United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
February 23, 2022
Lyle W. Cayce
Clerk

No. 21-40505

BRAD ALLEN DUNN,

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 Eastern District of Texas
USDC No. 2:18-CV-403

ORDER:

Brad Allen Dunn, Texas prisoner # 1988053, moves for a certificate of appealability (COA) to appeal the district court's denial of his 28 U.S.C. § 2254 application, challenging his guilty plea conviction for murder and resulting 99-year sentence. He renews his claims that his plea was invalid, that counsel was ineffective in numerous ways at sentencing before the jury and on appeal, that the trial court was biased against him, and that the prosecutor engaged in misconduct.

If his COA brief is liberally construed, Dunn also asserts, for the first time, that trial counsel was ineffective in failing to cross-examine and

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cross-examine and impeach prosecution witnesses effectively or move for a mistrial based on prosecutorial misconduct; the trial court deprived him of due process when it failed to conduct adequate voir dire about the jury's exposure to pretrial publicity, allowed the introduction of prejudicial and inflammatory statements and evidence, and erroneously instructed the jury on sudden passion; the trial court failed to ensure that jury notes were read aloud in open court; and the district court judge was biased against him. These newly raised claims will not be considered. *See Black v. Davis*, 902 F.3d 541, 545 (5th Cir. 2018); *Henderson v. Cockrell*, 333 F.3d 592, 605 (5th Cir. 2003).

Because Dunn fails to "demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," *Slack v. McDaniel*, 529 U.S. 473, 484 (2000), or that the issues that he raises "are adequate to deserve encouragement to proceed," *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003), a COA is DENIED. His motions for leave to proceed in forma pauperis, to set aside the district court's judgment, and for a stay of proceedings are similarly DENIED.

/s/ Carl E. Stewart
CARL E. STEWART
United States Circuit Judge

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United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

March 31, 2022

#1988053
Mr. Brad Allen Dunn
CID Michael Prison
2664 FM 2054
Tennessee Colony, TX 75886-0000

No. 21-40505 Dunn v. Lumpkin
USDC No. 2:18-CV-403

Dear Mr. Dunn,

We received your "Petition for Rehearing and/or Rehearing En Banc" from the court's February 23, 2022 order denying your motion for a certificate of appealability and other motions. As an initial matter, a petition for panel rehearing of an administrative order is not allowed--and when timely received, would be treated as a motion for reconsideration. Because the time for filing a motion for reconsideration under **5TH CIR. R.** 27, or a petition for rehearing en banc under **FED. R. APP. P.** 40 have now expired, no action will be taken on your rehearing.

Additionally, a brief in support and/or attachments in support of either a motion for reconsideration or a petition for rehearing en banc are not allowed. See **FED. R. APP. P.** 40 and **5TH CIR. R.** 35 and 40.

Sincerely,

LYLE W. CAYCE, Clerk

By: _____
Donna L. Mendez, Deputy Clerk
504-310-7677

cc: Ms. Gretchen Berumen Merenda

B

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

April 21, 2022

#1988053
Mr. Brad Allen Dunn
CID Michael Prison
2664 FM 2054
Tennessee Colony, TX 75886-0000

No. 21-40505 Dunn v. Lumpkin
USDC No. 2:18-CV-403

Dear Mr. Dunn,

We received your "Motion for Relief from Judgment Order" pursuant Fed. R. C. P. 60(b). We take no action on your motion. As previously advised, filings in this court are governed strictly by the Federal Rules of Appellate Procedure, **NOT** the Federal Rules of Civil Procedure. We cannot accept motions submitted under the Federal Rules of Civil Procedure. We can address only those documents the court directs you to file, or motions filed under the **FED. R. APP. P.** in support of the appeal. See **FED. R. APP. P.** and **5TH CIR. R.** 27 for guidance. Documents not authorized by these rules may not be acknowledged or acted upon.

To the extent your motion was an attempt to seek *reconsideration* of the court's February 23, 2022 order, the time for filing a motion for reconsideration under **5TH CIR. R.** 27 has expired. We further direct your attention to the clerk's notice issued on March 31, 2022 for information regarding the filing of a motion for reconsideration.

Sincerely,

LYLE W. CAYCE, Clerk

By: _____
Donna L. Mendez, Deputy Clerk
504-310-7677

cc: Ms. Gretchen Berumen Merenda

C

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

May 12, 2022

#1988053
Mr. Brad Allen Dunn
CID Michael Prison
2664 FM 2054
Tennessee Colony, TX 75886-0000

No. 21-40505 Dunn v. Lumpkin
USDC No. 2:18-CV-403

Dear Mr. Dunn,

We received your undated correspondence asserting the court made a mistake in denying your motion for a certificate of appealability (COA) and should correct it. We take no action on your assertion. To any extent this was an attempt to have the court's February 23, 2022 order denying your motion for COA reconsidered, time for filing a motion for reconsideration under **5TH CIR. R.** 27 has expired. You should review the clerk's prior responses issued regarding attempts to obtain review of the order. As previously advised, because the time to seek reconsideration has expired, any attempted filing will require leave of court to do so, out of time.

Sincerely,

LYLE W. CAYCE, Clerk

By: _____
Donna L. Mendez, Deputy Clerk
504-310-7677

cc: Ms. Gretchen Berumen Merenda

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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

MARSHALL DIVISION

BRAD ALLEN DUNN, #1988053	§	
VS.	§	CIVIL ACTION NO. 2:18cv403
DIRECTOR, TDCJ-CID	§	

REPORT AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE

Petitioner Brad Allen Dunn, a prisoner confined at the Michael Unit within the Texas Department of Criminal Justice proceeding *pro se*, filed this petition for writ of habeas corpus under 28 U.S.C. § 2254 challenging his Harrison County conviction and sentence. The cause of action was referred to the undersigned United States Magistrate Judge for findings of fact, conclusions of law, and recommendations for the disposition of the petition.

For reasons explained below, the Court recommends that Petitioner Dunn's habeas petition be denied, the case be dismissed with prejudice, and that Dunn be denied a certificate of appealability *sua sponte*.

I. Procedural History

Petitioner Dunn pleaded guilty to one count of murder and then elected to have a jury assess his punishment. Dunn proceeded to a jury trial for the punishment phase, which included a special punishment assessment regarding "sudden passion." After the sentencing trial, the jury rejected the special issue of "sudden passion," and sentenced him to 99 years' imprisonment along with a $10,000 fine. The Court entered judgment and sentence on March 5, 2015, (Dkt. #17, pg. id. #644). Dunn filed a direct appeal, and the Texas Sixth Court of Appeals affirmed the conviction on March 9, 2016 in an unpublished opinion. *See Dunn v. State*, 2016 WL 908108 (Tex. App.—Texarkana

2016, pet. ref'd). The Texas Court of Criminal Appeals (TCCA) then refused his petition for a discretionary review on July 27, 2016.

Dunn filed a state habeas application on May 18, 2017 challenging this conviction, (Dkt. #18, pg. id. #1865). After remand from the TCCA, the habeas court entered findings of fact and conclusions of law. On August 22, 2018, the TCCA denied Dunn's state habeas application on the findings of the habeas court without a hearing, (Dkt. # 17, pg. id. #1559). Dunn then filed this timely federal habeas petition on September 19, 2018.

II. Factual Background

The appellate court outlined the fact of this case as follows:

> There was no question at trial that Brad Allen Dunn had killed his wife, Kari Dunn, by stabbing her multiple times in a hotel bathroom, while the couple's children were just outside in the bedroom. Dunn's claim was that he murdered Kari while he was under the immediate influence of sudden passion from an adequate cause and that, therefore, he [] qualified for a lesser range of punishment. The jury rejected Dunn's claim, and he was sentenced to ninety-nine years' imprisonment and fined $ 10,000.00.
>
> . . .
>
> Dunn testified that the couple had been married ten years and that, after the children were born, Dunn became the primary or sole breadwinner, which led to financial and personal strife between the spouses. Dunn also testified to his resentment at Kari's alleged failure or refusal to seek employment and to his sometimes expressing this anger in crass and vulgar terms. Dunn also claimed that Kari announced she wanted a divorce several weeks before her tragic end and, in that time, began seeing another man. Dunn said he rented a motel room to have an overnight visitation with the children. On their arrival, Dunn and Kari sat in the hotel bathroom, smoking cigarettes and talking about their separation, Dunn pleading for reconciliation. Here, Dunn said his sadness, depression, frustration, and anger boiled over, he "snapped" or "froze," and he repeatedly plunged his pocket knife into Kari's neck, face, and torso. He fled, snatching up one of his toddlers, and called family members trying to tell them what had happened. He led police officers on a pursuit, before finally stopping and surrendering.

Dunn, 2016 WL at *1-2. In affirming Dunn's conviction, the appellate court found his appeal "wholly frivolous." *Id.* at *3.

