IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-41374
USDC No. 5:13-CV-66

A True Copy
Certified order issued Sep 13, 2017

Lyle W. Cayce
Clerk, U.S. Court of Appeals, Fifth Circuit

RYAN PATRICK JOHNSON,

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
Eastern District of Texas, Texarkana

O R D E R:

Ryan Patrick Johnson, Texas prisoner # 1648234, moves for a certificate of appealability (COA) to appeal the dismissal of his 28 U.S.C. § 2254 petition seeking relief from his jury conviction for murder and his resulting 99-year prison sentence. He seeks a COA on his claims of prosecutorial misconduct consisting of allowing the presentation of false testimony and withholding exculpatory evidence and on his claims of ineffective assistance of counsel resulting from the failure to object to hearsay testimony from the murder victim's mother, impeach a sheriff's investigator, object to the prosecution's failure to correct testimony from a defense witness, and impeach the murder victim's sister. The district court dismissed the claims on the merits.

An applicant for a COA must make "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, 327 (2003). The applicant meets this standard if he shows "that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Buck v. Davis*, 137 S. Ct. 759, 773 (2017) (internal quotation marks and citation omitted).

Johnson is DENIED a COA on his claims of prosecutorial misconduct because he did not brief them meaningfully. *See McGowen v. Thaler*, 675 F.3d 482, 497-98 (5th Cir. 2012). Further, Johnson is DENIED a COA on his claims of ineffective assistance of counsel because he has not met the required standard. *See Buck*, 137 S. Ct. at 773.

/s/Edith H. Jones
EDITH H. JONES
UNITED STATES CIRCUIT JUDGE

FILED

SEP 8 2016

Clerk, U.S. District Court
Texas Eastern

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

RYAN PATRICK JOHNSON	§	
	§	
V.	§	CIVIL ACTION NO. 5:13cv66
	§	
DIRECTOR, TDCJ-CID	§	

FINAL JUDGMENT

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

ORDERED AND ADJUDGED that this petition for writ of habeas corpus is **DENIED**. All motions by any party not previously ruled on are hereby **DENIED**.

SIGNED this 8th day of September, 2016.

Robert W Schroeder III

ROBERT W. SCHROEDER III
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

RYAN PATRICK JOHNSON	§	
	§	
V.	§	CIVIL ACTION NO. 5:13cv66
	§	
DIRECTOR, TDCJ-CID	§	

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

Ryan Patrick Johnson, proceeding *pro se*, filed the above-styled petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges a conviction for murder.

The Court referred this matter to the Honorable Caroline M. Craven, United States Magistrate Judge, for consideration pursuant to 28 U.S.C. § 636 and applicable orders of this court. The Magistrate Judge has submitted a Report and Recommendation of United States Magistrate Judge recommending the petition be denied. Docket No. 25.

The Court has received and considered the Report and Recommendation of United States Magistrate Judge, along with the record and pleadings. Petitioner filed objections to the Report and Recommendation. Docket No. 27. The court must therefore conduct a *de novo* review of the objections in light of the record and the applicable law.

Standard of Review

Pursuant to the Antiterrorism and Effective Death Penalty Act ("AEDPA"), a petitioner is not entitled to federal habeas relief unless the adjudication of his claim in the state courts: (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; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. 28 U.S.C. § 2254(d)(1)–(2). Under the "contrary to" clause, a federal court may only grant relief if the state courts reached an opposite result from the Supreme Court on a set of materially indistinguishable facts or arrived at a conclusion opposite to that reached by the Supreme Court on a question of law. *Simmons v. Epps*, 654 F.3d 526, 534 (5th Cir. 2011) (citing

Williams v.Taylor, 529 U.S. 362, 405 (2000)). Under the "unreasonable application" clause, habeas relief may be granted if the state court correctly identified a legal principle from the Supreme Court's jurisprudence, but misapplied the principle to the facts. *Id.* (citing *Williams*, 529 U.S. at 407). "The question under AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable—a substantially high threshold." *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007). "A state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurist could disagree' on the correctness of the state court's decision." *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). Accordingly, "a state prisoner must show that the state court's ruling on the claim being presented in federal court 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.

In summary, in order to be entitled to relief in this proceeding, petitioner must demonstrate with respect to a question of law that the determination by the state courts was contrary to, or involved an unreasonable application of, clearly established federal law. With respect to a question of fact, petitioner must establish that the state courts' determination was based on an unreasonable determination of the facts in light of the evidence presented in the state courts.

Grounds for Review

Petitioner asserted the following grounds for review: (1) the jury was permitted to serve without being sworn; (2) counsel was ineffective for failing to: (a) object to hearsay testimony from Tracy Dixon; (b) impeach testimony from Investigator McCarver; (c) object to the prosecution's failure to correct perjured testimony; (d) impeach the testimony of JeCarlos Hawkins; (e) object to hearsay testimony by Mr. Hawkins; and (f) impeach the testimony of Brittany Robinson; and (3) the prosecution improperly: (a) failed to correct perjured testimony from Aman Gray; (b) failed to correct perjured testimony from Mr. Hawkins and (c) failed to disclose exculpatory evidence.

Analysis

Ground for Review 1

In his first ground for review, petitioner asserted the trial court erred by permitting members of the jury to serve without being properly sworn. The Magistrate Judge concluded this review was without merit because the transcript and a supplemental transcript demonstrated the jury was properly sworn. The Magistrate Judge further concluded this ground for review did not provide a basis for relief because it was based on a violation of state law, not the Constitution.

Petitioner did not object to the Magistrate Judge's conclusion with respect to this ground for review. Accordingly, this point does not provide petitioner with a basis for relief.

Ground for Review 2(a)

In ground for review 2(a), petitioner asserted counsel should have objected to hearsay testimony provided by Tracy Dixon, the victim's mother. He complained of testimony regarding statements made to Ms. Dixon by her son regarding the relationship between her son and petitioner. The testimony indicated the victim believed the relationship was close and had lasted for five years.

