

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

May 13, 2022

Lyle W. Cayce
Clerk

DANNY RICHARD RIVERS,

Petitioner—Appellant,

versus

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

Respondent—Appellee.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 7:17-CV-124

Before RICHMAN, *Chief Judge*, and COSTA and HO, *Circuit Judges*.

PER CURIAM:*

This court granted a certificate of appealability (COA) on Danny Richard Rivers's claim for ineffective assistance of trial counsel based on an alleged failure to conduct a reasonable investigation and interview witnesses. The parties were directed to address "whether Rivers's witness affidavits

* Pursuant to 5th Circuit Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Circuit Rule 47.5.4.

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were considered in the state court proceedings and whether the district court properly deferred to the state habeas court's adjudication, as well as the merits of this claim." We conclude that Rivers did not properly submit evidence to support his claim in state court. We therefore affirm the district court's denial of habeas relief.

I

Rivers was convicted by a jury of one count of continuous sexual abuse of a child, two counts of indecency with a child by contact, one count of indecency with a child by exposure, and two counts of possession of child pornography.¹ At trial, Rivers proceeded on the theory that the victims fabricated the allegations of abuse at the behest of his ex-wife, who was their mother, and that his ex-wife had downloaded the child pornography. Rivers was convicted on all counts. On appeal, his convictions were affirmed.²

Rivers then filed two state habeas applications.³ His claims relating to child pornography were dismissed because he had served his sentence for those convictions.⁴ After the trial court forwarded its findings and conclusions, the Texas Court of Criminal Appeals (TCCA) remanded for factfinding concerning his ineffective assistance of counsel claim.

The trial court ordered Rivers's three trial attorneys to file affidavits. They declared in nearly identical affidavits that Rivers had admitted to the

¹ *Rivers v. State*, No. 08-12-145-CR, 2014 WL 3662569, at *1 (Tex. App.—El Paso July 23, 2014) (unpublished).

² *Ex parte Rivers*, Nos. WR-84,550-01 & 84,550-02, 2017 WL 3380491 (Tex. Crim. App. June 7, 2017) (per curiam) (unpublished); *Rivers*, 2014 WL 3662569, at *5.

³ See *Ex parte Rivers*, Nos. WR-84,550-01 & 84,550-02, 2016 WL 5800277, at *1 (Tex. Crim. App. Oct. 5, 2016) (per curiam) (unpublished).

⁴ These claims are not at issue.

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child abuse offenses. They said their trial strategy was to show that, after Rivers's ex-wife lost custody of a daughter during their divorce proceeding, she manipulated the child into fabricating the abuse allegations. Apart from witness Antonio Dino Fernandez, who testified at trial, counsel asserted generally that they had interviewed all witnesses Rivers identified and did not call them to the stand. Rivers then filed an affidavit denying that he admitted to the offenses and asked the court to order affidavits from the potential witnesses.

The state habeas trial court found that Rivers had admitted to the abuse offenses and that trial counsel "implemented a general trial strategy that the victims fabricated the allegations of abuse at the behest of their mother, who was [Rivers]'s ex-wife." The court also found that Rivers had not provided witness affidavits to support his claim regarding uncalled witnesses. It concluded that counsel were not ineffective and that Rivers was not prejudiced.

The trial court forwarded its findings to the TCCA. While the case was pending, and before the TCCA issued its ruling, Rivers filed with the TCCA three witness affidavits supporting his claim that counsel failed to interview or call potential witnesses. These were the affidavits of Fernandez (who had testified at trial), Misty Ross-Finley, and Danny Rivers, Sr. All three affidavits are dated after the state trial court filed its findings of fact and conclusions of law in the remanded proceedings. The letters from Rivers transmitting these affidavits reflect that they were sent directly to the TCCA. There is no indication in the record that these three affidavits were ever presented to the state habeas trial court. In its opinion and order denying habeas relief, the TCCA referred to affidavits from trial counsel that were presented to the state trial court on remand and agreed with the trial court's "findings of fact and conclus[ion] that counsel were not ineffective." The

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TCCA did not refer to the late-breaking affidavits in its opinion and order or otherwise address those affidavits in any ruling.

Rivers then sought 28 U.S.C. § 2254 relief. He raised, *inter alia*, a claim of ineffective assistance of trial counsel based on uncalled witnesses. The federal magistrate judge relied on the state court's findings and found that Rivers had not provided affidavits from the potential witnesses nor any assurance that they would have testified at trial had counsel interviewed them; that Rivers merely speculated as to what testimony he believes those witnesses would have given; and that counsel had interviewed the witnesses Rivers identified. The magistrate judge recommended that relief be denied.

In response to the magistrate judge's report and recommendation, Rivers objected to the finding that he had not provided witness affidavits. The federal district court's order states that Rivers had filed affidavits and that “[t]hese affidavits were also filed in the state habeas proceeding and were before the [TCCA].” Nevertheless, the district court denied relief, reasoning that a state court's determinations on competing affidavits as to ineffective assistance claims are “presumed correct unless the petitioner presents clear and convincing evidence to the contrary.” The district court adopted the magistrate judge's report, denied relief, and denied a COA.

Rivers moved for reconsideration. The district court deemed the motion timely under Federal Rule of Civil Procedure 59(e), but construed it as a successive § 2254 petition and dismissed it for lack of jurisdiction. Before the district court ruled on his motion, Rivers filed a notice of appeal.

Rivers argues that he filed the affidavits in the TCCA while his case was still pending, and that the TCCA decided his case without considering the affidavits. He also argues that the district court erred by denying relief without holding an evidentiary hearing.

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The respondent first argues that the notice of appeal was untimely and that a remand is necessary for a determination of good cause or excusable neglect. He also argues that Rivers violated procedural rules in filing his affidavits and that the TCCA did not consider them.

II

We must first consider our jurisdiction. A timely “notice of appeal in a civil case is a jurisdictional requirement” when, as here, a statute sets the time limit.⁵ A notice of appeal in a civil action must be filed within thirty days of the judgment from which the appeal is taken.⁶ Rivers had thirty days after the September 17, 2018 denial of his § 2254 petition—until October 17, 2018—to file a notice of appeal. “[T]hrough clerical oversight, the Court’s order denying relief and final judgment were mailed to [Rivers] at the Beto Unit in Tennessee Colony, Texas, rather than the McConnell Unit in Beeville, Texas,” where Rivers was incarcerated. As a result, Rivers did not deposit his notice of appeal into the prison mail system until November 14, 2018.⁷

However, Rivers filed a postjudgment motion for reconsideration, and certain postjudgment motions may extend the time for filing an appeal.⁸ A Rule 59(e) motion is timely if it is filed no later than twenty-eight days after the entry of the judgment, with no possibility of extensions.⁹ Rivers’s postjudgment motion was filed more than twenty-eight days after the entry

⁵ *Bowles v. Russell*, 551 U.S. 205, 214 (2007).

⁶ 28 U.S.C. § 2107(a); FED. R. APP. P. 4(a)(1)(A).

⁷ See *Spotville v. Cain*, 149 F.3d 374, 376-78 (5th Cir. 1998) (prison mailbox rule).

⁸ See FED. R. APP. P. 4(a)(4)(A).

⁹ FED. R. CIV. P. 59(e); see FED. R. CIV. P. 6(b)(2).

