A P P E N D I X

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

ROBERT LEE CRIDER,	§	
TDCJ No. 02230764,	§	
	§	
Petitioner,	§	
	§	
v.	§	**CIVIL NO. SA-22-CA-0498-XR**
	§	
BOBBY LUMPKIN, Director,	§	
Texas Department of Criminal Justice,	§	
Correctional Institutions Division,	§	
	§	
Respondent.	§	

MEMORANDUM OPINION AND ORDER

Before the Court is Petitioner Robert Lee Crider's Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (ECF No. 1), wherein Petitioner challenges the constitutionality of his 2018 state court conviction for felony driving while intoxicated (DWI). Also before the Court are Petitioner's supplemental memorandum in support (ECF No. 10), Respondent Bobby Lumpkin's Answer (ECF No. 14), and Petitioner's Reply (ECF No. 16) thereto.

Having reviewed the record and pleadings submitted by both parties, the Court concludes Petitioner is not entitled to relief under the standards prescribed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). *See* 28 U.S.C. § 2254(d). Petitioner is also denied a certificate of appealability.

I. Background

In October 2018, Petitioner was found guilty of felony DWI (enhanced as a habitual offender) and sentenced to seventy years of imprisonment. *State v. Crider*, No. B18-73 (198th Dist. Ct., Kerr Cnty., Tex. Oct. 26, 2018); (ECF No. 13-2 at 122-23). The Texas Fourth Court of Appeals affirmed Petitioner's conviction in an unpublished opinion on direct appeal. *Crider v.*

State, No. 04-18-00856-CR, 2019 WL 4178633 (Tex. App.—San Antonio, Sept. 4, 2019, pet. granted Jan. 15, 2020); (ECF No. 13-22). After granting Petitioner's petition for discretionary review and hearing oral argument, the Texas Court of Criminal Appeals affirmed the judgment of the court of appeals in a published opinion delivered September 16, 2020. *Crider v. State*, 607 S.W.3d 305 (Tex. Crim. App. 2020); (ECF No. 13-35). The United States Supreme Court then denied Petitioner's request for writ of certiorari. *Crider v. Texas*, 141 S. Ct. 1384 (2021); (ECF No. 13-39).

Following his direct appeal proceedings, Petitioner challenged the constitutionality of his conviction by filing an application for state habeas corpus relief. *Ex parte Crider*, No. 92,095-01 (Tex. Crim. App.); (ECF No. 13-54 at 12-27). The Texas Court of Criminal Appeals denied the application without written order on May 26, 2021. (ECF No. 13-47). Thereafter, Petitioner filed a second state habeas corpus application again challenging his conviction, but the Texas Court of Criminal Appeals eventually dismissed the subsequent application as a successive petition pursuant to Tex. Code Crim. Proc. Art. 11.07, Sec. 4. *Ex parte Crider*, No. 92,095-02 (Tex. Crim. App.); (ECF Nos. 13-56, 13-59, and 13-63 at 11-86).

Petitioner initiated the instant proceedings on May 11, 2022, by filing a petition for federal habeas corpus relief. (ECF No. 1 at 15). In the petition and supplemental memorandum that followed, Petitioner argues that his current DWI conviction and sentence violated his due process and *ex post facto* rights because prior DWI convictions were improperly used to jurisdictionally enhance the instant DWI charge to a felony.[1]

