UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

MICHAEL CHANDLER,	§	
	§	
Petitioner,	§	
	§	
v.	§	**Civil No. SA-16-CA-330-FB**
	§	
LORIE DAVIS, Director,	§	
Texas Department of Criminal Justice,	§	
Correctional Institutions Division,	§	
	§	
Respondent.	§	

MEMORANDUM OPINION AND ORDER

Before the Court are Petitioner Michael Chandler's petition for federal habeas corpus relief pursuant to 28 U.S.C. § 2254 (Docket Entry 1) and subsequent supplements (Docket Entries 4-5), as well as Respondent Lorie Davis's response thereto (Docket Entry 19).

In August 2013, petitioner was convicted of two counts of indecency with a child by exposure and was given consecutive sentences of life imprisonment and ninety-eight years. He now challenges the constitutionality of his state court conviction and sentences, arguing that (1) his trial attorney was ineffective for failing to object to illegally obtained evidence; (2) his sentences were improperly enhanced because the prior convictions used for enhancement were too remote; and (3) the evidence was legally insufficient to support the verdict because he was at work at the times the offenses occurred. Having reviewed the record and pleadings submitted by both parties, the Court concludes that petitioner is not entitled to relief because these claims have not been presented to the state court for review and are thus unexhausted and procedurally barred from federal habeas review.

I. Background

On August 3, 2011, petitioner was indicted by a Comal County grand jury on three counts of indecency with a child by exposure for exposing his genitals on three separate occasions to his fifteen-year-old stepdaughter. After being acquitted on the first count, petitioner was convicted on the second and third counts and was sentenced by the trial court to life and ninety-eight years and ten months, respectively. *State v. Chandler*, No. CR2011-365 (207th Dist. Ct., Comal County, Tex. Aug. 1, 2013). On direct appeal to the Third Court of Appeals, petitioner argued (1) the evidence was legally insufficient because it did not support the allegations in the indictment that the offenses took place in Comal County; (2) the trial court erred in admitting into evidence "certain search terms" found in the internet history of his home computer; and (3) his trial counsel was ineffective because he failed to object to the introduction of these search terms as irrelevant. The court of appeals rejected these claims and affirmed petitioner's conviction. *Chandler v. State*, No. 03-13-582-CR (Tex. App.—Austin, Oct. 1, 2014, pet. ref'd). Almost five months later, the Texas Court of Criminal Appeals refused petitioner's petition for discretionary review. *Chandler v. State*, No. PD-1447-14 (Tex. Crim. App. Feb. 25, 2015).

On October 28, 2015, petitioner filed a state habeas corpus application challenging his convictions and sentence. *Ex parte Chandler*, No. 78,068-03 (Tex. Crim. App.) (Docket Entry 18-23). In this application, he (1) accused the trial judge of bias, misconduct, and indifference; and (2) asserted that he was denied due process and effective assistance of counsel based on appointed counsel's failure to consider a plea offer that was allegedly offered prior to trial. (Docket Entry 18-23 at 14-18, 23-37). Petitioner's state habeas petition was denied without written order by the Texas Court of Criminal Appeals on January 13, 2016. (Docket Entry 18-

19). The instant federal habeas petition was placed in the prison mail system on March 18, 2016, and file-marked on April 1, 2016. (Docket Entry 1 at 10).

II. Analysis

Pursuant to § 2254(b)(1)(A), habeas corpus relief may not be granted "unless it appears that the applicant has exhausted the remedies available in the courts of the State." Under this exhaustion doctrine, a state prisoner must exhaust available state remedies, thereby giving the State the opportunity to pass upon and correct alleged violations of its prisoners' federal rights, before seeking federal habeas corpus relief. *Baldwin v. Reese*, 541 U.S. 27, 29 (2004); *Henry v. Cockrell*, 327 F.3d 429, 432 (5th Cir. 2003) ("Absent special circumstances, a federal habeas petitioner must exhaust his state remedies by pressing his claims in state court before he may seek federal habeas relief."). In order to satisfy the exhaustion requirement, a claim for relief must have been presented to the highest court of the state for review. *Richardson v. Procunier*, 762 F.2d 429, 431-32 (5th Cir. 1985). In Texas, the Texas Court of Criminal Appeals is the highest state court with jurisdiction to review the validity of a state criminal conviction. *Id.*

Further, a petitioner must "fairly present" all of his claims to the state courts prior to raising them in a federal habeas corpus application. *Duncan v. Henry*, 513 U.S. 364, 365 (1995); *Picard v. Connor*, 404 U.S. 270, 275 (1971). In other words, the state court must have been presented with the same facts and legal theory upon which an assertion is based in order for a claim to be exhausted. *Picard*, 404 U.S. at 275-77. The exhaustion requirement is not met if the petitioner presents new legal theories or factual claims in his federal habeas petition. *Anderson v. Harless*, 459 U.S. 4, 6-7 (1982); *Riley v. Cockrell*, 339 F.3d 308, 318 (5th Cir. 2003) (holding that "[t]he federal claim must be the 'substantial equivalent' of the claim brought before the State court."). "Where 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, 259-60 (5th Cir. 2001) (finding that it "is not enough . . . that a somewhat similar state-law claim was made.") (citation omitted).

Here, petitioner has not presented the state court with any of the allegations now brought forth in his federal habeas corpus petition. Although a petitioner need not spell out each syllable of a claim to the state court for the claim to have been "fairly presented," *Riley*, 339 F.3d at 318, a comparison of the claims Mr. Chandler did raise in his state court proceedings with the claims from the instant federal petition reveals the claims to be wholly distinct. Thus, petitioner failed to exhaust available state remedies and has presented this Court with new claims which the state court never had the opportunity to review.