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of judgment,¹⁰ rendering it untimely as a Rule 59(e) motion.¹¹ Moreover, his untimely Rule 59(e) motion did not toll the time for noticing an appeal.¹²

But the district court could have construed the motion as one seeking relief under Federal Rule of Appellate Procedure 4(a)(5), which allows the district court to extend the time for filing a notice of appeal if the requesting party “shows excusable neglect or good cause.”¹³ Such a motion is due no later than thirty days after the expiration of the time for filing a notice of appeal.¹⁴ In this case, Rivers had until October 17, 2018, to file a notice of appeal. Pursuant to the prison mailbox rule, his postjudgment motion was filed on October 26, 2018, and was therefore timely under Rule 4(a)(5), as it was filed within thirty days of the expiration of the time to file a notice of appeal.¹⁵ Along with his postjudgment motion, Rivers filed an affidavit stating that the order accepting the magistrate judge’s finding had been sent to his former address and then forwarded to him at the McConnell Unit. He asserted that he received the order on October 15, 2018, and placed his postjudgment motion in the prison mail system on October 26, 2018. The district court noted that, “through clerical oversight, the Court’s order denying relief and final judgment were mailed to [Rivers] at the Beto Unit in Tennessee Colony, Texas, rather than the McConnell Unit in Beeville, Texas,” and that Rivers filed his postjudgment motion twenty-one days after

¹⁰ See *Spotville*, 149 F.3d at 376-78.

¹¹ See FED. R. CIV. P. 59(e).

¹² *In re Crescent Res.*, L.L.C., 496 F. App’x 421, 424 (5th Cir. 2012) (per curiam) (unpublished); see FED. R. APP. P. 4(a)(4)(A)(iv), (vi); FED. R. CIV. P. 6(b)(2); FED. R. CIV. P. 59(e).

¹³ See FED. R. APP. P. 4(a)(5)(A)(ii).

¹⁴ FED. R. APP. P. 4(a)(5)(A)(i).

¹⁵ See *id.*; *Spotville*, 149 F.3d at 376-78.

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receiving the judgment. The same day, the district court granted Rivers's in forma pauperis (IFP) motion.

Rivers's postjudgment motion, affidavit, and IFP motion—construed liberally—could be a request for an extension of the thirty-day time limit to file the notice of appeal based on excusable neglect or good cause.¹⁶ Given Rivers's pro se status, the government's lack of objection, and the fact that Rivers submitted everything necessary to set forth a Rule 4(a)(5) motion, we will treat his postjudgment motion as such. Further, it appears as though the district court did the same because it granted Rivers's IFP motion and extended his time to file the postjudgment motion. It is unnecessary to remand this case for a determination on good cause or excusable neglect because the district court's grant of his IFP motion, taken together with the court's decision to extend the time to file the postjudgment motion based on clerical error, is tantamount to an excusable neglect finding excusing the untimely notice of appeal.¹⁷

This court reviews a ruling on a Rule 4(a)(5) motion for abuse of discretion and gives more leeway to the excusable neglect determination “when the district court grants the motion for an extension of time.”¹⁸ “[T]he determination is at bottom an equitable one, taking account of all relevant circumstances surrounding the party’s omission,” including the “danger of prejudice,” “the length of the delay and its potential impact on

¹⁶ See FED. R. APP. P. 4(a)(5); cf. *Frew v. Young*, 992 F.3d 391, 395-96 (5th Cir. 2021) (discussing the various ways the court could post hoc construe a party’s motion on appeal).

¹⁷ See *Salts v. Epps*, 676 F.3d 468, 474 (5th Cir. 2012) (concluding that the district court did not abuse its “broad discretion” by granting an extension in light of the four-day delay and the lack of any prejudice or bad faith).

¹⁸ *Stotter v. Univ. of Tex. at San Antonio*, 508 F.3d 812, 820 (5th Cir. 2007).

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judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.”¹⁹ In light of the foregoing, it would not have been an abuse of discretion to extend the time to file a notice of appeal because Rivers did not receive timely notice of the judgment; he filed a motion within the requisite time period; he established excusable neglect or good cause through his affidavit; and the court admitted to the clerical oversight causing the delay.²⁰ Additionally, the government does not contend that it would be prejudiced by the delay.

As noted above, the prescribed period for filing a notice of appeal in this case expired on October 17, 2018. With an extension under Rule 4(a)(5), Rivers’s notice of appeal was due by December 14, 2018, fourteen days after the district court’s November 30, 2018 order denying Rivers’s postjudgment motion.²¹ Rivers tendered his notice of appeal to prison authorities on November 14, 2018.²² Accordingly, Rivers timely filed a notice of appeal, and we have jurisdiction to review his claims.

III

Under AEDPA, we will not reverse a state court ruling unless it was “contrary to, or involved an unreasonable application of, clearly established Federal law” or “was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.”²³ Our review is generally limited “to the record that was before the state court that

¹⁹ *Pioneer Inv. Servs. Co. v. Brunswick Assocs.*, 507 U.S. 380, 395 (1993).

²⁰ See *Stotter*, 508 F.3d at 820; *Salts*, 676 F.3d at 474.

²¹ See FED. R. APP. P. 4(a)(5)(C).

²² See *Spotville v. Cain*, 149 F.3d 374, 376-78 (5th Cir. 1998).

²³ 28 U.S.C. § 2254(d)(1), (2).

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adjudicated the claim on the merits.”²⁴ To establish ineffective assistance of counsel, a defendant must show that counsel performed deficiently and that he was prejudiced.²⁵ Review of the state court’s ineffective assistance ruling is “doubly” deferential when § 2254(d) applies.²⁶

Further, “[c]laims that counsel failed to call witnesses are not favored on federal habeas review because the presentation of witnesses is generally a matter of trial strategy and speculation about what witnesses would have said on the stand is too uncertain.”²⁷ For this reason, a showing of prejudice for claims of ineffective assistance based on uncalled witnesses requires petitioners to “name the witness, demonstrate that the witness was available to testify and would have done so, set out the content of the witness’s proposed testimony, and show that the testimony would have been favorable to a particular defense.”²⁸

Rivers alleges ineffective assistance of his trial counsel on the theory that counsel was deficient in not calling or adequately preparing defense witnesses. Rivers must present evidence to support this claim.²⁹ He has produced two affidavits from uncalled witnesses and an affidavit from a trial witness who he claims was inadequately prepared. But these affidavits were not presented to the state habeas trial court. Rivers first produced the affidavits *after* the state habeas trial court had ruled against him and while his

²⁴ *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011).

²⁵ *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

²⁶ *Harrington v. Richter*, 562 U.S. 86, 105 (2011) (internal quotation marks and citation omitted).

²⁷ *Woodfox v. Cain*, 609 F.3d 774, 808 (5th Cir. 2010).

²⁸ *Day v. Quarterman*, 566 F.3d 527, 538 (5th Cir. 2009).

²⁹ *See id.*

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application was on appeal before the TCCA. He filed the affidavits directly with the TCCA, which docketed the affidavits but did nothing more.