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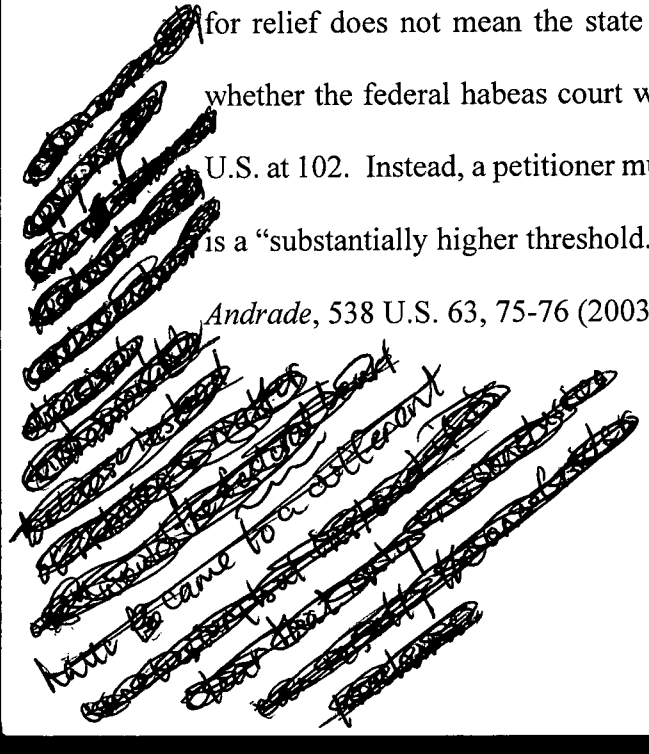
[1] Petitioner raised several more allegations (Claims 2-10) in his original petition and memorandum, but later withdrew these allegations "as though they were never even submitted" in his Reply to Respondent's Answer. (ECF No. 16 at 1). As such, the Court will only address Petitioner's first claim for relief.

II. Standard of Review

Petitioner's federal habeas petition is governed by the heightened standard of review provided by the AEDPA. 28 U.S.C.A. § 2254. Under § 2254(d), a petitioner may not obtain federal habeas corpus relief on any claim that was adjudicated on the merits in state court proceedings unless the adjudication of that claim either: (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States, or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. *Brown v. Payton*, 544 U.S. 133, 141 (2005). This intentionally difficult standard stops just short of imposing a complete bar on federal court relitigation of claims already rejected in state proceedings. *Harrington v. Richter*, 562 U.S. 86, 102 (2011) (citing *Felker v. Turpin*, 518 U.S. 651, 664 (1996)).

A federal habeas court's inquiry into unreasonableness should always be objective rather than subjective, with a focus on whether the state court's application of clearly established federal law was "objectively unreasonable" and not whether it was incorrect or erroneous. *McDaniel v. Brown*, 558 U.S. 120 (2010); *Wiggins v. Smith*, 539 U.S. 510, 520-21 (2003). Even a strong case for relief does not mean the state court's contrary conclusion was unreasonable, regardless of whether the federal habeas court would have reached a different conclusion itself. *Richter*, 562 U.S. at 102. Instead, a petitioner must show that the decision was objectively unreasonable, which is a "substantially higher threshold." *Schriro v. Landrigan,* 550 U.S. 465, 473 (2007); *Lockyer v. Andrade*, 538 U.S. 63, 75-76 (2003).



his indictment was defective, (2) the trial court was without jurisdiction to consider the charge, and (3) he is actually innocent of the charged offense.

Petitioner raised this allegation during his state habeas corpus proceedings, which the state habeas trial court and later the Texas Court of Criminal Appeals rejected without written order. (ECF Nos. 13-47; 13-52 at 12-13; 13-54 at 17-18). As discussed below, Petitioner fails to demonstrate the state court's determination was either contrary to, or an unreasonable application of, clearly established federal law or Supreme Court precedent.

A. State Law Issue

To start, the issue of whether a defendant's prior convictions are properly used for enhancement purposes is solely a question of state law. *Weeks v. Scott*, 55 F.3d 1059, 1063 (5th Cir. 1995); *Rubio v. Estelle*, 689 F.2d 533, 536 (5th Cir. 1982). Claims based solely on state law are generally not cognizable in a § 2254 proceeding, and a federal court must typically defer to the state court's determination of Texas law. *See Swarthout v. Cooke*, 562 U.S. 216, 219 (2011) (stating that the Court has repeatedly held that "federal habeas corpus relief does not lie for errors of state law.")(citations omitted); *Fuller v. Johnson*, 158 F.3d 903, 908 (5th Cir. 1998) (failure to follow Texas law is not reviewable). "[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions." *Trevino v. Johnson*, 168 F.3d 173, 184 (5th Cir. 1999) (quoting *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991)). Therefore, even if the state trial court in fact misapplied state law, it would have no impact on whether federal habeas corpus relief was warranted. *See Rubino v. Lynaugh*, 845 F.2d 1266, 1271 (5th Cir. 1988) ("[T]he determination of what prior crimes should count for enhancement purposes under Texas law was solely for the State and 'not cognizable' in a federal habeas proceeding.").

