A P P E N D I E S (A)(B)(C)(D)(E)(F)

A P P E N D I X [A]

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
December 9, 2021
Lyle W. Cayce
Clerk

No. 20-11192

DEMARCUS ANTONIO TAYLOR,

Petitioner—Appellant,

versus

BOBBY LUMPKIN, *Director, Texas Department of Criminal Justice, Correctional Institutions Division*,

Respondent—Appellee.

Application for Certificate of Appealability from the
United States District Court for the Northern District of Texas
USDC No. 3:17-CV-1153

ORDER:

Demarcus Antonio Taylor, Texas prisoner # 01996790, seeks a certificate of appealability (COA) to appeal the district court's denial of his 28 U.S.C. § 2254 petition challenging his conviction of possession with intent to deliver cocaine in a drug-free zone and his enhanced sentence. He contends that his trial counsel rendered ineffective assistance and that the district court's failure to review his insufficiency-of-the-evidence claim results in a miscarriage of justice.

To obtain a COA, Taylor must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see Miller-El*

v. Cockrell, 537 U.S. 322, 336 (2003). When the district court has denied relief on procedural grounds, the prisoner must show "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." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). When constitutional claims have been rejected on the merits, the prisoner must show "that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.* Taylor fails to make the necessary showing.

Accordingly, his motion for a COA is DENIED.

/s/ Leslie H. Southwick
LESLIE H. SOUTHWICK
United States Circuit Judge

A P P E N D I X [B]

U.S. N.D. Court finding and recommendation

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DEMARCUS ANTONIO TAYLOR, TDCJ No. 2082883, Petitioner, V. DIRECTOR, TDCJ-CID, Respondent.	§ § § § § § § § § §	No. 3:17-cv-1153-N-BN

FINDINGS, CONCLUSIONS, AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

Petitioner Demarcus Antonio Taylor, a Texas prisoner, was convicted "of possession with intent to deliver cocaine in an amount of four grams or more but less than 200 grams in a drug-free zone," in violation of the Texas Health and Safety Code, and was sentenced to thirty years of imprisonment. *Taylor v. State*, No. 05-15-00567-CR, 2015 WL 7720483 (Tex. App. – Dallas Nov. 25, 2015, pet. ref'd), *aff'g as modified State v. Taylor*, No. F14-57392-S (282d Dist. Ct., Dallas Cnty., Tex. Apr. 23, 2015).[1]

Taylor filed a state habeas application, raising three grounds: that his trial counsel was constitutionally ineffective ("Ground 1"); that, as he argued on direct appeal, his sentence was excessive ("Ground 2"); and that the evidence was insufficient to support his conviction ("Ground 3"), and the Texas Court of Criminal

[1] *See also Taylor*, 2015 WL 7720483, at *1 (raising one issue on appeal: that "the thirty-year sentence is disproportionate and constitutes cruel and unusual punishment prohibited by the United State and Texas Constitutions" (citing U.S. CONST. amend. VIII; TEX. CONST. art. I, § 13)).

Appeals (the "CCA") denied his application without written order on the findings of the trial court made without a hearing, findings which concluded that Taylor failed to show a Sixth Amendment violation and that Grounds 2 and 3 were not cognizable on habeas review. *See Ex parte Taylor*, W14-57392-S(A) (282d Dist. Ct., Dallas Cnty. Feb. 24, 2017); *Ex parte Taylor*, WR-85,813-03 (Tex. Crim. App. Apr. 5, 2017) [Dkt. Nos. 12-1, 12-2].

Taylor then filed a habeas application under 28 U.S.C. § 2254 on April 25, 2017, the date on which he certifies that he placed the petition [Dkt. No. 3] in the prison mailing system.[2] *See id.* at 10. And his case was referred to the undersigned United States magistrate judge for pretrial management under 28 U.S.C. § 636(b) and a standing order of reference from United States District Judge David C. Godbey.

As ordered, *see* Dkt. No. 9, the State responded to the Section 2254 application, *see* Dkt. No. 12. Taylor filed a reply. *See* Dkt. No. 18. And the undersigned now enters these findings of fact, conclusions of law, and recommendation that the Court should deny federal habeas relief.

Legal Standards

"Federal habeas features an intricate procedural blend of statutory and caselaw authority." *Adekeye v. Davis*, 938 F.3d 678, 682 (5th Cir. 2019). In the district

[2] *See* RULE 3(d), RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS ("A paper filed by an inmate confined in an institution is timely if deposited in the institution's internal mailing system on or before the last day for filing."); *Uranga v. Davis*, 893 F.3d 282, 286 (5th Cir. 2018) ("We reaffirm that the operative date of the prison mailbox rule remains the date the pleading is delivered to prison authorities.").

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court, this process begins – and often ends – with the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), under which "state prisoners face strict procedural requirements and a high standard of review." *Adekeye*, 938 F.3d at 682 (citation omitted).

Under AEDPA, where a state court has already rejected a claim on the merits, a federal court may grant habeas relief on that claim only if the state court 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; 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.

28 U.S.C. § 2254(d); *see Adekeye*, 938 F.3d at 682 ("Once state remedies are exhausted, AEDPA limits federal relief to cases where the state court's decision was 'contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States' or was 'based on an unreasonable determination of the facts in light of the evidence presented.'" (citation omitted)); *see also Allen v. Vannoy*, 659 F. App'x 792, 798-99 (5th Cir. 2016) (per curiam) (describing Section 2244(d) as "impos[ing] two significant restrictions on federal review of a habeas claim ... 'adjudicated on the merits in state court proceedings'").

A state court adjudication on direct appeal is due the same deference under Section 2254(d) as an adjudication in a state post-conviction proceeding. *See, e.g.*, *Dowthitt v. Johnson*, 230 F.3d 733, 756-57 (5th Cir. 2000) (a finding made by the CCA

on direct appeal was an "issue ... adjudicated on the merits in state proceedings," to be "examine[d] ... with the deference demanded by AEDPA" under "28 U.S.C. § 2254(d)").

And "[t]he question under AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable – a substantially higher threshold." *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007); *see also Sanchez v. Davis*, 936 F.3d 300, 305 (5th Cir. 2019) ("[T]his is habeas, not a direct appeal, so our focus is narrowed. We ask not whether the state court denial of relief was incorrect, but whether it was unreasonable – whether its decision was 'so lacking in justification' as to remove 'any possibility for fairminded disagreement.'" (citation omitted)).

A state court decision is "contrary" to clearly established federal law if "it relies on legal rules that directly conflict with prior holdings of the Supreme Court or if it reaches a different conclusion than the Supreme Court on materially indistinguishable facts." *Busby v. Dretke*, 359 F.3d 708, 713 (5th Cir. 2004); *see also Lopez v. Smith*, 574 U.S. 1, 2 (2014) (per curiam) ("We have emphasized, time and time again, that the [AEDPA] prohibits the federal courts of appeals from relying on their own precedent to conclude that a particular constitutional principle is 'clearly established.'" (citation omitted)).

"A state court unreasonably applies clearly established Supreme Court precedent when it improperly identifies the governing legal principle, unreasonably extends (or refuses to extend) a legal principle to a new context, or when it gets the

principle right but 'applies it unreasonably to the facts of a particular prisoner's case.'" *Will v. Lumpkin*, ___ F.3d ____, No. 18-70030, 2020 WL 4744894, at *5 (5th Cir. Aug. 17, 2020) (quoting *Williams v. Taylor*, 529 U.S. 362, 407-08 (2000); citation omitted). But the Supreme Court has only clearly established precedent if it has 'broken sufficient legal ground to establish an asked-for constitutional principle.'" *Id.* (quoting *Taylor*, 569 U.S. at 380-82; citations omitted).

