United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
January 5, 2023
Lyle W. Cayce
Clerk

No. 22-50664

CARLOS GARCIA,

Petitioner—Appellant,

versus

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

Respondent—Appellee.

Application for Certificate of Appealability
the United States District Court
for the Western District of Texas
USDC No. 1:21-CV-416

ORDER:

Carlos Garcia, Texas prisoner # 02126841, seeks a certificate of appealability (COA) to appeal the denial of his 28 U.S.C. § 2254 petition challenging his convictions for aggravated sexual assault of a child, indecency with a child by sexual contact, and indecency with a child by exposure. Garcia contends that (1) the state trial court violated due process by excluding evidence of the victim's sexual history and (2) his trial counsel was ineffective for failing to call witnesses.

Appendix A

To obtain a COA, Garcia must make "a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), by "show[ing] 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," *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (internal quotation marks and citation omitted); 28 U.S.C. § 2253(c)(2). To meet that burden, he must show that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack*, 529 U.S. at 484.

Garcia fails to make the requisite showing. Accordingly, the application for a COA is DENIED.

Carolyn Dineen King

CAROLYN DINEEN KING
United States Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CARLOS GARCIA, §
TDCJ NO. 02126841 §
PETITIONER, §
§
V. §
§ CAUSE NO. A-21-CV-416-LY
BOBBY LUMPKIN, DIRECTOR, §
TEXAS DEPARTMENT OF §
CRIMINAL JUSTICE, §
CORRECTIONAL INSTITUTIONS §
DIVISION, §
RESPONDENT.

FINAL JUDGMENT

Before the court is the above-referenced cause of action. On this date, the court denied Petitioner Carlos Garcia's petition for a writ of habeas corpus and determined that a certificate of appealability shall not be issued. As all issues have been resolved, the court renders the following Final Judgment pursuant to Federal Rule of Civil Procedure 58.

IT IS ORDERED that this action is hereby **CLOSED**.

SIGNED this 6th day of July, 2022.

LEE YEAKEL
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CARLOS GARCIA, §
TDCJ NO. 02126841 §
PETITIONER, §
§
V. §
§ CAUSE NO. A-21-CV-416-LY
BOBBY LUMPKIN, DIRECTOR, §
TEXAS DEPARTMENT OF §
CRIMINAL JUSTICE, §
CORRECTIONAL INSTITUTIONS §
DIVISION, §
RESPONDENT. §

ORDER ON REPORT AND RECOMMENDATION

Before the court is Petitioner Carlos Garcia's Petition for Writ of Habeas Corpus (Doc. #1). *See* 28 U.S.C. § 2254. The petition for writ of habeas corpus was referred to the United States Magistrate Judge for findings and recommendation. *See* 28 U.S.C. § 636(b); Loc. R. W. D. Tex. Appx. C, 1. The magistrate judge filed a Report and Recommendation on April 14, 2022 (Doc. #13), recommending that Garcia's petition for writ of habeas corpus be denied.

A party may serve and file specific, written objections to the proposed findings and recommendations of the magistrate judge within 14 days after being served with a copy of the Report and Recommendation, and thereby secure a *de novo* review by the district court. *See* 28 U.S.C. § 636(b); FED. R. CIV. P. 72(b). A party's failure to timely file written objections to the proposed findings, conclusions, and recommendation in a Report and Recommendation bars that party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court. *See Douglass v. United Servs. Auto Ass'n*, 79 F.3d 1415 (5th Cir. 1996) (*en banc*).

Garcia filed objections to the report and recommendation on June 9, 2022 (Doc. #18), as well as an Application for Certificate of Appealability (Doc. #19), which asserts further objections. In light of the objections, the court has undertaken a *de novo* review of the entire case file and concludes that the objections do not raise any issues that were not adequately addressed in report and recommendation. The court finds that the report and recommendation should be approved and accepted by the court for substantially the reasons stated therein.

An appeal may not be taken to the court of appeals from a final order in a habeas corpus proceeding "unless a circuit justice or judge issues a certificate of appealability." 28 U.S.C. § 2253(c)(1)(A). Pursuant to Rule 11 of the Federal Rules Governing Section 2254 cases, effective December 1, 2009, the district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant.