In her Report and Recommendation, the Magistrate Judge referenced an affidavit from defense counsel in which counsel stated that petitioner's trial strategy was to demonstrate the victim was obsessed with petitioner and had stalked and harassed him for a period of years. Counsel stated Ms. Dixon's testimony showed the victim was fixated on petitioner and potentially dangerous. As a result, her testimony supported the defense's theory that petitioner shot the victim in self-defense. Counsel stated he did not object to Ms. Dixon's testimony because it demonstrated the "stark contrast" between how petitioner viewed the relationship and how the victim viewed it. The Magistrate Judge concluded this was a reasoned trial strategy that was entitled to deference under the applicable law.

In his objections, petitioner states Ms. Dixon's testimony concerning statements made to her by her son demonstrated petitioner and the victim were in a long-term relationship, in contrast to

petitioner's own testimony. He asserts this testimony was harmful and that counsel should have objected to it.

The Court agrees with the Magistrate Judge's conclusion. Ms. Dixon's testimony was used by the defense to show that the victim had a delusional belief that he and petitioner were in a long-term relationship, a delusion that led the victim to stalk petitioner and led petitioner to believe the victim was dangerous. The testimony was used by the defense to show that while the victim and petitioner were not in a long-term relationship, the victim believed they were. This would have supported the theory of self-defense.

As the Magistrate Judge pointed out, strategic decisions by counsel are to be reviewed under a "double deferential" standard. *Burt v. Titlow*, 134 S. Ct. 10, 13 (2013). With this standard in mind, the Court is unable to conclude that counsel's failure to object to Ms. Dixon's testimony fell below an objective standard of reasonableness.[1]

Ground for Review 2(b)

In ground for review 2(b), petitioner asserted counsel was ineffective for failing to impeach testimony from Investigator McCarver. A videotape was played for the jury of Investigator McCarver's interview of petitioner. On direct examination, Investigator McCarver testified that during the interview, petitioner expressed no remorse for the victim and was only remorseful on his own behalf. He also stated that petitioner was crying for himself rather than for the victim. However, during cross-examination, the investigator acknowledged that he was speculating as to whom petitioner was crying for and that his statement as to petitioner's lack of remorse for the victim was based in part on speculation. Petitioner states counsel should have used the investigator's inconsistent statements to impeach him.

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[1] To prevail on a claim of ineffective assistance of counsel, a petitioner must show that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability the result of the proceeding would have been different without counsel's errors. *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984).

The Magistrate Judge concluded this ground for review was without merit because counsel did impeach Investigator McCarver's direct examination testimony by having him admit that certain of his conclusions were largely the result of speculation.

In his objections, petitioner does not address the Magistrate Judge's conclusion that counsel did impeach Investigator McCarver's testimony. Instead, he appears to argue it was important to impeach this testimony because that would have permitted the impeachment of the testimony of another witness, Aman Gray.

Counsel's cross-examination of Investigator McCarver resulted in a softening of the investigator's testimony on direct examination. Testimony that appeared to be factual statements regarding petitioner's demeanor and behavior on direct examination could be characterized as no more than opinion and speculation after cross-examination. Counsel's cross-examination of Investigator McCarver therefore did not fall below an objective standard of reasonableness and did not cause petitioner to suffer prejudice.

Ground for Review 2(c)

In ground for review 2(c), petitioner argued that counsel should have objected to the failure by the prosecution to correct perjured testimony from Mr. Gray. He also stated counsel should have used the discovery process to obtain a prior statement by Mr. Gray.

Prior to trial, Mr. Gray stated during an interview with Investigator McCarver that he only knew the victim because he worked with the victim's sister. He also stated he had never been in the victim's car and that the victim had never been in his. Later in the interview, however, Mr. Gray stated the victim had performed oral sex on him and that he had been in the victim's car to retrieve something for his sister.

In contrast, at trial, Mr. Gray testified on direct examination that he was not really familiar with the victim. He also stated that the victim had called him after obtaining his number from his sister, not because he had given the victim the number. He further stated that he had never been with the victim.

Petitioner asserted that based on Mr. Gray's statements during the interview, the prosecution should have known he was committing perjury and attempted to correct him. He states counsel was ineffective because counsel did not object to the prosecution's failure to do so.

The Magistrate Judge found that counsel had filed a motion for discovery that was granted by the court. She also concluded that the lack of an objection to the prosecution's failure to correct the testimony did not prejudice petitioner. She stated Mr. Gray's testimony at trial that the victim was a dangerous individual who made unwanted advances towards straight men was more beneficial to petitioner's self-defense theory than the statements he made during the interview. As a result, petitioner was not harmed because the prosecution did not attempt to correct Mr. Gray's testimony.

In his objections, petitioner states that if counsel was not at fault for failing to seek discovery, the prosecution was at fault for not disclosing exculpatory evidence in the form of Mr. Gray's statements during his interview. He also states that the Magistrate Judge did not use case law to support her conclusion that petitioner did not suffer prejudice because counsel did not object.

The prosecution is required by the Constitution to turn over evidence that is favorable to a defendant and material to either guilt or punishment. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). This includes evidence that could be used to impeach a witness. *Edmond v. Collins*, 8 F.3d 290, 293 (5th Cir. 1993).

As the Magistrate Judge stated, petitioner's attorney provided an affidavit stating his belief that the prosecution provided him with every statement and report the prosecution had. In addition, before trial began, the attorney stated the prosecution had completely complied with discovery. The Magistrate Judge concluded that as there was no evidence that the prosecution did not provide petitioner's attorney with a copy of Mr. Gray's statement, the state courts' rejection of this ground for review was not improper. The Court agrees. There is simply no indication in the record that the prosecution withheld any *Brady* material, including the prior statement of Mr. Gray.

