

United States Court of Appeals
for the Fifth Circuit

No. 22-10709

United States Court of Appeals
Fifth Circuit

FILED

October 18, 2022

Lyle W. Cayce
Clerk

ROBERT RODERICK STUBBLEFIELD,

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 Northern District of Texas
USDC No. 3:20-CV-213

ORDER:

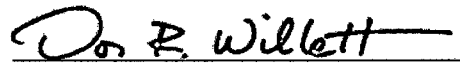
Robert Roderick Stubblefield, Texas prisoner 02021063, seeks a certificate of appealability (COA) to challenge the district court's denial and dismissal of his 28 U.S.C. § 2254 application. Stubblefield filed the § 2254 application to attack his conviction for continuous sexual abuse of a victim under the age of 14, for which he was sentenced to 80 years of imprisonment. Stubblefield raised claims that (1) the prosecution engaged in misconduct, (2) his due process rights were violated when the trial court allowed into evidence Stubblefield's prior acts, and (3) he received ineffective assistance because his counsel failed to have a "firm command of

No. 22-10709

the facts or laws that applied to his case.” The district court found all of his claims were either unexhausted or procedurally barred. In his COA motion, Stubblefield challenges the district court’s findings and argues the merits of his claims.

To obtain a COA, Stubblefield must make “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). Where, as here, the district court’s denial of federal habeas relief is based on procedural grounds, we will issue a COA “when the prisoner shows, at least, that jurists of reason would find it debatable whether the [application] states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Stubblefield has not met this standard.

Accordingly, Stubblefield’s motion for a COA is DENIED. His motion for appointment of counsel is likewise DENIED.


DON R. WILLET
United States Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ROBERT STUBBLEFIELD,)	
)	
Petitioner,)	
)	
v.)	
)	
DIRECTOR, TDCJ-CID,)	
)	
Respondent.)	Civil Action No. 3:20-CV-0213-C-BT

ORDER

Before the Court are the Findings, Conclusions, and Recommendation of the United States Magistrate Judge therein advising the Court that Petitioner's motion for a certificate of appealability should be denied.¹

The Court conducts a *de novo* review of those portions of the Magistrate Judge's report or specified proposed findings or recommendations to which a timely objection is made. 28 U.S.C. § 636(b)(1)(C). Portions of the report or proposed findings or recommendations that are not the subject of a timely objection will be accepted by the Court unless they are clearly erroneous or contrary to law. *See United States v. Wilson*, 864 F.2d 1219, 1221 (5th Cir. 1989).

After due consideration and having conducted a *de novo* review, the Court finds that Petitioner's objections should be **OVERRULED**. The Court has further conducted an independent review of the Magistrate Judge's findings and conclusions and finds no error. It is therefore **ORDERED** that the Findings, Conclusions, and Recommendation are hereby **ADOPTED** as the findings and conclusions of the Court. For the reasons stated therein, and

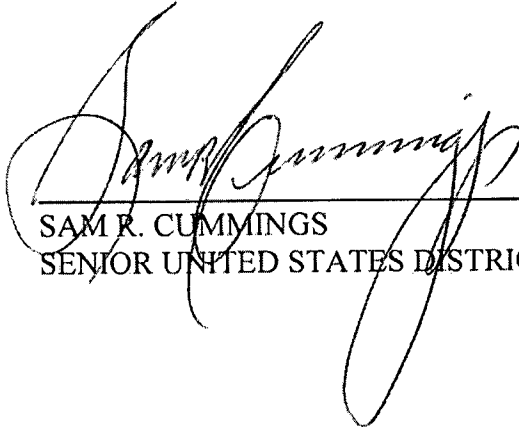
¹ Petitioner has filed objections to the Magistrate Judge's Findings, Conclusions, and Recommendation.

pursuant to Rule 22 of the Federal Rules of Appellate Procedure and 28 U.S.C. § 2253(c), this Court finds that a certificate of appealability should be **DENIED**. Specifically, Movant has failed to show that a reasonable jurist would find: (1) this Court's "assessment of the constitutional claims debatable or wrong," or (2) "it debatable whether the petition states a valid claim of the denial of a constitutional right" and "debatable whether [this Court] was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

The Clerk of Court is directed to **CLOSE** this civil action.

SO ORDERED.

Dated August 22, 2022.



SAM R. CUMMINGS
SENIOR UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ROBERT RODERICK	§	
STUBBLEFIELD,	§	
Petitioner,	§	
	§	No. 3:20-cv-00213-C (BT)
v.	§	
	§	
DIRECTOR, TDCJ-CID,	§	
Respondent.	§	

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

Petitioner Robert Roderick Stubblefield has filed a motion seeking a certificate of appealability (COA). (ECF No. 34.) For the following reasons, the District Court should deny Stubblefield's motion.