Legislature did not intend for the date of the prior conviction to be considered an element of [the offense]."). Because the date of Petitioner's prior DWI convictions were not an element of the offense for which he was ultimately convicted, no due process violation occurred. As such, Petitioner fails to demonstrate that the state court's rejection of this claim was unreasonable.

C. Ex Post Facto

Petitioner also fails to demonstrate that the state court's rejection of his *ex post facto* claim was unreasonable. "For an *ex post facto* violation to occur, two elements must be present: (1) a law must be retrospective, that is, it must apply to events occurring before its enactment, and (2) the new law must create a sufficient risk of increasing the punishment attached to the defendant's crimes." *Warren v. Miles,* 230 F.3d 688, 692 (5th Cir. 2000) (citing *California Dept. of Corrections v. Morales,* 514 U.S. 499, 509 (1995)). Here, the new law creates a sufficient risk of increasing the punishment attached to Petitioner's crime. Therefore, the only issue is whether the new law, as applied to Petitioner's case, is retrospective.

In *Gryger v. Burke,* 334 U.S. 728 (1948), the Supreme Court considered a defendant, similar to Petitioner, who was sentenced as a habitual offender based on a law that was enacted after his prior offense. The Court reasoned that: "[t]he sentence as a fourth offender or habitual criminal is not to be viewed as either a new jeopardy or additional penalty for the earlier crimes. It is a stiffened penalty for the latest crime, which is considered to be an aggravated offense because [it is] a repetitive one." *Id.* at 732. Thus, because they "penalize the new criminal offense being enhanced rather than the prior offense used for enhancement[,]" recidivist statutes, like the one in

question in this case, do not violate the *Ex Post Facto* Clause. *Ex parte White*, 211 S.W.3d 316, 320 (Tex. Crim. App. 2007);[2] *see also United States v. Rasco*, 123 F.3d 222, 227 (5th Cir. 1997).

Petitioner's punishment is based on the date of his most recent offense, which took place after the amendment of Section 49.09 became effective, rather than based on the dates of his earlier offenses. Accordingly, the new statute, which no longer contained the ten-year requirement, is not retrospective. Thus, this Court finds nothing unreasonable in the state court's rejection of Petitioner's *ex post facto* claim. Federal habeas corpus relief is therefore denied.

D. Actual Innocence

Finally, a component of Petitioner's allegation is that he is "actually innocent" of felony DWI. But "freestanding" claims of actual innocence, such as the allegation now before the Court, do not provide a valid basis for federal habeas relief. *Dowthitt v. Johnson*, 230 F.3d 733, 741 (5th Cir. 2000) (citing *Herrera v. Collins*, 506 U.S. 390, 400 (1993)). "This rule is grounded in the principle that federal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution—not to correct errors of fact." *Herrera*, 506 U.S. at 399. Because the Fifth Circuit does not recognize freestanding claims of actual innocence on federal habeas review, Petitioner's allegation must be rejected.

Alternatively, even if an actual-innocence claim could be the basis for federal relief, it

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[2] Texas courts have consistently held that for purposes of enhancement, the use of prior convictions that could not have been used at the time they were originally committed is not a violation of the prohibition against *ex post facto* laws. *Conelly v. State*, 451 S.W.3d 471, 477-78 (Tex. App.–Houston [1st Dist.] 2014) (citing *Cohen v. State*, No. 10-08-00385-CR, 2010 WL 199887, at *2 n.2 (Tex. App.—Waco Jan. 2, 2010, no pet.) (unpublished)); *see also Englelbrecht v. State*, 294 S.W.3d 864, 868 (Tex. App.—Beaumont 2009, no pet); *Sepeda v. State*, 280 S.W.3d 398, 402 (Tex. App.—Amarillo 2008, pet. ref'd); *Crocker v. State*, 260 S.W.3d 589, 592 (Tex. App.—Tyler 2008, no pet); *Saucedo v. State*, No. 03-06-0305-CR, 2007 WL 1573948, at *4 (Tex. App.—Austin May 30, 2007, no pet.) (unpublished); *Romo v. State*, No. 04-05-00602-CR, 2006 WL 3496933, at *1-2 (Tex. App.—San Antonio Dec. 6, 2006, no pet.) (unpublished).

