United States Court of Appeals for the Fifth Circuit

No. 21-40214

MICHAEL DUNTAE FAGANS,

Petitioner—Appellant,

versus

BOBBY LUMPKIN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent—Appellee.

Appeal from the United States District Court
Eastern District of Texas
USDC No. 6:19-CV-279

ON MOTION FOR RECONSIDERATION

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

PER CURIAM:

IT IS ORDERED that Appellant's motion for leave to file a motion for reconsideration out of time is GRANTED.

IT IS FURTHER ORDERED that the motion for reconsideration of the Court's order of December 6, 2021 denying a certificate of appealability is DENIED.

United States Court of Appeals for the Fifth Circuit

No. 21-40214

MICHAEL DUNTAE FAGANS,

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. 6:19-CV-279

ORDER:

Michael Duntae Fagans, Texas prisoner # 2211624, seeks a certificate of appealability (COA) to appeal the district court's denial of his 28 U.S.C. § 2254 petition challenging his guilty plea conviction for robbery and resulting 25-year sentence. To obtain a COA, he must make "a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), which in turn requires him to show that reasonable jurists would find the district court's assessment of his constitutional claims to be debatable or wrong, *Slack v. McDaniel*, 529 U.S. 473, 484 (2000), or that the issues

deserve encouragement to proceed further, *see Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

If his COA motion is liberally construed, Fagans renews his claims that indictment was defective, his speedy trial rights were violated, his sentence was wrongly enhanced, his arrest was illegal, and the prosecution withheld exculpatory evidence, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), as well as the claim that his plea was involuntary because he had been constructively denied counsel and forced to proceed pro se. To the extent that he also argues, for the first time, that his due process and equal protection rights were violated this court lacks jurisdiction to consider those newly raised claims. *See Black v. Davis*, 902 F.3d 541, 545 (5th Cir. 2018). To the extent that Fagans seeks to raise a freestanding claim of actual innocence, this court will likewise not consider the claim. *See id.*; *see also United States v. Shepherd*, 880 F.3d 734, 740 (5th Cir. 2018).

Although Fagans renews each of the claims he raised in his § 2254 petition, he furnishes no arguments addressing the district court's reasons for dismissing the majority of those claims. More specifically, he does not address the district court's conclusions that his claims challenging the sufficiency of the indictment, the legality of his sentence, or the legality of his arrest were not cognizable on federal habeas review or that his speedy-trial, illegal-sentence, and *Brady* claims were waived by his guilty plea. Accordingly, he has waived any argument that the district court reached those conclusions in error. *See Canales v. Stephens*, 765 F.3d 551, 576 (5th Cir. 2014); *see also Hughes v. Johnson*, 191 F.3d 607, 613 (5th Cir. 1999).

With respect to his remaining claim that he did not voluntarily waive his right to counsel and was incompetent to proceed pro se, Fagans has failed to make the required showing. *See Faretta v. California*, 422 U.S. 806, 835-36 (1975); *Bouchillon v. Collins*, 907 F.2d 589, 594-98 (5th Cir. 1990); *see also*

Miller-El, 537 U.S. at 327; *Slack*, 529 U.S. at 484. Accordingly, the motion for a COA is DENIED. Fagans's motion for leave to file exhibits in support of his COA motion is similarly DENIED.

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

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

MICHAEL D. FAGANS, #2211624,	§	
	§	
Petitioner,	§	
	§	
v.	§	Case No. 6:19-cv-279-JDK-JDL
	§	
DIRECTOR, TDCJ-CID,	§	
	§	
Respondent.	§	

FINAL JUDGMENT

The Court, having considered Petitioner's case and rendered its decision by opinion issued this same date, hereby enters **FINAL JUDGMENT**.

It is **ORDERED** that this petition for a writ of habeas corpus is **DISMISSED WITH PREJUDICE**. A certificate of appealability is **DENIED**. All pending motions are **DENIED** as **MOOT**.

The Clerk of Court is instructed to close this case.