III. Dunn's Federal Claims

In his federal petition, Dunn raises claims concerning (1) ineffective assistance of trial counsel, (2) ineffective assistance of appellate counsel, (3) a purported violation of his right to a fair trial, (4) prosecutorial misconduct, (5) a purported violation of the Confrontation Clause, and (6) that his guilty plea was involuntary.

IV. Respondent's Answer

After being ordered to do so, Respondent filed an answer, (Dkt. #16), addressing Dunn's habeas petition. Respondent maintains that Dunn's plea was both knowing and voluntary and that his various claims of ineffective assistance of counsel/appellate counsel are without merit. Respondent further insists that Dunn has not shown that the state court's adjudication of his habeas claims was unreasonable or contrary to federal law.

V. Petitioner's Response

Petitioner has responded to the answer, (Dkt. #23). In his response, Petitioner explains that he never received the state habeas court's findings and conclusions of law. He also challenges trial counsel's affidavit supplied to the state habeas court addressing his habeas claims. Dunn attached several items from the state court record in support of his response.

VI. Standard of Review

1. Federal Habeas Review

The role of federal courts in reviewing habeas petitions filed by state prisoners is exceedingly narrow. A prisoner seeking federal habeas corpus review must assert a violation of a federal constitutional right; federal relief is unavailable to correct errors of state constitutional, statutory, or procedural law unless a federal issue is also present. *See Lowery v. Collins*, 988 F.2d 1364, 1367 (5th Cir. 1993); *see also Estelle v. McGuire*, 503 F.3d 408, 413 (5th Cir. 2007) ("We

first note that 'federal habeas corpus relief does not lie for errors of state law.'") (internal citation omitted). When reviewing state proceedings, a federal court will not act as a "super state supreme court" to review error under state law. *Wood v. Quarterman*, 503 F.3d 408, 414 (5th Cir. 2007).

Federal habeas review of state court proceedings is governed by the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996. Under the AEDPA, which imposed several habeas corpus reforms, a petitioner who is in custody "pursuant to the judgment of a State court" is not entitled to federal habeas relief with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

> 1. resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established 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 proceedings.

28 U.S.C. § 2254(d). The AEDPA imposes a "highly deferential standard for evaluating state court rulings," which demands that federal courts give state court decisions "the benefit of the doubt." *See Renico v. Lett*, 559 U.S. 766, 773 (2010) (internal citations omitted); *see also Cardenas v. Stephens*, 820 F.3d 197, 201-02 (5th Cir. 2016) ("Federal review under the AEDPA is therefore highly deferential: The question is not whether we, in our independent judgment, believe that the state court reached the wrong result. Rather, we ask only whether the state court's judgment was so obviously incorrect as to be an objectively unreasonable resolution of the claim."). Given the highly deferential standard, a state court's findings of fact are entitled to a presumption of correctness and a petitioner can only overcome that burden through clear and convincing evidence. *Reed v. Quarterman*, 504 F.3d 465, 490 (5th Cir. 2007).

2. Ineffective Assistance of Counsel

To show that trial counsel was ineffective, Dunn must demonstrate both deficient performance and ensuing prejudice. *See Strickland v. Washington*, 466 U.S. 668 (1984). In evaluating whether an attorney's conduct was deficient, the question becomes whether the attorney's conduct fell below an objective standard of reasonableness based on "prevailing norms of practice." *See Loden v. McCarty*, 778 F.3d 484, 494 (5th Cir. 2016).

Moreover, to establish prejudice, the petitioner must show that there is a reasonable probability that—absent counsel's deficient performance—the outcome or result of the proceedings would have been different. *Id.*; *see also Reed v. Stephens*, 739 F.3d 753, 773 (5th Cir. 2014) (quoting *Strickland*, 466 U.S. at 687)). It is well-settled that a "reasonable probability" is one that is sufficient to undermine confidence in the outcome of the proceedings. *Strickland*, 466 U.S. at 694. Importantly, the petitioner alleging ineffective assistance must show both deficient performance and prejudice. *See Charles v. Stephens*, 736 F.3d 380, 388 (5th Cir. 2013) ("A failure to establish either element is fatal to a petitioner's claim.") (internal citation omitted). Given the already highly deferential standard under the AEDPA, establishing a state court's application whether counsel was ineffective "is all the more difficult." *Harrington v. Richter*, 562 U.S. 86, 105 (2011); *see also Charles*, 736 F.3d at 389 ("Both the *Strickland* standard and the AEDPA standard are highly deferential, and when the two apply in tandem, review is doubly so.") (internal quotations and citation omitted).

In the context of a plea, a defendant must illustrate that, but for counsel's alleged deficient performance, he or she would have proceeded to a trial. *See U.S. v. Rodriguez*, 616 F. App'x 153, 154 (Mem.) (5th Cir. 2016) ("As found by the district court, however, Rodriguez failed to show that, but for counsel's alleged deficient performance, she would have proceeded to trial.") (citing

Hill v. Lockhart, 474 U.S. 52, 57-59 (1985) ("In other words, in order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.")).

VII. Discussion and Analysis

Dunn raises claims concerning (1) ineffective assistance of trial counsel, (2) ineffective assistance of appellate counsel, (3) a purported violation of his right to a fair trial, (4) prosecutorial misconduct, (5) a purported violation of the Confrontation Clause, and (6) that his guilty plea was involuntary.

As an initial matter, Dunn raised these claims in his state habeas application. The state court received an affidavit from Dunn's trial counsel, Mr. Rectenwald, which addressed each of his claims of ineffective assistance. The state habeas court entered findings of fact—specifically finding that Mr. Rectenwald's affidavit was both credible and supported by the record and that his affidavit is more credible than Dunn's assertions. Therefore, under the AEDPA, Dunn must show through clear and convincing evidence that the state court's finding concerning the affidavit was unreasonable or contrary to federal law. For reasons explained below, he has made no such showing.

1. Dunn's Guilty Plea

Because Dunn pleaded guilty to the offense, the starting point of this Court's analysis begins with his plea. Dunn maintains that trial counsel—on the day of trial—"dupped, tricked," and coerced him to plead guilty against his wishes. He also opines that trial counsel researched a change of venue, but never filed the motion to do so—thereby showing that he "had no intention of pleading guilty."

Moreover, Dunn states that on the day of trial, trial counsel asked him to discuss the proceedings. Trial counsel "pulled out a chair," in the deliberation room and "told [him] to have a seat and sign this." Dunn read the document and informed trial counsel that he did not agree because he did not act with premeditation or intentionally; however, counsel remarked "I know, but I think this is the best route. You plead guilty and then we throw ourselves to the mercy of the court." Dunn responded that he did not know trial counsel's plan because trial counsel never told him the plan—and insists that everyone in the courtroom knew he was pleading guilty before he did. Once questioned by the court, Dunn asserts that when the trial judge asked him whether his trial counsel's performance was satisfactory, he "hesitated on [his] answer" because he did not want to say no—as he did not want to "piss off" trial counsel.

A guilty plea will be upheld on habeas review if the plea was entered into knowingly, voluntarily, and intelligently. *See Montoya v. Johnson*, 226 F.3d 399, 405 (5th Cir. 2000); *United States v. Hernandez*, 234 F.3d 252, 254 (5th Cir. 2000). Whether a plea is knowing turns on whether the defendant understood the consequences of his plea; the defendant must have a full understanding of "what the plea connotes and of its consequences." *Hernandez*, 234 F.3d at 255. If a criminal defendant understood the charge against her and the potential punishment for the offense charged—and voluntarily pleaded guilty—then the plea will be upheld. *See James v. Cain*, 56 F.3d 662, 666-67 (5th Cir. 1995).

With respect to voluntariness, the question becomes whether the plea was induced by threats or improper promises. *Montoya*, 226 F.3d at 405; *see also U.S. v. Nunez*, 539 F. App'x 502, 503 (5th Cir. 2013) ("Whether a plea is knowing looks to whether the defendant understands the direct consequences of his plea, while voluntariness looks to, inter alia, whether the plea was induced by threats or improper promises."). The Supreme Court has explained:

> A plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e.g. bribes).

Brady v. United States, 397 U.S. 742, 755 (1970).

Moreover, firm declarations in open court, including a plea colloquy, carry a strong presumption of verity. *See United States v. Perez*, 690 F. App'x 191, 192 (5th Cir. 2017) (Mem.) ("A defendant's solemn declarations in open court carry a strong presumption of truth.") (quoting *Blackledge v. Allison*, 431 U.S. 63, 74 (1977)). As a result, the petitioner faces the heavy burden of proving that he is entitled to relief through overcoming the evidence of his own words. *DeVille v. Whitley*, 21 F.3d 654, 659 (5th Cir. 1994); *see also United States v. Raetzsch*, 781 F.2d 1149, 1151 (5th Cir. 1986) (holding that there must be independent indicia of the likely merit of the petitioner's contentions; mere contradiction of the statements made at the guilty plea proceeding will not suffice); *cf. United States v. Fuller*, 769 F.2d 1095, 1099 (5th Cir. 1985) (to be entitled to an evidentiary hearing on a claim that sworn statements made during the guilty plea proceeding were false, the petitioner must make "specific factual allegations supported by the affidavit of a reliable third witness.").

