APPENDIX “A”

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
July 1, 2022
Lyle W. Cayce
Clerk

No. 21-20621

JOSE EFRAIN VEGA,

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 Southern District of Texas
USDC No. 4:13-CV-2714

ORDER:

Jose Efrain Vega, Texas prisoner # 01296101, seeks a certificate of appealability (COA) to appeal the district court's denial of his 28 U.S.C. § 2254 petition challenging his conviction of aggravated sexual assault of a child. He raises two claims: (1) the district court erred in not considering new evidence he presented which, he alleges, shows that could not have committed the offense, and (2) his trial counsel rendered ineffective assistance by failing to raise an objection or request a hearing regarding outcry witness testimony under Article 38.072 of the Texas Code of Criminal Procedure.

To obtain a COA, Vega must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483 (2000). This standard is satisfied "by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). Vega has failed to make the required showing.

Accordingly, his motion for a COA is DENIED.

ANDREW S. OLDHAM
United States Circuit Judge

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JOSE EFRAIN VEGA, TDCJ #1296101, Petitioner, vs. BOBBY LUMPKIN, Director, Texas Department of Criminal Justice - Correctional Institutions Division, Respondent.	§ § § § § § § § § § § §	CIVIL ACTION NO. H-13-2714

FINAL JUDGMENT

For reasons set out in the Court's Memorandum and Order, this federal habeas corpus proceeding is dismissed with prejudice.

The Clerk will provide a copy of this Final Judgment to the parties.

SIGNED at Houston, Texas, on Oct 15, 2021.

DAVID HITTNER
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JOSE EFRAIN VEGA, TDCJ #1296101, Petitioner, vs. BOBBY LUMPKIN, Director,[1] Texas Department of Criminal Justice - Correctional Institutions Division, Respondent.	§ § § § § § § § § § § §	CIVIL ACTION NO. H-13-2714

MEMORANDUM AND ORDER

State inmate Jose Efrain Vega has filed a petition for a federal writ of habeas corpus under 28 U.S.C. § 2254, challenging a conviction from Harris County, Texas, for aggravated sexual assault of a child. This federal habeas corpus proceeding was dismissed previously for want of prosecution (Dkt. # 9) and reinstated in 2020 (Dkt. # 36). The respondent has filed an answer to the petition (Dkt. # 53) and Vega has filed more than one reply (Dkts. # 62, # 63, # 66). After considering all of the pleadings, the state court records, and the applicable law, the petition will be denied and this action will be dismissed for the reasons discussed below.

[1] The Court substitutes Bobby Lumpkin, Director of the Texas Department of Criminal Justice – Correctional Institutions Division, as the proper party pursuant to Fed. R. Civ. P. 25(d).

I. BACKGROUND AND PROCEDURAL HISTORY

A local grand jury returned an indictment against Vega in Harris County Case No. 974863, charging him with aggravated sexual assault of a child, D.A., who was Vega's step-daughter. A jury in the 208th District Court of Harris County, Texas, found Vega guilty as charged. *See* Dkt. #48-5, at 54. The trial court sentenced him to serve 18 years' imprisonment. *Id.*

Vega raised two grounds on direct appeal, arguing that: (1) he was denied effective assistance of counsel when his trial attorney failed to raise proper objections to hearsay testimony from three outcry witnesses; and (2) the trial court erred by sustaining the State's objection based on relevancy and denying defense counsel the opportunity to question one of the outcry witnesses about her "bias or interest." *See* Dkt. # 48-1, at 4. The intermediate court of appeals rejected both claims after summarizing the evidence presented at trial as follows:

> When D.A. was approximately six years old, [Vega] touched D.A.'s legs underneath her pajamas and "rubbed [his hand] against [her] private part."[] [Vega] then took off D.A.'s pants and had sex with her. D.A. began to cry, and [Vega] showed her a gun and threatened to harm her and her mother. D.A. remained silent because she was afraid that appellant would harm her mother. When D.A. was approximately nine years old, [Vega] pulled D.A.'s pants off and applied cream to her "private area" with his hand. D.A. did not report this incident either because she was afraid of [Vega].
>
> When she was nine years old, D.A. moved away from [Vega] and her mother to live with her aunt, Mary Hernandez, for about a year. When she was 11, D.A. moved again to live with her aunt, Bonita Garcia, at which time she told Garcia that she had been raped by Alex,

