

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ALEX WAYNE GRACE,	§	
Petitioner,	§	
	§	
v.	§	CIVIL ACTION NO: H-05-1845
	§	
DOUG DRETKE,	§	
Director of the Texas Department	§	
of Criminal Justice - Correctional	§	
Institutions Division,	§	
Respondent.	§	

MEMORANDUM AND RECOMMENDATION

The district court referred Alex Wayne Grace's petition for writ of habeas corpus pursuant to 28 U.S.C. §§ 2241 and 2254 to this court for report and recommendation. Respondent has filed a motion for summary judgment (Dkt. 12). The court recommends that respondent's motion be granted and Grace's petition be dismissed.

Background

Grace was convicted by a jury of aggravated robbery and on May 24, 2001 he was sentenced to life imprisonment. The First Court of Appeals affirmed Grace's conviction on February 13, 2003,¹ and his petition for discretionary review was refused on September 10, 2003. Grace filed an application for state writ habeas corpus on June 18, 2004, which was denied without written order on March 23, 2005. Grace exhausted his state court remedies and timely filed this federal application for writ of habeas corpus on May 18, 2005.

Grace contends that he was denied effective assistance of counsel because his attorney

¹ *Grace v. State*, No. 01-01-00804-CR (Tex. App. – Houston [1st Dist.] 2003, pet. ref' d).

failed to raise an issue regarding his competency to stand trial, failed to investigate and raise a diminished capacity or insanity defense, failed to present evidence of his mental health history during the punishment phase, and failed to object to a discovery ruling by the court. Grace also argues that the state wrongfully suppressed evidence of his mental health history.

Legal Standards

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) provides that an application for a writ of habeas corpus by 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 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. *See* 28 U.S.C. § 2254(d). With respect to the second of these, a determination of a factual issue made by a State court shall be presumed to be correct, and can only be rebutted by clear and convincing evidence.” 28 U.S.C. § 2254(e)(1).

Grace’s ineffective assistance of counsel claim involves mixed questions of law and fact and is reviewed under the “unreasonable application” prong of § 2254(d)(1). *Miller v. Dretke*, 420 F.3d 356, 360 n.8 (5th Cir. 2005). Where, as here, the state court denies habeas relief without a written opinion, the court assumes that the state court applied the proper clearly established federal law, and determines whether the ultimate decision was contrary

to or an objectively unreasonable application of that law. *Id.* at 360.

The Supreme Court has established a two-part test for determining ineffective assistance of counsel claims. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). To establish an ineffective assistance of counsel claim, a defendant must first show that his counsel's performance was "deficient." To do this, a defendant must point to specific errors "so serious that counsel was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment." *Id.* The court's scrutiny of counsel's performance is highly deferential; the court presumes that counsel's conduct falls within the wide range of reasonable professional assistance. *Miller*, 420 F.3d at 361.

Second, a defendant must demonstrate that his counsel's performance prejudiced his defense. *Id.* In other words, a defendant must show that "counsel's errors were so serious as to deprive the defendant of a fair trial." *Id.*; *see also United States v. Chavez*, 193 F.3d 375, 379 (5th Cir. 1999) ("the focus here is whether a reasonable probability exists that counsel's deficient performance affected the outcome and denied [the defendant] a fair trial.").

In establishing an ineffective assistance of counsel claim, a defendant cannot merely present conclusory allegations. *See Green v. Johnson*, 160 F.3d 1029, 1043 (5th Cir. 1998). Rather, the defendant must allege "specific facts" to support his claim. *Id.*

Analysis

A defendant is incompetent to stand trial if he does not have (1) sufficient present ability to consult with his attorney with a reasonable degree of rational understanding, or (2)

rational as well as factual understanding of the proceedings against him. TEX. CODE CRIM. PROC. ANN. art. 46B.003(a). The trial court must conduct a competency inquiry “if evidence of the defendant’s competency is brought to the attention of the court from any source.” *McDaniel v. State*, 98 S.W.3d 704, 710 (Tex. Crim. App. 2003).

In support of his claim, Grace has submitted a mental health services report made in 2002 while Grace was in TDCJ custody and a letter from his mother dated June 1, 2004. Neither document indicates that Grace’s mental health at the time of trial was such that he was unable to consult with his attorney or have a rational and factual understanding of the proceedings. The mental health evaluation, performed to assess Grace’s suitability for the Mentally Retarded Offender Program, concluded that Grace’s intellectual level was in the borderline intellectual range, his adaptive behavior was in the low average adaptive functioning range, his educational functioning was at kindergarten level in reading and spelling and second grade level in math, and he was moderately depressed, suspicious of others, with moderate unusual thoughts and mild guilt, but no other impairing psychopathology.² His mother’s handwritten letter recalls incidents from Grace’s childhood.

