination of the facts in light of the evidence.

C. Coercing Petitioner to Testify

The petitioner contends that defense counsel coerced him into testifying at trial by telling the petitioner that he would "get 20-years" if he did not testify. By denying relief on this claim during the state habeas proceedings, the Texas Court of Criminal Appeals necessarily found that defense counsel did not coerce the petitioner into testifying. This implicit finding is entitled to a presumption of correctness, and the petitioner has not presented clear and convincing evidence that the finding was incorrect. The state court's rejection of this claim is not contrary to, and did not involve an unreasonable application of, clearly established federal law. Nor did the state court's findings result in a decision based on an unreasonable determination of the facts in light of the evidence.

D. Competence to Stand Trial

A criminal defendant must be mentally competent in order to stand trial. *Dunn v. Johnson*, 162 F.3d 302, 305 (5th Cir. 1998). To be competent, the defendant must be able to understand the nature and object of the proceedings, consult with counsel, and assist in preparing a defense. *Dusky v. United States*, 362 U.S. 402, 402 (1960); *United States v. Flores-Martinez*, 677 F.3d 699, 705 (5th Cir. 2012). This standard applies whether the defendant pleads guilty or stands trial. *Godinez v. Moran*, 509 U.S. 389, 398 (1993). Further, on habeas review, the petitioner "must show that the facts are 'sufficient to positively, unequivocally and clearly generate a real, substantial and legitimate doubt' as to his mental competency at the time of trial." *Dunn*, 162 F.3d at 306 (quoting *Bruce v. Estelle*, 536 F.2d 1051, 1058-59 (5th Cir. 1976)).

The petitioner has not shown that counsel performed deficiently by failing to argue that he was not competent to stand trial. The petitioner's mother testified at sentencing that the petitioner had unspecified mental health issues, but there is nothing in the record to suggest that the petitioner suffered from a mental condition that prevented him from understanding the nature of his proceedings or assisting his attorney in preparing a defense. Further, the petitioner has not shown that he was prejudiced by counsel's failure to request the examination. Therefore, the petitioner is not entitled to relief on this claim.

II. Amended Indictment

The petitioner contends the trial court erred by allowing the State to amend the indictment on the day of trial. The amended indictment removed the allegation of family violence, which reduced the offense from a first degree felony to a second degree felony and reduced the petitioner's sentence exposure from 5-99 years or life imprisonment to 2-20 years of imprisonment. Because the

indictment was amended without objection by the defense, it was not error for the trial court to allow the amendment. Further, the petitioner was not prejudiced by the amendment because it significantly reduced his potential sentence exposure. The state court's rejection of this claim is not contrary to, or involve an unreasonable application of, clearly established federal law. Nor did the state court's findings result in a decision based on an unreasonable determination of the facts in light of the evidence.

III. Handcuffed in the Jury's Presence

The petitioner alleges the trial court abused its discretion by handcuffing him before the jury. This issue was raised on direct appeal, and the Ninth Court of Appeals described the situation as follows:

> Spencer was indicted and convicted for the aggravated assault of his mother-in-law after he stabbed her several times, causing her serious bodily injury. Spencer's then-wife also testified Spencer stabbed her during the same incident. Throughout the trial, Spencer repeatedly interrupted the proceedings by speaking out and by refusing to follow the trial court's instructions. These outbursts eventually led to his removal from the courtroom during parts of the trial and being placed in handcuffs while he was in the courtroom.
>
> Before beginning voir dire, Spencer's trial counsel elicited assistance from the trial court to have Spencer sign the election for the jury to assess punishment if he was found guilty. When the trial court instructed Spencer to sign the election form, he refused and asserted his innocence. Even after the trial court further explained signing the election did not serve as an admission of his guilt, Spencer continued to argue, maintaining his innocence. During voir dire, Spencer interrupted the proceedings to go to the bathroom and was insistent on going at that time. The trial judge allowed him to go even though he was disruptive and argued with the court. Later in the voir dire proceedings, Spencer disrupted the trial again to apologize for his outburst and requesting to go to the bathroom, and the trial court assured him it was fine. We can discern from the record that Spencer was out of the courtroom for only a few minutes during the restroom break and he was present for the selection of the jury panel and when they took the oath. The second day of trial, Spencer entered his plea of not guilty after the indictment was presented and read. Spencer remained in the courtroom and the trial proceeded without incident.

