IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-40937

WILLIE HOUSTON, III,

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

O R D E R:

Willie Houston, III, Texas prisoner # 1674753, requests a certificate of appealability (COA) to appeal the district court's denial of his 28 U.S.C. § 2254 petition. Houston filed the § 2254 petition to challenge his guilty plea conviction of aggravated assault with a deadly weapon.

Renewing claims raised in the district court, Houston contends that his guilty plea was not intelligently made and that his trial counsel provided ineffective assistance in connection with his plea. Houston asserts that he was misled to believe that he was eligible to receive a sentence of probation and that his trial counsel incorrectly advised him that he could be sentenced to probation. He states that he would have exercised his right to a jury trial had he been properly informed of his ineligibility for probation. Houston has

waived the other claims raised in his § 2254 petition by failing to brief them in his COA filings. *See Hughes v. Johnson*, 191 F.3d 607, 613 (5th Cir. 1999).

In order to obtain a COA, Houston 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, 336 (2003). To satisfy this standard, he 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), or that an issue he presents deserves encouragement to proceed further, *see Miller-El*, 537 U.S. at 327.

Houston has failed to make the required showing. Accordingly, his request for a COA is DENIED. Houston's motion to proceed in forma pauperis on appeal is also DENIED.

/s/ Kurt D. Engelhardt

KURT D. ENGELHARDT
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

TYLER DIVISION

WILLIE HOUSTON, III	§	
VS.	§	CIVIL ACTION NO. 6:14cv231
DIRECTOR, TDJC-CID	§	

FINAL JUDGMENT

The Court having considered the Petitioner's case and rendered its decision by opinion issued this same date, it is hereby **ORDERED** that the petition for a writ of habeas corpus is **DISMISSED WITH PREJUDICE.**

So ORDERED and SIGNED this 27th day of March, 2017.

Ron Clark, United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

TYLER DIVISION

WILLIE HOUSTON, III #1674753	§	
VS.	§	CIVIL ACTION NO. 6:14cv231
DIRECTOR, TDCJ-CID	§	

ORDER OF DISMISSAL

Petitioner Willie Houston, III, an inmate confined in the Texas prison system, filed the above-styled and numbered petition for a writ of habeas corpus challenging his Gregg County conviction for aggravated assault with a deadly weapon, in violation of the state laws of Texas. Houston entered an open plea of guilty, and was found guilty. Because of his prior convictions, Houston was sentenced as a habitual offender. The State recommended a sentence of 55 years of imprisonment and Houston requested "[a]n appropriate sentence in the discretion of the court." SHCR at 101-02; CR 35. Petitioner was sentenced to fifty years in prison.

The federal petition was referred to United States Magistrate Judge John D. Love, who issued a Report and Recommendation on February 14 2017, concluding that the petition for a writ of habeas corpus should be dismissed with prejudice. (Dkt. #19). Petitioner filed objections to the Report and Recommendation. (Dkt. #23).

Where a magistrate judge's report has been objected to, the district court reviews the recommendation *de novo* pursuant to Federal Rule of Civil Procedure 72. *See also* 28 U.S.C § 636(b)(1) ("A judge of the court shall make a *de novo* determination of those portions of the report or specified proposed findings and recommendations to which objection is made."). During a *de novo*

review a court examines the entire record and makes an independent assessment of the law. The court should not conduct a *de novo* review when the objections are frivolous, conclusive, or too general. *See Battle v. United States Parole Commission,* 834 F.2d 419, 421 (5th Cir.1987).

In his first objection, Houston repeats his argument that he believed that he was eligible to receive probation. He contends that argues that a consent form he signed to allow the Court and District Attorney to review the PSI Report prepared for his case included probation as a sentencing alternative. (Dkt. #23, p.1).

Houston's trial counsel, however, attested in the state habeas proceedings that he "fully explained the range of punishment applicable in his case," including "the requirements regarding probation," and Houston "understood that this range of punishment precluded that option." SHCR at 91-92 no. 4B. Further, the record of court proceedings reflects Houston was orally admonished regarding the proper punishment. The court initially admonished Houston as to the punishment range for a first degree felony (a term of imprisonment for 5-99 years), but upon correction from the State, the court then admonished Houston as to the punishment range for a habitual offender ("25 years on the low end up to 99 years or life in prison") after it noted a discrepancy in the admonishment paperwork. *See* 3 RR 12.

The court inquired once more, "Did you understand, Mr. Houston?" to which Houston replied, "Yes, sir." *Id.* Earlier in his plea hearing, Houston had pled true to "both sets of enhancements" alleged in the indictments for both the instant case and the companion case, and, after the above admonishment, Houston affirmed his understanding that he faced the particular punishment range of 25 to 99 years' or life imprisonment "due to the enhancements . . . the prior criminal history." 3 RR 7, 13.

The trial transcript further reflects that the trial court gave Houston additional opportunities to

raise questions or otherwise indicate his plea was not voluntarily or knowingly entered:

> The Court: Mr. Houston, we've covered a lot of territory here today. It's a very important day in your life obviously. Have you understood everything that we've talked about here in court?
>
> [Houston]: Yes, sir.
>
> The Court: Do you have any questions of me before we go forward?
>
> [Houston]: No, sir.

3 RR 15.

After defense counsel pointed out the plea paperwork did not reflect an admonishment for a second-degree felony, enhanced to a first-degree felony, or enhanced to punishment for a habitual offender, the following colloquy occurred:

> The Court: I think we need to take a recess and have y'all redo the admonishment sheet so we have the correct range of punishment, and he can initial that.
> Mr. Houston, I've now been presented with the written plea admonishments that have been amended, have been modified to correctly reflect that the range of punishment before the Court in each case is what we call an habitual offender, which means that the range of punishment is 25 years to 99 years or life in prison, and, of course, anywhere in between there. Did you understand that?
>
> [Houston]: Yes, sir.
>
> The Court: And that's because of the two prior felony convictions in each indictment that have pled true to, which makes each punishment range an habitual offender range of punishment. Did you understand that?
>
> [Houston]: Yes, sir.

