United States Court of Appeals for the Fifth Circuit

No. 21-20613

United States Court of Appeals
Fifth Circuit
FILED
August 25, 2022
Lyle W. Cayce
Clerk

FRANCISCO FLORES,

Petitioner—Appellant,

versus

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

Respondent—Appellee.

Application for Certificate of Appealability from the United States District Court for the Southern District of Texas USDC No. 4:21-CV-175

ORDER:

Francisco Flores, Texas prisoner # 0219677, moves for a certificate of appealability (COA) to appeal the denial of his 28 U.S.C. § 2254 petition challenging his conviction for solicitation of capital murder. Flores argues that trial counsel was ineffective for failing to request a jury instruction on renunciation; that the state court improperly recharacterized his cognizable claim there was no evidence to support his conviction as a non-cognizable sufficiency of the evidence claim; and that the district court erred by concluding his "no evidence" claim was procedurally defaulted in light of the state court's characterization of it. As he does not brief any of the other

Appendix A.

claims he raised in the district court, they are not considered. *See Hernandez v. Thaler*, 630 F.3d 420, 426 n.24 (5th Cir. 2011). Flores also moves for leave to proceed in forma pauperis (IFP) on appeal.

To obtain a COA with respect to the denial of a § 2254 application, a petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483 (2000). When a district court has rejected a claim on its merits, the petitioner can meet this standard "by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists of reason could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). When a district court has rejected a claim on procedural grounds, a petitioner must show "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack*, 529 U.S. at 484. Flores has not made that showing.

In light of the preceding, Flores's COA motion is DENIED. His motion to proceed IFP on appeal is likewise DENIED.

Carolyn Dineen King

CAROLYN DINEEN KING
United States Circuit Judge

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

FRANCISCO FLORES, TDCJ #02190677	§	
Petitioner,	§	
v.	§	CIVIL ACTION NO. H-21-175
BOBBY LUMPKIN,	§	
Respondent.	§	

MEMORANDUM OPINION AND ORDER

Francisco Flores, a Texas inmate proceeding *pro se*, has filed a petition for writ of habeas corpus under 28 U.S.C. § 2254 and a memorandum in support of his petition, challenging his state court conviction and sentence for solicitation of capital murder. (Dkts. 1, 2). The respondent, Bobby Lumpkin, has answered with a motion for summary judgment. (Dkt. 9). Flores has filed a response and cross-motion for summary judgment. (Dkts. 13, 14). Based on careful consideration of the pleadings, the record, and the applicable law, the Court concludes that Flores has not stated meritorious grounds for federal habeas relief, denies his § 2254 petition, and, by separate order, enters final judgment. The reasons are explained below.

Attend. v-B

B

I. Background

A. Procedural Background

In 2018, a jury in the 230th District Court for Harris County, Texas, found Flores guilty of solicitation of capital murder and sentenced him to twelve years' imprisonment in Cause No. 1524645. (Dkt. 8-20, pp. 176-78). The First Court of Appeals affirmed Flores's conviction and sentence in a published opinion. *See Flores v. State*, 573 S.W.3d 864 (Tex. App.—Houston [1st Dist.] 2019, pet. ref'd). The Texas Court of Criminal Appeals refused Flores's petition for discretionary review. *See Flores v. State*, PD-337-19 (Tex. Crim. App. June 19, 2019) (Dkt. 8-10).

After his direct appeal was final, Flores filed a state habeas petition challenging his conviction and sentence, raising one claim of trial court error, nine claims of ineffective assistance of trial counsel, one claim of ineffective assistance of appellate count, and a claim of insufficiency of the evidence. (Dkt. 8-24, p. 5-30). The Court of Criminal Appeals denied the petition without written order on findings of the trial court without a hearing and on the court's independent review of the record on June 3, 2020. *Ex parte Flores*, Writ No. 91,048-01. (Dkt. 8-21).

Flores now seeks federal habeas corpus relief in a petition filed on January 19, 2021. (Dkt. 1). He raises the following claims:

1. The trial court committed fundamental error by expressing bias against Flores through improper comments during voir dire and on social media;

2. Trial counsel provided ineffective assistance by failing to object to the trial court's improper remark during voir dire;

3. Trial counsel provided ineffective assistance during voir dire by:

   a. Conducting an inadequate voir dire examination;

   b. Allowing four jurors to be seated who had not participated in voir dire;

4. Trial counsel provided ineffective assistance during voir dire by failing to remove an unqualified juror;

5. Trial counsel provided ineffective assistance during trial by eliciting inadmissible character evidence;

6. Trial counsel provided ineffective assistance during closing arguments by conceding Flores's guilt;

7. Trial counsel provided ineffective assistance by failing to request a jury instruction on renunciation based on Flores's testimony that he tried to call off the hit;

8. Trial counsel provided ineffective assistance by failing to request a jury instruction on the lesser-included offense of burglary of a habitation;

9. Trial counsel provided ineffective assistance in the punishment phase closing argument by:

   a. summarizing the evidence in a manner favorable to the prosecution; and

   b. asking the jury to consider the full range of punishment;

10. Trial counsel provided ineffective assistance by failing to retain a translator to translate videos and text messages from Spanish to English;

11. Appellate counsel provided ineffective assistance by failing to raise some of these claims on direct appeal; and

12. His conviction violates the Fifth and Fourteenth Amendments rights because there is no evidence to support it.

(*Id.* at 6-10). Flores asks the Court to vacate his conviction and sentence and order a new trial. (*Id.* at 7).

Lumpkin answered with a motion for summary judgment, asserting that Flores's claim based on the insufficiency of the evidence was procedurally defaulted and that the remainder of his claims had no merit. (Dkt. 9). Flores filed a timely response and cross-motion for summary judgment. (Dkts. 13, 14).

B. Factual Background

The First Court of Appeals summarized the factual background of Flores's case:

> A grand jury indicted Flores for the solicitation of capital murder. *See* TEX. PENAL CODE §§ 15.03(a), 19.03(a)(3). Flores pleaded not guilty and the charged offense was tried to a jury, which found him guilty and assessed his punishment at 12 years' confinement and a $10,000 fine.
>
> At trial, the State's witnesses testified that Flores paid J. Duran, an undercover officer with the Houston Police Department, $1,500 to kill Jose Montelongo, the husband of a woman with whom Flores was having an extramarital affair. A coworker whom Flores believed to be a drug trafficker, but who was actually an informant for the Drug

Enforcement Agency, introduced Flores to Duran after Flores sought the informant's assistance in arranging for Montelongo's murder.

In his dealings with the informant and Duran, Flores used the word *piso*, the Spanish word for "floor," to describe what he wanted done to Montelongo. The informant testified that *piso* is commonly used as slang in the illegal drug trade to mean "to kill." Duran similarly testified that *piso* meant "to murder." Flores disputed this, testifying that *piso* is slang meaning "to hit somebody, to floor them, to make them kiss the ground." Flores testified that he did not want Montelongo dead; he merely wanted Duran to threaten Montelongo or knock him out so that he would stop beating his wife.