The state court record contains the transcript Dunn's plea hearing. Pertinent portions of the plea hearing are as follows:

THE COURT:	All right. Mr. Dunn, State's Exhibit No. 1 is a two-page document. Appears to have your signature two places on page 1 and one place on Page 2. Is that your signature?
DEFENDANT:	Yes, sir.
THE COURT:	Did you freely and voluntarily sign that document?
DEFENDANT:	Yes, sir.
THE COURT:	When you signed that document, did you understand that Mr. Rectenwald would waive reading of your indictment?
DEFENDANT:	Yes, sir.

THE COURT:	Did you understand that you were requesting that I waive a presentence investigative report?
DEFENDANT:	Yes, sir.
THE COURT:	Mr. Rectenwald was appointed to represent you; is that correct?
DEFENDANT:	Yes, sir.
THE COURT:	To this point, are you satisfied with the representation that Mr. Rectenwald has given you?
DEFENDANT:	Yes, sir.
THE COURT:	Did he go over—to this point, has he gone over all of the evidence in your case with you, to your knowledge?
DEFENDANT:	Yes, sir.
THE COURT:	Has he gone over—did he go over these documents to your satisfaction?
DEFENDANT:	Yes, sir.
THE COURT:	Has he failed to do anything that you've asked or to respond to any request that you have made to this point?
DEFENDANT:	No.
THE COURT:	When you signed this document, did you understand, with regard to the guilt or innocence phase of this case, you were now waiving your right to a trial by jury?
DEFENDANT:	Yes, sir.
THE COURT:	That you are not waiving that with regard to punishment phase. Do you understand that?
DEFENDANT:	Yes, sir.
THE COURT:	Do you understand that with regard to the guilt or innocence, you're waiving the appearance, confrontation, and cross-examination of witnesses?
DEFENDANT:	Yes, sir.
THE COURT:	Not with regard to the punishment phase, though. Do you understand that?
DEFENDANT:	Yes, sir.
THE COURT:	Page 2 is a judicial confession that on or about the 1st day of December 2013, in Harrison County, Texas, you did then and there intentionally and knowingly cause the death of an individual, namely, Kari Dunn, by stabbing her with a knife?

Dkt. #17, pg. id. #759-62. At this point, the State urged the court to, in an abundance of caution, place the plea offer on the record. The transcript reflects that the State offered Dunn fifty years' imprisonment—which was conveyed to Dunn prior to the hearing and to which he discussed previously with this attorney. Dunn explained to the Court that he was rejecting the offer, at which point the court continued with the judicial confession:

THE COURT: All right. Then back to the judicial confession. Do you understand what you're charged with?

DEFENDANT: Yes, sir.

THE COURT: Do you understand that murder is a first-degree felony? In this case, it has a special range of punishment; is that correct?

MR. SOLOMON: Your Honor, it's a—the range of punishment in this case is 5 to 99 and/or life. There's going to be an issue about whether or not this may be a sudden heat of passion—

THE COURT: All right.

MR. SOLOMON: —under cause, just for the purposes of the record in this plea. We're going to have the court also admonish him on the potential range of punishment.

THE COURT: All right. The charge of murder itself, Mr. Dunn, is a first-degree felony punishable by confinement in prison for life or a term of not more than 99 years or less than—or 99 years or less than 5. In addition—I'm going to do it the way that I normally do it—5 to 99 years or life and a fine not to exceed $10,000. You understand that?

DEFENDANT: Yes, sir.

THE COURT: There's an issue in this case with regard to heat of passion, which would make this—would have a special range of punishment in the event the jury found that, that was proved by a preponderance of evidence.

Then you understand that that would make this charge a second-degree felony. It's punishable by not less than 2 years in the penitentiary, no more than 20 years, and a fine not to exceed $10,000.

DEFENDANT: Yes, sir.

THE COURT: So you understand the ranges of punishment int his case?

DEFENDANT: Yes, sir.

THE COURT: And you understand that the jury will assess punishment int this case based on their findings?

DEFENDANT: Yes, sir.

THE COURT: There is no plea agreement with the exception of a plea deal. You understand that?

DEFENDANT: Yes, sir.

THE COURT: You and I have discussed the range of punishment; is that correct?

DEFENDANT: Yes, sir.

THE COURT: You understand the range of punishment?

DEFENDANT: Yes, sir.

THE COURT: It's my understanding you will be entering a plea of guilty; is that correct, Mr. Dunn?

DEFENDANT: Yes, sir.

THE COURT: And you understand, from this point forward, you will not be allowed to withdraw that with regard—you won't be entitled to a trial by jury with respect to the guilt or innocence phase. Do you understand that?

DEFENDANT:	Yes, sir.
THE COURT:	Are you a citizen of the United States?
DEFENDANT:	I am.
THE COURT:	You understand that if you misrepresent that fact you could be deported, excluded from the country, or denied benefits of naturalization? Do you understand that?
DEFENDANT:	Yes, sir.
THE COURT:	Mr. Dunn, have you ever been treated for mental illness?
DEFENDANT:	No.
THE COURT:	Mr. Rectenwald, is Mr. Dunn competent to enter his plea?
MR. RECTENWALD:	I believe he is, Your Honor.
THE COURT:	Mr. Dunn, to the offense of first-degree felony offense of murder, with potential for special punishment range in this case, what is your plea: Guilty or not guilty?
DEFEDNANT:	Guilty.
THE COURT:	Mr. Dunn, the court will accept your plea of guilty in this case.

(Dkt. #17) (plea hearing transcript). The court then proceeded to jury selection for the sentencing/punishment phase.

A review of the plea transcript demonstrates that Dunn entered his guilty on the guilty/innocence phase of his case after being informed of the ranges of punishment, explaining that he did not suffer from any mental illness, and after his trial attorney informed the court that he was competent to enter a guilty plea. Dunn stated in court, under oath, that he understood both the charge against him and the ranges of punishment—for both first-degree murder and second-degree murder in the event that the jury found that he acted with sudden passion. Dunn further stated that he signed his plea paperwork "freely and voluntarily."

Dunn has not overcome the evidence of his own sworn words articulated during his plea hearing. While he now argues that he was "coerced" into pleading guilty, his own sworn words and mere contradiction of those words does not show that his plea was coerced or unwilling. Dunn's claim that he was coerced into pleading guilty is belied by the record—and he has not presented any independent indicia of the likely merit of his contentions that his plea was involuntary. *See, e.g.*, *Rhynes v. Lumpkin*, 2021 WL 536441 *3 (S.D. Tex. Jan. 19, 2021)

("Transcripts show that the court explicitly informed Rhynes of the maximum prison term and fine for the offenses. Nothing in the record indicates that Rhynes's guilty plea was involuntary."). Dunn's current claim that his plea was involuntary is without merit.

2. Claims of Ineffective Assistance of Counsel and Appellate Counsel

Dunn proceeded to a punishment on March 5, 2015. Ultimately, the jury rejected Dunn's claim that he committed the murder as a direct result of sudden passion and sentenced him to ninety-nine years' imprisonment. Dunn now claims that both his trial and appellate counsel were constitutionally ineffective.

Specifically, Dunn argues that trial counsel—Mr. Rectenwald—was ineffective during the punishment phase for (1) failing to present any testimony from the expert he retained or any other expert, (2) presenting, instead, an unfavorable witness who testified that he was "possessed" when committing the murder, (3) failing to file a motion for a change of venue, (4) failing to present evidence of a video interview of his daughter and text messages showing that the victim was having an affair, (5) failing to present witnesses who could have testified to his good character and to his mental state at the time of them murder, and (6) failing to object to an argument from the State and a jury instruction that shifted the burden of proof to the defense. Each claim will be addressed in turn.

As mentioned, Dunn must show that both deficient performance and ensuing prejudice. Further, it is well-settled that "[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." *Crane v. Johnson*, 178 F.3d 309, 314 (5th Cir. 1999) (quoting *Garland v. Maggio*, 717 F.2d 199, 206 (5th Cir. 1983)). Counsel's strategic decisions are given heavy deference and should not be second-guessed. *See United States*

v. Jones, 287 F.3d 325, 331 (5th Cir. 2002); *see also Yohey v. Collins*, 985 F.2d 222, 228 (5th Cir. 1993) ("Given the almost infinite variety of possible trial techniques and tactics available to counsel, this Circuit is careful not to second-guess legitimate strategic choices."); *Lamb v. Johnson*, 179 F.3d 352, 358 (5th Cir. 1999) ("Informed strategic decisions of counsel are given a heavy measure of deference and will not be second guessed.").

