Appendix

A

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

DANNY WAYNE ALCOSER	**§**	
#2187801	**§**	
	§	
V.	**§**	**W-24-CA-621-ADA**
	§	
ERIC GUERRERO	**§**	

ORDER

Before the Court are Petitioner's Application for Habeas Corpus under 28 U.S.C. § 2254 (#1), Respondent's answer (#18), Petitioner's Traverse (#23), Petitioner's Second Motion for Reconsideration for the Production of Records (#26), Petitioner's Motion for Stay and Abeyance (#27), Petitioner's Second Motion for Court's Reconsideration On Its Own Initiative (#28), and Petitioner's Second Motion for Evidentiary Hearing (#29). Petitioner is proceeding pro se and in forma pauperis. For the reasons set forth below, Petitioner's application for writ of habeas corpus is denied.

STATEMENT OF THE CASE

A. Petitioner's Criminal History

According to Respondent, the Director has lawful custody of Petitioner pursuant to a judgment and sentence of the 19th District Court of McLennan County, Texas on January 4, 2018, for assault family violence enhanced with a prior conviction. *See Ex parte Alcoser*, No. 90,777-05 (SHCR-05) (#20-113) at 388. Petitioner pleaded not guilty. *Id.* A jury found Petitioner guilty and, after pleading true to an enhancement paragraph, Petitioner was sentenced to twenty years of confinement. *Id.* Petitioner appealed and also filed a motion for new trial and an amended motion for new trial.

On December 20, 2019, the Seventh Court of Appeals found jury charge error caused egregious harm as to Petitioner's holding conviction and the two other counts on which he was originally convicted. *Alcoser v. State*, No. 07-18-00032-CR, 596 S.W.3d 320, 338 (Tex. App.—Amarillo 2019), rev'd by, No. PD-0166-20, 663 S.W.3d 160 (Tex. Crim. App. 2022). The Texas Court of Criminal Appeals (TCCA) granted the State's Petition for Discretionary Review (PDR) and reversed the Court of Appeals' judgment regarding Petitioner's conviction for Assault/Family Violence, remanding that cause to the appellate court for further consideration. *Alcoser v. State*, No. PD-0166-20, 663 S.W.3d 160 (Tex. Crim. App. 2022). On remand, the Seventh Court of Appeals denied Petitioner's motion to withdraw counsel and to self-represent. *Alcoser v. State*, No. 07-18-00032-CR, 2022 WL 1463976 (Tex. App. Amarillo, May 4, 2022). The Seventh Court of Appeals then entered an order abating and remanding the cause to the trial court to determine matters regarding Petitioner's representation. *Alcoser v. State*, No. 07-18-0032-CR, 2022 WL 1590751 (Tex. App.—Amarillo, May 19, 2022).

On remand, Petitioner obtained new counsel, and the trial court denied Petitioner's Amended Motion for New Trial after a hearing on July 13, 2022. *See Alcoser v. State*, No. 07-18-00032-CR, 2022 WL 3219808 at *1 (Tex. App.— Amarillo, Aug. 9, 2022, pet. ref'd) (hearing transcript located at SHCR-05 (#20-114) at 691–97). When the cause resumed in the Seventh Court of Appeals, two issues remained pending from the original appeal as well as additional issues raised by the denial of Petitioner's amended motion for new trial. *See id.* at * 2. The Court of Appeals affirmed Petitioner's conviction on count I, assault/family violence, reversed his convictions on counts II and III and remanded counts II and III to the trial court for further proceedings. *Id.* at *5. The Court of Appeals denied Petitioner's motion for rehearing on September 12, 2022. *Id.* The TCCA refused Petitioner's PDR on October 19, 2022, and denied his motion for rehearing on his PDR on November 23, 2022. *Id.* The Supreme Court denied certiorari review. *Alcoser v. Texas*, 143 S.Ct. 2594 (June 5, 2023).

Petitioner filed a state habeas application seeking an out of time PDR to challenge his assault family violence conviction on January 4, 2024. SHCR-05 (#20-112) at 7, 45. The TCCA denied that application on May 15, 2024, without written order on the findings of the trial court and on the Court's independent review of the record. SHCR-05 (#20-117). Petitioner then filed a state habeas application challenging his assault family violence conviction, signed July 8, 2024, which the TCCA denied without written order on October 30, 2024. SHCR-06 (#20-122) at 32, 77; SHCR-06 (#20-128). Petitioner filed his federal petition on November 25, 2024. Pet. (#1) at 21.

B. Petitioner's Grounds for Relief

Petitioner raises the following grounds for relief:

1. There was insufficient or no evidence to support his conviction.
2. His due process rights were violated when he was denied
    a. The right to have his amended motion for new trial properly filed and presented to the trial court and to have a hearing requested and held for disposition of that motion;
    b. An adequate and effective direct appeal with a full and complete appellate record; and

c. The right to have retained counsel file a PDR on his behalf.

3. His trial counsel was ineffective for failing to

   a. Obtain firm command of relevant facts and law;

   b. Introduce birth records;

   c. Obtain Petitioner's marriage certificate;

   d. Obtain jail calls; and

   e. Use Complainant's handwritten letter for impeachment.

4. His appellate counsel, E. Alan Bennett, was ineffective for

   a. Failing to file the amended motion for new trial;

   b. Refusing to ensure the amended motion for new trial was included in the appellate record; and

   c. Refusing to remedy the procedural error after remand to the trial court.

5. His appellate counsel, Tate N. Saunders, was ineffective for failing to

   a. Obtain firm command of relevant facts and law;

   b. Submit evidence in support of amended motion for new trial;

   c. File writ of prohibition and mandamus;

   d. Provide Petitioner notice of his right to file PDR; and

   e. File a counseled PDR and have Petitioner's pro-se PDR stricken.

Pet. (#1) at 5-18; Memo. (#1-1) at 6-17.

C. Factual Background

The Seventh Court of Appeals summarized the facts as follows:

> Appellant and the complainant met when she was assigned as his daughter's Child Protective Services caseworker. When that case was

closed, the complainant and Appellant began an on-again, off-again romantic relationship.

The complainant has two children, T.W. and J.A., the younger being Appellant's biological child. T.W., a special needs child, was six years old at the time of the incident resulting in Appellant's convictions and J.A., Appellant's child, was less than a year old. In May 2016, the complainant and Appellant were having relationship issues and were attending court-ordered counseling. The court order required them to live separately. During that period of separation, Appellant was staying with a former girlfriend.

On the day in question, the complainant was taking a shower and her two children were in the home. Appellant claimed he believed no one was home and used his key to enter and gather his clothes from the master bedroom closet. The complainant heard someone and exited the shower. When she realized Appellant was removing his clothes from the closet, she tried to persuade him to stay and they engaged in a physical altercation. According to Appellant's version of the events, he thought no one was home and was suddenly struck on the back of the head causing him to instinctively grab the person assaulting him without realizing it was the complainant.

Claiming he was defending himself from the complainant, Appellant placed one of his hands over her esophagus, causing her breathing to be impeded. With a firm hold around her neck, he guided her backwards from the closet through the master bedroom and toward the master bathroom.

The complainant testified that she fought back and was able to free herself from Appellant's grasp. She ran to the living room as Appellant gathered his belongings and left. She then locked the door behind him. When Appellant realized he had left his cigarettes inside, he asked to re-enter the home. The complainant instructed him to remain outside while she brought him his cigarettes. Instead, he entered the living room and the fighting resumed.

T.W. tried to separate them and was pushed away by Appellant. At that time, the complainant held up her cell phone and threatened to call the police. Appellant responded with a threat and grabbed her phone and damaged it. The complainant then instructed T.W. to run out of the house and he complied. She grabbed her infant and tried to leave through the back door; however, according to the complainant, Appellant followed her with a baseball bat. She testified that he threatened to kill her. She turned and ran toward the front door but veered off toward the master bathroom to try to exit through a window. She was unable to completely close the bathroom door when Appellant pushed it open, causing her to fall into the bathtub while still holding her infant. The complainant hit her head but managed to shield the infant from any injury. Appellant left the premises and the complainant went to a neighbor's house where she asked them to call 911 because her cell phone was inoperable.

Sergeant John Tucker responded to an assault-in-progress call at the complainant's home. He testified he was familiar with the address due to prior encounters with the parties. When he arrived, the complainant gave the officer her version of the incident. Sergeant Tucker decided not to interview T.W. in order to avoid any further trauma to the child. At trial, Sergeant Tucker testified that the complainant was visibly upset, and photographs taken at the scene showed red marks around her neck.

Appellant was arrested a few weeks later. While he was in jail, the complainant visited him, and they also corresponded. Eventually, the complainant signed an affidavit of non-prosecution seeking dismissal of the charges against Appellant. She testified she still loved Appellant and did not want him prosecuted. Nevertheless, the case proceeded to trial.