Nevertheless, despite petitioner's failure exhaust his state court remedies, his new claims are also subject to denial by this Court as procedurally defaulted. *Gray v. Netherland*, 518 U.S. 152, 161 (1996) (finding the exhaustion requirement to be satisfied "if it is clear that [the habeas petitioner's] claims are now procedurally barred under [state] law."); *Castille v. Peoples*, 489 U.S. 346, 351 (1989); *Graham v. Johnson*, 94 F.3d 958, 969 (5th Cir. 1996) ("exhaustion is not required if it would plainly be futile"). As the Fifth Circuit recently explained,

> Failure to exhaust state remedies and state procedural default are related but distinct concepts. If a claim is merely unexhausted but not procedurally defaulted, then, absent waiver by the state, a district court must either dismiss the federal petition or stay the federal proceeding while the petitioner exhausts the unexhausted claim in state court. But if a claim is both unexhausted and procedurally defaulted, then a district court may deny the federal petition outright. A claim is both unexhausted and procedurally defaulted where "the prisoner fails to exhaust available state remedies, and the state court to which the prisoner would have to present his claims in order to exhaust them would find the claims procedurally barred...."

Norman v. Stephens, 817 F.3d 226, 231 n.1 (5th Cir. 2016) (*quoting Kittelson v. Dretke,* 426 F.3d 306, 315 (5th Cir. 2005)). Thus, although the normal rule is that a claim is procedurally

barred from federal review only when the last state court to consider the claim expressly and unambiguously applied a state procedural bar, such a rule does not apply to cases where a petitioner has failed to exhaust state remedies and the state court to which he would be required to present the claim would now find the claims procedurally barred. *Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991).

As discussed previously, petitioner failed to exhaust state court remedies with regard to each of the claims raised in his federal habeas petition. Should this Court require him to return to state court to satisfy the exhaustion requirement with the Texas Court of Criminal Appeals, however, that court would find the claims procedurally barred under the abuse of the writ doctrine found in Article 11.07 § 4 of the Texas Code of Criminal Procedure. The Fifth Circuit has consistently held that where a petitioner raises claims in federal court that have not previously been presented to the state courts, and Article 11.07 § 4 would apply to foreclose review of the claims if presented in a successive state habeas application, such is an adequate state procedural bar foreclosing federal habeas review of the claims. *See, e.g., Bagwell v. Dretke*, 372 F.3d 748, 755-56 (5th Cir. 2004) (holding a petitioner procedurally defaulted by failing to "fairly present" a claim to the state courts in his state habeas corpus application); *Smith v. Cockrell*, 311 F.3d 661, 684 (5th Cir. 2002) (holding unexhausted claims were procedurally barred); *Jones v. Johnson*, 171 F.3d 270, 276-77 (5th Cir. 1999) (same).

In the instant case, "the procedural bar which gives rise to exhaustion provides an independent and adequate state-law ground for the conviction and sentence, and thus prevents federal habeas corpus review of the defaulted claim[.]" *Gray*, 518 U.S. at 162 (barring claim on basis that claim would be barred in state court if it were presented there); *Nichols v. Scott*, 69 F.3d 1255, 1280 (5th Cir. 1995) (same). Consequently, petitioner is precluded from federal

habeas review unless he can show cause for the default and resulting prejudice, or demonstrate that the court's failure to consider his claim will result in a "fundamental miscarriage of justice." *Coleman*, 501 U.S. at 750-51; *Barrientes v. Johnson,* 221 F.3d 741, 758 (5th Cir. 2000). Petitioner has made no attempt to demonstrate cause and prejudice for his failure to raise these claims in state court. Nor has he made any attempt to demonstrate that the Court's dismissal of these claims will result in a "fundamental miscarriage of justice." Thus, circuit precedent compels the denial of these claims as procedurally defaulted.

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). 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).

If a district court rejects a petitioner's constitutional claims as procedurally defaulted, the petitioner must demonstrate "that jurists of reason would find it debatable whether the petition states a valid claim of a denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Gonzales v. Thaler*, 565 U.S. 134, 140-41 (2012) (quoting *Slack v. McDaniel,* 529 U.S. 473, 484 (2000)); *Bridgers v. Dretke,* 431 F.3d 853, 860 (5th Cir. 2005). In that case, a COA should issue if the petitioner *not only* shows that the lower court's procedural ruling is debatable among jurists of reason, but also makes a substantial showing of the denial of a constitutional right.

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 has procedurally defaulted the issues presented in his federal habeas petition. As such, a COA will not issue.

IV. Conclusion and Order

By failing to present his allegations to the Court of Criminal Appeals for review either on direct appeal or in his state habeas application, Mr. Chandler has failed to exhaust state court remedies as required by 28 U.S.C. § 2254(b)(2). But even if he were given the opportunity to return to state court, there is no question that the Court of Criminal Appeals would dismiss any new application as successive pursuant to Texas Code of Criminal Procedure Article 11.07, Section 4. Because such unexhausted claims are considered to be procedurally defaulted from federal habeas review, petitioner is precluded from federal habeas relief.

Thus, for the foregoing reasons, it is **ORDERED** that:

1. Federal habeas corpus relief is **DENIED** and petitioner's § 2254 petition (Docket Entry 1) is **DISMISSED WITH PREJUDICE**;

2. No Certificate of Appealability shall issue in this case; and

3. All other pending motions, if any, are **DENIED** as moot.

SIGNED this 25th day of July, 2017.

FRED BIERY
UNITED STATES DISTRICT JUDGE