With respect to petitioner's assertion that the Magistrate Judge did not support her conclusion regarding a lack of prejudice with citations to case law, the Court finds that the Magistrate Judge's

conclusion was based on her analysis of the record and supported by quotations from the trial transcript. In light of the nature of this ground for review, no citations to case law were required to analyze the claim.

Ground for Review 2(d)

In this ground for review, petitioner objected to counsel's failure to impeach the testimony of JeCarlos Hawkins, a witness for the prosecution. Prior to trial, Mr. Hawkins provided Investigator McCarver with a statement indicting he had personal knowledge that the victim was seeing Mr. Gray. At trial, however, Mr. Hawkins denied having personal knowledge that the victim and Mr. Gray were involved in a sexual relationship.

Petitioner asserted counsel should have used the discovery process to obtain the pretrial statement and used the statement to impeach Mr. Hawkins's testimony. He stated it was important to impeach this testimony because Mr. Hawkins testified that while he and the victim were going through the drive-thru line at a fast food restaurant, the victim pointed out petitioner, who was working in the restaurant. Petitioner argues this testimony was used to prove he was in an intimate relationship with the victim, which was contrary to the theory of his defense.

As described above, the Magistrate Judge found counsel had filed a motion for discovery that was granted by the court. In addition, the Magistrate Judge concluded petitioner did not suffer prejudice because Mr. Hawkins's testimony was not impeached. She stated that as petitioner testified he and the victim knew each other, Mr. Hawkins's testimony that the victim recognized petitioner on sight was neither surprising nor harmful to petitioner's case.

Petitioner makes no specific objections to the Magistrate Judge's analysis of this ground for review. Instead, he asserts he has established by clear and convincing evidence that his claim is meritorious. The Court disagrees. As described above, counsel utilized the discovery process by filing a motion for discovery that the trial court granted. Moreover, the testimony petitioner asserts should have been impeached was consistent with petitioner's own testimony. As a result, the Court is unable to conclude petitioner suffered prejudice because Mr. Hawkins's testimony was not impeached.

Ground for Review 2(e)

As described above, Mr. Hawkins testified the victim pointed out petitioner when the victim and Mr. Hawkins were going through a drive-thru line. Petitioner argued counsel should have objected to this testimony as inadmissible hearsay.

As also described above, the Magistrate Judge found that the statement petitioner believes counsel should have objected to was consistent with petitioner's own testimony and not harmful to his case. Accordingly, the Magistrate Judge concluded petitioner did not suffer prejudice because counsel did not make the objection he describes.

In his objections, petitioner states he has successfully argued this claim by clear and convincing evidence. This assertion is incorrect. The testimony petitioner believes was inadmissible hearsay was consistent with petitioner's acknowledgment during his own testimony that he and the victim knew each other. As a result, petitioner suffered no prejudice as a result of counsel's failure to object to Mr. Hawkins's testimony.

Ground for Review 2(f)

The victim's sister, Brittany Robinson, testified at trial that petitioner and the victim were romantically involved. On cross-examination, however, she testified that she had never seen her brother and petitioner involved in a sexual act. Petitioner asserted counsel was ineffective for failing to use Ms. Robinson's testimony to impeach her.

The Magistrate Judge found counsel did impeach Ms. Robinson's testimony by having her admit she had no direct knowledge that the victim and petitioner were romantically involved. She concluded this admission weakened Ms. Robinson's direct examination testimony by making it appear to have been based on delusional statements by the victim rather than her personal observations. Accordingly, the Magistrate Judge concluded counsel's cross-examination of Ms. Robinson did not fall below an objective standard of reasonableness.

Petitioner makes no specific objection to the Magistrate Judge's analysis of this ground for review. The Court agrees with the analysis. Counsel's cross-examination of Ms. Robinson weakened the impact of her direct examination testimony by calling into question the factual basis of her testimony. Counsel's cross-examination of Ms. Robinson therefore did not fall below an objective standard of reasonableness.

Ground for Review 3(a)

Petitioner states that the prosecution should have realized Mr. Gray's testimony constituted perjury and taken steps to correct it.

The Magistrate Judge concluded petitioner had failed to demonstrate that Mr. Gray's testimony was either false or material.[2] She concluded the inconsistencies between Mr. Gray's pretrial statements and trial testimony were insufficient to demonstrate Mr. Gray committed perjury while testifying.[3] She further concluded that the allegedly perjurious statements by Mr. Gray were not material because Mr. Gray's trial testimony was more beneficial to petitioner's case than his pretrial statements.

Petitioner makes no specific objection to the Magistrate Judge's conclusions. After considering the record, the Court agrees with the conclusions. The inconsistencies between Mr. Gray's trial testimony and his pretrial statements do not demonstrate Mr. Gray committed perjury. Further, Mr. Gray testified that the victim made unwanted advances towards Mr. Gray and became threatening, actions consistent with petitioner's testimony concerning his own interactions with the victim. This testimony was beneficial to petitioner's assertion that he acted in self-defense. In contrast, Mr. Gray's pretrial statement that he and the victim were in a voluntary relationship did not

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[2] To demonstrate a prosecutor deprived a defendant of due process by knowingly using perjured testimony at trial, a defendant must show: (1) the testimony was actually false; (2) the prosecutor knew it was false; and (3) the testimony was material in the sense that there is a reasonable likelihood that the allegedly false testimony affected the jury's verdict. *Fuller v. Johnson*, 114 F.3d 491, 496 (5th Cir. 1997).

[3] Inconsistencies within a witness's testimony and conflicts between reports, written statements and the trial testimony of prosecution witnesses do not establish perjury. *United States v. Martinez-Mercado*, 888 F.2d 1484, 1492 (5th Cir. 1989).

support petitioner's theory of the case. As Mr. Gray's allegedly perjurious testimony was not harmful to petitioner, the testimony was not material.

Ground for Review 3(b)

Petitioner also asserted that the prosecution improperly allowed Mr. Hawkins to commit perjury without attempting to correct his testimony.