After the State presented its case-in-chief, Appellant chose not to testify. However, after both sides had rested and closed, he changed his mind. The trial court re-opened the evidence and admonished Appellant of the consequences of testifying. Against counsel's advice, Appellant testified he was defending himself against the complainant who initially assaulted him by surprise while he was gathering his clothes. According to Appellant, "[n]obody was supposed to be there. . . . I started getting hit in the back of the head." He explained that his physical reaction toward the complainant was "a response to -- to being hit." He also testified that the complainant damaged her own cell phone and fabricated her version of the events to avoid losing custody of her children because she was under investigation by Child Protective Services. He also sought admission into evidence of recorded phone calls which he claimed would reveal the truth.

During his testimony, Appellant admitted having a drug and alcohol problem in the past. He also testified that he suffers from anxiety and cannot always afford his medication. He admitted relinquishing his parental rights to other children so that the complainant would not lose custody of her two children.

Essentially, Appellant's self-defense theory portrayed the complainant as the provocateur. He insisted that she fabricated the story about falling in the bathtub. He denied using a baseball bat to intimidate her during the altercation and testified he never threatened to kill her. In his opinion, the complainant's machinations benefitted her with Child Protective Services

> because, if it was believed she was the instigator, she risked losing custody of her children.

Alcoser v. State, 596 S.W.3d 320, 326-28 (Tex. App.—2019), *rev'd and remanded*, 663 S.W.3d 160 (Tex. Crim. App. 2022) (footnotes omitted).

D. Request for Evidentiary Hearing

Petitioner asserts that his application for habeas relief raises factual questions, which have not been addressed by the state courts and that the state has failed to provide Petitioner with a full and fair hearing concerning his application. Petitioner concludes that he is entitled to an evidentiary hearing to resolve the factual questions left unresolved by the state courts. Mot. (#29).

<u>DISCUSSION AND ANALYSIS</u>

A. The Antiterrorism and Effective Death Penalty Act of 1996

The Supreme Court has summarized the basic principles that have grown out of the Court's many cases interpreting the 1996 Antiterrorism and Effective Death Penalty Act. *See Harrington v. Richter*, 562 U.S. 86, 97–100 (2011). Under § 2254(d), a petitioner may not obtain federal habeas corpus relief on any claim that was adjudicated on the merits in state court proceedings unless the adjudication of that claim either (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States, or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. *Brown v. Payton*, 544 U.S. 133, 141 (2005). This demanding standard stops just short of imposing a complete bar on federal court re-litigation of claims already rejected in state proceedings. *Harrington*, 562 U.S. at 102 (citing *Felker v. Turpin*, 518 U.S. 651, 664 (1996)).

One of the issues *Harrington* resolved was "whether § 2254(d) applies when a state court's order is unaccompanied by an opinion explaining the reasons relief has been denied." *Id.* Following all of the Courts of Appeals' decisions on this question, *Harrington* concluded that the deference due a state court decision under § 2554(d) "does not require that there be an opinion from the state court explaining the state court's reasoning." *Id.* (citations omitted). The Court noted that it had previously concluded that "a state court need not cite nor even be aware of our cases under § 2254(d)." *Id.* (citing *Early v. Packer*, 537 U.S. 3, 8 (2002) (per curiam)). When there is no explanation with a state court decision, the habeas petitioner's burden is to show there was "no reasonable basis for the state court to deny relief." *Id.*

As *Harrington* noted, § 2254(d) permits the granting of federal habeas relief in only three circumstances: (1) when the earlier state court's decision "was contrary to" federal law then clearly established in the holdings of the Supreme Court; (2) when the earlier decision "involved an unreasonable application of" such law; or (3) when the decision "was based on an unreasonable determination of the facts" in light of the record before the state court. *Id.* at 100 (citing 28 U.S.C. § 2254(d); *Williams v. Taylor*, 529 U.S. 362, 412 (2000)). The "contrary to" requirement "refers to the holdings, as opposed to the dicta, of . . . [the Supreme Court's] decisions as of the time of the relevant state-court decision." *Dowthitt v. Johnson*, 230 F.3d 733, 740 (5th Cir. 2000) (quotation and citation omitted).

> Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by . . . [the Supreme Court] on a question of law or if the state court decides a case differently than . . . [the Supreme Court] has on a set of materially indistinguishable facts.

Id. at 740-41 (quotation and citation omitted). Under the "unreasonable application" clause of § 2254(d)(1), a federal court may grant the writ "if the state court identifies the correct governing legal principle from . . . [the Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 741 (quotation and citation omitted). The provisions of § 2254(d)(2), which allow the granting of federal habeas relief when the state court made an "unreasonable determination of the facts," are limited by the terms of the next section of the statute, § 2254(e). That section states that a federal court must presume state court fact determinations to be correct, though a petitioner can rebut that presumption by clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1). But absent such a showing, the federal court must give deference to the state court's fact findings. *Id.*

A federal habeas court's inquiry into unreasonableness always should 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. *Wiggins v. Smith*, 539 U.S. 510, 520-21 (2003) (citing *Williams v. Taylor*, 529 U.S. 362, 409 (2000)). Even a strong case for relief does not mean the state court's contrary conclusion was unreasonable. *Harrington*, 562 U.S. at 102. A petitioner must show that the state court's 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). "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 (citation omitted). As a result, to obtain federal habeas relief on a claim previously adjudicated on the merits in state court, Petitioner must show that the state court's ruling "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id.* at 103; *see also Bobby v. Dixon*, 565 U.S. 23, 24 (2011). "'If this standard is difficult to meet—and it is—that is because it was meant to be.'" *Mejia v. Davis*, 906 F.3d 307, 314 (5th Cir. 2018) (quoting *Burt v. Titlow*, 571 U.S. 12, 20 (2013)).

B. Evidentiary Hearing

Section 2254(e)(2) provides:

> 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.

Petitioner has failed to plead any allegations that would entitle him to a hearing. Accordingly, Petitioner's request for an evidentiary hearing (#29) is denied.

Petitioner also contends that the habeas record is incomplete because it does not include a copy of the "Writ Staff Attorney Memorandum Analysis" (WSAMA). Pet. Reply

(#23) at 1-2; Pet. Mot. (#26); Pet. Mot. (#28) at 4. Petitioner claims that this document was relied on by the TCCA in denying his state writ and thus the document is important for this Court to review before ruling on his federal habeas petition. Petitioner fails to explain what relevant information may be contained in this alleged document, how the document would alter this Court's analysis of his claims in his federal petition, or on what basis this Court should supplement the state court records. Regardless whether the TCCA relied on such a document, Petitioner's burden remains the same. Because there is no explanation accompanying the TCCA decision, Petitioner's burden is to show there was "no reasonable basis for the state court to deny relief." *Harrington*, 562 U.S. at 102. In short, Petitioner fails to show prejudice and fails to identify any reason that the alleged WSAMA document would be relevant or determinative in this case. Petitioner's Second Motion for Reconsideration for the Production of Records (#26) and Motion for Court's Reconsideration On Its Own Initiative (#28) are denied.

C. Unexhausted and Procedurally Barred Claims

Respondent contends that Petitioner's Claim 1, that there was insufficient or no evidence to support his conviction, and Claims 2(a) and 2(b), that his due process rights have been violated, are unexhausted and procedurally barred. The exhaustion doctrine requires that the state courts be given the initial opportunity to address and, if necessary, correct alleged deprivations of federal constitutional rights. *Castille v. Peoples*, 489 U.S. 346, 349 (1989). In order to satisfy the exhaustion requirement, a claim must be presented to the highest court of the state for review. *Richardson v. Procunier*, 762 F.2d 429, 431 (5th Cir. 1985). A challenge to the sufficiency of the evidence must be brought on direct appeal. *Renz v. Scott*, 28 F.3d 431, 432 (5th Cir. 1994); *see also West v. Johnson*, 92 F.3d 1385, 1398, n.18 (5th Cir. 1996). Moreover, all of the grounds raised in a federal application for writ of habeas corpus must have been "fairly presented" to the state courts prior to being presented to the federal courts. *Picard v. Conner*, 404 U.S. 270, 275 (1971). In other words, in order for a claim to be exhausted, the state court system must have been presented with the same facts and legal theory upon which the petitioner bases his assertions. *Id.* at 275–77. Where a "petitioner advances in federal court an argument based on a legal theory distinct from that relied upon in the state court, he fails to satisfy the exhaustion requirement." *Wilder v. Cockrell*, 274 F.3d 255, 259 (5th Cir. 2001) (citing *Vela v. Estelle*, 708 F.2d 954, 958 n.5 (5th Cir. 1983)).

