

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

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| NORMAN SAXER, III, | § | |
| <i>Petitioner,</i> | § | |
| | § | CIVIL ACTION: H-06-1164 |
| v. | § | |
| | § | |
| NATHANIEL QUARTERMAN, | § | |
| Texas Department of Criminal Justice, | § | |
| Correctional Institutions Division, | § | |
| <i>Respondent.</i> | § | |
| | § | |

MEMORANDUM AND RECOMMENDATION

Norman Saxer III's application for a writ of habeas corpus pursuant to 28 U.S.C. §§ 2241 and 2254 has been referred to this magistrate judge for a report and recommendation. (Dkt. 3). Respondent has filed a motion for summary judgment. (Dkt. 16). The court recommends that Saxer's petition be denied and that respondent's motion be granted.¹

BACKGROUND

Saxer is currently a state prisoner, convicted of murder in the 410th District Court of Montgomery County, Texas, and sentenced to a term of fifty years. (Dkt. 16). The Court of Appeals for the Ninth District of Texas affirmed Saxer's conviction on August 29, 2003.

¹ Petitioner's request for evidentiary hearing must also be denied for failure to satisfy any of the prerequisites for such a hearing set by 28 U.S.C. § 2254(e)(2). His claims do not rely upon a new rule of constitutional law previously unavailable, nor upon a factual predicate that was not previously discoverable through the exercise of due diligence. Moreover, the facts underlying his claims do not establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have convicted him.

Saxer v. State, 115 S.W.3d 765, 772-82 (Tex. App.—Beaumont 2003, pet. denied). The Texas Court of Criminal Appeals (“TCCA”) denied a petition for discretionary review on May 19, 2004. *Id.* at 765. Saxer filed a writ petition in state trial court on June 17, 2005. *Ex parte Saxer*, Application No. 63,578-01, at 3. The state trial court forwarded the application to the TCCA, which denied relief without written order, explicitly adopting the findings of the trial court on March 15, 2006. Saxer filed his federal application for writ of habeas corpus on April 7, 2006.

STANDARD OF REVIEW

Saxer’s federal petition is subject to review under the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”). 28 U.S.C. § 2254. This section sets a highly deferential standard for evaluating state court rulings, demanding that state court decisions be given the benefit of the doubt. *Woodford v. Viscottie*, 537 U.S. 19, 24 (2002). Saxer may not obtain federal habeas corpus relief 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).

A decision is contrary to federal law if the 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 Court on a set of materially indistinguishable facts. *Hill v. Johnson*, 210 F.3d 481, 485 (5th Cir. 2000). Under an unreasonable application analysis, a federal court may still issue a writ of habeas corpus if the state court identifies the correct governing legal principle from the Court's decisions, but then unreasonably applies that principle to the facts of the petitioner's case. *Id.*

ANALYSIS

Saxer makes the following claims for relief in his federal habeas corpus petition (Dkt. 1), which was filed April 7, 2006: (A) ineffective assistance of counsel; (B) insufficient evidence to support his conviction; (C) various due process violations based on trial court error and the cumulative effect of all previously alleged errors.

A. Ineffective Assistance of Counsel

Saxer argues that his attorneys were ineffective because they (a) did not ask the members of the venire if they had previous knowledge of the case; (b) did not seek a change of venue; (c) did not ask appropriate questions about the effect of the September 11 terrorist attacks during voir dire; and (d) did not elicit essential evidence at trial.

To prevail on an ineffective assistance of counsel claim, a petitioner must prove both (1) deficient performance by his counsel and (2) prejudice to his defense so grave as to deprive him of a fair, reliable trial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Under the first prong, the petitioner must overcome the presumption "that trial counsel rendered adequate assistance and that the challenged conduct was the product of a reasoned

trial strategy,” *Wilkerson v. Collins*, 950 F.2d 1054, 1065 (5th Cir. 1992). In other words, reasonable jurists must not be in dispute over the trial counsel’s deficient performance. *See, e.g., Parr v. Quarterman*, 472 F.3d 245, 256 (5th Cir. 2006).