Grace’s trial counsel, Alan Percely, submitted an affidavit in the state habeas case stating that neither Grace nor Grace’s wife advised him of any mental health issues in Grace’s past. Percely further stated that he visited Grace on many occasions and had no difficulty communicating with him. Percely’s failure to raise Grace’s competency to stand trial was not objectively unreasonable.

² Appendix A to Grace’s memorandum.

Similarly, there is no evidence that indicates that Percely's performance was deficient because he did not raise an insanity or diminished capacity defense. An affirmative defense of insanity requires proof that a defendant did not know that his conduct was wrong as a result of a serious mental disease or defect. TEX. PEN. CODE ANN. § 8.01(a). At best, Grace's evidence shows a history of psychiatric treatment and a troubled past. This is not enough to support an insanity defense. Percely testified that nothing in his investigation led him to consider an insanity defense. Moreover, Texas law does not recognize a diminished capacity affirmative defense. *Jackson v. State*, 160 S.w.3d 568, 573 (Tex. Crim. App. 2005). Under certain circumstances, evidence of diminished capacity may be admitted to negate the *mens rea* element of a crime. Grace's evidence of his childhood mental health issues does not indicate that he was incapable of forming the requisite intent to commit robbery. The mental health evaluation Grace submitted affirmatively found that Grace was not mentally retarded. Percely's performance was not deficient due to the failure to assert a diminished capacity defense.

Grace further argues that Percely failed to object to the trial judge's rulings on discovery. It is unclear what evidence Grace contends should or should not have been discovered. The record reflects that Percely made a motion for discovery from the state, and the trial court granted most of his requests.³ There is no evidence that Percely's performance was deficient due to his failure to properly conduct discovery.

³ The trial court granted Percely access to certain documents but did not grant Percely's request that the state provide him copies.

Grace further argues that Percely's performance was deficient because he failed to raise Grace's mental health history during the punishment phase of the trial. The credible evidence is that Percely, despite many meetings with Grace, did not know about any mental health issues in Grace's past.⁴ The June 2004 letter from Grace's mother indicates that she told his lawyer that Grace had a "mental problem," but this assertion is not specific or detailed.⁵ In any event, there is no evidence that Grace's alleged treatment in a state mental hospital as a child, long before the events in issue, would have had any impact on his sentence. This is particularly true given Grace's lengthy criminal history. Again, The evidence does not support a finding that Percely's performance was deficient in this regard.

Finally, Grace appears to argue that the state violated its *Brady*⁶ obligations by failing to produce exculpatory evidence of his mental health history. To succeed on a *Brady* claim, Grace must establish that the state suppressed evidence or withheld evidence which was both favorable and material to the defense. *Jackson v. Johnson*, 194 F.3d 641, 648 (5th Cir. 1999). The state's duty does not extend to evidence or information already known to the defendant, or that he could have obtained by exercising reasonable diligence. *Brown v. Cain*, 104 F.3d 744, 750 (5th Cir 1994). Grace's mental health history was known to him. The evidence is that he did not bring his mental health history to the attention of counsel, and

⁴ Record, at 117-18.

⁵ Grace's mother and sister were present during the punishment phase, but chose not to testify. May 24, 2001 Trial Transcript, at 35-36.

⁶ *Brady v. Maryland*, 373 U.S. 83 (1963).

there is no evidence that the state knew of or had any material related to Grace's mental health history.

In sum, the state court's rejection of Grace's claims was not an unreasonable application of federal law nor was it based upon an unreasonable determination of the facts.⁷

Conclusion

The court recommends that respondent's motion for summary judgment (Dkt. 12) be granted and petitioner's application for writ of habeas corpus be dismissed. The court orders that Grace's request for an evidentiary hearing (Dkt. 14) is denied.

The court further finds that Grace has not made a substantial showing that he was denied a constitutional right or that it is debatable whether this court is correct in its procedural ruling. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Therefore, the court recommends that a certificate of appealability not issue.

The parties have ten days from service of this Memorandum and Recommendation to file written objections. Failure to file timely objections will preclude appellate review of factual findings or legal conclusions, except for plain error. *See* Rule 8(b) of the Rules Governing Section 2254 Cases; 28 U.S.C. § 636(b)(1)(C); FED. R. CIV. P. 72.

Signed at Houston, Texas on April 20, 2006.


Stephen Wm Smith
United States Magistrate Judge

⁷ An evidentiary hearing is not appropriate in this case. Grace has not shown that a new rule of constitutional law or newly discovered facts would change the result in this case. *See* 28 U.S.C. § 2254(e)(2).