

**IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF TEXAS HOUSTON DIVISION**

RODNEY YOUNG ANDERSON,
Petitioner,
V. CIVIL ACTION H-16-652

LORIE DAVIS,
Respondent.

FINAL JUDGMENT

For the reasons stated in the Court's Memorandum on Dismissal entered this date, this action is **DISMISSED** with prejudice.

SIGNED at Houston, Texas, on March 27, 2017.

/s/ David Hittner
DAVID HITTNER
UNITED STATES DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF TEXAS HOUSTON DIVISION**

RODNEY YOUNG ANDERSON,
Petitioner,
V.

CIVIL ACTION H-16-652

LORIE DAVIS,
Respondent.

MEMORANDUM ON DISMISSAL

Petitioner, Rodney Anderson, brings this habeas corpus application under 28 USC§ 2254. He was held in the Texas Department of Criminal Justice (TDCJ) when he filed this case. Pending before the Court is a Motion for Summary Judgment filed by Lorie Davis, the TDCJ Director. [Docket Entry No. 14] On consideration of the pleadings, the record, and the applicable law, this Court **GRANTS** the motion.

I. BACKGROUND AND CLAIMS

Petitioner challenges convictions in cause numbers 09-07-7255-I-CR and 09-07-7255-II-CR in the 359th Judicial District Court of Montgomery County, Texas. CRI at 109-14. He was indicted for possession with intent to deliver or manufacture a controlled substance and aggravated assault against a public servant. The jury found Petitioner guilty of both charges. On November 18, 2009, the trial court sentenced him to forty years imprisonment in the drug conviction and life imprisonment in the aggravated assault conviction. *Id.*, 109-14. The sentences were ordered to be served concurrently.

The Respondent sets forth the appellate and other post-conviction proceedings. The Texas Ninth Court of Appeals affirmed the convictions in an unpublished opinion on December 21, 2011. *Anderson v. State*, No. 09-10-00061-CR, 2011 WL 6743297 (Tex. App.-Beaumont 2011, pet. granted). The Texas Court of Criminal Appeals granted Anderson's petition for discretionary review. *Anderson v. State*, No. PD-0408-12 (Tex. Crim. App. Sept. 19, 2012).

The Court of Criminal Appeals affirmed the lower court's decision on November 27, 2013. *Anderson v. State*, 416 S.W.3d 884 (Tex. Crim. App. Nov. 27, 2013). Petitioner filed a motion for rehearing which the appellate court denied. *Anderson v. State*, No. PD-0408-12 (Tex. Crim. App. Jan. 29, 2014). He filed an application for state habeas relief on his convictions which the Court of Criminal Appeals denied without written order on the findings of the trial court after a hearing on December 9, 2015. SHCR, at Action Take Sheet.

The Respondent reasonably construes Petitioner's federal application to raise these grounds for relief:

1. Petitioner is actually innocent.
2. The State withheld exculpatory evidence in violation of *Brady v. Maryland*.
3. Petitioner's due process rights were violated because the prosecution failed to seek justice.
4. The evidence is insufficient to support Petitioner's convictions.

The Respondent submits the following statement of facts taken from the opinion of the Texas Court of Criminal Appeals in Petitioner's direct appeal.

[Petitioner Anderson] and Timothy Sherber had sold methamphetamine to Jeffery Harmon on numerous occasions. Harmon, who was acting as a paid confidential informant for the Texas Department of Public Safety, arranged to meet [Anderson] and Sherber in a parking lot to purchase methamphetamine. [Anderson] and Sherber arrived at the arranged location in Sherber's truck, and Harmon approached [Anderson], who was sitting on the passenger side. When [Anderson] showed Harmon the drugs, Harmon removed his hat, which was a signal to the undercover officers waiting in the parking lot. On Harmon's signal, the undercover officers pulled their weapons, identified themselves as police, and yelled at [Anderson] and Sherber to get out of the vehicle. Instead, Sherber backed his truck out of the parking space before officers were able to block him in. One of the officers who approached Sherber's truck on foot struck the driver's side window with the barrel of his gun and repeatedly yelled at Sherber to stop.