"For purposes of § 2254(d)(1), an unreasonable application of federal law is different from an incorrect application of federal law.... 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." *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (citations and internal quotation marks omitted). "Under § 2254(d), a habeas court must determine what arguments or theories supported or ... could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the Supreme] Court." *Id.* at 102 (internal quotation marks omitted); *see also Evans v. Davis*, 875 F.3d 210, 216 (5th Cir. 2017) (recognizing that Section 2254(d) tasks courts "with considering not only the arguments and theories the state habeas court actually relied upon to reach its ultimate decision but also all the arguments and theories it could have relied upon" (citation omitted)).

The Supreme Court has further explained that "[e]valuating whether a rule application was unreasonable requires considering the rule's specificity. The more

general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations." *Richter*, 562 U.S. at 101 (internal quotation marks omitted). And "even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Id.* at 102. The Supreme Court has explained that, "[i]f this standard is difficult to meet, that is because it was meant to be," where, "[a]s amended by AEDPA, § 2254(d) stops short of imposing a complete bar on federal court relitigation of claims already rejected in state proceedings," but "[i]t preserves authority to issue the writ in cases where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with this Court's precedents," and "[i]t goes no further." *Id.* Thus, "[a]s a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court 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; *accord Burt v. Titlow*, 571 U.S. 12, 20 (2013) ("If this standard is difficult to meet – and it is – that is because it was meant to be. We will not lightly conclude that a State's criminal justice system has experienced the extreme malfunction for which federal habeas relief is the remedy." (internal quotation marks, brackets, and citations omitted)).

As to Section 2254(d)(2)'s requirement that a petitioner show that the state court adjudication "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," the Supreme Court has explained that "a state-court factual

determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance" and that federal habeas relief is precluded even where the state court's factual determination is debatable. *Wood v. Allen*, 558 U.S. 290, 301, 303 (2010). Under this standard, "it is not enough to show that a state court's decision was incorrect or erroneous. Rather, a petitioner must show that the decision was objectively unreasonable, a substantially higher threshold requiring the petitioner to show that a reasonable factfinder must conclude that the state court's determination of the facts was unreasonable." *Batchelor v. Cain*, 682 F.3d 400, 405 (5th Cir. 2012) (brackets and internal quotation marks omitted).

The Court must presume that a state court's factual determinations are correct and can find those factual findings unreasonable only where the petitioner "rebut[s] the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1); *Gardner v. Johnson*, 247 F.3d 551, 560 (5th Cir. 2001).

This presumption applies not only to explicit findings of fact but also "to those unarticulated findings which are necessary to the state court's conclusions of mixed law and fact." *Valdez v. Cockrell*, 274 F.3d 941, 948 n.11 (5th Cir. 2001); *see also Ford v. Davis*, 910 F.3d 232, 235 (5th Cir. 2018) (Section 2254(e)(1) "'deference extends not only to express findings of fact, but to the implicit findings of the state court.' As long as there is 'some indication of the legal basis for the state court's denial of relief,' the district court may infer the state court's factual findings even if they were not expressly made." (footnotes omitted)).

And, even if the state court errs in its factual findings, mere error is not enough

– the state court's decision must be "*based* on an unreasonable factual determination. ... In other words, even if the [state court] had gotten [the disputed] factual determination right, its conclusion wouldn't have changed." *Will*, 2020 WL 4744894, at *6.

Further, "determining whether a state court's decision resulted from an unreasonable legal or factual conclusion does not require that there be an opinion from the state court explaining the state court's reasoning." *Richter*, 562 U.S. at 98; *see also* *Pondexter v. Dretke*, 346 F.3d 142, 148 (5th Cir. 2003) ("a federal habeas court is authorized by Section 2254(d) to review only a state court's 'decision,' and not the written opinion explaining that decision" (quoting *Neal v. Puckett*, 286 F.3d 230, 246 (5th Cir. 2002) (en banc) (per curiam))); *Evans*, 875 F.3d at 216 n.4 (even where "[t]he state habeas court's analysis [is] far from thorough," a federal court "may not review [that] decision de novo simply because [it finds the state court's] written opinion 'unsatisfactory'" (quoting *Neal*, 286 F.3d at 246)).

Section 2254 thus creates a "highly deferential standard for evaluating state court rulings, which demands that state-court decisions be given the benefit of the doubt." *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002). To overcome this standard, a petitioner must show that "there was no reasonable basis for the state court to deny relief." *Richter*, 562 U.S. at 98. That is, a petitioner must, in sum, "show, based on the state-court record alone, that any argument or theory the state habeas court could have relied on to deny [him] relief would have either been contrary to or an unreasonable application of clearly established federal law as determined by the

Supreme Court." *Evans*, 875 F.3d at 217.

Analysis

Taylor raises four grounds for federal habeas review: the three he raised in the state habeas proceedings (Grounds 1, 2, and 3) plus a claim that the indictment and its enhancements are void for insufficient notice ("Ground 4"). *Compare* Dkt. No. 3, *with* Dkt. No. 12-1.

I. Ground 4

Ground 4 was neither raised in Taylor's state habeas application nor in his petition for discretionary review refused by the CCA. *See* Dkt. No. 14-9 (presenting one question for review: "Failing to bring a disproportionate sentence complaint before the trial court is not waiver because such a sentence is an illegal sentence and is, therefore, void, and a void sentence can be brought up for the first time on appeal.").[3] Therefore, the factual and legal basis of Ground 4 has not "been fairly presented to the" CCA, as the highest available state court, for review, which means that Taylor has failed to properly exhaust state court remedies as to this claim. *Campbell v. Dretke*, 117 F. App'x 946, 957 (5th Cir. 2004) ("'The exhaustion requirement is satisfied when the substance of the habeas claim has been fairly presented to the highest state court' so that a state court has had a 'fair opportunity to apply controlling legal principles to the facts bearing on the petitioner's

[3] *See also* TEX. R. APP. P. 53.2(f) ("The petition must state concisely all issues or points presented for review. The statement of an issue or point will be treated as covering every subsidiary question that is fairly included. If the matter complained of originated in the trial court, it should have been preserved for appellate review in the trial court and assigned as error in the court of appeals.").

Even though you filed the 3 grounds in the state C.C.A.

you filed a 4th ground in the U.S. that was not filed in the C.C.A

This what they are attacking Claiming you didn't give the C.C.A ~~time to~~ a chance to answer the new ground.

You have to explain why you filed the new ground in the U.S. courts and not in the C.C.A.

constitutional claim.'" (quoting Soffar v. Dretke, 368 F.3d 441, 465 (5th Cir. 2004))); *see* 28 U.S.C. § 2254(b)(1)(A); *see also* Nickleson v. Stephens, 803 F.3d 748, 753 (5th Cir. 2015) ("The exhaustion doctrine demands more than allusions in state court to facts or legal issues that might be comprehended within a later federal habeas petition. The exhaustion doctrine is based on comity between state and federal courts, respect for the integrity of state court procedures, and 'a desire to protect the state courts' role in the enforcement of federal law.'" (quoting *Castille v. Peoples*, 489 U.S. 346, 349 (1989) (in turn quoting *Rose v. Lundy*, 455 U.S. 509, 518 (1982)))).

Unexhausted claims should be found procedurally barred if "the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred." *Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991).