A certificate of appealability ("COA") may issue only if a petitioner has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). The Supreme Court fully explained the requirement associated with a "substantial showing of the denial of a constitutional right" in *Slack v. McDaniel*. 529 U.S. 473, 484 (2000). In cases where a district court rejected a petitioner's constitutional claims on the merits, "the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.* "When a district court denies a habeas petition on procedural grounds without reaching the petitioner's underlying constitutional claim, a COA should issue when the petitioner shows, at least, 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." *Id.*

In this case, reasonable jurists could not debate the denial of Garcia's section 2254 application on substantive or procedural grounds, nor find that the issues presented are adequate to deserve encouragement to proceed. *See Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003) (citing *Slack*, 529 U.S. at 484). Accordingly, a certificate of appealability shall not be issued.

IT IS THEREFORE ORDERED that Petitioner Carlos Garcia's Objections to the Magistrate's Report and Recommendation (Doc. #18) as well as the objections contained within the Application for Certificate of Appealability (Doc. #19) are **OVERRULED.**

IT IS FURTHER ORDERED that the United States Magistrate Judge's Report and Recommendation (Doc. #13) filed in this cause is hereby **APPROVED** and **ACCEPTED.**

IT IS FURTHER ORDERED that Petitioner Carlos Garcia's Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254 (Doc. #1) is **DENIED.**

IT IS FINALLY ORDERED that a Certificate of Appealability is **DENIED.**

SIGNED this 6th day of July, 2022.

LEE YEAKEL
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CARLOS GARCIA,	§	
TDCJ No. 02126841,	§	
	§	
PETITIONER,	§	
	§	
V.	§	**A-21-CV-416-LY-DH**
	§	
BOBBY LUMPKIN, Director,	§	
Texas Department of Criminal Justice,	§	
Correctional Institutions Division,	§	
	§	
RESPONDENT.	§	

REPORT AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE

TO: THE HONORABLE LEE YEAKEL
UNITED STATES DISTRICT JUDGE

The Magistrate Judge submits this Report and Recommendation to the District Court pursuant to 28 U.S.C. § 636(b) and Rule 1(e) of Appendix C of the Local Court Rules of the United States District Court for the Western District of Texas, Local Rules for the Assignment of Duties to United States Magistrates Judges.

Before the Court are Petitioner Carlos Garcia's pro se Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, Dkt. 1; Respondent Bobby Lumpkin's Answer, Dkt. 8; and Petitioner's Reply, Dkt. 12. Having reviewed the record and pleadings submitted by both parties, the undersigned concludes Garcia's federal habeas corpus petition should be denied under the standards prescribed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). *See* 28 U.S.C. § 2254(d).

Appendix B

I. Factual Background

In August 2016, Garcia was charged with one count of continuous sexual abuse of a child, three counts of indecency with a child by contact, and two counts of indecency with a child by exposure. Dkt. 9-19, at 5-7. On April 3, 2017, a jury convicted Garcia of one count of aggravated sexual assault of a child (Count 1), three counts of indecency with a child by contact (Counts 2-4), and two counts of indecency with a child by exposure (Counts 5-6). The jury sentenced Garcia to thirty-five years imprisonment on Count 1, fifteen years imprisonment on Count 2, ten years imprisonment on Counts 3 and 4, five years imprisonment on Count 5, and for Count 6, Garcia received a ten-year suspended sentence and was placed on community supervision. The trial court ordered Counts 1-2 and 5-6 to run concurrently and Counts 3-4 to run consecutively. *State v. Garcia*, No. CR-16-0668 (428th Dist. Ct., Hays Cnty., Tex. Apr. 3, 2017); Dkt. 9-19, at 67-78. On March 28, 2019, Garcia's conviction was affirmed on direct appeal. *Garcia v. State*, No. 13-17-00218-CR, 2019 WL 1388532 (Tex. App.—Corpus Christi-Edinburg, Mar. 28, 2019, pet ref'd). On June 4, 2019, Garcia filed a counseled Petition for Discretionary Review (PDR), listing the following four grounds for relief:

1. Shouldn't basic due process allow a defendant to present to a jury that a child has similar, prior sexual experiences to show a child's *basis* to fabricate?

2. Shouldn't a defendant be allowed to present that an undocumented alien had knowledge of a visa's ability to provide legal status as a *motive* and *basis* to fabricate with respect to *any crime*?