Under the second prong of *Strickland*, Saxer “must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694. Moreover, a petitioner must affirmatively prove prejudice; simply alleging prejudice will not suffice. *Armstead v. Scott*, 37 F.3d 202, 206 (5th Cir. 1994).

Applying the *Strickland* analysis, the state court determined that Saxer failed to prove that he received ineffective assistance of counsel. The TCCA denied Saxer’s claim of ineffective assistance of counsel and explicitly adopted the trial court’s findings and conclusion that the claim lacked merit.²

1. Pretrial Publicity

Saxer’s first two ineffective assistance of counsel claims relate to the newspaper

² An issue common to all of Saxer’s ineffective assistance of counsel claims is the credibility of trial counsel’s affidavit. The state court explicitly found the assertions made by trial counsel in their affidavit credible. *Ex parte Saxer*, at 210. “When...a trial court fails to render express findings on credibility but makes a ruling that depends upon an implicit determination that credits one witness’s testimony as being truthful, or implicitly discredits another’s, such determinations are entitled to the same presumption of correctness that they would have been accorded had they been made explicitly.” *Self v. Collins*, 973 F.2d 1198, 1214 (5th Cir. 1992). Saxer’s counsel, Bruce Green and Lydia Clay-Jackson, had “long practiced” in Montgomery County, and the trial court was “familiar with the[ir] effective performance[s].” *Ex parte Saxer*, at 210. The state court therefore acted reasonably when it made a determination that trial counsel’s affidavit was credible.

pretrial publicity of the murder and the case against Saxer. To support his claims, Saxer submitted copies of newspaper articles published by *The Courier* discussing the events surrounding Saxer's trial. According to Saxer, *The Courier* ran eleven articles on the case.³

Nonetheless, the pretrial publicity was not so inflammatory as to give rise to a presumption of prejudice and ineffective assistance of counsel. The state court explicitly found that the eleven newspaper articles discussing the murder and Saxer's trial were "unemotional and factual in nature." *Id.* at 210. Second, the pretrial publicity was not extensive, considering that five of the articles were published during June 2-13, 2000, the period right after the murder leading up to Saxer's arrest, three were published during the trial, and three were published after Saxer's conviction. *See Busby v. Dretke*, 359 F.3d 708, 726 (5th Cir. 2004) (finding that the pretrial publicity did not give rise to a presumption of prejudice because the newspaper coverage was "largely factual in nature" and the coverage was heaviest right after the murder but lightened up in the months preceding the trial); *see also Murphy v. Florida*, 421 U.S. 794, 802-03 (1975) (holding that pretrial publicity did not prejudice the defendant and observing that most of the newspaper articles at issue were run seven months before the jury was selected). The few articles published by *The Courier* coupled with its limited circulation do not rise to the level of pretrial publicity that automatically creates a presumption of prejudice.

³ *The Courier* had a circulation base of only about 10,500 subscribers in Montgomery County out of a total population base of 300,000 in the year 2000. *Ex parte Saxer*, at 200, 202, 210.

a. Failure to Properly Voir Dire the Jury Concerning Pretrial Publicity

i. Jury Bias

Saxer argues that counsel failed to properly voir dire the jury regarding pretrial publicity concerning his case because the venire was not asked whether it had outside knowledge about the case. Trial counsel's affidavit countered that the trial court had "sternly admonished" the venire about considering any outside media coverage and that, to avert the possibility that jurors would try to research what had been said about the case at the time the incident occurred, it was tactically a better decision to avoid specific voir dire questions on the effect of pretrial publicity. Additionally, counsel felt that the fifteen month time lapse between the original newspaper articles and the trial would work in their favor, in case any of the jury members had indeed seen something in print long ago. *Ex parte Saxer*, at 121. Based on the voir dire record, no juror stated that he could not decide the case based solely on the evidence presented. *Id.* at 209-10.