Flores further testified that the informant understood that Flores just wanted Montelongo threatened or assaulted, not killed. Flores conceded that, when he met Duran, Duran spoke as if he was being hired to commit a murder. In that conversation, Duran did not use the word *piso* and instead unambiguously discussed killing Montelongo. Flores, however, claimed he "played along" with Duran's talk of murder at the informant's urging. Flores explained that, before they met with Duran, the informant had told him that Duran might "say some crazy things" but that Duran worked for the informant and would follow instructions and not take things further than Flores desired. When Flores expressed concern about Duran's talk of murder after their meeting, the informant again told him not to worry and "keep playing along."

Based on his testimony that he only intended to hire Duran to threaten or assault Montelongo, Flores asked the trial court to include a mistake-of-fact instruction in the jury charge. The trial court denied the request. Flores contends that the trial court erred in denying this request.

Flores v. State, 573 S.W.3d 864, 866–67 (Tex. App.—Houston [1st Dist.] 2019, pet. ref'd).

II. Legal Standards

A. The Antiterrorism and Effective Death Penalty Act

Flores's petition for federal habeas corpus relief is governed by the Antiterrorism and Effective Death Penalty Act (AEDPA). 28 U.S.C. § 2254; *see also Woodford v. Garceau*, 538 U.S. 202, 207 (2003); *Lindh v. Murphy*, 521 U.S. 320, 335-36 (1997). Under the AEDPA, federal habeas relief cannot be granted on claims that were adjudicated on the merits by the state courts unless the state court's decision (1) "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) "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); *Early v. Packer*, 537 U.S. 3, 7-8 (2002) (per curiam); *Cobb v. Thaler*, 682 F.3d 364, 372-73 (5th Cir. 2012).

Review under AEDPA is "highly deferential" to the state court's decision. *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam). To merit relief under AEDPA, a petitioner may not simply point to legal error in the state court's decision. *See White v. Woodall*, 572 U.S. 415, 419 (2014) (stating that being "merely wrong" or in "clear error" will not suffice for federal relief under AEDPA). Instead, AEDPA requires inmates to "show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood

and comprehended in existing law beyond any possibility for fair[-]minded disagreement." *Id.* at 419-20 (quoting *Harrington v. Richter*, 562 U.S. 86, 103 (2011)). "If this standard is difficult to meet, that is because it was meant to be." *Richter*, 562 U.S. at 102.

On questions of law or mixed questions of law and fact adjudicated on the merits in state court, this Court may grant habeas relief under § 2254(d)(1) only if the state-court decision "was contrary to, or involved an unreasonable application of, clearly established" Supreme Court precedent. *Id.* at 97-98. Under the "contrary to" clause, this Court may grant habeas relief "if the state court applies a rule different from the governing law set forth in our cases, or if it decides a case differently than we have done on a set of materially indistinguishable facts." *Bell v. Cone*, 535 U.S. 685, 694 (2002); *see also Broadnax v. Lumpkin*, 987 F.3d 400, 406 (5th Cir. 2021). Under the "unreasonable application" clause, this Court may grant habeas relief "if the state court correctly identifies the governing legal principle from our decisions but unreasonably applies it to the facts of the particular case." *Bell,* 535 U.S. at 694; *Broadnax*, 987 F.3d at 406. But the state court's determination under the "unreasonable application" clause "must be objectively unreasonable, not merely wrong; even clear error will not suffice." *Woods v. Donald*, 575 U.S. 312, 316 (2015) (per curiam) (internal citation and quotation marks omitted).

On factual issues, AEDPA precludes federal habeas relief unless the state habeas court's adjudication of the merits was based on an "unreasonable determination of the facts in light of the evidence presented in the state[-]court proceeding." *See* 28 U.S.C. § 2254(d)(2); *Martinez v. Caldwell*, 644 F.3d 238, 241-42 (5th Cir. 2011). The findings of the state court are "presumed to be correct" and a petitioner seeking to rebut that presumption must do so with clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

B. Summary-Judgment Standard

In ordinary civil cases, a district court considering a motion for summary judgment must construe the facts of the case in the light most favorable to the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). And "[a]s a general principle, Rule 56 of the Federal Rules of Civil Procedure, relating to summary judgment, applies with equal force in the context of habeas corpus cases." *Clark v. Johnson*, 202 F.3d 760, 764 (5th Cir. 2000). But AEDPA modifies summary-judgment principles in the habeas context, and Rule 56 "applies only to the extent that it does not conflict with the habeas rules." *Smith v. Cockrell*, 311 F.3d 661, 668 (5th Cir. 2002), *abrogated on other grounds by Tennard v. Dretke*, 542 U.S. 274 (2004); *see Torres v. Thaler*, 395 F. App'x 101, 106 n.17 (5th Cir. 2010). "Therefore, § 2254(e)(1)—which mandates that findings of fact made by a state court are 'presumed to be correct'—overrides the ordinary rule that, in a

summary judgment proceeding, all disputed facts must be construed in the light most favorable to the nonmoving party." *Smith*, 311 F.3d at 668. Unless the habeas petitioner can "rebut[] the presumption of correctness by clear and convincing evidence" as to the state court's findings of fact, they must be accepted as correct. *Id.*

C. Pro Se Pleadings

Flores is proceeding *pro se* in this action. Federal courts do not hold *pro se* habeas petitions "to the same stringent and rigorous standards as . . . pleadings filed by lawyers." *Hernandez v. Thaler*, 630 F.3d 420, 426 (5th Cir. 2011) (per curiam) (citation omitted); *see also Haines v. Kerner*, 404 U.S. 519, 520 (1972) (per curiam). "The filings of a federal habeas petitioner who is proceeding *pro se* are entitled to the benefit of liberal construction." *Hernandez*, 630 F.3d at 426. But even under a liberal construction, "*[p]ro se* litigants must properly plead sufficient facts that, when liberally construed, state a plausible claim to relief, serve defendants, obey discovery orders, present summary judgment evidence, file a notice of appeal, and brief arguments on appeal." *E.E.O.C. v. Simbaki, Ltd.*, 767 F.3d 475, 484 (5th Cir. 2014) (footnotes omitted).

III. Discussion

A. Trial Court Bias (Claim One)

Flores argues in his first claim that the trial judge committed fundamental error by expressing his personal opinion of Flores's guilt on two separate occasions, thus reflecting his bias against Flores. (Dkt. 1, p. 5). Flores contends that these statements prejudiced the jury against him and violated his right to a fair trial. (*Id.*). The habeas record does not support these assertions.

