

Supreme Court, U.S.
FILED
AUG 14 2023
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

RICHARD WAYNE TAYLOR,
PETITIONER

U.S.D.C. NO. 23-40-104

V.

BOBBY LUMPKIN- Respondent
Director TDCJCID

MOTION FOR LEAVE OF THE COURT TO FILE THE ATTACHED APPLICATION
FOR A CERTIFICATE OF APPEALABILITY

TO THE HONORABLE UNITED STATES SUPREME COURT JUSTICES:

Comes now RICHARD WAYNE TAYLOR petitioner in the above entitled
and numbered cause and respectfully moves this court to grant leave
to file the accompanying Application for a certificate of **Appealability**.

RESPECTFULLY Submitted

Richard Wayne Taylor

RICHARD WAYNE TAYLOR
TDCJCID NO. 02047424

JOHN B. CONNALLY UNIT
899 FM 632

KENEDY, TX 78119
petitioner prose

Certificate of Service

This is to certify that a copy of the above document has this day been
delivered by 1st class U.S. MAIL POSTAGE P:REPAID to MR. NATHAN
TADEMA P.O. BOX 12548 capitol station Austion AUSTIN ,TX 78711
on this 14th day of AUGUST 2023

Richard Wayne Taylor

CASE NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

RICHARD WAYNE TAYLOR
Petitioner

VF.

BOBBY LUMPKIN Respondent
Director TDCJCID

APPLICATION FOR A CERTIFICATE OF APPEALABILITY TO THE UNITED STATES
COURT OF APPEALS FIFTH CIRCUIT Appeal No. 23-40104

Submitted by:
RICHARD WAYNE TAYLOR
TDCJCID#02047424
JOHN B. CONNALLY UNIT
899 FM 632
KENEDY, TEXAS 78119
petitioner prose

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

RICHARD WAYNE TAYLOR-PETITIONER

VS.

U.S.C.A. NO. 23-40104

BOBBY LUMPKIN-RESPONDENT

Director TDCJCID

APPLICATION FOR A CERTIFICATE OF APPEALABILITY

Petitioner RICHARD WAYNE TAYLOR, proceeding pro se in the above numbered and styled criminal habeas corpus action moves the court for a certificate of appealability and in support states.

A. Standards for granting a certificate of appealability

A petitioner is entitled to a certificate of appealability if he makes a substantial showing of a denial of a constitutional right"

28 U.S.C. & 2253(c)(2). The United States Supreme Court in Carefoot V. Estelle, 463 U.S. 880, 893 (1983), held this means that the appellant need not show that he would prevail on the merits, but must demonstrate that the issues are debateable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to further proceed [citation omitted]. SEE Flieger V. Delo, 16 F. 3d 8768, 883 (8th cir. 1994)

This standard does not require the petitioner to show that he is entitled to relief:

We do not require petitioner to prove... that some jurists would grant the petition for habeas corpus. Indeed a claim can be debateable even though every jurist of reason might agree, after a Coa has been granted and the case has received full consideration, that petitioner will not prevail.

Miller-El v. Cockrell, 537 U.S. 322, 338 (2003). Therefore, doubts as to whether to issue a certificate of appealability should be resolved in favor of the appellant. Fuller V. Johnson, 114 F. 3d 491, 495 (5th cir. 1997).; Buie v. McAdory, 322 F. 3d 980 (7th cir. 2003).

If a ground was dismissed by the district court on procedural grounds a certificate of appealability must be issued if the petitioner meets the Barefoot standard as to the procedural question, and shows, at least that jurists of reason would find it debateable whether the ground ~~states~~ a valid claim of a constitutional right Slack V. McDaniel, 529 U.S. 473, 483-484 (2000)

ISSUE UPON WHICH A CERTIFICATE OF APPEABILITY SHOULD BE GRANTED

THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT ABUSED IT'S DISCRETION BY DENYING TAYLOR A CERTIFICATE OF APPEABILITY ON THE BASIS THAT TAYLOR HAS NOT MADE THE REQUIRED SHOWING DEMONSTRATING THAT REASONABLE JURISTS WOULD FIND THE DISTRICT COURT ASSESSMENT OF THE CONSTITUTIONAL CLAIMS DEBATEABLE OR WRONG

A JURIST OF REASON COULD FIND THAT THE UNITED STATES DISTRICT COURT ASSESSMENT OF PETITIONER'S CONSTITUTIONAL CLAIMS WHEN DECIDING TO ISSUE A CERTIFICATE OF APPEALABILITY DEBATEABLE OR WRONG

UNITED STATES DISTRICT COURT IMPROPER ANALYSIS OF A CERTIFICATE OF APPEABILITY

ON Feburary 1st, 2023, THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS when deciding to issue TAYLOR a certificate of appealability used an improper analysis of the certificate of appealability by first deciding the merits of an appeal without jurisdiction of TAYLOR'S ineffective assistance of counsel constitutional claims and then denying a certificate of appealability upon this basis