I.

Stubblefield initiated this habeas action by filing a petition for a writ of habeas corpus under 28 U.S.C. § 2254 in the Tyler Division of the Eastern District of Texas. Because the petition attacked a conviction from Kaufman County, Texas, the court transferred the case to the Northern District of Texas, Dallas Division. (ECF No. 3.) On June 10, 2022, the United States magistrate judge issued findings and conclusions, recommending the petition be dismissed with prejudice. FCR (ECF No. 29). Stubblefield filed objections and an exhibit. (ECF No. 30.) On July 11, 2022, the District Court accepted the magistrate judge's recommendation and dismissed Stubblefield's petition with prejudice. Ord. (ECF No. 31); J. (ECF No. 32).

Thereafter, Stubblefield appealed this case to the Fifth Circuit Court of Appeals. (ECF No. 33.)

Stubblefield filed the instant motion seeking a COA on July 15, 2022. (ECF No. 34.) In his motion, Stubblefield argues that the District Court has not granted him a COA, and if it does, he can appeal the District Court's final judgment to the Fifth Circuit Court of Appeals.

II.

The district court must issue or deny a COA when it enters a final order adverse to the petitioner. The Rules Governing Section 2254 Cases (Section 2254 Rules), Rule 11(a). The standard for granting a COA requires the petitioner to make a substantial showing of the denial of a constitutional right. Slack v. McDaniel, 529 U.S. 473, 483-84 (2000); *see also* Elizalde v. Dretke, 362 F.3d 323, 328 (5th Cir. 2004) (citing 28 U.S.C. § 2253(c)(2)). In making the requisite showing, the petitioner does not have to establish that he would prevail on the merits. *See* Slack, 529 U.S. at 483-84. Rather, the petitioner must only demonstrate that the issues are subject to debate among jurists of reason, a court could resolve the issues in a different manner, or the questions presented are worthy of encouragement to proceed further. *See id.* at 484. Any doubt regarding whether to grant a COA should be resolved in favor of the petitioner. *See* Miller v. Johnson, 200 F.3d 274, 280-81 (5th Cir. 2000). If the district court denies a COA, the parties may

not appeal the denial, but they may seek a COA from the court of appeals. Fed. R. App. Proc. 22(a); Section 2254 Rules, Rule 11(a).

Stubblefield raised eight claims in his habeas petition. FCR 2-3 (ECF No. 29). The magistrate judge addressed each of those claims and recommended that the petition be dismissed with prejudice because his prosecutorial misconduct claims were procedurally barred. *Id.* 3-4. The magistrate judge further found that Stubblefield's ineffective assistance of counsel claim and his claim that the trial court abused its discretion were unexhausted and procedurally barred. *Id.* 5-8. On July 11, 2022, the District Court accepted the recommendation and dismissed the petition with prejudice. Considering the magistrate judge's recommendation and the District Court's acceptance of that recommendation to dismiss the petition with prejudice, Stubblefield has failed to demonstrate that his claims are worthy of further encouragement. *See Slack*, 529 U.S. at 484. Likewise, he has not shown that any of his claims are subject to debate by jurists of reason, or another court may resolve the claims differently. *See id.* Therefore, Stubblefield has failed to demonstrate that he is entitled to a COA, and the District Court should deny his motion.

III.

For the foregoing reasons, the Court should DENY Stubblefield's motion.

SO RECOMMENDED.

Signed July 28, 2022.



REBECCA RUTHERFORD
UNITED STATES MAGISTRATE JUDGE

**INSTRUCTIONS FOR SERVICE AND
NOTICE OF RIGHT TO APPEAL/OBJECT**

A copy of this report and recommendation shall be served on all parties in the manner provided by law. Any party who objects to any part of this report and recommendation must file specific written objections within 14 days after being served with a copy. *See* 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72(b). 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 report 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 Automobile Ass'n*, 79 F.3d 1415, 1417 (5th Cir. 1996)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ROBERT STUBBLEFIELD,)	
)	
Petitioner,)	
)	
v.)	
)	
DIRECTOR, TDCJ-CID,)	
)	
Respondent.)	Civil Action No. 3:20-CV-0213-C-BT

ORDER

Before the Court are the Findings, Conclusions, and Recommendation of the United States Magistrate Judge therein advising the Court that Petitioner's petition for a writ of habeas corpus should be denied and dismissed.¹

The Court conducts a *de novo* review of those portions of the Magistrate Judge's report or specified proposed findings or recommendations to which a timely objection is made. 28 U.S.C. § 636(b)(1)(C). Portions of the report or proposed findings or recommendations that are not the subject of a timely objection will be accepted by the Court unless they are clearly erroneous or contrary to law. *See United States v. Wilson*, 864 F.2d 1219, 1221 (5th Cir. 1989).