Texas law precludes successive habeas claims except in narrow circumstances. *See* TEX. CODE CRIM. PROC. ANN. art. 11.07, § 5. This is a codification of the judicially created Texas abuse-of-the-writ doctrine. *See Barrientes v. Johnson*, 221 F.3d 741, 759 n.10 (5th Cir. 2000). Under this state law, a habeas petitioner is procedurally barred from returning to the Texas courts to exhaust his claims unless the petitioner presents a factual or legal basis for a claim that was previously unavailable or shows that, but for a violation of the United States Constitution, no rational juror would have found for the State. *See id.* at 758 n.9. Therefore, unexhausted claims that could not make the showing required by this state law would be considered procedurally barred from review on the merits in this Court unless an exception is shown. *See*

Beazley v. Johnson, 242 F.3d 248, 264 (5th Cir. 2001).

An exception to this bar allows federal habeas review if a petitioner "can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman*, 501 U.S. at 750.

But Ground 4 is procedurally barred, because Taylor has not shown that the claim would be allowed in a subsequent habeas proceeding in state court under Texas law. Nor has he asserted the "fundamental miscarriage of justice" exception to procedural bar.

The Court should therefore deny Ground 4 as procedurally barred.

II. Ground 3

Moving on to Ground 3, the state habeas court found that "[c]hallenges to the sufficiency of the evidence are not cognizable in post-conviction habeas proceedings." Dkt. No. 12-1 at 6 (citing *Ex parte Grigsby*, 137 S.W.3d 673, 674 (Tex. Crim. App. 2004)); *see also Bessire v. Quarterman*, No. 4:07-cv-597-Y, 2009 WL 54257, at *2 (N.D. Tex. Jan. 8, 2009) ("Under Texas law, while an allegation of 'no' evidence is cognizable in a state habeas proceeding, a sufficiency-of-the-evidence claim may only be raised on direct appeal and may not be raised in a state habeas proceeding." (citing *West v. Johnson*, 92 F.3d 1385, 1389 n.18 (5th Cir. 1996); *Grigsby*, 137 S.W.3d at 674; *Clark v. Texas*, 788 F.2d 309, 310 (5th Cir. 1986); *Ex parte McLain*, 869 S.W.2d 349, 350 (Tex. Crim. App. 1994))).

As stated above, Taylor did not raise this issue on direct appeal. And, where a

habeas petitioner first "challenges the sufficiency of the evidence in a state habeas application, and [the CCA] subsequently disposes of the application by entering a denial without written order, the applicant's sufficiency claim was denied because the claim is not cognizable." *Vaughn v. Stephens*, No. 4:14-cv-218-Y, 2015 WL 3504941, at *2 (N.D. Tex. June 3, 2015) (citing *Grigsby*, 137 S.W.3d at 674). "Under these circumstances, reliance on the procedural default by the state court is established and presents an adequate state procedural ground barring federal habeas review." *Id.* (citing *Ylst v. Nunnemaker*, 501 U.S. 797, 801-07 (1991)).

And Taylor, again as to this ground, has neither demonstrated cause and actual prejudice nor asserted the fundamental-miscarriage-of-justice exception.

The Court should deny Ground 3 as procedurally barred.

III. Ground 2

Ground 2, raised and rejected on direct appeal, was, like Ground 3, found to be not cognizable on state habeas review. *See* Dkt. No. 12-1 (citing *Ex parte Reynoso*, 257 S.W.3d 469, 475 (Tex. Crim. App. 2008)).

This Court may "look through" this ruling to examine the reasonableness of the state appellate decision. *See, e.g.*, *Divers v. Cain*, 698 F.3d 211, 216 (5th Cir. 2012) ("In denying Divers' petition for post-conviction relief, the state habeas court found that with the exception of one claim not relevant here, his arguments had been "previously considered and rejected" by the intermediate appellate court and the supreme court. In light of this determination, we examine the 'last clear state court decision of any substance.'" (quoting *Woodfox v. Cain*, 609 F.3d 774, 794 (5th Cir.

2010))); *see also* Caldwell v. Davis, 757 F. App'x 336, 340 (5th Cir. 2018) (per curiam) ("[B]ecause the order on collateral review did not consider the merits of Caldwell's claims, we "look through" to the last state court decision to do so: the state intermediate appellate court's decision on direct review." (citing *Ylst*, 501 U.S. at 804-06)).

In its decision, the Dallas Court of Appeals found, as to his single issue on appeal, "that the sentence is excessive and disproportionate for the offense," Taylor "did not object when he was sentenced, and his motion for new trial did not raise this complaint. Accordingly, he has not preserved the issue for appellate review." *Taylor*, 2015 WL 7720483, at *1 (citation omitted). The court of appeals alternatively found that

> punishment that is assessed within the statutory range for an offense is neither excessive nor unconstitutionally cruel or unusual. The punishment range for the offense of possession with intent to deliver cocaine in an amount four grams or more but less than 200 grams in a drug-free zone, a first-degree felony offense, is imprisonment for life or for any term not more than ninety-nine years nor less than ten years, and an optional fine up to $20,000. Appellant's thirty-year sentence is well within the statutory range.

Id. (citations omitted).

First,

> [t]o preserve a claim for federal habeas review, a defendant must make a specific and timely objection at the time of the allegedly objectionable conduct. Failure to object constitutes a procedural default, which bars federal habeas relief unless the petitioner shows either cause for the default and actual prejudice flowing from the alleged constitutional violation, or a miscarriage of justice.

White v. Thaler, 522 F. App'x 226, 230 (5th Cir. 2013) (per curiam) (citing *Wainwright v. Sykes*, 433 U.S. 72, 86-87, 87-91 (1977)); *see also Tanksley v. Lynaugh*, CIV. A. No.

V-87-40, 1998 WL 90187, at *2 (S.D. Tex. May 5, 1988) ("The state appellate court held that the Petitioner did not comply with the state's procedural rules. Consequently, Petitioner's claim is governed by *Wainright v. Sykes*, 433 U.S. 72 (1977). The *Sykes* bar precludes federal habeas corpus relief on grounds which were not presented to the state court in the manner prescribed by the state's procedural rules, absent cause for the omission and actual prejudice.").

To the extent that Ground 2 was denied on state procedural grounds, in the only state court decision of any substance – that is, addressing the ground's merits – Taylor has as to Ground 2, as with Grounds 3 and 4, "failed to demonstrate a fundamental miscarriage of justice," "and he did not offer any cause for the default." *White*, 522 F. App'x at 230.

The Court should therefore deny Ground 2 as procedurally barred.

Alternatively, to the extent that the Dallas Court of Appeals addressed Ground 2 on the merits by finding that, because Taylor's sentence was within the statutory range, it "is neither excessive nor unconstitutionally cruel or unusual," *Taylor*, 2015 WL 7720483, at *1, Taylor has not shown that this determination is unreasonable under Section 2254(d), *see, e.g.*, *Haynes v. Butler*, 825 F.3d 921, 923-24 (5th Cir. 1987) ("Although wide discretion is accorded a state trial court's sentencing decision and claims arising out of the decision are not generally constitutionally cognizable, relief may be required where the petitioner is able to show that the sentence imposed exceeds or is outside the statutory limits, or is wholly unauthorized by law. If a sentence is within the statutory limits, the petitioner must show that the sentencing

decision was wholly devoid of discretion or amounted to an "arbitrary or capricious abuse of discretion," or that an error of law resulted in the improper exercise of the sentencer's discretion and thereby deprived the petitioner of his liberty." (citations omitted)).