3. In sex cases, does having two sets of unrelated victims categorically constitute the same "criminal episode" for severance purposes?

4. Didn't the trial court cumulatively err in not allowing the appellant to present a viable defense to D.C. and M.C. and Y.G.'s claims?

Brief for Petitioner at ii-iii, *Garcia v. State*, No. PD-0468-19 (Tex. Crim. App. Jun. 4, 2019). The Texas Court of Criminal Appeals (TCCA) refused Garcia's PDR on August 21, 2019. *Garcia v.*

State, No. PD-0468-19 (Tex. Crim. App. Aug. 21, 2019). Petitioner did not file a petition for a writ of certiorari with the United States Supreme Court. Dkt. 1, at 3.

On March 1, 2020, Petitioner executed his pro se state habeas corpus application, listing the following grounds of relief:

1. Garcia was denied counsel at a critical stage of the criminal proceedings, specifically his bail hearings;

2. His trial counsel provided ineffective assistance when she failed to call three witnesses favorable to his defense; and

3. Garcia received ineffective assistance of counsel when his trial counsel failed to call any psychologist, social history, or medical expert in support of his defense.

Dkt. 9-19, at 110-28. On April 29, 2020, the TCCA remanded Garcia's writ application to the trial court for additional factual findings on whether Garcia's trial counsel provided ineffective assistance of counsel by failing to call three witnesses favorable to the defense. Dkt. 9-13. Garcia's trial counsel, Ms. Christie Williams, responded to the claim, Dkt. 9-17, at 3-4, and on July 17, 2020, the trial court issued its Findings of Fact and Conclusions of Law, Dkt. 9-18 at 3-4. On October 28, 2020, the TCCA denied Petitioner's application without written order on the findings of the trial court without hearing and on the court's independent review of the record. *Ex parte Garcia*, No. WR-91,146-01 (Tex. Crim. App. Oct. 28, 2020.) Dkt. 9-10.

On May 5, 2021, Petitioner executed his federal petition for writ of habeas corpus, listing the following four grounds of relief:

1. Whether due process allows a defendant to present to the jury that a child has similar, prior sexual experiences in order to show the child's basis to fabricate;

2. Whether a defendant should be allowed to present that an undocumented alien had knowledge that a U visa could provide legal status as a motive and basis to fabricate;

3. His trial counsel provided ineffective assistance when she failed to call three witnesses who were favorable to the defense; and

4. Whether the absence of counsel at the initial bail hearing violated Garcia's right to counsel under the Sixth Amendment.

Dkt. 1. On July 6, 2021, Respondent Lumpkin answered the petition, Dkt. 8, and on September 8, 2021, Garcia filed his reply, Dkt. 12.

II. Standard of Review

Garcia's federal habeas petition is governed by the heightened standard of review provided by the AEDPA. *See* 28 U.S.C. § 2254. Under § 2254(d), a petitioner may not obtain federal habeas corpus relief on any claim that was adjudicated on the merits in state court proceedings unless the adjudication of that claim either (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States, or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. *Brown v. Payton*, 544 U.S. 133, 141 (2005). This demanding standard stops just short of imposing a complete bar on federal court re-litigation of claims already rejected in state proceedings. *Harrington v. Richter*, 562 U.S. 86, 102 (2011) (citing *Felker v. Turpin*, 518 U.S. 651, 664 (1996)).

A federal habeas court's inquiry into unreasonableness should always be objective rather than subjective, with a focus on whether the state court's application of clearly established federal law was "objectively unreasonable" and not whether it was incorrect or erroneous. *Wiggins v. Smith*, 539 U.S. 510, 520-21 (2003) (citing *Williams v. Taylor*, 529 U.S. 362, 409 (2000)). Even a strong case for relief does not mean the state court's contrary conclusion was unreasonable. *Richter*, 562 U.S. at 102. A petitioner must show that the state court's decision was objectively unreasonable, which is a "substantially higher threshold." *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007); *Lockyer v. Andrade*, 538 U.S. 63, 75-76 (2003). "A state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the

correctness of the state court's decision." *Richter*, 562 U.S. at 101 (citation omitted). As a result, to obtain federal habeas relief on a claim previously adjudicated on the merits in state court, Petitioner must show that the state court's ruling "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id.* at 103; *see also Bobby v. Dixon*, 565 U.S. 23, 24 (2011). "'If this standard is difficult to meet—and it is—that is because it was meant to be.'" *Mejia v. Davis*, 906 F.3d 307, 314 (5th Cir. 2018) (quoting *Burt v. Titlow*, 571 U.S. 12, 20 (2013)).