> her aunt Norma Castillo's ("Norma") boyfriend, not [Vega]. In December 2003, when D.A. was 13 years old, she told her mother, Dora Castillo ("Dora"), another aunt, Norma, and her grandmother, Esperanza Arredondo, that she had been sexually assaulted. She initially told them that "Alex" had raped her. When Arredondo took D.A. into another room alone and instructed her to tell the truth, D.A. admitted that [Vega] had assaulted her.
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> Prior to trial, the State filed a notice of intention to use a child-abuse victim's hearsay statement. *See* Tex. Code Crim. Proc. art. 38.072 (Vernon 2005). The notice referenced three outcry witnesses: "Dora Castillo, Norma Castillo, and Lisa Holcomb." At trial, Dora, Norma, and Arredondo testified regarding D.A.'s statement to them about [Vega's] having sexually assaulted her.

Vega v. State, No. 01-05-00358-CR, 2006 WL 407821, at *1 (Tex. App.—Houston [1st Dist.] Feb. 23, 2006, pet. ref'd) (footnote omitted). Specifically, the court of appeals concluded that Vega failed to show that he was denied effective assistance of counsel or that his defense counsel's strategy was unreasonable and that Vega did not preserve error for appeal with regard to his claim of error by the trial court. *See id.*, 2006 WL 407821, at *4-5.

Vega filed two state applications for a writ of habeas corpus to challenge his conviction under Article 11.07 of the Texas Code of Criminal Procedure. Vega's first application was dismissed as premature because his direct appeal was still pending when it was filed. *See* Dkt. #48-21, at 2. In his second state habeas application, Vega raised three ineffective-assistance claims regarding his counsel's failure to properly object or challenge testimony given by the outcry witnesses at trial. *See* Dkt. #48-27, at 13; Dkt. #48-27, at 43-55. Both of Vega's defense

attorneys submitted affidavits in response to these claims. *See* Dkt. # 47-27, at 74; Dkt. # 48-27, at 77-78. The state habeas corpus court, which also presided over Vega's trial, entered detailed findings of fact and conclusions of law, recommending that relief be denied. *See* Dkt. 48-27, at 81-86. The Texas Court of Criminal Appeals agreed and denied Vega's application without a written order based on the trial court's findings on June 12, 2013. *See* Dkt. 48-27, at 2.

On September 4, 2013, Vega executed the federal petition for a writ of habeas corpus under 28 U.S.C. § 2254 that is pending in this case. *See* Dkt. #1. Similar to the claims that were rejected on state habeas corpus review, Vega alleges that he was denied effective assistance of counsel because his trial attorneys failed to: (1) request an Article 38.072 hearing to challenge the introduction of testimony from three outcry witnesses; (2) object to outcry testimony from the victim's grandmother, Esperanza Arredondo; and (3) make an offer of proof for purposes of preserving error regarding Arredondo's bias or prejudice as a witness. *See* Dkt. # 1, at 6-7; Dkt. # 2, at 3-7.

Shortly after his federal habeas petition was filed, the Court dismissed this action after correspondence was returned undeliverable, advising that Vega was no longer in custody at the address he provided. *See* Dkts. # 8, # 9, # 10. Subsequently, Vega submitted a letter explaining that he had been released on parole from TDCJ and deported to Mexico. *See* Dkt. #16. Although the Court sent him a docket sheet

in 2016, advising Vega that his case had been dismissed, he did not contact the Court again or seek to reopen this case until 2017. *See* Dkt. # 19.

After requesting briefing from Vega on whether he was entitled to relief from the dismissal order, the Court reinstated his case to the active docket in 2020, and requested an answer from the respondent after learning that Vega had returned to state custody on a parole violation following his federal conviction for illegal reentry into the United States.[2] *See* Dkt. #39, at 2. The respondent has filed an answer, arguing that Vega is not entitled to federal habeas relief because his claims are without merit. *See* Dkt. #53, at 21-39. The respondent also objects to the Court's previous order, reinstating this case after such a long period of delay by the petitioner. *Id.* at 7-16.

