APPENDIX A

Bien v Lumpkin, No. 22-11032 (Feb. 28, 2023)

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
February 28, 2023
Lyle W. Cayce
Clerk

No. 22-11032

MICHAEL BIEN,

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 Northern District of Texas
USDC No. 6:21-CV-20

UNPUBLISHED ORDER

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

PER CURIAM:

Michael Bien, Texas prisoner # 01915041, is serving a life sentence following his conviction for criminal solicitation to commit capital murder. He seeks a certificate of appealability (COA) to appeal the district court's dismissal of his 28 U.S.C. § 2254 application challenging this conviction and the denial of his Federal Rule of Civil Procedure 59(e) motion.

With respect to the district court's determination that his application was untimely, Bien argues that he was entitled to equitable tolling because the attorney who represented him in his state habeas proceedings misled him about the filing deadline for his federal application and delayed in providing him with a copy of his legal files. Our court has long held that mere attorney error or neglect is not an extraordinary circumstance such that equitable tolling is justified. *Cousin v. Lensing*, 310 F.3d 843, 848-49 (5th Cir. 2002). Additionally, a delay in receiving one's legal file is not an extraordinary circumstance such that equitable tolling is justified where a plaintiff is able to file their state and federal habeas applications without it. *See Hatcher v. Quarterman*, 305 F. App'x 195, 196 (5th Cir. 2008) (finding that prisoner was not entitled to equitable tolling because he was able to file his state and federal habeas applications without access to trial counsel's files). Bien had access to at least part of his record, and he was able to file both his state and federal habeas applications without first obtaining a copy of his trial counsel's file.

Although Bien appears to argue that he is entitled to tolling based on delays resulting from moves between prison units and placement in segregation, he did not raise such arguments in the district court, so we decline to address them. *See Henderson v. Cockrell*, 333 F.3d 592, 605 (5th Cir. 2003). To the extent that Bien raises additional equitable tolling arguments that he first presented in his Federal Rule of Civil Procedure 60(b) motion, we decline to consider them at this time. *See Black v. Davis*, 902 F.3d 541, 545 (5th Cir. 2018). Bien's motion to stay and abate the instant proceedings and to remand the case so the district court may address his Rule 60(b) motion is DENIED.

To obtain a COA, Bien 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, 484 (2000). When the district court's denial of relief is based on procedural grounds, a COA may not issue unless the prisoner shows 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. Bien fails to make the required showing as to the district court's limitations ruling.

Accordingly, his motion for a COA is DENIED. Because Bien has not satisfied the COA standard on the limitations question, we do not address Bien's challenges to the district court's alternative rulings on exhaustion and the merits of his claims. *See Slack*, 529 U.S. at 484-85. In addition, we do not reach his contention that the district court erred by failing to conduct an evidentiary hearing. *See United States v. Davis*, 971 F.3d 524, 534-35 (5th Cir. 2020).

APPENDIX B

Bien v Director, No. 6:21-cv-00020C (June 29, 2022)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
SAN ANGELO DIVISION

MICHAEL BIEN,	§	
	§	
Petitioner,	§	
	§	
v.	§	CIVIL ACTION NO. 6:21-CV-00020-C
	§	
DIRECTOR, TDCJ-CID,	§	
	§	
	§	
Respondent.	§	

ORDER

Petitioner Michael Bien, a state prisoner proceeding pro se, filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 to challenge his state-court conviction and sentence. The Court, having considered the petition, the response, the reply, the record, and applicable authorities, finds that the petition should be dismissed as untimely.

