A P P E N D I X

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United States Court of Appeals for the Fifth Circuit

No. 24-50588

United States Court of Appeals
Fifth Circuit
FILED
February 14, 2025
Lyle W. Cayce
Clerk

JUSTIN PANUS,

Petitioner—Appellant,

versus

ERIC GUERRERO, *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. 1:23-CV-999

ORDER:

Justin Panus, Texas prisoner # 02167693, seeks a certificate of appealability (COA) to appeal the district court's denial of his 28 U.S.C. § 2254 application challenging his convictions for aggravated kidnapping and unlawful possession of a firearm by a felon. In his COA motion, Panus argues that (i) the district court erred in denying his § 2254 application because the state habeas court's denial of his claims was based on an unreasonable determination of the facts in light of the evidence, which demonstrated that his counsel made false statements in counsel's postconviction affidavit;

(ii) the state court's findings were not entitled to deference because Texas's habeas laws offer no "procedural mechanism" for him to respond to his counsels' postconviction affidavits or to object to the state habeas court's findings and conclusions; and (iii) the state habeas court failed to "engage with critical evidence" and the district court erred by failing to apply the appropriate standard of review to the state court's denial of relief.

As a preliminary matter, Panus fails to reprise in his COA pleadings any of the substantive claims that he raised in his § 2254 application. Accordingly, those claims are abandoned. *See Hughes v. Johnson*, 191 F.3d 607, 613 (5th Cir. 1995).

A COA may issue only if the applicant has made "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). Where, as here, the district court denies relief on the merits, an applicant must show "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).

Panus fails to meet the requisite standard. *See id.* His motion for a COA is DENIED.

ANDREW S. OLDHAM
United States Circuit Judge

A P P E N D I X

B

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

JUSTIN PANUS, TDCJ No. 02167693, Petitioner, V. BOBBY LUMPKIN, Director, Texas Department of Criminal Justice, Correctional Institutions Division, Respondent.	§ § § § § § § § § § §	A-23-CV-999-RP

ORDER

Before the Court are Justin Panus's ("Petitioner") pro se Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 (ECF No. 1), Respondent Bobby Lumpkin's Answer (ECF No. 11), and Petitioner's Reply (ECF No. 14). Having reviewed the record and pleadings, the Court denies Petitioner's federal habeas corpus petition pursuant to the standards prescribed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). *See* 28 U.S.C. § 2254(d).

I. Background

In December 2016, Petitioner was charged by indictment with two counts of aggravated assault with a deadly weapon, one count of aggravated kidnapping, one count of unlawful possession of a firearm by a felon, and one count of burglary of a habitation. (ECF No. 12-50 at 53-54.) On October 18, 2017, the State elected to proceed to trial only on the aggravated kidnapping and unlawful possession charges. (ECF No. 12-9 at 12.) On October 26, 2017, a jury found Petitioner guilty of aggravated kidnapping and unlawful possession, and the trial court sentenced Petitioner to life imprisonment for the aggravated kidnapping charge and 10 years imprisonment for the unlawful possession charge, with the sentences to run concurrently. *State v.*

Panus, No. 16-2610-K368 (368th Dist. Ct., Williamson Cnty., Tex. Oct. 26, 2017). (ECF No. 12-50 at 70-77.)

The following is a summary of the factual allegations against Petitioner as described by the state appellate court:

> The events leading to Panus's convictions began in the early morning hours of September 25, 2016, when he used a gun to barge into the house where his ex-girlfriend Christina Cooper was staying with her fiancé Matthew Gauthier and his two young daughters. After threatening Gauthier at gunpoint, Panus dragged Cooper out of the house by her hair and forced her into his truck. He placed the gun on his lap, visible to Cooper, while he drove. Cooper testified that during the drive, Panus hit her face with the gun and threatened to kill her stating, "If we get out and you make a scene, I swear to God I'll kill you right here." When he parked the truck at his apartment complex and got out, Cooper escaped from the passenger side and ran away.
>
> Gauthier testified that the gun Panus used to gain entry into the house was distinctive because it had a light and projected a red-laser dot onto its target. Gauthier further testified that Panus pointed the laser dot of the gun at one of Gauthier's daughters in the living room before pointing the gun at Gauthier's head and forcing him to kneel in a corner of the house.
>
> Cooper testified that she met Panus through an online-dating site during a time when she and Gauthier had separated. She stated that she and Panus initially liked each other, that they saw each other and spoke by phone daily, and sent text messages to each other more than once a day. But when Panus began to text her with increasing frequency and leaving more of his belongings at her apartment, Cooper told him that she thought their relationship was moving too quickly. Panus disagreed. Cooper noticed that Panus became jealous after seeing her talking with a male neighbor. Cooper testified that two days before the offenses, she was still getting lots of phone calls and texts from Panus. Records of data showing Panus's phone calls, texts, and Facebook messages to Cooper near the time of his offenses, without the content of those communications, were admitted into evidence as State's Exhibit 59. That exhibit also showed Panus's Google searches on his phone near the time of his offenses, without the results of those searches.
>
> On the day before the offenses, Cooper told Panus that she would not see him that day because she had plans with a friend. Cooper testified that she met Gauthier, his daughters, and his aunt for lunch, and afterward, they went shopping for the girls' Halloween costumes and then to Gauthier's home. Cooper testified that during that time, Panus "texted over and over and over again. ... He called on [] Facebook over and over again." Cooper told him to stop or she would call the police. When Cooper blocked Panus on her phone, Cooper began receiving messages from Panus's