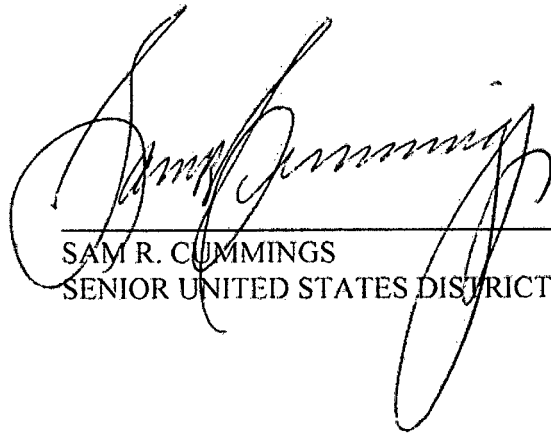
After due consideration and having conducted a *de novo* review, the Court finds that Petitioner's objections should be **OVERRULED**. The Court has further conducted an independent review of the Magistrate Judge's findings and conclusions and finds no error. It is therefore **ORDERED** that the Findings, Conclusions, and Recommendation are hereby **ADOPTED** as the findings and conclusions of the Court. For the reasons stated therein, the

¹ Petitioner has filed timely objections to the Magistrate Judge's Findings, Conclusions, and Recommendation.

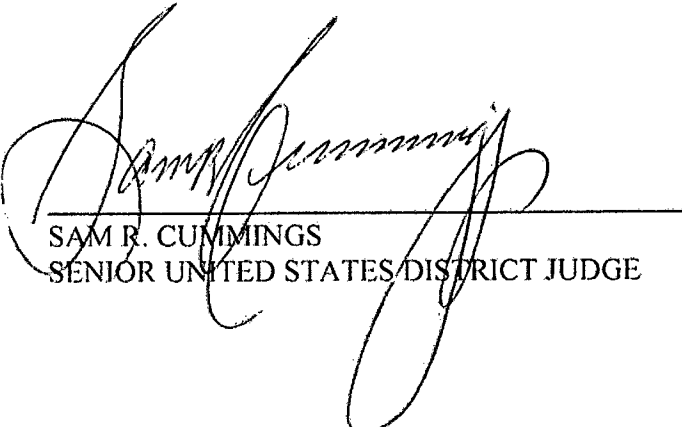
Court **ORDERS** that Petitioner's petition for a writ of habeas corpus be **DENIED** and **DISMISSED**.

SO ORDERED.

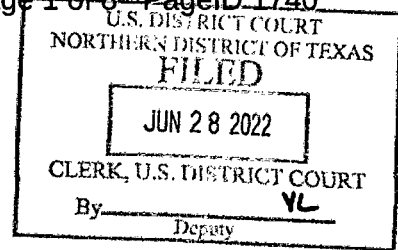
Dated July 11, 2022.



SAM R. CUMMINGS
SENIOR UNITED STATES DISTRICT JUDGE



SAM R. CUMMINGS
SENIOR UNITED STATES DISTRICT JUDGE



IN THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS

Robert Roderick Stubblefield, §
Petitioner,

V. § Cause No. 3:20-cv-00213

Bobby Lumpkin, Director TDCJ, §
Respondant.

OBJECTIONS TO MAGISTRATE'S
REPORT AND RECOMMENDATIONS

Comes now Stubblefield, pro se, to lodge his timely objections to the report and recommendations issued by the Magistrate Judge on 10 day of June, 2022, pursuant to Habeas Rule 11(a), F.R.A.P. Rule 22, and 28 U.S.C. § 2253(c). The due date of the objections is fourteen (14) days past the date of the report and recommendations, which is the 24 day of June, 2022. Stubblefield received the report from the mailroom the 14 day of June, 2022.

A request for a certificate of appealability and a notice of appeal will be filed simultaneously if these objections are rejected by this court.

OBJECTIONS- FACTUAL AND LEGAL ERRORS

Stubblefield disagrees with the following factual and legal findings in the report, and cites the record in support of all claims raised herein:

A failure to address a particular ground in this motion is not intended as a waiver of the right to seek appellate review of that ground.