Texas has specific rules regarding supplementing the evidence on appeal in a habeas case.³⁰ Rule 73.7 states that the TCCA will not consider new evidence such as these affidavits unless accompanied by a motion explaining their significance.³¹ Even then, they will only be accepted if the TCCA determines the need is truly exceptional.³² “If the motion is granted, [the] Court will specify a designated time frame for the party to file the evidence . . . and the party must present his evidence to the habeas court within that time frame.”³³

Rivers did not present his affidavits in line with the strictures of Rule 73.7.³⁴ He made no such motion, nor did he make the necessary argument concerning the exceptional nature of this evidence. The TCCA made no finding of exceptionality, did not grant his nonexistent motion, and—unsurprisingly—did not mention the affidavits in its opinion denying relief.³⁵ In light of this, and the TCCA’s silence with respect to the affidavits, our only conclusion can be that the TCCA decided they were improperly submitted and not in evidence. To the extent that the district court found otherwise, that finding is not supported by the record or Texas law.

³⁰ See TEX. R. APP. P. 73.7.

³¹ See *Ex parte Speckman*, 537 S.W.3d 49, 54 (Tex. Crim. App. 2017).

³² TEX. R. APP. P. 73.7.

³³ *Speckman*, 537 S.W.3d at 54-55.

³⁴ See TEX. R. APP. P. 73.7.

³⁵ See *Ex parte Rivers*, Nos. WR-84,550-01 & 84,550-02, 2016 WL 5800277, at *1 (Tex. Crim. App. 2016).

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IV

Through the benefit of liberal construction of his pro se brief, Rivers has also appealed the denial of an evidentiary hearing. Our review is generally limited to evidence placed before the state habeas courts.³⁶ “Although state prisoners may sometimes submit new evidence in federal court, AEDPA’s statutory scheme is designed to strongly discourage them from doing so.”³⁷ For claims adjudicated on the merits in state court, as here, “the petitioner must demonstrate that habeas relief is warranted under § 2254(d) *on the state court record alone*. If the petitioner succeeds in satisfying this threshold requirement, then a federal habeas court may entertain new evidence.”³⁸

Rivers must present evidence to support his claim of ineffective assistance of trial counsel.³⁹ Because his affidavits were never properly presented to the state habeas courts, he has not done so. Accordingly, Rivers has not demonstrated that, on the state court record alone, he is entitled to relief.⁴⁰ The district court correctly denied an evidentiary hearing.⁴¹

* * *

We AFFIRM the district court’s denial of an evidentiary hearing and denial of habeas relief.

³⁶ *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011); *see also Broadnax v. Lumpkin*, 987 F.3d 400, 406-07 (5th Cir. 2021).

³⁷ *Pinholster*, 563 U.S. at 186.

³⁸ *Broadnax*, 987 F.3d at 406-07 (emphasis in original) (citing *Smith v. Cain*, 708 F.3d 628, 634-35 (5th Cir. 2013)).

³⁹ *Day v. Quarterman*, 566 F.3d 527, 538 (5th Cir. 2009).

⁴⁰ *See id.* (requiring evidence to prove prejudice for a successful *Strickland* claim).

⁴¹ *See Broadnax*, 987 F.3d at 406-07.

United States Court of Appeals

FIFTH CIRCUIT
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May 13, 2022

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing
or Rehearing En Banc

No. 18-11490 Rivers v. Lumpkin
USDC No. 7:17-CV-124

Enclosed is a copy of the court's decision. The court has entered judgment under Fed. R. App. P. 36. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

Fed. R. App. P. 39 through 41, and 5th Cir. R. 35, 39, and 41 govern costs, rehearings, and mandates. **5th Cir. R. 35 and 40 require you to attach to your petition for panel rehearing or rehearing en banc an unmarked copy of the court's opinion or order.** Please read carefully the Internal Operating Procedures (IOP's) following Fed. R. App. P. 40 and 5th Cir. R. 35 for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if you make a nonmeritorious petition for rehearing en banc.

Direct Criminal Appeals. 5th Cir. R. 41 provides that a motion for a stay of mandate under Fed. R. App. P. 41 will not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate that a substantial question will be presented to the Supreme Court. Otherwise, this court may deny the motion and issue the mandate immediately.

Pro Se Cases. If you were unsuccessful in the district court and/or on appeal, and are considering filing a petition for certiorari in the United States Supreme Court, you do not need to file a motion for stay of mandate under Fed. R. App. P. 41. The issuance of the mandate does not affect the time, or your right, to file with the Supreme Court.

Court Appointed Counsel. Court appointed counsel is responsible for filing petition(s) for rehearing(s) (panel and/or en banc) and writ(s) of certiorari to the U.S. Supreme Court, unless relieved of your obligation by court order. If it is your intention to file a motion to withdraw as counsel, you should notify your client promptly, **and advise them of the time limits for filing for rehearing and certiorari.** Additionally, you MUST confirm that this information was given to your client, within the body of your motion to withdraw as counsel.

Sincerely,

LYLE W. CAYCE, Clerk

Nancy F. Dolly

By:

Nancy F. Dolly, Deputy Clerk

Enclosure(s)

Mr. Danny Richard Rivers
Ms. Jennifer Wissinger

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION**

FINDINGS, CONCLUSIONS, AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

Before the Court is an Amended Petition for Writ of Habeas Corpus filed by Petitioner Danny Rivers pursuant to 28 U.S.C. § 2254. ECF No. 27. After considering the claims alleged in the Petition, the undersigned **RECOMMENDS** that United States District Judge Reed O'Connor **DISMISS** the Petition **with prejudice**.

Background

Petitioner Danny Rivers (“Rivers”) is an inmate confined in the James V. Allred Unit of the Texas Department of Criminal Justice in Iowa Park, Texas. ECF No. 27. Rivers challenges the validity of his state conviction and sentencing for continuous sexual abuse of a child, indecency with a child, and possession of child pornography. *Id.* at 27-2 at 2. Rivers seeks federal habeas relief based on claims of ineffective assistance of trial counsel, ineffective assistance of appellate counsel, denial of an impartial jury, denial of a fair trial due to prosecutorial misconduct, the unconstitutionality of Article 21.02 of the Texas Penal Code, unconstitutional proceedings of his grand jury selection, and judicial impropriety. *Id.* at 6.

On February 22, 2012, Rivers pleaded not guilty to continuous sexual abuse with a child and indecency with a child. ECF No. 19 at 3. A jury convicted him at trial, and he was sentenced to thirty years' imprisonment for continuous sexual abuse of a child and three years' imprisonment for indecency with a child. *Id.* He appealed his conviction to the Eighth Court of Appeals of Texas ("COA"), which affirmed. *Id; Rivers v. State*, 08-12-00145-CR, 2014 WL 3662569, at *1 (Tex. App.—El Paso July 23, 2014, pet. ref'd). The Texas Court of Criminal Appeals ("TCCA") refused his petition for discretionary review ("PDR"). ECF No. 19 at 3. Rivers then filed two state habeas application on January 27, 2016. *See Ex parte Rivers*, Nos. WR-84,550-01 & 84,550-02, 2016 WL 5800277 (Tex. Crim. App. Oct. 5, 2016). The TCCA remanded to the trial court for findings of fact and conclusions of law concerning Rivers's ineffective assistance of counsel claims. *Id.* The TCCA then denied in part and dismissed in part Rivers's application for habeas relief with written order on the findings of the trial court. *Ex parte Rivers*, Nos. WR-84,550-01 & 84,550-02, 2017 WL 338091 (Tex. Crim. App. June 7, 2017).