I. BACKGROUND

On February 21, 2014, Petitioner was convicted under Cause No. CR22320 of criminal solicitation to commit capital murder, and under Cause No. CR22319 of criminal attempt to commit capital murder, in the 35th Judicial District Court of Brown County, Texas. He was sentenced to life in each case, with the sentences to run concurrently. Doc. 13-2 at 3–5, 8–10.[1] Petitioner appealed. The Eleventh Court of Appeals of Texas affirmed the conviction for solicitation to commit capital murder but vacated the conviction for attempted capital murder on double jeopardy grounds. *Bien v. State*, 530 S.W.3d 177 (Tex. App.—Eastland 2016). On June 6, 2018, the Court of Criminal Appeals of Texas agreed that the conviction for the two

[1] The page references are to the "Page __ of __" at the top right portion of the document on the Court's electronic filing system.

offenses violated double jeopardy but determined that the appropriate remedy was to allow the State to choose which conviction to vacate. The State requested that the criminal solicitation conviction be retained; thus, the Court of Criminal Appeals affirmed the judgment of the appellate court. *Bien v. State*, 550 S.W.3d 180 (Tex. Crim. App. 2018). On December 10, 2018, the United States Supreme Court denied Petitioner's petition for writ of certiorari. *Bien v. Texas*, 139 S. Ct. 646 (2018).

On November 22, 2019, Petitioner filed a state application for writ of habeas corpus. Doc. 13-3 at 3. On September 16, 2020, the Court of Criminal Appeals denied the application without written order on findings of the trial court and on independent review of the record. *Id.* at 2.

On March 1, 2021, Petitioner filed his federal application for writ of habeas corpus. Doc. 1 at 26. He asserts thirteen grounds, worded as follows:

> GROUND ONE: Petitioner was denied due process when the state court erred in permitting the State Prosecutor to select which of their unconstitutionally obtained convictions to retain, in violation of the Fifth and Fourteenth Amendments of the United States Constitution.
>
> GROUND TWO: Petitioner was denied due process when convicted despite insufficient evidence because the State Prosecutor failed to refute Petitioner's defense of entrapment.
>
> GROUND THREE: Trial counsel was ineffective for failure to request a proper entrapment defense jury charge, failing to object to the charge as given to the jury.
>
> GROUND FOUR: Appellate counsel was ineffective for failure to raise on appeal the issue of an improper jury charge as to Petitioner's entrapment defense.
>
> GROUND FIVE: Petitioner's due process rights were violated where trial court so mischarged the jury on the State Prosecutor's burden of proof and limitation of the defense that Petitioner did not receive a fair trial.
>
> GROUND SIX: Trial counsel was ineffective for failing to have a hearing, object, or secure a running objection to the State Prosecutor's and trial court's misstatements on the State's burden of proof on entrapment during voir dire.

GROUND SEVEN: Petitioner's due process rights were violated where trial court overruled trial counsel's objection to State Prosecutor's misstatement of law concerning the shifting burden intrinsic to the entrapment defense.

GROUND EIGHT: Trial counsel was ineffective for failure to request a limiting instruction for extraneous offenses during the guilt-innocence phase of trial.

GROUND NINE: Trial counsel was ineffective for failure to request preliminary admissibility hearing, object, or request contemporaneous limiting instruction on Evans' punishment extraneous offense testimony.

GROUND TEN: Petitioner was denied due process of law by prosecutorial misconduct where State Prosecutor did not act with impartiality, bolstered his evidence, and abandoned his role and became a witness.

GROUND ELEVEN: Trial counsel was ineffective for failure to obtain and present exculpatory evidence and to meaningfully cross examine witnesses.

GROUND TWELVE: Trial counsel was ineffective for failure to investigate or offer sufficient mitigation evidence in punishment (character witnesses and mental health evidence).

GROUND THIRTEEN: Trial counsel was ineffective for not allowing Petitioner to testify after Petitioner informed trial counsel of his intent to testify in his own defense.

Doc. 1 at 7–22. Respondent answers that the petition is untimely, partially unexhausted, and without merit. Doc. 13.

II. STANDARDS OF REVIEW

A. Limitations

A one-year period of limitation applies to a petition for writ of habeas corpus by a person in custody pursuant to the judgment of a state court. The period runs from the latest of —

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of diligence.

28 U.S.C. § 2244(d)(1). Typically, the time begins to run on the date the judgment of conviction becomes final. *United States v. Thomas*, 203 F.3d 350, 351 (5th Cir. 2000). A criminal judgment becomes final when the time for seeking direct appeal expires or when the direct appeals have been exhausted. *Griffith v. Kentucky*, 479 U.S. 314, 321 n.6 (1987).