Magistrate's Report (Report) page 1, first paragraph, has the age range of the charge at under ten when it should read fourteen. Stubblefield addressed this same issue with the Respondant's return to the Order to show cause in his Traveres on page 12. Report page 3- States that the claims raised under Prosecutorial Misconduct "...were not raised on direct appeal or in a state habeas application, they have been defaulted."

Stubblefield did raise these claims on his state habeas application under ground number five.

Report page 4- In reference to the default placed on the Prosecutorial Misconduct claim by the state for not filing it on the direct appeal, the report states: "Currently, Stubblefield makes no attempt to demonstrate cause for the default and actual prejudice resulting therefrom."

Stubblefield did show cause in his Traverse on pages 3&4. Cause for the default was trial counsel's failure to object to the misconduct and preserve the issues for direct appeal review. Stubblefield has also filed an ineffective assistance of counsel claim that includes his failure to object. See EDWARDS V. CARPENTER, 120 S.Ct. 1587,1591(2000).

Stubblefield has shown prejudice, because he suffered actual substantial harm from the misconduct of the state. The outcome of the proceedings would have been different and a fundamental miscarriage of justice resulted as well. The leading and coaching of the complaintant to change her testimony to match the charging instrument, witness bolstering, commenting on Stubblefield's trial silence and demeanor, orally presenting incorrect criminal history to the jury, misrepresenting criminal history exhibits to appear to be more crimes, and acting vindictively by pleading for a sentence of life without parole to be issued whe for many months before trial the offer was only nine(9) years with parole, violated Stubblefield's 5th, 6th, 8th, and 14th ammendment rights. Prejudice have been met to the fullest. See U.S. V. FRADY, 456 U.S. 152,170(1982).

Because these actions are firmly in the record, and because the state has never denied committing them in any of the proceedins, they are agreed to as facts. See BLAND V. CALIFORNIA DEPT. OF CORRECTIONS, 20 F3d 1469,1474(9th Cir.1994).

Report page 5- Stubblefield's ineffective assistance of counsel claim and his claim that the trial court abused its discretion are unexhausted and procedurally barred.

Stubblefield's second claim of the Due Process violation from the admission of extraneous evidence is actually his direct appeal issue(Stubblefield v. State, No.05-15-01124 CR(Tex.App.- Dallas 2017)) and also his P.D.R. as well(Stubblefield,PDR No.

0369-17(Tex.Crin.App.2017). Stubblefield also filed it under his state habeas application ground number eight. It has been fully exhausted.

Stubblefield's third claim of ineffective assistance of counsel is also exhausted as explained later. Report page 6- Stubblefield did not raise the ineffective assistance claim he now makes," which is that his attorney did not have a firm command on the law and facts involved in the case."

Filings in the state habeas proceedings by Stubblefield did give the state fair notice of this error. The memorandum that accompanied the state habeas application contained statements like:"Any competent attorney would not let this type of bias into a sex crime trial."See page 6. It also says," No reasonable attorney..." Oxford Paperback Dictionary, Third Edition, defines competent as: Having the necessary skill or knowledge to do something successfully" Further proof of exhausting this claim is found in the attached motion(Applicant's response to Trial Counsel's Amended Respose to Order Designating Issues). It no less than four times states that counsel lacked knowledge of rules and law and did not know the facts. The motion is dated 07-16-2018 and was sent well before the court's denial on 04-03-2019. See COLEMAN V. DRETKE, 395 F3d 216,200-21(5th Cir.2009).

Report page 6- Therefore, the CCA has not considered Stubblefield's second and third claims on their merits. Report page 8- Stubblefield's second and third claims are procedurally barred from Federal habeas review and they should be denied.

As shown above, all of Stubblefield's claims have been presented to the states highest court.


Report page 5- He further argues that the reliance upon defense counsel's affidavits to determine trueness and correctness of

counsel's performance is misplaced.

Stubblefield ment this not as a new ground, but as proof of meeting 28 U.S.C. § 2254(d)(1)&(2) requirements.

Stubblefield's filings should be considered liberally as the SCOTUS outlined in HAINES V. KERNER, 92 S.Ct. 594, 595 (1972). Based on the foregoing, the Magistrates report and recommendations should be rejected.

Respectfully submitted this 20 day of June, 2022.



pro se

Robert R. Stubblefield #02021063

Beto 1
1391 FM 3328
Tennessee Colony, TX 75880

Attatchment: Applicant's response to Trial Counsel's....