Court documents—including the judgment, reporter's record, and clerk's record—are entitled to a presumption of regularity under 28 U.S.C. § 2254(e). The court affords great evidentiary weight

to these instruments. *Carter v. Collins*, 918 F.2d 1198, 1202 n.4 (5th Cir. 1990). Houston bears the burden to rebut the presumption of regularity accorded these records, but he has not successfully rebutted the presumption and weight afforded these documents. 28 U.S.C. § 2254(e)(1); *see Bonvillain v. Blackburn*, 780 F.2d 1248, 1250 (5th Cir. 1986) ("in a habeas proceeding, the petitioner has the burden of proving that he is entitled to relief"). The Supreme Court has previously held that "[s]olemn declarations in open court carry a strong presumption of verity." *Blackledge v. Allison*, 431 U.S. 63, 74(1977). Houston stated in open court that he understood the range of punishment, which as stated by the trial judge, did not include probation. Houston's objection, therefore, is without merit.

Houston also objects to the District Court's findings and conclusion that his trial counsel was not constitutionally ineffective. (Dkt. #23, p.3). Houston claims that his trial counsel advised him he was eligible for probation. Trial counsel testified in Houston's state habeas proceedings that he had explained the applicable range of punishment to Houston; the requirements for probation eligibility; and that Houston did not meet those requirements, in light of the offense charged. SHCR at 91-92 no. 4B. Houston fails to rebut the presumption of correctness afforded the CCA's implicit credibility finding in favor of trial counsel. 28 U.S.C. § 2254(e); *Valdez*, 274 F.3d at 948 n.11; SHCR at Action taken sheet.

Houston's third objection concerns the finding and conclusion in the Report and Recommendation that his guilty plea was "knowing and voluntary". (Dkt. #23, p. 4). Houston, however, has not demonstrated that his plea was involuntarily and unknowingly entered. *See James v. Cain*, 56 F.3d 662, 666 (5th Cir. 1995) ("A federal court will uphold a guilty plea challenged in a habeas corpus proceeding if the plea was knowing, voluntary and intelligent."). The *James* Court explains:

The critical issue in determining whether a plea was voluntary and intelligent is

> "whether the defendant understood the nature and substance of the charges against him, and not necessarily whether he understood their technical legal effect." *Id.* at 666.

A guilty plea is not involuntary or unintelligent because the defendant is not informed of all the possible collateral consequences flowing from the conviction. *See*, e.g., *Johnson v. Puckett*, 930 F.2d 445, 448 (5th Cir. 1991); *see* also *LeBlanc v. Henderson*, 478 F.2d 481, 483 (5th Cir. 1973) (the trial judge is not required to inform a defendant of parole eligibility). The "knowing" requirement that a defendant understand "the consequences" of a guilty plea means only that the defendant understand the maximum prison term and fine for the offense charged. *See Ables v. Scott*, 73 F.3d 591, 592 n.2 (5th Cir. 1996). Further, a plea of guilty is not involuntary solely because a defendant pleads guilty out of a desire to limit the possible penalty. *North Carolina v. Alford*, 400 U.S. at 25; *see United States v. Rodriguez-De Maya*, 674 F.2d 1122, 1127 (5th Cir. 1984) (while a guilty plea must be voluntary, the inducement to plead guilty based on a plea bargain does not render the plea involuntary).

Before accepting a guilty plea, a trial court must admonish the defendant in accordance with article 26.13 of the Texas Code of Criminal Procedure—either orally or in writing—to assure that the defendant understands the charges against him and the consequences of his plea. Tex. Code Crim. Proc. Ann. Art. 26.13(d) (West 2011). Proper admonishment by the trial court establishes a prima facie showing that the defendant entered into a knowing and voluntary plea. *Ex parte Gibauitch*, 688 S.W.2d 868 (Tex. Crim. App. 1985). When a defendant raises the claim that his plea was not voluntary, the burden shifts to him to demonstrate that he did not fully understand the consequences of his plea. *See Martinez v. State*, 981 S.W.2d 195, 197 (Tex. Crim. App. 1998).

When a defendant affirmatively indicates at the plea hearing that he understands the proceeding's nature and is pleading guilty because the allegations in the indictment are true, not because of any outside pressure or influence, he has a heavy burden to prove that his plea was involuntary. *See*

United States v. Diaz, 733 F.2d 371, 373–74 (5th Cir.1984).

Houston has not demonstrated that his plea was not knowingly, intelligently, or voluntarily made. The trial transcript shows that the trial court asked Houston several times if he understood the proceedings, and if Houston was entering a plea of guilty of his own volition, without outside pressure:

The Court: Now, Mr. Houston, I have before me several papers that you have signed here in court today; is that correct?
. . . As to all these papers that you have signed, before you signed them did Mr. Dunn sit down with you and go over these papers?

[Houston]: Yes, sir.

The Court: Did he explain to you?

[Houston]: Yes, sir.

The Court: Did you understand everything you signed?

[Houston]: Yes, sir.

*****

The Court: . . . Do you feel under pressure to plead guilty because you're in jail?

[Houston]: No, Sir.

The Court: Has anybody tried to make you do this?

[Houston]: No, Sir.

The Court: Has Mr. Dunn in any way tried to force you to plead guilty in each case?

[Houston]: No, Sir.

The Court: Who made the decision to plead guilty?

[Houston]: I did.

3 RR 7-8.

*****

The Court: All right. Mr. Houston, again, have you understood everything we've talked about?

[Houston]: Yes.

*****

The Court: And do you still wish to enter a guilty plea to aggravated assault with a deadly weapon?

[Houston]: Yes, sir.

The Court: Okay. I'm going to receive each guilty plea. I'm going to find that you make each plea freely and voluntarily, that you are mentally competent.

3 RR 17-20.

Houston's disappointment with the punishment assessed does not affect the voluntariness of his pleas. *See Ybarra v. State,* 960 S.W.2d 742, 745 (Tex.App.-Dallas 1997, no pet.); *Rice v. State,* 789 S.W.2d 604, 607 (Tex.App.-Dallas, 1990, no pet.). Houston's objection to the finding and conclusion that his plea was knowing and voluntary is without merit.