To prevail, the tactical decision made by Saxer's counsel to avoid voir dire questions on pretrial publicity would have to be so grave that it infected the entire trial with its unfairness. *See Crane*, 178 F.3d at 314. However, Saxer has merely alleged prejudice and not affirmatively proven it, as is required. *See Strickland*, 466 U.S. at 694. His argument refers only to the general pretrial atmosphere in Montgomery County. Saxer's argument that "the extensive media denied him a fair trial rests almost entirely upon the quantum of

publicity which the events received.” *Murphy*, 421 U.S. at 798. The eight news articles that jurors could have potentially read prior to Saxer’s conviction fall well short of a “trial atmosphere . . . utterly corrupted by press coverage.” *See Murphy*, 421 U.S. at 798. “[P]resumptive prejudice is only rarely applicable and is confined to those instances where the petitioner can demonstrate an extreme situation of inflammatory pretrial publicity that literally saturated the community in which his trial was held.” *Busby*, 359 F.3d at 725-26. Saxer’s case does not satisfy that standard.

ii. Jury Foreman Bias

Saxer provides no evidence that any jurors decided the case on anything but the merits. He does not show that the particular jurors selected for service in his case were biased against him, as one usually must do. *Busby*, 359 F.3d at 725 (citing *Mayola v. Alabama*, 623 F.2d 992 (5th Cir. 1980)). Saxer complains that the jury foreman was Jim Fredericks, an editor of *The Courier*, who he speculates had access to more details of Saxer’s case through having worked on articles relating to the incident or by conversation with fellow employees at the paper. “Extensive knowledge in the community of either the crimes or the putative criminal is not sufficient by itself to render a trial constitutionally unfair.” *Murphy*, 421 U.S. at 798. Only in the most unusual of cases will presumed prejudice be applicable. *Busby*, 359 F.3d at 725. Saxer has conclusorily alleged that the jury foreman *may* have been more familiar with this case than the average citizen, but fails to provide evidence showing that the jury foreman had such knowledge or was biased as a result. In fact, Saxer has

offered no proof that the jury foreman was an editor of the *Courier*. Therefore, Saxer's claim that counsel ineffectively handled the issue of pretrial publicity during voir dire must fail.

b. Failure to Seek Change of Venue Based on Pretrial Publicity

Saxer further argues that counsel should have sought a change of venue based on the pretrial publicity concerning his case. *Ex parte Saxer*, at 8-10. Supporting this claim, Saxer filed his own affidavit along with affidavits from his mother, Francesca Saxer, and two witnesses, John Liptrap and Mark Scriviner. Trial counsel stated in their affidavit that they monitored all pretrial publicity regarding Saxer's case from the time of the incident through the end of the trial and that they asked residents of Montgomery and Walker Counties whether they had heard of the case. *Ex parte Saxer*, at 121. However, Saxer responds that counsel failed to indicate in their affidavit "who counsel allegedly spoke to, how they found them, where they were located, or what questions they were asked." In addition, Saxer argues that counsel never discussed the possibility of a change of venue with him and that he never approved of counsel's decision not to seek a change of venue. However, Saxer's attorneys state that they discussed the venue issue "extensively... with the Defendant and his family." They explained they made a tactical decision not to seek a change in venue due in part to the likely alternative venues. *Ex parte Saxer*, at 121.

After discussing the issue with Saxer, counsel made the proper investigation into the impact of pretrial publicity in Saxer's case and made a tactical decision based on possible alternative venues not to seek a change of venue. *Ex parte Saxer*, at 210. Therefore,

counsel's decision not to seek a change of venue did not fall "below an objective standard of reasonableness. *Strickland*, 466 U.S. at 687-88.

2. Voir Dire Concerning the Effect of the September 11 Terrorist Attacks

Saxer further argues that his counsel failed to properly voir dire the jurors concerning the September 11 terrorist attacks on their ability to give him a fair trial. Saxer's trial began six days after the attacks, and he claims that his counsel was ineffective because they asked only one voir dire question beyond the trial judge's commentary and single question on the terrorist attacks. Saxer states, "[T]he effects of such an attack, especially at a time when we did not know what might be coming next, was to make people more likely to convict a person accused of a violent crime. The prejudice is that, in a close case, the failure to remove jurors with a hidden agenda, was likely to have changed the outcome of the trial."