Like the testimony of Mr. Gray, the Magistrate Judge concluded that the testimony of Mr. Hawkins was neither false nor material. She found that the inconsistencies between Mr. Hawkins's pretrial statement and his trial testimony to be insufficient to establish Mr. Hawkins committed perjury. She further found, for the reasons explained above, that Mr. Hawkins's testimony was not damaging to petitioner.

No specific objection was made with respect to this ground for review. The conclusion that Mr. Hawkins's testimony did not constitute perjury is supported by the record. Moreover, as the testimony that the victim could identify petitioner on sight was consistent with petitioner's own testimony, the testimony was not material.

Ground for Review 3(c)

In his final ground for review, petitioner asserts that the prosecution failed to disclose Investigator McCarver's report and Mr. Hawkins's pretrial statement, thereby preventing him from being aware of exculpatory evidence.

Relying on statements by counsel during trial and an affidavit he submitted in connection with petitioner's state habeas proceeding, the Magistrate Judge concluded petitioner had submitted no evidence indicating the prosecution failed to disclose the evidence he described.

Petitioner asserts that he has established by clear and convincing evidence that this claim is meritorious. The Court disagrees. As described in the Report and Recommendation, counsel stated during trial that the prosecution had completely complied with its discovery obligations and had provided him with supplemental reports. In his affidavit, counsel stated he was not aware of any information that was not provided to him by the prosecution and believed the prosecution had provided him with all materials it knew about. In light of these statements,

the Court is unable to conclude the prosecution failed to disclose the evidence described by petitioner.

Conclusion

In order to be entitled to relief in this proceeding, petitioner must demonstrate that the conclusion of the state court regarding his grounds for review: (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, or (2) was based on an unreasonable determination of the facts in light of the evidence presented in state court. 28 U.S.C. § 2254(d). Petitioner has failed to meet this burden. As a result, his petition will be denied.

ORDER

Accordingly, petitioner's objections are **OVERRULED**. The findings of fact and conclusions of law of the Magistrate Judge are correct and the Report of the Magistrate Judge is **ADOPTED** as the opinion of the Court. A final judgment shall be entered in accordance with the recommendation of the Magistrate Judge.

In addition, petitioner is not entitled to a certificate of appealability. An appeal from a judgment denying federal 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 demonstrate he would prevail on the merits. Rather, he must demonstrate the issues are subject to debate among jurists of reason, that a court could resolve the issues in a different manner, or that the questions raised are worthy of encouragement to proceed further. *See Slack*, 529 U.S. at 483–84. Any doubt regarding the issuance of a certificate of appealability should be resolved in favor of the petitioner, and the severity of the penalty may be considered. *See Miller v. Johnson*, 200 F.3d 274, 280–81 (5th Cir. 2000). Petitioner has not shown that the issue of whether his claims are 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. As a result, a certificate of appealability shall not issue in this matter.

SIGNED this 8th day of September, 2016.

Robert W Schroeder III

ROBERT W. SCHROEDER III
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

TEXARKANA DIVISION

RYAN PATRICK JOHNSON	§	
VS.	§	CIVIL ACTION NO. 5:13cv66
DIRECTOR, TDCJ-CID	§	

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

Petitioner Ryan Patrick Johnson, an inmate confined within the Texas Department of Criminal Justice, Correctional Institutions Division, proceeding *pro se*, filed this petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

The above-styled action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636 and the Amended Order for the Adoption of Local Rules for the Assignment of Duties to the United States Magistrate Judge for findings of fact, conclusions of law, and recommendations for the disposition of the case.

Prior Proceedings

Following a jury trial, petitioner was convicted of murder in the 102nd District Court of Bowie County, Texas. He was sentenced to 99 years of imprisonment. The conviction was affirmed by the Texas Court of Appeals for the Sixth District. *Johnson v. State*, 2011 WL 240875 (Tex.App.-Texarkana Jan. 26, 2011). The Texas Court of Criminal Appeals refused a petition for discretionary review. *Johnson v. State*, PD-0295-11.

Petitioner subsequently filed a state application for writ of habeas corpus. The Court of Criminal Appeals denied the

application without written order on the findings of the trial court without a hearing.

Grounds for Review

Petitioner asserts the following grounds for review: (1) the trial court improperly allowed the jury to serve unsworn; (2) he received ineffective assistance of counsel because counsel failed to: (a) object to hearsay testimony from Tracy Dixon; (b) impeach the testimony of Investigator McCarver; (c) object to the prosecution permitting perjured testimony to go uncorrected; (d) impeach the testimony of JeCarlos Hawkins; (e) object to hearsay testimony from JeCarlos Hawkins and (f) impeach the testimony of Brittany Robinson; and (3) the prosecution acted improperly by: (a) allowing the perjured testimony of Aman Gray to go uncorrected; (b) allowing the perjured testimony of JeCarlos Hawkins to go uncorrected and (c) failing to disclose exculpatory evidence.

Factual Background

In its opinion, the intermediate appellate court described the factual background of this matter and certain of the testimony at trial as follows:

> Derrick Robinson and Ryan Patrick Johnson had been acquaintances and perhaps friends in the past. But, on December 17, 2008, Johnson shot and killed Robinson.
>
> Johnson testified on his own behalf and gave the following account: Robinson called Johnson twice on the day Robinson was killed. When told by Johnson to stop calling, Robinson announced that he was outside Johnson's house. Johnson was alarmed because he did not give Robinson his telephone number and had moved to a new home. Johnson went outside and saw Robinson walking into his yard. When asked by Robinson why Johnson had been ignoring him, Johnson replied that he did not want to speak with Robinson and turned to go back in the house. At that point,