Houston's fourth objection states that he objects to the "findings and conclusions of law pertinent to Claim 1 and Claim 4 as being based on an incorrect finding of fact that resulted in an incorrect conclusion of law." (Dkt. #23, p. 5). Houston's fifth objection also generally objects to the Report and Recommendation. (Dkt. #23, p. 5). Objections to a Report and Recommendation must specifically identify portions of the Report and the basis for those objections. *See* Fed. R. Civ. P. 72(b). If the party fails to properly object because the objections lack the requisite specificity, then *de novo* review by the court is not required. *See Battle v. United States Parole Commission,* 834 F.2d at 421. Houston's general objections in this instance are not specific enough to warrant *de novo* review. They are overruled.

Further, Houston has not met his burden of proof to demonstrate that the state habeas court's

denial of the claims was contrary to, or an unreasonable application of Supreme Court law. He is not entitled to relief because he cannot show "that the state court's ruling on the claim being presented in federal court [is] 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 101-102. Houston has failed to overcome the presumption of correctness afforded the implicit findings of the state court, and he has failed to demonstrate that its decision to deny relief was unreasonable. Houston's claims are without merit.

Finally, Houston requests that the Court order an evidentiary hearing. (Dkt. #23, p. 5). Under the Anti-terrorism and Effective Death Penalty Act and controlling authority interpreting it, a federal court may not examine or rely on new evidence not contained in the records of the state court of conviction except in extremely narrow circumstances not present here.

Specifically, a federal district court has discretion to grant an evidentiary hearing, or develop new evidence in a habeas petition from a state conviction, only if it is not barred under 28 U.S.C. § 2254(e)(2). *McQuiggin v. Perkins*, 569 U.S. (2013), 133 S. Ct. 1924, 1933 (2013); *Cullen v. Pinholster*, 563 U.S. 170 (2011); *Schriro v. Landrigan*, 550 U.S. 465, 473 n.1 (2007). Section 2254(e)(2) states:

> If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that - -
>
> (A) the claim relies on - -
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

Id.

Houston's claims do not fall within any of these narrow exceptions. Therefore, Houston's request for an evidentiary hearing is denied.

The Report of the Magistrate Judge, which contains the proposed findings of fact and recommendations for the disposition of such action, has been presented for consideration, and having made a *de novo* review of the objections adequately presented by the Petitioner to the Report, the Court is of the opinion that the findings and conclusions of the Magistrate Judge are correct. Therefore, the Court hereby adopts the findings and conclusions of the Magistrate Judge as the findings and conclusions of the Court. It is accordingly

ORDERED that the petition for a writ of habeas corpus is **DENIED** and the case is **DISMISSED** with prejudice. A certificate of appealability is **DENIED**. All motions not previously ruled on are hereby **DENIED**.

So ORDERED and SIGNED this 27th day of March, 2017.

Ron Clark

Ron Clark, United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

TYLER DIVISION

WILLIE HOUSTON, III #1674753	§	
VS.	§	CIVIL ACTION NO. 6:14cv231
DIRECTOR, TDCJ-CID	§	

REPORT AND RECOMMENDATION OF THE
UNITED STATES MAGISTRATE JUDGE

Petitioner Willie Houston, III, an inmate confined at the Telford Unit in the Texas prison system, proceeding *pro se* and *in forma pauperis*, filed the above-styled and numbered action for habeas corpus relief. The complaint was referred for findings of fact, conclusions of law and recommendations for the disposition of the case.

Procedural Background

Regarding the petition before this Court[1], Petitioner is in custody pursuant to the judgment and sentence from the 188th Judicial District Court of Gregg County, Texas, in cause number 39,622.[2] *See* SHCR2 104-06 (judgment), 107-09 (nunc pro tunc); CR 112-14 (judgment), 118-20 (nunc pro tunc). Houston was charged by indictment with the offense of committing aggravated assault with a deadly

[1]Houston is also in custody pursuant to a 50-year sentence for his conviction of evading detention with a vehicle as a habitual offender, pursuant to the judgment and sentence of the same court as the instant conviction, in cause number 39,621. *Houston v. State*, No. 06–11–00115–CR, 2012 WL 1939796 (Tex. App.—Texarkana 2012).

[2]"SHCR" refers to the Clerk's Record of pleadings and documents filed with the court during Petitioner's state habeas corpus proceedings in *Ex parte Houston*, Application No. 81-005-01, at the volume labeled "Event code: WRIT RECEIVED," unless otherwise noted. Also, "CR" refers to the "Clerk's Record" of papers filed in the trial court, followed by the page number, and "RR" refers to the Reporter's Record from Houston's trial court proceedings, preceded by volume number and followed by page number.

weapon, and two enhancement paragraphs alleging Houston's prior convictions for theft and possession of a controlled substance. SHCR at 98; CR 2. Houston entered an open plea of guilty. The State recommended a sentence of 55 years of imprisonment and Houston requested "[a]n appropriate sentence in the discretion of the court." SHCR at 101-02; CR 35.

After the trial court admonished Houston and Houston entered his written voluntary judicial confession and stipulation of evidence, the court found Houston guilty. On March 3, 2011, the Court sentenced Houston to 50 years' imprisonment. SHCR at 99-100 (written plea admonishments and judicial confession), 103 (stipulation of evidence), 104; CR 32-33 (written plea admonishments and judicial confession), 34-35 (unagreed punishment recommendations), 36 (stipulation of evidence). The Sixth District Court of Appeals affirmed Houston's conviction on May 30, 2012. *See Houston v. State*, Cause Number No. 06–11–00116–CR, 2012 WL 1940791 (Tex. App.—Texarkana 2012). Six months later, the Texas Court of Criminal Appeals ("CCA") refused Houston's petition for discretionary review (PDR). *See Houston v. State*, PDR No. 0832-12.

Houston filed a state application for writ of habeas corpus, challenging his conviction, which was file-stamped by the Gregg County District Clerk on January 8, 2014, and which Houston dated his averment of the truth of the facts asserted therein on December 30, 2013. SHCR at 4, 20. The CCA denied Houston's application without written order on March 12, 2014. SHCR at Action Taken sheet. Houston filed the instant federal habeas petition on March 21, 2014, the date which he avers that he placed the instant petition in the prison mail system. Fed. Writ Pet. at 10. *See Spotville v. Cain*, 149 F.3d 374, 378 (5th Cir. 1998) (generally, for purposes of determining the applicability of AEDPA, a federal petition is filed on the date it is placed in the prison mail system); Rule 3(d) of the Rules Governing Habeas Corpus Actions.

