# United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
**FILED**
April 22, 2022
Lyle W. Cayce
Clerk

No. 21-50846

MILTON LEE GARDNER,

*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 Western District of Texas
USDC No. 6:20-CV-772

ORDER:

IT IS ORDERED that the Appellant's motion for a Certificate of Appealability is DENIED.

IT IS FURTHER ORDERED that the Appellant's motion for judicial notice is DENIED.

**A True Copy**
**Certified order issued May 16, 2022**

Lyle W. Cayce

**Clerk, U.S. Court of Appeals, Fifth Circuit**

KURT D. ENGELHARDT
*United States Circuit Judge*

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF TEXAS**
**WACO DIVISION**

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| **MILTON LEE GARDNER,** | § | |
| **TDCJ No. 01913734,** | § | |
| | § | |
| **Petitioner,** | § | |
| | § | |
| **v.** | § | **W-20-CV-772-ADA** |
| | § | |
| **BOBBY LUMPKIN, Director,** | § | |
| **Texas Department of Criminal Justice,** | § | |
| **Correctional Institutions Division,** | § | |
| | § | |
| **Respondent.** | § | |

**JUDGMENT**

Before the Court is the above styled and numbered cause. On this date, the Court denied Petitioner Milton Lee Gardner's Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. Accordingly, as all issues in the cause have been resolved, the Court renders the following Final Judgment pursuant to Federal Rule of Civil Procedure 58.

IT IS ORDERED that Petitioner Milton Lee Gardner's Petition for Writ of Habeas Corpus is hereby DENIED WITH PREJUDICE and a certificate of appealability is DENIED.

IT IS FURTHER ORDERED that the above styled and numbered cause is hereby CLOSED.

**SIGNED** on August 12, 2021

ALAN D ALBRIGHT
UNITED STATES DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF TEXAS**
**WACO DIVISION**

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| **Texas Department of Criminal Justice,** | § | |
| **Correctional Institutions Division,** | § | |
| | § | |
| **Respondent.** | § | |

**ORDER**

Before the Court are Petitioner Milton Lee Gardner's pro se Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (ECF No. 1), Respondent's Response (ECF No. 15), and Petitioner's Reply (ECF No. 24). Having reviewed the record and pleadings submitted by both parties, the Court concludes Petitioner's federal habeas corpus petition should be denied under the standards prescribed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). *See* 28 U.S.C. § 2254(d).

## I. Background

In June 2013, Petitioner was charged by indictment with one count of Aggravated Assault Family Violence. (ECF No. 19-5 at 10.) In January 2014, the State filed a Notice of Enhancement Allegation, citing Petitioner's 1996 juvenile adjudication for delinquent conduct constituting a felony offense of Assault of a Public Servant. (*Id.* at 50-51.) On January 31, 2014, a jury convicted Petitioner of aggravated assault family violence, found

the enhancement violation true, and sentenced Petitioner to sixty years imprisonment. *State v. Gardner*, No. 13074-A (77th Dist. Ct., Limestone Cnty., Tex. Jan. 31, 2014.) (ECF No. 19-6 at 95-96.) The following is a brief summary of the factual allegations against Petitioner.[1]

In July of 2012, the complainant and Petitioner began dating and living together. On February 12, 2013, the complainant and Petitioner fought and the complainant ended up with two black eyes, an injured lip, and bruises all over her arms. A few days later, the police arrived at the residence and the complainant told the police she had fought with a girl because she did not want Petitioner to get into trouble. Shortly thereafter the complaint went to live with her mother.

In May 2013, the complainant and Petitioner reconnected. One day, Petitioner picked the complainant up during her lunch break and they went back to the motel room where they were staying. They began arguing and Petitioner punched the complainant in her face and stomach with his fists. Two days later, Petitioner was mad at the complainant because she would not ask his friend for gas money. Petitioner grabbed her hair and pushed her head into the car window. They then began driving around while Petitioner continued to hit the complainant. The complainant's jaw snapped out of place and was broken. The right side of the complainant's jaw hurt, and she was barely able to open her mouth.

[1] This factual background is adapted from the State's "Statement of Facts" in its response to Petitioner's habeas corpus petition. (ECF No. 15 at 4-6.) Petitioner did not object to this factual recitation in his reply. (ECF No. 24.)

The next day, the complainant's jaw and ribs hurt. Petitioner bought her a sandwich, but she could not open her jaw wide enough to eat it. Petitioner drove her to a Wal-Mart so she could exchange something for money. When the complainant exited the Wal-Mart, Petitioner was not there. However, the complainant saw a friend of hers and the next thing she remembered was being in the hospital.

The complainant sustained a knee sprain, broken ribs, an ankle sprain, a right mandible fracture, as well as bruises and contusions. The complainant testified that she now talks differently, her jaw sometimes locks when she eats, and she has reoccurring pain on the right side of her face. (ECF No. 15 at 4-6.)

Petitioner's conviction was affirmed on appeal. *Gardner v. State*, No. 10-14-00041-CR, 2015 WL 5092081 (Tex. Ct. App.—Waco Aug. 27, 2015, pet. ref'd). On April 6, 2016, the Texas Court of Criminal Appeals (TCCA) refused Petitioner's Petition for Discretionary Review (PDR). *Gardner v. State*, No. PD-0022-16 (Tex. Crim. App. Apr. 6, 2016). Petitioner's petition for a writ of certiorari to the United States Supreme Court was denied on January 9, 2017. *Gardner v. Texas*, No. 16-6656, 137 S. Ct. 656 (2017).

On November 18, 2017, Petitioner filed a pro se state habeas corpus application, listing the following twenty-three grounds of relief:

1. The State violated Petitioner's due process rights by using material false testimony when they allowed Dr. Radack to testify about the complainant's x-ray;

2. The State violated Petitioner's due process rights by using material false testimony when they allowed Dr. Hughes to testify about the complainant's x-ray and CAT scan;

3. Trial counsel provided ineffective assistance of counsel when she failed to call the testing physicians to testify about the complainant's radiology reports, and failed to object to the admission of the reports based on the Confrontation Clause.