II. STANDARD OF REVIEW

Vega's ineffective-assistance claims were rejected by the Texas Court of Criminal Appeals, which adopted written findings and conclusions of law made by the trial court on state habeas corpus review. Claims that have been adjudicated on the merits in state court are subject to the legal standard found in the Antiterrorism

[2] Court records reflect that Vega (former BOP #80083-379) was convicted of the illegal-reentry charges, which were filed against him in 2014, and sentenced to 46 months in federal prison in a judgment entered on June 8, 2015. *See United States v. Jose Efrain Vega-Vega*, Crim. No. 5:15-cr-35 (S.D. Tex.). His appeal from that judgment was dismissed as frivolous in an unpublished opinion. *See United States v. Vega-Vega*, No. 15-40770 (5th Cir. Feb. 17 2016). Public records indicate that Vega was released from the Bureau of Prisons and returned to TDCJ to continue serving his state prison sentence sometime in 2018.

and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2254(d). Under this standard, a federal habeas corpus court may not grant relief unless the state court's 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 Supreme Court has emphasized that the AEDPA imposes a "highly deferential standard" which "demands that state-court decisions be given the benefit of the doubt." *Renico v. Lett*, 559 U.S. 766, 773 (2010) (cleaned up). A federal habeas corpus court "must defer to reasonable state-court decisions." *Dunn v. Reeves*, — U.S. —, 141 S. Ct. 2405, 2407 (2021) (per curiam). To qualify as "unreasonable" a state court's conclusion "must be objectively unreasonable, not merely wrong; even clear error will not suffice." *Woods v. Donald*, 575 U.S. 312, 316 (2015) (citation omitted). This high bar is satisfied only where the petitioner shows that "the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011).

A state court's factual determinations are also entitled to deference on federal habeas corpus review. Findings of fact are "presumed to be correct" unless the petitioner rebuts those findings with "clear and convincing evidence." 28 U.S.C.

§ 2254(e)(1). Where a claim presents a question of fact, a petitioner cannot obtain federal habeas relief unless he shows that the state court's denial of relief "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). A federal habeas corpus court "may not characterize these state-court factual determinations as unreasonable 'merely because [it] would have reached a different conclusion in the first instance.'" *Brumfield v. Cain*, 576 U.S. 305, 313-14 (2015) (quoting *Wood v. Allen*, 558 U.S. 290, 301 (2010)). "Instead, § 2254(d)(2) requires that [a federal court] accord the state trial court substantial deference." *Id.*

III. DISCUSSION

The record confirms that the state habeas corpus court rejected Vega's claims after entering findings of fact and concluding that he was not denied effective assistance of counsel under the well-established standard found in *Strickland v. Washington*, 466 U.S. 668 (1984). *See* Dkt. #48-27, at 84. To prevail under the *Strickland* standard, a criminal defendant "must show: (1) 'that counsel's representation fell below an objective standard of reasonableness,' and (2) that the deficiency was 'prejudicial to the defense.'" *Hughes v. Vannoy*, 7 F.4th 380, 387 (5th Cir. 2021) (quoting *Anaya v. Lumpkin*, 976 F.3d 545, 550-51 (5th Cir. 2020) and *Strickland*, 466 U.S. at 692).

Review of counsel's performance is a "highly deferential" inquiry in which

"counsel is strongly presumed to have rendered adequate assistance" and that the challenged conduct was the product of reasoned trial strategy. *Strickland*, 466 U.S. at 690. "This analysis is 'doubly deferential' when, as here, a state court has decided that counsel performed adequately." *Dunn*, 141 S. Ct. at 2410 (citations omitted). Specifically, a federal court considering an ineffective-assistance claim under the AEDPA standard of review "may grant relief only if *every* fairminded jurist would agree that *every* reasonable lawyer would have made a different decision." *Id.* at 2411 (cleaned up) (emphasis in original).

A. Failure to Object or Request a Hearing (Claims 1 and 3)

In two related claims, Vega contends that his defense counsel was deficient for failing to raise an objection or request a hearing under Article 38.072 of the Texas Code of Criminal Procedure, which sets forth procedures for presenting testimony about a child sexual assault victim's outcry statement. *See* Dkt. # 2, at 3, 5-6. Specifically, Article 38.072 requires that: (1) the State give notice of the intent to offer an outcry statement before trial; (2) the defendant is notified of the identity of the outcry witness and given a written summary of the outcry witness' testimony; (3) the trial court finds, in a hearing conducted outside the presence of the jury, that the outcry statement is reliable based on the time, content, and circumstances of the statement; and (4) the child testifies or is made available to testify. *See* Tex. Code. Crim. Proc. Ann. Art. 38.072, § 2(b).