The Due Process Clause guarantees the right to a fair trial "before a judge with no actual bias against the defendant or interest in the outcome of his particular case." *Richardson v. Quarterman*, 537 F.3d 466, 474 (5th Cir. 2008) (quoting *Bracy v. Gramley*, 520 U.S. 899, 905 (1997)). Hence, when a judge fails to administer the courtroom in a neutral manner, the defendant is denied a constitutionally fair trial. *See Moore v. United States*, 598 F.2d 439, 442 (5th Cir. 1979). But a judge's conduct violates the Due Process Clause "only if the judge appears to predispose the jury toward a finding of guilt or to take over the prosecutorial role." *Cotton v. Cockrell*, 343 F.3d 746, 754 (5th Cir. 2003) (quoting *Derden v. McNeel*, 978 F.2d 1453, 1459 (5th Cir. 1992) (en banc)). When considering a due process claim, the reviewing court must consider the judge's comments in context and in light of the totality of the circumstances. *Derden*, 978 F.2d at 1459. Only when a trial court's error in this

regard "had [a] substantial or injurious effect or influence in determining the jury's verdict" will the error rise to a constitutional violation that entitles the defendant to relief. *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993).

In his federal petition, Flores identifies two instances in which he contends that the trial judge improperly expressed a personal opinion that reflected his bias against Flores. First, Flores contends that the trial judge interrupted defense counsel's questioning during voir dire regarding whether any of the prospective jurors had strongly-held religious beliefs that would prevent them from serving as a juror, interjecting that he personally did not like solicitation of capital murder. (Dkt. 1, p. 5). Second, while the jury was deliberating, the judge posted the following on his social media page:

> Jury is now deliberating guilt/innocence of this week's Solicitation of Capital Murder trial. At the risk of jinxing it, I want to again commend the attorneys, Tanisha Manning for the State and Guy Womack for the Defense, for an ag[g]ressively advocated but incredibly respectful trial. It makes my job so much easier. Thanks to them.

(Dkt. 2-1, p. 6). Flores alleges that the reference to "jinxing it" was an expression of the judge's personal opinion of Flores's guilt, and he argues that both of these comments reflect the judge's hostility and bias against him and prejudiced the jury against him. (Dkt. 2, pp. 6-7).

In addressing this claim, the state habeas court found that the comment during jury selection was made in connection with an instruction that was intended to clarify

the extent to which strongly held religious beliefs might impact potential jury service:

> 8. When numerous jurors raised their hands in response to trial counsel's question whether anyone felt that because of their religious beliefs or any other belief, they would not want to sit as a juror in the case, the trial court clarified defense counsel's question as follows:
>
> > "It's not, well, it's -- you know, this is going to be hard. Well, yeah, it's supposed to be hard to sit and look at evidence, determine whether or not the State has proven its case beyond a reasonable doubt. I'm not saying anything about any of this is easy. That's not what we're talking about. *We're not talking about well, I don't like solicitation of capital murder, therefore - well, no one does*. If we only had 12 people that said, you know, solicitation of capital murder is okay, we wouldn't want those 12 people either.
> >
> > It needs to be a strongly held religious or moral belief that prevents you - like it would do violence to your conscience, like I've said a couple times and to your strongly held beliefs to sit in judgment of another person. If you feel that way, fine. We certainly respect that. But that's what we're talking about." (II R.R. at 92).

(Dkt. 8-24, pp. 126-27) (emphasis added). Based on those factual findings, the court concluded that Flores failed to show the trial judge's clarification amounted to an improper personal opinion regarding the charge or Flores's guilt or innocence. (*Id.* at 133). And although the state habeas corpus court did not separately address the trial court's social media post, which complimented counsel from both the State and the defense for their competent representation, there is nothing in the post which can be reasonably construed as an improper personal opinion regarding a particular

outcome by the trial judge. Moreover, Flores points to no evidence that any of the jurors ever saw the social media post.

Read in context, neither the judge's comment during voir dire nor the social media post during deliberations expressed bias against Flores, and neither would tend to predispose the jury toward a finding of guilt or show that the trial judge had taken over the prosecutorial role. Flores points to no clear and convincing evidence to rebut the state habeas court's determination that the two comments were not improper expressions of personal opinion, nor has he shown that its decision to deny relief was contrary to or an unreasonable application of federal law. Lumpkin is therefore entitled to summary judgment on this claim.

B. Ineffective Assistance of Trial Counsel (Claims Two through Ten)

Next in his federal petition, Flores raises nine claims of ineffective assistance of trial counsel. Claims of ineffective assistance of counsel, whether at trial or on direct appeal, are governed by the two-prong test established in *Strickland v. Washington*, 466 U.S. 668 (1984). *Strickland* requires a habeas petitioner to show both that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Id.* at 687. "Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable." *Id.*

To establish the deficient-performance prong of *Strickland*, a habeas petitioner must show that counsel's performance fell below an objective standard of reasonableness. *Id.* at 687-88. To meet this standard, counsel's error must be "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687; *see also Buck v. Davis*, 137 S. Ct. 759, 775 (2017) (reaffirming that "[i]t is only when the lawyer's errors were 'so serious that counsel was not functioning as the "counsel" guaranteed . . . by the Sixth Amendment' that *Strickland*'s first prong is satisfied") (citation omitted). In addition, "because of the risk that hindsight bias will cloud a court's review of counsel's trial strategy, 'a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.'" *Feldman v. Thaler*, 695 F.3d 372, 378 (5th Cir. 2012) (quoting *Strickland*, 466 U.S. at 689).

"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." *Cotton*, 343 F.3d at 752-53 (quoting *United States v. Jones*, 287 F.3d 325, 331 (5th Cir. 2002)). "The Supreme Court has admonished courts reviewing a state court's denial of habeas relief under AEDPA that they are required not simply to give [the] attorney's [sic]

the benefit of the doubt, . . . but to affirmatively entertain the range of possible reasons [petitioner's] counsel may have had for proceeding as they did." *Clark v. Thaler*, 673 F.3d 410, 421 (5th Cir. 2012) (internal quotation marks omitted) (quoting *Cullen v. Pinholster*, 563 U.S. 170, 196 (2011)). Therefore, "[o]n habeas review, if there is any 'reasonable argument that counsel satisfied *Strickland*'s deferential standard,' the state court's denial must be upheld." *Rhoades v. Davis*, 852 F.3d 422, 432 (5th Cir. 2017) (quoting *Richter*, 562 U.S. at 105).

Besides showing deficient performance, the habeas petitioner alleging ineffective assistance of counsel must also show that he was prejudiced by that deficient performance. *See Strickland*, 466 U.S. at 687. "This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* To demonstrate prejudice, a habeas petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. "[T]he question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently." *Richter*, 562 U.S. at 111. "Instead, *Strickland* asks whether it is 'reasonably likely' the result would have been

different." *Id.* (quoting *Strickland*, 466 U.S. at 696). "The likelihood of a different result must be substantial, not just conceivable." *Id.* at 112.

When ineffective assistance of counsel claims are raised in a federal habeas petition, they present mixed questions of law and fact that must be analyzed under the "unreasonable application" standard of section 2254(d)(1). *See Gregory v. Thaler*, 601 F.3d 347, 351 (5th Cir. 2010). AEDPA does not permit de novo review of counsel's conduct, *see Richter*, 562 U.S. at 101-02, and a federal court has "no authority to grant habeas corpus relief simply because [it] conclude[s], in [its] independent judgment, that a state supreme court's application of *Strickland* is erroneous or incorrect." *Catalan v. Cockrell*, 315 F.3d 491, 493 (5th Cir. 2002) (quoting *Neal v. Puckett*, 286 F.3d 230, 236 (5th Cir. 2002) (en banc)).