IV. Ground 1

Turning finally to the various reasons why Taylor believes that trial counsel provided constitutionally ineffective assistance of counsel ("IAC"), the Court reviews IAC claims, whether directed at trial or appellate counsel, under the two-prong test established in *Strickland v. Washington*, 466 U.S. 668 (1984), under which a petitioner "'must show that counsel's performance'" – "'strongly presume[d to be] good enough'" – "'was [1] objectively unreasonable and [2] prejudiced him.'" *Coleman v. Vannoy*, 963 F.3d 429, 432 (5th Cir. 2020) (quoting *Howard v. Davis*, 959 F.3d 168, 171 (5th Cir. 2020)).

To count as objectively unreasonable, counsel's error must be "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687; *see also Buck v. Davis*, 137 S. Ct. 759, 775 (2017) (reaffirming that "[i]t is only when the lawyer's errors were 'so serious that counsel was not functioning as the "counsel" guaranteed ... by the Sixth Amendment' that *Strickland*'s first prong is satisfied" (citation omitted)). "And to establish prejudice, a defendant must show 'that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Andrus v. Texas*, 140 S. Ct. 1875, 1881 (2020) (per curiam) (quoting

Strickland, 466 U.S. at 694).

"A conscious and informed decision on trial tactics and strategy cannot be the basis for constitutionally ineffective assistance of counsel unless it is so ill chosen that it permeates the entire trial with obvious unfairness." *Cotton v. Cockrell*, 343 F.3d 746, 752-53 (5th Cir. 2003); *see also Feldman v. Thaler*, 695 F.3d 372, 378 (5th Cir. 2012) ("[B]ecause of the risk that hindsight bias will cloud a court's review of counsel's trial strategy, 'a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.'" (quoting *Strickland*, 466 U.S. at 689)).

And,"[j]ust as there is no expectation that competent counsel will be a flawless strategist or tactician, an attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities." *Richter*, 562 U.S. at 110. "The Supreme Court has admonished courts reviewing a state court's denial of habeas relief under AEDPA that they are required not simply to give [the] attorney's the benefit of the doubt, ... but to affirmatively entertain the range of possible reasons [petitioner's] counsel may have had for proceeding as they did." *Clark v. Thaler*, 673 F.3d 410, 421 (5th Cir. 2012) (internal quotation marks omitted).

Therefore, on habeas review under AEDPA, "if there is any 'reasonable argument that counsel satisfied *Strickland*'s deferential standard,' the state court's denial must be upheld." *Rhoades v. Davis*, 852 F.3d 422, 432 (5th Cir. 2017) (quoting

Richter, 562 U.S. at 105); *see also Sanchez*, 936 F.3d at 305 ("As the State rightly puts it, we defer 'both to trial counsel's reasoned performance and then again to the state habeas court's assessment of that performance.'" (quoting *Rhodes*, 852 F.3d at 434)).

To demonstrate prejudice, a habeas 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. Thus, "the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently." *Richter*, 562 U.S. at 111. "Instead, *Strickland* asks whether it is 'reasonably likely' the result would have been different," which "does not require a showing that counsel's actions 'more likely than not altered the outcome,' but the difference between *Strickland*'s prejudice standard and a more-probable-than-not standard is slight and matters 'only in the rarest case." *Id.* at 111-12 (quoting *Strickland*, 466 U.S. at 693, 696, 697). "The likelihood of a different result must be substantial, not just conceivable." *Richter*, 562 U.S. at 112.

IAC claims are considered mixed questions of law and fact and are therefore 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); *Adekeye*, 938 F.3d at 682.

Where the state court adjudicated claims of ineffective assistance on the merits, this Court must review a habeas petitioner's claims under the "doubly deferential" standards of both *Strickland* and Section 2254(d). *Cullen v. Pinholster*,

563 U.S. 170, 190, 202 (2011); *compare* *Rhoades*, 852 F.3d at 434 ("Our federal habeas review of a state court's denial of an ineffective-assistance-of-counsel claim is 'doubly deferential' because we take a highly deferential look at counsel's performance through the deferential lens of § 2254(d)." (citation omitted)), *with Johnson v. Sec'y, DOC*, 643 F.3d 907, 910-11 (11th Cir. 2011) ("Double deference is doubly difficult for a petitioner to overcome, and it will be a rare case in which an ineffective assistance of counsel claim that was denied on the merits in state court is found to merit relief in a federal habeas proceeding.").

In such cases, the "pivotal question" for this Court is not "whether defense counsel's performance fell below *Strickland*'s standard"; it is "whether the state court's application of the *Strickland* standard was unreasonable." *Richter*, 562 U.S. at 101; *see also id.* at 105 ("Establishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult. The standards created by *Strickland* and § 2254(d) are both 'highly deferential,' and when the two apply in tandem, review is 'doubly' so." (internal quotation marks and citations omitted)). In other words, AEDPA does not permit a *de novo* review of state counsel's conduct in these claims under *Strickland*. *See id.* at 101-02. Instead, on federal habeas review of a *Strickland* claim fully adjudicated in state court, the state court's determination is granted "a deference and latitude that are not in operation when the case involves review under the *Strickland* standard itself." *Id.* at 101.[4]

[4] *See also Woods v. Etherton*, 136 S. Ct. 1149, 1151 (2016) (per curiam) (explaining that federal habeas review of ineffective-assistance-of-counsel claims is "doubly deferential" "because counsel is 'strongly presumed to have rendered

Taylor alleges that his trial gave erroneous advice (1) about the possibility of receiving probation at trial and (2) not to accept the State's offer of ten years and (3) allowed Taylor to be "enhanced with the finding of a deadly weapon he was never charged with."

The state court, after obtaining an affidavit from Taylor's trial counsel, *see* Dkt. Nos. 12-1 & 12-5, and entered detailed findings of fact and conclusions of law recommending denial of the IAC claims, *see* Dkt. No. 12-1 at 3-6.

As applicable to Taylor's Section 2254 IAC claims:

> 1. In his first ground for relief, Applicant contends he was denied the effective assistance of counsel because trial counsel (1) gave erroneous advice about whether to take the State's offer or go to trial, (2) failed to challenge the deadly weapon enhancement, (3) failed to ask about the confidential informant or subpoena him to trial, (4) failed to seek out and interview potential witnesses.
>
> 2. A defendant has the right to effective assistance of counsel.
>
> 3. To prevail on a claim of ineffective assistance of counsel, a habeas applicant must prove by a preponderance of evidence that (1) his

adequate assistance and made all significant decisions in the exercise of reasonable professional judgment'"; therefore, "federal courts are to afford 'both the state court and the defense attorney the benefit of the doubt'" (quoting *Burt*, 571 U.S. at 22, 15)); *Adekeye*, 938 F.3d at 683-84 ("The Supreme Court standard on prejudice is sharply defined: 'It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding.' [A petitioner] must show it was 'reasonably likely' the jury would have reached a different result, not merely that it could have reached a different result. The Court reaffirmed this point in *Richter*: 'The likelihood of a different result must be substantial, not just conceivable.' Now layer on top of that the habeas lens of reasonableness. [Where] the state court has already adjudicated [a petitioner's] ineffective-assistance claim on the merits, he must show that the court's no-prejudice decision is 'not only incorrect but "objectively unreasonable."' Put differently, [he] must show that every reasonable jurist would conclude that it is reasonable likely that [a petitioner] would have fared better at trial had his counsel conducted [himself differently]. 'It bears repeating,' the Supreme Court emphasized in *Richter*, 'that even a strong case for relief does not mean the state court's contrary conclusion was unreasonable.'" (footnotes omitted)).

counsel's representation fell below an objective standard of reasonableness, and (2) there is a reasonable probability that the results of the proceedings would have been different in the absence of counsel's errors.