> Robinson grabbed Johnson's wrist; Johnson pulled his wrist free, asked Robinson to leave, and went back inside. Robinson refused to leave. Alarmed at Robinson's refusal to leave, Johnson retrieved a gun from his mother's room and placed it in his coat pocket. When Johnson emerged from his home, Robinson was still outside and stated that he needed a few minutes to speak with Johnson. Johnson agreed, and the two met in a wooded area down the street from Robinson's house. Robinson and Johnson conversed in the front seat of Robinson's vehicle; Robinson indicated he had feelings for Johnson, and Johnson indicated that he wanted Robinson to leave him alone. During the course of this conversation, Johnson pulled the gun out of his jacket in order to frighten Robinson and in order to emphasize the point that he wanted Robinson to leave him alone. After that, both Johnson and Robinson exited the vehicle, and Johnson began walking back to his car. In the meantime, Robinson opened the back of his vehicle and was "scrambling through some clothes or something in the back." Robinson then told Johnson that he was going to kill Johnson and his family. Johnson was looking at Robinson out of the corner of his eye and saw Robinson's arm raised. When Johnson turned around, he saw Robinson's arm go up and saw something in his hand, which he believed to be a gun. Johnson panicked and accidentally fired at Robinson, killing him. Johnson fled, only to be arrested for Robinson's murder several months later.

Johnson, 2011 WL 240875, at *1.

Standard of Review

Title 28 U.S.C. § 2254 authorizes the District Court to entertain a petition for writ of habeas corpus on behalf of a person in custody pursuant to a state court judgment if the prisoner is in custody in violation of the Constitution or laws or treaties of the United States. 28 U.S.C. § 2254(a). The Court may not grant relief on any claim that was adjudicated in state court proceedings unless the adjudication: (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, or (2) resulted in a decision based on an unreasonable determination of the facts in light of the

evidence presented in the state court. 28 U.S.C. § 2254(d). A decision is contrary to clearly established federal law if the state court reached a conclusion opposite to a decision reached by the Supreme Court on a question of law or if the state court decided a case differently than the Supreme Court has on a materially indistinguishable set of facts. *See Williams v. Taylore*, 529 U.S. 362, 412-13 (2000). An application of clearly established federal law is unreasonable if the state court identified the correct governing legal principle, but unreasonably applies that principle to the facts. *Id.* An unreasonable application of law differs from an incorrect application; thus, a federal habeas court may correct what it finds to be an incorrect application of law only if this application is also objectively unreasonable. *Id.* at 409-11. "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." *Harrington v. Richter*, 131 S.Ct. 770, 786 (2011) (citation omitted). "[E]ven a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Id.* The Supreme Court has noted that this standard is difficult to meet "because it was meant to be." *Id.*

This Court must accept as correct any factual determinations made by the state courts unless the petitioner rebuts the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e). The presumption of correctness applies to both implicit and explicit factual findings. *See Young v. Dretke*, 356

F.3d 616, 629 (5th Cir. 2004); *Valdez v. Cockrell*, 274 F.3d 941, 948 n.11 (5th Cir. 2001) ("The presumption of correctness not only applies to explicit findings of fact, but it also applies to those unarticulated findings which are necessary to the state court's conclusions of mixed law and fact."). Deference to the factual findings of a state court is not dependent upon the quality of the state court's evidentiary hearing. *See Valdez*, 274 F.3d at 951.

Analysis

Unsworn Jury

Initially, petitioner asserts the trial court erred by permitting members of the jury to serve without being properly sworn. He states that while the transcript reflects that the clerk of court read the required oath to the jurors, the transcript does not reflect that they gave an affirmative answer or otherwise agreed to be bound by the oath.

This ground for review is not supported by the record. The transcript originally read as follows:

> THE CLERK: You and each of you do solemnly swear that in the case of the State versus Ryan Patrick Johnson you will a true verdict render according to the law and the evidence, so help you God?
>
> THE COURT: Please be reseated.

2 Reporter's Record at 86.

However, as explained in the opinion of the intermediate appellate court, the court reporter filed a supplemental transcript. In the supplemental transcript, the statement "THE JURY WAS SWORN" was inserted between the statements of the clerk and the court that are quoted above. The intermediate appellate

court concluded that the additional language in the supplemental transcript rendered petitioner's complaints about the jury being unsworn moot. As supplemented by the court reporter, the record does not reflect that the jury was not properly sworn.

In addition, petitioner is contending this ground for review entitles him to relief because the failure to have the jury properly sworn violated state law, specifically Article 35.22 of the Texas Code of Criminal Procedure. However, violations of state law do not provide a basis for federal habeas relief. *Manning v. Warden*, 786 F.2d 710, 711 (5th Cir. 1986).

Ineffective Assistance of Counsel

A. Legal Standard

When addressing the issue of what a petitioner must prove to demonstrate an ineffective assistance of counsel claim, courts look to the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *See United States v. Grammas*, 376 F.3d 433, 436 (5th Cir. 2004). In order to show that counsel was ineffective a petitioner must demonstrate:

> First ... that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings it cannot be said that the conviction ... resulted in a breakdown of the adversarial process that renders the result unreliable.

Strickland, 466 U.S. at 687. In order to prove the prejudice prong, 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." *Day v. Quarterman*, 566 F.3d 527, 536 (5th Cir. 2009). "*Strickland* asks whether it is 'reasonably likely' the result would have been different." *Harrington v. Richter*, 131 S.Ct. at 791-92.

A habeas petitioner must "affirmatively prove," not just allege, prejudice. *Day*, 556 F.3d at 536. If a petitioner fails to prove the prejudice part of the test, the court need not address the question of counsel's performance. *Id.* A reviewing court "must strongly presume that trial counsel rendered adequate assistance and that the challenged conduct was the product of a reasoned trial strategy." *Wilkerson v. Collins*, 950 F.2d 1054, 1065 (5th Cir. 1992). In determining the merits of an alleged Sixth Amendment violation, a court "must be highly deferential" to counsel's conduct. *Strickland*, 466 U.S. at 687.