Saxer's counsel gave five reasons for not asking more questions of the venire about the September 11 attacks: (1) they understood that the entire regional panel had been questioned about the attacks in the central jury pool briefing before assignment to any specific court; (2) they heard the trial judge specifically question the panel about the effects the attacks might have on their ability to impartially hear the case; (3) they addressed the venire in the way they felt was tactically the most advantageous to their client; (4) in response to what questions they did ask, two jury members did speak up; (5) they believed that their questioning would find "all intellectually honest avengers" but that "no question posed to a panel [would] defeat a venireman with an agenda." *Ex parte Saxer*, at 120.

Saxer points specifically to *United States v. Adedoyin*, in which the trial court conducted an individual voir dire when trial commenced on September 19, 2001.⁴ *United States v. Adedoyin*, 369 F.3d 337, 340 (3rd Cir. 2004). In that case, the defendant was a foreign national of Nigerian descent who was alleged to have defrauded the World Trade Center, among other allegations. Although the court felt the need to individually voir dire the jury panel, those circumstances differ materially from the this case. There is no allegation in Saxer’s petition that he is of Middle Eastern descent nor that he is a foreign national of any kind. *See id.* at 341. Additionally, Saxer’s case held no connection to the World Trade Center, to New York City, or to acts of terrorism in general. Finally, the Third Circuit in *Adedoyin* decided that the trial court did not abuse its discretion in disallowing a postponement because the criminal activity of which defendant had been charged at trial had no similarity to the September 11 terror attacks, the defendant’s national origin was not “similar to that of terrorist attackers and he could hardly have been confused with them,” and allegations that defendant defrauded the World Trade Center of rent several years prior to the terrorism could have been addressed fairly by the jury. *Id.* at 341-42.

In this case, both the trial judge and Saxer’s counsel asked the jury about whether the events of September 11 would affect their decision-making. Counsel’s decision not to ask further questions regarding the September 11 attacks did not fall “below an objective

⁴ Little case law exists as to the effects of the terrorist attacks on the jury system in the days and weeks following September 11 and that case law which does exist only peripherally addresses the precise issue raised by Saxer. *See, e.g., Walls v. Konteh*, 2007 WL 1713329 (6th Cir. 2007).

standard of reasonableness.” *Strickland*, 466 U.S. at 687-88. Furthermore, Saxer has neither proven that his counsel rendered deficient performance nor, even if he had, that this performance prejudiced his defense so gravely as to deprive him of a fair, reliable trial.

3. Failure to Elicit Essential Evidence at Trial

Saxer argues that trial counsel were ineffective for failing to elicit ten pieces of potentially exculpatory evidence, including information that may have bolstered trial counsel’s main theory of the case (that John Sayers was the murderer instead of Saxer) or hurt the prosecution’s main argument (that Saxer killed the victim in revenge for having assisted his wife in leaving him). That evidence is as follows:

- 1) that there was no evidence of forced entry into the victim’s apartment, and John Sayers had a relationship with Lisa Garcia, the apartment manager, who had keys to all of the apartments;
- 2) that there were always drugs and drug paraphernalia around the victim’s apartment but the police found none, indicating a drug-related motive instead of a revenge-based motive;
- 3) that John Sayers had a reputation for violence against animals and people, and because the prosecution’s theory was that Sayers committed the murder, his reputation should have been attacked at every opportunity;
- 4) that the victim and her family were involved in drug dealing, and in light of the “execution style” murder and the fact that the apartment had been cleaned out of all drug-related paraphernalia, the victim may have been killed as part of a sour drug deal;
- 5) that Saxer and Sayers looked remarkably alike, and eyewitness testimony claiming that Saxer was seen with the victim around the time of the murder could have been mistaken;