III. Analysis

A. Trial Court Errors (claims 1-2)

In Petitioner's first and second claims, he argues the trial court erred and violated his due process rights when the court did not admit (1) evidence related to the complainant Y.G.'s sexual history, and (2) evidence suggesting the complainant M.C. and D.C.'s father had knowledge of the U visa and how it can grant legal status to an undocumented alien. Respondent argues that Garcia failed to exhaust these claims in his state habeas proceedings and therefore has procedurally defaulted them from federal habeas review. In his reply, Garcia argues that he exhausted these claims by presenting them in his PDR to the TCCA.

Garcia is correct. A fundamental prerequisite to federal habeas corpus relief under § 2254 is the exhaustion of all claims in state court prior to requesting federal collateral relief. *See Sterling v. Scott*, 57 F.3d 451, 453 (5th Cir. 1995). To exhaust a claim, a petitioner must "fairly present" his claims to the highest state court in a procedurally proper manner. *Nickleson v. Stephens*, 803 F.3d 748, 753 (5th Cir. 2015) (quoting *Morris v. Dretke*, 379 F.3d 199, 204 (5th Cir. 2004)). In Texas, this "requires that the Texas Court of Criminal Appeals be given an opportunity to review and rule upon the petitioner's claim before he resorts to the federal courts." *Richardson v. Procunier*, 762

F.2d 429, 431 (5th Cir. 1985). Once a federal claim has been fairly presented to the TCCA, either through direct appeal or collateral attack, the exhaustion requirement is satisfied. *See Castille v. Peoples*, 489 U.S. 346, 351 (1989). Petitioner raised these claims in his direct appeal, where they were overruled, and in his PDR, which the TCCA refused. As a result, these claims are exhausted and not procedurally barred from federal review.

As to the merits, the admissibility of evidence is governed by state law. "'[Federal courts] do not sit as a "super" state supreme court' in such a proceeding to review errors under state law." *Dickerson v. Guste*, 932 F.2d 1142, 1145 (5th Cir. 1991) (quoting *Martin v. Wainwright*, 428 F.2d 356, 357 (5th Cir. 1970)). Even assuming the trial court made an error, as the Supreme Court has held, "federal habeas corpus relief does not lie for errors of state law." *Estelle v. McGuire*, 502 U.S. 62, 67-68, (1991); *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990). As a result, a federal court will not grant relief based on a state court's erroneous evidentiary rulings unless those errors result in a "denial of fundamental fairness" under the Fourteenth Amendment's Due Process Clause. *Neal v. Cain*, 141 F.3d 207, 214 (5th Cir.1998) (citing *Porter v. Estelle*, 709 F.2d 944, 957 (5th Cir. 1983)).

Because the TCCA refused to review these issues in Garcia's PDR, the Thirteenth Court of Appeals has the last reasoned state judgment regarding Garcia's evidentiary claims. *See Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991) ("[w]here there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground.")

Regarding his claim that the trial court erred in not permitting Garcia to introduce evidence of Y.G.'s prior sexual history to show that she had a basis for fabricating her claims against Garcia, the state court of appeals reasoned as follows:

> Garcia argues that the trial court reversibly erred by excluding evidence of Y.G.'s sexual activity with her boyfriend because it was "an alternative source of sexual knowledge."
>
> Before his cross-examination of Y.G., Garcia requested a "412 hearing." The trial court complied, and outside the presence of the jury, Y.G. testified about her sexual history with her boyfriend. Garcia asked the trial court to allow Y.G. to testify about this evidence in front of the jury arguing that it was relevant because prior to her outcry, Y.G. engaged in the same sexual acts with her boyfriend that she accused Garcia of doing. The State argued that the evidence was inadmissible under rule of evidence 412, which prohibits the admission of "specific instances of a victim's past sexual behavior." *See* TEX. R. EVID. 412.
>
> Rule 412's general prohibition of evidence of the victim's past sexual history has several exceptions. *Id.* The evidence is admissible if its probative value outweighs the danger of unfair prejudice and it (1) "is necessary to rebut or explain scientific or medical evidence offered by the prosecutor," (2) "concerns past sexual behavior with the defendant and is offered by the defendant to prove consent," (3) "relates to the victim's motive or bias," (4) "is admissible under Rule 609," or (5) "is constitutionally required to be admitted." *Id.*
>
> Here, Garcia did not argue that any of the above-cited exceptions applied or that the probative value of the evidence outweighed the danger of unfair prejudice. Accordingly, we cannot conclude that the trial court abused its discretion by denying Garcia's request to present evidence of Y.G.'s sexual history.