Whether the representation was deficient is determined as measured against an objective standard of reasonableness. *Kitchens v. Johnson*, 190 F.3d 698, 701 (5th Cir. 1999). "A conscious and informed decision on trial tactics and strategy cannot be the basis for constitutionally ineffective assistance of counsel unless it is so ill chosen that it permeates the entire trial with obvious unfairness." *United States v. Jones*, 287 F.3d 325, 331 (5th Cir. 2002) (quoting *Garland v. Maggio*, 717 F.2d 119, 2006 (5th Cir. 1983)). "There is a strong presumption that counsel's conduct falls within a wide range of reasonable professional assistance."

Woodward v. Epps, 580 F.3d 318, 329 (5th Cir. 2009) (quoting *Romero v. Lynaugh*, 884 F.3d 871, 876 (5th Cir. 1989)).

B. Application

1. Failure to Object to Hearsay Testimony from Tracy Dixon

During trial, Tracy Dixon, the victim's mother, testified that petitioner had called her son's cell phone and that there was a relationship between her son and the victim. Subsequently, she was asked how long the relationship lasted. She replied that her son had told her he had purchased a gift for petitioner for their fifth year anniversary. Petitioner asserts counsel should have objected to Ms. Dixon's testimony regarding how long the relationship lasted, as well as other statements regarding a relationship between petitioner and the victim, as being inadmissible hearsay.

In connection with petitioner's state application for writ of habeas corpus, counsel provided an affidavit. He states petitioner had admitted to shooting the victim, but asserted that it was done in self-defense. In explaining why he did not object to the testimony as being hearsay, counsel stated:

> It was a valid trial strategy to allow the testimony regarding the familiarity between the victim and [petitioner] so that [petitioner] could show the harassment and stalking that had taken place over a long period of time. In fact, the admitted hearsay showed and illustrated the disparity of the perceptions of the alleged relationship between the victim and [petitioner].
>
> [Petitioner] wanted to show that the victim had been harassing [petitioner] over a period of years and that he had gone to great lengths to avoid the victim. The alleged hearsay was consistent with [petitioner's]showing that the victim was not going to leave [petitioner] alone. Thereby increasing the likelihood that [the] victim had some form of fixation [on petitioner] and was potentially

a dangerous person.

State Clerk's Habeas Record Supp. at 5.

Counsel also stated Ms. Dixon's testimony was useful because "[s]howing the stark contrast between [the victim's] portrayal and [petitioner's] portrayal of the intimacy was necessary to show the obsession of the victim and [petitioner's] fear."

Analysis of an ineffective assistance claim on federal habeas review of a state court conviction is not the same as adjudicating a similar claim on direct review of a federal conviction. *Harrington*, 131 S. Ct. at 771. The key question on federal habeas review is not whether counsel's performance fell below the *Strickland* standard, but whether the state court's application of *Strickland* was unreasonable. *Id.* The deferential standard applicable to federal habeas review requires federal courts to apply a "doubly deferential" standard of review to claims of ineffective assistance of counsel, under which both the conclusions of the state court and strategic decisions of defense counsel are given the benefit of the doubt. *Burt v. Titlow*, 134 S.Ct. 10, 13 (2013).

Counsel's affidavit demonstrates he had a reasoned trial strategy for not objecting to hearsay in Ms. Dixon's testimony. He believed the hearsay elements of her testimony demonstrated the victim had a delusional view of the closeness of his relationship with petitioner and the duration of the relationship. He felt this would support petitioner's self-defense argument by showing the victim was delusional and obsessed with petitioner. In light of

the deference owed to strategic decisions by defense counsel, it cannot be concluded that the conclusion of the state courts regarding this ground for review was contrary to, or involved an unreasonable application of, clearly established federal law. Counsel and the state courts could have reasonably believed that not objecting to the hearsay portions of Ms. Dixon's testimony was beneficial to petitioner's case and therefore did not fall below an objective standard of reasonableness.

2. Failure to Impeach Testimony of Investigator McCarver

Petitioner also asserts counsel was ineffective for failing to impeach testimony by Robert Mcarver, an investigator with the Bowie County Sheriff's Office. A videotape had been made of an interview of petitioner by Investigator McCarver. The videotape was played for the jury. On direct examination, Investigator McCarver provided the following testimony:

> Q: We also saw evidence of the Defendant crying on the tape?
>
> A: Yes, sir.
>
> Q: Did he ever express remorse for the victim?
>
> A: I only saw remorse on his behalf.
>
> Q: Crying for himself?
>
> A: For the Defendant himself.

During cross-examination, the following exchange took place:

> Q: Okay. And you really don't know why Ryan was crying do you, in the video? I mean, that's speculation isn't it?
>
> A: It would be speculation, yes, sir.
>
> Q: All right. And so if he was having any sympathy there or whether or not, that was just your opinion, was it not?

A: No, sir. He actually made some comments during that time, but still speculation beyond that.

Petitioner states counsel was ineffective for failing to impeach Investigator McCarver with what he considers to be inconsistent statements. He states that impeaching Investigator McCarver would have undermined his credibility as a reliable witness.

Defense counsel's questioning of Investigator McCarver did impeach his testimony on direct examination. While Investigator McCarver testified on direct examination that the only remorse petitioner felt was for himself and that petitioner was crying for himself, rather than for the victim, defense counsel was able to have Investigator McCarver admit that his conclusions were largely the result of speculation on his part. This admission weakened his testimony. As counsel did impeach the testimony of Investigator McCarver, his cross-examination of the investigator did not fall below an objective standard of reasonableness. This ground for review is therefore without merit.

3. Failure to Object to Prosecution's Failure to Correct Perjured Testimony

Aman Gray testified at trial as a defense witness. Prior to trial, Mr. Gray was interviewed by Investigator McCarver. Petitioner states the report of the interview provides that Mr. Gray initially told police he did not know the victim other than through working with the victim's sister at a store. He also stated he had never been in petitioner's car and the petitioner had never been in his. However, after Investigator McCarver told him

that DNA and other evidence would be collected, Investigator McCarver reported that it was discovered that Mr. Gray's knowledge of the victim was far greater than he had initially admitted. Mr. Gray stated the victim had performed oral sex on him, although he thought the victim was female. Mr. Gray also admitted that he remembered going into petitioner's car to retrieve something for his sister.

