

Appendix A

**United States Court of Appeals
for the Fifth Circuit**

No. 21-40468

United States Court of Appeals
Fifth Circuit

FILED

March 2, 2022

ANTONIO B. MOORE,

Lyle W. Cayce
Clerk

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. 5:19-CV-171

ORDER:

Antonio B. Moore, Texas prisoner # 2021785, moves for a certificate of appealability (COA) following the dismissal of his 28 U.S.C. § 2254 petition. He is serving concurrent 99-year habitual-offender sentences imposed after a jury convicted him of felony murder and intoxication assault, resulting from an auto accident that killed one person and injured another.

In three related claims, Moore contends that counsel was ineffective for abandoning a motion to suppress evidence, for failing to investigate the law regarding searches and seizures, and for failing to object to testimony

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about his blood alcohol content. Central to these claims is his contention that his blood sample was unlawfully obtained, despite the use of a search warrant.

Moore fails to “demonstrate that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Accordingly, the motion for a COA is DENIED because Moore does not make “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). Moore’s motion for appointment of counsel is also DENIED.

/s/ James E. Graves, Jr.

JAMES E. GRAVES, JR.
United States Circuit Judge

Appendix B

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

ANTONIO B. MOORE,

Plaintiff,

v.

DIRECTOR, TDCJ-CID,

Defendant.

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CIVIL ACTION NO. 5:19-CV-00171-RWS-CMC

ORDER

Pursuant to the Court's order denying the petition, the Court hereby enters Final Judgment. Accordingly, it is

ORDERED that the above-captioned case is **DISMISSED WITH PREJUDICE**. All motions by either party not previously ruled on are hereby **DENIED-AS-MOOT**.

The Clerk of the Court is directed to close the case.

It is so **ORDERED**.

So **ORDERED** and **SIGNED** this 26th day of May, 2021.

Robert W. Schroeder III
ROBERT W. SCHROEDER III
UNITED STATES DISTRICT JUDGE

"Appendix B"

Appendix C

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION**

ANTONIO B. MOORE,

Plaintiff,

v.

DIRECTOR, TDCJ-CID,

Defendant.

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CIVIL ACTION NO. 5:19-CV-00171-RWS-CMC

ORDER

Petitioner Antonio B. Moore, an inmate confined in the Texas Department of Criminal Justice, Correctional Institutions Division, proceeding *pro se*, filed this petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. The Court referred this matter to United States Magistrate Judge Caroline Craven pursuant to 28 U.S.C. § 636(b)(1) and (3) and the Amended Order for the Adoption of Local Rules for the Assignment of Duties to United States Magistrate Judges.

The Magistrate Judge issued a Report and Recommendation on January 25, 2021, recommending the petition be denied (Docket No. 22). The Court has received and considered the Report and Recommendation of United States Magistrate Judge filed pursuant to such order, along with the record, pleadings and all available evidence. Moore filed objections to the Magistrate Judge's Report and Recommendation (Docket Nos. 25, 28-1), which triggers a *de novo* review of the objections in relation to the pleadings and the applicable law. *See* FED. R. CIV. P. 72(b). For the reasons set forth below, the Court **OVERRULES** Moore's objections (Docket Nos. 25, 28-1) and **DENIES** the petition (Docket No. 1).

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After careful consideration, the Court concludes that Moore's objections should be overruled. As set forth in his supplemental objections, Moore generally disagrees with the Report and Recommendation, asserting that he demonstrated deficient performance by counsel and associated prejudice. Docket No. 28-1. However, Moore has failed to show that the state court adjudication was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States or that the state court adjudication resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

In his original objections, Moore also attempts to add new claims to this petition; however, such claims are barred by the applicable one-year statute of limitations. *See* 28 U.S.C. § 2244(d)(1). Moore's conviction became final on September 11, 2019. Moore did not assert the claims now presented until March 8, 2021. Since Moore's claims do not relate back to the claims asserted in his original petition, they are barred by limitations.