When a petitioner claims that counsel was ineffective at the punishment phase of a trial, "the relevant inquiry is whether, absent trial counsel's errors, there is a reasonable probability that the defendant's sentence would he been significantly less harsh." *Dale v. Quarterman*, 553 F.3d 876, 880 (5th Cir. 2008) (internal quotations and citation omitted). The relevant inquiry takes into account "such factors as the defendant's actual sentence, the potential minimum and maximum sentences that could have been received, the placement of the actual sentence within the range of potential sentences, and any relevant mitigating or aggravating circumstances." *Id.* at 880 (citing *United States v. Segler*, 37 F.3d 1131, 1136 (5th Cir. 1994)); *see, e.g., Halley v. Thaler*, 448 F. App'x 518, 524 (5th Cir. 2011) (unpublished) (explaining that Halley could not establish prejudice stemming his state sentencing because, among other reasons, "compelling evidence was presented to warrant Halley's life sentence. As noted above, the jury considered evidence of Halley's obsessive nature, extensive premeditation, and callous attitude toward his victim."). Therefore, the relevant inquiry here is whether—absent trial counsel's alleged errors—there is a reasonable probability for which Dunn would have received a "significantly less harsh" sentence as opposed to his sentence of ninety-nine years' imprisonment.

The Court notes, first, that Dunn raised these claims of ineffective assistance in his state habeas application. Mr. Rectenwald provided an affidavit to the state habeas court addressing each of Dunn's claims of ineffective assistance of trial counsel, (Dkt. #18, pg. id. #1830). The state

habeas court found that "[a]s between them, Scott Rectenwald's credibility as a witness is greater than that of Brad Allen Dunn" and that "Scott Rectenwald's affidavit is credible and supported by the record," (Dkt. #18, pg. id. #1836-37). Such findings and conclusions are entitled to a presumption of correctness on federal habeas review and the Dunn has the burden of overcoming this presumption. *See Carter v. Collins*, 918 F.2d 1198, 1202 (5th Cir. 1990).

Title 28 U.S.C. § 2254(e)(1) provides the following:

> In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

Under this statute, then, only one avenue exists in which a federal court can ignore state fact findings: When the petitioner rebuts the presumption of correctness by clear and convincing evidence. Because the court denied relief on the merits of Dunn's claims, he is bound by 28 U.S.C. § 2254 and must show that the state court's adjudication of his claims resulted in a decision which was contrary to or involved an unreasonable application of clearly established federal law—as established by the Supreme Court, or resulted in a decision based upon an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. *See Rivera v. Quarterman*, 505 F.3d 349, 356 (5th Cir. 2007).

Here, for all of his claims of ineffective assistance of trial counsel, Dunn has failed to overcome this burden. With respect Dunn's first two habeas claims, the pertinent portions of Mr. Rectenwald affidavit are as follows:

> 2. I did not retain an expert for Mr. Dunn's case to controvert the State's pathologist, Dr. Stash, because Mr. Dunn had elected to plead guilty to stabbing his wife multiple times, and nearly all of the facts to which Dr. Stash testified were not contested. The defense that we raised at trial was not as to the cause of death, but rather that Mr. Dunn acted under the immediate influence of a sudden passion, and the findings that Dr. Stash tended to support his defense. I did not judge that additional expert testimony would be helpful to Mr. Dunn before a jury, and I did

not want to have the jury exposed to more potentially gruesome medical testimony than was necessary.

Though I did not hire a psychiatrist o[r] psychologist, I did call a physician in Mr. Dunn's defense. I spoke with several mental health care professionals with the intention of hiring one, and was having some difficulty in finding someone that could assist me with Mr. Dunn's case. In gathering Mr. Dunn's records, I discovered a psychologist/expert that was treating Mr. Dunn in the Harrison County Jail, named Dr. Frank Murphy. One of the other psychiatrists that I spoke to suggested that it might be possible to get the testimony I needed from Dr. Murphy. I interviewed Dr. Murphy as a witness to testify concerning Mr. Dunn's psychological state, and his treatment in jail following the murder. I did not hire an expert because I believed that Dr. Murphy's testimony, as a treating psychiatrist, would be more readily accepted by a jury than testimony from a "hired gun" type expert, and that the testimony that he could provide would be substantially the same as those potential experts I had interviewed. I used Dr. Murphy's testimony to show Mr. Dunn's extreme remorse following the killing, and that during the time period where Mr. Dunn killed his wife that he was suffering from adjustment disorder, which could have contributed to Mr. Dunn "snapping" and being incapable of cool reflection during the incident. Dr. Murphy was also able to opine that Mr. Dunn's adjustment disorder was likely the result of traumas and abuse in his childhood, which was testified to by Mr. Dunn and his father at trial.

. . .

4. I did not present any witnesses who were unfavorable to Mr. Dunn. The only witness that I had any doubts about was a jail minister named Rebecca Ponder identified by Mr. Dunn as one of the witnesses that he wanted me to call. I was concerned that the jury might not identify well with her because of her belief that the cause of the murder was demonic possession that compelled Mr. Dunn to kill his wife. I discussed this potential problem with Mr. Dunn before calling Ms. Ponder as a witness, and he insisted that she be called as a witness. I decided to call Ms. Ponder in spite of my misgivings because I believed that there may have been persons on the jury that could identify with her spiritual view of the world.

(Dkt. #18, pg. id. #1830-31) (state court records).

On federal review, Dunn now argues that trial counsel failed to hire an expert and was ineffective for calling Ms. Ponder as witness because "the jury looked at her like she was crazy for saying that," (Dkt. #1, pg. id. #12). He also complains that both witnesses called for him did "no help" and "were devastating."

As an initial matter, complaints of uncalled witnesses are unfavored on federal habeas review because such allegations of what a proposed witness would have testified to is largely speculative. *See Evans v. Cockrell*, 285 F.3d 370, 377 (5th Cir. 2002). In order to show that counsel was ineffective for failing to call a witness, the petitioner must identify those witnesses and establish, by affidavit or otherwise, what those witnesses would have testified to at trial. *Sayre v. Anderson*, 238 F.3d 631, 635-36 (5th Cir. 2001). Further, the petitioner must not only show that the witness testimony was favorable, but also that the witness would have actually testified at trial. *See Alexander v. McCotter*, 775 F.2d 595, 602 (5th Cir. 1985).

Here, as Respondent indicates, Dunn's claim concerning counsel's alleged failure to call witnesses is wholly conclusory—and, therefore, presents no constitutional issue. Dunn's claim that no other expert was hired and no one else came to see him is conclusory—as he has not shown that any specific uncalled witness would have actually testified and would have provided favorable testimony. This claim should be dismissed.

Turning to Dunn's claim that trial counsel was ineffective for calling an "unfavorable witness," who testified that Dunn was "possessed" at the time he murdered his wife, the Court notes that this claim fails as well. Mr. Rectenwald's affidavit is clear: Ms. Ponder was called, against counsel's stated misgivings, because Dunn insisted that she be called as a witness.

Unhappy that the jury rejected her "demonic possession" theory, Dunn now seeks to blame Mr. Rectenwald for calling her in the first place. He states that Mr. Rectenwald's strategy was poor and "was plain sabotage." However, as the state habeas court found Mr. Rectenwald's affidavit more credible than Dunn's assertions, he has not shown that the state court's rejection of this claim was unreasonable or contrary to federal law. Dunn insisted that she be called, despite hearing that her testimony could be problematic; further, Mr. Rectenwald explained that he called her because

he believed that some jurors could identify with her spiritual worldview. This Court will not second-guess informed trial strategy—especially a strategy for which Petitioner insisted. *Strickland*, 466 U.S. at 689 (emphasizing that "[j]udicial scrutiny of counsel's performance might must be highly deferential" and that "every effort [must] be made to eliminate the distorting effects of hindsight."). This claim should be dismissed.

Next, Dunn claims that trial counsel was ineffective for failing to file a motion for a change of venue. Specifically, he complains about the publicity surrounding the trial, his name being printed in the papers, and how the community was gathering signatures for "Kari's Law." Dunn states that he asked his attorney for a change of venue—but was told that a motion was filed when it never was.

Dunn raised this claim in his state habeas application. Mr. Rectenwald responded to this allegation in his affidavit to the state court as follows:

> 3. With regard to a motion to transfer venue, I prepared a motion that I had ready to file, but I wanted to determine through jury questionnaires and voir dire whether I would be able to get Mr. Dunn a fair trial in Harrison County. I submitted questionnaires which the venirepersons filled out, and I used these to evaluate whether a motion to transfer venue based on pre-trial publicity was warranted. Most of the venire indicated that they had not heard anything about the case, and based on these responses, and responses to my questions in voir dire, I felt that a motion to transfer venue was not warranted.

(Dkt. #18, pg. id. #1831). As mentioned, the state habeas court found that Mr. Rectenwald's affidavit was credible and supported by the record—and that there was not evidence that he was deficient, (Dkt. #18, pg. id. #1836).