At trial, however, when Mr. Gray was asked during direct examination whether he was familiar with the victim, he replied by stating: "No, not really. Like who is he?" Further, when Mr. Gray was asked whether the victim had called him because Mr. Gray had asked him to, Mr. Gray denied asking the victim to call him. He stated the victim must have obtained the number from his sister. Finally, petitioner states the following exchange took place during cross-examination:

> Q: Sir, are you saying that you never had the occasion to be with [the victim]?
>
> A: Yes, sir.
>
> Q: And you're not gay?
>
> A: No, sir.

4 Reporter's Record at 65.

Petitioner asserts that based on his prior statements to Investigator McCarver, the prosecution should have known that Mr. Gray was committing perjury and attempted to correct him. He states counsel was ineffective for failing to object to the prosecution's failure to do this. He also states counsel should have used the discovery process to obtain Investigator McCarver's

report because the report described statements made by Mr. Gray that could have been used to impeach his testimony.

The record reflects that counsel did attempt to use the discovery. He filed a motion for discovery which included requests for: (a) all statements made by any party or witness to the offense and (b) all handwritten and typed notes made by all law enforcment officers. This motion was granted by the court. As a result, it cannot be concluded that counsel failed to use the discovery process to obtain Investigator McCarver's report.

In addition, it cannot be concluded counsel's failure to object to the prosecution's failure to correct Mr. Gray's testimony caused petitioner to suffer prejudice. Mr. Gray's statement to Investigator McCarver indicated he had previously been in the victim's car and he had allowed the victim to perform a sexual act on him. In contrast, at trial Mr. Gray stated he had never been with the victim and that the victim had obtained his cell phone number from someone else. He stated the victim made advances towards him and became threatening. He stated that at a certain point he felt as if he was in danger. It is difficult to see how the statements Mr. Gray made to Investigator McCarver would have helped petitioner's self-defense theory as described in counsel's affidavit. However, Mr. Gray's testimony that the victim was a dangerous individual who made unwanted advances towards straight men would have supported petitioner's self-defense theory that the victim stalked him and posed a threat. As a result, it appears counsel's failure to object to the prosecution's failure to correct

the testimony of Mr. Gray was beneficial to petitioner's case. At a minimum, it cannot be concluded that there is a reasonable probability the result of the proceeding would have been different if Mr. Gray's testimony had been corrected.

4. Failure to Impeach Testimony of JeCarlos Hawkins

JeCarlos Hawkins testified as a witness for the prosecution. Prior to trial, Mr. Hawkins was interviewed by Investigator Hawkins and provided a sworn statement. In his statement, Mr. Hawkins stated he had personal knowledge that the victim was seeing Aman Gray, stating: "I know that [the victim] used to mess with this dude that works at the Smokestack by Save-A-Lot. They called him Buck but I don't know his real name." Buck was a nickname for Mr. Gray.

At trial, however, Mr. Hawkins denied having personal knowledge of a sexual relationship between the victim and Mr. Gray. During direct examination, the following exchange took place between the prosecutor and Mr. Hawkins:

> Q: And [the victim] had an affinity toward straight guys, didn't he?
>
> A: I don't know, sir. I mean, I couldn't say yes, and I couldn't say no, so ....
>
> Q: Do you know who Aman Gray is?
>
> A: I've heard Derrick talk about him, but I just don't know him like that.

4 Reporter's Record at 17.

Petitioner asserts counsel was ineffective for failing to use the discovery process to obtain Investigator McCarver's report and the statement by Mr. Hawkins. He states these could have been used

to impeach the trial testimony of Mr. Hawkins. He contends demonstrating Mr. Hawkins was an unreliable witness was important because he also testified that when he and the victim were going through the drive-thru line at McDonald's the victim pointed out petitioner, who was working in the restaurant. He states this testimony was used to prove he was in an intimate relationship with the victim, contrary to the theory of his defense.

As stated above, defense counsel did use the discovery process in this matter. Moreover, Mr. Hawkins was a minor witness in this case, whose testimony occupies less than 5 pages of the transcript. Testimony from him that petitioner considers to have been damaging was his statement that the victim had identified petitioner while going through the drive-thru line at McDonald's. However, petitioner himself testified that he and the victim knew each other. As a result, Mr. Hawkins' testimony that the victim recognized petitioner on sight and was able to point him out would not have been surprising or harmful to petitioner's case. Even if counsel had thoroughly impeached Mr. Hawkins's testimony, rendering his statement about the victim pointing petitioner out in the drive-thru line completely incredible, there is not a reasonable probability the result of the proceeding would have been different. Consequently, petitioner did not suffer prejudice as a result of Mr. Hawkins' testimony not being impeached.

5. <u>Failure to Object to Hearsay Testimony from Mr. Hawkins</u>

As stated above, Mr. Hawkins testified that the victim had pointed out petitioner to him while they were going through the

drive-thru line at McDonald's. He states counsel should have objected to this testimony as being inadmissible hearsay.

As explained above, Mr. Hawkins' testimony about the victim identifying petitioner while in the drive-thru line was not damaging because petitioner testified that he and the victim knew each other. Accordingly, it cannot be concluded petitioner suffered prejudice because counsel did not object to this testimony as being hearsay.

6. Failure to Impeach Testimony of Brittany Robinson

Brittany Robinson, the victim's sister, testified at trial. Ms. Robinson testified that petitioner and the victim were romantically involved. However, on cross-examination, she acknowledged that she had never seen her brother and petitioner involved in a sexual act. Petitioner states counsel was ineffective for failing to use Ms. Robinson's inconsistent testimony to impeach her.