4. Trial counsel provided ineffective assistance by failing to request a limiting instruction regarding extraneous bad acts and in the jury charge, and failed to request a reasonable doubt instruction regarding the extraneous offenses;

5. Trial counsel provided ineffective assistance when she forfeited Petitioner's right to confront and cross-examine Rodney Irvin of the Mexia Police Department;

6. Appellate counsel provided ineffective assistance when he failed to file a complete trial transcript for Petitioner's direct appeal;

7. Trial counsel provided ineffective assistance when she failed to object to erroneous lesser-included offenses and request the proper lesser-included offenses of reckless conduct or assault family violence;

8. Trial counsel provided ineffective assistance when she failed to object to Petitioner being charged with a first-degree felony before there was a deadly weapon finding, failed to object to jury charge that included the first degree felony language, and failed to object to Petitioner being enhanced "twice";

9. The trial court committed fundamental error when the court communicated *ex parte* with the prosecutor about how to use evidence against the appellant at trial;

10. The jury was not unanimous about the specific result required by statute;

11. Appellate counsel provided ineffective assistance when he failed to object to the court reporter's statement of facts;

12. Trial counsel provided ineffective assistance when she failed to object to the prosecutor withholding or delaying the release of exculpatory impeachment evidence, and failed to investigate and use this evidence to impeach the State's witness Edward Rhodes at trial;

13. Trial counsel provided ineffective assistance when she failed to object to the introduction of evidence without notice and failed to request a continuance based on the late introduction of said evidence;

14. Trial counsel provided ineffective assistance when she failed to object to and/or request a continuance to State's witnesses that were not on the witness list, and failing to investigate the corroborating witness;

15. Trial counsel provided ineffective assistance when she failed to object to the prosecutor withholding or delaying the release of exculpatory impeachment evidence, and failed to investigate and use this evidence to impeach the State's witnesses Dr. Radack and Dr. Hughes at trial;

16. Trial counsel provided ineffective assistance when she failed to object to the State's illegal use of Petitioner's juvenile records for enhancement purposes;

17. Trial counsel provided ineffective assistance when she failed to challenge the prosecutor's decision to strike most Black jurors;

18. Trial counsel provided ineffective assistance when she failed to object to the admission of business records regarding a prior conviction of Petitioner's that is now invalid;

19. Trial counsel provided ineffective assistance when she failed to object to Dr. Radack's testimony on the medical records he interpreted as hearsay;

20. Appellate counsel provided ineffective assistance when he withdrew Petitioner's motion for a new trial based on the mistaken notion that the motion was untimely;

21. The trial court lacked jurisdiction to hold a jury trial while Petitioner's motion for a speedy trial was pending on appeal;

22. The trial court erred by not *sua sponte* submitting a jury instruction regarding Petitioner's convictions committed when younger than fifteen and seventeen; and

23. Trial counsel provided ineffective assistance when she failed to move to dismiss or quash the indictment based on lack of adequate notice; and

(ECF No. 19-8 at 4-50.) On March 21, 2018, the TCCA ordered the trial court to order trial counsel to respond to Petitioner's ineffective-assistance-of-counsel claims. (ECF No. 19-13.) On April 2, 2018, Petitioner filed a motion to supplement his writ of habeas corpus, with the following grounds of relief:

24. Trial counsel provided ineffective assistance by failing to object to clearly inadmissible evidence and failing to file a motion to suppress medical records that contained the CAT scans of a nonparty; and

25. Trial counsel provided ineffective assistance of counsel by failing to object to grounds detailed in Petitioner's habeas claims 3, 5, 7, 8, 12, 13, 14, 15, 16, 18, and 19, as the trial court would have abused its discretion if it overruled the objection.

(ECF No. 19-2 at 22-27.) On May 25, 2018, Petitioner filed a second motion to supplement his writ of habeas corpus with two additional grounds of relief:

26. The State violated Petitioner's due process rights by using false testimony to obtain his conviction; and

27. The trial court was biased against the Petitioner and conducted itself as an adversarial advocate against Petitioner.

(*Id.* at 82-85, 90.)

On June 1, 2018, Petitioner's court-appointed trial counsel, Ms. Michelle J. Latray, filed an affidavit addressing Petitioner's claims against her. (ECF No. 19-2 at 102 to 19-3 at 3.) On that same day, the State filed its answer to Petitioner's state habeas application (ECF No. 19-3 at 7-31.) On June 5, 2018, the State filed its Proposed Memorandum, Findings of Fact, and Conclusions of Law. (ECF No. 19-4 at 7-18.)

On October 15, 2018, Petitioner filed a Motion to Supplement the Record in the Trial Court, and attached the following ground for relief:

28. The trial court erred because the jury charge instructed the jury to return a verdict for aggravated assault in the first degree if the State proved the elements for aggravated assault in the second degree.

(ECF No. 18-19 at 6-9).

On June 9, 2020, the state habeas court adopted the State's Proposed Memorandum, Findings of Fact, and Conclusions of Law and recommended denying Petitioner's habeas application. (ECF No. 18-20 at 22.) On July 22, 2020, the TCCA denied

Petitioner's application without written order on the findings of the trial court without hearing and on the Court's independent review of the record. *Ex parte Gardner*, No. WR-43, 847-09.

On August 17, 2020, Petitioner filed his federal habeas petition, listing the following grounds of relief:

1. The trial court denied Petitioner his right to self-representation;

2. Trial counsel provided ineffective assistance for failing to object and request a continuance based on the State calling a witness not on the witness list, and for failing to investigate a corroborating witness;

3. Trial counsel provided ineffective assistance for failing to object to inadmissible evidence and failing to file a motion to suppress medical records that contained CAT scans from a nonparty;

4. Trial counsel forfeited Petitioner's right to confront witnesses against him when the reviewing physicians, rather than the testing physicians, testified about the complainant's medical scans;

5. Trial counsel provided ineffective assistance by failing to object to the prosecution's withholding or delaying the release of exculpatory or impeachment evidence, and then failing to investigate this evidence at trial to impeach the State's key witnesses;

6. The State's intentional use of material false testimony violated Petitioner's due process rights and allowed untrue testimony to go uncorrected;

7. Trial counsel provided ineffective assistance when she failed to challenge the prosecutor's decision to strike most Black jurors for a trial prosecuting a Black defendant accused of aggravated assault against a white complainant;

8. Petitioner's due process rights were violated by trial court's jury instructions that were plain error and contrary to established law; and

9. Trial counsel provided ineffective assistance when she failed to request a lesser-included instruction consistent with the theory of the case.

(ECF No. 1.) On November 20, 2020, Respondent filed their response (ECF No. 15) to which Petitioner replied on February 5, 2021 (ECF No. 24).

## II. Standard of Review

Petitioner's federal habeas petition is governed by the heightened standard of review provided by AEDPA. *See* 28 U.S.C. § 2254. Under § 2254(d), a petitioner may not obtain federal habeas corpus relief on any claim that was adjudicated on the merits in state court proceedings unless the adjudication of that claim either: (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States, or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. *Brown v. Payton*, 544 U.S. 133, 141 (2005). This demanding standard stops just short of imposing a complete bar on federal court re-litigation of claims already rejected in state proceedings. *Harrington v. Richter*, 562 U.S. 86, 102 (2011) (citing *Felker v. Turpin*, 518 U.S. 651, 664 (1996)).