Additionally, Moore's new claims are unexhausted and procedurally barred. A person in custody pursuant to the judgment of a state court generally must exhaust available state habeas remedies prior to filing an application in federal court. *See* 28 U.S.C. § 2254(b)(1). The exhaustion requirement is satisfied when the substance of the federal habeas claim has been "fairly presented" to the highest state court in a procedurally proper manner according to the rules of the state courts. *Baldwin v. Reese*, 541 U.S. 27, 29-33 (2004) (holding a petitioner failed to "fairly present" a claim of ineffective assistance by his state appellate counsel merely by labeling the performance of said counsel "ineffective," without accompanying that label with either a reference to federal law or a citation to an opinion applying federal law to such a claim). The exhaustion requirement is not met if the petitioner presents new legal theories or factual claims in his federal

habeas petition. *Anderson v. Harless*, 459 U.S. 4, 6–7 (1982); *Riley v. Cockrell*, 339 F.3d 308, 318 (5th Cir. 2003) (“It is not enough that the facts applicable to the federal claims were all before the State court, or that the petitioner made a similar state-law based claim. The federal claim must be the ‘substantial equivalent’ of the claim brought before the State court.”), *cert. denied*, 543 U.S. 1056 (2005); *Wilder v. Cockrell*, 274 F.3d 255, 259 (5th Cir. 2001) (holding that “where [a] petitioner advances in federal court an argument based on a legal theory distinct from that relied upon in the state court, he fails to satisfy the exhaustion requirement”). Moore did not provide the highest state court an opportunity to review his claims; thus, his claims are unexhausted.

If a petitioner has failed to exhaust state court remedies and the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred, the claims are procedurally defaulted for purposes of federal habeas review, irrespective of whether the last state court to which the petitioner actually presented his claims rested its decision upon an independent and adequate state ground. *Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991). The Texas abuse-of-the-writ doctrine is an independent and adequate state procedural rule under the *Coleman* standard. *See Fearance v. Scott*, 56 F.3d 633, 642 (5th Cir. 1995) (holding that the Texas Court of Criminal Appeals has strictly and regularly denied state habeas applications for abuse of the writ since 1994). “Texas’ abuse of the writ doctrine is a valid state procedural bar foreclosing federal habeas review.” *Coleman v. Quarterman*, 456 F.3d 537, 542 (5th Cir. 2006), *cert. denied*, 549 U.S. 1343 (2007); *Moore v. Quarterman*, 534 F.3d 454, 463 (5th Cir. 2008). Since Moore did not raise these new claims in his state application for writ of habeas corpus, the claims are procedurally barred at the state level. Thus, Moore did not exhaust his claims and is procedurally barred from doing so now.

A habeas petitioner can overcome a procedural default by showing cause and actual prejudice or a miscarriage of justice. *See Murray v. Carrier*, 477 U.S. 478, 488, 106 S.Ct. 2639, 2645, 91 L.Ed.2d 397 (1986). However, Moore has failed to demonstrate prejudice or a miscarriage of justice. Accordingly, Moore is not entitled to federal habeas corpus relief on these grounds for review, as the claims were not exhausted and are procedurally barred. Accordingly, Moore's petition for writ of habeas corpus is **DENIED**.

Furthermore, Moore is not entitled to the issuance of a certificate of appealability. An appeal from a judgment denying federal habeas corpus relief may not proceed unless a judge issues a certificate of appealability. *See* 28 U.S.C. § 2253; FED. R. APP. P. 22(b). The standard for granting a certificate of appealability, like that for granting a certificate of probable cause to appeal under prior law, requires the movant to make a substantial showing of the denial of a federal constitutional right. *See Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000); *Elizalde v. Dretke*, 362 F.3d 323, 328 (5th Cir. 2004); *see also Barefoot v. Estelle*, 463 U.S. 880, 893 (1982). In making that substantial showing, the movant need not establish that he should prevail on the merits. Rather, he must demonstrate that the issues are subject to debate among jurists of reason, that a court could resolve the issues in a different manner or that the questions presented are worthy of encouragement to proceed further. *See Slack*, 529 U.S. at 483-84. Any doubt regarding whether to grant a certificate of appealability is resolved in favor of the movant, and the severity of the penalty may be considered in making this determination. *See Miller v. Johnson*, 200 F.3d 274, 280-81 (5th Cir.), *cert. denied*, 531 U.S. 849 (2000).

Here, Moore has not shown that any of the issues raised by his claims are subject to debate among jurists of reason. The factual and legal questions advanced by Moore are not novel and have been consistently resolved adversely to his position. In addition, the questions presented are

not worthy of encouragement to proceed further. Therefore, Moore has failed to make a sufficient showing to merit the issuance of a certificate of appealability.