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

JEREMY D. KERNODLE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

MICHAEL D. FAGANS, #2211624,	§	
	§	
Petitioner,	§	
	§	
v.	§	Case No. 6:19-cv-279-JDK-JDL
	§	
DIRECTOR, TDCJ-CID,	§	
	§	
Respondent.	§	

ORDER ADOPTING REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

Petitioner Michael D. Fagans, an inmate confined at the Eastham Unit of the Texas Department of Criminal Justice, proceeding pro se, filed this federal petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The petition was referred to United States Magistrate Judge, the Honorable John D. Love, for findings of fact, conclusions of law, and recommendations for disposition.

On January 25, 2021, Judge Love issued a Report and Recommendation recommending that the Court deny the petition and dismiss the case with prejudice. Judge Love also recommended that a certificate of appealability be denied. Docket No. 35. Petitioner timely objected. Docket No. 37.

Where a party objects within fourteen days of service of the Report and Recommendation, the Court reviews the objected-to findings and conclusions of the Magistrate Judge de novo. 28 U.S.C. § 636(b)(1). In conducting a de novo review, the Court examines the entire record and makes an independent assessment under the law. *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1430 (5th Cir. 1996) (*en*

banc), *superseded on other grounds by statute*, 28 U.S.C. § 636(b)(1) (extending the time to file objections from ten to fourteen days).

In his objections, Petitioner appears to argue that his guilty plea was involuntary because trial counsel withdrew from representing him, which "forced" Petitioner to enter a guilty plea. Docket No. 37 at 7–16. However, Petitioner raises this claim for the first time in his objections. Therefore, this claim is not properly before the District Court. *See Place v. Thomas*, 61 F. App'x 120, 2003 WL 342287 *1 (5th Cir. 2003) (unpublished) ("Generally, an issue raised for the first time in an objection to a magistrate judge's report is not properly before the district court and therefore is not cognizable on appeal.").

Having conducted a de novo review of the Report and the record in this case, the Court has determined that the Report of the United States Magistrate Judge is correct, and Petitioner's objections are without merit. The Court therefore **OVERRULES** Petitioner's objections (Docket No. 37) and **ADOPTS** the Report and Recommendation of the Magistrate Judge (Docket No. 35) as the opinion of the District Court. Petitioner's petition for habeas corpus is hereby **DENIED** and this action is **DISMISSED** with prejudice. Further, the Court **DENIES** a certificate of appealability.

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

JEREMY D. KERNODLE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

TYLER DIVISION

MICHAEL D. FAGANS, #2211624	§	
VS.	§	CIVIL ACTION NO. 6:19cv279
DIRECTOR, TDCJ-CID	§	

REPORT AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE

Petitioner Michael D. Fagans, a prisoner currently confined at the Eastham Unit within the Texas Department of Criminal Justice (TDCJ), proceeding *pro se* and *in forma pauperis*, filed this habeas action challenging a Gregg County conviction. The case 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 the petition be denied, the case dismissed with prejudice, and that Petitioner be denied a certificate of appealability *sua sponte*.

I. Procedural History

After entering into a negotiated guilty plea, to which Fagans pleaded true to two enhancements, Fagans was sentenced to twenty-five years' imprisonment for one count of robbery on July 26, 2018, (Dkt. #14, pg. id. #204-07). In exchange for the guilty plea, the State dropped the aggravated element of the offense and offered the twenty-five-year sentence. Fagans did not file a direct appeal but did file two state habeas applications. The first was dismissed as non-compliant; the second, filed on January 29, 2019, was denied without a written order on May 8, 2019, (Dkt. #14, pg. id. #239). Fagans filed this timely federal habeas petition on June 16, 2019, (Dkt. #1).

II. Fagan's Habeas Claims

In his petition, Fagans raises several claims attacking the validity of his Gregg County conviction. Specifically, he maintains that (1) his indictment was improper when "no threat or weapon" existed beyond a reasonable doubt; (2) he was denied speedy trial; (3) the enhancements were illegal because the offense(s) were over twenty-two years ago; (4) law enforcement arrested him illegally without a warrant and mistaken identity; and (5) the State committed a *Brady* violation.