A federal habeas court's inquiry into unreasonableness should always be objective rather than subjective, with a focus on whether the state court's application of clearly established federal law was "objectively unreasonable" and not whether it was incorrect or erroneous. *McDaniel v. Brown*, 558 U.S. 120 (2010); *Wiggins v. Smith*, 539 U.S. 510, 520-21 (2003). Even a strong case for relief does not mean the state court's contrary conclusion was unreasonable. *Richter*, 562 U.S. at 102. A petitioner must show that the state court's decision was objectively unreasonable, not just incorrect, which is a "substantially higher threshold." *Schriro v. Landrigan,* 550 U.S. 465, 473 (2007); *Lockyer*

*v. Andrade*, 538 U.S. 63, 75-76 (2003). "A state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Richter*, 562 U.S. at 101 (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). As a result, to obtain federal habeas relief on a claim previously adjudicated on the merits in state court, Petitioner must show that the state court's ruling "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id.* at 103. "'If this standard is difficult to meet—and it is—that is because it was meant to be.'" *Mejia v. Davis*, 906 F.3d 307, 314 (5th Cir. 2018) (quoting *Burt v. Titlow*, 571 U.S. 12, 20 (2013)).[2]

## III. Analysis

A. Ineffective Assistance of Counsel

Six of Petitioner's nine federal habeas claims are based on allegations that his trial counsel provided constitutionally deficient assistance of counsel. The Sixth Amendment to the United States Constitution guarantees citizens the assistance of counsel in defending against criminal prosecutions. U.S. CONST. amend VI. Sixth Amendment claims based on ineffective assistance of counsel are reviewed under the familiar two-prong test established in *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*, a petitioner cannot establish a violation of his Sixth Amendment right to counsel unless he demonstrates (1) counsel's performance was deficient and (2) this deficiency prejudiced

[2] To the extent Petitioner has attached exhibits to his federal petitioner that were not presented to the state habeas court, the Court has not considered them because a federal habeas court's review under 28 U.S.C. § 2254(d) "is limited to the record that was before the state court." *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011).

the petitioner's defense. *Id.* at 687-88, 690. The Supreme Court has emphasized that "[s]urmounting *Strickland*'s high bar is never an easy task." *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010).

When determining whether counsel performed deficiently, courts "must be highly deferential" to counsel's conduct and a petitioner must show that counsel's performance fell beyond the bounds of prevailing objective professional standards. *Strickland,* 466 U.S. at 687-89. Counsel is "'strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'" *Burt*, 571 U.S. at 22 (quoting *Strickland*, 466 U.S. at 690). To demonstrate prejudice, a petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. Under this prong, the "likelihood of a different result must be substantial, not just conceivable." *Richter*, 562 U.S. at 112 (citing *Strickland*, 466 U.S. at 693). A habeas petitioner has the burden of proving both prongs of the *Strickland* test. *Wong v. Belmontes*, 558 U.S. 15, 27 (2009).

Ineffective assistance of counsel claims are considered mixed questions of law and fact and are analyzed under the "unreasonable application" standard of 28 U.S.C. § 2254(d)(1). *See Gregory v. Thaler*, 601 F.3d 347, 351 (5th Cir. 2010). When the state court has adjudicated the claims on the merits, a federal court must review a petitioner's claims under the "doubly deferential" standards of both *Strickland* and Section 2254(d). *See Woods v. Etherton*, 136 S. Ct. 1149, 1151 (2016) (citing *Cullen*, 563 U.S. at 190). In such cases, the "pivotal question" is not "whether defense counsel's performance fell

below *Strickland*'s standard," but whether "the state court's application of the *Strickland* standard was unreasonable." *Richter*, 562 U.S at 101.

1. *Failure to object to a State witness not on the witness list*

In Petitioner's first ineffective-assistance claim, he alleges his trial counsel provided ineffective assistance when she failed to object and request a continuance when the State called two witnesses to testify—Donald Ray Carter and Craig Player—who were not on the State's witness list. Petitioner alleges counsel also failed to investigate Donald Ray Carter, whose testimony was "highly damaging to the defense's case." (ECF No. 1-3 at 13.) Petitioner further alleges that, had he known Mr. Carter or Mr. Player was going to testify for the State, he would not have gone to trial but would have accepted the State's plea offer. (*Id.* at 22.)

At trial, Mr. Carter testified he was a certified police officer with the Texas Department of Public Safety. On February 14, 2014, Mr. Carter testified he was assisting the Mexia Police Department with a disturbance call when he spoke with Petitioner and the complainant and observed the complainant with two black eyes. When Mr. Carter asked the complainant about her eyes, she stated she had been in a fight with a friend that night. Mr. Carter also testified that the complainant appeared to be under the influence of narcotics and that he was at the scene for approximately fifteen minutes. On cross-examination, Mr. Carter testified that drug and alcohol use could result in memory problems and dark, sunken eyes. On redirect, Mr. Carter opined that the complainant's eyes did not look the dark, sunken eyes one gets from substance abuse, but rather were black like coffee. (ECF No. 17-11 at 120-31.)

Mr. Player testified during the punishment phase about a traffic stop of the Petitioner in 2014, during which Petitioner was, in Mr. Player's testimony, "uncooperative" and had to be restrained by several police officers. The State played a video of the traffic stop for the jury while Mr. Player narrated. (ECF No. 17-13 at 45-62.)

Ms. Latray responded to Petitioner's habeas claim in her affidavit before the state habeas court:

> "Any and all witnesses who testified at trial for the State were disclosed either in the State's Witness list, the supplemental State's Witness list, or in an email prior to trial. Additional witnesses' names, as well as documents, were provided to Trial Counsel by the State's attorneys as we progressed towards trial. In addition to supplemental lists filed with the Court, some notices were simply emails that were sent to Trial Counsel. Since 2014, Trial Counsel has changed email addresses/providers, and thus some old emails are not able to be located at this time unless they were printed and placed in the paper file. Subsequent to the trial's completion, the roof of Trial Counsel's office leaked and some paper files were damaged. This file was scanned in after being soaked in the storm, therefore not all pages were able to be saved. Trial Counsel does not have copies in any form (electronic or paper scanned to digital) of emails.
>
> "Trial Counsel researched, gathered information about, spoke to, attempted to contact, or otherwise investigated all witnesses whose information was provided by the State.
>
> "Further, Mr. Gardner cannot show harm, in that the evidence of his guilt of the offense was overwhelming. As such, even if not reasonable trial strategy, Mr. Gardner was not harmed.

(ECF No. 19-2 at 107.)