6) that Melissa Lewis, who had seen Saxer the day of the murder with another person, was not given the opportunity to identify that other person as Sayers, nor an opportunity to see if she had mistaken Saxer for Sayers;

7) that Patrick Sparks testified that he had only met Sayers once before, but another witness, Cassie Arrowood, not called to testify, stated that Sparks was a regular with a group at the apartment which included Sayers, Garcia, Saxer, Saxer's wife, and the victim, and this information could have been used to bolster the drug-related motive theory;

8) that Mario Henson's original statement given to the police said that he had seen the victim both at 11:35 a.m. with Saxer and again at 2:00 p.m, a time when Garcia and Lewis had both seen Sayers at the apartment complex;

9) that the victim was frightened of Sayers and would not let him into her apartment, indicating that Sayers may have had some motive to kill her; and

10) Saxer's wife returned to him by June 2001, indicating that her moving out was less serious and therefore less likely to have provided a motive for murder.

Ex parte Saxer, at 10-15. Saxer argues that the evidence in his case was circumstantial and slight and therefore the exculpatory evidence, especially that relating to John Sayers, was crucial, and trial counsel's failure to bring this evidence to the attention of the jury caused the jury to convict Saxer. Nonetheless, the state court determined that Saxer failed to prove by a preponderance of the evidence that he was denied effective assistance of counsel on these grounds.⁵

⁵ The state court specifically found as follows as to each of Saxer's ten allegations: (1) trial counsel showed that Garcia did have a relationship with Sayers; that trial counsel made a strategic decision to focus on the evidence that Garcia gave the murder weapon to Sayers the day of the murder; and that Sayers testified that Garcia never gave him access to any keys to the apartment complex; (2) trial counsel decided that raising the issue of drug usage by the victim and others would have been "extremely disingenuous;" (3) trial counsel knew of the bad acts of Sayers and strategically decided not to use that evidence; (4) again, trial counsel decided raising drug-usage by the victim would have been "extremely disingenuous;" (5) trial counsel saw the photographs of

A reviewing court has a strong presumption counsel “rendered adequate assistance and that the challenged conduct was the product of a reasoned trial strategy.” *Wilkerson*, 950 F.2d at 1065. Furthermore, in an affidavit, Saxer’s attorneys that they had determined both strategically and/or ethically that all of the allegedly exculpatory evidence Saxer raises here would be detrimental or disingenuous to bring to the jury’s attention.⁶ *Ex parte Saxer*, at 122-25. A court will not second guess counsel’s strategy simply because something may have been done differently. *See Green v. Johnson*, 116 F.3d 1115, 1122 (5th Cir. 1997). Accordingly, Saxer’s claim of ineffective assistance of counsel fails.

B. Insufficient Evidence

In his next claim for relief, Saxer argues that there was insufficient evidence to support his conviction. Respondent argues that this claim is procedurally barred because it was not properly raised in Saxer’s petition for discretionary review to the TCCA. Saxer’s claim was raised on direct appeal, where the state court of appeals found that the evidence

Saxer and Sayers but strategically decided not to make identity an issue in the case; (6) Saxer failed to provide specific proof that Lewis positively identified the person she saw with him between noon and 1 p.m. from photographs shown her by the police; that trial counsel did not have a photograph of Sayers as he appeared on June 1, 2000; that Lewis was shown a booking photograph of Sayers that she could not positively identify; that the District Attorney’s file did not reflect that Lewis had been shown photographs after the murder; and that Lewis did not recall the person she saw with Saxer as appearing nervous; (7) trial counsel made a strategic and ethical decision not to call Arrowood to impeach Sparks’ testimony that he had only met Saxer once; 8) trial counsel were not told that Henson had told police in his original statement that he had seen the victim around 2 p.m.; (9) trial counsel made a strategic decision not to have Arrowood testify that the victim was scared of Sayers; and (10) trial counsel had decided that attempting to present evidence that Saxer’s wife had returned to him “would be detrimental to counsel’s theory of the case.” *Ex parte Saxer*, at 163-64.