As he attempted to flee, Sherber hit two unmarked patrol cars. One of the detectives fired his weapon several times, and [Anderson] suffered a gunshot wound to the chin. Sherber continued to drive forward and hit the side of a marked patrol car as he exited the parking lot. The officer driving the marked patrol car was injured in this collision. Another officer rammed the side of Sherber's truck to bring it to a stop, and [Anderson] and Sherber were arrested. Officers searched Sherber's truck and found a plastic bag containing methamphetamine on the passenger side of the floorboard. They also collected loose methamphetamine from inside Sherber's truck and on the ground outside the passenger door. [Anderson] was tried by a jury and found guilty of possession with intent to deliver four grams or more but less than 200 grams of methamphetamine and with aggravated assault on a public servant. He was sentenced to 40 years' imprisonment in the Texas Department of Criminal Justice-Correctional Institution Division for the possession charge, and life in prison for aggravated assault.

Anderson, 416 S.W.3d at 886.

II. THE SUMMARY JUDGMENT STANDARD

A party seeking summary judgment must inform the district court of the basis for

the motion, and identify those portions of the record, which the moving party believes demonstrate the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317,325, (1986). In considering a motion for summary judgment, a court must review the material factual issues and give the non-moving party the benefit of every reasonable inference with respect to the facts alleged by that party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,248 (1986).

III. INNOCENCE AND FAILURE TO SEEK JUSTICE

In his first and third grounds for relief, Petitioner contends he is actually innocent and the prosecution failed to seek justice. To the extent Petitioner raises a claim of insufficiency of the evidence, he does not raise a genuine issue of material fact. The federal standard for insufficiency of the evidence "is whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307,319 (1979). Under this standard, the jury may disregard any evidence it chooses to disregard. It is the "responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts." *Jackson*, 443 U.S. at 319.

The fact-finder can find not credible, and thus ignore, any evidence. *Id.* Any contradictory testimony does not affect the validity of the guilty verdict. *Id.* The evidence can be sufficient to support a conviction under *Jackson* even when it also supports a claim of innocence. *Gibson v. Collins*, 947 F.2d 780, 783 (5th Cir. 1991). The Court of Criminal Appeals determined the evidence sufficient to sustain the verdict on state appellate review. *See Anderson v. State*, 416 S.W.3d 884, 888-891 (Tex. Crim. App. Nov. 27, 2013). Petitioner's claims that he is innocent and the prosecution did not seek justice fail to state a claim on which habeas corpus relief may be granted.

IV. THE *BRADY* CLAIM

Petitioner claims the prosecution failed to disclose evidence favorable to the defense prior to trial. He contends the prosecution withheld information and evidence: (1) showing that the trial testimony of confidential informant Harmon was coerced; (2) concerning the informant's contract with the State; (3) concerning statements from witnesses Paras and Brummett; and (4) evidence showing that CSI McAnarney had an "immense level of involvement" in the collection of evidence. *Id.* Respondent contends Petitioner fails to overcome AEDPA's re-litigation bar and he is not entitled to relief on this ground.

The state court issued the following findings of fact and conclusions of law on the claim that the prosecution withheld favorable, exculpatory evidence from the defense in violation of *Brady v. Maryland*:

Findings of Fact

6. The applicant has failed to allege sufficient facts to support a claim of the suppression of evidence by the prosecution.

7. The unsworn hearsay statement ... regarding the prosecutor's purported threat to jail Harmon until the ... trial if Harmon did not appear ... does not constitute exculpatory evidence.

8. The unsworn statement was not constitutionally "material," in that the ... statement would not have affected the jury's consideration ... or the outcome of the ... trial. SHCR at 133.

13. From February of 2008 until December of 2008, the State of Texas was represented in this case by [the] former Assistant District Attorney [who] ... maintained an "open file policy" and permitted defense discovery of the information ... regarding this case which she received from the sheriff

15.... an employee of attorney Andrea Kolski, visited the district attorney's office on at least two occasions, and was permitted to make a verbatim copy of the police offense report supplements and witness statements that the district attorney's office had received ... Rice made a verbatim copy of approximately five police offense report supplements and two witness statements concerning the events of February 11, 2008.

17. Glisson later completed the investigation and gave the district attorney's office the remainder of the offense report, supplements and witness statements.

20. the Court finds that the State maintained an "open file policy" both prior to and during the trial of this case, and that the contents of the State's file-including all offense report supplements and witness statement received from the sheriff's office-were available for review by counsel for the defense.