4. The right to reasonably effective assistance of counsel does not guarantee errorless counsel or counsel whose competency is to be judged by hindsight.

5. Counsel's competence is presumed, and the applicant must rebut this presumption by proving that his attorney's representation was unreasonable under prevailing professional norms and that the challenged action or inaction was not sound strategy.

6. Applicant first contends that his counsel was ineffective for giving him erroneous advice about his potential sentence and whether he should take the State's plea offer or proceed to trial. Applicant specifically alleges that counsel promised him that he would either be placed on community supervision or receive a sentence of no more than ten years in prison.

7. In response to Applicant's application, the Court ordered Applicant's trial counsel, Mr. Carlton Hughes, to provide the Court with an affidavit addressing Applicant's allegations. The Court finds Mr. Hughes' affidavit to be credible.

8. The Court finds that Mr. Hughes properly conveyed the State's plea offer of ten years' imprisonment to Applicant. Mr. Hughes also admonished Applicant numerous times about the range of punishment and that he risked a maximum sentence of ninety-nine years if he went to trial.

9. The Court further finds that the trial court twice admonished Applicant about the range of punishment he faced at trial. The State's offer of ten years was also mentioned during the admonitions and Applicant rejected the offer twice.

10. Applicant also alleges that Mr. Hughes gave him erroneous information about Applicant's eligibility for probation. Specifically, Applicant claims that Mr. Hughes incorrectly told him that he could receive probation from the jury.

11. A jury that imposes confinement as punishment for an offense may recommend to the judge that the judge impose suspension of the sentence and place the defendant on community supervision. A judge shall suspend the imposition of the sentence and place the defendant on community supervision if the jury makes that recommendation in the verdict.

12. Applicant claims that he could not be placed on community supervision because the jury made a finding that he used a deadly weapon in committing the offense. However, the prohibition on placing a defendant on community supervision after the finding of a deadly

weapon is limited to judge-ordered community supervision.

13. The Court finds that the State was not offering community service and it could not be granted by the trial court judge. Therefore, the only way Applicant could have received the probated sentence he desired was to go to trial and request it from the jury. Applicant's allegation that Mr. Hughes gave him erroneous advice is incorrect.

14. The Court finds that Applicant was properly informed of the potential risks and benefits involved in going to trial and that Applicant made a knowing and voluntary decision to do so. Therefore, the Court concludes that Applicant's first allegation as to why he was denied ineffective assistance of counsel is without merit.

15. Applicant also contends that he received ineffective assistance because his Mr. Hughes did not challenge the deadly weapon enhancement.

16. Applicant fails to specify what challenges Mr. Hughes should have made to the deadly-weapon enhancement paragraph and what evidence he should have challenged it with. Applicant also appears to confuse a deadly-weapon enhancement with a prior-conviction enhancement, arguing that the State failed to prove the enhancement because he never had any prior deadly-weapon convictions.

17. The Court finds that Applicant's claim that Mr. Hughes should have challenged the deadly-weapon enhancement paragraph is conclusory and, therefore, Applicant has failed to show that Mr. Hughes was ineffective.

Id. at 3-5.

Considering these findings, made after obtaining uncontroverted sworn testimony, which the state court found to be credible, and applying the deferential *Strickland* standards – through the deferential lens of AEDPA – to the applicable state court findings and conclusions, as the Court must, Taylor has not shown that the CCA's denial of any claim that his trial counsel's representation violated his rights under the Sixth Amendment amounts to either "an unreasonable application of *Strickland* or an unreasonable determination of the evidence." *Garza v. Stephens*, 738 F.3d 669, 680 (5th Cir. 2013) (citing 28 U.S.C. § 2254(d)(1)-(2)); *see also, e.g.*, *Rhodes*, 852 F.3d at 432, 434; *Sanchez*, 936 F.3d at 305.

The Court should therefore deny Ground 1.

Recommendation

The Court should deny the application for a writ of habeas corpus.

A copy of these findings, conclusions, and recommendation shall be served on all parties in the manner provided by law. Any party who objects to any part of these findings, conclusions, and recommendation must file specific written objections within 14 days after being served with a copy. *See* 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72(b). In order to be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and specify the place in the magistrate judge's findings, conclusions, and recommendation where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the magistrate judge is not specific. Failure to file specific written objections will bar the aggrieved party from appealing the factual findings and legal conclusions of the magistrate judge that are accepted or adopted by the district court except upon grounds of plain error. *See Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1417 (5th Cir. 1996).

DATED: September 3, 2020

DAVID L. HORAN
UNITED STATES MAGISTRATE JUDGE

Grounds -

① Plain Error is Miscarriage of Justice

② NO-Evidence on Deadly weapon allegation being true.

A P P E N D I X [C]

State's Court finding and recommendations
post conviction art.11.07

WRIT NO. W14-57392-S(A)

EX PARTE	§	**IN THE 282nd JUDICIAL**
	§	
	§	**DISTRICT COURT**
DEMARCUS ANTONIO TAYLOR,	§	
Applicant	§	**DALLAS COUNTY, TEXAS**

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON APPLICANT'S APPLICATION FOR WRIT OF HABEAS CORPUS

The Court, having considered the allegations contained in Applicant's Application for Writ of Habeas Corpus, the State's Response, the original trial court file and its contents, and all other evidence supplied to the Court makes the following Findings of Fact and Conclusions of Law:

HISTORY OF THE CASE

On April 23, 2015, a jury convicted Applicant of possession with intent to deliver cocaine in an amount of more than four grams but less than two hundred grams in a drug-free zone. *See* TEX. HEALTH & SAFETY CODE §§ 481.112(a), (d), 481.134(c). The jury also found that Applicant used or exhibited a firearm during the commission of the offense. The jury assessed punishment at 30 years' imprisonment and a $5,000 fine.

Applicant's conviction was affirmed on direct appeal by the Fifth District Court of Appeals at Dallas. *Taylor v. State*, No. 05-15-00567-CR, 2015 WL 7720483 (Tex. App. – Dallas Nov. 25, 2015, pet. ref'd) (not designated for publication). This is his first application for writ of habeas corpus filed in this cause.

ISSUES RAISED IN APPLICATION

In the instant application, Applicant raises three grounds for relief. In his first ground, Applicant contends he was denied the effective assistance of trial counsel. In his

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second ground, Applicant contends that his 30-year sentence was excessive and grossly disproportionate to the crime for which he was convicted. Lastly, in this third ground, Applicant contends that the evidence was insufficient to support his conviction.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. Ground 1: Ineffective Assistance of Trial Counsel

1. In his first ground for relief, Applicant contends he was denied the effective assistance of counsel because trial counsel (1) gave erroneous advice about whether to take the State's offer or go to trial, (2) failed to challenge the deadly weapon enhancement, (3) failed to ask about the confidential informant or subpoena him to trial, (4) failed to seek out and interview potential witnesses.

2. A defendant has the right to effective assistance of counsel. U.S. CONST. amend. VI.

3. To prevail on a claim of ineffective assistance of counsel, a habeas applicant must prove by a preponderance of evidence that (1) his counsel's representation fell below an objective standard of reasonableness, and (2) there is a reasonable probability that the results of the proceedings would have been different in the absence of counsel's errors. *Strickland v. Washington*, 466 U.S. 668, 689 (1984); *Bone v. State*, 77 S.W.3d 828, 834 (Tex. Crim. App. 2002).