On the third day of trial, as soon as the jury entered the courtroom, Spencer spoke out without permission. Even though the bailiff and trial court sought to quiet Spencer, he stated he wanted to address the court. The trial court instructed him he would not be able to address the court at that time and must remain quiet. Regardless of this instruction, Spencer continued to make outbursts. The trial court then ordered him to take a seat. Rather than doing so, Spencer continued talking, and the trial court instructed that he be removed from the courtroom. While being removed, Spencer stated, "I can't talk. They tell me to be quiet before y'all come in. See, how can I have a fair trial? This is—it's—it's war behind closed doors, you see." The trial court explained on the record that Spencer would be placed in a holding cell with speakers to allow him to hear the trial proceedings unless he was unable to calm down and conduct himself appropriately in court.

After a brief break, Spencer was brought into the courtroom following a conference with the trial court and his counsel. The trial court explained outside the presence of the jury that Spencer "had to be taken out of the courtroom by the bailiff forcibly. And his attorney [has] talked to him. I've gone to the back. We've talked. Mr. Spencer [is] back in the courtroom. He assures me he's going to follow the rules." (Emphasis added.) When the trial court asked Spencer to confirm he will adhere to the rules, he responded, "Yes, ma'am." The trial court continued and pointed out the following for the record,

> We do have, however, based on what went on and what the bailiff feels is most appropriate, Mr. Spencer is in handcuffs, and we're going to leave him in handcuffs. That's for everyone's safety, including his own and based on his own actions in front of the jury and when he refused to follow the rules before.

As the trial court prepared to proceed, Spencer interrupted again, but his counsel talked over him, objecting to "him being in handcuffs and restrained in front of the jury." The trial court noted his objection but overruled it.

Again, the trial court instructed Spencer not to speak out in the courtroom but to let his attorney know if he had something to say. Yet Spencer continued to address the trial court, at one time requesting medical attention. The trial court instructed Spencer to stop talking and that the court would place a call to request proper medical attention be given to Spencer at the jail. Because of this outburst, the trial court explained to Spencer that if he continued speaking without permission, he would be removed from the courtroom and placed into the holding cell where he could listen to his trial on speakers. The trial court stated it "will not allow [him] to interrupt myself, the attorneys[,] or anyone at any point from this point forward." When asked if Spencer understood, he affirmed.

> Soon thereafter, while Spencer's ex-wife was testifying, Spencer spoke to the witness, telling her she knew that he was not trying to kill her. The bailiff and the trial court sought to quiet Spencer, but he refused and continued speaking and cursing. The trial court once again ordered his removal. While being removed, he continued cursing and telling the witness to tell the truth. The trial court stated on the record Spencer would be placed in a holding cell for the remainder of the trial and could listen to the proceedings from inside the cell.
>
> After the State rested, the trial court instructed Spencer's defense counsel that if Spencer testified in his defense, he would have to do so under the rules or he would be removed from the stand. While outside the presence of the jury and prior to Spencer testifying, the trial court carefully instructed Spencer as to the behavior the court expected of him during his testimony and warned him that he would again be removed from the courtroom if he became disruptive. Although Spencer argued with the trial court, claiming the rules were "driving [him] crazy[,]" he finally agreed to follow the rules.
>
> Even with the trial court's repeated admonishment to follow the rules, only to answer the questions he was asked and to avoid the use of profanity, Spencer persisted in his inappropriate and disruptive behavior. After Spencer continued to vocalize about matters not relevant to his trial and addressed the trial judge by name rather than as judge, the trial court again ordered his removal. As the bailiff removed him, the record reflects that the bailiff told Spencer, "Don't put your arm around me[,]" to which Spencer responded, "I'm not doing anything. Y'all beating the s---outta me." After his removal from the courtroom for the third time during the trial, the trial court informed the State and defense counsel that Spencer would not be permitted back into the courtroom for the remainder of the trial. The trial court noted that based on its discussion with the bailiff, both the trial court and the bailiff were of the opinion that Spencer posed "a danger to either himself or others if he's allowed to remain in the courtroom" and so "based on his actions here in the courtroom today, and for everyone's safety, including his own," he would remain in the holding cell where he could hear the remainder of the trial through the speakers. The trial continued. Following closing arguments and deliberations, Spencer returned to the courtroom for the reading of the verdict.
>
> Spencer remained in the holding cell where he could hear the proceedings during the punishment phase of his trial. Spencer was present in the courtroom when the trial court read the punishment recommended by the jury and pronounced the sentence.