In Claim 1, Petitioner argues that the State told the jury Petitioner and Complainant were common law married and Complainant testified that Petitioner was J.A.'s father. Petitioner contends that these claims were false and that there was insufficient evidence to prove either claim. Petitioner contends that he could not have been common law married to Complainant because he was married to another woman at that time. Petitioner also contends that, when J.A. was born, he and Complainant opted not to complete an Acknowledgement of Paternity, and thus there was insufficient evidence that Petitioner was J.A.'s father. Petitioner asserts that, without these elements, the State could not have proved a "household relationship" and thus the charge would have been reduced to "nothing higher than a Class A misdemeanor." In addition, Petitioner contends that Complainant wrote a letter to Petitioner while Petitioner was in county jail stating that Petitioner's actions were self-defense. Plaintiff asserts that the State failed to acknowledge these records, failed to correct the record, and used false evidence to convict him.

Respondent claims that Petitioner failed to raise this claim on either direct appeal or in his State habeas petition.[1] Respondent explains that Petitioner raised a sufficiency of evidence claim on direct appeal, but it was not based on the same facts or legal theory as the claim Petitioner asserts in his federal habeas petition. Instead, Respondent asserts, Petitioner's claim in his appeal was based on an argument that the evidence was insufficient to support the jury's rejection of his self-defense claim, rather than any argument about the evidence of Petitioner's marriage or whether J.A. was his biological child. Furthermore, the Seventh Court of Appeals affirmed Petitioner's conviction, noting that factual sufficiency had been abolished in review of criminal convictions, noting an exception for affirmative defenses, and pointing out that self-defense is not an affirmative defense. *Alcoser*, 2022 WL 3219808 at *3 (citing *Brooks v. State*, 323 S.W.3d 893 (Tex. Crim. App. 2010)). In his subsequent PDR, Petitioner challenged the Court of Appeals' determination declining his invitation to conduct a factual sufficiency review of his self-defense claim or his convictions. The TCCA refused his PDR. PD-0531-22 (#20-48).

Respondent also contends that Petitioner failed to present his insufficient evidence claim in his state habeas application. Respondent concedes that Petitioner presented similar arguments, but that they were advanced as support for Petitioner's claims of prosecutorial misconduct, rather than any claim regarding insufficient evidence. *See*

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[1] Under Texas law, a sufficiency of the evidence claim is not cognizable in a post-conviction writ of habeas corpus, but must be pursued on direct appeal. *See, e.g. Ex parte McLain*, 869 S.W.2d 349, 350 (Tex. Crim. App. 1994 (*en banc*).

SHCR-06 (#20-122) at 22-24. Because Petitioner failed to present his federal claim of insufficient or no evidence to the highest state court, Respondent contends his challenge to the sufficiency of the evidence is unexhausted.

Petitioner argues in reply that, because his Amended Motion for New Trial (AMNT) was not properly presented to the trial court, he was unable to raise the sufficiency of the evidence claim. Pet. Reply (#23) at 3-4. Petitioner also contends that, because he proceeded in his state habeas application pro se, he was not equipped to make all the appropriate claims. *Id.* Petitioner claims that, once he explained to the TCCA that he wished to raise additional grounds from the AMNT in his state habeas, he was not allowed. *Id.* Petitioner also reiterates his allegations that there was insufficient evidence of both his marriage and his paternity. *Id.* at 7. Finally, Petitioner argues that he raised this claim in his state habeas petition.

As an initial matter, Petitioner's assertion that the AMNT would have sufficed to raise his no evidence/insufficient evidence claim is simply incorrect. Nothing in the AMNT deals with any no evidence/insufficient evidence claim. SHCR-06 (#20-126) at 1316-19. The only claims raised in the AMNT are that Petitioner's rights were violated because the trial court "refused to allow Defendant himself to be heard," and that Petitioner received ineffective assistance of trial counsel due to nineteen separate alleged failures by counsel. *Id.* Nothing in the AMNT sets forth a claim of insufficient or no evidence to support the conviction.

Further, Petitioner did not raise these issues in his state habeas petition, despite his claims to the contrary. Petitioner asserted a claim of prosecutorial misconduct for securing a wrongful conviction without any legal evidence in violation of his due process rights. SHCR-06 (#20-122) at 24 (Ground Two). Petitioner claimed that the prosecution used materially false testimony and evidence to obtain his conviction, arguing that he was neither married to nor living with Complainant at the time of the offense and was not proved to be the father of her child. *Id.* at 40–43, 46. He also presented evidence to rebut such findings. *Id.* He argued that but for the false testimony, there was no evidence to support his conviction. *Id.* at 43, 46. The TCCA denied Petitioner relief without written order. SHCR-06 at Action Taken Notice (#20-128). Petitioner failed to assert a claim of insufficient or no evidence on direct appeal and his state habeas claim was brought under the distinct legal theory of prosecutorial misconduct. Where a "petitioner advances in federal court an argument based on a legal theory distinct from that relied upon in the state court, he fails to satisfy the exhaustion requirement." *Wilder*, 274 F.3d at 259 (citations omitted). Consequently, Petitioner's Claim 1 is unexhausted.

In Claims 2(a) and 2(b), Petitioner argues that his due process rights were violated when he was denied the right to have his amended motion for new trial properly filed, presented to the trial court, a hearing requested and held for disposition of that motion; and when he was denied an adequate and effective direct appeal with a full and complete appellate record. Petitioner asserts that his AMNT had not been properly filed in either the trial court or the court of appeals. Consequently, Petitioner asserts that he was prevented from raising "matters of self-defense, challenge the sufficiency of the State's evidence and charge, and to prove there existed no relevant relationship between the Petitioner, Complainant's family, or the household." Pet. (#1) at 9. Petitioner also contends that the failure to properly address the AMNT prevented him from having an effective direct appeal containing the AMNT as part of the appellate record. Respondent asserts that Petitioner failed to present these claims to the state courts either on direct appeal or in his state habeas applications.

Petitioner replies that he did exhaust these claims in ground four of his state habeas petition. A review of the record, however, shows Petitioner argued in that ground that counsel was ineffective for failing to properly file the AMNT and failing to ensure that it was a part of the appellate record. SHCR-06 (#20-122) at 28. That claim is a distinct legal theory of ineffective assistance of counsel, not due process. Where a "petitioner advances in federal court an argument based on a legal theory distinct from that relied upon in the state court, he fails to satisfy the exhaustion requirement." *Wilder*, 274 F.3d at 259 (citations omitted). Consequently, Petitioner's Claims 2(a) and 2(b) are unexhausted.

As a consequence of Petitioner's failure to exhaust these claims, Petitioner is procedurally barred from federal habeas corpus review on them. Even where a claim has not been reviewed by the state courts, this Court may find that claim to be procedurally barred. *Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991). If a petitioner has failed to exhaust his state court remedies and the state court to which he would be required to present his unexhausted claims would now find those claims to be procedurally barred, the federal procedural default doctrine precludes federal habeas corpus review. *Id.*; *see Nobles v. Johnson*, 127 F.3d 409, 423 (5th Cir. 1997) (finding unexhausted claim, which would be barred by the Texas abuse-of-the-writ doctrine if raised in a successive state habeas petition, to be procedurally barred).

Here, if the Court required Petitioner to present his unexhausted claims to the Texas Court of Criminal Appeals to satisfy the exhaustion requirement, the Texas Court of Criminal Appeals would find his claim to be procedurally barred under the Texas abuse-of-the-writ doctrine. *See Fearance v. Scott*, 56 F.3d 633, 642 (5th Cir. 1995) ("[T]he highest court of the State of Texas announced that it would as a 'rule' dismiss as abuse of the writ 'an applicant for a subsequent writ of habeas corpus rais[ing] issues that existed at the time of his first writ.'") (quoting *Ex Parte Barber*, 879 S.W.2d 889, 892 n. 1 (Tex. Crim. App. 1994). Further, the Texas habeas corpus statute prohibits a Texas court from considering the merits of, or granting relief based on, a subsequent writ application filed after the final disposition of an inmate's first application unless he demonstrates the statutory equivalent of cause or actual innocence. Tex. Code Crim. Proc. Ann. art. 11.07 § 4 (West Supp. 1996). In order for this Court to reach the merits of his claim, Petitioner "must establish cause and prejudice from [the court's] failure to consider his claim." *Fearance*, 56 F.3d at 642 (citations omitted).

Petitioner argues that he should overcome the exhaustion and procedural bar issues because of the alleged evidence that he was not married to the Complainant and not the father of J.A. While his state habeas claims were premised on a different legal argument, even assuming that the argument was the same, he fails to show how any of the alleged evidence would have succeeded in overturning his conviction.