III. Respondent's Answer

After being ordered to do so, Respondent has filed an answer to Fagan's habeas petition, (Dkt. #15). Respondent asserts that some of Fagans claims are not cognizable on federal habeas review and that all claims—cognizable or not—are meritless.

IV. Fagans's Response

Fagans argues, in his response, that his guilty plea was involuntary. A review of the response illustrates that he has repeated many of his underlying habeas claims.

V. Standard of 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).

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 her 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.").

VI. Discussion and Analysis

As the Respondent highlights, Fagan's habeas petition is without merit. Each of Fagan's claims will be addressed in turn.

1. Improper Indictment

Fagans argues that his indictment was improper because it "enhanced agg. robbery when no threat or weapon exist[s] beyond a reasonable doubt." He insists that the only evidence was a "note" robbery of a FDIC Federal Bank. By virtue of no weapon or threat, Fagan insists that his plea is involuntary because he pleaded to only committing robbery—non-aggravated.

It is well-settled that the sufficiency of a state indictment is **not** a matter for federal habeas review—unless it can be shown that the indictment is so defective that it deprives the trial court of jurisdiction. *See McKay v. Collins*, 12 F.3d 66, 68 (5th Cir. 1994) (emphasis added); *see also McLamb v. Hargett*, 69 F.3d 469, 1995 WL 581877 *5 (5th Cir. 1995) (unpublished) ("Federal habeas relief is not available for deficiencies in a state indictment unless it can be shown that the indictment is so defective that it deprived the state court of jurisdiction."). Moreover, "state law dictates whether a state indictment is sufficient to confer" jurisdiction on a court. *Williams v. Collins*, 16 F.3d 626, 637 (5th Cir.), *cert. denied*, 115 S.Ct. 42 (1994). Importantly, when a state court has held that an indictment is sufficient under state law, a federal court need not address the issue. *McKay*, 12 F.3d at 68.

Here, the record reflects that Fagans raised this exact claim in his state habeas application, (Dkt. # 14, pg. id. #383)—which was ultimately denied without a written order. By denying relief on Fagan's claim concerning the indictment, the Texas Court of Criminal Appeals necessarily and

implicitly found that the indictment was sufficient. *See Young v. Dretke*, 356 F.3d 616, 629 (5th Cir. 2004) (explaining that a federal court is bound by state court's factual findings, both implicit and explicit); *see also Morlett v. Lynaugh*, 851 F.2d 1521, 1523 (5th Cir. 1988) ("If the question of sufficiency of the indictment is presented to the highest state court of appeals, then consideration of the question is foreclosed in federal habeas proceedings."); *Johnson v. Johnson*, 114 F.3d 1180, 1997 WL 255692 *3 (5th Cir. 1997) (unpublished) ("This issue [sufficiency of the indictment] was presented to the Texas Court of Criminal Appeals in Johnson's state habeas petitions. The state court denied the applications without written orders. Hence, we decline to review this issue."). Because the Texas Court of Criminal Appeals denied Fagan's state application wherein he raised this exact issue, this Court declines to review this issue.

2. Speedy Trial

Next, Fagans insists that his speedy trial rights were violated. Specifically, he argues that he asserted his claim to a speedy trial on September 8, 2017 and that he had three trial dates set, but that were delayed. One alibi witness and one material witness died in a car wreck, which prejudiced him. Essentially, Fagans is arguing that pre-trial delays violated his speedy trial rights.

However, as Respondent claims, Fagans waived this claim by pleading guilty. As explained above, when a criminal defendant enters a voluntary guilty plea, he waives all non-jurisdictional defects—which includes a speedy trial claim—in the proceedings leading to a conviction. *See U.S. v. Celestine*, 546 F. App'x 346, 347 (5th Cir. 2013); *see also Pickens v. Davis*, 2019 WL 2617945 *3 (N.D. Tex. May 27, 2019) ("Petitioner's objections to the denial of his speedy trial claim lack merit for the same reason that denial of the initial claim was recommended: the claim was waived by his guilty plea.") (citing *Nelson v. Hargett*, 989 F.2d 847, 850 (5th Cir. 1993) (a defendant's guilty plea waives non-jurisdiction defects, including alleged speedy trial violations.)).

