

United States Court of Appeals  
for the Fifth Circuit

United States Court of Appeals  
Fifth Circuit

**FILED**

August 23, 2023

Lyle W. Cayce  
Clerk

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No. 23-40110

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BRUCE WAYNE HARP,

*Petitioner—Appellant,*

*versus*

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

*Respondent—Appellee.*

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Application for Certificate of Appealability  
the United States District Court  
for the Eastern District of Texas  
USDC No. 1:18-CV-261

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ORDER:

Bruce Wayne Harp, Texas prisoner # 01929800, seeks a certificate of appealability (COA) to challenge the denial and dismissal of his 28 U.S.C. § 2254 application challenging his conviction of sexual abuse of a child under the age of 14. He argues that his trial counsel was ineffective during both the guilt/innocence and punishment phases of his trial on numerous grounds, that the trial court violated his right to due process and a fair trial by refusing to appoint a mental health expert in mitigation of his punishment, and that appellate counsel was ineffective for failing to raise mental health expert

APPENDIX A

No. 23-40110

appointment issues on direct appeal. He does not argue, as he did in the district court, that his due process rights were denied due to an alleged error in the jury charge. Accordingly, he has abandoned that issue. *See Hughes v. Johnson*, 191 F.3d 607, 613 (5th Cir. 1999); *Yohey v. Collins*, 985 F.2d 222, 224-25 (5th Cir. 1993).

Harp has not shown 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); 28 U.S.C. § 2253(c)(2). Accordingly, his COA motion is DENIED.

APPENDIX A

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF TEXAS

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BRUCE WAYNE HARP,

Petitioner,

*versus*

DIRECTOR, TDCJ-CID,

Respondent.

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CIVIL ACTION NO. 1:18-CV-261

**MEMORANDUM ORDER OVERRULING PETITIONER'S OBJECTIONS AND  
ADOPTING THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION**

Petitioner Bruce Wayne Harp, an inmate confined in the Texas Department of Criminal Justice, proceeding *pro se*, brought this petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

The court referred this matter to the Honorable Zack Hawthorn, United States Magistrate Judge, at Beaumont, Texas, for consideration pursuant to applicable laws and orders of this court. The magistrate judge recommends denying and dismissing the petition.

The court has received and considered the Report and Recommendation of United States Magistrate Judge, along with the record, pleadings and all available evidence. Petitioner filed objections to the magistrate judge's Report and Recommendation.

The court has conducted a *de novo* review of the objections in relation to the pleadings and the applicable law. *See* FED. R. CIV. P. 72(b). After careful consideration, the court concludes petitioner's objections are without merit. Petitioner has failed to show either that the state court adjudication was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States or that the state court adjudication 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. Particularly, when a petitioner brings an ineffective assistance claim under the AEDPA, the relevant question is whether the state court's application of the deferential *Strickland* standard was unreasonable. *See Beatty v. Stephens*,

759 F.3d 455, 463 (5th Cir. 2014). “Both the *Strickland* standard and AEDPA standard are ‘highly deferential,’ and ‘when the two apply in tandem, review is doubly so.’” *Id.* (quoting *Harrington*, 562 U.S. at 105). Petitioner has failed to satisfy his burden in this case.

Additionally, the petitioner is not entitled to the issuance of a certificate of appealability. An appeal from a judgment denying federal habeas corpus relief may not proceed unless a judge issues a certificate of appealability. *See* 28 U.S.C. § 2253; FED. R. APP. P. 22(b). The standard for granting a certificate of appealability, like that for granting a certificate of probable cause to appeal under prior law, requires the petitioner to make a substantial showing of the denial of a federal constitutional right. *See Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000); *Elizalde v. Dretke*, 362 F.3d 323, 328 (5th Cir. 2004); *see also Barefoot v. Estelle*, 463 U.S. 880, 893 (1982). In making that substantial showing, the petitioner need not establish that he should prevail on the merits. Rather, he must demonstrate that the issues are subject to debate among jurists of reason, that a court could resolve the issues in a different manner, or that the questions presented are worthy of encouragement to proceed further. *See Slack*, 529 U.S. at 483-84. Any doubt regarding whether to grant a certificate of appealability is resolved in favor of the petitioner, and the severity of the penalty may be considered in making this determination. *See Miller v. Johnson*, 200 F.3d 274, 280-81 (5th Cir.), *cert. denied*, 531 U.S. 849 (2000).

Here, the petitioner has not shown that any of the issues raised by his claims are subject to debate among jurists of reason. The factual and legal questions advanced by the petitioner are not novel and have been consistently resolved adversely to his position. In addition, the questions presented are not worthy of encouragement to proceed further. Thus, the petitioner has failed to make a sufficient showing to merit the issuance of a certificate of appealability. Therefore, a certificate of appealability shall not be issued.