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

at page 2 in the memorandum order overruling objections and adopting the magistrate judge's report and recommendation THE UNITED STATES DISTRICT JUDGE placed a heavy burden on TAYLOR by requiring him

to prove that his petition was meritorious and then on this basis denying a certificate of appealability as follows:

In this case, the petitioner has not shown that the issue of whether his petition is meritorious is subject to debate among jurists of reason. The factual and legal questions raised by petitioner have been consistently resolved adversely to his position and the questions presented are not worthy of encouragement to proceed further. Petitioner has failed to make a sufficient showing to merit the issuance of a certificate of appealability. Thus, a certificate of appealability will not be issued. SEE Appendix (Exhibit (1) MEMORANDUM ORDER OVERRULING OBJECTIONS AND ADOPTING THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION AT PAGE (2) AND FINAL JUDGEMENT

Argument and Authorities

under 28 U.S.C. & 2253(c)(2) petitioner is not required to make a showing that his petition is meritorious but need only to show that he was denied a substantial constitutional right.

SEE Buck v. Davis 580 U.S. 100 at HN 3

in a case similar as Taylor's in Buck v. Davis, the court put it in the second sentence of its opinion: Because [BUCK] has not shown extraordinary circumstances that would permit relief under Federal Rule of Civil Procedure 60(b)(6) we deny the application

for a COA Idat 669

SEE Buck V. Davis 137 S.Ct. 759 (2017)

The court reversed the judgement and remanded and in part held that:

(1). Because a reviewing court inverted the statutory order of operations by deciding the merits of an appeal and then denying the COA based on adjudication of the actual merit's it placed to heavy a burden on the prisoner at the COA stage.

under these circumstances the UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT ABUSED IT'S DISCRETION JULY 17th, 2023 by adopting

the UNITED STATES DISTRICT COURT MEMORANDUM ORDER OVERRULING OBJECTIONS
AND ADOPTING THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATIONS.
SEE UNITED STATES COURT OF APPEALS FIFTH CIRCUIT UNPUBLISHED ORDER
APPENDIX EXHIBIT (2) dated July 17th 2023

JURISTS OF REASON

Because reasonable jurists could differ about the COA analysis applied by the UNITED STATES DISTRICT COURT AND ADOPTED BY THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, a certificate of appealability should issue as to petitioner ground five ineffective assistance of counsel failure to renew his objections upon different grounds to the edited portion of states exhibit 36 audio zip drive containing the deceased out of court recorded statement identifying TAYLOR as her assailant. which was inadmissible under TEX. R. Evid. 901 as being unauthenticated denied TAYLOR a substantial constitutional right to the effective assistance of counsel and a fair trial.

SEE JOHNSON V. STATE, 172 S.W. 3d 6 (Tex. App. Austin 2005).

SEE MILLER V. GENOVESE, 994 F.3d 734 (6th cir. 2021).

SEE HOOVER V. STATE, 707 S.W. 2d 144 (TEX. APP. HOUSTON 14t Dist 1986)

RELIEF REQUESTED

WHEREFORE PREMISES CONSIDERED, PETITIONER prays that this court grants him a certificate of appealability in **respect** to his ground five for relief or grant all relief that Taylor may be entitled to under this article.

AUGUST 14th 2023
petitioner prose

Richard Wayne Taylor
RICHARD WAYNE TAYLOR
TDCJCID NO. 02047424
JOHN B. CONNALLY UNIT
899 FM 632
KENEDY, TEXAS 78119

Certificate of Service

THIS is to certify that **on this 14th day of August 2023** service of the Application for **certificate of appealability** by 1st class U.S. mail has been served **Postage prepaid** upon respondent lead counsel of record to

MR. NATHAN TADEMA Asst. **Atty general**
post litigation division
p.o. box 12548 capitol **station**
Austin, Texas 78711

DATE: AUGUST 14th, 2023

Richard Wayne Taylor

Case No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

RICHARD WAYNE TAYLOR,
PETITIONER

V.

BOBBY LUMPKIN- Respondent
Director TDCJCID

U.S.C. A. NO. 23-40104

APPENDIX EXHIBIT'S

1. U.S.D.C. MEMORANDUM ORDER OVERRULING OBJECTIONS AND ADOPTING THE
MAGISTRATE JUDGE'S REPORT AND RECOMMENDATIONS
2. U.S.C.A. unpublished order

THE EXHIBITS was not served upon respondent counsel due to lack of
photo copier.

DATE SAUGUST 14th, 2023

petitioner prose

Richard Wayne Taylor
RICHARD WAYNE TAYLOR
TDCJCID NO. 0-2047424

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF TEXAS

RICHARD WAYNE TAYLOR,

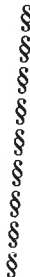
Petitioner,

versus

DIRECTOR, TDCJ-ID,

Respondent.

CIVIL ACTION NO. 9:19-CV-149



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

Richard Wayne Taylor, *proceeding pro se*, filed this petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. **Petitioner** challenges a conviction for murder.