Petitioner testified at trial and introduced himself as Complainant's spouse, and he referred to her as his wife in testimony. 7 RR 218, 244. Petitioner also spoke about the two of them going to marriage counseling. 7 RR 227. Petitioner also had addressed letters to her "To my lovely wife of mine." 7 RR 7 (Exhibit Index). Furthermore, Petitioner did not deny he was J.A.'s father. 7 RR 218–90. In fact, on the stand, Petitioner testified that Complainant "is the mother of my child." 7 RR 243. Regarding the older child, Petitioner did clarify that "he calls me dad." 7 RR 235. He acknowledged that he had taken responsibility for T.W. 7 RR 263. Petitioner failed to make any such clarification about J.A. Petitioner wholly fails to address the ways in which his own testimony at trial contradicted his alleged claims regarding marriage and parenthood except to claim that he did not understand the law at the time of his testimony.

Petitioner has failed to demonstrate that the prosecutor introduced any false evidence or testimony, or that the prosecutor did so knowingly, regarding Petitioner's relationship to Complainant or to J.A. Moreover, "a party generally may not invite error and then complain thereof." *United States v. Baytank (Houston), Inc.*, 934 F.2d 599, 606 (5th Cir. 1991). Petitioner's own testimony perpetuated the impression that he was married to Complainant and that he was J.A.'s father.

These claims are unexhausted and procedurally barred and Petitioner fails to establish cause and prejudice to overcome the bar. Petitioner's Motion for Stay and Abeyance (#27) which requests that this Court stay his habeas petition so that he might return to state court to exhaust his claims is dismissed as futile because, as discussed above, such an action would be procedurally barred under the Texas abuse-of-the-writ doctrine. Accordingly, 28 U.S.C. § 2254, as amended by the AEDPA, bars habeas corpus relief on Petitioner's Claim 1, that there was insufficient or no evidence to support his conviction, and Claim 2(a) and 2(b), that his due process rights have been violated.

D. Hybrid-Representation Due Process Claim

After his conviction was affirmed on appeal, Petitioner asserts that he retained counsel to file a PDR. Pet. (#1) at 9. Petitioner claims that sometime thereafter he "lost contact with counsel." *Id.* Because of this, Petitioner was concerned about the expiration of the time to file a PDR. *Id.* Therefore, Petitioner claims that he "filed a skeletal PDR" pro se, with the intention that the filing would alert his counsel. *Id.* Petitioner claims that the plan worked and counsel was made aware. However, Petitioner claims that counsel should have then had Petitioner's "skeletal PDR" stricken so that counsel could file a more complete PDR. *Id.* Instead, Petitioner asserts that counsel took no such action. Subsequently, the TCCA refused Petitioner's PDR. *Id., see also* Notice (#20-48). Petitioner argues that the TCCA's decision to rule on Petitioner's pro se PDR "deprived him of his right to have a PDR filed by the guiding hand of counsel." *See id., see also* SHCR-05 (#20-112) at 44. Petitioner also argues that the TCCA's decision was in violation of their own precedent forbidding hybrid representation. Petitioner contends that the TCCA should have rejected his pro se PDR filing so that a counseled PDR could have been filed on his behalf.

Respondent argues that there is no constitutional right to counsel on discretionary review. In addition, Respondent explains that Petitioner was not denied the opportunity to file and have a PDR considered by the TCCA. Respondent argues that Petitioner made the choice to file his PDR without his counsel, and that he cannot demonstrate that he was denied his due process rights.

When Petitioner raised this claim in his state habeas petition, the trial court found that any assertion that Petitioner was not advised of his right to seek discretionary review was without merit because he did file a PDR that was considered and refused by the TCCA. SHCR-05 (#20-112) at 222. The TCCA denied relief on the trial court's findings and the TCCA's independent review of the record. SHCR-05 (#117).

Petitioner argues in reply that he hired counsel to file his PDR. However, Petitioner asserts that counsel was ineffective, and thus Petitioner was deprived of "the right to have his PDR filed by the guiding hand of professional counsel." This argument, however, is the precise reason that Petitioner's due process claim regarding hybrid representation fails. Petitioner does not have the right to have a PDR filed by counsel. *In re Charles*, 697 S.W.3d 912, 914 (Tex. Crim. App. 2024) (explaining that "a criminal defendant has no right to the assistance of counsel for purposes of actually pursuing discretionary review"). Thus, the TCCA's consideration of Petitioner's pro se PDR was not a violation of his due process rights.

Having independently reviewed the entire state court record, this Court finds nothing unreasonable in the state court's application of clearly established federal law or in the state court's determination of facts in light of the evidence. Accordingly, the Court is of the opinion that 28 U.S.C. § 2254, as amended by the AEDPA, bars habeas corpus relief on Petitioner's Claim 2(c) that he was denied his due process right to have retained counsel file a PDR on his behalf.

E. Ineffective Assistance of Trial Counsel

1. AEDPA Impact

In Claim 3, Petitioner claims that his trial counsel was ineffective for failing to failing to obtain firm command of relevant facts and law; introduce birth records; obtain a marriage certificate; obtain jail calls; and use complainant's handwritten letter for impeachment. Petitioner raised these same issues in his state habeas application and the Court of Criminal Appeals rejected the merits of Petitioner's claims. As such, the AEDPA limits the scope of this Court's review to determining whether the adjudication of Petitioner's claims by the state court 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.

2. Standard of Review

The Sixth Amendment to the United States Constitution guarantees citizens the assistance of counsel in defending against criminal prosecutions. U.S. CONST. amend VI. Ineffective assistance of counsel claims are analyzed under the well-settled standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*, a petitioner cannot establish a violation of his Sixth Amendment right to counsel unless he demonstrates (1) counsel's performance was deficient and (2) this deficiency prejudiced the petitioner's defense. *Id.* at 687-88, 690. The Supreme Court has emphasized that "[s]urmounting *Strickland's* high bar is never an easy task." *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010).

When determining whether counsel performed deficiently, courts "must be highly deferential" to counsel's conduct and a petitioner must show that counsel's performance fell beyond the bounds of prevailing objective professional standards. *Strickland,* 466 U.S. at 687-89. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689. Counsel is "'strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'" *Burt*, 571 U.S. at 22 (quoting *Strickland*, 466 U.S. at 690). To demonstrate prejudice, a petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. Under this prong, the "likelihood of a different result must be substantial, not just conceivable." *Richter*, 562 U.S. at 112 (citing *Strickland*, 466 U.S. at 693). A habeas petitioner has the burden of proving both prongs of the *Strickland* test. *Wong v. Belmontes*, 558 U.S. 15, 27 (2009).

Ineffective assistance of counsel claims are considered mixed questions of law and fact and are analyzed under the "unreasonable application" standard of 28 U.S.C. § 2254(d)(1). *Gregory v. Thaler*, 601 F.3d 347, 351 (5th Cir. 2010). When the state court has adjudicated the claims on the merits, a federal court must review a petitioner's claims under the "'doubly deferential'" standards of both *Strickland* and § 2254(d). *Woods v.*

Etherton, 578 U.S. 113, 117 (2016) (quoting *Cullen v. Pinholster*, 563 U.S. 170, 190 (2011)). In such cases, the "pivotal question" is not "whether defense counsel's performance fell below *Strickland*s standard," but whether "the state court's application of the *Strickland* standard was unreasonable." *Richter*, 562 U.S at 101.

Factual determinations by a state court are presumed correct absent clear and convincing evidence to the contrary, and a decision adjudicated on the merits in a state court and based on a factual determination may not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state court proceeding. *See Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003). The presumption of correctness is especially strong when the trial court and the habeas court are one in the same, as they are in this case. *Clark v. Johnson*, 202 F.3d 760, 764 (5th Cir. 2000)

Petitioner contends that his trial counsel failed to "gain a firm command of the facts and law governing the case" and did not "properly investigate matters relating to the State's charge." Pet. (#1) at 11. Specifically, Petitioner contends that counsel did not have "a firm understanding of what it means to be a family member" under Texas law. *Id.* Petitioner further asserts that counsel failed to seek the marriage records that would show Petitioner was married to a woman other than Complainant at the time of the assault. *Id.* at 12. Petitioner also claims that his counsel failed to use J.A.'s birth records to show that Petitioner and Complainant agreed not to acknowledge Petitioner as J.A.'s father. *Id.* Petitioner argues these facts would have rebutted the State's charge of assault family violence. Petitioner also complains that counsel failed to retrieve jail calls in which Complainant allegedly admitted to being the first aggressor and failed to use a letter sent by Complainant in which she "declar[ed] Petitioner acted in self-defense." *Id.* Petitioner contends that trial counsel's performance caused him to be unlawfully charged and illegally convicted.