Spencer v. State, No. 09-17-00062-CR, 2018 WL 6186109, at *1–3 (Tex. App.–Texarkana Nov. 28, 2018, pet. ref'd).

Restraining a defendant before the jury violates the defendant's right to due process unless it is "justified by an essential state interest such as the interest of courtroom security." *Deck v. Missouri*, 544 U.S. 622, 624 (2005). Observing a defendant in restraints sends the jury a powerful image that is inconsistent with the presumption of innocence. *Hatten v. Quarterman*, 570 F.3d 595, 603 (5th Cir. 2009). If the defendant was erroneously restrained in the jury's presence, the State must prove beyond a reasonable doubt that the error did not contribute to the jury's verdict. *Id.* at 603-04. On direct review the Ninth Court of Appeals found:

> Here, the trial court assessed the need for restraints for this specific defendant. The trial court did not merely express generalized safety concerns. Instead, the trial court specifically referenced his prior outbursts and noted Spencer had to be forcibly removed from the courtroom. The trial court held that based on his actions, the handcuffs were necessary not only for the safety of everyone in the courtroom but for Spencer himself. The record also reflects Spencer refused to follow the trial court's repeated verbal instructions and admonishments throughout the trial.
>
> Thus, we conclude the record establishes Spencer was disruptive and abusive towards others, specifically the trial judge and courtroom staff, and had to be forcibly removed from the courtroom more than once. The record reflects that the trial court assessed the security risk with the bailiff before making the decision to shackle Spencer when he was in the courtroom. On the facts before us, we cannot say the trial judge abused her discretion by ordering Spencer to be placed in handcuffs.

Spencer, 2018 WL 6186109, at *4.

On collateral review, a federal court may grant relief based on constitutional trial error only if the error had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)); *see also Fry v. Pliler*, 551 U.S. 112, 119-20 (2007) (holding that the *Brecht* harmless error standard survived passage of the Antiterrorism and Effective Death Penalty Act of 1996). Under this standard, the petitioner should prevail if the record is balanced such that "a conscientious

judge is in grave doubt as to the harmlessness of the error." *O'Neal v. McAninch*, 513 U.S. 432, 435 (1995); *Robertson v. Cain*, 324 F.3d 297, 305 (5th Cir. 2003).

Due to the petitioner's disruptive behavior during the trial and the need to forcibly remove him from the courtroom on multiple occasions, it was not an abuse of discretion for the trial court to determine, after consulting with the bailiff, that the petitioner presented a security risk in the courtroom. Even if it was error to handcuff the petitioner, the alleged errors did not have a substantial or injurious influence on the jury's verdict in light of the overwhelming evidence supporting the guilty verdict. Therefore, the petitioner is not entitled to relief on this ground.

The petitioner also contends that the trial court erred by failing to grant a mistrial after the petitioner was forcibly removed from the courtroom by the bailiff, but the record reflects that the petitioner did not request a mistrial. As a result, the state court's rejection of this claim was not contrary to, and did not involve an unreasonable application of, clearly established federal law. Nor did the state court's findings result in a decision based on an unreasonable determination of the facts in light of the evidence.

IV. Perjured Testimony

The petitioner contends that the victim and the victim's daughter, the petitioner's ex-wife, perjured themselves at trial. A criminal defendant is denied due process when the prosecutor knowingly presents perjured testimony at trial or fails to correct untrue testimony. *Giglio v. United States*, 405 U.S. 150, 153 (1972). To obtain habeas relief on such a claim, the petitioner must show that the testimony was false, the state knew it was false, and the testimony was material. *Creel v. Johnson*, 162 F.3d 385, 391 (5th Cir. 1998).

Petitioner offers no factual support for his conclusory claims that the witnesses committed perjury or that the State presented perjured testimony. Conclusory claims, such as these, do not warrant federal habeas relief. *Ross v. Estelle*, 694 F.2d 1008, 1012 (5th Cir. 1983). The state court's rejection of this claim was not contrary to, and did not involve an unreasonable application of, clearly established federal law. Nor did it result in a decision that was based on an unreasonable determination of the facts.

V. Insufficient Evidence

The petitioner contends there was insufficient evidence to support his conviction. Claims regarding sufficiency of the evidence are reviewed under the standard set forth by the Supreme Court in *Jackson v. Virginia*, 443 U.S. 307 (1979). The inquiry to be used with such claims is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 320.