Accordingly, Moore's objections (Docket Nos. 25, 28-1) are **OVERRULED** and the Report and Recommendation of the Magistrate Judge (Docket No. 22) is **ADOPTED** as the opinion of this Court. The petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 (Docket No. 1) is therefore **DENIED**.

So ORDERED and SIGNED this 26th day of May, 2021.


ROBERT W. SCHROEDER III
UNITED STATES DISTRICT JUDGE

Appendix D

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

ANTONIO B. MOORE	§	
VS.	§	CIVIL ACTION NO. 5:19cv171
DIRECTOR, TDCJ-CID	§	

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

Petitioner Antonio B. Moore, an inmate at the Michael Unit of the Texas Department of Criminal Justice, Correctional Institutions Division, proceeding *pro se*, filed this petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

The above-styled action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636 and the Local Rules for the Assignment of Duties to the United States Magistrate Judge for findings of fact, conclusions of law, and recommendations for the disposition of the case.

Discussion

On May 21, 2015, in the 102nd Judicial District Court for Bowie County, Texas, following a trial by jury, petitioner was convicted of Felony Murder and Intoxicated Assault as a result of an automobile accident which injured one person and killed another. Petitioner was sentenced as a habitual offender to two terms of ninety-nine years' confinement in the Texas Department of Criminal Justice.

On appeal, the judgment for petitioner's Felony Murder conviction was affirmed on March 28, 2017. *See Moore v. State*, No. 06-16-00144-CR, 2018 WL 1513455, at *1 (Tex. App. – Texarkana 2018, pet. ref'd). The judgment for petitioner's Intoxication Assault conviction was also affirmed on March 28, 2017 by separate opinion. *See Moore v. State*, No. 06-16-00145-CR, 2018

WL 1513172, at *1 (Tex. App. – Texarkana 2018, pet. ref’d). The Texas Court of Criminal Appeals refused petitioner’s petitions for discretionary review. *Id.*

On September 21, 2018, petitioner filed separate state habeas applications for each conviction. The Texas Court of Criminal Appeals denied both applications without written order on September 11, 2019.

The Petition

Petitioner brings this petition asserting the following grounds for review: (1) counsel provided ineffective assistance when he abandoned a motion to suppress; (2) counsel provided ineffective assistance by failing to investigate the facts of the case and the law; and (3) counsel provided ineffective assistance when he failed to object to harmful inadmissible evidence.

The Response

The respondent has filed a response to the Court’s order to show cause why relief should not be granted. The respondent denies all of petitioner’s assertions of fact except those supported by the record or admitted in the response. Further, the respondent asserts petitioner has failed to show the state court resolution of petitioner’s claims 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 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. Accordingly, the respondent asserts that the petition should be denied and dismissed with prejudice.

Factual Background

The Twelfth Court of Appeals summarized the factual background for petitioner’s convictions in two separate opinions as follows:

A. Felony Murder

About 4:15 p.m. on Memorial Day May 24, 2014, Texas Department of Public Safety Trooper Michael Ferguson came upon a two-vehicle crash that had just occurred on U.S. Highway 67 in Bowie County, Texas. Upon his arrival, Ferguson learned that Janette Hale had been the driver of one of the vehicles [footnote 2] and that the other vehicle had been driven by Moore. [footnote 3] At trial, Hale testified as to what occurred just before the collision, stating that she first noticed an “out of control” car heading toward her on the highway. Hale identified the “out of control” car as being a Chevrolet Impala. Hale stated that once the vehicle had gotten around the other cars, she believed the driver had regained control of the car. [footnote 4] Hale testified,

I get back to hitting 60. All of the sudden, he just careens over into my lane like this. I see him starting to come toward my lane, like he was going to do a—it looked like you were going to do a donut in the middle of the road. So, he just careens over. I take both feet on the brake, and I brace for impact.

Hale stated that she did not see any other vehicle hit Moore’s car prior to the collision nor did she see any other vehicle sideswipe his vehicle. [footnote 5]

[footnote 2] Hale was driving a white Hyundai Sonata and was traveling westbound on Highway 67.

[footnote 3] Moore was driving a gray Chevrolet Impala and was traveling eastbound on Highway 67.

[footnote 4] Ferguson also testified that several of the witnesses he spoke to at the scene stated that just prior to the collision, Moore had been in the process of passing a vehicle that was pulling a trailer.