The state habeas court made the following findings of fact:

> 43. Michelle Latray was appointed to represent Applicant as trial counsel. Michelle Latray's affidavit is credible and supported by the record. . . .

> 44. Applicant has not presented evidence sufficient to prove that trial counsel's alleged acts of misconduct or omissions fell below the standard of reasonable, professional assistance.
>
> 45. Trial counsel has demonstrated that the alleged acts of misconduct and/or omissions were attributable to sound trial strategy. . . .
>
> 46. There is no evidence that a reasonable probability exists that the outcome of the proceeding would have been different but for the alleged acts of misconduct by trial counsel.

(ECF No. 19-4 at 14.)

This Court's review of Petitioner's claim is guided by the AEDPA, under which Petitioner must show that the state habeas court's determination was an unreasonable application of *Strickland*. *Strickland* requires counsel to undertake a reasonable investigation. 466 U.S. at 690-91; *Charles v. Stephens*, 736 F.3d 380, 389 (5th Cir. 2013). In assessing the reasonableness of counsel's investigation, a heavy measure of deference is applied to counsel's judgments and is weighed in light of the defendant's own statements and actions. *Strickland*, 466 U.S. at 691.

The state habeas court found Ms. Latray's affidavit to be credible and supported by the record. In that affidavit, Ms. Latray attested all State witnesses were disclosed to the defense prior to trial, and that she had "researched, gathered information about, spoke to, attempted to contact, or otherwise investigated all witnesses whose information was provided by the State." In response, Petitioner argues that neither witnesses' name is on the witness lists in the clerk's record, and that Ms. Latray's attestion that she received the name via email is "without merit."

Petitioner has failed to rebut the state habeas court's findings with clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1) (a state court's factual findings are "presumed to be correct" unless the habeas petitioner rebuts the presumption through "clear and convincing evidence"). Under the Texas Code of Criminal Procedure, there is no statutory requirement that the State produce its witness list for non-expert witnesses prior to the day of trial. Further, the state habeas court credited Ms. Latray's attestation that she received notice of all the State's witnesses, and Petitioner's conclusory allegations that her statements are meritless cannot support an ineffective-assistance claim. *United States v. Demik*, 489 F.3d 644, 646 (5th Cir. 2007) ("conclusory allegations are insufficient to raise cognizable claims of ineffective assistance of counsel") (quoting *Miller v. Johnson*, 200 F.3d 274, 282 (5th Cir. 2000)). This is also true for Petitioner's allegation that, had he known Mr. Carter would testify, he would not have proceeded to trial. There is no support for this claim beyond Petitioner's bare assertion.

Even if Ms. Latray had objected to the State calling Mr. Carter as a witness, Petitioner has not shown prejudice: Mr. Carter testified not about the indicted incident, but an encounter with Petitioner and the complaint three months before. Mr. Player testified after Petitioner had been convicted and Petitioner makes no argument that, without Mr. Player's testimony, Petitioner would have received a significantly shorter sentence. *Spriggs v. Collins*, 993 F.2d 85, 88 (5th Cir. 1993) (for a federal court to grant habeas relief based on a petitioner's challenge to his trial counsel's actions during the punishment phase, there must be a reasonable probability that the petitioner's non-capital sentence would have been "significantly less harsh" but for counsel's alleged

errors). Accordingly, the Court concludes the state habeas court's application of *Strickland* was not unreasonable, and this claim is denied.

2. *Failure to Confront Testing Physicians Regarding Complainant's Injuries*

Petitioner argues his trial counsel provided ineffective assistance when she failed to object to a reviewing analyst's testimony regarding the complainant's medical scans. Specifically, Petitioner argues that the doctors who initially interpreted the complainant's x-rays and CAT scans—the "testing physicians"—should have testified about these reports and that it violated his Sixth Amendment right to confrontation when Dr. Radack and Dr. Hughes—the "reviewing physicians"—testified instead.

Ms. Latray responded to this claim in her state habeas affidavit as follows:

> Counsel is permitted to make trial strategy decisions and choose not to make objections she deems frivolous. The State called the treating physician from the hospital to testify as to [the complainant]' s injuries. Counsel for Defendant did not call this physician as a witness nor would it make any semblance of trial strategy for Counsel for Defendant to call the radiologist as a witness. Counsel for Defendant did cross examine the treating physician from the emergency room and the medical doctor whom [the complainant] saw at a later date for follow up.
>
> "Appellant contends that Dr. Radack is a nurse with a degree in zoology and biochemistry. This is inaccurate. Dr. Radack testified that he went to medical school at UTMB, did a family practice residency, had practiced emergency medicine for 20 years, is licensed to practice medicine in Texas and Ohio, and is a board certified physician in family practice. He actually treated [the complainant] at the hospital emergency room.
>
> "In reviewing his medical licensure, Dr. Radack was licensed in 1983 in Texas and he has a full medical license number G3715. His primary specialty is emergency medicine and he is Board Certified in Family Medicine.
>
> "Dr. Radack personally took [the complainant's] history at the emergency room and [the complainant] informed him she had been beaten up by her ex-boyfriend. He noted that she told him that her jaw, face, and chest hurt.

> X-rays and a CAT Scan were ordered by Dr. Radack. Afterwards, Dr. Radack read the CAT scan and described what he could see on the image at the emergency room when it was completed. . . .
>
> "Medical doctors use x-rays to decide how to treat their patients. Both testifying doctors had evaluated the x-rays and CAT scan while meeting with the patient in person. Dr. Radack goes into great detail in his testimony as to what injuries he observed on [the complainant] and he analyzed the CAT Scan and X-ray on site at the emergency room with [the complainant] present. He explained in court what the CAT Scan and X-Ray showed as far as injuries in detail in his testimony.
>
> "Appellant argues that "counsel forfeited Appellant's right to confrontation by her inaction to insist upon the right to confront the doctors whom made the findings grounded in the medical Report (exhibit A) which prejudiced appellant's defense" and cites this as a violation of his [Sixth] Amendment right to confront witnesses against him. However, the treating physicians from the hospital and follow-up treatment are both witnesses regarding the diagnosis of the injuries. Appellant would liken this to a reviewing expert versus a testing expert in a drug laboratory analysis case. This is far from the matter. In a drug laboratory analysis situation, the actual drugs are tested by a laboratory technician and therefore that technician is the only one who can testify as to how he or she personally handled and tested the sample. In a medical setting, a treating physician can testify as to what injuries he personally observed, what tests he ordered, and what the results of the tests were.

(ECF No. 19-2 at 103.)