Garcia, 2019 WL 1388532, at *10-11. Regarding Garcia's second claim—that the trial court erred when it prevented him from questioning the complainants M.C. and D.C.'s stepmother about how she obtained legal status through a U visa and how M.C. and D.C.'s father was an undocumented alien and knew a U visa could grant him legal status—the court of appeals first noted that

> Garcia's defensive theory was that ... D.C.'s stepmother and father coaxed D.C. and M.C. to falsely claim that Garcia committed the charged offenses so that D.C.'s father could also obtain a U visa, which is given to a parent of a victim of certain crimes. Garcia argued that D.C.'s stepmother's testimony regarding her U visa and D.C.'s father's citizenship status was relevant to support his theory that the children and stepmother had a motive to lie.

The court of appeals concluded that the trial court did not abuse its discretion by limiting the stepmother's testimony:

> Here, the trial court first limited Garcia's questioning of D.C.'s stepmother concerning the citizenship status of D.C.'s father who was not a witness in this case. ... [T]he trial court could have reasonably found that evidence of the citizenship status of D.C.'s father was not relevant or logically connected to D.C's stepmother's motive to lie. Moreover, the trial court has discretion to limit the scope of cross-examination to prevent harassment, prejudice, confusion of the issues, endangering the witness, and the injection of cumulative or collateral evidence. ... Garcia's assertion that the family plotted against him so that D.C.'s father could obtain a U visa is not supported by any evidence and only supported by his hypothetical assertion. In *Samson* [*v. State*, 292 S.W.3d 112 (Tex. App.—Houston [14th Dist.] 2008, pet. ref'd)], there was evidence that Arcos, a witness testifying against the appellant, would be deported if the appellant sought a divorce and Arcos then fabricated the allegations in retaliation. *Id.* at 119. Here, there is no evidence that D.C.'s stepmother would benefit in any way from Garcia's conviction, and D.C.'s father did not testify and thus he was not available for impeachment purposes. Thus, we cannot conclude that the trial court abused its discretion in not allowing Garcia to question D.C.'s stepmother about D.C.'s father's citizenship status.

Garcia, 2019 WL 1388532, at *6 & n.13.

In his federal petition, Garcia fails to show how the court of appeals' analysis was contrary to or involved an unreasonable application of clearly established federal law. The court of appeals concluded that Garcia failed to show that any of the exceptions in Rule 412 applied to Y.G.'s testimony, and thus the trial court did not abuse its discretion in excluding the evidence. In his petition and reply, Garcia insists the trial court's ruling violates his constitutional rights but does not cite any federal statutory or legal precedent in support. Further, regarding his second claim, Garcia argues that court of appeals erred by saying his argument was not supported by the evidence, when, in fact, it was only unsupported because the trial court did not allow Garcia to present the evidence via his proposed cross-examination. Again, Garcia fails to show that the court of appeals' opinion was contrary to clearly established federal law, or that the trial court's ruling resulted in the denial of fundamental fairness under the Due Process Clause of the Fourteenth Amendment. As a result, these claims should be denied.