would only be cognizable if there were no state procedure available for making the claim. *Herrera*, 506 U.S. at 417; *Graves v. Cockrell,* 351 F.3d 143, 151 (5th Cir. 2003). Such is not the situation in Texas, where state procedures are available to raise claims in clemency proceedings or a state habeas petition. *See* Tex. Crim. Proc. Code art. 48.01 (West 2022); *Lucas v. Johnson*, 132 F.3d 1069, 1075 (5th Cir. 1998). Indeed, Petitioner unsuccessfully raised his actual innocence claim during his state habeas proceeding. Thus, Petitioner's freestanding claim of actual innocence must be denied.

IV. Certificate of Appealability

The Court must now determine whether to issue a certificate of appealability (COA). *See* Rule 11(a) of the Rules Governing § 2254 Proceedings; *Miller–El v. Cockrell,* 537 U.S. 322, 335-36 (2003) (citing 28 U.S.C. § 2253(c)(1)). A COA may issue only if a petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). If a district court rejects a petitioner's constitutional claims on the merits, the petitioner must demonstrate "that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel,* 529 U.S. 473, 484 (2000). This requires a petitioner to show "that reasonable jurists could debate whether the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Miller–El*, 537 U.S. at 336 (citation omitted).

A district court may deny a COA *sua sponte* without requiring further briefing or argument. *See Alexander v. Johnson,* 211 F.3d 895, 898 (5th Cir. 2000). For the reasons set forth above, the Court concludes that jurists of reason would not debate the conclusion that Petitioner was not entitled to federal habeas relief. As such, a COA will not issue.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

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Petitioner,	§	
	§	
v.	§	**CIVIL NO. SA-22-CA-0498-XR**
	§	
BOBBY LUMPKIN, Director,	§	
Texas Department of Criminal Justice,	§	
Correctional Institutions Division,	§	
	§	
Respondent.	§	

ORDER

Before the Court is *pro se* Petitioner Robert Lee Crider's motion to proceed *in forma pauperis* on appeal (ECF No. 23) wherein he requests that he not be required to pay the $505.00 filing fee required for the notice of appeal. For the reasons stated in the Court's Memorandum Opinion and Order dated November 20, 2023 (ECF No. 17), Petitioner's request is **DENIED**. Petitioner fails to present a "good faith" non-frivolous issue for appeal as required by 28 U.S.C. § 1915(a)(3).

It is so **ORDERED**.

SIGNED this 11th day of January, 2024.

XAVIER RODRIGUEZ
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT
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JUDGMENT

The Court has considered the Judgment to be entered in the above-styled and numbered cause.

Pursuant to this Court's Memorandum Opinion and Order of even date herewith, **IT IS HEREBY ORDERED, ADJUDGED** and **DECREED** that Petitioner Robert Lee Crider's Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (ECF No. 1) is **DISMISSED WITH PREJUDICE**. No Certificate of Appealability shall issue in this case. This case is now **CLOSED**.

It is so **ORDERED**.

SIGNED this 20th day of November, 2023.

XAVIER RODRIGUEZ
UNITED STATES DISTRICT JUDGE

United States Court of Appeals for the Fifth Circuit

No. 23-50918

United States Court of Appeals
Fifth Circuit
FILED
July 24, 2024
Lyle W. Cayce
Clerk

ROBERT LEE CRIDER,

Petitioner—Appellant,

versus

BOBBY LUMPKIN, *Director, Texas Department of Criminal Justice, Correctional Institutions Division*,

Respondent—Appellee.