[footnote 5] According to Hale, “[M]y arm just fell in my lap.” Hale knew it was broken because she immediately felt the pain. Believing she was going to pass out, she sat down. “I felt—my whole body was hurting.” As a result of the collision, Hale suffered a dislocated shoulder, fractured ribs, and multiple fractures to her arm. Hale explained that doctors had performed surgery and implanted rods in her arm. She stated that the rods would be in her arm for the remainder of her life and that she was unable to perform the work she had been doing due to pain and numbness in her arm.

Chris Jeans, who was traveling in the same direction as Moore that day, also witnessed Moore’s actions immediately before the collision. Jeans stated, “It come around, around past me and then switched lanes, and it got up close to this car and then switched lanes. And then it had to—ran up on this car pretty fast. So it had to slow down, and that’s when he started fishtailing.” Jeans believed that Moore had

regained control of his vehicle, but “then all of a sudden, [it] just went straight across to the other lanes of traffic.” Jeans testified that he saw the vehicles collide and that he did not observe any other vehicle sideswipe Moore’s vehicle. [footnote 6] Jeans went on to state that he was traveling the speed limit but that Moore was driving his vehicle at a higher rate of speed. “I mean, it wasn’t a whole lot faster, but, yes, it was faster.”

[footnote 6] Jeans’ wife, Rebecca, described a similar version of the events leading up to the collision. In addition, Rebecca stated, “The way I have explained it, of course, to my friends and family when it happened, was it looked like the hand of God took [Moore’s] car and just turned it to the left straight across in front of her. I’ve never seen anything like it.”

Ferguson testified that immediately following the collision, he made contact with Moore, who had bloodshot eyes, slurred speech, and smelled of alcohol. According to Ferguson, there were several bystanders at the scene, including three nurses. One of the nurses was in the process of rendering aid to Moore’s passenger, Karl Payne, who was still in the passenger seat of Moore’s vehicle. Ferguson stated, “[Payne] would quit breathing, and then she would tap him on the chest and tell him, keep breathing, keep breathing. He’d take a gargled gasp and then stop at that point.”

Paramedic, Shon Matthews, testified that upon arriving at the scene, he immediately began to render aid to Payne. Matthews stated that Payne was leaning over toward the driver’s side of the vehicle and that Payne’s neck was in a position that he referred to as “incompatible with life.” According to Matthews, when he attempted to reposition Payne’s airway, “his neck had no form. It was like his spinal cord was not intact.” Following standard procedure, Matthews checked for Payne’s pulse, but was unable to find one. Payne was then taken from the scene by ambulance to the funeral home. It was later determined that Payne had died as a result of blunt force trauma.

Kevin Plunk, also a paramedic, testified that when he arrived at the scene, he began to render aid to Moore, who was complaining of flank and side pain. According to Plunk, Moore did not appear to have any cuts, bruises, or scrapes, and was able to speak. While loading Moore in the ambulance, Plunk smelled the “obvious” odor of alcohol. Plunk testified that when he asked Moore if he had been drinking alcohol, Moore responded that he had consumed six to seven beers. In Plunk’s opinion, Moore had consumed more than the “average amount” of alcohol.

After Moore had been transported to the hospital, Ferguson went to speak to him about the incident. According to Ferguson, Moore informed him that he had consumed six or seven beers at his mother’s home in Maud and that he was in the process of returning to his home in Hooks. While at the hospital, Ferguson performed a horizontal gaze nystagmus [footnote 7] test (HGN test) on Moore, and based on the results, Ferguson believed that Moore was intoxicated. [footnote 8] At

that point, Ferguson obtained a search warrant for the purpose of retrieving a blood sample from Moore in order to determine his blood alcohol content. Around 7:25 p.m., Moore's blood was drawn, and it was later determined that his blood alcohol content was 0.196. Ferguson testified that after concluding his investigation, he believed that the contributing factors to the collision were: (1) the vehicle driven by Moore, (2) was traveling at an unsafe speed, and (3) the driver was under the influence of alcohol. [footnote 9]

[footnote 7] Ferguson explained to the jury that "horizontal gaze nystagmus is the involuntary jerking of the eye as it looks toward the side."

[footnote 8] Ferguson stated that he performed the HGN test at approximately seven o'clock p.m., which was almost three hours after the collision had occurred.