Like his cross-examination of Investigator McCarver, counsel's questioning of Ms. Robinson did impeach the testimony she provided on direct investigation. While she initially testified that petitioner and the victim were romantically involved, defense counsel's questioning forced her to admit that she had never seen them involved in a sexual act and therefore had no direct knowledge that they were romantically involved. This admission made her assertion that petitioner and the victim were romantically involved less credible because, in the absence of direct knowledge, her assertion would have appeared to have been based on statements made

to her by the victim, statements which may have been delusional. As counsel was able to impeach Ms. Robinson's testimony, his cross-examination of her did not fall below an objective standard of reasonableness.

Prosecutorial Misconduct

A. Allowing Perjured Testimony from Mr. Gray

As explained above, petitioner contends the prosecutor should have been aware that some of Mr. Gray's testimony constituted perjury. He states the prosecution should have taken steps to correct Mr. Gay's perjury.

A state denies a criminal defendant due process when it knowingly uses perjured testimony at trial or allows untrue testimony to go uncorrected. *Faulder v. Johnson*, 81 F.3d 515, 519 (5th Cir. 1996). To prove such a violation, a habeas petitioner must demonstrate that (1) the testimony was actually false; (2) the state knew it was false and (3) the testimony was material. *Id.* False evidence is material only "if there is any reasonable likelihood that the false testimony would have affected the jury's verdict." *Kirkpatrick v. Whitley*, 992 F.2d 491, 497 (5th Cir. 1993). Perjury is not established by mere contradictory testimony from witnesses, inconsistencies within a witness' testimony and conflicts between reports, written statements and the trial testimony of witnesses. *Koch v. Puckett*, 907 F.2d 525, 531 (5th Cir. 1990).

Inconsistencies between Mr. Gray's testimony and the statements contained in Investigator McCarver's report are

described above. At trial, Mr. Gray indicated that the relationship between him and the victim was minimal, while Investigator McCarver's report indicated that a closer relationship existed. However, as stated above, inconsistencies between trial testimony and pretrial statements are insufficient to demonstrate a witness was committing perjury. Moreover, as explained above, the testimony that petitioner considers to have been perjured was not material. Mr. Gray's trial testimony supported petitioner's self-defense theory by indicating that petitioner made unwanted advances towards Mr. Gray and became threatening, as petitioner contends happened to him. In contrast, his pretrial statement to Investigator McCarver indicated he was in an actual and voluntary relationship with the victim. Thus, his trial testimony was more beneficial to petitioner than his pretrial statement would have been. As the testimony was beneficial, or, at worst neutral, there is no reasonable likelihood that the allegedly false testimony had an effect on the jury's verdict.

B. Allowing Perjured Testimony from JeCarlos Hawkins

As also explained above, petitioner asserts Mr. Hawkins provided trial testimony that was inconsistent with statements he made while being interviewed by Investigator McCarver and in a prior sworn statement. He states the prosecution should have been aware Mr. Hawkins was providing false testimony and taken action to correct it.

As in the situation involving Mr. Gray, the inconsistencies between Mr. Hawkins' testimony and his pretrial statement are

insufficient to establish that Mr. Hawkins committed perjury that the prosecution would have been obligated to correct. Further, as explained above, Mr. Hawkins's testimony that the victim pointed petitioner out while going through the drive-thru lane at a McDonald's testimony was not damaging to petitioner. As a result, the allegedly false testimony was not material because there is not a reasonable likelihood that the testimony had an effect on the jury's verdict.

C. Failure to Disclose Exculpatory Evidence

Finally, petitioner asserts the prosecution improperly failed to disclose Investigator McCarver's report and the sworn statement of Mr. Hawkins. He contends exculpatory evidence was contained in these documents.

Due process is violated when the prosecution withholds evidence that is both favorable to the accused and material to either guilt or punishment. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). This rule covers evidence that might be used for impeachment purposes. *Edmond v. Collins*, 8 F.3d 290, 293 (5th Cir. 1993).

As stated above, counsel provided an affidavit in connection with the state habeas proceeding. In the affidavit, counsel stated that he met

> with the Bowie County District Attorney's Office, and reviewed what was presented as the State's entire file and went through both, counsel's file and the State's file, including all photographs, and viewed tangible evidence. Counsel is not aware of any information not provided by State's counsel and believes that the State produced every Statement, Report, Supplemental Report, Witness Statements, known to the District Attorney's office prior

to trial.

State Clerk's Habeas Record Supp. at 7-8.

In addition, after the jury was selected, defense counsel stated: "And if I may add, when I say a complete compliance with discovery, I mean above and beyond. He even provided the supplemental reports and everything, not merely compliant with the code." 2 Reporter's Record at 104.

Petitioner has provided no evidence that would indicate the prosecution failed to disclose Investigator McCarver's Supplemental Report and the statement of Mr. Hawkins. In light of counsel's statement during trial and the contents of his affidavit, it therefore cannot be concluded that the conclusion by the state courts that exculpatory evidence was not withheld was based on an unreasonable determination of the facts or was contrary to, or involved an unreasonable application of, clearly established federal law.

Recommendation

This petition for writ of habeas corpus should be denied.

Objections

Objections must be (1) specific, (2) in writing, and (3) served and filed within 14 days after being served with a copy of this report. 28 U.S.C. § 636(b)(1).

Failure to file objections bars a party from (1) entitlement to *de novo* review by a district judge of proposed findings and recommendations, *Rodriguez v. Bowen*, 857 F.2d 275, 276-77 (5th Cir. 1988), and (2) appellate review, except on grounds of plain error,

of unobjected-to factual findings and legal conclusions accepted by the district court, *Douglass v. United Serv. Auto. Ass'n.*, 79 F.3d 1415, 1419 (5th Cir. 1996) (*en banc*).

SIGNED this 16th day of March, 2016.

CAROLINE M. CRAVEN
UNITED STATES MAGISTRATE JUDGE