B. Ineffective Assistance of Counsel (claim 3)

In Garcia's third claim, he argues he received ineffective assistance of counsel when his trial counsel failed to call three witnesses whose testimony would have impeached the complainants' allegations and shown that their claims were fabricated. For support Garcia attached affidavits from Yeni Sandoval Rapalo, Tishay Michelle King, and Jacqueline R. McNutt. In Ms. Sandoval Rapalo's affidavit, she attests that she was in a relationship with Garcia from 2012 to 2015, that Garcia was never alone with her children M.C. and D.C., and that—after describing the circumstances behind M.C. and D.C.'s outcry in May 2015—she was certain their father, Santos Cruz, was not interested in their welfare but rather wanted to avoid paying child support and wanted to get a U visa, as his wife had done. Attached to Ms. Sandoval Rapalo's affidavit was a lease agreement between Patricia Garcia (Garcia's sister) and Ms. Sandoval Rapalo, and parts of a February 2015 Child Protective Services Safety Plan involving Ms. Sandoval Rapalo and M.C. and D.C. Tishay King attested that there was no opportunity for Garcia to sexually assault Y.G. on the night on June 17, 2012, and that there was never a party at her house where Y.G. could have also been assaulted. Finally, Ms. McNutt attested that she represented Garcia during his divorce in March 2015, and that she believed, based on the contentious divorce, that the allegations of Garcia sexually abusing his children were made out of spite and revenge. Dkt. 1-1, at 16-34.

The Sixth Amendment to the United States Constitution guarantees citizens the assistance of counsel in defending against criminal prosecutions. U.S. CONST. amend VI. Sixth Amendment claims based on ineffective assistance of counsel are reviewed under the familiar two-prong test established in *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*, a petitioner cannot establish a violation of his Sixth Amendment right to counsel unless he demonstrates (1) counsel's performance was deficient and (2) this deficiency prejudiced the petitioner's defense. *Id.*

at 687-88, 690. The Supreme Court has emphasized that "[s]urmounting *Strickland*'s high bar is never an easy task." *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010).

When determining whether counsel performed deficiently, courts "must be highly deferential" to counsel's conduct and a petitioner must show that counsel's performance fell beyond the bounds of prevailing objective professional standards. *Strickland,* 466 U.S. at 687-89. Counsel is "'strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'" *Burt*, 571 U.S. at 22 (quoting *Strickland*, 466 U.S. at 690). To demonstrate prejudice, a 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." *Strickland*, 466 U.S. at 694. Under this prong, the "likelihood of a different result must be substantial, not just conceivable." *Richter*, 562 U.S. at 112 (citing *Strickland*, 466 U.S. at 693). A habeas petitioner has the burden of proving both prongs of the *Strickland* test. *Wong v. Belmontes*, 558 U.S. 15, 27 (2009).

Ineffective assistance of counsel claims are considered mixed questions of law and fact and are analyzed under the "unreasonable application" standard of 28 U.S.C. § 2254(d)(1). *Gregory v. Thaler*, 601 F.3d 347, 351 (5th Cir. 2010). When the state court has adjudicated the claims on the merits, a federal court must review a petitioner's claims under the "'doubly deferential'" standards of both *Strickland* and § 2254(d). *Woods v. Etherton*, 578 U.S. 113, 117 (2016) (quoting *Cullen v. Pinholster*, 563 U.S. 170, 190 (2011)). In such cases, the "pivotal question" is not "whether defense counsel's performance fell below *Strickland*'s standard," but whether "the state court's application of the *Strickland* standard was unreasonable." *Richter*, 562 U.S at 101.

After the TCCA remanded these allegations back to the state habeas court for further findings, Garcia's trial counsel, Ms. Christie Williams, provided the following statement:

> I was aware of the existence of Yeni Sandoval, Tishay Michelle King and Jacqueline R. McNutt. I spoke to all three of these individuals in preparation for Mr. Garcia's trial.
>
> With regard to Ms. McNutt, I spoke to her several times to clarify status in the pending family law matters. I did not consider calling her as a witness, nor was I asked to proffer her as a witness in the criminal trial. The jury was aware that the allegations by Mr. Garcia's wife and children were not made until after the family law matters were being litigated. Even if she had relevant testimony, calling Ms. McNutt would have concerned me because she had a privileged relationship with Mr. Garcia.
>
> With regard to Ms. King, I did interview her about the items contained in the affidavit provided by Mr. Garcia in his writ application. Her testimony was quite similar to that provided to the jury by her wife, Patricia Garcia. Ms. Garcia is Carlos Garcia's sister and [Y.G.]'s aunt. Ms. Garcia made an excellent witness and the decision was made, with Mr. Garcia's consent, to call her instead of Ms. King and to not call both witnesses.
>
> With regard to Ms. Sandoval, she was interviewed on 2 occasions by my investigator, AJ Keim and interpreter Irene Odorn. Although there were facts that could have been elicited that would have been helpful to Mr. Garcia, there were also items that would have been harmful. We anticipated that she would be called by the State to testify in their case in chief and she was subpoenaed to do so. The plan was to elicit any helpful information during cross-examination. However, she did not appear, and was not cooperative with the State or the defense during the trial. Additionally, the CPS matters were not settled and she had a disincentive to provide the testimony detailed in the affidavit. After discussion with Mr. Garcia, the decision was made not to call her in the defense case due to all these potentially negative possibilities.