21. There is no evidence that any sheriff's deputy or prosecutor withheld from disclosure to the defense any particular offense report supplement or witness statement.

23. The applicant has not proven by a preponderance of the evidence that the statements signed by Paras and Brummett were withheld from disclosure prior to and during the trial of this case, by counsel for the State.

28. Tritico testified that he delivered his trial file to Steve Jackson, the attorney who represented the applicant in the direct appeal from his conviction.

29. Jackson produced in this Court what appeared to be a file consisting of

materials obtained from Tritico and Kolski and materials collected during the appellate process, but neither Tritico nor Kolski were able to state whether Jackson's file contained all of the materials that were contained in their respective files during the trial of this case.

30. The applicant has not proven by a preponderance of the evidence that the statements signed by Paras and Brummett were withheld from disclosure prior to and during the trial of this case, by counsel for the State.

The prosecution formally notified defense counsel in July of 2009 that the Montgomery County Sheriff had terminated the employment of crime scene investigator Caryn McAnarney because of general incompetence and false statements in her reports of testing of evidence.

45. The defense was provided with access to McAnarney's personnel file (2 R.R. 31, 33).

The state court issued the following conclusions of law on the *Brady* claim:

Conclusions of Law

2. The statements signed by witnesses Brummett and Paras on February 11, 2008, were neither exculpatory nor material to the outcome of the case.

3. The contents of Harmon's confidential informant packet and the receipt reflecting Womack's payment of \$200 to Harmon were neither exculpatory nor material to the outcome of the case.

4. Evidence that crime scene investigator McAnarney made false statements in her reports in other, unrelated cases would not have been relevant or admissible in the trial of this case.

5. The applicant was not deprived of any material information regarding McAnarney's participation in this case or the termination of her employment because of her misconduct in other cases.

6. The State of Texas did not withhold from the defense any exculpatory information, prior to or during the trial of this case.

7. The State of Texas did not withhold from the defense any information that was material to the outcome of the trial.

8. The applicant was not deprived of due process or due course of law as the result of the State's failure to disclose to the defense any material information or evidence.

I Supp. SHCR at 149-54.

V. AEDPA REVIEW OF THE *BRADY* CLAIM

The state habeas judge concluded that the State, in its prosecution of Petitioner, did not violate *Brady v. Maryland*. The preceding findings of fact and conclusions of law show many instances in which the prosecution provided exculpatory material and information to the Petitioner and his attorney. The state court habeas judge found that the Assistant District Attorney "maintained an open file policy and permitted defense discovery of the information ... regarding this case which she received from the sheriffs office." (Finding of Fact No. 13). The habeas findings also included a finding that an employee of defense counsel was twice allowed to make a verbatim copy of the offense report, supplements, and witness statements. (Finding 15) Another employee was allowed to make a copy of four or five police offense-report supplements and two witness statements. *Id.*

A state employee, after completing part of the investigation, obtained from the district attorney's office the remainder of the offense report, supplements, and witness statements. (17) There was no evidence raised that any sheriffs deputy or any prosecutor withheld any particular offense report, supplement or witness statement from disclosure to the defense. (21)

The state habeas corpus judge concluded that Petitioner had not proven by a preponderance of the evidence that the statements signed by Paras and Brummett were withheld from disclosure either before nor during the trial of the case. (30) The state habeas judge concluded that the witness statements by Brummett and Paras were not exculpatory nor material to the outcome of the prosecution.

The state judge made the following specific conclusions of law.

3. The contents of Harmon's confidential informant packet and the receipt reflecting Womack's payment of \$200 to Harmon were neither exculpatory nor material to the outcome of the case. Evidence that crime scene investigator McAnarney made false statements in her reports in other, unrelated cases would not have been relevant or admissible in the trial of this case.

5. The Petitioner was not deprived of any material information regarding McAnarney's participation in this case or the termination of her employment because of her misconduct in other cases.

6. The State of Texas did not withhold from the defense any exculpatory information, prior to or during the trial of this case.

7. The State of Texas did not withhold from the defense any information that was material to the outcome of the trial.

8. The applicant was not deprived of due process or due course of law as the result of the State's failure to disclose to the defense any material information or evidence.