Facts of the Case

The Sixth Court of Appeals summarized the facts of Houston's offense as the following:

> Houston was stopped for erratic driving on Interstate Highway 20 in Gregg County by Trooper Michael Hearn. While Hearn was awaiting warrant confirmation, Houston fled in his vehicle, at a high rate of speed, almost hitting several vehicles. As Hearn pursued him, Houston exited the interstate, disregarded a red light, and crashed into a truck and trailer. The crash severely injured both Houston and the operator of the truck. Houston pled guilty to evading detention with a vehicle and aggravated assault with a deadly weapon.

Houston v. State, No. 06-11-00115-CR, 2012 WL 1939796, *1 (Tex. App.—Texarkana 2012) (appellate proceedings for Houston's companion case, Cause No. 39,620–A).

Petitioner presents several claims of error. The Director has responded, arguing that Petitioner's claims are without merit and that his petition should be dismissed with prejudice.

Petitioner's Claims

Petitioner alleges the following improprieties in his representation and trial:

1. Petitioner's plea was not intelligently, knowingly, or voluntarily entered, as he was misled "into believing he was eligible for probation;"

2. Petitioner's conviction and sentence are void because he never entered a plea—rather, he "entered an invalid guilty plea to a 1st degree felony of aggravated assault after being improperly admonished;"

3. Petitioner was denied effective assistance of counsel at trial because counsel failed to inform him of the element of recklessness;

4. Petitioner was denied effective assistance of counsel at trial for advising him that he was eligible for probation;

5. Petitioner's plea was not intelligently, knowingly, or voluntarily entered, because he was misled by admonishments for "what Petitioner believed was a 1st degree felony with a range of punishment of 5-99 years," but "Petitioner's offense was actually a second degree felony with a range of punishment of 2-20 years;" and

6. "Petitioner's waivers of constitutional rights, stipulation of evidence and judicial confession were not intelligently made," where counsel failed to "explain the consequences of waivers of constitutional rights, stipulation of evidence and judicial confession."

See Fed. Writ Pet. at 6-7, 6A-7F (handwritten pages attached to form petition, paginated by Houston as "6" and "7," with headings labeled A, B, C, D, and E, and with "7F" referring to page with heading "Ground 6 (Six)").

AEDPA Standard of Review

The role of federal courts in reviewing habeas corpus petitions by prisoners in state custody is exceedingly narrow. A person seeking federal habeas corpus review must assert a violation of a federal constitutional right. *Lowery v. Collins*, 988 F.2d 1364, 1367 (5th Cir. 1993). Federal habeas corpus relief will not issue to correct errors of state constitutional, statutory, or procedural law, unless a federal issue is also present. *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). In the course of reviewing state proceedings, a federal court does "not sit as a super state supreme court to review error under state law." *Wood v. Quarterman*, 503 F.3d 408, 414 (5th Cir. 2007); *Skillern v. Estelle*, 720 F.2d 839, 852 (5th Cir. 1983).

The prospect of federal courts granting habeas corpus relief to state prisoners was severely limited by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Under AEDPA, a petitioner who is in custody "pursuant to the judgment of a State court" is not entitled to federal habeas corpus relief with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim -

> (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 proceedings.

28 U.S.C. § 2254(d).

AEDPA imposes a "highly deferential standard for evaluating state-court rulings, and demands that state-court decisions be given the benefit of the doubt." *Renico v. Lett*, 559 U.S. 766, 773 (2010). "By its terms § 2254(d) bars relitigation of any claim 'adjudicated on the merits' in state court, subject only to the exceptions in §§ 2254(d)(1) and (d)(2)." *Harrington v. Richter*, 562 U.S. 86, 98 (2011). With respect to the first provision, a "state court decision is 'contrary to' clearly established federal law if (1) the state court 'applies a rule that contradicts the governing law' announced in Supreme Court cases, or (2) the state court decides a case differently than the Supreme Court did on a set of materially indistinguishable facts." *Nelson v. Quarterman*, 472 F.3d 287, 292 (5th Cir. 2006); *see* also *Mitchell v. Esparza*, 540 U.S. 12, 15-16 (2003).

"[R]eview under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits." *Cullen v. Pinholster*, 131 S. Ct. 1388, 1398 (2011). As such, "evidence later introduced in federal court is irrelevant." *Id.* at 1400. "The same rule necessarily applies to a federal court's review of purely factual determinations under § 2254(d)(2), as all nine Justices acknowledged." *Blue v. Thaler*, 665 F.3d 647, 656 (5th Cir. 2011). A Texas court's factual findings are presumed to be sound unless a petitioner rebuts the "presumption of correctness by clear and convincing evidence. § 2254(e)(1)." *Miller-El v. Dretke*, 545 U.S. 231, 240 (2005). The "standard is demanding but not insatiable; . . . [d]eference does not by definition preclude relief." *Id.*; *Goodrum v. Quarterman*, 547 F.3d 249, 256 (5th Cir. 2008). "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.

Stated differently, a federal court may overturn a state court's application of federal law only if it is so erroneous that there is no possibility fairminded jurists could disagree that the state court's decision conflicts with the Supreme Court's precedents. *Dorsey v. Stephens*, 720 F.3d 309, 315 (5th

Cir. 2013). The Supreme Court has explained that the provisions of AEDPA "modified a federal habeas court's role in reviewing state prisoner applications in order to prevent federal habeas 'retrials' and to ensure that state-court convictions are given effect to the extent possible under law." *Bell v. Cone*, 535 U.S. 685, 693 (2002). Federal habeas corpus relief is not available just because a state court decision may have been incorrect; instead, a petitioner must show that a state court decision was unreasonable. *Id.* at 694.