Instead, the "pivotal question" for this Court is "whether the state court's application of the *Strickland* standard was unreasonable." *Richter*, 562 U.S. at 101; *see also Visciotti*, 537 U.S. at 27 (holding that the federal habeas scheme "authorizes federal-court intervention only when a state-court decision is objectively unreasonable"). Thus, this Court's review becomes "'doubly deferential' because we take a highly deferential look at counsel's performance through the deferential lens of § 2254(d)." *Rhoades*, 852 F.3d at 434; *see also Woods v. Etherton*, 136 S. Ct. 1149, 1151 (2016) (per curiam) (explaining that federal habeas review of ineffective-assistance-of-counsel claims is "doubly

deferential" because "counsel is 'strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment,'" and requiring that federal courts "afford 'both the state court and the defense attorney the benefit of the doubt'" (quoting *Burt v. Titlow*, 571 U.S. 12, 15 (2013))); *see also Richter*, 562 U.S. at 105 ("The standards created by *Strickland* and § 2254(d) are both 'highly deferential,' and when the two apply in tandem, review is 'doubly' so.") (internal quotation marks and citations omitted). "'If this standard is difficult to meet'—and it is—'that is because it was meant to be.'" *Burt*, 571 U.S. at 20 (quoting *Richter*, 562 U.S. at 103).

In this case, the Court of Criminal Appeals denied each of Flores's ineffective assistance of trial counsel claims based on the findings of the state habeas trial court and the court's own independent review of the record. (Dkt. 8-21). Therefore, this Court considers Flores's claims of ineffective assistance under the "doubly deferential" standard. *See Richter*, 562 U.S. at 105.

1. Failure to object to the judge's improper comment (Claim Two)

In claim two, Flores contends that trial counsel provided ineffective assistance when he failed to object to the trial court's comment expressing a personal opinion about the charge against Flores. (Dkt. 1, p. 6). Flores contends that the trial court's remark during voir dire displayed hostility toward Flores that

"vitiated [his] presumption of innocence." (Dkt. 2, p. 14). He asserts that he was prejudiced because the jury panel was tainted by the court's remark and that, had counsel objected and been sustained, the court would have been compelled to summon a new venire. (*Id.*).

As discussed above, the state habeas court determined that the trial court's comments were not improper. (Dkt. 8-24, p. 127). This finding is supported by the record, and Flores has failed to refute it. The state habeas court then concluded that Flores had failed to show that trial counsel's failure to object was ineffective, citing *Ex parte White*, 160 S.W.3d 46, 53 (Tex. Crim. App. 2004), for the proposition that trial counsel's failure to object amounts to ineffective assistance only when the trial court would err in overruling such an objection, and it denied relief on this basis. (Dkt. 8-24, pp. 133-34). Flores has not demonstrated that his trial counsel had, but failed to make, a valid objection to the comment made by the trial court during voir dire. Flores has not otherwise shown that the state habeas court's decision to deny relief on this basis was objectively unreasonable in light of the record and the court's factual findings. Flores has therefore failed to show that he is entitled to relief, and Lumpkin is entitled to summary judgment on this claim.

2. Failure to conduct an adequate voir dire (Claim Three)

Flores next argues that trial counsel provided ineffective assistance by failing to ask sufficient questions during voir dire to determine whether the members of the venire were biased against him. (Dkt. 1, p. 7). Specifically, he contends that trial counsel failed to ask the venire whether any of them

> had any inclination to believe the testimony of police officers over non-police officers, any connection with law enforcement, and relation to the prosecutors or to any of the State's witnesses, their trust of belief that confidential informants were trustworthy, if they knew what C.I.'s are commonly known as in street slang, inquire about language translations, about their concept of English slang and Spanish slang, had they been victims of crime, presumption of innocence, probation.

(*Id.*). He also alleges that trial counsel allowed four persons who did not actively participate in the voir dire process to sit at jurors. (*Id.*). However, Flores did not identify any specific juror who served on his jury who was actually biased against him.

The Sixth Amendment guarantees criminal defendants the right to trial by a panel of impartial jurors. U.S. CONST. amend. VI; *see also Irvin v. Dowd*, 366 U.S. 717, 722 (1961). To be entitled to habeas relief based on an inadequate voir dire, "a petitioner alleging deficient performance during jury selection must identify 'any particular juror [who] was in fact prejudiced' and must establish that had counsel's questioning focused on a specific area of bias, the bias would have been found."

Villanueva v. Stephens, 555 F. App'x 300, 306 (5th Cir. 2014) (quoting *Neville v. Dretke*, 423 F.3d 474, 483 (5th Cir. 2005)). Further, a habeas petitioner must point to some actual evidence of juror bias. *See Skilling v. United States*, 561 U.S. 358 425 (2010) (Alito, J., concurring) ("In the end, . . . if no biased juror is actually seated, there is no violation of the defendant's right to an impartial jury."). A mere assertion of juror bias unsupported by anything in the record is not sufficient to entitled a petitioner to habeas relief. *See Ross v. Estelle*, 694 F.2d 1008, 1011 (5th Cir. 1983) (per curiam).

Flores has failed to identify any particular juror who held any particular impermissible bias and who was actually seated on his jury, and this failure, standing alone, was sufficient to warrant the denial of this claim by the state habeas court. But the state habeas court also examined the record of voir dire and made the following findings of fact:

> 16. The applicant does not identify a specific bias trial counsel should have inquired about or how specific jurors would have responded.
>
> 17. The trial court discussed the burden of proof during its voir dire (II R.R. at 18-20).
>
> 18. The applicant fails to show the trial court's voir dire regarding the burden of proof was insufficient.
>
> 19. The applicant fails to show that trial counsel would have added something to the court's voir dire regarding the burden of proof that would have identified jurors that might be adverse to the defense.
>
> 20. The trial court discussed reasonable doubt during its voir dire (II R.R. at 20-23).

21. The applicant fails to show that trial counsel would have added something to the court's voir dire regarding reasonable doubt that would have identified jurors that might be adverse to the defense.

22. The trial court discussed the range of punishment during its voir dire (II R.R. at 31-34).

23. The applicant fails to show that trial counsel would have added something to the court's voir dire regarding the range of punishment that would have identified jurors that might be adverse to the defense.

24. The State discussed the law of parties (II R.R. at 67-72).

25. The applicant fails to show that trial counsel would have added something to the state's voir dire regarding the law of parties that would have identified jurors that might be adverse to the defense.

(Docket Entry No. 8-24, pp. 127-28). Based on those findings, the court concluded that Flores failed to show any harm as a result of trial counsel's failure to conduct a more thorough questioning of the venire. (*Id.* at 134).

