

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

TEDDIE WAYNE DAVENPORT #1936067	§	
	§	
	§	6:16-CV-480-RP
v.	§	6:16-CV-481-RP
	§	6:16-CV-482-RP
	§	6:16-CV-483-RP
LORIE DAVIS	§	

ORDER

Before the Court are Petitioner’s Applications for Habeas Corpus Relief under 28 U.S.C. § 2254,¹ Respondent’s Response (#10), and Petitioner’s Reply (#17). Petitioner, proceeding pro se, has paid the filing fee. For the reasons set forth below, the undersigned finds that Petitioner’s application for writ of habeas corpus should be denied.

STATEMENT OF THE CASE

A. Petitioner’s Criminal History

According to Respondent, the Director has lawful and valid custody of Petitioner pursuant to judgments and sentences of the 77th District Court of Limestone County, Texas. Petitioner was charged by indictment in four separate causes with a total of four counts of aggravated assault of a public servant, burglary of a building, and evading arrest. 278 CR 183-84; 279 CR 182-83; 280 CR 4; 281 CR 6.² Following a consolidated trial in all causes, the jury found Petitioner not guilty of two

¹ Petitioner filed four Applications for Habeas Corpus Relief under 28 U.S.C. § 2254 in case numbers 6:16-CV-480, 481, 482, and 483. These were consolidated on February 1, 2017 (#6).

²“CR” refers to the Clerk’s Record on appeal preceded by the last three digits of the appellate cause number and followed by the page number(s). “RR” refers to the Reporter’s Record of Davenport’s consolidated trial, preceded by the volume number and followed by the page number(s). SHCR refers to *Ex parte Davenport*, Nos. 84,256-01 through -04, followed by the writ number and the page number(s).

of the aggravated assault counts and guilty of the other two aggravated assault counts, the burglary count, and the evading arrest count. 278 CR 245-46; 279 CR 226-27; 280 CR 64-65; 281 CR 213-14. The jury assessed punishment of fifty years of imprisonment for each of the aggravated assault counts and ten years of imprisonment for both the burglary and evading arrest counts. *Id.*

Petitioner appealed his conviction and on April 13, 2015 and April 27, 2015, the Seventh Court of Appeals affirmed. *Davenport v. State*, Nos.07-14-00278-CR, 07-14-00279-CR, 466 S.W.3d 308 (Tex. App.–Amarillo, Apr. 27, 2015); *Davenport v. State*, Nos.07-14-00280-CR, 07-14-00281-CR, 2015 Tex. App. LEXIS 3605 (Tex. App.–Amarillo, Apr. 13, 2015). Petitioner did not file a petition for discretionary review in the Texas Court of Criminal Appeals (TCCA), nor did he petition the Supreme Court for a writ of certiorari.

Petitioner then filed state applications for writ of habeas corpus on October 30, 2015. *See* SHCR-01 at 262; SHCR-02 at 262; SHCR-03 at 99; SHCR-04 at 248. The Texas Court of Criminal Appeals denied the applications without written order on the findings of the trial court without a hearing on June 29, 2016. SHCR (#13-4; 13-18; 14-8; 15-2). Petitioner filed his federal petitions on December 27, 2016.

B. Factual Background

The Seventh Court of Appeals summarized the facts of the case as follows:

On October 5, 2013, appellant and his confederate, Richard Fraser, set out to steal a welding machine and other items from a country weekend home owned by Donald Jones. Unknown to appellant and his cohort was the fact that two Texas Department of Parks and Wildlife Game Wardens, Trent Marker and Michael Serbanic, were in that part of Limestone County looking for a poacher who was suspected of hunting from the roadway out of season. The Game Wardens set up surveillance at a rural location in Limestone County. During this surveillance, they noticed a vehicle driving very slowly toward them with the lights off. After repositioning their vehicle, they watched as the vehicle went toward Jones's home.

Initially, the Game Wardens did not know who owned the home and, indeed, speculated that it might be the home of appellant's father. However, while observing appellant and his associate, the Game Wardens heard glass break and surmised they were witnessing a burglary in progress.