> roommate. Cooper then testified about the details of Panus's confrontation of her at Gauthier's house, his abduction of her, and her eventual escape from him at about 3:00 a.m.
>
> The jury also heard from Woodson Blase, a Leander Police Department Detective and Special Deputy U.S. Marshal with the Lone Star Fugitive Task Force. Detective Blase testified about his part of the investigation to locate and arrest Panus, including Panus's refusal to comply with police commands to show his hands and instead, reaching toward his waistband, where officers found a subcompact pistol.
>
> After trial, the jury found Panus guilty of aggravated kidnapping and unlawful possession of a firearm by a felon. The trial court assessed his punishment and rendered judgment in accordance with the jury's verdict. This appeal followed.

Panus v. State, No. 03-17-00719-CR, 2018 WL 4140851 at *1-2 (Tex. App.--Austin, Aug. 30, 2018, pet. ref'd). On August 30, 2018, Petitioner's conviction was affirmed on direct appeal. *Id.* Petitioner filed a petition for discretionary review (PDR), which the Texas Court of Criminal Appeals (TCCA) refused on January 16, 2019. *Panus v. State*, No. PD-0948-18 (Tex. Crim. App. Jan. 16, 2019). (ECF No. 12-27.) The United States Supreme Court denied Petitioner's petition for writ of certiorari on October 7, 2019. *Panus v. Texas*, No. 19-5043, 140 S. Ct. 249 (Oct. 7, 2019).

On January 2, 2020, Petitioner filed a Chapter 64 motion in the trial court, seeking DNA testing of the gun admitted into evidence at his trial. (ECF No. 12-33 at 139-40.) The trial court denied the motion on April 2, 2020. (ECF No. 12-35.) Petitioner appealed and the denial was affirmed on January 26, 2022. *Panus v. State*, No. 03-20-00099-CR, 2022 WL 221236 (Tex. App. May 18, 2022). (ECF No. 12-39.) The TCCA denied Petitioner's PDR on May 18, 2022, *Panus v. State*, No. PD-0113-22 (Tex. Crim. App. May 18, 2022), and then denied his motion for rehearing on June 29, 2022.

On July 24, 2022, Petitioner filed a state habeas application, listing the following five grounds of relief:

1. Petitioner received ineffective assistance of counsel when his trial attorney misadvised him that his offense was illegally enhanced from a third degree felony to a first degree felony by using the same elemental fact.

2. Petitioner received ineffective assistance of counsel when his trial counsel
   a. based the trial strategy on an untested legal theory;
   b. conceded Petitioner's guilt through this same trial strategy;
   c. advised Petitioner not to testify; and
   d. failed to present mitigating evidence to support Petitioner's "mens rea" defense.

3. As applied to Petitioner, section 20.04 of the Texas Penal Code is unconstitutional.

4. To the extent Petitioner's trial counsel failed to preserve Petitioner's constitutional challenge to section 20.04, this constitutes ineffective assistance of counsel.

5. The State used materially false testimony from the complainant to obtain Petitioner's conviction.

(ECF No. 12-48 at 18-36.) On December 14, 2022, the TCCA denied Petitioner's state habeas 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 Panus*, No. WR-94,335-01 (Tex. Crim. App. Dec. 14, 2022). (ECF No. 12-53 at 1.)

Petitioner executed his federal habeas corpus petition on August 15, 2023, listing the first four grounds of relief from his state habeas application. (ECF No. 1.) Respondent filed an answer (ECF No. 11) to which Petitioner has replied (ECF No. 14).

II. Standard of Review

Petitioner's federal habeas petition is governed by the heightened standard of review provided by 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. *McDaniel v. Brown*, 558 U.S. 120 (2010); *Wiggins v. Smith*, 539 U.S. 510, 520-21 (2003). 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, not just incorrect, 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 (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). 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. "'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

1. Ineffective Assistance of Trial Counsel (claims 1-2)

Petitioner's first two claims are based on allegations he received ineffective assistance of trial counsel. In Petitioner's first claim, he argues he received ineffective assistance of counsel when his trial counsel incorrectly advised him that his kidnapping charge was illegally enhanced from a third-degree felony to a first-degree felony by using the same elemental fact. This incorrect advice led Petitioner to reject the State's 40-year plea offer. In Petitioner's second claim, he argues his trial counsel provided ineffective assistance by (a) basing the trial strategy on an untested legal theory; (b) effectively conceding Petitioner's guilt through said trial strategy; (c) advising Petitioner not to testify; and (d) failing to present evidence supporting a "mens rea" defense.