Ex Parte

§

In the 86th

§

District Court for

Robert Roderick Stubblefield

§

Kaufman County, Texas

Applicant's response to Trial Counsel's Amended Response to Order Designating Issues
To the Honorable Judge of said Court:

Now comes Robert Roderick Stubblefield, Applicant in the above styled and numbered case and makes the following responses to Trial Counsel's Amended Order Designating Issues. Trial Counsel only amended a small number of the questions, so Applicant will only address those at this time.


Question # 28 - The Jury in this case heard only the statement made in court by the "victim". The State clearly tells the jury that the "victim's" story remained constant. This remark is very objectable for arguing outside of evidence. It also gives the jury the impression that not only is the State convinced that the victim is truthful, but that the State has some other known evidence of guilt. Mr. Harris is a licensed attorney that can not grasp the basic workings of court. The fact that he claims to find no error here is proof of his lack of basic knowledge of how to make proper closing arguments during trial.

Question # 29 - When the State told the jury that Applicant "sat there and stared at the victim and stared at all of y'all," they made a clear reference not only to the Applicant's demeanor, but also to the fact that the Applicant was silent during the trial. This type of behavior can likely give the jury the impression that they are allowed to use this as direct evidence of guilt. Again, Mr. Harris failed to notice this error after reviewing the transcripts and he certainly couldn't have been prepared to object at the trial.

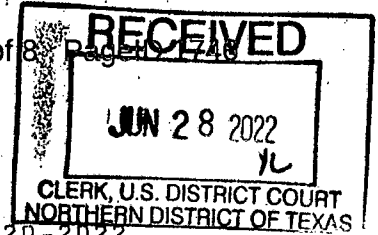
Question # 32 - Trial Counsel wants this court to believe that he based his decision not to call the Applicant's mother to testify on a conversation that he had with the attorney that represented Applicant on his juvenile offense. If this were true, then Mr. Harris had to have known that Ms. Cook told an outright lie to the jury when she informed them that Applicant went to T.Y.C. for Aggravated Assault with a Deadly Weapon, when in fact, it was for a simple Assault. There happens to be a great deal wrong with State's Exhibits numbered 11 through 17. Number 11 has no name on the fingerprints and they could belong to anyone. State's Exhibit 12 is incomplete and none of the copies are certified. It is for Credit Card Abuse 32.31. State's Exhibit 13 - this judgement for Arson 28.02(a) has uncertified copies in it. State's Exhibit 16 is the

Case 3:20-cv-00213-C-BT Document 30 Filed 06/28/22 Page 6 of 8 PageID 1745
same Credit Card Abuse 32.31 charge as State's Exhibit 12. It too is incomplete and it appears to have a Juvenile Docket sheet from 1997 included in it. State's Exhibit 17 is arranged to not show the Final Commitment Order until the middle of it. The Final Order clearly shows that the charge was a Misdemeanor Assault and not the Aggravated Felony that the State told the jury. Mr. Harris' inability to find the errors here shows his lack of effort to even investigate when directed to a specific problem. Mr. Harris has previously shown his lack of knowledge of basic hearsay rules and of the use and qualifications of experts. In Mr. Harris's Motion for New Trial Affidavit, Paragraph 10, he gives the reason for not admitting the CAC interview as being that the court wouldn't let him enter it through the interviewer Mr. Ramirez. The Court abanished Mr. Harris on the fact that what he was trying to do was barred by the rules and he still doesn't understand that any statements made by the victim can only be admitted through the victim. Mrs. Russell did not meet the standards of an expert and the Court again had to abanish him repeatedly on basic rules for expert qualifications. Mrs. Russell was only allowed to tell the jury some basic signs of sexual abuse that they had already heard. In no way did she, nor could she, be beneficial to the defense. Mr. Harris made a claim that Dr. Gottlieb would have been negative for the defense, yet he has failed to show how. As stated in Dr. Gottlieb's affidavit, his evaluation was on the CAC interview video. At no point did Dr. Gottlieb mention evaluating the Applicant like Mr. Harris claimed. Trial Counsel makes several references to relying on the State's investigation and the State's witnesses instead of using his own. When each of these errors alone demonstrate ineffectiveness, there can be no doubt that when combined into one trial, the fundamental right to counsel was violated for the Applicant.

Respectfully Submitted,


07-16-18
Robert Roderick Stubblefield
Applicant

Robert Roderick Stubblefield
#2021063
Telford Unit
3899 State Hwy 98
New Boston, Texas 75570




06-20-2022

Dear clerk,

Please file the enclosed objections to the Magistrate Judge's Report and recommendations.

Cause No. 3:20-cv-00213

Thank You,


Robert Stubblefield #02021063

Beta 1
1391 FM 3328
Tennessee Colony, TX 75880

Robert Steven Petrucci #2024063

Beto!