As appellant began leaving the scene of the burglary, Warden Serbanic activated the emergency lights and siren on the Department of Parks and Wildlife pickup truck he was driving and attempted to block appellant's path away from the burglary site. It was at this time that appellant's truck and trailer collided with the vehicle containing the Game Wardens. Appellant maneuvered his vehicle away from the Game Wardens' pickup and there began a chase across rural parts of Limestone County.

The pursuit by the Game Wardens of appellant's vehicle reached speeds of 80 m.p.h. After an extended pursuit, there suddenly appeared an intense beam of light emanating from appellant's vehicle that was directed into the cab of the pursuing Game Wardens' vehicle. Warden Serbanic, who was driving the Parks and Wildlife pickup, was temporarily blinded by the beam of light. Serbanic then lost control of his vehicle, went off the road, and crashed into a tree. As a result of colliding with the tree, Warden Marker was seriously injured and Warden Serbanic suffered less serious injuries.

Appellant escaped the scene of the wreck and was hidden by friends. However, the next day, he was captured and subsequently indicted for a number of offenses. At the trial, appellant was convicted of two aggravated assaults on peace officers arising out of the beam of light causing Warden Serbanic to lose control of his vehicle and crash into the tree, one conviction for the injuries suffered by Warden Marker, and another for the injuries suffered by Warden Serbanic. Appellant was also convicted of burglary of a building and evading arrest or detention by motor vehicle. Appellant's counsel on appeal filed an *Anders* brief regarding the burglary and evading convictions, and those cases were disposed of by the Court in a separate opinion.

Appellant, as noted above, was acquitted on the other two charges of aggravated assault on a peace officer arising out of the initial collision.

Davenport, 466 S.W.3d at 309 (internal citations omitted).

C. Petitioner's Grounds for Relief

Petitioner raises the following grounds for relief:³

1. Appellate counsel was ineffective for failing to challenge the sufficiency of the evidence;
2. He was denied effective assistance of trial counsel because:
 - a. the court forced him to go to trial with an unprepared attorney;
 - b. counsel did not subject the State's case to a meaningful adversarial process;
 - c. counsel failed to object to the prosecutor's improper arguments; and
 - d. counsel assumed a role "as part of the prosecution team when it was time to put on a defense and also during closing arguments;"
3. The evidence was insufficient to support Petitioner's convictions.⁴

Pet. (#1) at 6, 11; Reply (#17) at 9-10.

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.

DISCUSSION AND ANALYSIS

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.*

³ Claims 2c and 2d were only raised in Petitioner's petitions challenging his convictions for aggravated assault and burglary of a building. The remaining claims were raised in each of Petitioner's four petitions.

⁴ Petitioner supplemented his original petition to add this claim on March 14, 2017.

Richter, 562 U.S. 86, 97–100 (2011). The Court noted that the starting point for any federal court in reviewing a state conviction is 28 U.S.C. § 2254, which states in part:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
- (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). The Court noted that “[b]y its terms § 2254(d) bars relitigation of any claim ‘adjudicated on the merits’ in state court, subject only to the exceptions in §§ 2254(d)(1) and (d)(2).”

Harrington, 562 U.S. at 98.

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 § 2254(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.* And even when a state court fails to state which of the elements in a multi-

part claim it found insufficient, deference is still due to that decision, because “§ 2254(d) applies when a ‘claim,’ not a component of one, has been adjudicated.” *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.*

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 is denied.

C. Sufficiency of the Evidence

Petitioner contends the evidence is legally insufficient to support his convictions. Petitioner added this claim in a supplement filed on March 14, 2017 (#9). The Court ordered Respondent to include any additional arguments related to the supplement in the response. Respondent did not, however, include any argument regarding sufficiency of the evidence in the response filed on April 11, 2017. Thus, although it appears from the record that Petitioner's sufficiency of the evidence claim is unexhausted, the Court will presume that Respondent is waiving that argument and the Court will address the claim on the merits.