Rivers filed his original petition in this Court on August 30, 2017 (ECF No. 1), and filed his amended petition on March 19, 2018 (ECF No. 27). Pursuant to this Court's Order (ECF No. 11), the State filed an answer in which it argued that River's petition should be dismissed because his claims lack merit. ECF No. 19. Rivers filed his reply on April 12, 2018. ECF No. 30.

Legal Standard of Review

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") provides in pertinent part that:

- (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established 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.

28 U.S.C. § 2254(d) (2016).

Under the “contrary to” clause, a federal court may grant a writ of habeas corpus if the state court either arrived at a conclusion opposite to that reached by the United States Supreme Court on a question of law or decided a case differently from the United States Supreme Court on a set of materially indistinguishable facts. *Williams v. Taylor*, 529 U.S. 362, 412–13 (2000); *Chambers v. Johnson*, 218 F.3d 360, 363 (5th Cir. 2000). Under the “unreasonable application” clause, a federal court may grant a writ of habeas corpus if the state court either unreasonably applied the correct legal rule to the facts of a particular case or unreasonably extended a legal principle from Supreme Court precedent to a new context where it should not have applied or unreasonably refused to extend that principle to a new context where it should have applied. *Williams*, 529 U.S. at 407. The standard for determining whether a state court’s application was unreasonable is an objective one and applies to all federal habeas corpus petitions that, like the instant case, were filed after April 24, 1996, provided that they were adjudicated on the merits in state court. *Lindh v. Murphy*, 521 U.S. 320, 326 (1997). In the context of habeas corpus, “adjudicated on the merits” is a term of art referring to a state court’s disposition of a case on substantive rather than procedural grounds. *Green v. Johnson*, 116 F.3d 1115, 1121 (5th Cir. 1997).

Upon a finding of state court compliance with the “contrary to” clause of 28 U.S.C. § 2254(d)(1), federal courts give deference to the state court’s findings unless such findings violate the “unreasonable application” clause of 28 U.S.C. § 2254(d)(2). *Chambers*, 218 F.3d at 363. The “unreasonable application” clause concerns only questions of fact. *Hill v. Johnson*, 210 F.3d 481,

485 (5th Cir. 2000). The resolution of factual issues by the state court is presumed to be correct and will not be disturbed unless the petitioner rebuts the presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); *Sumner v. Mata*, 449 U.S. 539, 550 (1981). Absent such evidence, the presumption of correctness is applied provided that the state court findings are evidenced in writing, issued after a hearing on the merits, and are fairly supported by the record. 28 U.S.C. § 2254(d); *Burden v. Zant*, 498 U.S. 433, 436–37 (1991); *Williams v. Scott*, 35 F.3d 159, 161 (5th Cir. 1994).

ANALYSIS

Rivers challenges his conviction on the following seven grounds: (1) his trial counsel's representation was ineffective; (2) his appellate counsel's representation was ineffective (3) he was denied the right to an impartial jury; (4) he was denied a fair trial due to prosecutorial misconduct; (5) Article 21.02 of the Texas Penal Code is unconstitutional; (6) the grand jury proceedings were unconstitutional; (7) and he was denied a fair trial due to judicial impropriety.

I. Ineffective Assistance of Trial Counsel

The Sixth Amendment of the United States Constitution guarantees a criminal defendant "reasonably effective assistance" of counsel. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To obtain habeas relief on a claim of ineffective assistance of counsel, the petitioner must prove (1) that his counsel's performance was deficient and (2) that it prejudiced him. *Id.* To satisfy the first prong of *Strickland*, a petitioner must demonstrate that "counsel's representation fell below an objective standard of reasonableness." *Id.* To prove prejudice under the second prong, a petitioner must demonstrate a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Moreover, a reasonable

probability “requires a ‘substantial,’ not just ‘conceivable,’ likelihood of a different result.” *Cullen v. Pinholster*, 563 U.S. 170, 189 (2011) (quoting *Harrington v. Richtner*, 562 U.S. 86 (2011)).

Rivers argues that his trial counsel, Rick Mahler (“Mahler”), Frank Trotter (“Trotter”), and Mark Barber (“Barber”), rendered ineffective assistance. Rivers lists sixteen grounds for ineffective assistance of trial counsel, but he does not elaborate on the majority of these grounds. Thus, the undersigned shall only address the grounds that Rivers does explain. These grounds are whether Rivers’s counsel were ineffective for improperly advising Rivers not to testify at trial; failing to call expert witnesses to verify Rivers’s child pornography charges; failing to interview any of the witnesses Rivers provided to his counsel; and failing to conduct a reasonable investigation of his case. ECF No. 27-2 at 30–31.

In response to these claims, the State relies on the findings of the state habeas court, which were adopted by the TCCA. ECF No. 19 at 10. The state habeas court found that Mahler, Trotter, and Barber reviewed evidence, interviewed witnesses on Rivers’s witness list, consulted with Rivers regularly before and during trial, and adequately prepared for trial. *Id.* at 11. Further, all three trial counsel submitted sworn affidavits to the TCCA stating that Rivers admitted to counsel that he engaged in sexual acts with the victims. *Id.* The TCCA ultimately found that Mahler, Trotter, and Barber rendered effective assistance of counsel, and that Rivers failed to show how he was prejudiced by his counsel’s representation. *Id.* at 13.

Rivers argues that his counsel were ineffective for failing to call expert witnesses at trial. ECF No. 27-2 at 31. Specifically, Rivers contends that his counsel should have called expert witnesses to “refute” his child pornography conviction. *Id.* at 33. “The Court specifically rejected the possibility that due process requires that ‘all competent, reliable evidence must be admitted.’” *Pierce v. Thaler*, 355 Fed. App’x 784 (5th Cir. 2009) (internal quotations omitted). Here, Rivers

has failed to produce any evidence or argument as to the specific testimony the proposed expert witnesses would have been able to provide and that failure is critical to his case. In light of the record before the Court and the evidence presented at trial, the undersigned cannot find that counsel's failure to call expert witnesses violates his constitutional rights. Further, the TCCA denied relief on the merits on the basis of these findings, and this decision is not contrary to federal law. Accordingly, habeas relief is not warranted on this ground.

Rivers also argues that his counsel failed to interview any witnesses on the list he provided them. ECF No. 27-2 at 33. According to Rivers, his counsel failed to interview a number of alibi witnesses who were willing to testify that Rivers did not download the child pornography on the laptop that implicated him. *Id.* The Fifth Circuit "has emphasized that 'complaints of uncalled witnesses are not favored, because the presentation of testimonial evidence is a matter of trial strategy and because allegations of what a witness would have testified are largely speculative.'"
United States v. Cockrell, 720 F.2d 1423, 1427 (5th Cir. 1983) (quoting *Buckelew v. United States*, 575 F.2d 515, 521 (5th Cir. 1978)). Moreover, a petitioner making a claim of "ineffective assistance based on counsel's failure to call a witness [is required] to demonstrate prejudice by 'nam[ing] the witness, demonstrat[ing] that the witness was available to testify and would have done so, set[ting] out the content of the witness's proposed testimony, and show[ing] that the testimony would have been favorable to a particular defense.'"
Woodfox v. Cain, 609 F.3d 774, 808 (5th Cir. 2010) (quoting *Day v. Quaterman*, 566 F.3d 527, 538 (5th Cir. 2009)). Rivers has not provided affidavits from the potential witnesses nor any assurance that they would have appeared at trial had counsel interviewed them. *Cockrell*, 720 F.2d at 1427 (finding that complaints of uncalled witnesses are not favored and an affidavit from the witness is necessary to demonstrate what the witness would have testified at trial). Rather, Rivers merely speculates as to what

testimony he believes those witnesses would have given. *See* ECF No. 4 at 66. His allegation that his counsel failed to interview and call a witness, without more, is insufficient to warrant habeas relief.