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). *See 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 Section 2254(d). *See Woods v. Etherton*, 136 S. Ct. 1149, 1151 (2016) (citing *Cullen*, 563 U.S. at 190). 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.

a. Erroneous legal advice (claim 1)

Petitioner argues his trial counsel provided ineffective assistance when he advised Petitioner that his aggravated kidnapping charge was incorrectly enhanced from a third-degree felony to a first-degree felony. Petitioner alleges he rejected the State's 40-year plea offer based on this incorrect legal advice.

Petitioner's trial attorneys, Mr. James McDermott and Mr. Todd Ver Weire, submitted lengthy affidavits to the state habeas court explaining their investigation of the case, chosen trial strategy, consideration of different defenses, and presentation of the State's plea offers. (ECF Nos.

12-49 at 12-50 at 10.) The state habeas court credited their affidavits and made the following findings and conclusions:

> 21. Mr. McDermott states that he considered several strategies and defenses during his preparation for trial and provides reasonable basis as to why he was unable to pursue most of these strategies.
>
> 22. Mr. McDermott states that he decided to pursue an "improper enhancement" defense arguing that the same firearm could not be used to enhance an act from unlawful restraint to kidnapping, and also from kidnapping to aggravated kidnapping. Mr. McDermott further acknowledges that this issue had not been fully litigated in the courts.
>
> 23. Mr. McDermott concedes that he built his trial strategy around the "improper enhancement" defense; however, he further states that he advised Applicant that that there was not an appellate case either affirming or denying this defense, that he could not promise success with this defense, and that pursuing this strategy was risky. Based on this advice, Mr. McDermott asked Applicant to consider accepting the State's plea offer of 40 years in prison. Applicant refused to consider the plea offer and became angry with his trial counsel for asking him to consider the plea deal.
>
> 24. Both Mr. McDermott and Mr. Ver Weire state that after Applicant was found guilty of aggravated kidnapping, but before the punishment phase of trial commenced, both attorneys again asked Applicant to consider agreeing to a forty-year sentence in lieu of a punishment hearing. Trial counsel reminded Applicant of the untested nature of the defensive legal theory and expressed concern as to the outcome of the punishment hearing. Applicant again refused to consider the plea offer and expressed his desire to continue with the punishment phase of trial.
>
> 25. Trial counsel's decision to pursue the so-called "improper enhancement" defensive strategy was a decision made after a thorough investigation of law and facts relevant to plausible options and said strategy was not outside the wide range of competent assistance.
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> 26. Trial counsel's decision to pursue the "improper enhancement" defense was not ineffective because counsel's judgment rested on an unsettled proposition of law.
>
> 27. Applicant has failed to overcome the basic presumption that trial counsel made all significant decisions in the exercise of a reasonable trial strategy.
>
> 28. Applicant's trial counsel did not misadvise Applicant concerning the validity of the improper enhancement defense.

> 29. Applicant's decision to reject the State's plea offer, both pre-trial and prior to the punishment phase of trial, was not a result of improper advice from trial counsel.
>
> 30. Applicant's trial counsel was not constitutionally ineffective in pursuing the "improper enhancement" defense, nor was counsel ineffective in their advising Applicant that said defense was a reasonable defensive strategy, nor was counsel ineffective in asking Applicant to consider the State's plea offer.

(ECF No. 12-50 at 17-18 (record citations omitted.))

The Sixth Amendment right to the effective assistance of counsel "extends to the plea-bargaining process." *Lafler v. Cooper*, 566 U.S. 156, 162 (2012). When a habeas petitioner argues he rejected a plea offer and chose to stand trial based on the ineffective assistance of counsel,

> [he] must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed.

Lafler, 566 U.S. at 164.

The state habeas court concluded that, while Mr. McDermott's defensive strategy relied on an untested proposition of law, it was nonetheless made after "a thorough investigation of law and facts relevant to plausible options" and was therefore not outside the range of competent assistance. The trial court further concluded that Mr. McDermott advised Petitioner that he could not promise success on this trial strategy, and thus Petitioner's pre-trial and post-trial rejection of the State's plea offer was not the result of Mr. McDermott's advice.