[footnote 9] In reaching his conclusion, Ferguson noted that on the day of the collision, it had not rained, the roads were not wet, there were no lighting problems, and there were no obstructions in the road.

In addition, Karen Ream, a forensic scientist for the Texas Department of Public Safety, explained to the jury that she had performed an analysis on Moore's blood sample and that the result of the analysis showed that Moore's blood alcohol content was 0.196. Ream testified that a blood alcohol content of 0.196 was over two times the legal limit and that an individual having a blood alcohol content of 0.196 would not have normal use of his mental and physical faculties. Moreover, Ream explained that a person who consumes alcohol on a regular basis "would still not have the normal use of their mental or physical faculties. They would just have a learned tolerance."

Moore, 2018 WL 1513455, at *1-2.

B. Intoxicated Assault.

On Memorial Day 2014, Texas Department of Public Safety Trooper Michael Ferguson came upon a two-vehicle crash that had just occurred on U.S. Highway 67. After assessing the situation, Ferguson learned that Janette Hale had been the driver of one of the vehicles, and the other vehicle had been driven by Moore. [footnote 2] Hale was transported to the hospital by ambulance with fractured ribs, multiple fractures to her arm, and a dislocated shoulder. According to Ferguson, when he made contact with Moore, his eyes were red and bloodshot, his speech was slurred, and he smelled of alcohol. [footnote 3] Ferguson spoke to several witnesses, and they all stated that, immediately prior to the collision, Moore had been in the process of passing another vehicle that was pulling a trailer.

[footnote 2] Moore was traveling in the eastbound lane when he crossed over into the westbound lane where Hale was traveling.

[footnote 3] Moore was transported to the hospital, at which point Ferguson performed a horizontal-gaze nystagmus test on him. Based on the results, Ferguson believed that Moore was intoxicated. Ferguson then obtained a search warrant for the purpose of retrieving a blood sample from Moore in order to determine his blood alcohol concentration. About three hours after the collision had occurred, Moore's blood was drawn. The results of the blood draw revealed that Moore was intoxicated, with the test results showing a blood alcohol concentration of 0.196. See TEX. PENAL CODE ANN. § 49.01(2)(B) (West 2011).

Karen Ream, a forensic scientist for the Texas Department of Public Safety, testified that she performed the analysis on Moore's blood sample. Ream explained that a blood alcohol content of 0.196 is over two times the legal limit and that an individual having a blood alcohol content of 0.196 would not have normal use of his mental and physical faculties. Moreover, Ream stated that a person who consumes alcohol on a regular basis "would still not have the normal use of their mental or physical faculties. They would just have a learned tolerance."

At trial, Hale testified that she had noticed "an out of control" car heading toward her on the highway. Hale stated that, once the vehicle had maneuvered around the other cars, she believed the driver had regained control of the car. Hale explained,

Well, at first, I hit my brake, but then it looked like he—once he got around the passing—the people he was passing, or these other cars that were there, which I didn't even notice any of them, I just noticed the one out of control, because it was just something you notice. So once he got around them, I thought, okay, he got control of the car. So this is how far I am away from him, because—so I get back on my accelerator. I get back to hitting 60. All of the sudden, he just careens over into my lane like this. I see him starting to come toward my lane, like he was going to do a—it looked like you were going to do a donut in the middle of the road. So he just careens over. I take both feet on the brake, and I brace for impact."

Hale said she did not observe any other vehicle hit Moore's car prior to their collision, nor did she see any other vehicle sideswipe his vehicle. [footnote 4]

[footnote 4] Due to Hale's injuries, doctors implanted rods in her arm to allow her to have normal use of it. Hale testified that the rods will be there for the remainder of her life. According to Hale, she is unable to use her arm as she previously had, and she lives with pain, numbness, and other difficulties associated with the injury.

Chris Jeans, who was traveling in the eastbound lane that day, also witnessed Moore's actions immediately before the collision. Jeans stated, "It came around, around past me and then switched lanes, and it got up close to this car and then switched lanes. And then it had to—ran up on this car pretty fast. So it had to slow

down, and that's when it started fishtailing." At that point, Jeans believed that Moore had regained control of his vehicle, "but then all of the sudden, [it] just went straight across to the other lanes of traffic." Jeans stated that he saw the vehicles collide and that he did not observe any other vehicle sideswipe Moore's vehicle. [footnote 5]

[footnote 5] Jean's wife, Rebecca, described a similar version of the events leading up to the collision. Rebecca stated, "The way I have explained it, of course, to my friends and family when it happened, was it looked like the hand of God took [Moore's] car and just turned it to the left straight across in front of her. I've never seen anything like it."