Application for Certificate of Appealability
the United States District Court
for the Western District of Texas
USDC No. 5:22-CV-498

ORDER:

Robert Lee Crider, Texas prisoner # 2230764, moves this court for a certificate of appealability (COA) to challenge the denial of his 28 U.S.C. § 2254 application. Crider filed the application to challenge his 70-year enhanced sentence as a habitual offender for third-degree felony driving while intoxicated (DWI). He contends that the use of his 1990 DWI convictions to enhance his DWI offense to a third-degree felony, pursuant to Texas Penal Code § 49.09(b)(2), violated his due process rights because application of the amended statute violated the Ex Post Facto Clause.

To obtain a COA, Crider must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Where a district court has rejected a claim on the merits, a movant "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack*, 529 U.S. at 484.

Crider has not made the requisite showing. *See id.* We do not consider Crider's ineffective assistance of counsel claims, and he abandons any challenge to the district court's conclusion that a freestanding claim of actual innocence is not cognizable on federal habeas review. *See Black v. Davis*, 902 F.3d 541, 545 (5th Cir. 2018); *Brinkmann v. Dallas Cnty. Deputy Sheriff Abner*, 813 F.2d 744, 748 (5th Cir. 1987). Accordingly, Crider's request for a COA is DENIED. His motions for the appointment of counsel and to proceed in forma pauperis are likewise DENIED.

Cory T. Wilson

CORY T. WILSON
United States Circuit Judge

CERTIFICATE OF SERVICE:

Petitioner, Robert Crider, T.D.C.J. I.D. #2230764, is an inmate in the Texas Prison System at McConnell Unit, 3001 S. Emily Dr., Beeville, Texas 78102. After the Court returned Crider's Petition for Writ of Certiorari for correction, he corrected it and e-mailed it to his Father, Robert Crider, who printed, had notarized, and timely filed the Petition by mailing the original and a copy, , respectively, to: (1) Clerk of the United States Supreme Court, 1 First Street, N.E., Washington, D.C. 20543-0001; and (2) Nathan Tadema A.A.G., Texas Attorney General's Office, Post Office Box 12548, Austin, Texas 78711-2548. This "substitute" corrected Petition is now necessary because Crider's "original" corrected Petition, timely filed, delivered to the Court, and signed for by "Jake," verifiable by U.P.S. Tracking Number: 1ZGG47130378792416, was never received in the Clerk's office. Because Petitioner is electronically preparing this substitute Petition but his facility has no "print" option available, he is e-mailing it to his father for printing and service to the Court and Attorney General at the addresses provided above. Thus, because Petitioner can only digitally sign the Petition and this Certificate, his Father will, before a Notary, "wet sign" Petitioner's name next to his digital signature on the last page of the Petition and on this Certificate of Service. By my digital signature and "wet signature by proxy," I, Petitioner, certify under penalty of perjury that the information contained in this Certificate of Service is true and correct. /s/ Robert Crider. Robert Crider Proxy Signature and Date Robert Crider, Petitioner, Pro Se #2230764 McConnell Unit 3001 South Emily Drive Beeville, Texas 78012

I, Robert Crider, reside at 606 Josephine Street, Ingram, Texas 78025. Under penalty of perjury and by my signature below I attest that the information provided in this Certificate of Service is true and correct. I further affirm that I personally mailed (1) "Declaration of Timely Filing"; (2) Letter to the Clerk; (3) "Motion for Leave to Proceed in Forma Pauperis"; (4) "Substitute corrected Petition for Writ of Certiorari,"; and (5) Certificate of Service, first-class postage prepaid, to the SCOTUS and the Attorney General's Office at the addresses provided above on

3/10/2025. Date

Robert L. Crider. Sender's Signature Provide Notary's info here

State of Texas County of Kerr

This instrument was acknowledged before me on the 10 of March 2025

By Robert L. Crider

Notary Public

JORDAN WIDENER
Notary Public, State of Texas
Comm. Expires 01-09-2028
Notary ID 134707637