Petitioner contends there is no evidence that he used a deadly weapon when evading arrest or that he used a deadly weapon in connection with the burglary of a building. *Id.* at 1-2. Relatedly, Petitioner contends that the evidence was insufficient to sustain his convictions for aggravated assault of a public servant because there was no evidence that he committed an assault or used or exhibited a deadly weapon. *Id.* at 3-5. Essentially, Petitioner asserts that, once the jury found him not guilty of aggravated assault for ramming the Game Warden's vehicle, the jury could not also have found sufficient evidence that he used or exhibited a deadly weapon as a part of any of his other convictions.

The standard for testing the sufficiency of evidence in a federal habeas review of a state court conviction is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). The evidence need not exclude every reasonable hypothesis of innocence or be completely inconsistent with every conclusion except guilt so long as a reasonable trier of fact could find that the evidence established guilt beyond a reasonable doubt. *United States v. Leahy*, 82 F.3d 624, 633 (5th Cir. 1996).

Petitioner does not indicate exactly what evidence may have been missing, instead focusing only on what he appears to allege are inconsistent verdicts from the jury. However, there is nothing inconsistent in the jury determining that the collision between the two vehicles was not aggravated assault, but the use of the spotlight was aggravated assault. Further, there is nothing inconsistent in the jury's determination that the collision was not aggravated assault, but that the vehicle or intense light were deadly weapons for purposes of the enhancements to the burglary and evading arrest convictions.

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. Petitioner's claim is nothing more than a disagreement with the jury's resolution of conflicts of evidence and credibility choices. After viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the crimes for which Petitioner was convicted beyond a reasonable doubt. Accordingly, Petitioner's claim does not warrant federal habeas relief.

D. Ineffective Assistance of Trial Counsel Claims

1. AEDPA Impact

Petitioner alleges his trial counsel was ineffective because (1) he was unprepared, (2) he did not subject the State's case to a meaningful adversarial process, (3) he failed to object to the prosecutor's improper arguments, and (4) he assumed a role "as part of the prosecution team when it was time to put on a defense and also during closing arguments." 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

Ineffective assistance of counsel claims are analyzed under the well-settled standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984):

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

Id. at 687. In deciding whether counsel's performance was deficient, the Court applies a standard of objective reasonableness, keeping in mind that judicial scrutiny of counsel's performance must be highly deferential. *Id.* at 686-689. "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. "Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* (citation omitted). Ultimately, the focus of inquiry must be on the fundamental fairness of the proceedings whose result is being challenged. *Id.* at 695-97. Accordingly, in order to prevail on a claim of ineffective assistance of counsel, a convicted defendant must show that (1) counsel's representation fell below an objective standard of reasonableness, and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 687.

3. Failure to Adequately Prepare

Petitioner alleges counsel was unprepared and, when the court denied a motion for continuance, the court effectively forced Petitioner to go to trial with an unprepared attorney. In Petitioner's response he asserts that this claim was not adjudicated on the merits by the TCCA. Resp. (#17) at 10. While this would mean that his claim was unexhausted and procedurally barred, the Court has reviewed the state court record and it is clear that Petitioner raised the claim of counsel's unpreparedness in his state habeas application and his claim was rejected. *See* Order (#13-14) at 2. Therefore the Court will review it on the merits.

Petitioner essentially asserts that the trial court forced him to go to trial with counsel that had made the court aware he was not prepared and that this "caused a total breakdown in the adversarial process." #17 at 12. Petitioner does not allege specific issues about which counsel was unprepared, but instead implies that the denial of a motion for continuance prevented counsel from being adequately prepared and thus counsel was generally ineffective throughout the trial process.

To the extent Petitioner is challenging the denial of a continuance, it is well settled in the Fifth Circuit that "[w]hen a denial of a continuance forms a basis of a petition for a writ of habeas corpus, not only must there have been an abuse of discretion but it must have been so arbitrary and fundamentally unfair that it violates constitutional principles of due process." *Schrader v. Whitley*, 904 F.2d 282, 288 (5th Cir. 1990) (quoting *Hicks v. Wainwright*, 633 F.2d 1146, 1148 (5th Cir. 1981) (citations omitted)); *see also Johnson v. Puckett*, 176 F.3d 809, 822 (5th Cir. 1999).