The state habeas judge found that Petitioner did not raise a valid claim under *Brady vs. Maryland*. HR, 35-36, ¶4. Petitioner has not raised a violation of *Brady v. Maryland* under the preceding findings of fact by the state habeas judge. Supp. SHCR at 149-54. The Court of Criminal Appeals denied habeas corpus relief. *Id.*, at cover. The record before this Court does not raise a genuine issue of material fact that this Court can grant relief overcoming the restrictions in 28 U.S.C. § 2254(d), (e). The state court's adjudication on the merits that the State did not violate the holding in *Brady vs. Maryland* stands.

The record before this Court does not raise a genuine issue of material fact that this Court can grant relief overcoming the restrictions in 28 U.S.C. § 2254(d), (e). The state court's adjudication on the merits that Petitioner did not suffer a constitutional violation under *Brady vs. Maryland* is not contrary to and did not involve an unreasonable application of clearly established federal law under *Brady*. 28 U.S.C. § 2254(d)(1). Under the record, the state habeas court's adjudication on the *Brady* claim was not incorrect or erroneous, much less also unreasonable. *Williams v. Taylor*, 529 U.S. 362, 411 (2000). Therefore, this Court cannot grant habeas corpus relief on Petitioner's claim of a violation under *Brady vs. Maryland*. The fact findings that are subsidiary to a determination under *Brady* and implicitly underlie that determination are fact questions governed by 28 U.S.C. § 2254(e)(1). *Black v. Collins*, 962 F.2d 394, 405-06 (5th Cir. 1992) (discussing a prior version of § 2254(d)). The state habeas findings are presumed correct unless rebutted by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). Petitioner has not overcome this presumption of correctness. Therefore, AEDPA also precludes this Court from granting relief on the *Brady* claim because the state habeas court's implicit fact findings concerning counsel's effectiveness have not been rebutted by clear and convincing evidence.

The record before this Court does not raise a genuine issue of material fact that the conviction was unconstitutional based on a violation of *Brady vs. Maryland*. The summary judgment record does not raise a genuine issue of material fact that this Court has authority to grant federal habeas corpus relief under 28 U.S.C. § 2254(d), (e). Under the record, the state habeas court's adjudication was not incorrect or erroneous, much less also unreasonable. *Williams v. Taylor*, 529 U.S. 362, 411 (2000). Therefore, this Court cannot grant habeas corpus relief on Petitioner's claim of a *Brady* violation.

VI. SUFFICIENCY OF THE EVIDENCE

Petitioner challenges the sufficiency of the evidence in his convictions. The

Respondent contends these claims are procedurally barred. She maintains Petitioner did not raise this claim on direct appeal in state court. It is not controverted that a petitioner must exhaust his state court remedies before bringing his claim to this Court. Under Texas law, he must exhaust state court remedies on direct appeal in the highest state criminal court, the Texas Court of Criminal Appeals. *Ex parte McLain*, 869 S.W.2d 349, 350 (Tex. Crim. App. 1988) (en banc). Furthermore, the

U.S. Court of Appeals for the Fifth Circuit has recognized that a petitioner must bring a sufficiency of the evidence claim to the Court of Criminal Appeals on direct appeal to satisfy the exhaustion requirement. *Renz v. Scott*, 28 F.3d 431, 432 (5th Cir. 1994). It is undisputed that the specific claims raised in federal court must have been presented the state court. Respondent points out that Petitioner did not bring to the Texas appellate court the same specific claim on evidentiary sufficiency that he raises here. Petitioner has failed to properly and fully exhaust state court remedies under two deficiencies. Petitioner failed to properly exhaust state court remedies. He also failed to exhaust his state court remedies on the same specific claim raised in this Court. Petitioner's claim on sufficiency of the evidence is denied for failure to exhaust state court remedies.

VII. CONCLUSION

The record before this Court does not raise a genuine issue of material fact that Petitioner is in custody in violation of the Constitution. Respondent is entitled to summary judgment on Petitioner's habeas corpus claims raised in this action.

Respondent's Motion for Summary Judgment [Docket Entry No. 14] is **GRANTED** and this case is **DISMISSED** with prejudice under Rule 56. All other pending motions and requests for relief are **DENIED**.