1391 FM 3328

Tennessee Colony, TX 75880

✓ 454 ✓

United States District Court

1100 Commerce St Room 1452

CHECKED JUN 28 75242-1310 Dallas, TX

75242-131052

1100 Commerce St
Room 1452
Dallas, TX 75242-1310

FOREVER



IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ROBERT STUBBLEFIELD,)	
)	
Petitioner,)	
)	
v.)	
)	
DIRECTOR, TDCJ-CID,)	
)	
Respondent.)	Civil Action No. 3:20-CV-0213-C-BT

ORDER

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After due consideration and having conducted a *de novo* review, the Court finds that Petitioner's objections should be **OVERRULED**. The Court has further conducted an independent review of the Magistrate Judge's findings and conclusions and finds no error. It is therefore **ORDERED** that the Findings, Conclusions, and Recommendation are hereby **ADOPTED** as the findings and conclusions of the Court. For the reasons stated therein, and

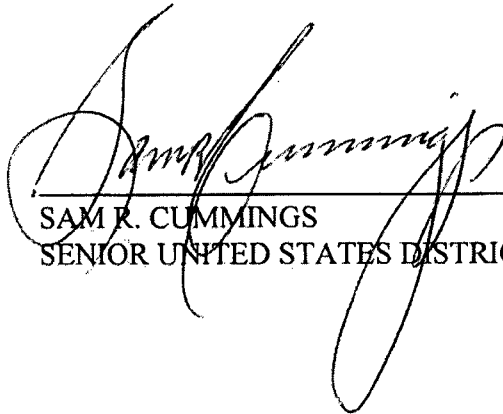
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pursuant to Rule 22 of the Federal Rules of Appellate Procedure and 28 U.S.C. § 2253(c), this Court finds that a certificate of appealability should be **DENIED**. Specifically, Movant has failed to show that a reasonable jurist would find: (1) this Court's "assessment of the constitutional claims debatable or wrong," or (2) "it debatable whether the petition states a valid claim of the denial of a constitutional right" and "debatable whether [this Court] was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

The Clerk of Court is directed to **CLOSE** this civil action.

SO ORDERED.

Dated August 22, 2022.



SAM R. CUMMINGS
SENIOR UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ROBERT RODERICK	§	
STUBBLEFIELD,	§	
Petitioner,	§	
	§	
v.	§	No. 3:20-cv-00213-C (BT)
	§	
DIRECTOR, TDCJ-CID,	§	
Respondent.	§	

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

Robert Roderick Stubblefield, a Texas prisoner, filed a *pro se* petition for a writ of habeas corpus under 28 U.S.C. § 2254. The District Court referred the petition to the United States magistrate judge pursuant to 28 U.S.C. § 636(b) and a standing order of reference. For the following reasons, the District Court should DISMISS Stubblefield's petition.

Background

Stubblefield was charged in Kaufman County, Texas with continuous sexual abuse of a child under ten years of age. *The State of Texas v. Robert Roderick Stubblefield*, Case Number 14-30574-86-F. He pleaded not guilty and had a jury trial. The jury found Stubblefield guilty as charged. On September 10, 2015, he was sentenced to eighty years' imprisonment.

Stubblefield appealed, and his conviction and sentence were affirmed by the Fifth Court of Appeals of Texas. *Stubblefield v. State*, No. 05-15-01124-CR, 2017 WL 343596, at *1 (Tex. App. Jan. 18, 2017), slip op. (Tex.

App.—Dallas 2017, pet. ref'd). On July 26, 2017, the Texas Court of Criminal Appeals (CCA) refused his petition for discretionary review (PDR). *Stubblefield*, 2017 WL 343596, PDR No. 0369-17 (Tex. Crim. App. 2017).

Stubblefield filed a state application for a writ of habeas corpus. On April 3, 2019, the CCA denied the application without a written order on the findings of the trial court.

On January 15, 2020, Stubblefield filed his federal petition in the Eastern District of Texas. Because the petition attacks a conviction from Kaufman County, Texas, the case was transferred to the Northern District of Texas, Dallas Division. In his petition, Stubblefield argues:

- (1) The prosecutor engaged in prosecutorial misconduct when he:
 - a. asked leading questions over objection;
 - b. coached the complaining witness to add missing elements;
 - c. bolstered the complainant's testimony;
 - d. made direct comments on Stubblefield's silence at trial and demeanor during closing arguments;
 - e. misrepresented Stubblefield's prior criminal history; and
 - f. presented an incorrect criminal history to the jury.
- (2) The trial court abused its discretion and violated his Due Process rights when it allowed unadjudicated extraneous offenses to be admitted during his trial; and

- (3) His trial attorney provided ineffective assistance of counsel by failing to have a firm command on the facts and law involved in Stubblefield's case.