Under Texas law, the offense of aggravated assault with a deadly weapon consists of four elements: (1) the defendant (2) intentionally, knowingly, or recklessly (3) caused bodily injury to another and (4) used a deadly weapon during the commission of the assault. TEX. PENAL CODE ANN. § 22.02(a)(2).

The complainant testified that the petitioner, her son-in-law, slammed her daughter, his then-wife, to the ground and then began hitting the complainant in the abdomen. The complainant did not see a knife or realize she had been stabbed until she saw blood and heard her daughter say that the defendant had also cut her. The complainant testified that she remained in the intensive care unit for eleven or twelve days, and then spent another six weeks at the hospital for treatment. The complainant testified that she was discharged to a nursing facility for rehabilitation, and she

continued to have physical therapy, occupational therapy, and dialysis after her release. The complainant's daughter testified that the petitioner also stabbed her during the incident. Although she did not see the knife, she could feel that she was being stabbed as it happened. Sergeant James Graham, who is employed by the Beaumont Police Department, was working a security job at Baptist Hospital when the complainant and her daughter arrived at the hospital. Sergeant Graham testified that he could see the complainant's intestines, and he recognized from his experience that the wounds were stab wounds. In addition, the complainant's clothing and photographs of the clothing were admitted into evidence, and they showed holes corresponding to the injuries on the complainant.

By denying relief, the Texas Court of Criminal Appeals implicitly found that the evidence was sufficient to support the petitioner's conviction. This determination was not contrary to, and did not involve an unreasonable application of, clearly established federal law. Nor did it result in a decision that was based on an unreasonable determination of the facts. The petitioner argues that the evidence was insufficient because there is no evidence that the complainant saw a knife and a knife was not admitted into evidence, but the testimony of a witness can be sufficient evidence to support a conviction, and physical evidence is not required. *Peters v. Whitley*, 942 F.2d 937, 941-42 (5th Cir. 1991).

VI. Speedy Trial

The petitioner contends that the 23-month delay between his arrest and trial violated his Sixth Amendment right to a speedy trial. In *Barker v. Wingo*, 407 U.S. 514 (1972), the Supreme Court set forth a four-part test for determining whether there was an undue delay before trial. The court must consider the length of the delay, the reason for the delay, whether the defendant asserted his right to

a speedy trial, and the prejudice to the defendant. *Barker*, 407 U.S. at 530. None of the four factors is dispositive; each factor must be considered together with the circumstances of the case. *Goodrum v. Quarterman*, 547 F.3d 249, 257 (5th Cir. 2008).

The United States Court of Appeals for the Fifth Circuit has held that a full *Barker* analysis is warranted if the trial has been delayed for at least one year. *Goodrum*, 547 F.3d at 257-58. In this case, the first factor weighs in the petitioner's favor because the delay exceeded one year. *Id.* at 257-58. Therefore, the court must consider the remaining three factors. *United States v. Duran-Gomez*, 984 F.3d 366, 374 (5th Cir. 2020).

The second factor, the reason for the delay, asks whether the State or the defendant is more at fault for the delay. *Duran-Gomez*, 984 F.3d at 374. Deliberate delay to hinder the defense would weigh heavily against the State. *Vermont v. Brillon*, 556 U.S. 81, 90 (2009). Negligence or overcrowded courts weigh less heavily against the State, but are still considered. *Id.* Delay caused by the defendant weighs heavily against the defendant. *Id.* Defense counsel's conduct is attributable to the defendant, whether counsel is retained or appointed. *Id.* at 90-91. Therefore, delay caused by defense counsel's failure "to move the case forward" is attributable to the defendant. *Id.* at 91-93.

In this case, the reason for the delay is unclear from the record. Although the trial court reset the case seven times, the record does not reflect that either party requested any of the continuances. On several occasions, the case was set for trial, but not reached by the court. Although unprompted by the State, the court's delays are attributed to the State. On February 8, 2016, the petitioner filed a motion to dismiss appointed counsel, and then his defense counsel filed a motion to withdraw on March 2, 2016. On March 15, 2016, new counsel was appointed, and the case was reset until April 11, 2016. On April 11, 2016, the case was reset until May 31, 2016, for defense counsel to review

discovery. Thus, the time from February 8, 2016, through May 31, 2016, is attributable to the petitioner since it was prompted by his desire to change counsel. Since most of the delay is attributable to the State, rather than the petitioner, the second factor weighs against the State, although not heavily. *Goodrum*, 547 F.3d at 258.