4. The right to reasonably effective assistance of counsel does not guarantee errorless counsel or counsel whose competency is to be judged by hindsight. *Ex parte Kunkle*, 852 S.W.2d 499, 505 (Tex. Crim. App. 1993).

5. Counsel's competence is presumed, and the applicant must rebut this presumption by proving that his attorney's representation was unreasonable under prevailing professional norms and that the challenged action or inaction was not sound strategy. *Kimmelman v. Morrison*, 477 U.S. 365, 284 (1986).

6. Applicant first contends that his counsel was ineffective for giving him erroneous advice about his potential sentence and whether he should take the State's plea offer or proceed to trial. Applicant specifically alleges that counsel promised him that he would either be placed on community supervision or receive a sentence of no more than ten years in prison.

7. In response to Applicant's application, the Court ordered Applicant's trial counsel, Mr. Carlton Hughes, to provide the Court with an affidavit addressing Applicant's allegations. The Court finds Mr. Hughes' affidavit to be credible.

8. The Court finds that Mr. Hughes properly conveyed the State's plea offer of ten years' imprisonment to Applicant. Mr. Hughes also admonished Applicant numerous times about the range of punishment and that he risked a maximum sentence of ninety-nine years if he went to trial.

9. The Court further finds that the trial court twice admonished Applicant about the range of punishment he faced at trial. The State's offer of ten years was also mentioned during the admonitions and Applicant rejected the offer twice.

10. Applicant also alleges that Mr. Hughes gave him erroneous information about Applicant's eligibility for probation. Specifically, Applicant claims that Mr. Hughes incorrectly told him that he could receive probation from the jury.

11. A jury that imposes confinement as punishment for an offense may recommend to the judge that the judge impose suspension of the sentence and place the defendant on community supervision. A judge shall suspend the imposition of the sentence and place the defendant on community supervision if the jury makes that recommendation in the verdict. TEX. CODE. CRIM. PROC. art. 42.12 § 4(a).

12. Applicant claims that he could not be placed on community supervision because the jury made a finding that he used a deadly weapon in committing the offense. However, the prohibition on placing a defendant on community supervision after the finding of a deadly weapon is limited to judge-ordered community supervision. *See* TEX. CODE. CRIM. PROC. art. 42.12 § 3g(a).

13. The Court finds that the State was not offering community service and it could not be granted by the trial court judge. Therefore, the only way Applicant could have received the probated sentence he desired was to go to trial and request it from the jury. Applicant's allegation that Mr. Hughes gave him erroneous advice is incorrect.

14. The Court finds that Applicant was properly informed of the potential risks and benefits involved in going to trial and that Applicant made a knowing and voluntary decision to do so. Therefore, the Court concludes that Applicant's first allegation as to why he was denied ineffective assistance of counsel is without merit.

15. Applicant also contends that he received ineffective assistance because his Mr. Hughes did not challenge the deadly weapon enhancement.

16. Applicant fails to specify what challenges Mr. Hughes should have made to the deadly-weapon enhancement paragraph and what evidence he should have challenged it with. Applicant also appears to confuse a deadly-weapon enhancement with a prior-conviction enhancement, arguing that the State failed to prove the enhancement because he never had any prior deadly-weapon convictions.

17. The Court finds that Applicant's claim that Mr. Hughes should have challenged the deadly-weapon enhancement paragraph is conclusory and, therefore, Applicant has failed to show that Mr. Hughes was ineffective.

18. Applicant also alleges that Mr. Hughes rendered ineffective assistance because he failed to ask about the confidential informant and have him brought to trial.

19. The State has a privilege to withhold the identity of any person who provided information relating to, or assisting in, an investigation of a possible crime. TEX. R. EVID. 508(a).

was not raised on direct appeal

The informant made a case worked

20. A court can order the State to disclose the identity of a confidential informant, but only if the defendant makes a plausible showing that the informant can give testimony necessary to a fair determination of guilt or innocence. TEX. R. EVID. 508(c)(2); *Bodin v. State*, 807 S.W.2d 313, 318 (Tex. Crim. App. 1991).

21. The Court finds that Applicant has not shown that the outcome of his case would have been different if Mr. Hughes had attempted to learn the identity of the confidential informant. Applicant fails to show what evidence the informant would have provided and that Applicant could have overcome the burden of proving that the informant was necessary to a fair determination of guilt or innocence.

22. Because Applicant has not shown any basis for the disclosure of the informant's identity, or that such disclosure would have affected the outcome of his case, the Court finds that Applicant has not shown that Mr. Hughes was ineffective for failing to obtain the informant's information and have him brought to court.

23. Finally, Applicant alleges that he received ineffective assistance of counsel because Mr. Hughes failed to seek out and interview witnesses.

24. The Court finds that Mr. Hughes went to the apartment complex where Applicant was arrested and asked several people if they knew anything about Applicant's case.

25. Furthermore, Applicant fails to identify which witnesses Mr. Hughes should have sought out and interviewed. Applicant also has failed to show that any witnesses were available to testify and that their testimony would have affected the outcome of his case. Therefore, Applicant has failed to show that Mr. Hughes was ineffective in this regard.

26. The Court finds that Applicant has failed to show he received ineffective assistance from trial counsel and, therefore, the Court recommends his first ground of error be **DENIED**.

II. Ground 2: Excessive Sentence

1. In his second ground for relief, Applicant contends his 30-year sentence was excessive and grossly disproportionate to the crime for which he was convicted.

2. Issues that have been raised and rejected on direct appeal are not cognizable on habeas review. *Ex parte Reynoso*, 257. S.W.3d 469, 475 (Tex. Crim. App. 2008).

3. The Court finds that Applicant raised this identical point on direct appeal and it was rejected by the court of appeals. *See Taylor v. State*, No. 05-15-00567-CR, 2015 WL 7720483 (Tex. App. – Dallas Nov. 25, 2015, pet. ref'd) (not designated for publication).

4. For the above reasons, the Court concludes that Applicant's second ground for relief is not cognizable on habeas review and, therefore, recommends it be **DENIED.**

III. Ground 3: Insufficient Evidence

No Evidence not Insufficient evidence

1. In his third ground for relief, Applicant contends that his mere presence alone in the area of a controlled substance is insufficient to support his conviction for possession of a controlled substance.

2. Challenges to the sufficiency of the evidence are not cognizable in post-conviction habeas proceedings. *Ex parte Grigsby*, 137 S.W.3d 673, 674 (Tex. Crim. App. 2004).

5. The Court concludes that Applicant's third ground for relief is not cognizable on habeas review and, therefore, recommends it be **DENIED.**

ORDER

The Clerk of the Court is hereby **ORDERED** to transmit to the Court of Criminal Appeals a record containing the writ application, the State's response, these findings of fact, the affidavit of Carlton Hughes, and any other papers entered in this cause number, including the judgment and indictment, docket sheets, and other exhibits and evidentiary matter filed in the trial records of this cause.

It is further **ORDERED** that the Clerk of this Court send a copy of these findings to the following parties:

1. Demarcus Antonio Taylor, TDCJ# 01996790, Fort Stockton Unit. 1536 East IH-10, Fort Stockton, Texas 79735; and
2. Jacyln O'Connor Lambert, counsel for the State.

SIGNED this the 24 day of February, 2017.

JUDGE AMBER GIVENS-DAVIS
282nd JUDICIAL DISTRICT COURT
DALLAS COUNTY, TEXAS

A P P E N D I X [D]

U.S. N.D. Court finding and recommendation on Rule60 (b)(6) & Rule 60(d)(3).