Respondent argues that Petitioner fails to explain what, exactly, trial counsel did not know or understand about the law or facts of the case. With respect to the facts and evidence relevant to Petitioner's alleged familial relationships to Complainant and J.A., Petitioner was in the best position to inform counsel of his marital status and any information that could call into question J.A.'s paternity. Respondent asserts that Petitioner fails to show that counsel was deficient or that Petitioner was prejudiced by any failure to use J.A.'s birth records as evidence. Respondent also contends that trial counsel cannot be held ineffective for failing to introduce evidence that his client failed to disclose. Petitioner does not contend that he informed trial counsel he was married to another woman at the time of the offense, nor that he provided counsel with sufficient information to locate the marriage certificate. Respondent asserts that the alleged jail calls were, in fact, sought by counsel and obtained in large part. The trial record shows that counsel issued a subpoena for the calls, but that several months were missing at first. Eventually counsel was provided with all of the jail calls. Thus, Respondent asserts that counsel was not deficient. Lastly, Respondent asserts that Complainant's letters were not exculpatory or particularly helpful as impeachment. Consequently, counsel was not deficient in failing to use them.

Petitioner replies that if counsel had actually "gained a firm command of the law and facts" then Petitioner "would not currently be incarcerated." Petitioner complains that

Respondent's arguments are only speculation and should not be credited. Petitioner claims that it is wholly unknown why counsel failed to utilize J.A.'s birth records. Petitioner also contends that he only learned, while in prison, about the law on marriage and the establishment of paternity. Petitioner contends that, had he known the law at the time of his testimony, he would not have testified as he did. Petitioner also states that he "hereby recants his statements declaring any existence of a family relationship between him and Complainant's family." Petitioner also indicates that he now "recants all statements relating to a marriage relationship between him and Complainant during trial."

As discussed above, despite not completing an acknowledgment of paternity, Petitioner testified at trial and did not dispute that J.A. was his son. Complainant likewise testified that Petitioner was J.A.'s father. Petitioner also testified that Complainant was "the mother of my child." Petitioner had every opportunity to clarify in his testimony if there were any doubt that J.A. was his biological child, but he did not. Petitioner's assertion that he now "recants" his statements is without effect. Petitioner testified under oath at trial and the jury considered his testimony in their determination of a verdict. Petitioners knowledge of the law on paternity at the time of his testimony is irrelevant. Furthermore, Petitioner has not shown any prejudice from counsel's failure to introduce the acknowledgment of paternity form.

Similarly, Petitioner testified at trial that he was "the spouse" of Complainant, referred to Complainant as his wife, testified about he and Complainant going to marriage counseling, and also had letters addressed to her as his "lovely wife." Petitioner even referred to Complainant as his wife at pretrial hearings. 2 RR 6 (#20-5). In addition, even if proof of Petitioner's marriage to someone else could have eliminated one avenue for finding familial ties, a jury could have found a parent-child relationship or a shared household relationship. Further, questioning Petitioner regarding his marriage and paternity status after he had introduced himself as Complainant's spouse and J.A.'s father may have tarnished Petitioner's character or called his credibility into question. Counsel's decision was not unreasonable strategy.

As for the jail calls, counsel did obtain them, even if they were not utilized at trial. Petitioner fails to allege specifically what the calls would have revealed and how they would have altered the outcome of trial. When trial counsel broached the issue of the jail calls during trial outside of the jury's presence, she made it clear that she did not believe that it would be strategically wise to use the calls, or perhaps that they would be excluded as hearsay. Counsel said she "did not believe that we were going to head that direction, but it is [counsel's] understanding that that is exactly what [Petitioner] wants to do at this point." 7 RR 207 (#20-10). Petitioner believes that the calls could have been used to support his claim of self-defense, but Petitioner fails to establish how counsel could have used the calls or what statements in the calls would have been favorable to his case.

Lastly, regarding Complainant's letters that Petitioner alleges could have impeached her credibility or given credence to Petitioner's claims of self-defense, Petitioner fails to establish how counsel could have used them or what statements in the letters were favorable. Indeed, the letters are not Complainant's admissions of anything, but instead appear to set out potential arguments Petitioner could make in his defense. Complainant lists "what to point out to your attorney" and emphasizes that "because of marks and bruising on my body and the neighbors' involvement" it would be difficult to claim that nothing happened. Pet. Exh. 6 (#1-2 at 12-13). Complainant then lists the possible defenses Petitioner could use for each of his charges, even suggesting that Petitioner acted in self-defense because he was "unable to react appropriately and you perceived imminent danger because you were on drugs." *Id.* Nowhere in the letter are there any facts to suggest that Complainant was the first aggressor.

Counsel has a duty to make reasonable investigations. *Strickland*, 466 U.S. at 691. "A defendant who alleges a failure to investigate on the part of his counsel must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the trial." *United States v. Green*, 882 F.2d 999, 1003 (5th Cir. 1989). Whether or not counsel's investigation is reasonable may critically depend on the information provided by the defendant and the defendant's own strategic choices concerning his representation *Ransom v. Johnson*, 126 F.3d 716, 723 (5th Cir. 1997). As such, trial counsel cannot be held ineffective for failing to introduce evidence that his client failed to disclose. *Johnson v. Cockrell*, 306 F.3d 249, 252–53 (5th Cir. 2002).

Petitioner fails to show that counsel's actions were prejudicial. To demonstrate prejudice, a petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. Under this prong, the "likelihood of a different result must be substantial, not just conceivable." *Richter*, 562 U.S. at 112 (citing *Strickland*, 466 U.S. at 693). Petitioner fails to meet his burden to show that there was a substantial likelihood of a different result. Even assuming that counsel could have made different decisions at trial, Petitioner has failed to meet his burden to show not only that counsel failed to meet the *Strickland* standard, but that the state court's application of the *Strickland* standard was unreasonable. *See Richter*, 562 U.S at 101. Having independently reviewed the entire state court record, this Court finds nothing unreasonable in the state court's application of clearly established federal law or in the state court's determination of facts in light of the evidence. Accordingly, the Court is of the opinion that 28 U.S.C. § 2254, as amended by the AEDPA, bars habeas corpus relief on Petitioner's claim that he received ineffective assistance of trial counsel.

F. Ineffective Assistance of Appellate Counsel

Petitioner asserts his appellate counsel, E. Alan Bennett, was ineffective for failing to file the amended motion for new trial; refusing to ensure the amended motion for new trial was included in the appellate record; and refusing to remedy the procedural error after remand to the trial court. Petitioner asserts his appellate counsel, Tate N. Saunders, was ineffective for failing to obtain firm command of relevant facts and law; failing to submit evidence in support of amended motion for new trial; failing to file a writ of prohibition and mandamus; failing to provide Petitioner notice of his right to file a PDR; and failing to file a counseled PDR and have Petitioner's pro se PDR stricken.

As with claims of ineffective assistance of trial counsel, claims of ineffective assistance of appellate counsel are reviewed under the two-part *Strickland* test. *Loden v. McCarty*, 778 F.3d 484, 501 (5th Cir. 2015). Therefore, Petitioner must show his appellate attorney's performance was deficient and the deficient performance prejudiced his defense. *Dorsey v. Stephens*, 720 F.3d 309, 319 (5th Cir. 2013). To prove prejudice, a petitioner must show that but for counsel's deficient performance "he would have prevailed on appeal." *Smith v. Robbins*, 528 U.S. 259, 286 (2000). Furthermore, to demonstrate deficiency he must show that "counsel unreasonably failed to discover [and raise] nonfrivolous issues." *Id.* Appellate counsel "need not (and should not) raise every nonfrivolous claim, but rather may select among them in order to maximize the likelihood of success on appeal." *Id.* (citing *Jones v. Barnes*, 463 U.S. 745 (1983)).

Petitioner asserts that Bennett failed to file an amended motion for new trial (AMNT) and failed to ensure it was included in the appellate record. Petitioner then contends that Bennett refused to remedy that error on remand when it was discovered that the AMNT had never been made part of the trial record. Petitioner asserts that the absence of the AMNT in the record prevented him from having an effective appeal which would have resulted in a different outcome.

Petitioner fails to explain how any issues surrounding the AMNT would have resulted in a different outcome in his case. The only claims raised in the AMNT were an allegation that Petitioner's due process rights were violated because the trial court "refused to allow Defendant himself to be heard" and a multitude of ineffective assistance of counsel claims. AMNT (#20-126) at 1316. Petitioner asserts that if the AMNT had been handled differently, he would have won his ineffectiveness of counsel claims in the state court, his offense would have been reclassified, and he would have wholly avoided prison. However, as discussed above, Petitioner's ineffectiveness of trial counsel claims do not satisfy his burden under *Strickland*. Thus, even if the claims had been heard earlier in state court, they would not have altered the ultimate result.