In *Crawford v. Washington*, the Supreme Court held that the Sixth Amendment's Confrontation Clause does not allow admission of "testimonial statements" from a witness who does not testify at trial unless the declarant is unavailable and the defendant has had a prior opportunity to cross-examine. 541 U.S. 36, 59 (2004). An out-of-court statement is "testimonial" if it was "'made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'" *United States v. Santos*, 589 F.3d 759, 762 (5th Cir. 2009) (quoting

*Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 311 (2009)). "[S]tatements made for the purposes of obtaining medical treatment during an ongoing emergency are not testimonial under *Crawford*." *Santos*, 589 F.3d at 763. A statement that is not testimonial cannot violate the Confrontation Clause. *Brown v. Epps*, 686 F.3d 281, 286 (5th Cir. 2012) (quotations and citation omitted).

The state habeas court credited Ms. Latray's affidavit and found it supported by the trial court record. The complainant's x-rays and other scans were made during her hospital stay. There is no support that, had Ms. Latray objected to the physician's testimony of their analysis of these scans based on the Confrontation Clause, the trial court would have sustained it. *Green v. Johnson*, 160 F.3d 1029, 1037 (5th Cir. 1998) (failure to make a frivolous objection does not cause counsel's performance to fall below an objective level of reasonableness). Petitioner has failed to rebut the state habeas court's factual findings by clear and convincing evidence. As such, the state habeas court's application of *Strickland* to this claim was not unreasonable. As this claim is denied.

*3. Failure to Object to Inadmissable Evidence*

Petitioner argues Ms. Latray provided ineffective assistance when she failed to object to inadmissible evidence and failed to file a motion to suppress medical records that contained the scans of a nonparty. Specifically, Petitioner alleges that a nonparty's x-rays and CAT scans were mixed in with the complainant's medical records and then used against Petitioner at trial. Petitioner argues that, had Ms. Latray objected to or moved to suppress the admission of this evidence at trial, the trial court would have sustained the objection or granted the motion.

Ms. Latray responded to this claim in her state habeas affidavit:

> "No medical records were admitted into evidence at trial. Furthermore, Dr. Radack and Dr. Hughes actually treated [the complainant]. They observed her injuries and reviewed her X-rays and her CAT Scans. Dr. Radack actually saw [the complainant] at the emergency room. Dr. Hughes saw [the complainant] in follow up later, but she was present and was able to be examined in person, as well as him reviewing the records. The 2 pages of un-redacted records relating to another patient that were provided to Trial Counsel with the Business Records affidavit were inadvertently included in [the complainant]'s records, but were only 2 pages related to the CAT Scans and not the actual films.

(ECF No. 19-3 at 2-3.)

The state habeas court found Ms. Latray's affidavit credible. Petitioner has failed to rebut this presumption with clear and convincing evidence showing that an objection to the admittance of these records—which were, in fact, not admitted into evidence—would have been sustained. *See* 28 U.S.C. § 2254(e)(1); *Green*, 160 F.3d at 1037 (failure to make a frivolous objection does not cause counsel's performance to fall below an objective level of reasonableness). Accordingly, the state habeas court's application of *Strickland* was not unreasonable, and this claim is denied.

*4. Failure to Object to State Withholding Impeachment/Exculpatory Evidence*

Petitioner argues his trial counsel provided ineffective assistance when she failed to object to the State's withholding or delaying the release of exculpatory/impeachment evidence, and then failed to investigate and use said evidence to impeach the State's key witnesses at trial. Specifically, Petitioner points to the following exchange that occurred on the second day of trial, outside the presence of the jury:

> [PROSECUTOR]: Judge, I did want to put one thing on the record before we leave.

> THE COURT: Yes, ma'am.
>
> [PROSECUTOR]: Everybody's so paranoid about putting stuff about *Brady* and exculpatory information, and so I just wanted to put on the record that prior to the time that we called each of the doctors, we had asked them if they had ever been sued or had any disciplinary matters. And Dr. Radack indicat[ed] that he had been sued on four occasions. Three of them settled, one of them he won. And I told Ms. Latray as far as if she wanted to go into that just if she could do it outside the hearing of the jury first.
>
> And then as far as Dr. Hughes, he indicated that he had had some -- he was in good standing with the Board right now, but that he had had some issues in the past, and I had asked [Ms. Latray] if she wanted to go into that if she would do that in front of you first. And I just wanted to put it on the record that I had told her those things.
>
> THE COURT: Okay. That's noted for the record.
>
> MS. LATRAY: Yes, ma'am.

(ECF No. 17-11 at 208-09.) Petitioner argues that Ms. Latray provided ineffective assistance when she did not object to the State's failure to disclose this evidence until after Dr. Radack and Dr. Hughes testified. Further, he argues Ms. Latray was ineffective when she failed to use this evidence to impeach the credibility of both physicians, whose testimony over the complainant's injuries was the sole medical evidence introduced at trial, and thus whose credibility was critical to the case.

Ms. Latray responded to this claim as follows:

> "Both doctors who testified had current medical licenses without restrictions. Neither were currently suspended or unable to practice at the time they treated the [complainant]. Regardless of any testimony or lack thereof regarding the physicians' history of any lawsuits or disciplinary processes, the outcome would not change as to the conviction of Defendant.

(ECF No. 19-2 at 107.)

Trial counsel has broad discretion when it comes to deciding how best to proceed strategically. *See Ward v. Stephens*, 777 F.3d 250, 264 (5th Cir. 2015) (the Supreme Court has emphasized counsel has "wide latitude in deciding how best to represent a client"). On federal habeas review, the Court is mindful that "*Strickland* does not allow second guessing of trial strategy and must be applied with keen awareness that this is an after-the-fact inquiry." *Granados v. Quarterman*, 455 F.3d 529, 534 (5th Cir. 2006). In other words, simply because counsel's strategy was not successful does not mean counsel's performance was deficient. *Avila v. Quarterman*, 560 F.3d 299, 314 (5th Cir. 2009).

Under *Strickland*, it is Petitioner's burden to show Ms. Latray's performance was deficient; again, the Court presumes counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'" *Burt*, 571 U.S. at 22. Petitioner argues Ms. Latray provided ineffective assistance when she failed to argue that the State violated *Brady v. Maryland*, by withholding the physicians' prior histories. "[S]uppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). In order to establish a *Brady* violation, a petitioner must demonstrate that (1) the prosecution suppressed evidence, (2) the evidence was favorable to the defense, and (3) the evidence was material to either guilt or punishment. *Banks v. Dretke*, 540 U.S. 668, 691 (2004); *Graves v. Cockrell*, 351 F.3d 143, 153-54 (5th

Cir. 2003). However, the State disclosed the prior histories of Dr. Radack and Dr. Hughes in open court, thus there was no suppression and no *Brady* violation.