Fagans raised this claim in his state habeas application, which was ultimately denied, (Dkt. #14, pg. id. #385). Because the Texas Court of Criminal Appeals denied his habeas application without written order, the state court implicitly found Fagan's speedy trial claim without merit. Here, on federal habeas review, he has not demonstrated that this state court decision was unreasonable or contrary to federal law.

To the extent that Fagans claims that his plea was involuntary because his speedy trial rights were violated, the Court finds this argument unavailing. The record includes Fagans' plea paperwork, (Dkt. #14, pg. id. #68-72). The documents indicate that on June 19, 2018, (1)both the State and Defendant announced that they were ready for trial; (2) Fagans "advised the Court of desire to plead guilty and waive jury"; (3) the jury waived-indictment/information was presented to Fagans; and (4) Fagans "was admonished as to consequences of plea and reminded of right to jury trial but persisted in pleading guilty." The plea documents also include Fagans' signature, indicating that he was mentally competent, that his plea was both entered freely and voluntary, and a judicial confession wherein Fagans admitted that he was guilty of the offense. *Id.* at pg. id. #69. Fagans has not overcome his own sworn words. In this way, Fagans' voluntary guilty plea waived his speedy trial claim—and it should be dismissed.

3. Illegally Enhanced Sentence

Fagans further contends that his sentence "was enhanced by 2 state jail felonies, that [were] enhanced by [an] offense over 22 years ago." In his response, it seems Fagans is arguing that his prior convictions should not have been used because, for one prior drug offense, the "Government failed to present any evidence on essential element of crime," namely the quantity issue.

However, this claim is both waived by Fagans' guilty plea and is not cognizable on federal habeas review. Whether an offense has been properly enhanced is a matter of state law—and not

a federal issue. *See Weeks v. Scott*, 55 F.3d 1059, 1063 (5th Cir. 1995) ("It is not our function as a federal appellate court in a habeas proceeding to review a state's interpretation of its own law."); *see also Rubio v. Estelle*, 689 F.2d 533, 563 (5th Cir. 1982) ("Assuming the variance [between pleading and proof concerning the date of a prior conviction used for enhancement] constituted a violation of state law, such violation is purely a question of state criminal procedure and does not present an issue cognizable in federal habeas corpus action."); *Hazlip v. Davis*, 2017 WL 4280727 *7 (S.D. Tex. Sept. 27, 2017) ("The respondent correctly notes that whether Hazlip's sentence was properly enhanced turns on the state court's interpretation of its own laws.").

Crucially, it is well-established that when a defendant pleads true to an enhancement paragraph, he waives any subsequent challenge to the validity of the prior conviction. *See Randle v. Scott*, 43 F.3d 221, 226 (5th Cir. 1995) ("An objection to the use of a prior invalid conviction for enhancement purposes is waived when a plea of guilty is entered to the enhancement charged."). Here, the record illustrates that Fagans pleaded "true" to both enhancements, (Dkt. #14, pg. id. #204). Accordingly, any challenge to those prior convictions is waived and, therefore, this claim should be dismissed.

4. Illegal Arrest

Fagans also maintains that his Fourth Amendment rights were violated through an illegal arrest because law enforcement did not have probable cause to arrest. He also asserts that it was a "mistaken identity warrantless search."

However, Fagans' Fourth Amendment challenges are foreclosed on habeas review under *Stone v. Powell*, 428 U.S. 464 (1976). As Respondent explains, Fourth Amendment claims are not cognizable under federal habeas review if the petitioner had a full and fair opportunity to litigate his Fourth Amendment claims. *See Stone*, 428 U.S. at 494 ("In sum, we conclude that where the

State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained during an unconstitutional search or seizure was introduced at trial."); *see also Bell v. Lynaugh*, 828 F.2d 1085, 1091-92 (5th Cir.), *cert. denied*, 484 U.S. 933 (1987) ("We need not spend much time addressing appellant's Fourth Amendment concerns, for appellant does not allege, nor does our independent review of the record indicate, that appellant did not have a full and fair opportunity to litigate his Fourth Amendment claim in state court.").