Ferguson testified that, following the collision, he conducted a fatality crash investigation and determined by the cars' skid marks that Moore had traveled from the outside eastbound lane, across two lanes of traffic, and then hit Hale's car, which was traveling in the westbound lane. Ferguson believed the contributing factors to the collision were: (1) the vehicle driven by Moore, (2) was traveling at an unsafe speed, [footnote 6] and (3) the driver was under the influence of alcohol. In reaching his conclusion, Moore noted, in part, that, on the day of the collision, it had not rained, the roads were not wet, there were no lighting problems, and there were no obstructions in the road.

[footnote 6] Ferguson stated that Moore was not driving at a reckless speed.

Moore, 2018 WL 1513172, at *1-2.

Standard of Review

Title 28 U.S.C. § 2254(a) allows a district court to "entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a).

Section 2254 generally prohibits a petitioner from relitigating issues that were adjudicated on the merits in State court proceedings, with two exceptions. *See* 28 U.S.C. § 2254(d). The first exception allows a petitioner to raise issues previously litigated in the State court in federal habeas proceedings if the adjudication "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.” 28 U.S.C. § 2254(d)(1). The second exception permits relitigation if the adjudication “resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” 28 U.S.C. § 2254(d)(2). Federal habeas relief from a state court’s determination is precluded “so long as fairminded jurists could disagree on the correctness of the state court’s decision.” *Harrington v. Richter*, 562 U.S. 86, 101 (2011).

Federal habeas courts are not an alternative forum for trying facts and issues which were insufficiently developed in state proceedings. *Williams v. Taylor*, 529 U.S. 420, 437 (2000). Further, following the Supreme Court’s decision in *Cullen v. Pinholster*, federal habeas review under 2254(d)(1) “is limited to the record that was before the state court that adjudicated the claim on the merits.” *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011).

A determination of a factual issue made by a state court shall be presumed to be correct upon federal habeas review of the same claim. The petitioner shall have the burden of rebutting the presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

A decision is contrary to clearly established federal law if the state reaches a conclusion opposite to a decision reached by the Supreme Court on a question of law or if the state court decides a case differently than the Supreme Court has on a set of materially indistinguishable facts. *See Williams v. Taylor*, 529 U.S. 362, 412-13 (2000). An application of clearly established federal law is unreasonable if the state court identifies the correct governing legal principle, but unreasonably applies that principle to the facts. *Id.*

This Court must accept as correct any factual determinations made by the state courts unless the petitioner rebuts the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e). The presumption of correctness applies to both implicit and explicit factual findings.

See Young v. Dretke, 356 F.3d 616, 629 (5th Cir. 2004); *Valdez v. Cockrell*, 274 F.3d 941, 948 n. 11 (5th Cir. 2001) (“The presumption of correctness not only applies to explicit findings of fact, but it also applies to those unarticulated findings which are necessary to the state court’s conclusions of mixed law and fact.”). Deference to the factual findings of a state court is not dependent upon the quality of the state court’s evidentiary hearing. *See Valdez*, 274 F.3d at 951 (holding that a full and fair hearing is not a precondition according to § 2254(e)(1)’s presumption of correctness to state habeas court findings of fact nor to applying § 2254(d)’s standards of review).

Analysis

Ineffective Assistance of Counsel

Petitioner claims trial counsel provided ineffective assistance of counsel when counsel: (1) abandoned a motion to suppress; (2) failed to investigate the facts of the case and the law; and (3) failed to object to harmful inadmissible evidence.

When addressing the issue of what a petitioner must prove to demonstrate an actual ineffective assistance of counsel claim, courts look to the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). *See United States v. Grammas*, 376 F.3d 433, 436 (5th Cir. 2004). In order to show that counsel was ineffective a petitioner must demonstrate:

first... that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings it cannot be said that the conviction or death sentence resulted in a breakdown of the adversarial process that renders the result unreliable.

Strickland, 466 U.S. at 687.