Discussion and Analysis

I. Houston's Guilty Plea Was Both Knowing and Voluntary (Claims 1, 2, and 5).

Houston challenges his guilty plea on three grounds. *See* Fed. Writ Pet. at 6, 6A-B, 7E. Any challenge to a conviction that was obtained by a guilty plea is limited to issues of voluntariness, the defendant's understanding of the charges against him, and his understanding of the consequences of the plea. *Hill v. Johnson*, 474 U.S. 52, 56-57 (1985); *Diaz v. Martin*, 718 F.2d 1372, 1376-77 (5th Cir. 1983) ("a plea of guilty is more than a confession of having acted culpably, it is itself a conviction."); *see* also *Boykin v. Alabama*, 395 U.S. 238, 242 (1969); *see Bradshaw v. Stumpf*, 545 U.S. 175, 183 (2005) ("A guilty plea operates as a waiver of important rights, and is valid only if done voluntarily, knowingly, and intelligently, 'with sufficient awareness of the relevant circumstances and likely consequences.'"); *see* also *Brady v. United States*, 397 U.S. 742, 748 (1970).

Houston fails to demonstrate his plea was involuntarily and unknowingly entered. *See James v. Cain*, 56 F.3d 662, 666 (5th Cir. 1995) ("A federal court will uphold a guilty plea challenged in a habeas corpus proceeding if the plea was knowing, voluntary and intelligent."). The *James* Court explains:

> The critical issue in determining whether a plea was voluntary and intelligent is "whether the defendant understood the nature and substance of the charges against him, and not necessarily whether he understood their technical legal effect." *Id.* at 666.

A guilty plea is not involuntary or unintelligent because the defendant is not informed of all the possible collateral consequences flowing from the conviction. *See*, e.g., *Johnson v. Puckett*, 930 F.2d 445, 448 (5th Cir. 1991); *see* also *LeBlanc v. Henderson*, 478 F.2d 481, 483 (5th Cir. 1973) (the trial judge is not required to inform a defendant of parole eligibility). The "knowing" requirement that a defendant understand "the consequences" of a guilty plea means only that the defendant understand the maximum prison term and fine for the offense charged. *See Ables v. Scott*, 73 F.3d 591, 592 n.2 (5th Cir. 1996); *United States v. Rivera*, 898 F.2d 442, 447 (5th Cir. 1990). Further, a plea of guilty is not involuntary solely because a defendant pleads guilty out of a desire to limit the possible penalty. *North Carolina v. Alford*, 400 U.S. at 25; *see United States v. Rodriguez-De Maya*, 674 F.2d 1122, 1127 (5th Cir. 1984) (while a guilty plea must be voluntary, the inducement to plead guilty based on a plea bargain does not render the plea involuntary).

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When a defendant affirmatively indicates at the plea hearing that he understands the proceeding's nature and is pleading guilty because the allegations in the indictment are true, not because of any outside pressure or influence, he has a heavy burden to prove that his plea was involuntary. *See United States v. Diaz*, 733 F.2d 371, 373–74 (5th Cir.1984).

In the instant case, Houston fails to demonstrate that his plea was not knowingly, intelligently, or voluntarily made. The trial transcript shows that the trial court asked Houston several times if he understood the proceedings, and if Houston was entering a plea of guilty of his own volition, without outside pressure:

The Court: Now, Mr. Houston, I have before me several papers that you have signed here in court today; is that correct?
. . . As to all these papers that you have signed, before you signed them did Mr. Dunn sit down with you and go over these papers?

[Houston]: Yes, sir.

The Court: Did he explain to you?

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The Court: Did you understand everything you signed?

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*****

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[Houston]: No, Sir.

The Court: Who made the decision to plead guilty?

[Houston]: I did.

3 RR 7-8.

The record also reflects Houston was orally admonished regarding the proper punishment. After the above colloquy, the court initially admonished Houston as to the punishment range for a first degree felony (a term of imprisonment for 5-99 years), but upon correction from the State, the court then admonished Houston as to the punishment range for an habitual offender ("25 years on the low end up to 99 years or life in prison") after it noted a discrepancy in the admonishment paperwork. *See* 3 RR 12. The court inquired once more, "Did you understand, Mr. Houston?" to which Houston replied, "Yes, sir." *Id.* Earlier in his plea hearing, Houston had pled true to "both sets of enhancements" alleged in the indictments for both the instant case and the companion case, and, after the above admonishment, Houston affirmed his understanding that he faced the particular punishment range of 25 to 99 years' or life imprisonment "due to the enhancements . . . the prior criminal history." 3 RR 7, 13.

The trial transcript further reflects that the trial court gave Houston additional opportunities to raise questions or otherwise indicate his plea was not voluntarily or knowingly entered:

> The Court: Mr. Houston, we've covered a lot of territory here today. It's a very important day in your life obviously. Have you understood everything that we've talked about here in court?
>
> [Houston]: Yes, sir.
>
> The Court: Do you have any questions of me before we go forward?
>
> [Houston]: No, sir.

3 RR 15.

After defense counsel pointed out the plea paperwork did not reflect an admonishment for a second-degree felony, enhanced to a first-degree felony, or enhanced to punishment for an habitual offender, the following colloquy occurred:

> The Court: I think we need to take a recess and have y'all redo the admonishment sheet so we have the correct range of punishment, and he can initial that.
> Mr. Houston, I've now been presented with the written plea admonishments

that have been amended, have been modified to correctly reflect that the range of punishment before the Court in each case is what we call an habitual offender, which means that the range of punishment is 25 years to 99 years or life in prison, and, of course, anywhere in between there. Did you understand that?

[Houston]: Yes, sir.

The Court: And that's because of the two prior felony convictions in each indictment that have pled true to, which makes each punishment range an habitual offender range of punishment. Did you understand that?

[Houston]: Yes, sir.

*****

The Court: All right. Mr. Houston, again, have you understood everything we've talked about?

[Houston]: Yes.

*****

The Court: And do you still wish to enter a guilty plea to aggravated assault with a deadly weapon?

[Houston]: Yes, sir.

The Court: Okay. I'm going to receive each guilty plea. I'm going to find that you make each plea freely and voluntarily, that you are mentally competent.