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DEMARCUS ANTONIO TAYLOR, TDCJ No. 2082883, Petitioner, V. DIRECTOR, TDCJ-CID, Respondent.	§ § § § § § § § § §	No. 3:17-cv-1153-N-BN

FINDINGS, CONCLUSIONS, AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

The Court entered judgment dismissing Petitioner Demarcus Antonio Taylor's application for a writ of habeas corpus under 28 U.S.C. § 2254 with prejudice, concluding that three of his four claims were procedurally barred and that one was without merit. *See Taylor v. Dir., TDCJ-CID*, No. 3:17-cv-1153-N-BN, 2020 WL 6551271 (N.D. Tex. Sept. 3, 2020), *rec. accepted*, 2020 WL 6545981 (N.D. Tex. Nov. 6, 2020), *C.O.A. denied*, No. 20-11192 (5th Cir. Dec. 9, 2021).

Taylor now returns to the district court to request that the judgment be vacated under Federal Rules of Civil Procedure 60(b)(6) and 60(d)(3), arguing that Respondent perpetrated a fraud on the Court by arguing that Taylor's Section 2254 claim based on the sufficiency of the evidence was procedurally barred and that therefore extraordinary circumstances exist. *See* Dkt. No. 38.

This case remains referred to the undersigned United States magistrate judge under 28 U.S.C. § 636(b) and a standing order of reference from United States District Judge David C. Godbey. And the undersigned enters these findings of fact,

Appendix D

conclusions of law, and recommendation that the Court should deny the motion.

Legal Standards

Although Rule 60(b) provides for relief from a final judgment or order, "a Rule 60(b) motion for relief from a final judgment denying habeas relief counts as a second or successive habeas application ... so long as the motion 'attacks the federal court's previous resolution of a claim on the merits.'" *Banister v. Davis*, 140 S. Ct. 1698, 1709 (2020) (cleaned up; quoting *Gonzalez v. Crosby*, 545 U.S. 524, 532 (2005)). Even so, "there are two circumstances in which a district court may properly consider a Rule 60(b) motion in a § 2254 proceeding: (1) the motion attacks a 'defect in the integrity of the federal habeas proceeding,' or (2) the motion attacks a procedural ruling which precluded a merits determination" by, for example, arguing that a district court's ruling as to exhaustion, procedural default, or limitations was in error. *Gilkers v. Vannoy*, 904 F.3d 336, 344 (5th Cir. 2018) (quoting *Gonzalez*, 545 U.S. at 532); *see also Jackson v. Lumpkin*, ___ F.4th ____, No. 20-20516, 2022 WL 354439 (5th Cir. Feb. 7, 2022).

> Rule 60(d)(3) authorizes a court to "set aside a judgment for fraud on the court" at any time. Rule 60(d)(3) addresses only fraud *on the federal habeas court*, not fraud on the state courts, the parties, or their relatives. *See Fierro v. Johnson*, 197 F.3d 147, 153-54 (5th Cir. 1999). The standard for "fraud on the court" is demanding. *Jackson v. Thaler*, 348 F. App'x 29, 34 (5th Cir. 2009).
>
> > "[O]nly the most egregious misconduct, such as bribery of a judge or members of a jury, or the fabrication of evidence by a party in which an attorney is implicated, will constitute fraud on the court." *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1338 (5th Cir. 1978) (citations omitted). Fraud under Rule 60(d)(3) "embrace[s] ... the species of fraud which does or attempts to[ ] defile the court itself." *Wilson v. Johns-Manville Sales Corp.*, 873 F.2d 869, 872

(5th Cir. 1989) (quotation omitted).

> *Id.* Fraud on the court also includes "a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication." *Wilson v. Johns-Manville Sales Corp.*, 873 F.2d 869, 872 (5th Cir. 1989) (quotations omitted). It "requires a showing of an unconscionable plan or scheme which is designed to improperly influence the court in its decision." *Id.* (quotation omitted). Courts should grant relief for fraud on the court to protect "the integrity of the courts," *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991), and to "fulfill a universally recognized need for correcting injustices which, in certain instances, are deemed sufficiently gross to demand a departure from rigid adherence" to the finality of a judgment. *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 244 (1944).

Preyor v. Davis, 704 F. App'x 331, 340-41 (5th Cir. 2017) (per curiam).

And, while "Rule 60(b) vests wide discretion in courts, ... relief under Rule 60(b)(6) is available only in 'extraordinary circumstances.'" *Buck v. Davis*, 137 S. Ct. 759, 777 (2017) (quoting *Gonzalez*, 545 U.S. at 535); *accord Priester v. JP Morgan Chase Bank, N.A.*, 927 F.3d 912, 913 (5th Cir. 2019); *see also U.S. ex rel. Garibaldi v. Orleans Parish Sch. Bd.*, 397 F.3d 334, 337 (5th Cir. 2005) ("Rule 60(b)(6) authorizes a court to relieve a party from a final judgment for 'any ... reason justifying relief' other than a ground covered by clauses (b)(1) through (b)(5) of the rule. Relief under this section, however, is appropriate only in an 'extraordinary situation' or 'if extraordinary circumstances are present.'" (footnotes omitted)))). Further, "in the context of habeas law, comity and federalism elevate the concerns of finality, rendering the 60(b)(6) bar even more daunting." *Haynes v. Davis*, 733 F. App'x 766, 769 (5th Cir. 2018) (quoting *Diaz v. Stephens*, 731 F.3d 370, 376 n.1 (5th Cir. 2013)).

Analysis

Taylor has not shown that Respondent perpetrated a fraud on this Court

during the federal habeas proceeding and therefore also has not shown that extraordinary circumstances are present.

Stepping back to the Court's denial of the applicable habeas claim, the Court recounted that "the state habeas court found that '[c]hallenges to the sufficiency of the evidence are not cognizable in post-conviction habeas proceedings.'" *Taylor*, 2020 WL 6551271, at *5 (quoting Dkt. No. 12-1 at 6 (citing, in turn, *Ex parte Grigsby*, 137 S.W.3d 673, 674 (Tex. Crim. App. 2004)); citing *Bessire v. Quarterman*, No. 4:07-cv-597-Y, 2009 WL 54257, at *2 (N.D. Tex. Jan. 8, 2009) ("Under Texas law, while an allegation of 'no' evidence is cognizable in a state habeas proceeding, a sufficiency-of-the-evidence claim may only be raised on direct appeal and may not be raised in a state habeas proceeding." (citing *West v. Johnson*, 92 F.3d 1385, 1389 n.18 (5th Cir. 1996); *Grigsby*, 137 S.W.3d at 674; *Clark v. Texas*, 788 F.2d 309, 310 (5th Cir. 1986); *Ex parte McLain*, 869 S.W.2d 349, 350 (Tex. Crim. App. 1994)))).

The Court then observed that the state court was correct that

> Taylor did not raise this issue on direct appeal. And, where a habeas petitioner first "challenges the sufficiency of the evidence in a state habeas application, and [the Texas Court of Criminal Appeals (the CCA)] subsequently disposes of the application by entering a denial without written order, the applicant's sufficiency claim was denied because the claim is not cognizable." *Vaughn v. Stephens*, No. 4:14-cv-218-Y, 2015 WL 3504941, at *2 (N.D. Tex. June 3, 2015) (citing *Grigsby*, 137 S.W.3d at 674). "Under these circumstances, reliance on the procedural default by the state court is established and presents an adequate state procedural ground barring federal habeas review." *Id.* (citing *Ylst v. Nunnemaker*, 501 U.S. 797, 801-07 (1991)).
>
> And Taylor, again as to this ground, has neither demonstrated cause and actual prejudice nor asserted the fundamental-miscarriage-of-justice exception.