Legal Standards and Analysis

A. Stubblefield's prosecutorial misconduct claims are procedurally barred.

In his first claim, Stubblefield argues that the prosecutor engaged in prosecutorial misconduct in the following respects: (1) he asked leading questions over objection; (2) he coached the complaining witness to add missing elements; (3) he bolstered the complainant's testimony; (4) he made direct comments on Stubblefield's silence at trial and demeanor during closing argument; (5) he misrepresented Stubblefield's prior criminal history; and (6) he presented an incorrect criminal history to the jury. Pet. 6 (ECF No. 1). To the extent that these claims were not raised on direct appeal or in a state habeas application, they have been defaulted.

"Exhaustion requires that a petitioner first present the substance of his federal claims to the highest state court either through direct appeal or by state collateral review procedures." *Hatten v. Quarterman*, 570 F.3d 595, 605 (5th Cir. 2009) (citing *Morris v. Dretke*, 413 F.3d 484, 491 (5th Cir. 2005)); see also *Renz v. Scott*, 28 F.3d 431, 432 (5th Cir. 1994) ("[The petitioner's] failure to raise this [sufficiency of the evidence] claim on direct appeal constituted a procedural default under state law.") (citing *Clark v. State of Texas*, 788 F.2d 309, 310 (5th Cir. 1986)).

Stubblefield did not raise his prosecutorial misconduct claims on direct review. *See Stubblefield*, 2017 WL 343596, at *2 (noting only one issue was raised and it addressed the claim his Due Process rights were violated by the admission of extraneous unadjudicated sexual offenses committed against another child). When Stubblefield raised these claims on state habeas review, the CCA found that the claims were procedurally barred because they were not raised on direct appeal. *See State Habeas Ct. R.-01 at cover, 61-62, 77-78, 196, 260 (ECF No. 17-31)*. Currently, Stubblefield makes no attempt to demonstrate cause for the default and actual prejudice resulting therefrom.

The procedural bar finding by the state habeas court also bars review of Stubblefield's prosecutorial misconduct claims on federal habeas review. *See Soria v. Johnson*, 207 F.3d 232, 249 (5th Cir. 2000) (holding a federal habeas petitioner forfeits review of his claims when he fails to raise them on direct appeal unless he can show cause for the default and actual prejudice resulting from the constitutional violation) (citing *Coleman v. Thompson*, 501 U.S. 722, 750 (1991)); *see also Finley v. Johnson*, 243 F.3d 215, 219 (5th Cir. 2001) ("Finley's *Brady* claim was procedurally barred there since it is the sort of claim that could have been raised on direct appeal but was not.") (citing *Ex parte Gardner*, 959 S.W.2d 189, 199 (Tex. Cr. App. 1996)).

B. Stubblefield's ineffective assistance of counsel claim and his claim that the trial court abused its discretion are unexhausted and procedurally barred.

Stubblefield argues in his second claim that the introduction of unadjudicated offenses by the trial court during the guilt-innocence phase violated his Due Process rights. Pet. 6 (ECF No. 1). He further argues that the erroneous admission of the unadjudicated offenses was an improper application of the “T.R.E. Rule 403 balancing test” and resulted in lowering the State’s burden of proof. *Id.* In his third claim, Stubblefield argues that his trial attorney provided ineffective assistance of counsel by failing to have a firm command of the facts and law involved in his case. *Id.* 7. He further argues that “[t]he reliance upon defense counsel’s affidavits to determine trueness and correctness of counsel’s performance is misplaced.” *Id.* Stubblefield concludes that the affidavits show that his trial attorney was not prepared on the law and facts, and this impacted the outcome of his trial and sentence. *Id.*

Before a state prisoner seeks a federal writ of habeas corpus, he must exhaust his available state court remedies. 28 U.S.C. § 2254(b)(1)(A). In Texas, a petitioner can exhaust his state remedies by pursuing one of two avenues: (1) he can present his claims to the CCA in a petition for discretionary review; or (2) he can file an application for writ of habeas corpus in the CCA. *See Myers v. Collins*, 919 F.2d 1074, 1076 (5th Cir. 1990). A claim is deemed unexhausted if a petitioner has the right under state law

to raise it through any available procedure and fails to do so. 28 U.S.C. § 2254(c). Exhaustion can be excused only when a petitioner can demonstrate “exceptional circumstances of peculiar urgency.” Deters v. Collins, 985 F.2d 789, 795 (5th Cir. 1993). Federal courts dismiss without prejudice a federal petition for writ of habeas corpus when the grounds contained therein have not been exhausted. *See* Rose v. Lundy, 455 U.S. 509, 510 (1982).