The state court's findings of fact are presumed correct and can only be rebutted with clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1); *Matamoras v. Stephens*, 783 F.3d 212, 216 (5th Cir. 2015) (recognizing the presumption of correctness afforded a state habeas court's factual

findings applies absent clear and convincing evidence to the contrary). Petitioner fails to provide any evidence outside his own allegations that shows he would have taken the plea deal. *See United States v. Demik*, 489 F.3d 644, 646 (5th Cir. 2007) ("conclusory allegations are insufficient to raise cognizable claims of ineffective assistance of counsel") (quoting *Miller v. Johnson*, 200 F.3d 274, 282 (5th Cir. 2000)). Although Petitioner questions why he would accept a 40-year plea offer when trial counsel told him he should only be punished for a third-degree felony, he omits the state court's finding that trial counsel advised Petitioner their defensive strategy was risky and they could not promise its success. Petitioner fails to rebut any of these factual findings. As such, the state habeas court's application of *Strickland* to this claim was not unreasonable, and it is denied.

b. Choice of trial strategy (Claims 2(a), (d))

Petitioner next argues his trial counsel provided ineffective assistance by basing Petitioner's entire trial strategy on an untested, meritless legal theory, i.e., that Petitioner's charge could not be enhanced to a first-degree felony using the same elemental fact (a firearm) that made the offense a third-degree felony. Petitioner further argues his counsel was deficient by not supporting Petitioner's chosen strategy, i.e., that Petitioner did not have the necessary mens rea to commit the aggravated kidnapping.

In his affidavit, Mr. McDermott attested to the following regarding his chosen trial strategy:

Mr. Panus's requested defenses

> At the end of my initial conversation with Mr. Panus, I had significant doubts as [to] his ability to testify. Thus, very quickly it became apparent to me that I could not advise him to testify but rather that his position at trial would be stronger if he remained silent. His behavior and his responses, ... to the events gave me doubts as to his ability to tell a coherent or even basically credible story from the stand. My review of the evidence confirmed my initial thoughts. His evasiveness about the prior case in Wisconsin, his version of what happened, the fact that Cooper ran from the vehicle barefoot and in her underwear and for a mile to the highway, the 911 call, all contributed to that conclusion.

Mr. Panus offered two approaches to a factual defense. First, he denied that anything unusual had happened that night. Later, he offered a more elaborate factual defense, focusing on Gauthier. He had gone to Gauthier's house because Cooper was being abused and held against her will. She had left a relationship with Gauthier because of prior abuse, and Mr. Panus was concerned for her safety when she abruptly ended their relationship and stopped taking his calls or responding to texts. Mr. Panus believed he was justified in kidnapping Cooper because he believed she was being held against her will by Gauthier.

Preparation to present Mr. Panus's defenses

Initially, I had some hope of building a defense around this second theory. Mr. Panus's grandparents, Edward and Maria Robnett, had met Cooper. Mr. Panus had brought Cooper to eat dinner with them at a restaurant only a few nights before the events of this case. They reported to me that Cooper seemed affectionate and loving, and spoke in a happy way about the developing relationship with their grandson. Edward was a veteran. He had met his wife in Italy when he was stationed there, and they seemed sincere and believable. Their experience with Cooper certainly did not fit with a person, only days later, cutting off all communication.

However, Mr. Panus continually undercut my ability to raise this defense in preparation for trial. He wrote several long letters from the jail to Cooper, which seemed harassing and inappropriate. I asked him to stop, but he continued. These letters most certainly would have been admitted had he testified about his mental state, and I believed they were very damaging.

Still, throughout my preparation of the case, I considered the Robnetts' testimony as part of the trial strategy. I did not subpoena them, but I did ask that they remain outside the courtroom during trial in case we decided to call them, in compliance with the Rule.

Regarding Mr. Panus's potential testimony, Mr. Panus was aggressive, [argumentative], and threatening to me during the course of my representation of him. Particular communications with him raised serious concerns on my part. First, I was concerned about a medical or psychological disorder that might be affecting his judgment and behavior and could have been a factor in the offense. The trial court denied my request for *Ake* funds to pursue a medical diagnosis because the jail medical staff had not noticed other symptoms that would be consistent with a brain disorder, injury, or trauma.

The court did grant me funds to hire Dr. George Parker to explore mental health issues. Dr. Parker's conclusion, communicated to me and Todd Ver Weire orally two weekends before trial, was that Mr. Panus suffered from an untreatable, progressive form of psychosis. He asked me not to call him to testify in either phase of trial because he felt his testimony would severely damage any defense we could raise and would likely result in a life sentence. He recommended as well that Mr.

Panus not testify, because his psychosis could lead to unpredictable and possibly violent outbursts. Dr. Parker did not believe he was incompetent or insane. He just thought he was psychotic and untreatable.

Mr. Panus's words and behavior towards me did not only raise concerns about his ability to testify. I was also troubled by my own physical safety in the courtroom. Before trial, I asked the court to provide extra, though discreet, security in the courtroom should Mr. Panus attack me physically. I have been licensed as an attorney since 2003 and practicing criminal defense work since 2006. This is the only case I have worked on in 16 years for which I asked for security for myself because of the threatening behavior of my client.