Flores has not pointed to any clear and convincing evidence to rebut the presumption that the state habeas court's findings of fact on this claim were correct. Because of this, as well as his failure to identify any specific juror who was actually biased, Flores has failed to show that the state habeas court's decision to deny relief on this claim was objectively unreasonable. Therefore, Lumpkin is entitled to summary judgment on this claim.

3. Failure to remove an unqualified juror (Claim Four)

Next, Flores contends that trial counsel provided ineffective assistance by failing to strike a prospective juror who specifically indicated that her religious

convictions would prevent her from sitting in judgment. (Dkt. 1, p. 7). He alleges that he was prejudiced by having this biased and unqualified juror sit as a member of his jury. However, this claim is contradicted by the record.

A federal habeas corpus court must initially presume that the selected jurors were impartial. *See Smith v. Phillips*, 455 U.S. 209, 218 (1982); *De La Rosa v. Texas*, 743 F.2d 299, 306 (5th Cir. 1984). Because of this presumption, the first question in determining whether counsel was ineffective for failing to strike an allegedly biased juror is whether there is evidence that the particular juror in question was actually biased. *See Virgil v. Dretke*, 446 F.3d 598, 608 (5th Cir. 2006). To demonstrate actual bias, a habeas petitioner must point to an "admission" or present "factual proof" of the juror's bias. *United States v. Thomas*, 627 F.3d 146, 161 (5th Cir. 2010) (citing *United States v. Bishop*, 264 F.3d 535, 554 (5th Cir. 2001)). Actual bias exists if the juror has "such fixed opinions that they could not judge impartially the guilt of the defendant." *Chavez v. Cockrell*, 310 F.3d 805, 811 (5th Cir. 2002).

In support of this claim, Flores alleges that the record shows that juror #19 identified herself as being unable to sit in judgment, and he points to the following discussion:

> [MR. WOMACK]: And again, with that explanation from His Honor, a show of hands of those who would be affected and it would

do violence to your personality if you had to actually sit here -- to your conscience and sit in judgment.

And so, as I see 11, 42, 43, 33, 62, 19.

VENIRE PERSON: 18.

MR. WOMACK: 18 – I'm sorry. 18.

(Dkt. 8-12, pp. 93-94). Flores argues that this exchange should be interpreted as juror #18 wanting to be added to the list of biased jurors rather than as the juror correcting defense counsel about her juror number. (Dkt. 2, p. 20).

However, after reviewing the record of the trial proceedings, the state habeas court found that while trial counsel initially attributed the admission of bias to juror #19, the juror corrected trial counsel and identified herself as juror #18. (Dkt. 8-24, p. 128). Juror #18 was then stricken for cause. (*Id.*). The state habeas court found that juror #19 never expressed an unequivocal and positive bias that would warrant a challenge for cause. (*Id.*). Therefore, the court concluded that Flores had failed to show that trial counsel was ineffective for failing to challenge juror #19 for cause. (*Id.* at 134).

While Flores disagrees with the state habeas court's interpretation of the record, he has not pointed to any evidence, much less clear and convincing evidence, that would overcome the presumption under § 2254(e)(1) that the state habeas court's findings of fact are correct. Absent such evidence, he cannot

demonstrate that the state court's decision to deny relief on this claim was objectively unreasonable. Lumpkin is entitled to summary judgment on this claim.

4. Eliciting extraneous and inadmissible character evidence (Claim Five)

Flores next contends that trial counsel provided ineffective assistance by eliciting extraneous and inadmissible character evidence from him concerning his extramarital affair with the complainant's wife. (Dkt. 1, p. 8). He contends that this evidence served no purpose other than to bolster the State's case for motive and that it painted him in a bad light in front of the jury. (*Id.*). However, he admits that this evidence was elicited after the State had already introduced evidence about the affair. (Dkts. 2, p. 23; 8-14, pp. 16-17).

The record of the trial proceedings shows that during the State's direct examination of the informant, the prosecutor elicited testimony that Flores told the informant that he and Montelongo's wife were involved in an intimate relationship. (Dkt. 8-14, pp. 16-17). Trial counsel did not object to this question or the response. (*Id.*). Then, during Flores's direct testimony, trial counsel revisited the issue, apparently in an effort to explain how Flores knew Montelongo and why he would want to take any type of action against him. (Dkt. 8-15, pp. 53-54). However, trial counsel also had Flores admit that the affair was wrong, and Flores expressed his regret for the affair and the people he had harmed by it. (*Id.*).

When considering Flores's claim of ineffective assistance regarding the affair testimony in light of the entire trial record, the state habeas court found:

> 36. It is plausible that trial counsel sought to elicit this testimony in an attempt to gain trust with the jury, to show that the applicant was not hiding his faults and was willing to accept responsibility for his wrongdoings.
>
> 37. The applicant fails to overcome the presumption that trial counsel's apparent strategy of admitting the affair and conceding it was wrong was based on reasonable trial strategy.

(Dkt. 8-24, pp. 128-29). The court then concluded:

> 10. Because the applicant cannot show harm as a result of trial counsel eliciting evidence of the applicant's affair as well as the applicant's admission that the affair was wrong, the applicant fails to show trial counsel was ineffective for eliciting this testimony.

(*Id.* at 134).

Based on the facts it found credible, the state habeas court determined that counsel's actions were part of a trial strategy intended to address and attempt to mitigate the video and electronic evidence against Flores. And generally, conscious and informed decisions on trial tactics and strategy cannot be the basis for constitutionally ineffective assistance of counsel. *See Cotton*, 343 F.3d at 752-53. Flores has failed to demonstrate that trial counsel's decision about how to deal with the evidence of Flores's affair was an unreasonable or ill-chosen trial strategy, and the state habeas court's findings were not an unreasonable determination of the facts in light of the record. Based on this record, Flores does not demonstrate that the

state habeas court's decision to deny relief was objectively unreasonable or that he is otherwise entitled to relief. Lumpkin is entitled to summary judgment on this claim.

5. Conceding guilt in closing argument (Claim Six)

Flores next argues that trial counsel provided ineffective assistance by conceding guilt during his closing argument. (Dkt. 1, p. 8). He alleges that trial counsel argued to the jury that Flores had solicited someone to attack Montelongo and had offered to pay for the attack, which was a concession to his guilt. (*Id.*). Flores also alleges that trial counsel never asked for the jury to return a not-guilty verdict. (*Id.*).

However, the record contradicts Flores's assertion that defense counsel never asked for a verdict of not guilty. As the state habeas court found, trial counsel asked the jurors to find Flores not guilty several times during the closing argument. (Dkt. 8-24, pp. 129-30). In light of this finding, which Flores does not rebut, the state habeas court's conclusion that counsel was not ineffective for conceding guilt in closing argument is not objectively unreasonable.