A defendant's failure to demand a speedy trial, by objecting to a continuance or filing a motion for a speedy trial or by other means, is entitled to strong evidentiary weight of the third factor. *Duran-Gomez*, 984 F.3d at 377-78. In this case, the petitioner did not request a speedy trial or object to the continuances. Therefore, the third factor weighs heavily against the petitioner.

The fourth factor considers whether the defendant was prejudiced by the delay. To determine whether the defendnat was prejudiced, the court must consider the interests that the right to a speedy trial was designed to protect, including: (1) prevention of oppressive pretrial incarceration; (2) minimizing the anxiety and concern of the defendant; and (3) limiting the possibility of impairment to his defense. *Id.* at 260. Although the petitioner asserts there was "prejudicial contamination," he offers no factual basis to support his conclusory assertion that he was prejudiced by the delay.

On federal habeas review, the court does not determine whether the state court ruling was correct, but whether it was reasonable. *Goodrum*, 547 F.3d at 266. In *Goodrum*, the Texas Court of Criminal Appeals found that the first three factors weighed in Goodrum's favor, but found he was not prejudiced by the delay. *Id.* at 254. After weighing all four factors, the Texas Court of Criminal Appeals concluded that Goodrum's right to a speedy trial was not impaired. *Id.* On federal habeas review, the district court found that the state court's decision was reasonable and granted summary judgment to the respondent. *Id.* at 255. On appeal, the Fifth Circuit found that the first and third

factors weighed heavily in Goodrum's favor, and the second factor weighed in his favor. *Id.* at 257-60. The Fifth Circuit found that the anxiety and concern Goodrum suffered, and the worsened conditions of his confinement as a result of the detainer, constituted only a minimal showing of prejudice. *Id.* at 260-65. Emphasizing that review was limited to the reasonableness rather than the correctness of the state court's decision, the Fifth Circuit held that "it would not be unreasonable to view the insubstantial and limited prejudice proven by Goodrum, combined with the other relevant factors as we have found them, not to tip the balance enough in Goodrum's favor so as to establish a violation of the speedy trial right." *Id.* at 266. Accordingly, the Fifth Circuit affirmed the district court's dismissal of the claim on summary judgment. *Id.*

This case is indistinguishable from *Goodrum*. Although the first two factors weighed slightly in the petitioner's favor, it was not unreasonable for the state court to deny relief because the petitioner did not request a speedy trial and did not show prejudice from the almost two-year delay between his arrest and trial. Therefore, the petitioner is not entitled to relief on the claim that he was denied a speedy trial.

VII. Cumulative Error

The claim of cumulative error also lacks merit. While relief on this ground is theoretically possible, it is virtually impossible for a defendant to demonstrate on collateral review that the errors so infected the entire trial that the conviction violates due process. *Derden v. McNeel*, 978 F.2d 1453, 1457 (5th Cir. 1992). The petitioner must prove that: (1) errors were committed in the state trial court; (2) the errors were not procedurally barred from habeas corpus review; and (3) the errors were of a constitutional dimension. *Id.* at 1458. Then, the federal court must review the record as a whole to determine whether the errors likely caused a suspect verdict. *Id.*

As discussed above, the petitioner has not raised any errors of a constitutional dimension. Further, after reviewing the record as a whole, it is clear that the alleged errors did not likely cause a suspect verdict. Thus, the petitioner is not entitled to relief on this ground.

Recommendation

This petition for writ of habeas corpus should be denied.

Objections

Within fourteen days after receipt of the magistrate judge's report, any party may serve and file written objections to the findings of facts, conclusions of law and recommendations of the magistrate judge. 28 U.S.C. § 636(b)(1)(C).

Failure to file written objections to the proposed findings of facts, conclusions of law and recommendations contained within this report within fourteen days after service shall bar an aggrieved party from the entitlement of *de novo* review by the district court of the proposed findings, conclusions and recommendations and from appellate review of the factual findings and legal conclusions accepted by the district court, except on grounds of plain error. *Douglass v. United Servs. Auto. Ass'n,* 79 F.3d 1415, 1417 (5th Cir. 1996) (en banc); 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72.

SIGNED this 3rd day of February, 2022.

Zack Hawthorn
United States Magistrate Judge

Additional material from this filing is available in the Clerk's Office.