Rivers further contends that his counsel was ineffective for failing to conduct an objectively reasonable investigation of his case and for advising him not to testify at trial. ECF No. 27-2 at 34. According to Rivers, his counsel failed to fully investigate and develop all aspects of his defense because they: (1) failed to properly cross-examine the expert witnesses and victims; (2) failed to rebut the state's expert opinions due to the lack of investigation; (3) failed to investigate further into his ex-wife's motive to testify against him; and (4) failed to investigate the alleged fact that Rivers could not have downloaded at least "2 of 3 of the alleged porn images" because he was out of town. *Id.* at 30-43.

Habeas relief can be warranted on the ground of ineffective assistance of counsel where an attorney does not engage in a reasonable amount of pretrial investigation, which at a minimum requires counsel to interview potential witnesses and make an independent investigation of the facts and circumstances in the case. *Bryant v. Scott*, 28 F.3d 1411, 1415 (5th Cir. 1994) (citing *Nealy v. Cabana*, 764 F.2d 1173, 1177 (5th Cir. 1985)); *see also Anderson v. Johnson*, 338 F.3d 382, 391 (5th Cir. 2003). A strong indication that counsel performed unreasonably is if counsel did not interview eyewitnesses and alibi witnesses. *Bryant*, 28 F.3d at 1415. Counsel provides ineffective assistance where he relies solely on discussions with the defendant and material provided by the prosecution. *Anderson*, 338 F.3d at 391.

"In assessing unreasonableness a heavy measure of deference must be applied to counsel's judgments. A defendant who alleges a failure to investigate on the part of his counsel must allege with specificity what the investigation would have revealed and how it would have altered the

outcome of the trial.” *United States v. Green*, 882 F.2d 999, 1003 (5th Cir. 1989) (citations omitted). “Under *Strickland*, however, a petitioner cannot “simply allege but must ‘affirmatively prove’ prejudice.” *Wilkerson v. Collins*, 950 F.2d 1054, 1065 (5th Cir. 1992) (quoting *Celestine v. Blackburn*, 750 F.2d 353, 356 (5th Cir. 1984)). “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).

The State relies on the state habeas court’s findings that Rivers’s counsel interviewed potential witnesses, reviewed evidence regarding Rivers’s ex-wife’s motive to implicate Rivers, consulted with Rivers to prepare for trial, and made the strategic decision not to interview the victims of the offense. ECF No. 19 at 11–12. The state habeas court ultimately found that Rivers’s claims of ineffective assistance of counsel failed because counsel’s “overall trial strategy was reasonable” and that the amount of trial preparation rendered in Rivers’s case does not prove that his counsel’s performance fell below an objective standard of performance. *Id.*

Mahler, Trotter, and Barber all submitted sworn affidavits to the TCCA concerning their representation of Rivers. All three affidavits state that counsel met with Rivers on numerous occasions, that their defense strategy was limited by the fact that Rivers had admitted to counsel that he engaged in sexual activities with the victims for several years, that counsel interviewed all witnesses provided by Rivers—including the alibi witnesses Rivers contends were never interviewed, and that it was a strategic trial decision not to have Rivers testify at trial or bring on additional experts due to the type of offenses involved in the case. ECF No. 24-10 at 60–138.

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.” *Green v. Johnson*, 116 F.3d 1115, 1122 (5th Cir. 1997) (quoting *Garland v. Maggio*, 717 F.2d 199, 206 (5th Cir. 1983)). “[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable[.]” *Strickland*, 466 U.S. at 690. Rivers summarily argues that his counsel’s trial strategy was flawed, and thus rendered ineffective assistance of counsel. While the Court must construe a *pro se* habeas petition liberally, conclusory allegations are insufficient to raise cognizable claims of ineffective assistance of counsel. *Miller v. Johnson*, 200 F.3d 274, 282 (5th Cir. 2000) (citing *Estelle*, 694 F.2d at 1012); *see also United States v. Daniels*, 12 F. Supp. 2d 568, 575 (N.D. Tex. 1998) (holding that conclusory allegations cannot serve as basis for a claim of ineffective assistance of counsel in a habeas proceeding). In light of the state habeas court’s findings and counsel’s sworn affidavits, Rivers’s ineffective assistance of counsel claims do not prove that his counsel’s representation fell below an objectively reasonable standard of performance. Because Rivers has not overcome his burden of establishing how his counsel’s strategy was so flawed that it prejudiced his case, the undersigned recommends that River’s claims of ineffective assistance of trial counsel be denied.

II. Ineffective Assistance of Appellate Counsel

Rivers argues that his appellate counsel, Barber and Dustin Nimz (“Nimz”), were ineffective for failing to conduct a reasonable investigation into mitigating evidence. ECF No. 27-2 at 28–29. Specifically, Rivers argues that his first appellate counsel, Barber, made “no contact” with Rivers during his representation of him on appeal, improperly advised Rivers not to testify at trial, and failed to advise Nimz—who replaced Barber as Rivers’s appellate counsel—on the status

of the case. *Id.* at 28. With regard to Nimz, Rivers argues that he was unfamiliar with the case, failed to raise issues on appeal, and missed court ordered deadlines. *Id.* at 29. Rivers contends that both Barber and Nimz failed to conduct a reasonable investigation concerning the issues on appeal and, further, failed to consult with Rivers himself. *Id.*

In a claim of ineffective assistance of counsel on appeal, a petitioner must demonstrate both that “counsel’s errors were so serious that counsel was not functioning as the counsel guaranteed to the defendant by the sixth amendment” and “that the particular lapse was prejudicial, meaning that there is a reasonable probability that but for the error the ultimate result would have been different.” *McCrae v. Blackburn*, 793 F.2d 684, 688 (5th Cir. 1986). A reasonable probability is one sufficient to undermine confidence in the outcome of the appeal. *Sharp v. Puckett*, 930 F.2d 450, 453 (5th Cir. 1991). The Constitution does not require appellate counsel to raise every nonfrivolous ground that might be asserted on appeal. *Jones v. Barnes*, 463 U.S. 745, 751 (1983). “Instead, to be deficient, the decision not to raise an issue must fall ‘below an objective standard of reasonableness.’” *United States v. Phillips*, 210 F.3d 345, 348 (5th Cir. 2000) (quoting *Strickland*, 466 U.S. at 688). “[A] reasonable attorney has an obligation to research relevant facts and law, or make an informed decision that certain avenues will not prove fruitful. Solid, meritorious arguments based on directly controlling precedent should be discovered and brought to the court’s attention.” *United States v. Williamson*, 183 F.3d 458, 463 (5th Cir. 1999). To determine whether appellate counsel was deficient, the Court thus must consider whether the omitted challenge “would have been sufficiently meritorious such that [the attorney] should have raised it on appeal.” *Phillips*, 210 F.3d at 348.