In addition, the record shows that trial counsel was pursuing a conscious and informed trial strategy to deal with the State's evidence. Counsel's theory of defense was that while Flores might have been guilty of having an extramarital

affair and soliciting an assault on Montelongo, he was not guilty of the only offense with which he was charged—soliciting capital murder. (Dkts. 8-13, pp. 24-25; 8-15, p. 163). Counsel also sought to boost Flores's credibility by admitting to the events that were undeniably on video or in text messages while arguing that there was a misunderstanding about what either party meant by the term "piso." (*Id.* at 166, 169). Such conscious and informed decisions on trial tactics and strategy cannot be the basis for constitutionally ineffective assistance of counsel. *See Cotton*, 343 F.3d at 752-53. Flores has not shown that counsel's summation, which conceded that Flores had committed some bad acts but argued that he had not committed the acts with which the State charged him, was part of a strategy so ill-chosen as to render the trial unfair.

Based on its review of the trial record and the facts it found credible, the state habeas court concluded that Flores had received reasonably effective assistance of counsel during closing arguments. Flores has not demonstrated that trial counsel's strategy was deficient or that he was actually prejudiced. Based on this record, Flores does not show that the state habeas court's decision to deny relief was objectively unreasonable. He is therefore not entitled to relief, and Lumpkin is entitled to summary judgment on this claim.

6. Failure to request an instruction on renunciation (Claim Seven)

Flores next contends that trial counsel provided ineffective assistance by failing to request a jury instruction on the defense of renunciation. (Dkt. 1, p. 8). Flores argues that his testimony established that when the undercover officer/hitman asked him whether he wanted Montelongo dead, Flores responded, "'No, no. All I want is a floor.' That means like I don't want anybody dead." (*Id.*). Flores also testified that he asked for his money back before the "hit" was actually supposed to occur. (*Id.*). Flores contends that this testimony was sufficient to support an instruction on renunciation. And he argues that had such an instruction been given, he would have received a lesser sentence. (Dkt. 2, p. 31).

Texas law provides criminal defendants with "the right to an instruction on any defensive issue raised by the evidence, whether that evidence is weak or strong, unimpeached or contradicted, and regardless of what the trial court may or may not think about the credibility of the evidence." *Granger v. State*, 3 S.W.3d 36, 38 (Tex. Crim. App. 1999). So the first question is whether the evidence in Flores's case was sufficient to implicate the renunciation defense.

Renunciation is an affirmative defense to a solicitation charge when there is evidence "that under circumstances manifesting a voluntary and complete renunciation of his criminal objective the actor countermanded his solicitation or

withdrew from the conspiracy before commission of the object offense and took further affirmative action that prevented the commission of the object offense." TEX. PENAL CODE § 15.04(b). "An essential part of such renunciation is that it must be voluntary and it must either avoid commission or prevent commission of the offense." *Hackbarth v. State*, 617 S.W.2d 944, 946 (Tex. Crim. App. 1981). But "the offense of criminal solicitation is completed when the culpable request or inducement to commit a capital felony or a first degree felony is unilaterally presented." *McGann v. State*, 30 S.W.3d 540, 547 (Tex. App.—Fort Worth 2000, no pet.) (citing TEX. PENAL CODE ANN. § 15.03). "Proof that the object crime is actually committed is not required to establish the offense of solicitation." *State v. Brinkley,* 764 S.W.2d 913, 915 (Tex. App.—Tyler 1989, no pet.).

The evidence at Flores's trial showed that he solicited a "piso" of Montelongo. While there was a dispute over whether by "piso" he meant a murder, a burglary, or a battery and while there was some evidence that he later tried to avoid the commission of a murder, there is no dispute that Flores nonetheless intended that some offense be committed against Montelongo. Thus, as the state habeas court found, the evidence did not show the "complete renunciation of his criminal objective" necessary to warrant an instruction on the renunciation defense. (Dkt. 8-24, p. 130). And based on those findings, the state habeas court concluded:

> 12. Because [Flores] cannot show he was entitled to a jury instruction on renunciation, he fails to show harm as a result of trial counsel's alleged failure to request the instruction.

(*Id.* at 135).

In light of the record of the proceedings, the state habeas court's findings are not an "unreasonable determination of the facts in light of the evidence presented in the state[-]court proceeding," 28 U.S.C. § 2254(d)(2), and Flores has failed to point to clear and convincing evidence that would show otherwise. The state habeas court's conclusion that trial counsel was not ineffective for failing to request an instruction to which Flores was not entitled is not objectively unreasonable. Flores has not shown a basis for the relief he seeks in this claim, and Lumpkin is therefore entitled to summary judgment on this claim.

7. Failure to request an instruction on lesser-included offenses (Claim Eight)

Flores next contends that trial counsel provided ineffective assistance by failing to request a jury instruction on the offense of burglary of a habitation as a lesser-included offense. (Dkt. 1, pp. 8-9). He contends that there was evidence showing that he intended that an assault occur at Montelongo's home and therefore he should have been entitled to an instruction on burglary of a habitation as a lesser-included offense. (*Id.* at 9). Flores relies on certain plea negotiations to argue that this offense was a valid potential lesser-included offense. (Dkt. 2, p. 34).

In Texas, the analysis of whether an instruction on a lesser-included offense is proper has two steps. In the first step, the court compares the elements of the charged offense, as modified by the allegations of the indictment, to the elements of the proposed lesser offense and asks whether the elements of the lesser offense are "established by proof of the same or less than all the facts required to established the commission of the offense charged." *Hall v. State*, 225 S.W.3d 524, 536 (Tex. Crim. App. 2007) (quoting TEX. CODE CRIM. P. art. 37.09(1)). Under this step of the analysis, an offense that requires proof of different facts from those alleged in the indictment does not constitute a lesser-included offense. *Id.* In the second step, the court considers whether the evidence presented at trial supports giving an instruction on a lesser-included offense. *Id.*

Burglary of a habitation requires proof that a person entered a habitation without the consent of the owner and with the intent to commit a felony, theft, or assault therein. *See* TEX. PENAL CODE § 30.02(a). But the indictment against Flores for solicitation of capital murder contains no facts concerning entering a habitation, either with or without consent of the owner. (Dkt. 8-20, p. 25). Therefore, his claim fails the first step of the analysis.

As the state habeas court found, burglary of a habitation is not a lesser-included offense of solicitation of capital murder. (Dkt. 8-24, p. 130). Flores has failed to show that this finding is an "unreasonable determination of the facts in

eight great kids . . . that his actions were the kind that no one would have expected ... and that no one would expect those same actions again (VI R.R. at 42-44); and

• that the applicant was not a career felon and was not someone who should be getting a life sentence (VII R.R. at 44).

49. Trial counsel asked the jury to consider the full range of punishment and to assess no more than 10 years and recommend community supervision (VII R.R. at 46).

(Dkt. 8-24, p. 130-31). Based on these facts, the state habeas court concluded that Flores was not entitled to relief because he failed "to show that trial counsel summarized the evidence in a manner favorable to the State or asked the jury to assess the maximum punishment." (*Id.* at 135).