Petitioner also argues that Ms. Latray provided ineffective assistance when she failed to use this evidence to impeach the credibility of Dr. Radack and Dr. Hughes. Although Ms. Latray does not explicitly say why she chose not to impeach Dr. Radack and Dr. Hughes with their prior records, she does say that both physicians were licensed and in good standing when they treated the complainant for her injuries. It is not a stretch to assume Ms. Latray concluded that impeaching the doctors with old disciplinary actions or lawsuits in unrelated cases would have been distracting and futile. Accordingly, Petitioner has failed to show Ms. Latray's performance was deficient, and the state court's application of *Strickland* was not unreasonable. This claim is denied.

*5. Failure to Challenge the State Striking Black Jurors*

Petitioner argues Ms. Latray provided ineffective assistance when she failed to challenge the prosecution's striking eight out of nine Black jurors during voir dire.

Ms. Latray responded to this claim as follows:

> "Trial Counsel filed a motion prohibiting the Prosecution from using "Racial Discrimination in the Exercise of Peremptory Strikes which was granted by the Court prior to trial. At the beginning of the jury selection, there were only 32 potential jurors left. Further, Applicant offers no proof, other than his bare assertion, that jurors were struck by the State for any improper reason, including race.

(ECF No. 19-3 at 1.)

The Fourteenth Amendment's Equal Protection Clause forbids prosecutors from challenging potential jurors solely on account of their race. *Batson v. Kentucky*, 476 U.S.

79, 89 (1986). To prevail on a *Batson* claim, a defendant must first make a prima facie showing that the prosecutor removed a juror on account of race. If the defendant does so, the burden shifts to the prosecution to propound a race-neutral explanation for the peremptory challenge. Lastly, the "court must determine whether the defendant has carried his burden of proving purposeful discrimination." *United States v. Thompson*, 735 F.3d 291, 296 (5th Cir. 2013).

Here, Gardner made no *Batson* challenges at trial and also failed to raise the issue on direct appeal. Gardner provides no additional facts or citations to the record supporting his claim that the State struck eight out of nine prospective Black jurors. Rather, the only evidence supporting Gardner's *Batson* claim are his conclusory allegations, which are insufficient for federal habeas relief. *See Demik*, 489 F.3d at 646. Accordingly, the Court concludes the state habeas court's application of *Strickland* was not unreasonable, and this claim is denied.

*6. Failure to Request Proper Lesser-Included Offenses*

In Petitioner's last ineffective-assistance claim, he argues his trial counsel provided ineffective assistance when she failed to include the proper lesser-included offenses in the jury charge, with the result that the jury could only find Petitioner guilty of aggravated assault-family violence with a deadly weapon. In his state habeas application, Petitioner argued Ms. Latray should have requested instructions for Reckless Conduct/Deadly Conduct and Assault Family Violence.

The record shows that the lesser offenses included in Petitioner's jury charge were Aggravated Assault and Assault. (ECF No. 19-6 at 67-78.) Ms. Latray responded to this claim as follows:

> "In the Clerk's Record on pages 124-136, the First Main Charge of the Court shows the lesser included instructions that were given. . . .
>
> "In Vol. 6, p. 5 at line 19 "assault" and p. 10 line 13-14 "simple assault" instructions are given. These are lesser than "Deadly Conduct". And, a "reckless" instruction was given in aggravated assault.

(ECF No. 19-2 at 105.) The Court understands Ms. Latray's response as indicating that the proper lesser included offenses were listed in the jury charge, and that Deadly Conduct is not a lesser offense than Aggravated Assault and Assault. The state court credited Ms. Latray's affidavit and Petitioner has failed to rebut the state court's factual findings with clear and convincing evidence. 28 U.S.C. § 2254(e). Accordingly, the state court's application of *Strickland* was not unreasonable, and this claim is denied.

B. Prosecutorial Misconduct

Petitioner argues his Due Process rights under the Fifth and Fourteenth Amendments were violated when the prosecutor knowingly used false testimony from Dr. Hughes and Dr. Radack and let untrue testimony go uncorrected. Specifically, Petitioner argues Dr. Radack's testimony that the complainant's prior jaw fracture was in a "totally different area" was "false and misleading" and that Dr. Hughes falsely testified that the complainant suffers from temporomandibular joint dysfunction based on his examination of the complainant's CAT scans.

The state habeas court made the following findings of fact regarding this claim:

31. Dr. Radack was the emergency room physician that examined and treated [the complainant] on May 12, 2013.

32. Dr. Radack was qualified as an expert witness and testified about the victim's injuries from his personal observations and review of the medical reports.

33. Dr. Radack opined that the victim suffered serious bodily injury.

34. The evidence does not suggest that Dr. Radack's testimony was false or perjured.

35. The evidence does not show that the testimony of Dr. Radack, taken as a whole, gave the jury a false impression.

36. The jury permissibly considered any inconsistencies in Dr. Radack's testimony as evidence of his credibility.

37. Dr. Hughes conducted a follow-up examination on [the complainant] a week prior to the trial.

38. Dr. Hughes was qualified as an expert witness and testified about the victim's injuries from his personal observations and review of the medical reports.

39. Dr. Hughes opined that the victim suffered serious bodily injury.

40. The evidence does not suggest that Dr. Hughes testimony was false or perjured.

41. The evidence does not show that the testimony of Dr. Hughes, taken as a whole, gave the jury a false impression.

42. The jury permissibly considered any inconsistencies in Dr. Hughes' testimony as evidence of his credibility.

(ECF No. 19-4 at 13-14 (record citations omitted).] The state habeas court concluded that Petitioner had not shown that the State had sponsored false testimony or allowed untrue testimony to go uncorrected, or that any use of false testimony by the State contributed to Petitioner's conviction or punishment. The court also concluded that any

inconsistencies in the physicians' testimony went to their credibility and did not establish the use of perjured testimony. (*Id.* at 16.)

In *Napue v. Illinois*, 360 U.S. 264 (1959), the Supreme Court held that a criminal defendant is denied due process when the State knowingly uses false or perjured testimony or allows false testimony to go uncorrected at trial. *See also Giglio v. United States*, 405 U.S. 150 (1972). A petitioner seeking to obtain relief on such a claim must show that (1) the testimony is false, (2) the prosecution knew that the testimony was false, and (3) the testimony was material. *Reed v. Quarterman*, 504 F.3d 465, 473 (5th Cir. 2007); *Kutzner v. Johnson*, 242 F.3d 605, 609 (5th Cir. 2001). False testimony is only material if there was a reasonable likelihood that it affected the jury's verdict. *Giglio*, 405 U.S. at 153-54; *Barrientes v. Johnson*, 221 F.3d 741, 753 (5th Cir. 2000).