The opportunity, regardless of whether it is acted upon at the state level, is all that is required to preclude federal habeas review. *Smith v. Maggio*, 664 F.2d 109, 111 (5th Cir. 1981). Crucially, even errors in adjudicating Fourth Amendment claims are not an exception to *Stone's* bar. *See Moreno v. Dretke*, 450 F.3d 158, 167 (5th Cir. 2006). Here, Fagans had the opportunity to fully and fairly litigate his Fourth Amendment challenges in state court. Fagans also raised this claim in his state habeas application, which was denied. Because Fagans had the opportunity to make these challenges in state court, in accordance with *Stone*, his current Fourth Amendment challenges are foreclosed. These claims should be dismissed.

5. *Brady* Claim

Fagans argues that the State withheld business records which contained names of potential witnesses and many cameras as well as fingerprints, which would have proved "innocence or guilt." He also argues that a person in the jury box recognized him, which was exculpatory, because the State withheld such information. 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).

With respect to the juror who recognized him, the Court notes that Fagans ultimately pleaded guilty. He has not identified a constitutional violation with respect to a potential juror recognizing him because he did not, in fact, proceed to a jury trial. This claim should be dismissed.

Turning to the allegation that the State withheld cameras, witness names, and fingerprints, the Court notes that Respondent maintains that Fagans failed to prove that any of the items the State allegedly withheld actually existed. *See* Dkt. #15, pg. 16. Respondent highlighted how the State responded to Fagans' state habeas application by noting that Fagans failed to show that the items exist or that it would have proven his innocence—thereby demonstrating that Fagans' claim is conclusory.

The Court notes that Fagans filed a motion in this Court, (Dkt. #21), seeking to expand the record. In his motion, he claimed that he has such evidence in his actual possession. The Court then ordered Respondent to file a response to Fagan's motion. In Respondent's response, (Dkt. #29), Respondent argues that this Court's review of Fagan's petition is limited to the record before the state court under *Cullen v. Pinholster*, 563 U.S. 170 (2011). In *Pinholster*, the Supreme Court explained that when a federal court evaluates a state-court decision under section 2254(d)(1), that particular review is:

> limited to the record that was before the state court that adjudicated the claim on the merits. Section 2254(d)(1) refers, in the past tense, to a state-court adjudication that "resulted in" a decision that was contrary to, or "involved" an unreasonable application of, established

> law. This backward-looking language requires an examination of the state-court decision at the time it was made. It follows that the record under review is limited to the record in existence at the same time *i.e.*, the record before the state court.

Pinholster, 563 U.S. at 181-82; *see also Pape v. Thaler*, 645 F.3d 281, 288 (5th Cir. 2011) ("The Court concluded that § 2254(d)(1) bars a district court from conducting such an evidentiary hearing because the statute requires an examination of the state court decision at the time it was made, which limits the record under review to the record in existence at that same time *i.e.*, the record before the state court.") (internal quotations omitted).

Here, Fagans raised this *Brady* claim in his state habeas application. As mentioned, the Texas Court of Criminal Appeals denied the application without a written order. Because the state court adjudicated this claim, *Pinholster* forecloses his claim on federal review.

Furthermore, as Respondent correctly notes, Fagans waived this *Brady* claim by pleading guilty. *See Orman v. Caine*, 228 F.3d 616, 617 (5th Cir. 2000) ("*Brady* requires a prosecutor to disclose exculpatory evidence for purposes of ensuring a fair trial, a concern that is absent when a defendant waives trial and pleads guilty."); *see also 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 trial is not a constitutional violation."). Because Fagans cannot overcome *Pinholster* and his guilty plea waived his *Brady* claim, this claim should be dismissed. An order denying Fagans' motion to expand the record will be entered separately.

VII. 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), she 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 she 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 at 140-41).

Here, Fagans 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

Accordingly, it is recommended that Petitioner Fagans' federal habeas corpus petition be denied and the civil action be dismissed, with prejudice. It is further recommended that Fagans be denied a certificate of appealability *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*).

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

JOHN D. LOVE
UNITED STATES MAGISTRATE JUDGE