The time during which a properly filed application for state post-conviction relief is pending does not count toward the period of limitation. 28 U.S.C. § 2244(d)(2). A state habeas petition is pending on the day it is filed through the day it is resolved. *Windland v. Quarterman*, 578 F.3d 314, 317 (5th Cir. 2009). A subsequent state petition, even though dismissed as successive, counts to toll the applicable limitations period. *Villegas v. Johnson*, 184 F.3d 467, 470 (5th Cir. 1999). And, a motion for reconsideration of the denial of a state petition also counts to toll limitations. *Emerson v. Johnson*, 243 F.3d 931, 935 (5th Cir. 2001). A state habeas application filed after limitations has expired does not entitle the petitioner to statutory tolling. *Scott v. Johnson*, 227 F.3d 260, 263 (5th Cir. 2000).

Equitable tolling is an extraordinary remedy available only where strict application of the statute of limitations would be inequitable. *United States v. Patterson*, 211 F.3d 927, 930 (5th Cir. 2000). The doctrine is applied restrictively only in rare and exceptional circumstances. *In re Wilson*, 442 F.3d 872, 875 (5th Cir. 2006). The petitioner bears the burden to show that equitable tolling should apply. *Alexander v. Cockrell*, 294 F.3d 626, 629 (5th Cir. 2002). To do so, the petitioner must show that he was pursuing his rights diligently and that some extraordinary circumstance stood in his way and prevented the timely filing of his motion.

Holland v. Florida, 560 U.S. 631, 649 (2010). The failure to satisfy the statute of limitations must result from factors beyond the petitioner's control; delays of his own making do not meet the test. *In re Wilson*, 442 F.3d at 875. Equitable tolling applies principally where the petitioner is actively misled by the government or is prevented in some extraordinary way from asserting his rights. *Fierro v. Cockrell*, 294 F.3d 674, 682 (5th Cir. 2002); *Patterson*, 211 F.3d at 930. Neither excusable neglect nor ignorance of the law is sufficient to justify equitable tolling. *Id.* Lack of legal acumen and unfamiliarity with legal process are not sufficient justification to toll limitations. *United States v. Petty*, 530 F.3d 361, 366 (5th Cir. 2008); *Alexander v. Cockrell*, 294 F.3d 626, 629 (5th Cir. 2002).

Finally, the Supreme Court has recognized actual innocence as an equitable exception to the statute of limitations. *McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013). To meet the actual innocence exception to limitations, the petitioner must show that, in light of new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt. *Id.* at 386–87; *Merryman v. Davis*, 781 F. App'x 325, 330 (5th Cir. 2019). "Actual innocence" means factual innocence, not mere legal insufficiency. *Bousley v. United States*, 523 U.S. 614, 623 (1998). Moreover, such a claim requires the petitioner to support his allegations with new reliable evidence that was not presented at trial. *Schlup v. Delo*, 513 U.S. 298, 324 (1995).

B. Exhaustion

The exhaustion doctrine requires that the state courts be given the initial opportunity to address alleged deprivations of constitutional rights. *Castille v. Peoples*, 489 U.S. 346, 349 (1989); *Anderson v. Harless*, 459 U.S. 4, 6 (1982). The petitioner must present his claims to the highest court of the state, here, the Court of Criminal Appeals of Texas. *Richardson v. Procunier*, 762 F.2d 429, 431 (5th Cir. 1985). And, all of the grounds raised must be fairly

presented to the state courts before being presented in federal court. *Picard v. Connor*, 404 U.S. 270, 275 (1971). That is, the state courts must have been presented with the same facts and legal theories presented in federal court. The petitioner cannot present one claim in federal court and another in state court. *Id.* at 275–76. Presenting a "somewhat similar state-law claim" is not enough. *Anderson*, 459 U.S. at 6; *Wilder v. Cockrell*, 274 F.3d 255, 260 (5th Cir. 2001).