**ORDER**

Accordingly, Petitioner's objections are **OVERRULED**. The findings of fact and conclusions of law of the magistrate judge are correct, and the report of the magistrate judge is **ADOPTED**. A final judgment will be entered in this case in accordance with the magistrate judge's recommendation.

SIGNED at Beaumont, Texas, this 24th day of January, 2023.

Handwritten signature of Marcia A. Crone in black ink.

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MARCIA A. CRONE  
UNITED STATES DISTRICT JUDGE

THE STATE OF TEXAS     §  
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COUNTY OF HARRIS     §

**AFFIDAVIT OF BRYAN J. SWEENEY, PhD**

BEFORE ME the undersigned authority on this the 19 day of JUNE  
\_\_\_\_\_ 2017, appeared before me Bryan J. Sweeney, PhD, who after having been  
sworn stated and subscribed as follows:

My name is Bryan J. Sweeney, PhD and my office is located on 1110 Nasa Pkwy, Suite 307 Houston, Texas. I am over the age of eighteen (18), competent to give this affidavit, and have personal knowledge of the facts stated herein.

My name is Bryan J. Sweeney, PhD and I work as both a counseling and forensic psychologist. I am licensed in the State of Texas, License Number 32939, and have been practicing since 2001. I earned my Bachelor of Arts from Baylor University in Psychology in 1996, my Master of Arts from Sam Houston State University in General Psychology in 1998, and my Doctor of Philosophy in Counseling Psychology from The University of Houston in 2002. I completed my residency as a United States Air Force Captain at Wilford Hall Medical Center, Lackland AFB, Texas in 2002. After completing my residency I served as an Air Force psychologist for three years and have been self-employed, owning my own practice, since leaving the Air Force in 2005. I currently devote close to 60% of my practice to forensic work and approximately 40% to counseling.

I am regularly employed as an evaluator, consultant, or expert witness, among other things, in family, civil, and criminal law. As such, I am often asked to educate judges and juries on my findings and how my findings relate to the legal questions at hand. I regularly evaluate defendants

for a number of reasons. Risk-assessment or recidivism testing is one of the most common requests from the court or the attorneys involved in the case. I have evaluated many defendants for sentencing purposes and have testified regarding the findings of my evaluations.

I am providing this affidavit at the request of Attorney Steven J. Lieberman, concerning the case of Bruce Harp.

1. I do not recall, nor do I have any documentation regarding, Attorney Lameka Trahan requesting an affidavit/letter from me to support her request for my appointment as an expert in Mr. Harp's case.

2. There are many areas that a forensic psychologist could provide relevant testimony in mitigation of punishment for a convicted sex offender. The following are some of the ways that only a trained forensic psychologist could help:

a. Psychometric/Psychological testing to help the finder of fact understand the psychological and emotional factors of the offender that could either increase or decrease his or her chances of reoffending.

b. Recidivism/ Risk Assessment – By using actuarial data a trained forensic psychologist can scientifically assess the relative likelihood that an offender will reoffend in the future.

c. Educate the court and/or jury on psychological and emotional risk factors that could lead to offending.

d. Assess and evaluate the presence of a personality disorder or some other mental health disorder that could affect offender's decision making abilities as well as their abilities to control their impulses.

e. Assess and determine how likely an offender is to adhere to treatment and other rehabilitation programs available to him or her.

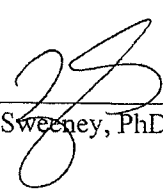
f. Educate the finder of fact on treatment and rehabilitation programs as well as the efficacy of such treatments on sex offenders.

3. In legal cases it is very important that the person assessing and evaluating the offender be an unbiased forensic evaluator rather than a treating provider of the offender. The most relevant reason for this is the bias that exists between a doctor and his or her patient. As a treating provider the focus is on helping the patient get better. The focus is not on assessing the client to help the court determine the likelihood of reoffending or any other pertinent information. There are many factors that could lead a treating provider to have a skewed, non-scientific, opinion of a particular patient's likelihood of either complying with treatment or of reoffending to include: one's own hope for successful treatment, personal feelings about the patient, concerns over their own efficacy, and many other human and emotional factors that exist. Therefore, a trained forensic evaluator that does not have a personal connection to the offender is most appropriate to complete the evaluation as well as to render an expert opinion to the court.

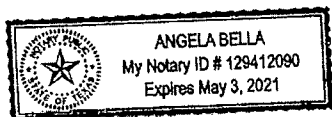
I was available to provide testimony as an expert witness at Bruce Harp's trial had Ms. Trahan obtained funds from the court and an order appointing me as an expert witness.




Further, affiant sayeth not.

  
Bryan J. Sweeney, PhD

SUBSCRIBED AND SWORN TO BEFORE ME on this 19 day of June  
2017.



  
NOTARY PUBLIC IN AND FOR  
THE STATE OF TEXAS