Dkt. 9-17, at 3-4. Upon review, the state habeas court credited Ms. Williams's affidavit, concluded that the testimony and evidence presented by the State—which the habeas court described as "so overwhelming"—was credible, and that Ms. Williams did not provide ineffective assistance of counsel. Dkt. 9-18, at 3-4.

To prevail on an ineffective assistance claim based on counsel's failure to call a witness, the petitioner must name the witness, demonstrate the witness was available to testify, delineate the content of the witness's proposed testimony, and show the testimony would have been favorable to the defense. *Day v. Quarterman*, 566 F.3d 527, 538 (5th Cir. 2009). The Fifth Circuit

has "repeatedly held that complaints of uncalled witnesses are not favored in federal habeas corpus review because the presentation of testimonial evidence is a matter of trial strategy and because allegations of what a witness would have stated are largely speculative." *Id.* (citing *Bray v. Quarterman*, 265 F. App'x 296, 298 (5th Cir. 2008)).

Here, none of the proposed witnesses—Ms. Sandoval Rapalo, Ms. King, or Ms. McNutt—attested that they were available to testify at Garcia's trial. Further, in her statement to the state habeas court, Ms. Williams stated she had anticipated cross-examining Ms. Sandoval Rapalo at trial, but that she became uncooperative with both the State and defense and did not show up. Ms. Williams further stated that Ms. King's testimony was redundant to Ms. Garcia's, who she described as an "excellent witness," and that Ms. McNutt's privileged relationship with Garcia was problematic in terms of her testifying. The state habeas court—which was the same as the trial court—credited Ms. Williams's statement and concluded that Ms. Williams did not provide ineffective assistance of counsel and that the evidence against Garcia was overwhelming. In his federal petition and reply, Garcia argues that because the state habeas court failed to hold an evidentiary hearing on this issue, its findings of fact are unreasonable.

"[A] state-court factual determinations is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance." *Wood v. Allen*, 558 U.S. 290, 301 (2010). Rather, "§ 2254(d)(2) requires that [the federal habeas court] accord the state trial court substantial deference." *Brumfield v. Cain*, 576 U.S. 305, 314 (2015). This deference is "especially strong when"—as in this case—"the state habeas court and the trial court are one in the same." *Clark v. Johnson*, 202 F.3d 760, 764 (5th Cir. 2000). In his federal petition, Garcia does not show that the witnesses were available to testify at trial, and in the case of Ms. Sandoval Rapalo, the record shows she did not cooperate with the State or defense and

affirmatively chose not to testify at trial. Garcia has also not shown how this testimony from these witnesses would have been favorable to the defense. He has therefore failed to rebut the state habeas court's factual findings with clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1) (a state court's factual findings are "presumed to be correct" unless the habeas petitioner rebuts the presumption through "clear and convincing evidence"). Accordingly, the state habeas court's application of *Strickland* to this claim was not unreasonable, and it should be denied.

C. Denial of Counsel (claim 4)

In Garcia's final ground for relief, he argues that he was denied counsel at his three separate bail hearings, which violated his rights under the Sixth Amendment. The record shows that Garcia was brought before a magistrate on three separate occasions, and that he declined a court appointed attorney each time. Dkt. 9-19, at 201-07.

The Sixth Amendment right to counsel attaches at the initiation of adversarial judicial proceedings "whether by way of formal charge, preliminary hearing, indictment, information, or arraignment," and no request for counsel need be made by the accused. *Kirby v. Illinois*, 406 U.S. 682, 689 (1972) (plurality); *Brewer v. Williams*, 430 U.S. 387, 398 (1977). Once the Sixth Amendment right to counsel has attached, the accused is entitled to the assistance of counsel at each "critical" stage of the prosecution, absent a valid waiver. *Michigan v. Jackson*, 475 U.S. 625, 629 (1986).