The Sixth Amendment guarantees a criminal defendant the right to a fair trial by an impartial jury—and the denial of a fair trial violates due process. *See Skilling v. United States*, 561 U.S. 358, 357 (2010). Nonetheless, "the Constitution does not require that jurors be ignorant of the facts and issues involved," as "extensive knowledge in the community of either the crimes or

the putative criminal is not sufficient by itself to render a trial constitutionally unfair." *See Coble v. Davis*, 682 F. App'x 261, 274 (5th Cir. 2017) (citing *Dobbert v. Florida*, 432 U.S. 282, 301 (1977)). To prevail on a claim concerning the denial of a fair trial because of adverse pretrial publicity, a habeas petitioner must demonstrate that "the particular jurors selected for service in his case were biased against him.") *See Busby v. Dretke*, 359 F.3d 708, 725 (5th Cir. 2004); *see also Moore v. Johnson*, 225 F.3d 495, 504 (5th Cir. 2000) (stating that a habeas petitioner seeking "relief as a result of pretrial publicity must demonstrate an actual, identifiable prejudice on the part of members of the jury that is attributable to that publicity.").

Here, Dunn does not identify any particular jurors who were biased as a direct result of pretrial publicity. Given that trial counsel's credible affidavit explains that most of the venire indicated that they had not heard anything about the case—as well as using responses to his questionnaire to determine whether a venue change was warranted—Dunn cannot show that the state court's rejection of this claim was unreasonable or contrary to federal law. This claim should be dismissed.

Furthermore, Dunn asserts that the trial judge was biased against him during the sentencing trial. Specifically, he opines that his trial judge was also the judge at his custody trial. Dunn also maintains that the trial judge denied him "individual voir-dire" and "told the jury it will be a quick case."

Every criminal defendant has the right to a fair and impartial tribunal and, therefore, actual or presumptive judicial bias may constitute a due process violation. *See Buntion v. Quarterman*, 524 F.3d 664, 672 (5th Cir. 2008). However, judicial bias is "not lightly established" and, in almost every case of judicial bias, the bias has been presumed. *Id.*; *see also Valley v. Rapides Parish Sch. Bd.*, 118 F.3d 1047, 1052 (5th Cir. 1997). The Supreme Court has found presumptive bias in three

situations: (1) "the decision maker has a direct, personal, substantial, and pecuniary interest in the outcome of the case; (2) an adjudicator has been the target of personal abuse or criticism from the party before him; and (3) a judicial or quasi-judicial decision maker has the dual role of investigating and adjudicating disputes and complaints." *Buntion*, 524 F.3d at 672 (citing *Bigby v. Dretke*, 402 F.3d 551, 559 (5th Cir. 2005) (citing Supreme Court cases)).

Here, Dunn's allegations of judicial bias are purely conclusory—as he points to nothing in the record to show any predisposition, bias, or anything that would apply to the three factors elucidated above. Conclusory allegations do not present a constitutional issue in a habeas case. *See Ross v. Estelle*, 694 F.2d 1008, 1012 (5th Cir. 1983) ("We are thus bound to re-emphasize that mere conclusory allegations do not raise a constitutional issue in a habeas proceeding."). Moreover, on Dunn's direct appeal, the appellate court addressed Dunn's claim that the trial court was biased. The appellate court stated that, "[w]e find nothing in the record showing any trial or pretrial objection to the trial court's presiding over this case or supporting Dunn's claim that the trial court previously represented Dunn or had knowledge of any information outside the murder trial which could have been detrimental to Dunn." *Dunn*, 2016 WL 908108 at *1. Dunn has not shown that this adjudication was unreasonable or contrary to federal law. This claim should be dismissed.

Dunn further maintains that counsel was ineffective for failing to present evidence of a video interview of his daughter and text messages showing that the victim was having an affair. Trial counsel's affidavit submitted to the state habeas court addresses both claims:

> 6. I did not present the video interview of Mr. Dunn's daughter, because Mr. Dunn's daughter testified live in Court, and she did not significantly contradict anything that she said in the video interview. Brianna Dunn's testimony at trial did establish that her mother, Kari Dunn, was staying at her boyfriend's house, and that the family was told to keep this secret from Mr. Dunn. This was part of my strategy to show that, little by little, Mr. Dunn was discovering his wife's possible infidelity,

> which led to his losing control when she admitted the affair on the night of Kari Dunn's killing. I do not believe that there was anything more that her statements in the video could have added. Also, in my estimation, the video was one of the most heart-rendering and damaging pieces of potential evidence in the case that would not have helped Mr. Dunn in any way. It depicted Mr. Dunn's oldest daughter, Brianna Dunn, in an interview with the police and Child Protective Services Personnel immediately after her mother's killing. She is asked to describe what she witnessed, and while she bravely tries to do so, at points during the interview she breaks down in tears.
>
> 6. With regard to text messages, the State and I agreed to the introduction of the cell phone data that [was] recovered from the phones of Brad Dunn and Kari Dunn. There were thousands of text messages and other information recovered altogether. During the trial, I cross-examined all witnesses that would have had knowledge about the texts sent either by Brad or Kari Dunn. I attempted to establish that Brad and Kari Dunn were going through a bad divorce, that Kari Dunn was seeing another man, that some of her family was concerned for their kids that Kari Dunn was trying to supplant Brad Dunn as their father, and that the effect of all of this upon Brad Dunn was to build up his feelings of despair and anger to a boiling point which caused the killing. While the State and I agreed to the introduction of all of the messages taken from Brad and Kari Dunn's phones, because of the large volume, I did not attempt to go through each and every one with a witness for fear of aggravating and alienating the jury. Again, my strategy was not to attempt to prove that an affair existed in the weeks before Kari Dunn's death, but rather, that, bit by bit, when the affair was fully revealed to Brad Dunn on December 1, 2013, it caused him to act under a fit of sudden passion.

(Dkt. #18, pg. id. #1831-32).

Because the state court entered findings and conclusions—particularly that trial counsel's affidavit was credible and supported by the record—which are presumed correct on federal habeas review, Dunn must now overcome this presumption. However, his claims do not demonstrate that the state court's adjudication of his claims or that counsel was not deficient was unreasonable or contrary to federal law. This claim should be dismissed.

Dunn further argues that trial counsel was ineffective for failing to present witnesses who could have testified to his good character and to his mental state at the time of the murder. Trial counsel once again addressed this claim, thoroughly, as follows:

5. Mr. Dunn gave me and my investigator the names of four jail staff that he wanted me to interview as character witnesses, namely Deputy Latrell, Ms. Benson, Sgt. Stancil, and Deputy Bell. I interviewed these persons, and each of them was able to recount the things that Mr. Dunn said to them following his arrest and during his jail stay while awaiting trial, but none of them was willing or able to act as a favorable character witness.

. . .

8. Mr. Dunn identified Jason Kopecky as a possible witness. Mr. Dunn indicated to me that during his breakup, he would call Mr. Kopecky, a relative of Kari Dunn's, to cry to him about what he had been going through with Kari during their separation and divorce. I was never able to reach or locate Mr. Kopecky, and none of my calls were returned. I instead used the text messages and Mr. Dunn's testimony to establish his state of mind leading up to the killing.

9. Mr. Dunn identified Jason Dorthlon as a potential witness for him, and indicated that he had lived with Mr. Dorthlon for a short period of time. I recall speaking with James Dorthlon in investigating the case, but that he had nothing material or favorable to add when I spoke with him. Mr. Dunn never mentioned Sandra Dorthlon to me as a potential witness, and I did not mention Mike Dorthlon as a potential witness, but only as a person that I might contact to get in touch with James Dorthlon. I believe that I listed Mike Dorthlon as a potential witness out of an abundance of caution.

10. During my investigation and preparation for trial, Mr. Dunn never identified anybody in the District Attorney's office that might testify favorably for him, at least not by name. He did mention that members of law enforcement would have remembered him from running a paintball business and a car show in Marshall, Texas.

11. I did call Richard Connel to testify for Mr. Dunn at trial. Mr. Dunn did not identify any other person named Richard that I should contact or call as a witness.

12. Late in my trial preparations, Mr. Dunn identified his uncle Mark Doss and Aunt Amy Doss from Aurora, Colorado, as persons who would know his personal history. I opted to use the testimony of Mr. Dunn's father, Craig, as well as Mr. Dunn's testimony, to establish Mr. Dunn's personal history, and felt that their testimony would be cumulative.

13. I interviewed Russell Doss during my investigation of the case, and he has a number of favorable things to say about Brad Dunn, including that Kari Dunn was abusive to Brad Dunn, and that Brad worked extremely hard to keep his family together. However, when I went over the information I obtained from Russell Doss with my client, Mr. Dunn indicated that Mr. Doss was a liar, that his testimony was untrue, and that he believed Mr. Doss was an attention seeker. Mr. Dunn also indicated that Russell Doss had tried to extort or steal money from his father, Craig Dunn. Craig

> Dunn confirmed the things that Brad Dunn stated, and we decided against calling Mr. Doss as a witness.

(Dkt. #18, pg. id. #1831-33).