Rivers states that neither Barber nor Nimz “performed any objectively reasonably investigation for [his] appeal.” ECF No. 27-2 at 29. A petitioner who alleges a failure to investigate

on the part of counsel *must* allege with specificity what the investigation would have revealed and how it would have altered the outcome of the proceeding. *Alexander v. McCotter*, 775 F.2d 595, 602 (5th Cir. 1985); *Gray v. Lucas*, 677 F.2d 1086, 1093 (5th Cir. 1982). Conclusory claims are insufficient to entitle a habeas corpus petitioner to relief. *United States v. Woods*, 870 F.2d 285, 288 (5th Cir. 1989); *Schlang v. Heard*, 691 F.2d 796, 799 (5th Cir. 1982). Here, Rivers's conclusory allegations that both Barber and Nimz failed to properly investigate his case on appeal do not sufficiently specify what a further investigation by either Barber or Nimz would have revealed. Thus, Rivers's claim does not meet the second prong of *Strickland*, as Rivers does not argue or provide sufficient support of how the result on appeal would have been different. Because these claims are conclusory in nature, they fail to state a ground upon which habeas relief may be granted. *Estelle*, 694 F.2d at 1012. Rivers has failed to demonstrate that his counsel's performance on appeal was objectively unreasonable or that it resulted in prejudice. Therefore, habeas relief on this ground should be denied.

III. Impartial Jury

Rivers argues that he was denied the right to a fair and impartial jury because one of the jurors, Ms. Green ("Green"), "became ill" and was "admitted to the hospital," and thus Rivers was forced to proceed with an eleven-member jury. ECF No. 27-2 at 26. Rivers challenges the state judge's decision to declare Green "disabled" and to proceed with an eleven-person jury. *Id.* It appears that Rivers challenges the constitutionality of not having a twelve-person jury. The Sixth Amendment constitutional guarantee of trial by jury in criminal cases applies to the states through the Fourteenth Amendment; however, the Sixth Amendment does not prescribe the size of the jury a state must provide for a criminal defendant. *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968). In *Williams v. Florida*, the Supreme Court held that a twelve-member jury was not an indispensable

component of the Sixth Amendment jury trial guarantee. 399 U.S. 78, 100 (1970). However, in *Ballew v. Georgia*, the Supreme Court held that a jury of fewer than six members does violate the constitutional guarantee. 435 U.S. 223, 239 (1978).

Article 36.29(a) of the Texas Code of Criminal Procedure provides “not less than twelve jurors can render and return a verdict in a felony case.” However, the article provides an exception that if one juror dies or becomes “disabled” before the jury is given its charge, the remaining eleven jurors have the power to render a verdict. Tex. Code Crim. Proc. art. 36.29(c); *see Mills v. Collins*, 924 F.2d 89, 91 (5th Cir. 1991) (finding that the state district court’s interpretation of Article 36.29(c) was not subject to review); *Moore v. Director*, No. 9:12-CV-100, 2015 WL 10793852, *4 (E.D. Tex. Aug. 5, 2015) (petitioner was not prejudiced when the state habeas court excused a juror from the jury due to a sudden illness). Here, Rivers has failed to show the state habeas court’s finding was contrary to or involved an unreasonable application of clearly established federal law, 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. 28 U.S.C. § 2254(d).

Further, Rivers argues that juror Luke Oechsner (“Oechsner”) allegedly knew the victims and their families, and thus Rivers was denied an impartial jury trial by the presence of this juror. ECF No. 27-2 at 27. In response, the State relies on the state appellate court finding, based on the sworn affidavit submitted by Oechsner and the testimony of the witnesses, that it was “implicitly determined that Oechsner did not know the victims or their families.” ECF No. 22-18 at 8.

“The Sixth Amendment requires that in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.” *Solis v. Cockrell*, 342 F.3d 392, 395 (5th Cir. 2003). The Sixth Amendment does not prescribe a specific test as to what constitutes impermissible juror bias. *Id.* “Bias can be actual or implied; that is, it may be bias in fact or bias

conclusively presumed as a matter of law.” *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 556–57 (1984). Implied bias cases warranting a new trial occur only in “extreme situations.” *Solis*, 342 F.3d at 395. In *Uranga v. Davis*, the Fifth Circuit recently clarified that the following instances “rise to the level of the extreme situations” to “trigger the application of the implied bias doctrine:” a juror who is an actual employee of the prosecuting agency, a juror who is a close relative of one of the participants in the trial, or a juror who was a witness or somehow involved in the criminal transactions. ____ F.3d ___, 2018 WL 3028691, at *4–5 (5th Cir. 2018). Here, there is no evidence in the record that indicates that Oechsner knew any of the victims or their families, and thus Rivers’s request for relief on this ground lacks merit. However, even assuming *arguendo* that Oeschner knew the victims and their families, this alone is not the type of “extreme situation” to warrant habeas relief. Thus, the circumstances of this case do not rise to the level of the extreme situations that previously have been found to constitute juror bias. Habeas relief is not warranted on this ground.

IV. Prosecutorial Misconduct

Rivers argues that his constitutional rights were violated due to the misconduct of the prosecutor at trial. ECF No. 27-2 at 20–21. A claim of prosecutorial misconduct is actionable on federal habeas review only where the alleged misconduct so infected the trial with unfairness as to make the resulting conviction a denial of due process. *Darden v. Wainwright*, 477 U.S. 168, 181 (1986). Due process is only violated when the alleged conduct deprived the petitioner of his right to a fair trial. A trial is fundamentally unfair if there is a reasonable probability the verdict might have been different had the trial been properly conducted. *Styron v. Johnson*, 262 F.3d 438, 454 (5th Cir. 2001). As a general rule, habeas corpus relief is available for prosecutorial misconduct only when the prosecutor’s conduct is so egregious in the context of the entire trial that it renders

the trial fundamentally unfair. *Darden*, 477 U.S. at 181. The conduct must either be so persistent and pronounced, or the evidence so insubstantial that, but for the remarks, no conviction would have occurred. *Kirkpatrick v. Blackburn*, 777 F.2d 272, 281 (5th Cir. 1985) (*per curiam*).

Here, Rivers argues that the prosecutor “tainted” the jurors with his “improper association between Ted Bundy and [Rivers].” ECF No. 27-2 at 24. Specifically, Rivers argues that the prosecutor’s use of PowerPoint to compare him to the notorious murderer Ted Bundy rendered his trial fundamentally unfair. *Id.* In response, the State argues that Rivers failed to show how the prosecutor’s trial strategy rendered his trial fundamentally unfair and relies on trial counsel’s affidavits submitted to the state habeas court, which provided that the examples the prosecutor used in his PowerPoint presentation were “nothing out of the ordinary.” ECF No. 19 at 28; ECF No. 24-10 at 67, 87, and 115. Rivers has not shown that the prosecutor’s trial strategy was so egregious as to render his trial fundamentally unfair. To the extent that Rivers argues that his counsel were ineffective for failing to object to the prosecutor’s presentation and statements during jury *voir dire*, Rivers fails to show that his counsel’s decisions not to object gave rise to constitutional violations. *See Zafiro v. United States*, 506 U.S. 534, 540–41 (1993) (“[E]ven if there were some risk of prejudice, here it is of the type that can be cured with proper instructions, and ‘juries are presumed to follow their instructions.’”); *Johnson v. Cockrell*, 306 F.3d 249, 255 (5th Cir. 2002) (finding that counsel is not required to make frivolous objections). Accordingly, Rivers has failed to show he is entitled to habeas relief on this basis.