Cooper's choices and responses further limited Mr. Panus's defense

Cooper did not request help or communicate to Mr. Panus, or anyone else, that she was in distress from Gauthier before Mr. Panus's actions in this case. She clearly knew how to use her cell phone to call 911 undetected but she had not. She had not sent a message or make a call requesting help. The evidence suggested the opposite that Cooper did not want *Mr. Panus* involved with her anymore.

Cooper's testimony included information about Mr. Panus becoming increasingly possessive, jealous, and controlling in their relationship as a reason she decided to end it. She also testified about wanting to return to a relationship with Gauthier. Her testimony matched both the tone and content of her responses to letters Mr. Panus was sending and to my own attempts to contact her.

Her testimony combined with Mr. Panus's communications with her pre-trial and his own behavior, confirmed my opinion that his testimony would lead to disaster. I discussed with both Mr. Panus and with the Robnetts not calling them as a witness during trial, and they agreed with my advice at the time.

Of course, the Robnetts were not able to testify about most interactions between Mr. Panus and Cooper, and they knew nothing but hearsay, through Mr. Panus, about Gauthier. Although there was uncontroverted evidence that Gauthier and Cooper had broken up, and there were difficult emotions from both sides concerning that breakup, there was no independent evidence to support the deeply abusive relationship that Mr. Panus reported.

Decision not to pursue my client's offered defense

In my career, I have dealt on many occasions with the question of a client testifying. I have also had clients testify when I did not think it was a good idea. I have experience navigating difficult facts. And sometimes, a client's story is the correct one, even when I have my doubts. This is the fundamental reason, in addition to my constitutional and ethical duties, why I take my obligations seriously to inform

my clients of my opinions but also to cede to their decisions. *See* Tex. Const. art I, § 10; Tex. Disc. R. I.02(a)(3).

As such, I discussed my client's preferred approach with him early in my representation and throughout my preparation of the case. I discussed the options with his grandparents, the Robnetts, as much as I could. However, I could not share some of the details that had come up about their grandson because he did not give me full permission to divulge them, and some I did not share because I did not want to feed them information before possible testimony on their part.

I only decided during trial to advise against offering the testimonies of Mr. Panus and his grandparents. I formed my opinion based on all the information I had, and the evidence I reviewed above. In addition, as the trial progressed, it became clear the Robnetts had nothing of value to offer; they had dinner with Cooper once, several days before this happened, and everything else they could offer was hearsay. I consulted with my client about this choice, and he consented. We together chose for me not to call his grandparents to the stand. He chose not to testify, and I had him confirm that choice and that the choice was his on the record in open court, outside the presence of the jury.

Legal theory presented

As is standard in my practice, I researched the case early on to find all avenues through which to present a defense. In doing so, I decided that a second means of attacking the case could be an "improper enhancement" defense. I reviewed the indictment and relevant statutes. The legal theory I settled on-as outlined in my sentencing memo-was that the same firearm should not be able to be used to enhance an act from unlawful restraint to a kidnapping and then from kidnapping to aggravated kidnapping. This issue had not been fully litigated in Texas appellate courts. My research had revealed only one time this issue had been raised, in *Cummings v. State*, No. 03-09-00269-CR, 2010 Tex. App. Lexis 6367 (Tex. App. Austin 2010, no pet.). In developing this theory, I consulted with the *Cummings* lawyer, Gregory Sherwood, twice by phone. I believed there were good arguments for this approach, based on established caselaw.

Pursuing this approach is more difficult for a lawyer than presenting a factual defense. It involves, as appellate lawyer Jani Maselli Wood terms it, "creating error" for appellate review, as opposed to preserving error or arguing facts. This approach is not one of inviting error but rather one of consciously and deliberately creating a record so as to narrow and clarify issues for appellate review. This approach is more than preserving error. It requires knowledge and for[e]thought of possible legal issues and deliberate choices in record creation so as to clearly present legal issues to appellate courts.

In this case, creating error involved several difficult points of evidentiary policing. I had to keep out of evidence any mention of any firearm other than the one used

> when my client went into Gauthier's house. This effort was memorialized in the motion in limine that I filed before trial. I had to make sure the record was clear that the firearm used in Gauthier's house was the same as the one used in Mr. Panus's truck. I had to prevent anyone from testifying that Mr. Panus kept other firearms in his truck and that Cooper knew there were other firearms in the truck. And, I had to limit the admissibility of Mr. Panus's prior offenses, including the Wisconsin felony kidnapping.[1]
>
> Mr. Panus is accurate when he reflects that I built my trial strategy around this theory. I discussed this theory with my client and, separately, with his grandparents. In all conversations with them, I emphasized that there was no appellate case on point either affirming this argument or denying it. I told them that appellate courts rarely reversed convictions or even granted defendants' arguments have merits. I described my experience as an appellate lawyer, with at least 60 appeals written at that point in my career, and that appellate courts have rejected some of my best arguments. I also told them that this was true of all criminal-defense appellate lawyers. In the law, there are no clear and obvious winners. Even when the caselaw is on point, a court can reverse itself and change the law.
>
> However, I also told them sometimes, the unexpected happens and the defense argument wins. I described to them the *Crawford* case and the change in the law on the Confrontation Clause. I told them that it was our best chance of what could be termed a good outcome, but it would still mean time in prison with a conviction.