3 RR 17-20.

Court documents—including the judgment, reporter's record, and clerk's record—are entitled to a presumption of regularity under 28 U.S.C. § 2254(e). The court affords great evidentiary weight to these instruments. *Carter v. Collins*, 918 F.2d 1198, 1202 n.4 (5th Cir. 1990). Houston bears the burden to rebut the presumption of regularity accorded these records, but he has failed to make any attempt to rebut the presumption and weight afforded these documents. 28 U.S.C. § 2254(e)(1); *see Bonvillain v. Blackburn*, 780 F.2d 1248, 1250 (5th Cir. 1986) ("in a habeas proceeding, the petitioner has the burden of proving that he is entitled to relief").

Additionally, when making a collateral challenge to a guilty plea, a petitioner must vault the formidable barrier that "[s]olemn declarations in open court carry a strong presumption of verity." *Blackledge v. Allison*, 431 U.S. 63, 74(1977). Houston has failed to do meet this burden.

Although the record directly rebuts Houston's Claims 2 and 5, the record is silent as to Houston's allegation that he believed or was led to believe that he was eligible for probation (Claim 1). Houston's trial counsel attested in the state habeas proceedings that he "fully explained the range of punishment applicable in his case," including "the requirements regarding probation," and Houston "understood that this range of punishment precluded that option." SHCR at 91-92 no. 4B.

In rejecting Houston's claim, the CCA implicitly found counsel credible. *Valdez v. Cockrell*, 274 F.3d 941, 948 n.11 (5th Cir. 2001). Since Houston fails to provide any support for his allegation, Claim 1 is conclusory. *See Ross v. Estelle*, 694F.2d 1008,1011-12 (5th Cir. 1983)("[A]bsent evidence in the record, a court cannot consider a habeas petitioner's bald assertions on a critical issue in his pro se petition, unsupported and unsupportable by anything else contained in the record, to be of probative evidentiary value"); *Blackledge*, 431 U.S. at 74("the presentation of conclusory allegations unsupported by specifics is subject to summary dismissal."); *see* also *Schlang v. Heard*, 691F.2d 796, 799 (5th Cir. 1982)("Mere conclusory statements do not raise a constitutional issue in a habeas case.).

Finally, Houston has failed to meet his burden under AEDPA, in failing to overcome the factual determinations made by the state courts, or to demonstrate the state court's rejection of his claims (SHCR at Action taken sheet) was contrary to or involved the unreasonable application of federal law. *See* 28 U.S.C. § 2254(e), (d). In sum, Houston has failed to demonstrate that his plea was not voluntarily and knowingly entered.

II. Houston's Claim 6 Is Without Merit.

Houston alleges that his "waivers of constitutional rights, stipulation of evidence and judicial

confession were not intelligently made," because "counsel never explained these documents would waive all of Petitioner's rights and relieve the State of its burden of proof." *See* Fed. Writ Pet. at 7F. Houston fails to provide any support for his allegation; accordingly, his claim is conclusory. *See Ross*, 694 F.2d at 1011-12; *Blackledge*, 431 U.S. at 74; *see* also *Schlang v. Heard*, 691 F.2d at 799.

A. Houston's claim regarding the State's failure to meet its burden of proof is procedurally defaulted.

Houston's complaint regarding the stipulation of evidence and judicial confession ultimately amounts to a complaint of the sufficiency of the evidence; it is thus procedurally defaulted. More specifically, petitioners are required to present a claim of insufficient evidence before the state courts in a procedurally proper manner according to the rules of the state courts. *Dupuy v. Butler*, 837 F.2d 699, 702 (5th Cir. 1988). While Houston raised this claim in his state habeas application, it has long been the case in Texas that sufficiency of the evidence is not cognizable in a post-conviction writ of habeas corpus.[3] *Ex parte Grigsby*, 137 S.W.3d 673, 674 (Tex. Crim. App. 2004).

The Fifth Circuit has also recognized this state procedural bar, even when "the Court of Criminal Appeal's denial of habeas relief stated no reasons, that court, as we have held, has long held that the sufficiency of the evidence may only be raised on direct appeal, and may not be raised on state habeas." *West v. Johnson*, 92 F.3d 1385, 1398, n.18 (5th Cir. 1996); *see Renz v. Scott*, 28 F.3d 431, 432 (5th Cir. 1994) (recognizing that under Texas law a claim regarding sufficiency of the evidence may be raised on direct appeal but not in a habeas corpus proceeding).

Thus, Houston's claim, in relevant part, is procedurally defaulted. *See O'Sullivan v. Boerckel*,

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[3] *Ex parte Easter*, 615 S.W.2d 719, 721 (Tex. Crim. App. 1981); *Ex parte Williams*, 703 S.W.2d 674, 677 (Tex. Crim. App. 1986); *Ex parte McLain*, 869 S.W.2d 349, 350 (Tex. Crim. App. 1988) (en banc); *Ex parte Ash*, 514 S.W.2d 762, 763 (Tex. Crim. App. 1974).

526 U.S. 838, 844, 848 (1999) (a petitioner's failure to present his claims in procedurally proper manner constitutes a procedural default that excludes him from federal habeas corpus review); *Grigsby*, 137 S.W.3d at 674; *see* also *West*, 92 F.3d at 1398, n.18; *Renz*, 28 F.3d at 432.

B. The remaining portion of Houston's complaint is contradicted by the record.

The remaining portion of Houston's claim—that his waiver of constitutional rights was involuntary because counsel did not explain the consequences of these waivers, stipulation of evidence, and judicial confession—is contradicted by the record of his plea proceedings. *See* generally, 3 RR 7-20; 2 RR 4-8. Additionally, in Houston's state habeas proceedings, trial counsel averred:

> . . . I fully explained the process of entering a guilty plea to [Houston]. I fully explained his applicable rights, and how entering a guilty plea involved relinquishing those rights. He understood the factual and legal background in his case. He understood the legal framework of a guilty plea in general, and, specifically, in his case. He was aware of the consequences and ramifications of his plea. SHCR at 92 (no. 4E).

Again, when the CCA rejected Houston's claim, the court implicitly found counsel credible, and Houston has failed to overcome the presumption of correctness afforded that factual finding. SHCR at Action taken sheet; 28 U.S.C. § 2254(e); *Valdez*, 274 F.3d at 948 n.11. Thus, Houston's claim is contradicted by the record.