The state habeas court determined that Flores had received reasonably effective assistance of counsel during the punishment phase of the proceedings, and the Court of Criminal Appeals expressly based its denial of habeas relief on the trial court's findings. Flores has not pointed to any evidence that would overcome the presumption that the court's factual findings were correct or that the decision to deny relief was objectively unreasonable. Therefore, Flores has not shown a basis for the relief he seeks in this claim, and Lumpkin is entitled to summary judgment.

9. Failure to retain a translator (Claim Ten)

In his final claim of ineffective assistance of trial counsel, Flores contends that counsel was ineffective by failing to hire an expert to provide a translation of

two videos and numerous text messages and to provide an opinion on the proper interpretation of the Spanish word "piso." (Dkt. 1, p. 9). Flores argues that trial counsel did not have "his own" translation of the videos and text messages and instead relied on that provided by the State, which he contends contained inaccuracies. (*Id.*). He also points to a November 2020 affidavit from his "expert," who opines that the word "piso" in Spanish slang means a "knock-down" or a "beating." (Dkt. 2, p. 43).

Ample evidence was presented at trial concerning the dispute over the meaning of the word "piso." All of the witnesses testified that the literal translation of "piso" was "floor" or "ground." (Dkts. 8-14, pp. 28-29; 118-19; 8-15, p. 8, 61-62). But the witnesses offered varying opinions as to whether the slang or street meaning of "piso" was a "murder hit" or simply a battery. (Dkts. 8-13, p. 63, 80, 109; 8-14, p. 28, 61-62, 118-19). The jury's task was to determine what Flores intended by the word "piso" when he met with the informant and the hitman.

In considering Flores's allegations on this issue, the state habeas court made detailed findings of fact about the evidence presented at the trial:

> 53. A key issue at trial was the translation of the Spanish word "piso".
>
> 54. The State's position was that "piso" was slang for "a hit", meaning to kill someone (III R.R. at 6).
>
> 55. The applicant's position was that "piso" meant "floor", as in to hit them and knock them down (III R.R. at 6).

56. Numerous State's witnesses testified regarding the different translations for the word "piso":

- Detective Mauro Cisneros testified the term "piso" is used for a "hit" and that a "hit" meant to murder someone (III R.R. at 63).
- Cisneros testified that he recalled the applicant say "no, no, I want solamente a piso, only a floor" (III R.R. at 75-76).
- Cisneros testified that if someone said they only wanted a "floor", it could mean to knock someone down (III R.R. at 80).
- Francisco Tirado testified that "piso" meant to kill someone (III R.R. at 109, IV R.R. at 28).
- Tirado testified that "piso" could also mean "floor" (IV R.R. at 28-29).
- Mariana Gloria, a licensed interpreter, testified that "piso" is a verb to step on, to walk on . . . it is also a noun to describe stories, as in levels in a building . . . and also the word "ground" and that its literal translation is the word "ground" or "floor" (IV R.R. at 118).
- Gloria testified that "piso" also has a colloquial translation that means "hit", as in a murder (IV R.R. at 118-19).
- Javier Durah testified that the literal translation of "piso" meant "floor" or "ground" (V R.R. at 8).

57. The applicant testified that a "piso" is a term that means to hit somebody, to floor them, to make them kiss the ground (V R.R. at 61-62).

58. The applicant fails to show a specific expert was available to testify at trial and that their testimony regarding the translation of the word "piso" would have benefited the defense.

(Dkt. 8-24, p. 131-32). Based on those findings, the state habeas court concluded:

> 15. Because the applicant fails to show an expert was available to testify at trial and that their testimony would have benefited the defense, the applicant fails to show trial counsel was ineffective for failing to call an expert. *King v. State*, 649 S.W.2d 42, 44 (Tex. Crim. App. 1983).

(*Id.* at 135).

Flores has not pointed to any evidence that would overcome the presumption that the court's factual findings concerning the evidence presented at trial were correct. And based on the facts found by the state habeas court, its decision to deny relief on this claim reasonably applied the law to the facts, consistent with clearly established federal law. Its decision was not objectively unreasonable.

Before this Court, Flores points to an affidavit he received from his "expert" in November 2020 as evidence sufficient to rebut the state habeas court's factual findings. (Dkt. 2-1, pp. 14-15). However, this court may not consider this affidavit, which was not part of the record before the state habeas court. *See Cullen*, 563 U.S. at 181 (holding that federal habeas review is limited to the record that was before the state habeas court). Moreover, this affidavit does not explain what Flores meant when he used the term "piso," nor does it provide evidence any more favorable to Flores than the other evidence about the various meanings of "piso" that was offered at trial. *See Day v. Quarterman*, 566 F.3d 527, 538 (5th Cir. 2009) (holding that to "prevail on an ineffective assistance claim based on counsel's failure to call a witness, the petitioner must . . . show that the testimony would have been favorable

to a particular defense"). Absent such evidence, Flores cannot establish that he was prejudiced by any alleged deficiency on counsel's part. Thus, even if this Court could consider this affidavit, it is not sufficient to entitle Flores to federal habeas relief on this claim. Lumpkin is entitled to summary judgment on this claim.

C. Ineffective Assistance of Appellate Counsel (Claim Eleven)

Flores next argues that appellate counsel provided ineffective assistance by failing to raise on direct appeal nine of the twelve claims that he raised in his state petition for writ of habeas corpus. (Dkt. 1, p. 9-10). Flores contends that each of the claims has merit and would have resulted in a reversal if raised on direct appeal. (*Id.* at 10).

A claim of ineffective assistance of appellate counsel is governed by the test set out in *Strickland*, which requires the petitioner to establish both constitutionally deficient performance and actual prejudice. *See Smith v. Murray*, 477 U.S. 527, 535–36 (1986) (applying *Strickland* to a claim of ineffective assistance of counsel on appeal). To establish that appellate counsel's performance was deficient, the petitioner must show that counsel was objectively unreasonable in failing to find arguable issues to appeal—that is, that counsel unreasonably failed to discover non-frivolous issues and raise them. *Smith v. Robbins*, 528 U.S. 259, 285 (2000). A reasonable appellate attorney has an obligation to research the relevant facts and

law and make informed decisions on whether any identified issues will, or will not, prove fruitful. *Strickland*, 466 U.S. at 690–91. But the Constitution does not require an appellate attorney to advance every conceivable argument, regardless of merit. *Evitts v. Lucey*, 469 U.S. 387, 394 (1985).

A habeas petitioner claiming ineffective assistance of appellate counsel must also establish prejudice by showing a "reasonable probability" that, but for counsel's deficient performance, "he would have prevailed on his appeal." *Robbins*, 528 U.S. at 285. In essence, the petitioner must show that appellate counsel's "deficient performance led to a fundamentally unfair and unreliable result." *United States v. Dovalina*, 262 F.3d 472, 475 (5th Cir. 2001) (citing *Goodwin v. Johnson*, 132 F.3d 162, 176 (5th Cir. 1997)).