“To show deficient performance, ‘the defendant must show that counsel’s representation fell below an objective standard of reasonableness.’” *Reed v. Stephens*, 739 F.3d 753, 773 (5th Cir. 2014) (quoting *Strickland*, 466 U.S. at 688). “Counsel’s performance is judged based on prevailing norms of practice, and judicial scrutiny of counsel’s performance must be highly deferential to avoid ‘the distorting effects of hindsight.’” *Loden v. McCarty*, 778 F.3d 484, 494 (5th Cir. 2015) (quoting *Carty v. Thaler*, 583 F.3d 244, 258 (5th Cir. 2009)). “A conscious and informed decision on trial tactics and strategy cannot be the basis for constitutionally ineffective assistance of counsel unless it is so ill chosen that it permeates the entire trial with obvious unfairness.” *United States v. Jones*, 287 F.3d 325, 331 (5th Cir. 2002) (quoting *Garland v. Maggio*, 717 F.2d 199, 206 (5th Cir. 1983)). “There is a strong presumption that counsel’s conduct falls within a wide range of reasonable professional assistance.” *Woodward v. Epps*, 580 F.3d 318, 329 (5th Cir. 2009) (quoting *Romero v. Lynaugh*, 884 F.2d 871, 876 (5th Cir. 1989).

Strategic decisions made by counsel during the course of trial are entitled to substantial deference in the hindsight of federal habeas review. *See Strickland*, 466 U.S. at 689, 104 S.Ct. 2052 (emphasizing that “[j]udicial scrutiny of counsel’s performance must be highly deferential” and that “every effort [must] be made to eliminate the distorting effects of hindsight”). A federal habeas corpus court may not find ineffective assistance of counsel merely because it disagrees with counsel’s chosen trial strategy. *Crane v. Johnson*, 178 F.3d 309, 312 (5th Cir. 1999).

In order to prove the prejudice prong, 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.” *Day v. Quarterman*, 566 F.3d 527, 536 (5th Cir. 2009). “*Strickland* asks whether it is ‘reasonably likely’ the result would have been different.” *Harrington*, __ U.S. at __, 131 S.Ct. at 792. “Prejudice in the state sentencing context turns on whether, absent counsel’s errors, there

is a reasonable probability that the defendant's sentence would have been significantly less harsh."

Charles v. Thaler, 629 F.3d 494, 499 (5th Cir. 2011) (internal quotations omitted).

A habeas petitioner must "affirmatively prove," not just allege, prejudice. *Day*, 556 F.3d at 536. If a petitioner fails to prove the prejudice part of the test, the Court need not address the question of counsel's performance. *Id.* A reviewing court "must strongly presume that trial counsel rendered adequate assistance and that the challenged conduct was the product of a reasoned trial strategy." *Wilkerson v. Collins*, 950 F.2d 1054, 1065 (5th Cir. 1992). In determining the merits of an alleged Sixth Amendment violation, a court "must be highly deferential" to counsel's conduct. *Strickland*, 466 U.S. at 687.

When a petitioner brings an ineffective assistance claim under the AEDPA, the relevant question is whether the state court's application of the deferential *Strickland* standard was unreasonable. *See Beatty v. Stephens*, 759 F.3d 455, 463 (5th Cir. 2014). "Both the *Strickland* standard and AEDPA standard are 'highly deferential,' and 'when the two apply in tandem, review is doubly so.'" *Id.* (quoting *Harrington*, 562 U.S. at 105).

A. *Grounds One and Two*

In his first ground for relief, petitioner contends counsel provided ineffective assistance when he abandoned a motion to suppress. Petitioner states counsel had filed a motion to suppress the blood test which petitioner claims was obtained in violation of his Fourth Amendment rights. Additionally, in his second ground, petitioner contends counsel provided ineffective assistance by failing to investigate the facts of the case and the law concerning search warrants. Petitioner contends counsel's failure to investigate caused him to make an uninformed decision to abandon the motion to suppress. Petitioner claims the search warrant was questionable because it was not produced until five years after the trial.

To establish that an attorney was ineffective for failure to investigate, a petitioner must allege with specificity what the investigation would have revealed and how it would have changed the outcome of the trial. *See United States v. Green*, 882 F.2d 999, 1003 (5th Cir. 1989); *see also Miller v. Dretke*, 420 F.3d 356, 361 (5th Cir. 2005). “Mere conclusory allegations in support of a claim of ineffective assistance of counsel are insufficient to raise a constitutional issue.” *Green v. Johnson*, 160 F.3d 1029, 1042 (5th Cir. 1998). “Absent evidence in the record, a court cannot consider a habeas petitioner’s bald assertions on a critical issue in his *pro se* petition (in state and federal court), unsupported and unsupportable by anything else contained in the record, to be of probative evidentiary value.” *Ross v. Estelle*, 694 F.2d 1008, 1011-12 (5th Cir. 1983).