Here, Stubblefield raised thirteen claims of ineffective assistance of counsel in his state habeas application, but he did not present the ineffective assistance claim he now makes, which is that his attorney did not have a firm command on the law and facts involved in the case. *See* State Habeas Ct. R.-01 at 63-64, 78-79, 261-79 (ECF No. 17-31). Likewise, Stubblefield failed to raise his claim that the trial court abused its discretion when it allowed the extraneous offense evidence in his state habeas application. *See id.* at 53-57, 60-72. Therefore, the CCA has not considered Stubblefield’s second and third claims on the merits. If Stubblefield filed a second state habeas application to include his second and third claims, it would be denied for abuse of the writ because he was required to include all his grounds for relief in his first petition. *See Nobles v. Johnson*, 127 F.3d 409, 423 (5th Cir. 1997) (“The Texas abuse-of-writ doctrine prohibits a second habeas petition, absent a showing of cause, if the applicant urges grounds therein that could have been, but were not, raised in his first habeas petition.”) (footnote omitted) (citing *Ex parte Barber*, 879 S.W.2d 889, 891 n.1 (Tex. Crim. App.

1994) (en banc)). And the abuse-of-writ doctrine is an adequate state procedural bar for purposes of federal habeas review. *Id.* (citing *Emery v. Johnson*, 123 F.3d 213, 217-18 (5th Cir. 1997); *Fearance v. Scott*, 56 F.3d 633, 642 (5th Cir. 1995)); see also *Ex parte Barber*, 879 S.W.2d at 892 n.1 (discussing the abuse-of-writ doctrine in the criminal context, which generally prohibits “an applicant for a subsequent writ of habeas corpus [from] rais[ing] issues that existed at the time of his first writ” application). Where a state prisoner has been cited for abuse of the writ following *Ex parte Barber*, 897 S.W.2d 889 (Tex. Crim. App. 994), federal habeas review of that claim is barred. See *Delgado v. Davis*, 2017 WL 881865, at *2 (N.D. Tex. Feb. 2, 2017), *rec. adopted* 2017 WL 880862 (N.D. Tex. Mar. 3, 2017).

When a petitioner has never presented his claim to the state courts, it is procedurally barred from federal habeas review “if it is clear that his claims are now procedurally barred under [state] law.” *Castille v. Peoples*, 489 U.S. 346, 351 (1989); see also *Teague v. Lane*, 489 U.S. 288, 297-98 (1989) (holding the petitioner’s claim was unexhausted because a state court would now find it procedurally defaulted). And when a petitioner’s unexhausted federal habeas claims would be dismissed for abuse of the writ if presented in a subsequent state writ application, they are procedurally barred in federal court. *Fuller v. Johnson*, 158 F.3d 903, 906 (5th Cir. 1998) (“Because the claims [the petitioner] brings in this petition are procedurally barred in state court, these claims are not cognizable in federal habeas

proceedings.”). Stubblefield’s second and third claims are procedurally barred from federal habeas review, and they should be denied.

III.

The Court should DISMISS Stubblefield’s petition.

Signed June 10, 2022.


REBECCA RUTHERFORD
UNITED STATES MAGISTRATE JUDGE

**INSTRUCTIONS FOR SERVICE AND
NOTICE OF RIGHT TO APPEAL/OBJECT**

A copy of this report and recommendation shall be served on all parties in the manner provided by law. Any party who objects to any part of this report and recommendation must file specific written objections within 14 days after being served with a copy. *See* 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72(b). 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 report 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 Automobile Ass'n*, 79 F.3d 1415, 1417 (5th Cir. 1996)

United States Court of Appeals
for the Fifth Circuit

No. 22-10709

ROBERT RODERICK STUBBLEFIELD,

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. 3:20-CV-213

ON MOTION FOR RECONSIDERATION
AND REHEARING EN BANC

Before STEWART, DENNIS, and WILLETT, *Circuit Judges.*

PER CURIAM:

The motion for reconsideration 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

November 28, 2022

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 22-10709 Stubblefield v. Lumpkin
USDC No. 3:20-CV-213

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. Edward Larry Marshall
Mr. Robert Roderick Stubblefield
Mr. Nathan Tadema

**Additional material
from this filing is
available in the
Clerk's Office.**

