

APPENDIX

Appendix A	Decision of the State Court of Appeals
Appendix B	Order of the Texas Court of Appeals Denying Writ
Appendix C	U.S. Magistrate's Report and Recommendation
Appendix D	Judgment of the U.S. District Judge Denying Habeas Petition
Appendix E	Decision of the 5th Circuit Denying Certificate of Appealability
Appendix F	Decision of the 5th Circuit Denying Rehearing En Banc

APPENDIX C

U.S. Magistrate's Report and Recommendation

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

BRIAN DOUGLAS RAMBO, §
TDCJ No. 2202552, §
§
Petitioner, §
§
§
v. § **Civil Action No. 7:20-cv-00100-O-BP**
§
BOBBY LUMPKIN, Director, §
Texas Department of Criminal Justice, §
Correctional Institutions Division, §
§
Respondent. §

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

This habeas corpus case was referred to the undersigned automatically pursuant to Special Order 3 on July 24, 2020. ECF No. 3. Petitioner Brian Douglas Rambo (“Rambo”), an inmate confined in the William P. Clements Unit of the Texas Department of Criminal Justice (“TDCJ”) in Amarillo, Texas, brings this action pursuant to 28 U.S.C. § 2254. ECF No. 1. After considering the pleadings and the applicable legal authorities, the undersigned **RECOMMENDS** that United States District Judge Reed O’Connor **DENY** the Petition for Writ of Habeas Corpus (ECF No. 1).

I. FACTUAL BACKGROUND

In his petition, Rambo challenges his May 2018 conviction in the 46th Judicial District Court of Hardeman County, Texas of two counts of aggravated sexual assault of a child and one count of indecency with a child. ECF No. 1 at 2. Rambo pleaded not guilty to the charges, the jury convicted him, and he was sentenced to consecutive prison terms of ninety-nine years on each sexual assault count and twenty years on the indecency with a child count. ECF No. 11-2 at 99-104. His prison sentences commenced on May 17, 2018. *Id.* He appealed, and the Seventh Court

of Appeals (“COA”) affirmed his conviction on March 20, 2019. *Rambo v. State*, Nos. 07-18-00214-CR, 07-18-00215-CR, 07-18-00216-CR, slip op. (Tex. App.—Amarillo. 2019, pet. ref’d). The Texas Court of Criminal Appeals (“TCCA”) refused his Petition for Discretionary Review (“PDR”) on May 22, 2019. *Rambo v. State*, PDR No. 383-19 (Tex. Crim. App. 2019). On March 5, 2020, Rambo filed an application for a state writ of habeas corpus. ECF No. 11-25 at 18. The TCCA denied the application on May 6, 2020, without written order. ECF No. 11-21.

On July 18, 2020, Rambo filed the instant petition and contests his state conviction on two grounds. ECF No. 1. First, he asserts that no evidence supported every element of the crimes for which he was convicted. *Id.* at 6. Second, he claims in the alternative that there was insufficient evidence to support his conviction. *Id.*

II. LEGAL STANDARDS AND ANALYSIS

A. The Court views Rambo’s no evidence claim as a challenge to the sufficiency of the evidence.

Rambo asserts that there was no evidence admitted at trial to support every element of the crimes for which he was convicted. ECF No. 1 at 6. Under federal habeas review, a “no-evidence claim is not cognizable.” *Lowery v. Davis*, No. 4:18-cv-361-Y, 2019 WL 1099007, at *4 (N.D. Tex. Mar. 8, 2019), *certificate of appealability denied*, No. 19-10330, 2019 WL 4668571 (5th Cir. Sept. 5, 2019), *request to file out-of-time cert. pet. denied*, ___ U.S. ___, 140 S. Ct. 2639 (2020) (Mem.). For purposes of federal habeas corpus review, the courts view a claim of no evidence to support a conviction as a claim of insufficiency of the evidence. *Jackson v. Virginia*, 433 U.S. 307, 319 (1979). Therefore, the Court interprets Rambo’s no evidence point of error as a challenge to the sufficiency of the evidence.

B. Rambo’s challenge for sufficiency of the evidence is procedurally defaulted.

Typically, a petitioner must fully exhaust state remedies before seeking federal habeas

relief. 28 U.S.C. § 2254(b)(1)(A); *Nobles v. Johnson*, 127 F.3d 409, 419 (5th Cir. 1997). If the last state court to consider the claims expressly based its denial of relief on independent and adequate state procedural grounds, the petitioner's claims are considered to have been defaulted, and federal habeas review is barred unless the petitioner demonstrates cause for the default and actual prejudice as a result of the alleged violation of federal law or shows that failure to consider the claims will result in a fundamental miscarriage of justice. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). Furthermore, in appealing a conviction in a Texas state court, an appellant can raise a sufficiency-of-the-evidence claim only on direct appeal, not for the first time in a state habeas petition. *West v. Johnson*, 92 F.3d 1385, 1389 n.18 (5th Cir. 1996); *Clark v. Texas*, 788 F.2d 309, 310 (5th Cir. 1986); *Ex parte Grigsby*, 137 S.W.3d 673, 674 (Tex. Crim. App. 2004); *Ex parte Williams*, 703 S.W.2d 674, 677 (Tex. Crim. App. 1986).