Bennett provided Petitioner a file-stamped copy of the amended motion for new trial he had filed raising claims Petitioner requested him to raise. *See* Pet's Exh. 7, 10 (#1-2). When the amended motion was not included in the appellate record, Bennett explained that it would not affect his appeal because counsel was not pursuing those claims on appeal. *Id.* Bennett also explained at length why it is not practical to raise IAC claims in a motion for new trial or on direct appeal. *Id.* Bennett's explanation reflects that his failure to ultimately press the amended motion for new trial once it was filed was the result of reasonable legal strategy. Appellate counsel "need not (and should not) raise every nonfrivolous claim." *Smith*, 528 U.S. at 286 (citing *Jones*, 463 U.S. 745). Petitioner cannot demonstrate that he was prejudiced by Bennett's failure to ensure the amended motion for new trial was placed in the trial court's case file, to present the amended motion for new trial, or to pursue the amended motion for new trial on remand. Petitioner has not demonstrated that the amended motion for new trial would have resulted in a new trial, especially in light of the Court of Appeals' Opinion agreeing that such claims are better raised in a state habeas proceeding, and the TCCA's denial of such claims when they were raised in the state habeas proceeding. In short, Petitioner's claims from the AMNT were eventually heard by the TCCA in his state habeas case. The TCCA denied him relief. Petitioner fails to show that Bennett's handling of the AMNT would have altered this decision.

Petitioner asserts that Saunders provided ineffective assistance of appellate counsel by failing to gain a firm command of the facts and law of the case, failing to submit to the courts the documents on which Petitioner relies for his ineffective assistance of trial counsel claims, failing to seek a writ of prohibition and mandamus to allow for additional grounds to be developed during abatement, failing to provide Petitioner with the notice required by Texas Rule of Appellate Procedure 48.4, and failing to have Petitioner's pro se PDR struck and instead file an attorney-drafted PDR in its place.

Petitioner fails to explain how Saunders failed to gain a firm command of the facts and law of the case. At the motion for new trial hearing at which Saunders represented Petitioner, Saunders was not going to be able to introduce evidence to support the motion, because the trial court had not granted a motion to file a late motion for new trial and the motion that had been filed had been overruled by operation of law. See SHCR-05 (#20-112) at 126–28. Saunders did, however, ensure that the record reflected that the amended motion for new trial had been timely filed, that the motion would be made a part of the trial clerk's record and part of the appellate record, which it had not been, and clarified that the motion was denied because it was overruled by operation of law. *Id.* Saunders explained on the record that he "need[ed] to make a record of that, because that will become a basis – another basis of ineffective counsel when we get to the habeas stage of things." *Id.* at 128. Petitioner fails to show that Saunders was deficient or that Petitioner was prejudiced by his failure to introduce documents in support of a motion that had already been overruled as a matter of law.

Petitioner has also not demonstrated that Saunders was deficient for failing to seek to develop additional grounds during abatement or for failing to raise new claims on appeal. Petitioner himself filed a motion for leave to file an application of writ of prohibition and mandamus, which was denied by the TCCA. SHCR-03 Action Taken (#20-

103). Petitioner has not shown that such a motion would have been successful if Saunders had filed it. Nor has Petitioner demonstrated that but for counsel's failure to develop and raise new claims on appeal, there is a reasonable probability that he would have prevailed on appeal. *Smith*, 528 U.S. at 286.

Because there is no federal constitutional right to counsel to prepare and file a PDR, Petitioner's claim that Saunders was ineffective for failing to move to strike Petitioner's pro se PDR and file one in its place is completely without merit. *See Wainwright v. Torna*, 455 U.S. 586, 587 (1982) (holding that because there was no right to counsel on discretionary review, a petitioner cannot claim ineffective assistance of counsel for failing to perfect a PDR). In addition, while Texas state law requires counsel to inform defendants of their rights to file a pro se PDR, federal habeas courts do not review state law errors. *See Trevino v. Johnson*, 168 F.3d 173, 180 (5th Cir. 1999). Consequently, Petitioner's claim that Saunders failed to provide him with notice required under state law is not cognizable on federal habeas review. Furthermore, because Petitioner timely filed his pro se PDR, he is unable to demonstrate prejudice. The trial court determined that Petitioner had failed to demonstrate any prejudice regarding his complaints of Saunders's performance relating to the PDR proceedings. When Petitioner raised these claims in his state writ, the TCCA denied relief without written order. Petitioner fails to show that these decisions were unreasonable. Petitioner fails to plead any facts showing that the actions of either of his appellate attorneys were unreasonable or that any of his alleged claims would have prevailed. Having independently reviewed the entire state court record, this Court finds nothing unreasonable in the state court's application of clearly established federal law or in the state court's determination of facts in light of the evidence. Accordingly, the Court is of the opinion that 28 U.S.C. § 2254, as amended by the AEDPA, bars habeas corpus relief on Petitioner's claim that he received ineffective assistance of appellate counsel.

CONCLUSION

Petitioner's application for writ of habeas corpus is denied.

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). Pursuant to Rule 11 of the Federal Rules Governing Section 2254 Cases, effective December 1, 2009, the district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant.

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.* "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, reasonable jurists could not debate the dismissal or denial of Petitioner's section 2254 petition on substantive or 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) (citing *Slack*, 529 U.S. at 484). Accordingly, the Court shall not issue a certificate of appealability.

It is **ORDERED** that Petitioner's Second Motion for Reconsideration for the Production of Records (#26), Second Motion for Court's Reconsideration On Its Own Initiative (#28) and Second Motion for Evidentiary Hearing (#29) are **DENIED**.

It is further **ORDERED** that Petitioner's Motion for Stay and Abeyance (#27) is **DISMISSED**.

It is further **ORDERED** that Petitioner's application for writ of habeas corpus is **DENIED**.

It is further **ORDERED** that all other pending motions are **DISMISSED**.

It is finally **ORDERED** that a certificate of appealability is **DENIED**.

SIGNED on May 28, 2025

ALAN D ALBRIGHT
UNITED STATES DISTRICT JUDGE

Appendix

B

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

December 17, 2025

Lyle W. Cayce
Clerk

No. 25-50523

DANNY WAYNE ALCOSER,

Petitioner—Appellant,

versus

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

Respondent—Appellee.

Application for Certificate of Appealability
the United States District Court
for the Western District of Texas
USDC No. 6:24-CV-621

UNPUBLISHED ORDER

Before SOUTHWICK, DUNCAN, and ENGELHARDT, *Circuit Judges*.

PER CURIAM:

Danny Wayne Alcoser, Texas prisoner # 02187801, seeks a certificate of appealability (COA) to appeal the district court's denial of his 28 U.S.C. § 2254 application, challenging his conviction for assault family violence. Alcoser argues that the district court erred in (i) dismissing certain of his claims as unexhausted and procedurally defaulted; (ii) denying his motion for a stay and abeyance; (iii) applying deference to the state court's decision denying his state habeas petition under § 2254(d) and applying the presumption of correctness to the state court's findings under § 2254(e)(1); and (iv) denying his motions for an evidentiary hearing and for the production of various memoranda purportedly generated by the Texas Court of Criminal Appeals. Alcoser also reprises certain of his ineffective-assistance claims he raised in the district court.

As a preliminary matter, Alcoser fails to reprise in his COA pleadings the remainder of his ineffective-assistance claims and his claim that his due process rights were violated when he was deprived of the right to have retained counsel file a petition for discretionary review. He has, accordingly, abandoned those claims. *See Hughes v. Johnson*, 191 F.3d 607, 613 (5th Cir. 1999).

A COA may issue only if the applicant has made "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). When the district court denies relief on the merits, an applicant must show that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). When the district court denies relief on procedural grounds, a COA should issue if an applicant establishes, at least, that jurists of reason would find it debatable whether the application states a valid claim of the denial of a constitutional right and whether the district court was correct in its procedural ruling. *Id.*

Alcoser fails to meet the requisite standard. *See id.* His motion for a COA is DENIED. His motion to certify a question of state law to the Texas Court of Criminal Appeals is likewise DENIED.

As Alcoser fails to make the required showing for a COA, we do not reach the issue whether the district court erred by denying his motions for an evidentiary hearing and for discovery. *See United States v. Davis*, 971 F.3d 524, 534-35 (5th Cir. 2020).