For the Court to reach the merits of unexhausted claims, the petitioner must demonstrate either (1) cause for the procedural default and actual prejudice, or (2) that he is actually innocent of the offense for which he was convicted. *McQuiggin*, 569 U.S. at 386; *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). To establish actual innocence, the petitioner must provide the Court with "new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." *Schlup*, 513 U.S. at 324. In other words, actual innocence means factual innocence, not merely legal insufficiency. *Bousley*, 523 U.S. at 623.

C. Section 2254

A writ of habeas corpus on behalf of a person in custody under a state-court judgment shall not be granted with respect to any claim that was adjudicated on the merits in state court proceedings unless the petitioner shows that the prior adjudication:

> (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 proceedings.

28 U.S.C. § 2254(d). A decision is contrary to clearly established federal law if the state court arrives at a conclusion opposite to that reached by the United States Supreme Court on a question of law or if the state court decides a case differently than the Supreme Court has on a set of

materially indistinguishable facts. *Williams v. Taylor*, 529 U.S. 362, 405–06 (2000); *see also Hill v. Johnson*, 210 F.3d 481, 485 (5th Cir. 2000). A state-court decision will be an unreasonable application of clearly established precedent if it correctly identifies the applicable rule but applies it objectively unreasonably to the facts of the case. *Williams*, 529 U.S. at 407–09; *see also Neal v. Puckett*, 286 F.3d 230, 236, 244–46 (5th Cir. 2002) (*en banc*) (explaining that the focus should be on the ultimate legal conclusion reached by the state court and not on whether that court considered and discussed every angle of the evidence). A determination of a factual issue made by a state court is presumed to be correct. 28 U.S.C. § 2254(e)(1). The presumption of correctness applies to both express and implied factual findings. *Young v. Dretke*, 356 F.3d 616, 629 (5th Cir. 2004); *Valdez v. Cockrell*, 274 F.3d 941, 948 n.11 (5th Cir. 2001). Absent express findings, a federal court may imply fact findings consistent with the state court's disposition. *Marshall v. Lonberger*, 459 U.S. 422, 433 (1983). Thus, when the Texas Court of Criminal Appeals denies relief without written order, such ruling is an adjudication on the merits that is entitled to this presumption. *Ex parte Torres*, 943 S.W.2d 469, 472 (Tex. Crim. App. 1997). The petitioner has the burden of rebutting the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); *Hill*, 210 F.3d at 486.

In making its review, the Court is limited to the record that was before the state court. 28 U.S.C. § 2254(d)(2); *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011).

D. Ineffective Assistance

To prevail on an ineffective assistance of counsel claim, movant must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *see also*

Missouri v. Frye, 566 U.S. 133, 147 (2012). "[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." *Strickland*, 466 U.S. at 697; *see also United States v. Stewart*, 207 F.3d 750, 751 (5th Cir. 2000). "The likelihood of a different result must be substantial, not just conceivable," *Harrington v. Richter*, 562 U.S. 86, 112 (2011), and a movant must prove that counsel's errors "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Cullen*, 563 U.S. at 189 (quoting *Strickland*, 466 U.S. at 686). Judicial scrutiny of this type of claim must be highly deferential and the defendant must overcome a strong presumption that his counsel's conduct falls within the wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 689. Simply making conclusory allegations of deficient performance and prejudice is not sufficient to meet the *Strickland* test. *Miller v. Johnson*, 200 F.3d 274, 282 (5th Cir. 2000).

Where, as here, the state court adjudicated the ineffective-assistance claims on the merits, this Court must review Petitioner's claims under the "doubly deferential" standards of both *Strickland* and § 2254(d). *Cullen*, 563 U.S. at 190. In such cases, the "pivotal question" for the Court is not "whether defense counsel's performance fell below *Strickland's* standard"; it is "whether the state court's application of the *Strickland* standard was unreasonable." *Richter*, 562 U.S. at 101, 105. In other words, the Court must afford "both the state court and the defense attorney the benefit of the doubt." *Burt v. Titlow*, 571 U.S. 12, 15 (2013) (quoting *Cullen*, 563 U.S. at 190); *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009).