Here, the state habeas court determined that record did not support Petitioner's claims that Dr. Radack and Dr. Hughes's testimony was false or perjured, and Petitioner had failed to meet his burden of proof to establish the State knowingly sponsored or failed to correct false or untrue testimony. Petitioner has failed to bring any clear and convincing evidence rebutting the state habeas court's findings. Accordingly, this claim is denied.

C. Trial Court Errors

*1. Denying Petitioner His Right to Self-Representation*

Petitioner argues the trial court erred when it denied him his right to represent himself during his criminal trial, in violation of *Faretta v. California*, 422 U.S. 806 (1975). Specifically, the Petitioner argues the trial court forced him to waive his right to self-

representation when, on the eve of trial, the court denied his request for an additional ten days to either find new counsel or prepare to represent himself. Petitioner points to the following exchange between the court and Petitioner on the first day of trial:

> THE COURT: The only issue is your Motion to Withdraw.
>
> MS. LATRAY: Yes, Your Honor.
>
> THE COURT: Which I'm not going to allow you to withdraw without advising Mr. Gardner. Do you still want her to withdraw? Because I can tell you right now, I'm not granting you ten days to prepare for trial if she withdraws. You've been here the whole time. You're well aware of the facts of the case and I'm not granting you ten days. So you're either going to have to go forward with no counsel or with Ms. Latray. That's your choices. And we are not going to spend much time making that decision today. You've had days to think about it.
>
> PETITIONER: Well, you leave me no choice, Your Honor.

(ECF No. 17-9 at 4-5.)

A criminal defendant has a Sixth Amendment right to represent himself at trial. *Faretta,* 422 U.S. at 807. Unlike the Sixth Amendment right to counsel, which is in effect until waived, the right to self-representation is not effective until asserted. *Brown v. Wainwright*, 665 F.2d 607, 611 (5th Cir. 1982). The demand to defend pro se must be stated unequivocally. *Faretta*, 422 U.S. at 835. "In the absence of a clear and knowing election, a court should not quickly infer that a defendant unskilled in the law has waived counsel and has opted to conduct his own defense." *Brown*, 665 F.2d at 610. *See also Miller v. Thaler*, 714 F.3d 897, 903 (5th Cir. 2013). Additionally, "[e]ven if defendant requests to represent himself . . . the right may be waived through defendant's subsequent conduct indicating he is vacillating on the issue or has abandoned his request

altogether." *Brown*, 665 F.2d at 611. Whether a defendant waived his right to represent himself is a determination of fact, which is entitled to deference when made by the state court. *Batchelor v. Cain*, 682 F.3d 400, 407 (5th Cir. 2012).

In rejecting Petitioner's claim, neither the state habeas court nor the TCCA offered a reasoned explanation. Thus, this Court will " 'look through' the unexplained decision to the last related state-court decision providing" particular reasons, both legal and factual, "presume that the unexplained decision adopted the same reasoning," and give appropriate deference to that decision. *Wilson v. Sellers*, 138 S. Ct. 1188, 1191-92 (2018); *Uranga v. Davis*, 82 F.3d 282, 287 n.33 (5th Cir. 2018). In other words, when reviewing the claim under the AEDPA's deferential standard, the Court must look to the last reasoned state judgment that considered and rejected Petitioner's claim. *See Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991). In this case, the last reasoned state court decision was issued by the intermediate court of appeals.

First, the appellate court concluded that Petitioner did not unequivocally assert his right to self-representation. Noting the exchange between the trial court and Petitioner quoted above, the appellate court concluded,

> Even then, Gardner did not clearly and unequivocally invoke his right to represent himself. He merely replied, "you leave me no choice. . . ." When pressed by the trial court to clarify his choice, Gardner agreed that he wanted to have counsel. A few moments later, the State asked the trial court to make sure Gardner understood he had the "absolute right" to represent himself. Gardner indicated that he understood he had the right to represent himself. But when informed that he would then have to conduct his voir dire as soon as the pretrial hearings were over, Gardner refused to represent himself.

*Gardner*, 2015 WL 5092081 at *2. The appellate court went on to conclude that, even if Petitioner's assertion of his right to self-representation had been unequivocal, he waived the right, and his argument that the trial court forced the waiver by denying him ten days to prepare was unavailing:

> [E]ven if Gardner clearly and unequivocally asserted his right to self-representation, he was not forced to waive that right which would have made the waiver ineffective. A defendant may waive his right to represent himself once that right has been asserted. *McKaskle v. Wiggins*, 465 U.S. 168 (1984); *Funderburg v. State*, 717 S.W.2d 637, 642 (Tex. Crim. App. 1986). While the record must reflect that a defendant waives his right to self-representation after it is asserted, that waiver is not subject to the same stringent standards as the waiver of the right to counsel. *Brown v. Wainwright*, 665 F.2d 607, 611 (5th Cir. 1982); *Funderburg*, 717 S.W.2d at 642. "'A waiver may be found if it reasonably appears to the court that [the] defendant has abandoned his initial request to represent himself.'" *Funderburg*, 717 S.W.2d at 642 (quoting *Brown*, 665 F.2d at 611).
>
> When the trial court denied Gardner's request for 10 days to prepare for trial, . . . Gardner was given a choice: proceed immediately to trial representing himself, which he was told he had the right to do, or proceed immediately to trial being represented by counsel. Further, it was explained to Gardner that if he wanted to represent himself, he would "walk out of this room and in front of that jury panel and start on your voir dire." When asked if that was what he wanted to do, Gardner replied, "No way." Gardner was presented with a choice and he made a decision. Based on this record, Gardner made a "conscious, deliberate and voluntary choice" to abandon his initial request, if any, to represent himself. *See Funderburg*, 717 S.W.2d at 642.

*Id.*

Under the AEDPA, the appellate court's factual findings are presumed to be correct and Petitioner can only rebut this presumption with clear and convincing evidence. 28 U.S.C. § 2254(e). In his federal petition, Petitioner argues that, after he stated he wanted to represent himself, the trial court failed to advise him of the advantages and

disadvantages of self-representation to ensure Petitioner "[knew] what he is doing and his choice is made with eyes open." (ECF No. 1-3 at 10.) Petitioner appears to argue that the trial court's failure to offer this colloquy constitutes a constitutional error that effectively voids Petitioner's subsequent choice not to represent himself, regardless of whether the choice was forced.

Petitioner offers no authority to support this legal interpretation of *Faretta*. *See* 28 U.S.C. § 2254(d)(1) (writ of habeas corpus not granted unless the state court adjudication resulted in a decision that was contrary to or an unreasonable application of clearly established federal law). Further, he does not rebut the appellate court's factual findings with clear and convincing evidence, and—as noted above—whether a defendant waived his right to represent himself is a determination of fact. *Batchelor*, 682 F.3d at 407. Accordingly, this claim is denied.