Prior to the commencement of trial, trial counsel explained to the trial court that he had been hospitalized for a period of four days and subsequently experienced a death in the family, which had limited his ability to prepare. 4 RR 12. Trial counsel also noted that Petitioner had requested a

change of venue earlier that same day, and trial counsel had not yet had time to research the issue. 4 RR 12. The trial court denied trial counsel's request for a continuance. 4 RR 12. Immediately before requesting the continuance, however, trial counsel had announced ready for trial on all charges. 4 RR 9-12.

The state habeas record shows that counsel conducted extensive discovery in this case, prepared and implemented a defensive theory at trial, and met with Petitioner multiple times in preparing for trial. The state habeas trial court entered written findings of fact which noted that trial counsel "was as prepared as a defense attorney could be in facing substantial evidence with no rebuttal evidence" and that "[t]he State's evidence of Applicant's guilt of Aggravated Assault, Evading Arrest, and Burglary was overwhelming." SHCR (#13-8) at 62. Despite that, Petitioner's allegedly unprepared counsel actually secured a *not guilty* verdict on two of the aggravated assault charges.

There is no indication that the trial court's decision to deny trial counsel's motion was "so arbitrary and fundamentally unfair that it violates constitutional principles of due process." *Schrader*, 904 F.2d at 288. Further, Petitioner fails to identify any particular actions that counsel took, or failed to take, as a result of his alleged unpreparedness or how the outcome of trial would have been altered if a continuance had been granted or counsel had been more prepared. Petitioner has not demonstrated what evidence further preparedness would have revealed or how it would have changed the outcome of his trial. *Green*, 882 F.2d at 1003. The Fifth Circuit has made clear that conclusory allegations of ineffective assistance of counsel do not raise a constitutional issue in a federal habeas proceeding. *Ross v. Estelle*, 694 F.2d 1008, 1012 (5th Cir. 1983). 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 was forced to go to trial with unprepared counsel due to the trial court's denial of a motion for continuance.

4. Failure to Subject the State's Case to a Meaningful Adversarial Process

In a claim that is largely duplicative of his claim regarding counsel's preparedness, Petitioner alleges counsel was ineffective because he was unprepared for trial; did not object to the State asking improper questions during voir dire; waived opening argument and presented no defensive theory at the beginning of trial; failed to show that State's witness Trey Davidson had a self-serving interest; had no defensive theory and instead placed Davenport on the stand to testify; conducted a direct examination of Petitioner that destroyed his credibility and presumption of innocence; and, did nothing to defend Petitioner during closing argument.

The record shows trial counsel did object during voir dire and that his objection was sustained. 4 RR 74. Further, the state habeas court made findings of fact explaining that counsel had a clear defense strategy and that defense counsel chose to make his opening statement at the end of the State's case in order to support that strategy. SHCR (#13-8) at 62. As the state habeas trial court found, "[g]iven the State's evidence, and Applicant's incorrect assumptions about his friends, this was a wise decision." *Id.* Petitioner's friends unexpectedly testified against him and Petitioner decided to testify on his own behalf, both factors that counsel attempted to account for in his strategy. Regarding Petitioner's decision to testify, trial counsel urged Petitioner not to testify and, at a hearing outside the presence of the jury, counsel discussed with Petitioner, under oath, the risks of testifying. 8 RR at 8-12. Petitioner confirmed that, despite the risks, he desired to testify. *Id.*

This Court must presume that factual determinations made by state courts are correct unless rebutted by clear and convincing evidence. The Texas Court of Criminal Appeals found no ineffective assistance of counsel violations and Petitioner fails to show how trial counsel's actions fell below an objective standard of reasonableness. 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 his counsel failed to subject the State's case to a meaningful adversarial process.