Here, Dunn cannot show that the state habeas court's adjudication of this claim was unreasonable or contrary to federal law. Counsel cannot be ineffective for failing to present cumulative testimony—and, likewise, cannot be ineffective for failing to present witness that were not favorable to his own client. *See Coble v. Quarterman*, 496 F.3d 430, 436 (2007) ("Counsel's decision not to present cumulative testimony does not constitute ineffective assistance."); *see also Day v. Qaurterman*, 566 F.3d 527, 538 (5th Cir. 2009) (explaining that a habeas petition, in presenting a claim of uncalled witnesses, must "show that the testimony would have been **favorable** to a particular defense.") (emphasis added).

In other words, given that counsel made an informed decision that Dunn's witnesses' would not have provided favorable testimony, Dunn cannot show deficient performance or prejudice. In these ways, he therefore failed to demonstrate that the state habeas court's rejection of this claim was unreasonable or contrary to federal law. This claim should be dismissed.

Dunn asserts that trial counsel was also ineffective for failing to object to an argument from the State and a jury instruction that shifted the burden of proof to the defense. Trial counsel responded to this claim through his affidavit and the state habeas court rejected Dunn's claim:

> 14. As to the allegation that I failed to object to the Charge, and/or argument by the Prosecutor that shifted the burden of proof, to the best of my knowledge, the charged complied with Texas Penal Code 19.02, and raised the issue of whether Mr. Dunn caused the death under the immediate influence of sudden passion arising from adequate cause. Pursuant to 19.02(d) I understood the burden of proof to be on the Defense, and made no objection to either the charge or any argument by the State that suggested this proposition.

(Dkt. #18, pg. id. #1833). Indeed, counsel is correct: Under Texas law, the defendant has the burden of proof and persuasion with respect to the issue of sudden passion. *See Jones v. State*,

613 S.W.3d 274, 275 (Tex. App.—Austin Sept. 29, 2020) ("Under the statute [Tex. Penal Code § 19.02(d)], a defendant relying on the issue of sudden passion must raise the issue and prove the issue in the affirmative by a preponderance of the evidence.") (internal quotations omitted); *see also Wooten v. State*, 400 S.W.3d 601, 605 (Tex. Crim. App. 2013). Dunn has failed to show that the state habeas court's rejection of this claim was unreasonable or contrary to federal law.

Finally, Dunn maintains that appellate counsel was ineffective because he filed an *Anders* brief without Dunn's approval, as he insists that there were meritorious issues on appeal. He also argues appellate counsel was ineffective for failing to visit him and filed a motion to withdraw.

The *Strickland* standard applies to claims of ineffective assistance of appellate counsel. *Smith v. Robbins*, 528 U.S. 259, 285 (2000). To show prejudice on appeal, the petitioner must show that but for appellate counsel's deficient performance, "he would have prevailed on appeal." *Id.* at 285-86; *see also Halprin v. Davis*, 911 F.3d 247, 260 (5th Cir. 2018) ("A petitioner may demonstrate prejudice by showing a reasonable probability that, but for his counsel's unreasonable failure to file a merits brief, he would have prevailed on his appeal.") (citing *Smith*, 528 U.S. at 285) (internal quotations omitted).

Here, Dunn cannot show that appellate counsel was ineffective because he cannot show that he would have prevailed on appeal. The appellate court, in affirming Dunn's conviction, examined both appellate counsel's *Anders* brief and Dunn's *pro se* brief—and determined that Dunn's appeal was wholly frivolous. *See Dunn v. State*, 2016 WL 908108 at *3 ("We have determined that this appeal is wholly frivolous. We have independently reviewed the clerk's record and the reporter's record and find no genuinely arguable issue. . . . . We, therefore, agree with counsel's assessment that no arguable issues support an appeal."). On federal review, Dunn fails

to show that the state court's adjudication of this claim was unreasonable—as the appeal was frivolous.

3. Prosecutorial Misconduct and the Confrontation Clause

In the final two claims, Dunn maintains that the prosecutor committed misconduct by (1) reminding the jury that he pleaded guilty, thereby improperly shifting the burden, (2) articulated his own opinions numerous times, (3) withheld his daughter's video, thereby committing a *Brady* violation, and (4) lying to the jury when evidence at trial showed that his statements compared with state witnesses' statements to be lies.

The standard for granting federal habeas relief because of alleged prosecutorial misconduct is "the narrow one of due process, and not the broad exercise of supervisory power." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986). To prevail on such claims, the petitioner must show that the prosecutor's actions were so egregious as to tender the trial fundamentally unfair. *See Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974). His or her actions must have "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden*, 477 U.S. at 181.

It is not enough that his or her actions "were undesirable or even universally condemned." *Id.* Crucially, the Fifth Circuit has held that the test to determine whether a trial is fundamentally unfair "is whether there is a reasonable probability that the verdict might have been different had the trial been properly conducted." *Rogers v. Lynaugh*, 848 F.2d 606, 609 (5th Cir. 1988). Here, because Dunn pleaded guilty to the offense, the question becomes whether there is a reasonable probability—absent alleged prosecutorial misconduct—Dunn's sentence would have been different.

As to the first claim, the transcript of the sentencing trial demonstrates that the state sought to have Dunn's guilty plea on the record before the sentencing trial began—in front of the jury. Mr. Rectenwald, defense counsel, agreed, (Dkt. #17, pg. id. #920). Dunn stated, under oath, that he pleaded guilty to the offense of murder, by stabbing his wife Kari Dunn with a knife, (Dkt. #18, pg. id. #927). The bottom line is that the defense's strategy was to prove that Dunn killed his wife under sudden passion—not that Dunn had not been the perpetrator. In other words, given that Dunn pursued a sudden passion defense, the jury necessarily was going to be aware that he pleaded guilty or committed the offense. This claim is without merit.

Turning to Dunn's claims concerning a potential *Brady* violation, the Court notes that to demonstrate a *Brady* violation, a defendant must satisfy three components:

> First, the evidence must be favorable to the accused, a standard that includes impeachment evidence. Second, the State [or, in this case, the Government] must have suppressed the evidence. Third, the defendant must have been prejudiced. *United States v. Hughes*, 230 F.3d 815, 819 (5th Cir. 2000). To establish the third element, a defendant must show that the evidence "could reasonably be taken to put the whole case in such a different light as to undermine the confidence in the verdict." *Id.* (internal quotation marks omitted).

See U.S. v. Fields, 761 F.3d 443, 475 (5th Cir. 2014); *see also Brady v. Maryland*, 373 U.S. 83 (1963). Importantly, the State does not have an obligation under *Brady* to produce evidence or information already known to a defendant or that he could have obtained through exercising reasonable diligence. *See Brown v. Cain*, 104 F.3d 744, 750 (5th Cir. 1997).

Here, Respondent is correct: Dunn's guilty plea waived his *Brady* claim. Dunn entered a voluntary and intelligent guilty plea at the guilt/innocence phase; therefore, any *Brady* claim is waived because a possible *Brady* violation is defined in terms of its potential effects of undisclosed, exculpatory information on an assessment of guilt—not sentencing. *See Matthew v. Johnson*, 201 F.3d 353, 362 (5th Cir. 2000) ("Because a *Brady* violation is defined in terms of the potential effects of undisclosed information on a judge's or jury's assessment of guilt, it follows that the

failure of a prosecutor to disclose exculpatory information to an individual waiving his right to a trial is not a constitutional violation."); *Freeman v. Thaler*, 2012 WL 3453128 *3 (N.D. Tex. July 23, 2012) ("The Fifth Circuit has held that a guilty plea forecloses a defendant's *Brady* claim.").

Even if Dunn's *Brady* claim was not foreclosed by his guilty plea, he has not shown that his daughter's video was exculpatory. In fact, defense counsel in his affidavit to the state habeas court described the video as "one of the most [heart-rendering] and damaging pieces of potential evidence in the case that would not have helped Mr. Dunn in any way," (Dkt. #18, pg. id. #1831). Counsel described the video as depicting the daughter as "brave" and that she breaks down in tears at points during the interview. *Id.* This claim should be dismissed.

Dunn further asserts that the prosecutor committed misconduct by giving his own opinions and allegedly lying to the jury. He complains about the prosecutor's comments that he purchased a "cheap room" at the hotel, comments about Dunn cussing at the victim, and how "he had whatever it takes to win approach because of all the publicity the trial and Kari's Law had gained."

A review of the trial transcript shows that the prosecutor's comments were comments on the evidence or reasonable deductions from the evidence presented. Moreover, Dunn has failed to demonstrate that absent such comments, the result of his sentencing trial would have been different. Most importantly, however, Dunn also failed to demonstrate that the state court's adjudication of these claims was unreasonable or contrary to federal law. Dunn's claims concerning alleged prosecutorial misconduct should be dismissed.

Turning to Dunn's claim regarding the Confrontation Clause, the Court notes that this claim fails as well. Dunn maintains that his due process rights under the Confrontation Clause were violated "because of key witnesses not called/subpoenaed for trial." It seems that Dunn is complaining that the victim's boyfriend, Todd Liston, should have been called.