Here, counsel filed a motion to suppress the blood evidence based on the alleged lack of consent or warrant. However, the record reflects Trooper Ferguson performed a horizontal gaze nystagmus test on petitioner at the hospital, and based on the results, he believed petitioner was intoxicated. After suspecting petitioner was intoxicated, Trooper Ferguson testified that he sought and obtained a probable cause search warrant for the purpose of retrieving a blood sample from petitioner. SHCR at 1231-1233. Additionally, Ray Staggs, the nurse performing the blood draw taking the sample from petitioner, testified Ferguson presented him with a warrant and he signed an affidavit which was introduced into evidence as being the person drawing the blood from petitioner. SHCR at 1338-1340; SHCR at 1642.

Petitioner contends the search warrant for the blood draw was not produced until five years after the trial. However, the trial record shows the Affidavit of Assistance in Execution of Search Warrant for the blood draw was introduced at trial as State’s Exhibit 40. Further, both Trooper Ferguson and Nurse Staggs testified to the existence of the warrant at the time of the blood draw. Petitioner has failed to satisfy his burden of proof. It is clear in the Fifth Circuit that “counsel is not

required to make futile motions or objections.” *See Roberts v. Thaler*, 681 F.3d 597, 611 (5th Cir. 2012); *Murray v. Maggio*, 736 F.2d 279, 283 (5th Cir. 1984). “Failure to raise meritless objections is not ineffective lawyering; it is the very opposite.” *Clark v. Collins*, 19 F.3d 959, 966 (5th Cir. 1994). Counsel was not deficient in his performance for failing to raise petitioner’s meritless objections or pursue a meritless motion to suppress. Further, in light of the strong evidence against him, petitioner has failed to show any related prejudice.

The Texas Court of Criminal Appeals rejected petitioner’s claim on habeas review, denying relief. Petitioner has failed to satisfy his burden of proof regarding his claim and has failed to demonstrate he is entitled to relief with respect to the habeas court’s determination that trial counsel’s performance was constitutional in this regard. Petitioner has failed to show either the state court adjudication was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States or that the state court adjudication resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Accordingly, petitioner’s ground for relief should be denied.

B. Ground Three

In his final ground, petitioner contends counsel provided ineffective assistance when he failed to object to harmful inadmissible evidence. Petitioner complains that counsel failed to object to the State’s introduction of evidence obtained from a non-consensual blood sample.

Evidence of petitioner’s intoxication was introduced as the State’s Exhibit 41 through a report with the results of a blood analysis conducted by Karen Ream, a forensic scientist at the crime lab for the State of Texas in Tyler. SHCR at 1349-1368. Ms. Ream was recognized as an expert

witness. While the report was introduced without objection, counsel raised objections during direct testimony and thoroughly cross-examined the witness. SHCR at 1349-1382.

As set forth above, the record shows the blood draw was legally taken from petitioner pursuant to a warrant. Therefore, there was no valid objection for counsel to make to the introduction of the results. As previously set forth, it is clear in the Fifth Circuit that “counsel is not required to make futile motions or objections.” *See Roberts*, 681 F.3d at 611; *Murray*, 736 F.2d at 283. Thus, petitioner has failed to show deficient performance. Further, in light of the strong evidence against him, petitioner has failed to show any related prejudice.

The Texas Court of Criminal Appeals rejected petitioner’s claim on habeas review, denying relief. Petitioner has failed to satisfy his burden of proof regarding his claim and has failed to demonstrate he is entitled to relief with respect to the habeas court’s determination that trial counsel’s performance was constitutional in this regard. Petitioner has failed to show either the state court adjudication was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States or that the state court adjudication resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Accordingly, petitioner’s ground for relief should be denied.

Recommendation

Petitioner’s petition for writ of habeas corpus should be denied and dismissed.

Objections

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

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

SIGNED this 25th day of January, 2021.


CAROLINE M. CRAVEN
UNITED STATES MAGISTRATE JUDGE