V. Constitutionality of Texas Penal Code Article 21.02

Rivers further contends that Article 21.02 of the Texas Penal Code is unconstitutional because the statute “requires 2 or more acts of sexual abuse within a 30 day or more duration of time,” and thus creates a risk that juries can disagree over which specific acts to use to convict a

defendant of the offense. ECF No. 27-2 at 25. Further, Rivers contends that Article 21.02 is the “only statute in Texas which does not require jury unanimity,” and thus is unconstitutional. *Id.*

Article 21.02 of the Texas Penal Code provides:

A person commits an offense if: (1) during a period that is 30 or more days in duration, the person commits two or more acts of sexual abuse, regardless of whether the acts of sexual abuse are committed against one or more victims; and (2) at the time of the commission of each of the acts of sexual abuse, the actor is 17 years of age or older and the victim is a child younger than 14 years of age.

Tex. Penal Code § 21.02(b).

Rivers makes conclusory allegations that Article 21.02 “creates a risk where juries can disagree over which specific acts to conflict a defendant” without explaining how the elements of the offense would cause such issues. Conclusory claims are insufficient to entitle a habeas corpus petitioner to relief. *Woods*, 870 F.2d at 288. To the extent that Rivers claims that Article 21.02 is unconstitutional because it does not require a unanimous jury verdict, the claim fails. There is no federal constitutional right to a unanimous jury verdict in state criminal proceedings. *Urseti v. Davis*, No. 3:16-CV-802-G-BH, 2018 WL 2075837 (N.D. Tex. Mar. 19, 2018) (citing *Apodaca v. Oregon*, 406 U.S. 404, 406–410 (1972)); *see also Johnson v. Louisiana*, 406 U.S. 356, 359 (1972) (“We note at the outset that this Court has never held jury unanimity to be a requisite of due process of law. Indeed, the Court has more than once expressly said that ‘[i]n criminal cases, due process of law is not denied by a state law . . . which dispenses with the necessity of a jury of twelve, or unanimity in the verdict’ ”) (citations omitted). Accordingly, habeas relief is not warranted on this ground.

VI. Grand Jury Proceedings

Rivers further contends that the selection of the grand jury that indicted him was unconstitutional. ECF No. 27-2 at 18. Specifically, Rivers argues that the grand jury selection was

based on the “pick-a-pal system where a judge would select a panel of Jury Commissioners who would then select a panel of grand jurors,” and thus violated his due process rights. *Id.* Rivers appears to argue that the grand jury was not selected at random as required under Article 19.01 of the Texas Code of Criminal Procedure. *Id.*; Tex. Code Crim. Proc. art. § 19.01.

While Rivers does have a right to have a fair cross-section of the community on panels from which grand jurors are chosen, Rivers does not plead the elements of a fair cross-section claim. *Duren v. Missouri*, 439 U.S. 357, 364 (1979); *Paredes v. Quarterman*, 574 F.3d 281, 289 (5th Cir. 2009) (“The fair-cross-section requirement does not guarantee ‘jur[ies] of any particular composition.’”). Instead, Rivers makes conclusory allegations that the grand jury was not selected at random without any supporting facts. “Although *pro se* habeas petitions must be construed liberally, ‘mere conclusory allegations on a critical issue are insufficient to raise a constitutional issue.’” *Koch v. Puckett*, 907 F.2d 524, 530 (5th Cir. 1990) (quoting *Woods*, 870 F.2d at 288 n.3); see *Ross v. Estelle*, 694 F.2d 1008, 1012 (5th Cir. 1983) (emphasizing that mere conclusory allegations do not raise constitutional issues in habeas proceedings). Rivers has offered no facts or circumstances that could demonstrate that he is entitled to relief on this ground.

VII. Judicial Impropriety

In his last claim for relief, Rivers argues that he was deprived of a fair and impartial trial because the state habeas judge, Judge Bob Brotherton, did not appoint Rivers an attorney, and he was “forced” to proceed *pro se*. ECF No. 27-2 at 16. In addition, Rivers states that he filed an application for a court of inquiry under Chapter 52 of the Texas Code of Criminal Procedure, in which he alleged Judge Brotherton “committed obstruction, perjury, and criminal violations.” See Tex. Code Crim. Proc. art. 52.01. *Id.* Rivers argues that because he filed the application for a court

of inquiry, that Judge Brotherton was required to “voluntarily recuse himself and/or disqualify himself from further acting in the proceedings on remand.” ECF No. 27-2 at 17.

However, as the State argues, in general there is “no constitutional right to habeas counsel in state collateral proceedings exists, so [an inmate] cannot claim a constitutional violation.” *Beazley v. Johnson*, 242 F.3d 248, 271 (5th Cir. 2001); *Barraza v. Cockrell*, 330 F.3d 349, 352 (5th Cir. 2003) (“[T]here is no constitutional right to competent habeas counsel.”); *see also Fairman v. Anderson*, 188 F.3d 635, 643 (5th Cir. 1999) (“[B]ecause appointment of counsel on state habeas is not constitutionally required, any error committed by an attorney in such a proceeding cannot be constitutionally ineffective.”); 28 U.S.C. § 2254(i) (providing that the ineffectiveness or incompetence of counsel during state collateral post-conviction proceedings shall not be a ground for relief). Thus, Rivers’s claim fails on this ground.

With regard to Rivers’s claim that he was denied a fair and impartial tribunal, the undersigned notes that Rivers simply makes conclusory allegations that Judge Brotherton “committed obstruction, perjury, and criminal violations” without any supporting facts. ECF No. 27-2 at 16. A criminal defendant has the right to a fair and impartial tribunal under the Due Process Clause. *Richardson v. Quartermar*, 537 F.3d 466, 474 (5th Cir. 2008) (citing *Bracy v. Gramley*, 520 U.S. 899 (1997)). A defendant is entitled to a fair trial before a judge with no actual bias against the defendant or interest in the outcome of the particular case. *Id.* Judicial bias is not easily established, and courts presume that a judge has properly discharged official duties. *Id.* General allegations of judicial bias are insufficient to establish a constitutional violation. *Id.* Courts have found constitutionally intolerable bias only in extreme cases. *Aetna Life Ins. Co.*, 475 U.S. at 821, 822 (1986) (finding that, for the requisite extreme case, a party must show a judge has a “direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case.”). Rivers

has not presented any evidence that Judge Brotherton had a personal, substantial, or pecuniary interest in his case, and Rivers certainly has not offered any evidence that shows an extreme case where there was a probability of bias that was so high that it was constitutionally intolerable.

Further, Rivers argues that Judge Brotherton was required to recuse himself after Rivers filed the request for a court of inquiry under Chapter 52 of the Texas Code of Criminal Procedure. ECF No. 27-2 at 16. Chapter 52 allows a district judge to request the appointment of another judge to conduct a court of inquiry if the judge finds that probable cause exists to believe an offense has been committed. Tex. Code Crim. Proc. art. 52.01(a). Nothing in Chapter 52 indicates that Judge Brotherton was required to recuse himself based on Rivers's application for a court of inquiry.