A True Copy
Certified order issued Jan 07, 2026

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

Appendix

C

United States Court of Appeals for the Fifth Circuit

No. 25-50523

United States Court of Appeals
Fifth Circuit
FILED
February 12, 2026
Lyle W. Cayce
Clerk

DANNY WAYNE ALCOSER,

Petitioner—Appellant,

versus

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

Respondent—Appellee.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 6:24-CV-621

ON MOTION FOR RECONSIDERATION
AND REHEARING EN BANC

UNPUBLISHED ORDER

Before SOUTHWICK, DUNCAN, and ENGELHARDT, *Circuit Judges*.

PER CURIAM:

The motion for reconsideration is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (FED. R. APP. P. 40 and 5TH CIR. R. 40), the petition for rehearing en banc is DENIED.

Appendix

D

DANNY WAYNE ALCOSER

ASSAULT FAMILY VIOLENCE WITH A PRIOR-COUNT I (ENHANCED) (F3 – F2); ENDANGERING A CHILD-COUNT II (FS); INTERFERENCE WITH 911 CALL-COUNT III (MA); EVADING ARREST-COUNT IV (MA)

D.O.B.: [redacted]

Code: 22.01, Texas Penal Code - Count I
Code: 22.041, Texas Penal Code-Count II
Code: 42.062, Texas Penal Code-Count III
Code: 38.04, Texas Penal Code-Count IV

CID#: 103441

TRN#: 9199347180-A006 Count I
9199347180-A004 Count II
9199347180-A002 Count III
9199347180-A001 Count IV

SID#: 5799338

Bond Amount:

FILED
2017 NOV 29 AM 9:49
JON R. GIMBLE
DISTRICT CLERK
MCLENNAN CO. TX.

Cause No. 2016-1261-C1 SUPERCEDING INDICTMENT

TRUE BILL OF INDICTMENT

IN THE NAME AND BY AUTHORITY OF THE STATE OF TEXAS:

The Grand Jurors of McLennan County, State of Texas, duly organized at the July Term, A.D., 2017, of the 54th Judicial District Court of said county, upon their oaths do present that **DANNY WAYNE ALCOSER**, hereinafter called Defendant, on or about the 15th day of May, 2016, in said county and state did then and there intentionally, knowingly, and recklessly cause bodily injury to **URSULA WOESSNER**, a member of the defendant's family or a member of the defendant's household, as described by Section 71.003 or 71.005 of the Texas Family Code, by choking or strangling her, and before the commission of the charged offense, the Defendant had previously been convicted of an offense under Chapter 22 of the Texas Penal Code, against a member of the Defendant's family or a member of the Defendant's household, as described by Section 71.003 or 71.005, to-wit: on the 20th day of May, 2014, in the County Court at Law of Hill County, Texas, in cause number M0693-13,

COUNT II

And it is further presented in and to said Court that the said **DANNY WAYNE ALCOSER,** in the County of McLennan and State aforesaid on or about the 16th day of May, 2016, did then and there intentionally, knowingly, recklessly, or with criminal negligence, engage in conduct that placed J[redacted] A[redacted], a child younger than fifteen (15) years of age, in imminent danger of death, bodily injury, or physical or mental impairment, by pushing the child's mother into or against the bathtub while the child's mother was holding the child, and the Defendant did not voluntarily deliver the child to a designated emergency infant care provider under Section 262.302 of the Texas Family Code,

COUNT III

And it is further presented in and to said Court that the said **DANNY WAYNE ALCOSER,** in the County of McLennan and State aforesaid on or about the 16th day of May, 2016, did then and there knowingly prevent or interfere with the ability of **URSULA WOESSNER** to place an emergency telephone call to a law enforcement agency,

COUNT IV

And it is further presented in and to said Court that the said **DANNY WAYNE ALCOSER,** in the County of McLennan and State aforesaid on or about the 30th day of May, 2016, did then and there intentionally flee from **AUSTIN EVANS,** a person the Defendant knew was a peace officer who was attempting lawfully to arrest or detain the Defendant,

ENHANCEMENT ALLEGATION

And it is further presented in and to said Court that prior to the commission of the offense alleged in Count I, on the 29th day of September, 2005, in the Western District of Texas, Waco Division, in Cause Number W-05-CR-086(01), the said **DANNY WAYNE ALCOSER**, was convicted of a felony, to wit: Possession with Intent to Distribute Methamphetamine, and said conviction became final prior to the commission of the offense alleged in Count I,

AGAINST THE PEACE AND DIGNITY OF THE STATE.

Abelino Reyna
Criminal District Attorney
McLennan County, Texas

Foreman of the Grand Jury

Appendix

E

THE VENIRE: (No response.)

MS. LaBORDE: If you can do that, I think you can be fair. If you've already made up your mind based on something that's happened to you, that's what we're -- that's what we're trying to find out.

Okay. I just want to ask from the beginning. This is the number one reason why people can't serve in a case like this. Has this touched you in some way, and will that affect you, so when I'm talking about domestic violence, I'm talking about some relationship to the offender by blood or marriage, so it's -- it's -- it's a -- it's a spouse, it's a brother, it's an uncle, it's an aunt, or it's people who are living together. They're common law married. That's what I'm talking about when I'm talking about domestic violence. Okay, so it can -- it doesn't have to be married couples. It doesn't have to be dating couples. It could be, you know, Grandpa and an aunt. It could be lots of different things, so we're talking about violence in the house, violence in an intimate relationship.

Okay, so is there anyone here -- and I'm just going to go row-by-row -- who knows anyone who's been the victim of physical abuse as a child or an adult, and is there anyone here who is themselves

Appendix

F

A. I have Tristen and Jeremiah.
Q. And how old is Tristen?
A. Tristen will be seven at the end of -- I mean eight at the end of this month, and Jeremiah is two.
Q. And who is the father of Tristen?
A. My late husband, Michael Woessner.
Q. And so you said that he's deceased. Is that right?
A. Yes.
Q. And then who is the father of Jeremiah, your two-year-old, your baby?
A. Danny Alcoser.
Q. And when you came into court today, when we're talking about Danny Alcoser, did you see him in court this morning?
A. Yes.
Q. And can you identify him, so that we all know who we're talking about when we're talking about Danny, by an article of clothing he's wearing or the color he's wearing?
A. Brown.
MS. MASSEY: Let the record reflect the witness has identified the Defendant, Your Honor.
THE COURT: It shall. Thank you.
Q. (BY MS. MASSEY) So, Ursula, do you remember

Appendix

G

the house and moving back in?

A. The plan -- okay. The plan was to put our family back together, and I couldn't do it by myself.

Q. Right, so there was a plan that you and he had discussed that he was going to be moving back in?

A. As soon as we were allowed to. He was not allowed to live at the house at the time.

Q. The period of time that he'd been gone, were you upset with him about that period of time of being apart?

A. Okay. My last living grandparent died --

Q. Ma'am, I'm going to ask you to stick with the questions.

A. -- and he disappeared on me.

Q. Ma'am --

MS. LABORDE: Judge, she asked her was she upset he left. She's allowed to say all the reasons she was upset.

THE COURT: I agree.

MS. SCARAMUCCI: It's a "yes" or "no" question, Judge.

MS. LaBORDE: It is not a "yes" or "no" question.

THE COURT: Overruled.

Q. (BY MS. SCARAMUCCI) Is it safe to say that

Q. Okay, and you're aware of what an excited utterance is, correct, that she was still under the influence of that event when she was telling you what happened. Is that right?

A. Yes, yes, ma'am.

Q. Okay. Can you tell us -- when she was in that state, what did she tell you had happened?

A. In that state she said that she had gotten into a verbal altercation -- well, first of all, Danny wasn't living -- Danny Alcoser wasn't living there at the time. He had came over, and they got into a verbal altercation. That ensued into a physical altercation where he was in her face to the point to where they got in a -- they got into a shoving match.