Taylor, 2020 WL 6551271, at *5-*6.

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Taylor now asserts that Respondent perpetrated a fraud on the Court by arguing that his sufficiency-of-the-evidence claim was procedurally barred because he located a 2006 unpublished decision of the CCA that he contends is evidence that Texas courts do indeed consider such claims outside of direct appeals. *See* Dkt. No. 38 at 2-3, 6-7. In the decision that Taylor provides the Court the CCA explained:

> This is a post-conviction application for a writ of habeas corpus filed pursuant to Article 11.07, TEX. CODE CRIM. PROC. Applicant was convicted of aggravated assault on a public servant and punishment was assessed at imprisonment for five years. No appeal was taken from this conviction.
>
> Applicant contends that his plea was involuntary, his counsel was ineffective, and the evidence was insufficient because there was no allegation or proof that he used a deadly weapon. The trial court has entered findings that Applicant was convicted pursuant to an agreement that he plead guilty to a third degree felony, and the information alleged that he threatened a public servant. There was no allegation or proof that Applicant used a deadly weapon or caused serious bodily injury. These facts reflect that Applicant was convicted of assault on a public servant pursuant to Penal Code § 22.01(b)(1), and not of aggravated assault on a public servant pursuant to Penal Code § 22.02(b)(1).
>
> Relief is granted. The judgment in Cause No. 04-01-0001A-CR in the 97th Judicial District Court of Archer County is reformed to reflect that Applicant was convicted of assault on a public servant.

Dkt. No. 6-7 (emphasis added); *see also Ex parte Anderson*, No. AP-75,509, 2006 WL 2694705 (Tex. Crim. App. Sept. 20, 2006) (per curiam).

As the language highlighted above indicates, in *Anderson*, the CCA considered a claim of no evidence on habeas review, not a claim that there was insufficient evidence. And, as the Court explained to Taylor, a claim of no evidence – unlike his claim of insufficient evidence – is cognizable on habeas review. So, because his argument here fails, he cannot carry the much higher burden to show that a fraud on the Court and/or extraordinary circumstances require that the judgment be vacated.

Recommendation

The Court should deny Petitioner Demarcus Antonio Taylor's motion to vacate the judgment under Federal Rules of Civil Procedure 60(b)(6) and 60(d)(3) [Dkt. No. 38] but should, solely for statistical purposes, reopen and then close this case based on any order accepting or adopting these findings, conclusions, and recommendation.

A copy of these findings, conclusions, and recommendation shall be served on all parties in the manner provided by law. Any party who objects to any part of these findings, conclusions, and recommendation must file specific written objections within 14 days after being served with a copy. *See* 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72(b). In order to be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and specify the place in the magistrate judge's findings, conclusions, and recommendation where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the magistrate judge is not specific. Failure to file specific written objections will bar the aggrieved party from appealing the factual findings and legal conclusions of the magistrate judge that are accepted or adopted by the district court, except upon grounds of plain error. *See Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1417 (5th Cir. 1996).

DATED: February 11, 2022

DAVID L. HORAN
UNITED STATES MAGISTRATE JUDGE

A P P E N D I X [E]

Copy of Court of Criminal Appeals unpublish decision.
in support of his Rule 60 motion

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. AP-75,509

EX PARTE CHARLES RAY ANDERSON, Applicant

ON APPLICATION FOR A WRIT OF HABEAS CORPUS
IN CAUSE NUMBER 04-01-0001A-CR IN THE 97TH DISTRICT COURT
FROM ARCHER COUNTY

Per curiam.

OPINION

This is a post-conviction application for a writ of habeas corpus filed pursuant to Article 11.07, TEX.CODE CRIM.PROC. Applicant was convicted of aggravated assault on a public servant and punishment was assessed at imprisonment for five years. No appeal was taken from this conviction.

Applicant contends that his plea was involuntary, his counsel was ineffective, and the evidence was insufficient because there was no allegation or proof that he used a

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deadly weapon. The trial court has entered findings that Applicant was convicted pursuant to an agreement that he plead guilty to a third degree felony, and the information alleged that he threatened a public servant. There was no allegation or proof that Applicant used a deadly weapon or caused serious bodily injury. These facts reflect that Applicant was convicted of assault on a public servant pursuant to Penal Code §22.01(b)(1), and not of aggravated assault on a public servant pursuant to Penal Code §22.02(b)(1).

Relief is granted. The judgment in Cause No. 04-01-0001A-CR in the 97th Judicial District Court of Archer County is reformed to reflect that Applicant was convicted of assault on a public servant.

Copies of this opinion shall be sent to the Texas Department of Criminal Justice, Correctional Institutions division.

DELIVERED: September 20, 2006
DO NOT PUBLISH

A P P E N D I X [F]

Order of denial and finding & recommendation Rule 60(b)(6) & Rule 60(d)(3).

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DEMARCUS ANTONIO TAYLOR, TDCJ No. 2082883, Petitioner, V. DIRECTOR, TDCJ-CID, Respondent.	§ § § § § § § § § §	No. 3:17-cv-1153-N

ORDER

As to Petitioner Demarcus Antonio Taylor's motion to vacate the judgment under Federal Rules of Civil Procedure 60(b)(6) and 60(d)(3) [Dkt. No. 38] (the Motion), the United States Magistrate Judge made findings, conclusions, and a recommendation. Objections were filed. The District Court reviewed *de novo* those portions of the proposed findings, conclusions, and recommendation to which objection was made, and reviewed the remaining proposed findings, conclusions, and recommendation for plain error. Finding no error, the Court ACCEPTS the Findings, Conclusions, and Recommendation of the United States Magistrate Judge. Accordingly, the Motion is DENIED.

Considering the record in this case and pursuant to Federal Rule of Appellate Procedure 22(b), Rule 11(a) of the Rules Governing §§ 2254 and 2255 proceedings, and 28 U.S.C. § 2253(c), the Court DENIES a certificate of appealability as to its denial of the Motion. The Court adopts and incorporates by reference the Magistrate Judge's Findings, Conclusions, and Recommendation filed in this case in support of

its finding that Petitioner has failed to show that reasonable jurists would find "it debatable whether the petition states a valid claim of the denial of a constitutional right" or "debatable whether [this Court] was correct in its procedural ruling." *Slack v. McDaniel,* 529 U.S. 473, 484 (2000).

But, insofar as Petitioner does appeal the denial of the Motion, the Court prospectively DENIES Petitioner leave to appeal *in forma pauperis* (IFP) and CERTIFIES, under 28 U.S.C. § 1915(a)(3), and as fully explained in the applicable findings, conclusions, and recommendation that any appeal would not be taken in good faith.

Petitioner may challenge this finding under *Baugh v. Taylor*, 117 F.3d 197 (5th Cir. 1997), by filing a motion to proceed IFP on appeal with the Clerk of the Court, U.S. Court of Appeals for the Fifth Circuit, within 30 days of this order. *See, e.g.*, *Dobbins v. Davis*, 764 F. App'x 433, 434 (5th Cir. 2019) (per curiam) (applying *Baugh* to state prisoner's appeal in federal habeas action).

The Court further DIRECTS the Clerk of Court to, solely for statistical purposes, REOPEN and then CLOSE this case based on this order.

SO ORDERED this 21st day of March, 2022.

DAVID C. GODBEY
UNITED STATES DISTRICT JUDGE