The Confrontation Clause, found within the Sixth Amendment to the United States Constitution, protects criminal defendants in two important ways. First, it gives criminal defendants the right to confront or physically face his accusers or those that testify against him and, second, provides the right to conduct cross-examination. *See Pennsylvania v. Ritchie*, 480 U.S. 39, 51 (1987). The right to confrontation is a trial right designed "to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness." *Id.* at 54 (quoting *Davis v. Alaska*, 415 U.S. 308, 318 (1974)); *see also Maryland v. Craig*, 497 U.S. 836, 845 (1990) ("The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversarial proceeding before the trier of fact.").

However, as previously mentioned, complaints of uncalled witnesses are not favored on federal habeas review because the allegations of what an uncalled witness would have testified to are largely speculative. Additionally, defense counsel's affidavit explains why Mr. Liston was not called as a witness: Defense counsel was unable to locate him, no calls to him were ever returned, and defense counsel decided that Mr. Liston did not have "anything material or favorable" to add to Dunn's case or that could not be established through other witnesses/evidence, (Dkt. #18, pg. id. #1832). Mr. Liston, as the victim's boyfriend, was neither Dunn's accuser nor testified against him in the state's case; therefore, Dunn's claim concerning the Confrontation Clause fails and should be dismissed.

VIII. Challenge to Jury's Determination

A review of Dunn's habeas petition, his response to Respondent's answer, and even his state habeas application demonstrates that the theme of Dunn's challenges to his murder sentence is his unhappiness that the jury did not find that he acted with sudden passion. Dunn's pleadings

are rife with complaints that various individuals did not highlight that he loved his wife, loved his children, was a good father, provided for his family, that the victim cheated on him, his purported "good character," and that he allegedly did not mean to murder her.

It is not, however, the purview of federal courts to second-guess a jury's determination. *See Lucio v. Lumpkin*, 987 F.3d 451, 479 (5th Cir. 2021) ("As to the evidence the jury heard, it was the jury's province—not the federal court's—to weigh it."); *Brown v. Thaler*, 2012 WL 677179 *18 (N.D. Tex. Feb. 10, 2012) ("Moreover, it was within the sole province of the jury as the finder of fact to assess the credibility of the witnesses and to choose among reasonable constructions of the evidence."); *Sharper v. Dretke*, 2004 WL 1074068 *12 (N.D. Tex. May 12, 2004) ("Determining the weight and credibility of the evidence is within the sole province of the jury.") (citing *United States v. Martinez*, 975 F.2d 159, 161 (5th Cir. 1992)).

In light of the evidence presented, Dunn has shown no reasonable probability that—absent counsel's strategic decisions or even his claims that do cast aspersions on his lawyer—he would not have received a sentence of 99 years or life imprisonment. Given that Dunn is *essentially* arguing that counsel was constitutionally ineffective because the jury rejected the defense, the Court notes that a claim of ineffective assistance of counsel will fail "if the facts against adduced at trial point so overwhelmingly to the defendant's guilt that even the most competent attorney would be unlikely to have obtained an acquittal." *See, e.g.*, *Green v. Lynaugh*, 868 F.2d 176, 177 (5th Cir. 1989); *see also Salazar v. Quarterman*, 260 F. App'x 643, 650 (5th Cir. 2007) (citing *Green*, 868 F.2d at 177) (unpublished) *Jones v. Jones*, 163 F.3d 285, 304 (5th Cir. 1998) (same).

The evidence clearly supports the jury's rejection of Dunn's sudden passion defense. Under Texas law, "a murder committed under the immediate influence of sudden passion arising from adequate cause is a second-degree felony carrying a maximum punishment of twenty years'

imprisonment." *Wooten v. State*, 400 S.W.3d 601, 605 (Tex. Crim. App. 2013) (internal quotations omitted). "Sudden passion" is "passion directly caused by and arising out of provocation by the individual killed which arises at the time of the murder." *Id.* The defendant must also regain his capacity for cool reflection. *Id.* Importantly, "sudden passion must arise at the time of the offense and cannot result solely from former provocation." *De Leon v. State*, 373 S.W.3d 644, 650 (Tex. App.—San Antonio 2012, pet. ref'd); *see also Naasz v. State*, 974 S.W.2d 418, 425 (Tex.App.—Dallas 1998, pet. ref'd) (holding that defendant's testimony of being upset and angry over culmination of events did not rise to the level of adequate cause).

As defense counsel explained in his affidavit, the defense strategy was to show sudden passion through demonstrating that Dunn became upset/distraught when he learned that the victim was leaving him for her boyfriend while inside the hotel bathroom—causing him to "snap," (Dkt. #18, pg. id. #1831-32). However, the jury heard testimony and evidence that Dunn knew about the relationship well *before* he was told in the hotel bathroom—thereby negating his claim of provocation that arises at the time of the murder.

Mr. Kennel, who worked with Dunn, testified that around Thanksgiving that year—right before the murder—Dunn became "angry" and was not "Brad [Dunn] anymore," (Dkt. #17, pg. id. #1125). This testimony and evidence show that Dunn did not learn that the victim was in a relationship and possibly having an affair right at the time of the murder; rather, he learned throughout the month before. In fact, Mr. Kennel testified that the day before the murder, Dunn was on the phone at work "arguing" with the boyfriend.

Dunn's own testimony at trial further demonstrates that the jury's' rejection of his sudden passion defense was supported by the evidence. He testified that he did not want his wife to leave, did not want her to give up on their marriage, and that he was "mad" that she was calm about their

breakup, (Dkt. #17, pg. id. #1231). He testified that while in the hotel bathroom with the victim, he became "heated" when they were discussing dating and "living single." *Id.* at pg. id. #1253. Dunn testified that he told her that he "[wasn't] stupid," that he knew she was sleeping with Mr. Liston, and that he was "pissed." *Id.* at pg. id. #1253-54.

He then told the victim that he "hated her," pleaded with her "not to do this," and asked her if they could spend the day together with the children. When she declined, she went to hug Dunn. Dunn testified that as he was hugging the victim, he was thinking to himself and feeling, "I'm never going to get to hug her again." *Id.* at pg. id. #1254. Then the victim remarked, "you're going have to let go, Brad, you've got to be done with this, you've got to—you're wasting your time." *Id.* at pg. id. #1254-55.

Dunn then stabbed her dozens of times inside the bathroom—as at least one of their children was virtually steps away. Given that Dunn knew that the victim was leaving him well before the murder and specifically remarked to himself that he may never hug her again, the totality of the evidence supports the jury's rejection of the sudden passion defense. *See, e.g.*, *Hobson v. State*, 644 S.W.2d 473, 478 (Tex. Crim. App. 1983) (en banc) ("Appellant argues that earlier events of the morning preceding the confrontation in the evening had created an emotional crisis for his father, so concerned about his daughter's relationship with a young man just released from jail. However, if that be the passion influencing appellant, it cannot be reasonably said to be sudden—arising at the time of the offense."); *McKinney v. State*, 179 S.W.3d 565, 570 (Tex. Crim. App. 2005) ("Similarly, in the instant case, the argument between Appellant and Jeremy began hours before the fatal shooting. The issues between Appellant and his son arose earlier in the evening, when Appellant and Garner went to search for Jeremy."); *Bygoytia v. State*, 2020 WL 597350 *9 (Tex.App.—El Paso 2020, no pet.) ("Although there is evidence in the record that Appellant and

the complainant had previous verbal encounters in school and met in a parking lot pursuant to an agreement to fight, sudden passion cannot be the result of former provocation; the passion must arise at the time of the offense.").

IX. Conclusion

Dunn's federal habeas petition should be denied and the case be dismissed with prejudice. His habeas claims are meritless, and he has failed to show that the state courts' adjudication of his claims were unreasonable or contrary to federal law. While Dunn is dissatisfied that the jury in his sentencing trial did not find that he committed the murder of Kari Dunn under sudden passion, there is ample evidence to support the jury's rejection of such defense.

The Court has reviewed the entire record in this case, including trial transcripts and all pleadings. Dunn's sentence of 99 years' imprisonment for the murder of Kari Dunn is justified in this case. *See U.S. v. Horton*, 705 F.2d 1414, 1418 ("We are not moralists but jurists, and we have acted as such in reviewing these convictions. Appointed counsel have labored manfully in the cause of these appellants; we commend their efforts. Even so, we cannot close without observing that the twenty-year sentences meted out to appellants for these callous acts directed against unknown and innocent third persons, perhaps children, seems richly deserved. There being no one else to say so, we take the occasion.").