Q. Was that inside the house?

A. Yes, already inside the house. She had let him inside. They had got into the argument there.

Q. So your understanding was this was a time they were living apart?

A. Yes.

Q. Okay, at least for that day --

A. For that day.

Q. -- but he had returned? Okay.

A. Yes.

Q. She had let him in?

Appendix

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Appendix

I

DECLARATION AND REGISTRATION OF INFORMAL MARRIAGE McLENNAN COUNTY, TX

MALE

Prefix	First Name	Middle Name	Last Name	Suffix
	DANNY	WAYNE	ALCOSER	

SSN	Address	City	State Zip
460-59-0685	707 E WALNUT	HILLSBORO	TX 76645-

Date of Birth	Place of Birth City	County	State
7/8/1975	SAN ANTONIO	BEXAS	TX

ID Type	ID No.	Age
DRIVERS LICENSE	TX#09021715	30

The other party is not related to me as an ancestor or descendant, by blood or adoption; a brother or sister, of the whole or half blood or by adoption; or a parent's brother or sister of the whole or half blood; or a son or of a brother or sister of the whole or half blood or by adoption. TRUE [X] FALSE [ ]

FEMALE

Prefix	First Name	Middle Name	Last Name	Suffix	Maiden Name
	AMBER	JADE	THURMAN		THURMAN

SSN	Address	City	State Zip
454-85-2455	707 E WALNUT	HILLSBORO	TX 76645-

Date of Birth	Place of Birth City	County	State
11/2/1986	WACO	MCLENNAN	TX

ID Type	ID No	Age
BIRTH CERTIFICATE	#265906-1986	18

The other party is not related to me as an ancestor or descendant, by blood or adoption; a brother or sister, of the whole or half blood or by adoption; or a parent's brother or sister of the whole or half blood; or a son or of a brother or sister of the whole or half blood or by adoption. TRUE [X] FALSE [ ]

DECLARATION AND OATH I solemnly swear (or affirm) that we, the undersigned, are married to each other by virtue of the following facts: on or about *November 4, 2003*, we agreed to be married, and after that date we lived together as husband and wife and in this State we represented to others that we were married. Since the date of marriage to the other party I have not been married to any other person. This declaration is true and the information in it which I have given is correct.

SIGNATURE OF MALE

SIGNATURE OF FEMALE

Subscribed and sworn to before me on 7/25/2005

J.A. "Andy" Harwell County Clerk

McLENNAN COUNTY, TX

by Deputy

B MARTINEZ

Recorded in Vol. No. ________ Page ________

Informal Marriage Records.

License No. 01-0026-2005

McLENNAN COUNTY, TX

cut along the line

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IN THE CIRCUIT COURT OF BENTON COUNTY, ARKANSAS
DOMESTIC RELATIONS DIVISION

AMBER THURMAN PLAINTIFF

VS. CASE NO.: 04DR-21-

DANNY ALCOSER DEFENDANT

COMPLAINT FOR DIVORCE

Comes now the Plaintiff, AMBER THURMAN by and through her attorney Sue Ann V. Newman and for her Complaint for Divorce against the Defendant DANNY ALCOSER, states as follows to wit:

1. That the Plaintiff is a resident of Benton County, Arkansas, and has been for more than sixty (60) days prior to the filing of this action, and that her cause of action for divorce hereinafter started accrued and existed within the State of Arkansas within five (5) years last past.
2. That the Defendant, DANNY ALCOSER, is a resident of Texas.
3. That the parties to this action were married on or about November 4, 2004 and separated on or about November 19, 2005.
4. That the Plaintiff is entitled to a divorce under the provisions of Arkansas law, Ark. Code Ann. §9-12-301 (1987).
5. That there are no minor children of the marriage.
6. That there is no property or debt of the marriage.

VERIFICATION

STATE OF ARKANSAS)
) SS
COUNTY OF BENTON)

COMES now the undersigned, being duly sworn on oath, and I state that I have read the above and foregoing document, and that the facts, matters and allegations therein contained are true and correct to the best of my knowledge and belief.

DATED this 12 day of July, 2021.

AMBER THURMAN

SUBSCRIBED AND SWORN TO before me, the undersigned Notary Public, on this 12 day of July, 2021.

Brandy D. Bolinger
Notary Public

My Commission Expires:

OFFICIAL SEAL - #12700197
BRANDY D. BOLINGER
NOTARY PUBLIC-ARKANSAS
BENTON COUNTY
MY COMMISSION EXPIRES: 02-13-27

BAYLOR SCOTT & WHITE MEDICAL CENTER - HILLCREST
100 Hillcrest Medical Blvd.
WACO TX 76712

ALCOSER,JEREMIAH Q
MRN: 7321350
DOB: 7/22/2015, Sex: M
Adm: 7/22/2015, D/C: 7/24/2015

PARENT SURVEY ON THE ACKNOWLEDGMENT OF PATERNITY (AOP)

Mandated by Law

This Survey should be completed after the AOP has been signed or a person has declined to sign the AOP.

Hospital/Entity *Name & Location:* Baylor Scott & White Hillcrest Medical Center Entity Code: 3650
Child's Name: Jeremiah Q. Alcoser Date of Birth: 7/22/15

Please read and INITIAL the following:

STATEMENTS	MOTHER	FATHER
1. I was given the opportunity to sign an Acknowledgment of Paternity.	UKW	DA
2. I choose NOT to complete an Acknowledgment of Paternity.	UKW	DA
If you initial #2, please skip questions 3 through 8.		
3. I was made aware that I could have a DNA test done before I signed the AOP.	~~UKW~~	
4. I was given written and oral information regarding the benefits, rights and responsibilities of an AOP, an explanation of those rights and responsibilities, and information about child support.	~~UKW~~	
5. The biological father who signed this AOP will have all legal rights and duties of a parent. This may include the legal responsibility for financial and medical support of the child named in this AOP.		
6. If I change my mind, a Rescission of Acknowledgment (VS-158) must be filed within the earlier of 60 days of signing the Acknowledgment of Paternity or the date a proceeding involving the child is initiated before a court.		
7. After 60 days, I may challenge the AOP in court and must prove fraud, duress, or material mistake of fact.		
8. I was given a completed copy of the AOP with the benefits, rights, and responsibilities on the back.		

Mother's Printed Name: Ursula K Woessner ID Type: ID Bracelet
Mother's Signature: [signature] Phone Number:
Father's Printed Name: Danny Alcoser ID Type: TX DL.
Father's Signature: [signature] Phone Number:
Certified Staff Signature: [signature] Date: 7-23-15

Presumed Father: After you read the Denial of Paternity and Change of Mind sections of the rights and responsibilities, please read the statement below and initial.

After I have signed the Denial of Paternity and it has been filed with the Vital Statistics Unit, my legal rights and responsibilities to this child will be terminated. If I change my mind, a Rescission of Acknowledgment of Paternity (VS-156) can be filed within the earlier of 60 days of signing the Acknowledgment of Paternity or the date a proceeding involving the child is initiated before a court. After 60 days, I may challenge the AOP in court and must prove fraud, duress, or material mistake of fact. Initial here ______

Presumed Father's Printed Name: ______ ID Type: ______
Presumed Father's Signature: ______ Phone Number: ______
Certified Staff Signature: ______ Date: ______

September 2011 Form 179

See Blank form on page ~~X~~ UKW A (next page)

PARENT SURVEY ON THE ACKNOWLEDGEMENT OF PATERNITY (AOP)

Mandated By Law

This Survey should be completed after the AOP has been signed or a person has declined to sign the AOP.

Hospital/Entity Name & Location: ______________________ Entity Code: ____________

Child's Name: ______________________ Date of Birth: ____________

Please read and INITIAL the following:

STATEMENTS	MOTHER	FATHER
1. I was given the opportunity to sign an Acknowledgment of Paternity.	____	____
2. I choose NOT to complete an Acknowledgment of Paternity	____	____

If you initial #2, please skip questions 3 through 8.

3. I was made aware that I could have a DNA test done before I signed the AOP.	____	____
4. I was given written and oral information regarding the benefits, rights and responsibilities of an AOP, an explanation of those rights and responsibilities, and information about child support.	____	____
5. The biological father who signed this AOP will have all legal rights and duties of a parent. This may include the legal responsibility for financial and medical support of the child named in this AOP.	____	____
6. If I change my mind, a Rescission of Acknowledgment of Paternity (VS-158) must be filed within the earlier of 60 days of signing the Acknowledgment of Paternity or the date a proceeding involving the child is initiated before a court.	____	____
7. After 60 days, I may challenge the AOP in court and must prove fraud, duress, or material mistake of fact.	____	____
8. I was given a completed copy of the AOP with the benefits, rights, and responsibilities on the back.	____	____

Mother's Printed Name: ______________________ ID Type: ____________

Mother's Signature: ______________________ Phone Number: ____________

Father's Printed Name: ______________________ ID Type: ____________

Father's Signature: ______________________ Phone Number: ____________

Certified Staff Signature: ______________________ Date: ____________

Presumed Father: (After you read the Denial of Paternity and Change of Mind sections of the rights and responsibilities, please read the statement below and initial.)

After I have signed the Denial of Paternity and it has been filed with the Vital Statistics Unit, my legal rights and responsibilities to this child will be terminated. If I change my mind, a Rescission of Acknowledgment of Paternity (VS-158) can be filed within the earlier of 60 days of signing the Acknowledgment of Paternity or the date a proceeding involving the child is initiated before a court. After 60 days, I may challenge the AOP in court and must prove fraud, duress, or material mistake of fact.

Initial Here: ______

Presumed Father's Printed Name: ______________________ ID Type: ____________

Presumed Father's Signature: ______________________ Phone Number: ____________

Certified Staff Signature: ______________________ Date: ____________