5. Failure to Object to Prosecutor's Improper Arguments

Petitioner asserts that counsel was ineffective for failing to object to the prosecutor's reference to "evidence outside the record" during closing argument including the prosecutor's discussion of his prior experience trying cases in which law enforcement officers were killed, the prosecutor's statements regarding Petitioner's use of methamphetamine and Petitioner's encounter with drug dogs, and the prosecutor's alleged bolstering of a State's witness's credibility. Pet. (#1) at 7, 12-13.

Counsel is not required to file frivolous motions or make frivolous objections. *Green v. Johnson*, 160 F.3d 1029, 1037 (5th Cir. 1998). And accordingly, "failure to make a frivolous objection does not cause counsel's performance to fall below an objective level of reasonableness." *Id.* (citing *Sones v. Hargett*, 61 F.3d 410, 415 n.5 (5th Cir. 1995)). The state habeas trial court found that the "argument of the State was not objectionable and certainly not reversible error." SHCR (#13-8) at 63. Further, Petitioner himself testified that he was taking drugs, including methamphetamine,

and that he was chased by drug dogs. 8 RR 25-26, 88. Even if Petitioner's proposed objections were not wholly frivolous, Petitioner has failed to show how he was prejudiced by the failure to object.

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 counsel on his failure to object.

6. Assuming Role as Part of Prosecution Team

Petitioner contends that trial counsel "abdicated his role as counsel and assumed the role as a part of the prosecutions team" because he "put petitioner on the stand" and because he "failed to do anything to act as an advocate in petitioner's defense" during closing argument. As explained above, the record demonstrates that it was Petitioner's decision to testify, and that trial counsel advised him *not* to take the stand. 8 RR 8-12. Petitioner appears to be upset that his counsel sought to mitigate punishment and provoke sympathy from the jury by discussing Petitioner's struggles. Considering the overwhelming evidence, this may well have been the best possible defense strategy. Petitioner wholly fails to put forth any evidence that he would not have been found guilty had trial counsel put forth a different argument in closing.

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 counsel "abdicated his role as counsel."

E. Ineffective Assistance of Appellate Counsel

Petitioner asserts his appellate attorney was ineffective for failing to challenge the sufficiency of the evidence supporting each of Petitioner's convictions. 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).

Petitioner first alleges that the jury cannot have found that he used a deadly weapon in committing aggravated assault, as charged, because there was no evidence that he was the one shining the light, and the jury was not instructed on law of parties. Petitioner further alleges that the jury cannot have found that he used a deadly weapon in committing burglary of a building or in evading arrest because he was acquitted of two counts of aggravated assault. Petitioner seems to argue that because the charges of aggravated assault of a public servant of which he was acquitted alleged that he used a motor vehicle as a deadly weapon, and the charges of burglary of a building and evading arrest of which he was convicted also alleged that he used a motor vehicle as a deadly weapon, his convictions for burglary of a building and evading arrest cannot be based on sufficient evidence.

Prejudice in the context of appellate counsel error requires the petitioner to demonstrate a reasonable probability that he would have prevailed on appeal. *Smith v. Robbins*, 528 U.S. 259, 285 (2000). Here, Petitioner fails to show that any unraised appellate claim would have been successful. As explained above, the evidence was sufficient to sustain Petitioner's convictions. Petitioner's claims regarding the sufficiency of the evidence are nothing more than a disagreement with the jury's

resolution of conflicts of evidence and credibility choices. Furthermore, the state habeas court rejected Petitioner's claims for similar reasons, and thus Petitioner has failed to demonstrate that appellate counsel was deficient for raising them. Petitioner also fails to explain how a different argument from appellate counsel would have altered the outcome of his appeal.

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.

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 the 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 therefore **ORDERED** that Petitioner’s Applications for Habeas Corpus Relief under 28 U.S.C. § 2254 are **DENIED**.

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

SIGNED on July 27, 2017.



ROBERT PITMAN
UNITED STATES DISTRICT JUDGE