C. Houston fails to meet his burden under AEDPA.

Lastly, Houston has failed to overcome the re-litigation bar set out in AEDPA, in failing to demonstrate the CCA's rejection of his claim (SHCR at Action taken sheet) was contrary to or involved the unreasonable application of federal law. See 28 U.S.C. § 2254(d).

III. Houston Fails to Prove Trial Counsel Rendered Constitutionally Ineffective Assistance. (Claims 3 & 4)

In Claims 3 & 4, Houston alleges that his trial attorney rendered ineffective assistance. These claims are without merit because Houston has failed to prove ineffective assistance or meet his burden

of proof under AEDPA.

A. Standard of review

The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to the assistance of counsel. U.S. Constitution Amend. VI. The Supreme Court has recognized that "the right to counsel is the right to the effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771, n.14. (1970). The proper standard for evaluating the effectiveness of counsel is reasonable performance under prevailing professional norms. *Strickland*, 466 U.S. 668.

To successfully state a claim of ineffective assistance of counsel, a petitioner must demonstrate (1) that counsel's performance was deficient, and (2) that the deficient performance prejudiced his defense. *Strickland*, 466 U.S. at 687; *Schaetzle v. Cockrell*, 343 F.3d 440, 444 (5th Cir. 2003). The Supreme Court has admonished that judicial scrutiny of counsel's performance "must be highly deferential," with every effort made to avoid "the distorting effect of hindsight," and instead "to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689. "[S]econd-guessing is not the test for ineffective assistance of counsel." *King v. Lynaugh*, 868 F.2d 1400, 1405 (5th Cir. 1989). "No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." *Strickland*, 466 U.S. at 688–89.

In *Richter*, the Supreme Court described the stark limits imposed on the federal courts when reviewing a state court's *Strickland* determination: surmounting *Strickland*'s high bar is never an easy task. An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the *Strickland* standard must be applied with scrupulous care, lest intrusive post-trial inquiry threaten the integrity of the very adversary process the right to counsel

is meant to serve. The standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is all too tempting to second-guess counsel's assistance after conviction or adverse sentence. The question is whether an attorney's representation amounted to incompetence under prevailing professional norms, not whether it deviated from best practices or most common custom.

Establishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult. The standards created by *Strickland* and § 2254(d) are both highly deferential, and when the two apply in tandem, review is doubly so. The *Strickland* standard is a general one, so the range of reasonable applications is substantial. Reviewing courts must guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under § 2254(d). When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard. *Richter*, 562 U.S. at 99. The Fifth Circuit has further described the manner in which a federal court is to review a state court's *Strickland* determination under AEDPA:

> It bears repeating that the test for federal habeas purposes is not whether [petitioner] made that showing. Instead, the test is whether the state court's decision—that [petitioner] did not make the *Strickland*-showing—was contrary to, or an unreasonable application of, the standards, provided by the clearly established federal law (*Strickland*), for succeeding on his IAC claim. Of course, in reaching our decision, we must consider the underlying *Strickland* standards. *See Schaetzle* , 343 F.3d at 444.

Generally, the burden of proof in a habeas corpus proceeding attacking the effectiveness of trial counsel is upon the petitioner, who must demonstrate that ineffectiveness by a preponderance of the evidence. *Jernigan v. Collins*, 980 F.2d 292, 296 (5th Cir. 1992). A petitioner's failure to establish either prong of *Strickland* necessarily requires a finding that counsel's performance was constitutionally

effective. *Strickland*, 466 U.S. at 687; *Alexander v. McCotter*, 775 F.2d 595, 602 (5th Cir. 1985). *Strickland*'s first prong requires a petitioner to establish that counsel's performance fell below an objective standard of reasonableness. *Strickland*, 466 U.S. at 688.

The courts will "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689; *see* also *Wilkerson v. Collins*, 950 F.2d 1054, 1064 (5th Cir.1992) (a reviewing court must be highly deferential to the trial attorney's conduct and presume that the assistance was reasonably effective). Further, there is a strong presumption that counsel's strategic decisions cannot amount to ineffectiveness: "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." *Green v. Johnson*, 116 F.3d 1115, 1122 (5th Cir. 1997); *see* also *Maggio*, 717 F.2d 199, 206 (5th Cir. 1983). "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable[.]" *Strickland*, 466 U.S. at 690 (emphasis added).

Trial counsel will not be deemed ineffective for failing to advance a defensive theory when his decision was a reasonable strategic choice based upon a "professional assessment of the plausibility of the defense and its prospects for success at trial." *Moreno v. Estelle*, 717 F.2d 171, 177 (5th Cir. 1983).

In order to establish that he has sustained prejudice, the convicted defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine the confidence in the outcome." *Strickland*, 466 U.S. at 694. A mere allegation of prejudice is not sufficient to satisfy the prejudice prong of *Strickland*; rather, the petitioner must "affirmatively prove" prejudice. *Id.* at 693.

B. Houston Fails To Demonstrate He Was Denied Effective Assistance of Counsel at Trial (Claims 3 and 4).

Houston alleges that he was denied effective assistance of counsel on two grounds. Fed. Writ Pet. at 7, 7C-D. These claims are meritless. The duty of an attorney to a defendant who desires to enter a plea of guilty is to ascertain that the plea is voluntarily and knowingly made. *Randle v. Scott*, 43 F.3d 221, 225 (5th Cir. 1995). In *Hill v. Johnson*, 474 U.S. at 52, the Supreme Court held that the two-prong test enunciated in *Strickland v. Washington*, 466 U.S. 668 (1984) applies to cases involving guilty pleas. Under *Strickland*, a defendant must show that counsel's performance was deficient, and that the deficient performance prejudiced the defense. *Strickland*, at 687. "With regard to the first prong of the *Strickland/Hill* test, if a defendant is represented by counsel and pleads guilty upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases." *Armstead v. Scott*, 37 F.3d 202, 206 (5th Cir. 1994). *Strickland* makes clear that the merits of an ineffective-assistance claim must be "viewed as of the time of counsel's conduct." *Id.*, at 690; *Lucas v. Johnson*, 132 F.3d 1069, 1078-79 (5th Cir. 1998) (counsel does not render ineffective assistance by failing to anticipate changes in the law).