*2. Trial Court's Jury Charge Constituted Plain Error*

In Petitioner's final claim for relief, he argues that the trial court violated his right to due process when it used incorrect jury instructions. Specifically, Petitioner argues the trial court erred because the jury charge only stated the elements for a second-degree felony—aggravated assault family violence—whereas the indictment stated a first-degree felony—aggravated assault family violence with a deadly weapon. Petitioner argues that the trial court's incorporation of the phrase "use or exhibit a deadly weapon" in the jury charge changed the crime from a first-degree felony to second-degree felony.

Respondent argues that this claim is unexhausted and procedurally barred from federal habeas review. Respondent states that Petitioner admits he did not include this

claim in his state habeas application before it was forwarded to the TCCA and that the State had already responded to Petitioner's application and filed its Proposed Memorandum, Findings of Fact and Conclusion of Law on June 5, 2018. As a result, Respondent argues this claim was not fairly presented to the state courts before Petitioner filed his federal claim and that, were Petitioner to return to state court to exhaust this claim, his habeas application would be dismissed as successive. As a result, Respondent urges this Court to conclude this claim is procedurally barred from federal review.

The record shows the following. After the State filed its Proposed Memorandum on June 5, 2018, Petitioner's state habeas application remained pending before the state habeas court until June 9, 2020, when the state court adopted the State's Memorandum, Findings of Fact and Conclusions of Law and ordered the Clerk of Court to file these findings and transmit them to the TCCA. (ECF No. 18-20 at 22.) During the pendency of his state writ, Petitioner filed a "Motion to Supplement the Record in the Trial Court" and sought to add the instant claim to his state habeas application. The claim is attached to the motion, written on the form required by the Texas Rules of Appellate Procedure, and was filed with the Limestone County District Clerk on October 15, 2018. A month later, Petitioner filed a "Judicial Notice" document, stating he had moved to supplement his habeas application in early October with the instant claim, but had received no response from the State or confirmation that his claim had been forwarded to the TCCA where "his writ is pending at this time." (ECF No. 18-19 at 6-10.)

Before seeking review in federal court, a habeas petitioner must first present his claims in state court and exhaust all available state court remedies through a proper

adjudication on the merits. *See* 28 U.S.C. § 2254(b)(1)(A) (federal habeas relief may not be granted unless it appears applicant exhausted remedies available in the state courts). The exhaustion requirement is satisfied if the substance of the federal habeas claim was presented to the highest state court in a procedurally proper manner. *Baldwin v. Reese*, 541 U.S. 27, 29-32 (2004); *Moore v. Cain*, 298 F.3d 361, 364 (5th Cir. 2002). In Texas, the § 2254 exhaustion requirement is satisfied if the substance of the claim was presented to the TCCA in a procedurally proper manner either through a petition for discretionary review (PDR) or through an application for writ of habeas corpus. *Whitehead v. Johnson*, 157 F.3d 384, 387 (5th Cir. 1998).

The TCCA has held that "the plain language in Article 11.07 permits this Court's consideration of amended or supplemental claims filed by an applicant before final disposition of an application . . ." *Ex parte Saenz*, 491 S.W.3d 819, 825 (Tex. Crim. App. 2016); *see also Green v. State*, 374 S.W.3d 434, 453 (Tex. Crim. App. 2012) (Price, J., concurring) (observing it has "long been the Court's established practice" to entertain amended or supplemental pleadings to an initial 11.07 habeas application that remains pending at the time of the supplemental pleadings; the Court "typically consider[s] whatever matters continue to be forwarded to us from the convicting court right up to the point at which we finally rule on the habeas corpus application").

Here, Petitioner filed a motion to supplement with the instant claim while his petition was still pending in the state habeas court. According to the TCCA, this supplementation was permissible because the court did not finally rule on Petitioner's state habeas application until July 22, 2020 when it denied Petitioner's application "on

the findings of the trial court without hearing and on the Court's independent review of the record." *Ex parte Gardner*, No. WR-43, 847-09. Accordingly, the Court concludes Petitioner's claim is exhausted and ripe for federal habeas review.

As to the merits, improper jury instructions in state criminal trials do not generally form a basis for federal habeas relief. *Estelle v. McGuire*, 502 U.S. 62, 71-72 (1991). The relevant inquiry on claims of improper jury instructions is not whether state law was violated, but whether there was prejudice of constitutional magnitude. *Cupp v. Naughten*, 414 U.S. 141, 147 (1973); *Galvan v. Cockrell*, 293 F.3d 760, 764 (5th Cir. 2002). Errors in jury instructions are subject to harmless-error analysis. *O'Neal v. McAninch*, 513 U.S. 432, 436 (1995). Thus, even if an instruction was erroneous or lacking, habeas corpus relief is not warranted unless the error "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 623-24 (1993); Galvan, 293 F.3d at 764-65. "The burden of demonstrating that an erroneous instruction was so prejudicial that it will support a collateral attack on the constitutional validity of a state court's judgment is even greater than the showing required to establish plain error on direct appeal." *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977). In a collateral proceeding, the question is not "whether the instruction is undesirable, erroneous, or even universally condemned," but "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." *Id.* (internal quotations omitted).

Here, the jury instruction is identical in language to the indictment. Petitioner did not object to the jury instruction at trial nor did he raise it as an error on direct appeal.

Petitioner can therefore not show erroneous instructions, and therefore cannot show prejudice of a constitutional magnitude. This claim is denied.

## IV. Certificate of Appealability

A petitioner may not appeal a final order in a habeas corpus proceeding "unless a circuit justice or judge issues a certificate of appealability." 28 U.S.C. § 2253(c)(1)(A). Pursuant to Rule 11(a) of the Rules Governing Section 2254 Cases, the district court must issue or deny a certificate of appealability (COA) when it enters a final order adverse to the applicant. *See Miller-El v. Cockrell,* 537 U.S. 322, 335-36 (2003) (citing 28 U.S.C. § 2253(c)(1)).

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

In this case, reasonable jurists could not debate the dismissal or denial of the Petitioner's § 2254 petition on substantive or procedural grounds, nor find that the issues presented are adequate to deserve encouragement to proceed. *Miller-El,* 537 U.S. at 327

(citing *Slack*, 529 U.S. at 484). Accordingly, the Court will not issue a certificate of appealability.

It is therefore **ORDERED** that Petitioner's Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (ECF No. 1) is **DENIED**; and

It is **FURTHER ORDERED** that no certificate of appealability shall issue in this case.

**SIGNED** on August 12, 2021

ALAN D ALBRIGHT
UNITED STATES DISTRICT JUDGE