(ECF No. 12-49 at 39-43.)

The state habeas court made the following findings of fact in recommending the rejection of these claims:

> 34. Mr. McDermott states that he decided to pursue an "improper enhancement" defense arguing that the same firearm could not be used to enhance an act from unlawful restraint to kidnapping, and also from kidnapping to aggravated kidnapping. Mr. McDermott further acknowledges that this issue had not been fully litigated in the courts.
>
> 35. Mr. McDermott concedes that he built his trial strategy around the "improper enhancement" defense; however, he further states that he advised Applicant that that there was not an appellate case either affirming or denying this defense, that he could not promise success with this defense, and that pursuing this strategy was risky.

[1] In an affidavit filed on December 13, 2022, Mr. McDermott acknowledged that Petitioner's Wisconsin kidnapping case had been dismissed, although Petitioner had plead guilty to a failure-to-appear charge related to the proceedings. Regardless, Mr. McDermott stated "[m]y factual error in my affidavit was not material to my reflection of the decision making in the case." (ECF No. 12-52 at 3.)

> 36. Trial counsel's decision to pursue the so-called "improper enhancement" defensive strategic decision made after a thorough investigation of law and facts relevant to plausible options and said strategy was not outside the wide range of competent assistance.
>
> 37. Trial counsel's decision to pursue the "improper enhancement" defense was not ineffective because counsel's judgment rested on an unsettled proposition of law.
>
> . . . .
>
> 50. Mr. McDermott stated in his affidavit that the decision not to pursue Applicant's offered defense was made by counsel after considering the witnesses and evidence available to support the proposed defensive theory. Counsel further stated that the decision not to call Applicant and the Robnetts to testify was a decision that counsel discussed with Applicant and a decision to which Applicant consented.
>
> 51. This Court finds that trial counsel made a reasoned, strategic choice to limit the evidence and witnesses to what thought would be more persuasive to the jury. The decision to call a witness is generally, as it was here, a matter of trial strategy. *Carter v. State*, 506 S.W.3d 529, 540-41 (Tex. App.—Houston [1st Dist.] 2016, pet. ref'd). And, "[e]ven if such [additional mitigating] evidence existed, defense counsel could have reasonably determined that the potential benefit of additional witnesses or evidence was outweighed by the risk of unfavorable counter-testimony." *Bone v. State*, 77 S.W.3d 828, 835 (Tex. Crim. App. 2002) (citing TEX. R. EVID. 404(b), 405, 608).
>
> 52. Therefore, this Court finds that trial counsel's decision not to present evidence in support of Applicant's offered defense was a reasonable, strategic decision that fell within the wide range of reasonable assistance and such decision was sound trial strategy.

(ECF No. 12-50 at 19, 21-22 (record citations omitted).)

Trial counsel also has wide latitude in determining trial strategy. *See Ward v. Stephens*, 777 F.3d 250, 264 (5th Cir. 2015). In fact, "[d]efense counsel's 'strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable.'" *Mejia*, 906 F.3d at 316 (quoting *Rhoades v. Davis*, 852 F.3d 422, 434 (5th Cir. 2017)). Further, "*Strickland* does not allow second guessing of trial strategy and must be applied with keen awareness that this is an after-the-fact inquiry." *Granados v. Quarterman*, 455 F.3d 529,

534 (5th Cir. 2006). As a result, an unsuccessful trial strategy does not mean that counsel's performance was deficient. *Avila v. Quarterman*, 560 F.3d 299, 314 (5th Cir. 2009).

The record shows that Petitioner's trial counsel investigated the law and facts and made a clear and reasoned choice to follow the "improper enhancement" strategy. Counsel further attested that he warned Petitioner that it was a risky defense but felt it was the better option based on the conflicting evidence supporting Petitioner's chosen "mens rea" defense. Petitioner has failed to show that the state court's decision rejecting this claim was an unreasonable application of *Strickland*. As a result, these claims are denied.

c. Conceding guilt (claim 2(b))

Petitioner next argues that his trial counsel provided ineffective assistance when they effectively conceded his guilt at trial by pursing the "improper enhancement" strategy. Petitioner argues the strategy required him to be found guilty in order to be effective.

In his affidavit, Mr. McDermott attested that "[w]e did not concede guilt during trial, but still argued non-guilt through trial and closing argument. Mr. Panus never mentioned that he saw the improper-enhancement argument as conceding guilt, either. I discussed this issue with him throughout the preparation of the case and again during the trial itself." (ECF No. 12-50 at 2-3.)