Flores first argues that appellate counsel was ineffective for failing to raise his claims of ineffective assistance of trial counsel on direct appeal. However, in Texas these types of claims are properly raised in a petition for writ of habeas corpus rather than on direct appeal. *See Aldrich v. State*, 104 S.W.3d 890, 896 (Tex. Crim. App. 2003) ("As we have said repeatedly, appellate courts can rarely decide the issue of unreasonable performance because the appellate record rarely speaks to the strategic reasons that counsel may have considered. . . . The proper procedure for raising such a claim is almost always habeas corpus."). As the state habeas court

concluded, appellate counsel cannot be ineffective for failing to raise claims in a procedurally improper manner. (Dkt. 8-24, p. 135).

Flores also argued that appellate counsel provided ineffective assistance by failing to raise his claim concerning the trial court's bias as reflected in his expressions of personal opinion. However, as discussed above, the trial court's comments did not express personal opinions and were not improper. Appellate counsel does not provide ineffective assistance by failing to raise meritless arguments. *See Murray*, 477 U.S. at 536 ("This process of 'winnowing out weaker arguments on appeal and focusing on' those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy." (quoting *Jones v. Barnes*, 463 U.S. 745, 751-52 (1983)); *see also Busby v. Dretke*, 359 F.3d 708, 714 (5th Cir. 2004) (noting that appellate counsel need not raise every nonfrivolous ground available and may make "an informed decision that certain avenues will not prove fruitful").

Flores has failed to demonstrate that the state habeas court's decision denying relief on this claim was objectively unreasonable. He is therefore not entitled to relief, and Lumpkin is entitled to summary judgment on this claim.

D. Insufficiency of the Evidence Claim (Claim Twelve)

In his final claim, Flores contends that his conviction violates the Fifth and Fourteenth Amendments to the U.S. Constitution because the State presented no evidence that would support it. (Dkt. 1, p. 10). He argues that he never said the words "murder" or "kill" and that he testified that he went along with that language only on the instructions of the informant. (*Id.*). He therefore contends that there was no evidence to show that he intended for a murder to occur. (*Id.*). However, this claim is procedurally defaulted.

The state habeas record shows that the only issue Flores raised on direct appeal was that the trial court erred by denying his request for a mistake-of-fact instruction. (Dkt. 8-4, p. 4). That claim was also the only claim raised in Flores's petition for discretionary review. (Dkt. 8-8, p. 6). The sufficiency of the evidence claim was raised for the first time in Flores's state habeas petition. However, in Texas, a claim challenging the sufficiency of the evidence must be raised on direct appeal and is not cognizable in a habeas proceeding. *See Ex parte Grigsby*, 137 S.W.3d 673, 674 (Tex. Crim. App. 2004). The Court of Criminal Appeals denied Flores's petition on the basis of this state procedural default. (Dkt. 8-24, pp. 133, 136).

As a general rule, "a federal court will not review the merits of claims, including constitutional claims, that a state court declined to hear because the prisoner failed to abide by a state procedural rule." *Martinez v. Ryan*, 566 U.S. 1, 9 (2012). When a claim was not adequately presented in state court and so is barred from further presentation in state court on state procedural grounds, the claim is considered procedurally defaulted. *See Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991); *Nobles v. Johnson*, 127 F.3d 409, 420 (5th Cir. 1997). The insufficiency of the evidence claim Flores raises in his federal petition is procedurally defaulted because it was not properly raised and cannot be raised again in the state courts due to state procedural rules. *See* Tex. Code Crim. P. 11.07, § 4(a) (limiting cognizable claims in a subsequent petition to those that have not been and could not have been presented in a previous petition). Therefore, this claim is barred from federal habeas review unless an exception applies.

A procedural default based on state procedural rules may be excused if the petitioner can show cause for the default and actual prejudice as a result of a violation of federal law. *See Coleman*, 501 U.S. at 750. "Cause" for a procedural default occurs when "something *external* to the petitioner, something that cannot fairly be attributed to him . . . 'impeded [his] efforts to comply with the State's procedural rule.'" *Id.* at 753 (quoting *Murray v. Carrier*, 477 U.S. 478, 488 (1986)). "Actual prejudice" occurs when errors at trial "worked to [the petitioner's] actual and

substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *United States v. Frady,* 456 U.S. 152, 170 (1982).

But Flores has not alleged any facts to establish cause and so avoid the procedural default. Flores had the opportunity to properly present this claim through one complete cycle of state direct review proceedings, but he failed to do so. And while ineffective assistance of counsel may be sufficient "cause" for a procedural default, *see Martinez*, 566 U.S. at 9, Flores has not argued that appellate counsel was ineffective for failing to raise this claim on direct appeal. (Dkts. 1, p. 10 (alleging that appellate counsel was ineffective for failing to raise grounds 1, 2, 3, 4, 5, 6, 7 9, and 10 on direct appeal); 2, pp. 45-46 (listing the claims Flores contends appellate counsel should have raised on direct appeal but not including the claim of alleged insufficiency of the evidence)). And even had he done so, the record contains sufficient evidence to support Flores's conviction. Appellate counsel cannot be ineffective for failing to raise meritless arguments. *See Clark*, 19 F.3d at 966; *see also Busby*, 359 F.3d at 714.

Flores alleges no other facts to show cause for his failure to properly raise this claim. He has also failed to allege facts sufficient to show prejudice, as the record of the trial proceedings contains sufficient evidence of guilt to support Flores's conviction. Therefore, Flores has failed to establish any exception sufficient to permit this court to consider his procedurally defaulted claim, this claim is barred

from federal habeas review, and Lumpkin is entitled to summary judgment on this claim.

IV. Certificate of Appealability

Habeas corpus actions under § 2254 require a certificate of appealability to proceed on appeal. 28 U.S.C. § 2253(c)(1); *Miller-El v. Cockrell*, 537 U.S. 322, 335-36 (2003). Rule 11 of the Rules Governing Section 2254 Cases requires a district court to issue or deny a certificate of appealability when entering a final order that is adverse to the petitioner. To be entitled to a certificate of appealability, the petitioner must make "a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), which requires a petitioner to demonstrate "that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Tennard*, 542 U.S. at 276 (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). The petitioner must show "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Miller-El*, 537 U.S. at 336 (quoting *Slack*, 529 U.S. at 484). When the denial of relief is based on procedural grounds, the petitioner must show not only that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right," but also that they

"would find it debatable whether the district court was correct in its procedural ruling." *Slack*, 529 U.S. at 484.

A district court may deny a certificate of appealability, *sua sponte*, without requiring further briefing or argument. *See Alexander v. Johnson*, 211 F.3d 895, 898 (5th Cir. 2000). Because Flores has not shown that reasonable jurists would find the Court's resolution of the constitutional issues debatable or wrong, this Court will not issue a certificate of appealability.

V. Conclusion

For the reasons explained above, Flores's petition for a writ of habeas corpus (Dkt. 1) is **DENIED**. The case is dismissed with prejudice. Any pending motions are denied as moot. A certificate of appealability shall not issue.

SIGNED at Houston, Texas, on Oct. 7, 2021.

DAVID HITTNER
UNITED STATES DISTRICT JUDGE