X. Certificate of Appealability

"A state prisoner whose petition for a writ of habeas corpus is denied by a federal district court does not enjoy an absolute right to appeal." *Buck v. Davis*, 137 S. Ct. 759, 773 (2017). Instead, under 28 U.S.C. § 2253(c)(1), he must first obtain a certificate of appealability ("COA") from a circuit justice or judge. *Id.* Although Petitioner has not yet filed a notice of appeal, the court may address whether he would be entitled to a certificate of appealability. *See Alexander v.*

Johnson, 211 F.3d 895, 898 (5th Cir. 2000) (A district court may *sua sponte* rule on a certificate of appealability because "the district court that denies a petitioner relief is in the best position to determine whether the petitioner has made a substantial showing of a denial of a constitutional right on the issues before the court. Further briefing and argument on the very issues the court has just ruled on would be repetitious.").

A certificate of appealability may issue only if a petitioner has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). To make a substantial showing, the petitioner need only show that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). The Supreme Court recently emphasized that the COA inquiry "is not coextensive with merits analysis" and "should be decided without 'full consideration of the factual or legal bases adduced in support of the claims.'" *Buck*, 137 S. Ct. 773 (quoting *Miller-El*, 537 U.S. at 336). Moreover, "[w]hen the district court denied relief on procedural grounds, the petitioner seeking a COA must further show that 'jurists of reason would find it debatable whether the district court was correct in its procedural ruling.'" *Rhoades v. Davis*, 852 F.3d 422, 427 (5th Cir. 2017) (quoting *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012)).

Here, Dunn failed to present a substantial showing of a denial of a constitutional right or that the issues he has presented are debatable among jurists of reason. He also failed to demonstrate that a court could resolve the issues in a different manner or that questions exist warranting further proceedings. Accordingly, he is not entitled to a certificate of appealability.

RECOMMENDATION

For the foregoing reasons, it is recommended that the above-styled application for the writ of habeas corpus be denied, and the case dismissed with prejudice. It is further recommended that Petitioner Dunn be denied a certificate of appeal *sua sponte*.

Within fourteen (14) days after receipt of the Magistrate Judge's Report, any party may serve and file written objections to the findings and recommendations contained in the Report.

A party's failure to file written objections to the findings, conclusions and recommendations contained in this Report within fourteen days after being served with a copy shall bar that party from *de novo* review by the district judge of those findings, conclusions and recommendations and, except on grounds of plain error, from appellate review of unobjected-to factual findings and legal conclusions accepted and adopted by the district court. *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1430 (5th Cir. 1996) (*en banc*).

SIGNED this 2nd day of May, 2021.

ROY S. PAYNE
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

MARSHALL DIVISION

BRAD ALLEN DUNN, #1988053	§	
VS.	§	CIVIL ACTION NO. 2:18cv403
DIRECTOR, TDCJ-CID	§	

ORDER OF DISMISSAL

Petitioner Brad Allen Dunn, a prisoner confined at the Michael Unit within the Texas Department of Criminal Justice proceeding *pro se*, filed this petition for writ of habeas corpus under 28 U.S.C. § 2254 challenging his Harrison County conviction and sentence. The cause of action was referred to United States Magistrate Judge Roy S. Payne for findings of fact, conclusions of law, and recommendations for the disposition of the petition.

On May 2, 2021, Judge Payne issued a Report, (Dkt. #26), recommending that Petitioner's section 2254 habeas petition be denied and that the case be dismissed with prejudice. It also recommended that Petitioner be denied a certificate of appealability *sua sponte*. A copy of this Report was sent to Petitioner at his address. Petitioner has filed timely objections, (Dkt. #37). Petitioner's objections include hundreds of pages of exhibits which serve only to underscore the correctness of the Report and Recommendation. These objections lack merit.

The Court has conducted a careful *de novo* review of the record and the Magistrate Judge's proposed findings and recommendations. *See* 28 U.S.C. §636(b)(1) (District Judge shall "make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made."). Upon such *de novo* review, the Court has determined that the Report of the United States Magistrate Judge is correct and Petitioner's objections are without merit. Accordingly, it is

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ORDERED that the Report and Recommendation of the United States Magistrate Judge, (Dkt. #26), is ADOPTED as the opinion of the Court. Petitioner's objections, (Dkt. #37), are OVERRULED.

It is also ORDERED that Petitioner's federal habeas petition is DENIED. The above-styled civil action is hereby DISMISSED WITH PREJUDICE. Petitioner is also DENIED a certificate of appealability sua sponte. Finally, it is

ORDERED that any and all motions which may be pending in this civil action are hereby DENIED.

So ORDERED and SIGNED this 2nd day of June, 2021.

RODNEY GILSTRAP
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

MARSHALL DIVISION

BRAD ALLEN DUNN, #1988053	§	
VS.	§	CIVIL ACTION NO. 2:18cv403
DIRECTOR, TDCJ-CID	§	

ORDER DENYING MOTION TO ALTER OR AMEND JUDGMENT

Before the Court is Petitioner's motion to alter or amend the judgment, (Dkt. #42), in this 28 U.S.C. § 2254 proceeding. Petitioner's habeas petition was denied and the case was dismissed, with prejudice, on June 2, 2021. Petitioner was further denied a certificate of appealability *sua sponte*. In support of his current motion, Petitioner again repeats his underlying habeas claims—particularly concerning text messages, voicemails, and letters that "show" his character and his distress over the actions of his wife, whom he subsequently murdered—and further reiterates his displeasure with his trial counsel's affidavit because it is not "facts." The Court notes that the affidavit was examined by the state habeas court and found to be more credible than Petitioner's assertions.

A. Standard of Review

> The United States Supreme Court discussed the purpose of Rule 59(e) as follows:
>
> Rule 59(e) was added to the Federal Rules of Civil Procedure in 1946. Its draftsmen had a clear and narrow aim. According to the accompanying Advisory Committee Report, the Rule was adopted to "mak[e] clear that the district court possesses the power" to rectify its own mistakes in the period immediately following entry of judgment. . . . Consistent with this original understanding, the federal courts have invoked Rule 59(e) only to support reconsiderations of matters properly encompassed in a decision on the merits.

White v. New Hampshire Dept. of Employment Sec., 455 U.S. 445, 450-51 (1982) (citations omitted). Furthermore, "Rule 59(e) permits a court to alter or amend a judgment, but it 'may not be used to relitigate old matters, or to raise arguments or present evidence that could have been

raised prior to the entry of judgment." *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 485 n.5 (2008) (citation omitted).

The Fifth Circuit has observed that a Rule 59(e) motion "serve[s] the narrow purpose of allowing a party to correct manifest errors of law or fact or to present newly discovered evidence." *Waltman v. Int'l Paper Co.*, 875 F.2d 468, 473 (5th Cir. 1989) (citation and internal quotations omitted). A Rule 59(e) motion "is not the proper vehicle for rehashing evidence, legal theories, or arguments that could have been offered or raised before the entry of judgment." *Templet v. HydroChem, Inc.*, 367 F.3d 473, 479 (5th Cir.) (citation omitted), *cert. denied*, 543 U.S. 976 (2004). The Fifth Circuit has repeatedly held that the purpose of a Rule 59(e) motion is not to rehash arguments that have already been raised before a court. *See, e.g.*, *Naquin v. Elevating Boats, L.L.C.*, 817 F.3d 235, 240 n.4 (5th Cir. 2016); *Winding v. Grimes*, 405 F. App'x 935, 937 (5th Cir. 2010).

Moreover, "[r]econsideration of a judgment after its entry is an extraordinary remedy that should be used sparingly." *Templet*, 367 F.3d at 479 (citations omitted). The decision to alter or amend a judgment is committed to the sound discretion of the district judge and will not be overturned absent an abuse of discretion. *S. Contractors Group, Inc. v. Dynalectric Co.*, 2 F.3d 606, 611 & n.18 (5th Cir. 1993).

B. Discussion and Analysis

Petitioner's motion is without merit and must be denied. As he consistently repeats his underlying habeas arguments, his attempt to relitigate is improper under Rule 59(e). Furthermore, as previously explained to Petitioner, the state court found counsel's affidavit credible. This finding is binding on this Court absent a showing by clear and convincing evidence that the affidavit is not credible—a showing that Petitioner has manifestly failed to present.

Moreover, Petitioner insists that he would have received a less harsh sentence had evidence of these text messages, voicemails, and letters been presented. The Court finds that based on the state record, trial transcripts, and the state habeas record that it is particularly unlikely that Petitioner would have received a different or significantly a less harsh sentence given the egregious facts of this case. *See, e.g.*, *Solis v. Dretke*, 107 F. App'x 414, 415-16 (5th Cir. 2004) ("Solis also contends that the unreasonable severity of his sentence shows prejudice. Solis has not established that his sentence was wholly unreasonable for the offense he did commit and for his criminal history."). Here, Petitioner has presented no basis for Rule 59(e) relief. Accordingly, it is

ORDERED that Petitioner's motion to alter or amend judgment, (Dkt. #42), is **DENIED**. To the extent that a certificate of appealability is required, such is **DENIED**.

So ORDERED and SIGNED this 25th day of June, 2021.

RODNEY GILSTRAP
UNITED STATES DISTRICT JUDGE