The state habeas court made the following findings of fact:

> 40. The essence of the "improper enhancement" defense advanced by trial counsel was that counsel denied Applicant's legal guilt; however, at no time did trial counsel explicitly or implicitly concede Applicant's factual guilt.
>
> 41. Applicant's trial counsel through final argument contested the notion that Applicant was guilty by arguing to the jury that the State had not met its burden of proof and that the jury should return a verdict of "not guilty."
>
> 42. This Court finds that Applicant's trial counsel did not concede Applicant's guilt.

(*Id.* at 20.)

The state habeas court made the factual finding that Petitioner's trial counsel did not concede either his legal or factual guilt at trial, and concluded that trial counsel contested Petitioner's factual guilt through final argument. Under the AEDPA, the state habeas court's factual findings are entitled to a presumption of correctness and a petitioner bears the burden of rebutting this presumption with clear and convincing evidence. 28 U.S.C. § 2254(e)(1). This presumption is especially strong where, as here, the state habeas court and trial court are one in the same. *Mays v. Stephens*, 757 F.3d 211, 214 (5th Cir. 2014) (citations omitted). Petitioner has failed to provide any evidence to rebut the state habeas court's factual finding that Petitioner's trial counsel did not concede his guilt at trial. As a result, the state habeas court's application of *Strickland* to this claim was not unreasonable, and it is denied.

d. Advising Petitioner not to testify (claim 2(c))

Petitioner next argues that his trial counsel provided ineffective assistance when he advised Petitioner not to testify at his trial due to counsel pursuing the improper-enhancement strategy. The state habeas court found the following:

> 46. The record herein reflects that Applicant was made aware that the right for him to testify was a right that was personal to Applicant and that no one else could make that decision for him. Applicant made the independent, voluntary, and uncoerced decision not to testify after considering the evidence presented and the advice of counsel.
>
> 47. The trial record fails to demonstrate that counsel's performance fell below an objective standard of reasonableness. To the extent that trial counsel advised Applicant not to testify, such advice was a part of counsel's trial strategy.
>
> 48. This Court finds trial counsel's advice to Applicant to be reasonable trial strategy. This Court further finds that Applicant's decision not to testify was his own voluntary decision.

(ECF No. 12-50 at 21.)

The state habeas court found that Petitioner voluntarily decided against testifying in his own defense. The trial record supports the state habeas court's conclusion. (ECF No. 12-12 at 23-27.) Again, Petitioner fails to proffer any evidence, much less clear and convincing evidence, that would rebut the state habeas court's factual findings. 28 U.S.C. § 2254(e)(1). Accordingly, the Court concludes the state habeas court's application of *Strickland* to this claim was not unreasonable, and it is denied.

2. Unconstitutional Statute (claim 3)

In Petitioner's third claim, he argues that, if the Court finds Mr. McDermott's "improper enhancement" strategy to be meritorious, then he asserts section 20.04 of the Texas Penal Code[2] is unconstitutional as applied to his case. In support of the statute's unconstitutionality, Petitioner essentially repeats his trial counsels' trial strategy, i.e., that the firearm used in the offense was improperly used to enhance his offense from unlawful restraint to kidnapping, and then from kidnapping to aggravated kidnapping. As such, Petitioner argues he should have only been found guilty and sentenced to a third-degree felony. In his federal petition, Petitioner argues that section 20.04 of the Texas Penal Code violates the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

To obtain relief on his claim, Petitioner must show that the state habeas court's decision rejecting this claim was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States. 28 U.S.C. § 2254(d)(1). "[T]he state court's decision must have been more than incorrect or erroneous." *Wiggins*, 539 U.S. at 520. Rather, the decision must be "so lacking in justification that there was an error well

[2] This is the section of the Texas Penal Code listing the elements for the charge of aggravated kidnapping.

understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Richter*, 562 U.S. at 103.

In denying this claim, the state habeas court relied on the state appellate court's decision, which determined that the same elemental fact was not used twice to improperly enhance Petitioner's offense to a first-degree felony:

> The State contends that the jury's aggravated-kidnapping verdict is supportable without relying twice on the elemental fact of "use of deadly force or a deadly weapon" because, as set forth in the charge, the offense may be committed by the threat—and not just the use—of deadly force. We agree.
>
> . . . .
>
> Here, Panus was charged with aggravated kidnapping based on the allegation that he abducted Cooper with the intent to prevent her liberation by either using—or threatening to use—deadly force and Panus used a deadly weapon, namely a firearm. See Tex. Penal Code §§ 20.01(2)(B), 20.04(b). Based on the evidence at trial—including Cooper's testimony that Panus hit her in the face with his gun and threatened to kill her if she made a scene—the jury could have reasonably determined that Panus prevented Cooper's liberation by threatening to use deadly force. . . . Separate and apart from Panus's death threat to Cooper, the jury could have reasonably determined from the evidence at trial—including Cooper's testimony that Panus drove with the gun on his lap and visible to her—that Panus exhibited a deadly weapon during the commission of the kidnapping.