Regarding the second prong, the petitioner may not simply allege but must "affirmatively prove" prejudice. *Strickland*, 466 U.S. at 693. In *Hill*, the requirement of prejudice was interpreted to mean, in the guilty plea context, "that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill*, 474 U.S. at 59; *Armstead*, 37 F.3d at 206. A reviewing court need not consider the deficiency prong if it concludes that the defendant has demonstrated no prejudice. *Id.* at 697. Finally, the burden of proof in a habeas corpus proceeding attacking the effectiveness of trial counsel is upon Houston. *See Martin v. Maggio*, 711 F.2d 1273, 1279 (5th Cir. 1983).

Again, Houston fails to provide any support for his allegations that counsel advised him he was eligible for probation, or that counsel erroneously advised him regarding the mens rea required for aggravated assault; accordingly, his claims are conclusory. *See Ross*, 694 F.2d at 1011-12; *Blackledge*, 431 U.S. at 74; *see* also *Schlang*, 691 F.2d at 799.

Also, trial counsel testified in Houston's state habeas proceedings that he had explained the applicable range of punishment to Houston; the requirements for probation eligibility; and that Houston did not meet those requirements, in light of the offense charged. SHCR at 91-92 no. 4B. Houston fails to rebut the presumption of correctness afforded the CCA's implicit credibility finding in favor of trial counsel. 28 U.S.C. § 2254(e); *Valdez*, 274 F.3d at 948 n.11; SHCR at Action taken sheet.

Houston's ineffective assistance claim regarding the issue of "recklessness" is also baseless. The pertinent elements of aggravated assault are:

(1) intentionally, knowingly, or recklessly causing

---serious bodily injury

---to another, or

(2) using or exhibiting a deadly weapon

---while intentionally, knowingly, or recklessly causing

---bodily injury

---to another.

Tex. Penal Code §§ 22.02(a), 22.01(a)(1) (West 2010).

The indictment alleges that Houston intentionally, knowingly, or recklessly cause[d] bodily injury to Billy Bruner by striking the white Chevrolet truck driven by Billy Bruner with the automobile [Houston] was driving, and [Houston] did then and there use or exhibit a deadly weapon, to-wit: an automobile, during the commission of said assault. *See* SHCR at 98. Thus, Houston had notice of the

element of recklessness. Additionally, while Houston's stipulation contains the strike-out of the alleged mens rea of "intentionally, knowingly," the stipulation still conforms to the elements set out in aggravated assault with a deadly weapon. *See* SHCR at 103.

Finally, the trial court repeatedly asked Houston if he, indeed, desired to plead guilty and stipulate to the charge of "recklessly causing bodily injury" to the complainant, and whether Houston understood that the change to the stipulation "does not change the range of punishment." 3 RR 9-10. Thus, the record demonstrates that Houston's claim does not constitute error.

Houston also fails to demonstrate that, but for counsel's alleged errors, he would not have pleaded guilty and would have insisted on going to trial; in other words, Houston wholly fails to "affirmatively prove" prejudice, as required by *Strickland*, 466 U.S. at 693; *Hill*, 474 U.S. at 59; *Armstead*, 37 F.3d at 206.

Most importantly, Houston's claims regarding the effective assistance of counsel should be denied because he fails to overcome the re-litigation bar set out in 28 U.S.C. § 2254(d), (e), in failing to rebut the implied factual determinations made by the state courts, and in failing to demonstrate that the state court's rejection of his IAC claims was contrary to, or involved the unreasonable application of federal law. 28 U.S.C. § 2254(e), (d); *Valdez*, 274 F.3d at 948 n.11; SHCR at Action taken sheet. Houston's claims of ineffective assistance of counsel, therefore, are meritless. *See Richter*, 131 S. Ct. at 786. For these reasons, Houston's claims are without merit and should be denied. Therefore, the petition should be dismissed with prejudice.

Certificate of Appealability

An appeal may not be taken to the court of appeals from 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). Although Houston has not yet filed a notice of appeal, it is respectfully recommended

that this Court, nonetheless, address whether he would be entitled to a certificate of appealability. *See Alexander v. Johnson*, 211 F.3d 895, 898 (5th Cir. 2000) (A district court may *sua sponte* rule on a certificate of appealability because "the district court that denies a petitioner relief is in the best position to determine whether the petitioner has made a substantial showing of a denial of a constitutional right on the issues before the court. Further briefing and argument on the very issues the court has just ruled on would be repetitious.").

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). The Supreme Court fully explained the requirement associated with a "substantial showing of the denial of a constitutional right" in *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). In cases where a district court rejected 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." *Id.*; *Henry v. Cockrell*, 327 F.3d 429, 431 (5th Cir. 2003). "When a district court denies a habeas petition on procedural grounds without reaching the petitioner's underlying constitutional claim, 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, it is respectfully recommended that reasonable jurists could not debate the denial of Houston's § 2254 petition on procedural grounds, nor find that the issues presented are adequate to deserve encouragement to proceed. *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). Accordingly, it is respectfully recommended that the Court find that Houston is not entitled to a certificate of appealability as to his claims.

Recommendation

It is accordingly recommended that the above-styled petition for writ of habeas corpus be denied and that the case be dismissed with prejudice. It is further recommended that a certificate of appealability be denied.

Within fourteen (14) days after receipt of the magistrate judge's report, any party may serve and file written objections to the findings and recommendations contained in the report. A party's failure to file written objections to the findings, conclusions and recommendations contained in this Report within fourteen days after being served with a copy shall bar that party from *de novo* review by the district judge of those findings, conclusions and recommendations and, except on grounds of plain error, from appellate review of unobjected-to factual findings and legal conclusions accepted and adopted by the district court. *Douglass v. United Servs. Auto Ass'n.*, 79 F.3d 1415, 1430 (5th Cir. 1996) (*en banc*).

So ORDERED and SIGNED this 14th day of February, 2017.

JOHN D. LOVE
UNITED STATES MAGISTRATE JUDGE