III. ANALYSIS

A. Timeliness

On December 10, 2018, the Supreme Court denied the petition for certiorari filed by Petitioner. *Bien v. Texas*, 139 S. Ct. 646 (2018). Absent tolling, he had until December 10, 2019, in which to file his federal habeas application. His state habeas application, pending from November 22, 2019, until September 16, 2020, or 299 days, extended the deadline until October 5, 2020, for filing his federal habeas application. He did not file his federal application until March 1, 2021, approximately five months too late, which Petitioner recognizes. Doc. 1 at 25.

Petitioner argues that he should be entitled to equitable tolling because his attorney misled him. Doc. 1 at 25; Doc. 9. Petitioner recognizes that the time began running December 10, 2018, when the Supreme Court denied his petition for writ of certiorari. Doc. 9 at 1. He admits that "roughly three months into [the one-year period]", on or near March 21, 2019, he hired Jacob Blizzard to represent him in filing a state habeas application. *Id.* at 1–2. Further, the state application was filed with only 18 days left on the clock. *Id.* at 2. On September 16, 2020, the state application was denied, and Blizzard notified Petitioner of the denial by letter dated September 20, 2020. Doc. 10 at 3. Petitioner contends that he could not have received the letter before the deadline expired. Doc. 9 at 2–3. Blizzard erroneously informed Petitioner that because the state application was filed within one year of the state appeal being final, Petitioner would "have the opportunity to file a federal writ." Doc. 10 at 3. Blizzard noted that he had discussed filing a federal writ with Petitioner's mother and would talk to Petitioner soon to "discuss the same." *Id.* Petitioner wrote follow-up letters to Blizzard. Doc. 10, Exs. C & D. By letter dated January 8, 2021, Blizzard stated that the scope of his representation of Petitioner

"only covered filing an 11.07 application" and that he could not provide further representation.[2] *Id.*, Ex. E. Petitioner was surprised but admitted that it was probably due to his mother not giving him good information. *Id.*, Ex. G.

No conclusion can be reached but that Blizzard and Petitioner did not properly calculate the due date for his federal habeas application. Each seemed to believe Petitioner had one year from the denial of state habeas relief. Petitioner learned of the correct deadline when he "described his frustration to a fellow inmate, who then calculated his AEDPA limitations period for him." Doc. 9 at 4. Neither ignorance of the law nor excusable neglect is sufficient to support tolling. Petitioner's mistaken assumption about the deadline is no excuse for his untimely filing. *United States v. Petty*, 530 F.3d 361, 365–66 (5th Cir. 2008); *Cousin v. Lensing*, 310 F.3d 843, 848–49 (2002). As much as Petitioner would like it to be, this is not a case where an attorney intentionally misled his client. *See United States v. Riggs*, 314 F.3d 796, 799 (5th Cir. 2002); *United States v. Wynn*, 292 F.3d 226 (5th Cir. 2002). This case involves nothing more than garden variety negligence. *Holland*, 560 U.S. at 651.

Petitioner also alleges that he should be entitled to tolling because an external obstacle—lack of his legal file—prevented his filing of his federal application any sooner. Specifically, he says his case is closest to the factual outline presented in *Jimenez v. Davis*, 741 F. App'x 189 (5th Cir. 2018). Doc. 9 at 6–7. In *Jimenez*, the Fifth Circuit determined that the failure of an attorney to provide the petitioner with legal documents necessary to prepare his federal petition was not an error arising out of his representation of the petitioner; rather, it was an external obstacle because the attorney no longer represented the petitioner and was not acting as his agent. 741 F. App'x at 192–93. The key in that case was that the petitioner did not have any

[2] Petitioner's description of Blizzard having deserted and abandoned him, Doc. 9 at 3, is not supported by the letters attached to Petitioner's appendix. Doc. 10.

portion of the record; in particular, he did not have a copy of his state writ papers. *Id.* at 193–94. That is not the case here, where Petitioner's letters reflect that he had access to the record. *See, e.g.*, Doc. 10, Ex. D ("I have been going through my files and reviewing the 'Judge's Criminal Docket' for my case."). His request was limited to transcripts so that he could search for additional errors. Doc. 10, Ex. G. No essential piece of information was delayed near the filing deadline. *See Fisher v. Johnson*, 174 F.3d 710, 714–15 (5th Cir. 1999).