Under Texas law, a defendant must be brought before a magistrate for hearing within 48 hours after being arrested. *See* TEX. CODE CRIM. PROC. art. 15.17(a). This hearing—known as an Article 15.17 hearing—requires the magistrate to inform the accused "of the accusation against him and of any affidavit filed therewith, of his right to retain counsel, of his right to remain silent, of his right to have an attorney present during any interview with peace officers or attorneys

representing the state, of his right to terminate the interview at any time, and of his right to have an examining trial. The magistrate shall also inform the person arrested of the person's right to request the appointment of counsel if the person cannot afford counsel." *Id.*

The Supreme Court has held that the right to counsel attaches, for Sixth Amendment purposes, when a defendant appears for an Article 15.17 hearing. *Rothgery v. Gillespie Cnty., Tex.*, 554 U.S. 191, 213 (2008). Counsel must be appointed "within a reasonable time *after* attachment to allow for adequate representation at any critical stage before trial, as well as at trial itself." *Id.* at 212 (emphasis added). But while an Article 15.17 hearing "plainly signals attachment," it is not a "critical stage" of the state criminal proceeding at which an attorney's presence is mandatory. *Id.* Indeed, contrary to Garcia's assertions, the Sixth Amendment does not require the appointment of an attorney prior to an Article 15.17 hearing or the physical presence of one during the Article 15.17 hearing. As a result, Garcia fails to demonstrate that the state habeas court's rejection of this claim was either contrary to, or an unreasonable application of, clearly established federal law. This claim should be denied.

IV. Recommendation

The undersigned recommends the District Court **DENY** Garcia's Petition for Writ of Habeas Corpus.

V. Certificate of Appealability

A petitioner may not appeal a final order in a habeas corpus proceeding "unless a circuit justice or judge issues a certificate of appealability." 28 U.S.C. § 2253(c)(1)(A). Pursuant to Rule 11(a) of the Rules Governing Section 2254 Cases, the district court must issue or deny a certificate of appealability (COA) when it enters a final order adverse to the applicant. *See Miller-El v. Cockrell,* 537 U.S. 322, 335-36 (2003) (citing 28 U.S.C. § 2253(c)(1)).

A certificate of appealability may issue only if a petitioner has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). In cases where a district court rejects a petitioner's constitutional claims on the merits, "the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). When a district court rejects a habeas petition on procedural grounds without reaching the constitutional claims, "a COA should issue when the petitioner shows, at least, 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." *Id.*

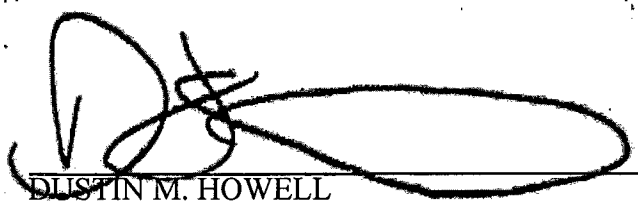
In this case, reasonable jurists could not debate the dismissal or denial of the Garcia's § 2254 petition on substantive or procedural grounds, nor find that the issues presented are adequate to deserve encouragement to proceed. *Miller-El*, 537 U.S. at 327 (citing *Slack*, 529 U.S. at 484). The undersigned thus recommends the Court not issue a certificate of appealability.

VI. Objections

Within 14 days after receipt of the magistrate judge's report, any party may serve and file written objections to the findings and recommendations of the magistrate judge. 28 U.S.C. § 636(b)(1)(C). Failure to file written objections to the proposed findings and recommendations contained within this report within 14 days after service shall bar an aggrieved party from de novo review by the district court of the proposed findings and recommendations and from appellate review of factual findings accepted or adopted by the district court except on grounds of plain error

or manifest injustice. *Thomas v. Arn*, 474 U.S. 140, 148 (1985); *Douglass v. United Servs. Auto. Assoc.*, 79 F.3d 1415 (5th Cir. 1996) (en banc).

SIGNED this 14th day of April, 2022.



DUSTIN M. HOWELL
UNITED STATES MAGISTRATE JUDGE