Panus, 2018 WL 4140851, at *5-6. The state habeas court further noted that Petitioner failed to present new evidence or arguments in his state habeas application to support what was, essentially, the same argument previously litigated on direct appeal. (ECF No. 12-50 at 22-23.)

Again, in is federal petition, Petitioner fails to offer any new evidence or argument showing how section 20.04 violates the Fifth, Sixth, or Fourteenth Amendments as applied to himself. Further, as noted above, to be granted relief on this claim, Petitioner must show that the state habeas court's—and, by extension, the intermediate appellate court's—decision "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Richter*, 562 U.S. at 103. Petitioner points to no

federal law that compels this conclusion and therefore has failed to satisfy this heavy burden. This claim is denied.

3. Ineffective Assistance of Trial and Appellate Counsel (claim 4)

In Petitioner's final claim, he argues his trial and appellate attorneys performed deficiently and prejudiced him by failing to preserve a potential challenge to the constitutionality of Texas Penal Code section 20.04.

Similar to the entitlement to effective trial counsel, a criminal defendant is constitutionally entitled to effective assistance of appellate counsel when he has a right to appeal under state law. *Evitts v. Lucey*, 469 U.S. 387, 397 (1985); *United States v. Phillips*, 210 F.3d 345, 348 (5th Cir. 2000). The *Strickland* standard for proving ineffective assistance of counsel applies equally to both trial and appellate attorneys. *Smith v. Robbins*, 528 U.S. 259, 285 (2000); *Dorsey v. Stephens*, 720 F.3d 309, 319 (5th Cir. 2013). To obtain relief, Petitioner must demonstrate that (1) counsel's conduct was objectively unreasonable under then-current legal standards, and (2) there is a reasonable probability that, but for counsel's deficient performance, the outcome of Petitioner's appeal would have been different. *See Smith*, 528 U.S. at 285; *Higgins v. Cain*, 720 F.3d 255, 260-61 (5th Cir. 2013). To demonstrate deficiency, Petitioner must show that "counsel unreasonably failed to discover nonfrivolous issues and to file a merits brief raising them." *Smith*, 528 U.S. at 285. Counsel is not, however, required to "raise every nonfrivolous claim, but rather may select among them in order to maximize the likelihood of success on appeal." *Id.* at 288 (citing *Jones v. Barnes*, 463 U.S. 745 (1983)).

In denying this claim, the state habeas court concluded that Petitioner could not prove prejudice based its prior conclusion that Petitioner had failed to show the statue was unconstitutional as applied to himself. (ECF No. 12-50 at 24.)

Petitioner cannot succeed on this claim. First, as previously discussed, Petitioner's challenge to the constitutionality of section 20.04 is simply a restatement of his trial counsel's arguments regarding the "improper enhancement" of his charge to a first-degree felony. His appellate counsel raised this issue on appeal, which the state court of appeals overruled in affirming Petitioner's conviction. Accordingly, Petitioner fails to show deficient performance or prejudice: the type of challenge he argues should have been preserved appears to be substantively identical to the challenge his trial counsel preserved and appellate counsel raised on appeal. Further, as discussed above, Petitioner fails to show that section 20.04 is unconstitutional as applied to himself, and therefore cannot show prejudice. Accordingly, the state habeas court's application of *Strickland* to this claim was not unreasonable, and it is denied.

IV. 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 Petitioner'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). Accordingly, the Court will not issue a certificate of appealability.

It is therefore **ORDERED** that Petitioner's Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (ECF No. 1) is **DENIED**; and

It is finally **ORDERED** that a certificate of appealability shall not issue in this case.

SIGNED this 25th day of June, 2024.

ROBERT PITMAN
UNITED STATES DISTRICT JUDGE

A P P E N D I X
C

United States Court of Appeals for the Fifth Circuit

No. 24-50588

United States Court of Appeals
Fifth Circuit
FILED
March 28, 2025
Lyle W. Cayce
Clerk

JUSTIN PANUS,

Petitioner—Appellant,

versus

ERIC GUERRERO, *Director, Texas Department of Criminal Justice, Correctional Institutions Division*,

Respondent—Appellee.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 1:23-CV-999

ON MOTION FOR RECONSIDERATION AND REHEARING EN BANC

UNPUBLISHED ORDER

Before SOUTHWICK, WILLETT, and OLDHAM, *Circuit Judges*.

PER CURIAM:

The motion for reconsideration is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled

on rehearing en banc (FED. R. APP. P. 40 and 5TH CIR. R. 40), the petition for rehearing en banc is DENIED.