This Court finds that Petitioner has not made a substantial showing of the denial of a constitutional right. The issues raised here are not debatable among jurists of reason, could not be resolved in a different manner, and do not deserve encouragement to proceed further. *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983).

This Court finds that a Certificate of Appealability should not issue in this case.

Signed at Houston, Texas, on March 27, 2017.

/s/ David Hittner
DAVID HITTNER
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 17-20614

4:16-CV-652

RODNEY YOUNG ANDERSON,

Petitioner - Appellant

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,

Respondent - Appellee

Appeal from the United States District Court for the Southern District of
Texas

Before JONES, DENNIS, and HIGGINSON, Circuit Judges. PERCURIAM:
This court must examine the basis of its jurisdiction, on its own motion if necessary. *Hill v. City of Seven Points*, 230 F.3d 167, 169 (5th Cir. 2000). Pursuant to 28 U.S.C. § 2107(a) and Federal Rule of Appellate Procedure 4(a)(1)(A), the notice of appeal in a civil case must be filed within thirty days of entry of judgment. In this 28 U.S.C. § 2254 case, the district court entered a memorandum on dismissal and a final judgment dismissing the petition and denying a certificate of appealability on March 29, 2017. Petitioner filed a motion for new trial on April 20, 2017. The district court denied the motion on July 25, 2017. Therefore, the final day for filing a timely notice of appeal was August 24, 2017. The plaintiffs notice of appeal is dated and stamped as filed on September 29, 2017. When set by statute, the time limitation for filing a notice of appeal in a civil case is jurisdictional. *Hamer v. Neighborhood Hous. Servs. of Chi.*, 138 S. Ct. 13, 17 (2017); *Bowles v. Russell*,

551 U.S. 205, 214 (2007) . The lack of a timely notice mandates dismissal of the appeal. *Robbins v. Maggio*, 750 F.2d 405, 408 (5th Cir. 1985).

IT IS SO ORDERED.*

*A certificate of appealability was denied when the petition was dismissed on March 29, 2017. Petitioner's notice of appeal references the August 25, 2017, denial of a certificate of appealability. The denial of an application for certificate of appealability is not appealable. See Rule 11(a), Rules Governing Section 2254 Proceedings, 28 U.S.C. foll. § 2254.

United States Court of Appeals

**FIFTH CIRCUIT
OFFICE OF THE CLERK**

**LYLE W. CAYCE
CLERK**

**TEL. 504-310-7700
600 S. MAESTRI PLACE
NEW ORLEANS, LA 70130**

February 21, 2018

Mr. David J. Bradley
Southern District of Texas
Houston United States District Court

No. 17-20614 Rodney Anderson v. Lorie Davis, Director
USDC No. 4:16-CV-652

Dear Mr. Bradley,

Enclosed is a copy of the judgment issued as the mandate.

Sincerely,

LYLE W. CAYCE, Clerk

cc w/encl:

Ms. Melissa L. Hargis
Ms. Cynthia Eva Hujar Orr

App. 13

United States Court of Appeals
FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE
NEW ORLEANS, LA 70130

February 26, 2018

Ms. Cynthia Orr
Goldstein, Goldstein, Hilley & Orr
310 S. St. Mary's Street, Suite 2900
San Antonio, TX 78205-0000

No. 17-20614

Rodney Anderson v. Lorie Davis, Director
USDC No. 4:16-CV-652

Dear Ms. Orr,

We received your petition for panel rehearing, however a panel rehearing is not allowed for and administrative panel order. We are taking no action on this petition.

Sincerely,

LYLE W. CAYCE, Clerk

cc: Mr. Charles Arnone
Ms. Melissa L. Hargis

App. 14

United States Court of Appeals
FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE
NEW ORLEANS, LA 70130

March 6, 2018

Ms. Cynthia Orr
Goldstein, Goldstein, Hilley & Orr
310 S. St. Mary's Street, Suite 2900
San Antonio, TX 78205-0000

No. 17-20614 Rodney Anderson v. Lorie Davis, Director
USDC No. 4:16-CV-652

Dear Ms. Orr,

We received your motion for rehearing en banc & exhibits in support. No action will be taken on the rehearing en banc as it is not allowed for administrative panel orders. The event will be deleted.

Sincerely,

LYLE W. CAYCE, Clerk

cc: Mr. Charles Arnone
 Ms. Melissa L. Hargis