Finally, the record does not support Petitioner's contention that he exercised diligence. As he admits, he did not hire Blizzard until three months of the limitations period had passed. Then, Blizzard did not file the state habeas application until the entire year had almost been exhausted. Petitioner is responsible for the running of that time. *See Jackson v. Davis*, 933 F.3d 408, 411 (5th Cir. 2019). As he admits, as a practical matter, there was no way for him to timely file his federal habeas application after the state court denied habeas relief. That Blizzard did not represent Petitioner for the last few days of the limitations period does not entitle him to equitable tolling. He did not exercise sufficient diligence before the filing of the state petition. And, filing his federal application two months after he received the transcripts (assuming they were critical—they were not) was not the exercise of diligence. *Id.* He is not entitled to equitable tolling.

B. Exhaustion

Respondent maintains that Petitioner failed to exhaust his state-court remedies as to his second ground, that the State failed to refute his defense of entrapment. Doc. 13 at 11–14. To exhaust a claim, it must be fairly presented to the state courts, meaning that the petitioner must present the same facts and legal theory. *Picard*, 404 U.S. at 275–76. As best the Court can tell, Petitioner makes two responses. First, he says that he should not be penalized because the rules

of appellate procedure encourage the winnowing out of weaker arguments to present those more likely to prevail. Doc. 15 at 2–3. Second, he says that the Court should presume that the Court of Criminal Appeals necessarily considered the sufficiency of the evidence in granting his petition for discretionary review. *Id.* at 3–4. Neither argument is persuasive. Petitioner clearly raised sufficiency of the evidence in his direct appeal. *Bien*, 530 S.W.3d at 180. He did not, however, raise the issue of sufficiency in his petition for discretionary review. Doc. 12-9. Because he did not present that issue to the Court of Criminal Appeals, and he would be barred by the abuse of the writ doctrine if he sought to do so now, he cannot pursue relief on that ground here.[3] *Emery v. Johnson*, 139 F.3d 191, 196 (5th Cir. 1997); *Nobles v. Johnson*, 127 F.3d 409, 423 (5th Cir. 1997).

C. Merits

As noted, the petition is untimely and partially unexhausted and must be dismissed. The Court need not reach the merits, but Petitioner could not prevail in any event.

In his first ground, Petitioner maintains that he was denied due process when the Court of Criminal Appeals allowed the State to determine which conviction to retain. Doc. 1 at 7. He alleges that the "decision has failed to fully vindicate the Double Jeopardy Clause and affirmatively undermines it. Furthermore, it deprives Petitioner of traditionally-provided construct for resolving constitutional violations of such magnitude." *Id.* at 8. The argument makes no sense and is not clarified by the reply. Doc. 16 at 10.[4] Logically, the outcome is the

[3] Petitioner has made no attempt to show cause and prejudice or actual innocence to be able to pursue this claim.

[4] As best the Court can tell, Petitioner seems to believe that the Supreme Court has determined that the appropriate remedy is to remand the case to the trial court to exercise its discretion to vacate one of the convictions. The cases upon which he relies did not concern double jeopardy but rather Congressional intent as to federal gun statutes in one case and a lesser included offense of continuing criminal enterprise in the other. Remand to the district court as the sentencing authority in the federal scheme was appropriate. *Ball v. United States*, 470 U.S. 856 (1985); *Rutledge v. United States*, 517 U.S. 292 (1996).

same in any event. The conviction for the more serious offense, whether actually more serious or so perceived, will stand. That is what happened here, where the State chose the same offense as the appellate court had identified as the most serious to let stand. Petitioner did not suffer any harm of a constitutional magnitude.[5] And, he has not shown, much less made any attempt to show, that the decision of the Court of Criminal Appeals was contrary to, or an unreasonable application of, federal law. *Richter*, 562 U.S. at 100.