The TCCA has held it will not consider in habeas proceedings any record-based claims that the petitioner did not raise on direct appeal. *Ex parte Gardner*, 959 S.W.2d 189, 191 (Tex. Crim. App. 1996), *clarified on reh'g* (Feb. 4, 1998). When the TCCA is silent on its reasoning for denying an applicant's sufficiency claim raised for the first time on state habeas petition, this Court may assume that the claim was denied because it was not cognizable. *Ex parte Grigsby*, 137 S.W.3d at 674. The Fifth Circuit also has recognized the Texas courts' procedural rule prohibiting consideration of record-based claims not raised on direct appeal to be an adequate state ground for barring federal habeas review. *Dorsey v. Quarterman*, 494 F.3d 527, 532 (5th Cir. 2007) (citing *Ex parte Gardner*, 959 S.W.2d at 191); *Renz v. Scott*, 28 F.3d 431, 432 (5th Cir. 1994) (under Texas law sufficiency claim may be raised on direct appeal, but not for first time in habeas proceeding).

Rambo filed a direct appeal to the state COA, a PDR to the TCCA, and an application to

APPENDIX D

**Judgment of the U.S. District Judge
Denying Habeas Petition**

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

BRIAN DOUGLAS RAMBO,
TDCJ No. 02202552,

Petitioner,

v.

BOBBY LUMPKIN, Director,
Texas Dep't of Criminal Justice,
Correctional Institutions Division,

Respondent.

§
§
§
§
§
§
§
§
§
§

Civil Action No. 7:20-cv-100-O-BP

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

This is a habeas action brought pursuant to 28 U.S.C. § 2254 in which Petitioner challenges his May 2018 conviction in the 46th Judicial District Court of Hardeman County, Texas, on two counts of aggravated sexual assault of a child and one count of indecency with a child. *See* ECF No. 1 at 2. The United States Magistrate Judge entered his Findings, Conclusions, and Recommendation in which he recommends that the petition be denied. *See* ECF No. 27. Petitioner has filed objections. *See* ECF No. 30.

The District Court reviewed *de novo* those portions of the Findings, Conclusions, and Recommendation to which objections were made and reviewed the remaining Findings, Conclusions, and Recommendation for plain error. Finding no error, I am of the opinion that the findings of fact, conclusions of law, and reasons for denial set forth in the Magistrate Judge's Recommendation are correct and they are hereby adopted and incorporated by reference as the Findings of the Court.

Accordingly, the petition for writ of habeas corpus is **DENIED**.

SO ORDERED this 20th day of October, 2021.


Reed O'Connor
UNITED STATES DISTRICT JUDGE

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

**BRIAN DOUGLAS RAMBO,
TDCJ No. 02202552,**

Petitioner.

v.

**BOBBY LUMPKIN, Director,
Texas Dep't of Criminal Justice,
Correctional Institutions Division,**

Respondent.

§
§
§
§
§
§
§
§

Civil Action No. 7:20-cv-100-O-BP

JUDGMENT

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

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

SIGNED this 20th day of October, 2021.



Reed O'Connor
UNITED STATES DISTRICT JUDGE

APPENDIX E

**Decision of the 5th Circuit Denying
Certificate of Appellability**

FILED

July 22, 2022

KAREN MITCHELL
CLERK, U.S. DISTRICT
COURT

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

June 30, 2022

Lyle W. Cayce
Clerk

BRIAN DOUGLAS RAMBO,

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. 7:20-CV-100 -O-BP

ORDER:

Brian Douglas Rambo, Texas prisoner #02202552, seeks a certificate of appealability (COA) to appeal the district court's denial of his 28 U.S.C. § 2254 petition challenging his convictions of aggravated sexual assault of a child and indecency with a child. He claims the district court committed two errors: (1) concluding that a no evidence claim is not cognizable on federal habeas review; and (2) concluding that his sufficiency of the evidence claim was procedurally defaulted. Additionally, he seeks the appointment of counsel.

No. 21-11136

To obtain a COA, 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, 483-84 (2000). his standard requires a showing that “reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.” *Slack*, 529 U.S. at 484. When the district court denies relief on procedural grounds, the petitioner must demonstrate that reasonable jurists would find it debatable whether the motion states a valid claim of the denial of a constitutional right and whether the district court was correct in its procedural ruling. *Id.* Rambo has failed to make the required showing.

Accordingly, his motions for a COA and the appointment of counsel are DENIED.



Don R. Willett
DON R. WILLETT
United States Circuit Judge

A True Copy
Certified order issued Jul 22, 2022

Jyle W. Caylor
Clerk, U.S. Court of Appeals, Fifth Circuit

APPENDIX F

**Decision of the 5th Circuit Denying
Rehearing En Banc**

United States Court of Appeals
for the Fifth Circuit

No. 21-11136

BRIAN DOUGLAS RAMBO,

Petitioner—Appellant,

versus

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

Respondent—Appellee.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 7:20-CV-100

ON PETITION FOR REHEARING EN BANC

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

PER CURIAM:

Treating the petition for rehearing en banc as a motion for reconsideration (5TH CIR. R. 35 I.O.P.), 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.

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