The court previously referred this matter to the Honorable Zack Hawthorn, United States Magistrate Judge, at Beaumont, **Texas**, for consideration pursuant to applicable laws and orders of the court. The magistrate judge has submitted a Report and Recommendation of United States Magistrate Judge recommending the petition be denied.

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

The court has conducted a *de novo* review of petitioner's lengthy objections in relation to the pleadings and the applicable law. After careful consideration, the court is of the opinion the objections are without merit. **Petitioner** has failed to show that the rejection by the state courts of his grounds for review was **contrary** to, or involved an unreasonable application of, clearly established federal law or was based on an unreasonable determination of the facts in light of the evidence presented to the state courts. See 28 U.S.C. § 2254(d).

ORDER

Accordingly, the objections filed by petitioner (#69) are **OVERRULED**. The findings of fact and conclusions of law of the magistrate judge are correct and the report of the magistrate judge (#57) is **ADOPTED**. A final judgment will be entered denying the petition.

Furthermore, petitioner is not entitled to the issuance of a certificate of appealability. An appeal from a final judgment denying habeas relief may not proceed unless a certificate of appealability is issued. *See* 28 U.S.C. § 2253. The standard for a certificate of appealability 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). To make a substantial showing, the petitioner need not establish that he would prevail on the merits. Rather, he must demonstrate that the issues raised in the petition 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 should be 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. 2000).

In this case, the petitioner has not shown that the issue of whether his petition is meritorious is subject to debate among jurists of reason. The factual and legal questions raised by petitioner have been consistently resolved adversely to his position and the questions presented are not worthy of encouragement to proceed further. Petitioner has failed to make a sufficient showing to merit the issuance of a certificate of appealability. Thus, a certificate of appealability will not be issued.

SIGNED at Beaumont, Texas, this 1st day of February, 2023.



MARCIA A. CRONE

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF TEXAS

RICHARD WAYNE TAYLOR,

Petitioner,

versus

DIRECTOR, TDCJ-CID,

Respondent.

§
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§

CIVIL ACTION NO. 9:19-CV-149

FINAL JUDGMENT

This action came on before the court, and the issues having been duly considered and a decision having been duly rendered, it is

ORDERED and **ADJUDGED** that this petition for writ of habeas corpus is **DENIED**.

All motions not previously ruled on are **DENIED**.

SIGNED at Beaumont, Texas, this 1st day of February, 2023.



MARCIA A. CRONE
UNITED STATES DISTRICT JUDGE

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

July 17, 2023

Lyle W. Cayce
Clerk

No. 23-40104

RICHARD WAYNE TAYLOR,

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 Eastern District of Texas
USDC No. 9:19-CV-149

UNPUBLISHED ORDER

Before STEWART, CLEMENT, and ENGELHARDT, *Circuit Judges.*

PER CURIAM:

Richard Wayne Taylor, Texas prisoner # 02047424, was convicted of murder and is serving a life sentence. He now seeks a certificate of appealability (COA) to appeal the district court's denial of his 28 U.S.C. § 2254 application challenging this conviction. Taylor's motion for leave to

file supplemental exhibits and supplemental briefs in support of his motion for a COA is GRANTED.

Before this court, Taylor asserts that his trial counsel rendered ineffective assistance by failing to object to irrelevant testimony relating to the victim's character, failing to seek funds to obtain an expert toxicologist, failing to present a proper predicate for impeaching state witnesses with their prior inconsistent statements, failing to challenge the admission of an altered audio zip drive, and failing to challenge evidence related to the autopsy proceedings. In addition, he contends that he was denied a fair trial because the trial judge's oath of office was invalid and his pretrial and trial counsel rendered ineffective assistance by failing to object to the proceedings on that basis. Although Taylor raised additional claims of ineffective assistance in the district court, he did not brief them before this court, and those claims are abandoned. *See Hughes v. Johnson*, 191 F.3d 607, 613 (5th Cir. 1999).

To obtain a COA, Taylor 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, as here, the district court has denied relief on the merits, a COA applicant "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack*, 529 U.S. at 484. Taylor has not made the required showing.

Accordingly, the motion for a COA is DENIED. Because Taylor has not satisfied the COA standard, we do not reach his contentions that the district court erred by failing to conduct an evidentiary hearing and by denying his motion for funds to retain a toxicologist. *See United States v. Davis*, 971 F.3d 524, 534-35 (5th Cir. 2020).

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

RICHARD WAYNE TAYLOR — PETITIONER
(Your Name)

VS.

Bobby Lumpkin — RESPONDENT(S)
Director / TDCJCID

PROOF OF SERVICE

I, Richard Wayne Taylor, do swear or declare that on this date, August 14th, 2023, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows:

MR. NATHAN TADEMA - ASST. ATTY. GENERAL P.O. BOX 12548 CAPITAL STATION
AUSTIN, TX 78711

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 14th, 2023

Richard Wayne Taylor
(Signature)