In his second ground, Petitioner asserts that he was denied due process because he was convicted despite insufficient evidence to overcome his defense of entrapment. Doc. 1 at 8. As noted, this ground is unexhausted and procedurally defaulted. Even if properly presented, the claim has no merit. The intermediate appellate court thoroughly considered the sufficiency of the evidence and found that a rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt and could have found against Petitioner on the entrapment issue beyond a reasonable doubt. *Bien*, 530 S.W.3d at 183–86. Petitioner has not met his burden under 28 U.S.C. § 2254(d).

In his third, sixth, eighth, ninth, eleventh, twelfth, and thirteenth grounds, Petitioner alleges that he received ineffective assistance of trial counsel. In his fourth ground, he alleges that his appellate counsel was ineffective. Doc. 1 at 9–12, 14–19, 20–23. The state habeas court addressed each of these issues and determined that Petitioner had not shown that counsels' performance was deficient under *Strickland*. Doc. 13-5, Ex. D. Petitioner has not met the doubly deferential standard applicable here. *Cullen*, 563 U.S. at 190.

[5] The Court notes that Petitioner requested that the state court consider his appeal under the Texas constitution rather than the federal constitution, conceding that the results would be the same. *Bien v. State*, 530 S.W.3d 177, 180 (Tex. App.—Eastland 2016). The state courts applied state law in determining the appropriate resolution. *Id.*; *Bien v. State*, 550 S.W.3d 180 (Tex. Crim. App. 2018).

In his fifth and seventh grounds, Petitioner alleges that his due process rights were violated because the trial court mischarged the jury as to entrapment and because the trial court overruled his objections to the State's misstatement as to the burden of proof on the entrapment defense. Doc. 1 at 12–16. The record reflects that, although there was some confusion during voir dire as to burden of proof regarding entrapment, the matter was clarified by the court telling the panel that the court would instruct them in the jury charge, which it did. Petitioner has not shown that any error in the instructions or charge had a substantial and injurious effect or influence in determining the jury's verdict. *Brecht v. Abrahamson*, 507 U.S. 619, 637–38 (1993). His conclusory allegations do not show any error so extreme it constituted a denial of fundamental fairness. *Bailey v. Procunier*, 744 F.2d 1166, 1168 (5th Cir. 1984); *Banks v. McGougan*, 717 F.2d 186, 190 (5th Cir. 1983).

In his tenth ground, Petitioner alleges that he was denied due process by prosecutorial misconduct. Doc. 1 at 19–20. Again, the burden is on Petitioner to show that the misconduct so infected the trial with unfairness as to make the resulting conviction a denial of due process. *Greer v. Miller*, 483 U.S. 756, 765 (1987); *Barrientes v. Johnson*, 221 F.3d 741, 753 (5th Cir. 2000). He has not met his burden.

IV. CONCLUSION

For the reasons discussed, the Court **ORDERS** that the petition in this action is dismissed with prejudice as untimely.

Pursuant to Rule 22(b) of the Federal Rules of Appellate Procedure, Rule 11(a) of the Rules Governing Section 2254 Proceedings in the United States District Courts, and 28 U.S.C. § 2253(c)(2), for the reasons discussed herein, the court further **ORDERS** that a certificate of

appealability be, and is hereby, denied, as Petitioner has not made a substantial showing of the denial of a constitutional right.

All relief not expressly granted and any pending motions are denied.

Judgment will be entered accordingly.

Dated June 29, 2022.

SAM R. CUMMINGS
Senior United States District Judge

APPENDIX C

Fifth Circuit denial of Motion for Rehearing (March 29, 2023)

United States Court of Appeals for the Fifth Circuit

No. 22-11032

MICHAEL BIEN,

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. 6:21-CV-20

UNPUBLISHED ORDER

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

PER CURIAM:

A member of this panel previously DENIED a motion for a certificate of appealability. The panel has considered Appellant's motion for reconsideration, which raises the same arguments that were previously considered.

Accordingly, IT IS ORDERED that the motion is DENIED.