To the extent that Rivers argues that the state trial judge failed to file any additional findings and conclusions after the case was remanded by the TCCA, Rivers's claim lacks merit. In its review of Rivers's habeas application for the second time, the TCCA expressly stated:

On October 5, 2016, we remanded these applications for a response from counsel and findings of fact and conclusions of law from the trial court. On remand, counsel filed affidavits in response to Applicant's claims, and the trial court entered findings of fact and concluded that counsel were not ineffective. We agree.

Ex parte Rivers, Nos. WR-84,550-01 & 84,550-02, 2017 WL 338091 (Tex. Crim. App. June 7, 2017). Thus, Rivers's claim that Judge Brotherton failed to follow the procedures and recommendations of the TCCA by not filing any findings of fact is simply false. Accordingly, habeas relief is not warranted on these grounds.

Conclusion

Because Petitioner has not shown that he is entitled to habeas relief, the undersigned **RECOMMENDS** that Petitioner's Amended Petition for Writ of Habeas Corpus (ECF No. 27) be **DISMISSED with prejudice**.

A copy of this Findings, Conclusions, and Recommendation shall be served on all parties in the manner provided by law. Any party who objects to any part of this Findings, Conclusions, and Recommendation must file specific written objections within fourteen days after being served with a copy. *See* 28 U.S.C. § 636(b)(1)(B) and Fed. R. Civ. P. 72(b)(1). In order to be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and specify the place in the magistrate judge's Findings, Conclusions, and Recommendation where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the magistrate judge is not specific. Failure to file specific written objections will bar the aggrieved party from appealing the factual findings and legal conclusions of the magistrate judge that are accepted or adopted by the district court, except upon grounds of plain error. *See Douglass v. United Services Auto. Ass'n*, 79 F.3d 1415, 1417 (5th Cir. 1996).

Signed July 27, 2018.

Hal R. Ray, Jr.
Hal R. Ray, Jr.
UNITED STATES MAGISTRATE JUDGE

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION**

DANNY RICHARD RIVERS,

§

Petitioner,

§

v.

Civil Action No. 7:17-cv-124-O-BP

**LORIE DAVIS, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,**

§

Respondent.

§

**ORDER ACCEPTING FINDINGS, CONCLUSIONS, AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE**

This is a habeas action brought pursuant to 28 U.S.C. § 2254 in which Petitioner challenges the validity of his 2012 convictions for continuous sexual abuse of a young child, indecency with a child by exposure, indecency with a child by sexual contact (two counts), and possession of child pornography (two counts). *See* Trial Court Judgments, ECF No. 22-10 at 231-48 (Bates Stamped 225-42). The United States Magistrate Judge entered his Findings, Conclusions, and Recommendation in which he recommends that the petition be denied. *See* ECF No. 38. Objections were filed by Petitioner. ECF No. 43. The district court reviewed de novo those portions of the proposed Findings, Conclusions, and Recommendation to which objection was made, and reviewed the remaining proposed Findings, Conclusions, and Recommendation for plain error. Finding no error, I am of the opinion that the findings of fact, conclusions of law, and reasons for denial set forth in the Magistrate Judge's Recommendation are correct and they are hereby adopted and incorporated by reference as the Findings of the Court with the following exceptions:

In his objections, Petitioner states that he is not confined in the Allred Unit in Iowa Park, Texas. Rather, he is confined in the McConnell Unit in Beeville, Texas. Based on Petitioner's statement and on the return address on the envelope in which his objections were submitted, the **Clerk of Court** shall update Petitioner's address on the docket sheet to reflect that he has moved to the McConnell Unit.

Petitioner challenges the Magistrate Judge's factual determination that no affidavits were produced to support Petitioner's claim of ineffective assistance of counsel for failure to call additional defense witnesses. Petitioner is correct in that he filed three affidavits in support of this claim; the affidavits of Antonio Dino Fernandez, Misty Rodd-Finley, and Danny R. Rivers, Sr. *See* Petitioner's Exhibits, ECF No. 27-3 at 9-11. These affidavits were also filed in the state habeas proceeding and were before the Texas Court of Criminal Appeals. *See* ECF No. 23-3 at 3-5; ECF No. 23-12 at 2. The state habeas court reviewed the affidavits of Petitioner's attorneys finding them to be reliable and credible. *See* ECF No. 25-22 at 79-87. Such credibility determinations by the state habeas court must be afforded deference. *See Carter v. Collins*, 918 F.2d 1198, 202 (5th Cir. 1990) ("a state court may evaluate an ineffective assistance of counsel claim by making credibility determinations based on affidavits submitted by the petitioner and the attorney"). Findings of fact made by a state court on competing affidavits regarding a claim of ineffective assistance of counsel must be presumed correct unless the petitioner presents clear and convincing evidence to the contrary. *See Gregory v. Thaler*, 601 F.3d 347, 2010 WL 1010598, at *4 (5th Cir. 2010); 28 U.S.C. § 2254(e)(1). Petitioner has offered no evidence other than the same affidavits that were before the

Court of Criminal Appeals.¹ Therefore, the credibility determinations made by the state habeas court must be afforded deference. *Coleman v. Quarterman*, 456 F.3d 537, 541 (5th Cir. 2006).

For the foregoing reasons, the petition for writ of habeas corpus is **DENIED**.

SO ORDERED this 17th day of September, 2018.


Reed O'Connor
UNITED STATES DISTRICT JUDGE

¹ The Court of Criminal Appeals' written order denying state habeas relief is located at ECF No 24-13 in the instant case, and at *Ex parte Rivers*, Nos. WR-84,550-01 & 84,550-02, 2017 WL 3380491 (Tex. Crim. App. June 7, 2017).

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION**

DANNY RICHARD RIVERS,

Petitioner,

v.

Civil Action No. 7:17-cv-124-O-BP

**LORIE DAVIS, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,**

Respondent.

JUDGMENT

This action came on for consideration by the Court, and the issues having been duly considered and a decision duly rendered,

It is ORDERED, ADJUDGED, and DECREED that the petition for writ of habeas corpus is DENIED.

SIGNED this 17th day of September, 2018.

Reed O'Connor
Reed O'Connor
UNITED STATES DISTRICT JUDGE

United States Court of Appeals
for the Fifth Circuit

No. 18-11490

DANNY RICHARD RIVERS,

Petitioner—Appellant,

versus

BOBBY LUMPKIN, *Director, Texas Department of Criminal Justice,
Correctional Institutions Division,*

Respondent—Appellee.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 7:17-CV-124

ON PETITION FOR REHEARING
AND REHEARING EN BANC

Before RICHMAN, *Chief Judge*, and COSTA and HO, *Circuit Judges.*

PER CURIAM:

The petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (FED. R. APP. P. 35 and 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.

United States Court of Appeals

**FIFTH CIRCUIT
OFFICE OF THE CLERK**

**LYLE W. CAYCE
CLERK**

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

August 12, 2022

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 18-11490 Rivers v. Lumpkin
USDC No. 7:17-CV-124

Enclosed is an order entered in this case.

Sincerely,

LYLE W. CAYCE, Clerk

Lisa E. Ferrara

By: Lisa E. Ferrara, Deputy Clerk
504-310-7675

Mr. Danny Richard Rivers
Ms. Jennifer Wissinger