At trial, the State presented testimony from the victim, D.A., who described how Vega sexually assaulted her while she was still a child. *See* Dkts. # 48-12, at 13-94; 48-13, at 1-27. The State also presented testimony from three outcry witnesses: the victim's mother, Dora Castillo; the victim's aunt, Norma Castillo; and the victim's grandmother, Esperanza Arredondo. *See* Dkts. # 48-13, at 27-60; Dkt. # 48-14, at 78-100; 48-15, at 1-9, 33-52. Although the State filed a written notice before trial that it intended to present outcry testimony from Dora Castillo and Norma Castillo, as required by Article 38.072, the notice did not mention Arredondo. *See* Dkt. # 48-4, at 47-48. Vega contends that his attorneys were deficient for failing to object to lack of notice regarding Arredondo or to request a hearing on the admissibility of the outcry witness testimony. *See id.*

Both of Vega's attorneys, lead counsel Chadrick Henderson and co-counsel Chaun Hubbard, submitted an affidavit to the state habeas corpus court in response to his allegations of ineffective assistance. Henderson stated that he learned well before trial that all three of the outcry witnesses would testify and that he was not surprised when the State put Arredondo on the stand because he was "on notice" of the identity of the witnesses and the content of their testimony. *See* Dkt. # 48-27, at 77. Hubbard agreed that, based on pretrial discussions with the prosecution, they were not surprised when Arredondo was called to testify or by the content of her testimony. *See id.* at 74. Hubbard explained further that he did not request a hearing

under Article 38.072 or object to the Arredondo's absence from the State's notice because the reliability of the outcry testimony was not an issue. *Id.* at 78. Because the outcry witness testimony indicated that the victim initially identified another perpetrator (Alex), he wanted to focus on the complainant's credibility and an Article 38.072 hearing "was not the proper forum for that." *Id.* at 78. Therefore, counsel made a "strategic decision not to object to any of the outcry witnesses because each provided evidence that the complainant initially said that Alex was the perpetrator and not my client." *Id.*

The state habeas corpus court found that each of the outcry witnesses acknowledged on cross-examination that the victim had indicated initially that she was sexually assaulted by Alex, not Vega. *See* Dkt. # 48-27, at 82. After finding that Henderson and Hubbard's affidavits were "credible," the state habeas corpus court found further that they had adequate notice prior to trial that Arredondo would testify as an outcry witness and the content of her testimony. *See id.* at 83. The state habeas corpus court also found that the decision not to object was based on sound trial strategy because, based on pre-trial investigation showing that the victim initially provided the name of a different perpetrator, counsel believed that this testimony would undercut the victim's credibility. *See id.* Based on these findings, which are presumed correct on federal review, the state habeas corpus court concluded that counsel's strategic decision not to object to the outcry witnesses or

request a hearing under Article 38.072, but instead to use their testimony to undercut the victim's credibility, was objectively reasonable. *See id.* at 84.

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 (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"). The Supreme Court has emphasized that strategic decisions are entitled to a "strong presumption" of reasonableness. *Richter*, 562 U.S. at 104. "[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." *Pape v. Thaler*, 645 F.3d 281, 291 (5th Cir. 2011) (citation and internal quotation marks omitted).

Vega does not establish that the testimony given by the outcry witnesses was unreliable or inadmissible such that an Article 38.072 hearing would have been beneficial and he does not show that his counsel lacked notice that Arredondo was going to testify. Moreover, Vega does not demonstrate that counsel's trial strategy was unsound or that every reasonable lawyer would have made a different decision about whether to object or request an Article 38.072 under the circumstances. As a result, he fails to establish to overcome the strong presumption that his counsel's performance was adequate and not deficient. Because he further fails to show that

the state habeas corpus court's decision was unreasonable, Vega is not entitled to relief on Claims 1 or 3.

B. Failure to Make an Offer of Proof (Claim 2)

Vega's remaining claim concerns defense counsel's cross-examination of Arredondo, who had expressed skepticism during her direct testimony when the victim initially identified another family member (Alex) as the perpetrator. When defense counsel attempted to question Arredondo regarding her disbelief that Alex could be the perpetrator by asking Arredondo whether she "liked" Alex, the State objected based on relevance and the trial court sustained that objection. Dkt. # 48-15, at 48. Vega claims that counsel was deficient for failing to "make an offer of proof" or demonstrate that the testimony was "relevant to the issue of [Arredondo's] bias or prejudice" as a witness. *See* Dkt. # 2, at 4. Vega argues that he was prejudiced by the error because, by failing to make an offer of proof, counsel did not preserve error for appeal regarding whether the trial court properly sustained the State's objection. *See id.*

Hubbard, who cross-examined Arredondo at trial, explained that she did not make an offer of proof because she had none to make. Dkt. # 48-27, at 74. Hubbard also explained her strategy when cross-examining Arredondo, noting that she pursued additional questions after the State's objection was sustained in an effort to clarify Arredondo's belief that Alex was not the perpetrator:

> On cross-examination my objective was for Ms. Arredondo to make three acknowledgements. First, that the complainant initially indicated that a family member Alex had sexually assaulted her. Second, there were periods of time when Alex did not come into contact with the complainant. Third, she simply decided it was not Alex based on her belief and without any investigation.
>
> In the context of this third objective I asked "Do you like Alex?" I did not know what the answer to this question would be. If she said "yes" I would likely have tried to probe that this was the reason she did not investigate further. If she said "no" I had no evidence to the contrary with which to impeach her or make an offer of proof. Therefore, I did not follow up on this question after the court sustained the State's objection. Additionally, I felt that I achieved my third objective based on Ms. Arredondo's answers to my queries, "You don't want to believe it was Alex, do you?" and "And you've decide that it wasn't Alex," that were asked immediately after the court sustained the State's objection. As a result, I felt it was unnecessary to make the "like" inquiry again.

Dkt. # 48-27, at 74. Counsel's explanation is supported by the trial transcript of her cross-examination, which attacked Arredondo's belief that Alex could not have been the perpetrator. *See* Dkt. # 48-15, at 48-49. Based on this explanation, which the state habeas corpus court found to be "credible," the state habeas corpus court concluded that defense counsel acted "reasonably when she did not attempt to make an offer of proof" about whether Arredondo liked or disliked Alex and that Vega was not prejudiced because counsel's strategy on cross-examination developed Arredondo's previous testimony that the victim initially identified someone else as the person who sexually assaulted her. *See* Dkt. # 48-27, at 84, 85.

Vega does not provide any information showing that defense counsel had

evidence, but failed to make an offer of proof regarding whether Arredondo harbored any particular feelings about the individual whom the victim initially identified as the perpetrator. The Fifth Circuit has "made clear that conclusory allegations of ineffective assistance of counsel do not raise a constitutional issue in a federal habeas proceeding." *Collier v. Cockrell*, 300 F.3d 577, 587 (5th Cir. 2002) (citing *Miller v. Johnson*, 200 F.3d 274, 282 (5th Cir. 2000); *Ross v. Estelle*, 694 F.2d 1008, 1012 (5th Cir. 1983)).

The record supports the state court's findings and conclusions, demonstrating that defense counsel successfully elicited testimony from all three outcry witnesses about the victim initially identifying Alex as the person who sexually assaulted her. *See* Dkt. #48-14 at 23-24; Dkt. # 48-15 at 1-6, 47-49. Vega does not otherwise show that defense counsel's chosen strategy was ill-conceived or that if an offer of proof had been made, preserving error for appeal, the result of his direct appeal would have been different. Because Vega does not demonstrate deficient performance or actual prejudice, he fails to demonstrate that his counsel was ineffective or that the state court's decision to deny relief was objectively unreasonable. Vega is not entitled to relief on this claim or any other allegation raised in his petition, which is denied.

IV. CERTIFICATE OF APPEALABILITY

Rule 11 of the Rules Governing Section 2254 Cases requires a district court to issue or deny a certificate of appealability when entering a final order that is

adverse to the petitioner. A certificate of appealability will not issue unless the petitioner makes "a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), which requires a petitioner to demonstrate "that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Tennard v. Dretke*, 542 U.S. 274, 282 (2004) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). The petitioner must show not only that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right," but also that they "would find it debatable whether the district court was correct in its [] ruling." *Slack*, 529 U.S. at 484. Because jurists of reason would not debate whether the ruling in this case was correct, a certificate of appealability will not issue.

V. CONCLUSION AND ORDER

For the reasons set forth above, the federal habeas corpus petition under 28 U.S.C. § 2254 filed by Jose Efrain Vega (Dkt. #1) is **DENIED** and this case is **DISMISSED** with prejudice. A certificate of appealability shall not issue.

The Clerk will provide a copy of this Memorandum and Order to the parties.

SIGNED at Houston, Texas, on Oct 15, 2021.

DAVID HITTNER
UNITED STATES DISTRICT JUDGE

APPENDIX "C"

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Jose Efrain Vega TDCJ #1296101 Plaintiff, V. William Stephens, Defendants.	§ § § § § § § § § § §	CIVIL ACTION: 4:13-2714

ORDER

Jose Efraim Vega moves this Court for leave to file supplemental evidence. The Court hereby

Orders that Mr. Vega may file the supplemental evidence within 30 days of the date of this order.

The motion (Docket # 64) is GRANTED.

Signed this 10 day of September, 2021.

David Hittner
United States District Judge