⁶ The only exception to this is Saxer’s claim related to Lewis’ testimony (item 6), which the state court simply rejected as inaccurate. *Ex parte Saxer*, at 211.

was both legally and factually sufficient to support the jury's finding of Saxer's guilt. *Saxer*, 115 S.W. 3d at 769-73. The TCCA declined to find that his conviction had been subsequently rendered void, that a subsequent change in the law was made retroactive, or that additional evidence warranted relief. *See Ex parte Torres*, 943 S.W.2d 469, 474 (Tex. Crim. App. 1997). Therefore, the state court determined that this claim was not cognizable on application for a writ of habeas corpus.

A federal court is barred from reviewing a state petitioner's federal claim if that claim was defaulted in state court pursuant to an independent and adequate state procedural rule. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991); *Cotton v. Cockrell*, 343 F.3d 746, 754 (5th Cir. 2003). A petitioner is entitled to relief, however, if he "can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman*, 501 U.S. at 750. In order to show a fundamental miscarriage of justice, a petitioner must show that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Murray v. Carrier*, 477 U.S. 478, 496 (1986).

Saxer has failed to adequately show cause for the procedural default. Saxer has not presented any evidence showing that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." *See Murray*, 477 U.S. at 496. Therefore, Saxer has not met his burden to overcome the procedural bar for federal habeas review of his claim.

Alternatively, Saxer's claim fails on the merits. Saxer argues that no reasonable jury could have found him guilty beyond a reasonable doubt. He states that there was no physical evidence tying him to the murder, that there was no evidence linking the state's suggested motive to Saxer's actual knowledge, and that the only evidence putting the gun in Saxer's hands at the time of the murder was the testimony of John Sayers, a convicted felon.

Federal courts use a highly deferential standard for evaluating state court rulings. *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002). In determining a claim of legal insufficiency, a court should consider 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). A federal court must consider all evidence in a light most favorable to the verdict and cannot substitute its own view of the evidence for that of the fact finder. *Weeks v. Scott*, 55 F.3d 1059, 1061 (5th Cir. 1995). The fact that evidence is circumstantial does not mean that it is insufficient or that it will not support a verdict. *U.S. v. Ochoa*, 609 F.2d 198, 203 (5th Cir. 1980).

The state court on direct appeal thoroughly sifted the evidence and concluded that the evidence was legally sufficient to support the verdict. *Saxer*, 115 S.W.3d at 769-72. This court finds no error in the state court's finding that the jury could have found the essential elements of the crime beyond a reasonable doubt. Furthermore, the State provided evidence relating to four possible motives Saxer may have had for killing the victim: 1) Saxer killed the victim for helping his wife move out of their apartment; 2) the victim owed Saxer drug

money; 3) the murder was methamphetamine-induced; and 4) the victim refused to have sex with Saxer. *Id.* at 769-70. Using the Texas Rules of Evidence, the State determined that the circumstantial and actual evidence linking these motives to Saxer's actual knowledge were sufficient. (See the discussion on Admission of Extraneous Acts below.) Finally, the testimony of John Sayers put the gun in Saxer's hands around the time of the murder. Viewing this evidence in light most favorable to the verdict, this evidence is legally sufficient to support the verdict, as a rational trier of fact could have reasonably found him guilty beyond a reasonable doubt.

Saxer has not presented clearly convincing evidence that controverts the state courts findings. Thus, under the highly deferential standard of *Jackson*, this claim may be dismissed on its merits. *See Jackson*, 443 U.S. at 319.

C. Denial of Due Proces

1. Procedural Bar to Federal Review of Trial Court Rulings

In his next claim for relief, Saxer contends that he was denied due process because the trial court erred by: (a) denying his motion for continuance in light of the September 11 terrorist attacks, which took place less than one week prior to the start of his trial; (b) failing to individually voir dire the jury regarding the September 11 terrorist attacks; and (c) failing to individually voir dire the jury regarding pretrial publicity. Respondent argues that these claims are procedurally barred from federal review because the state habeas court rejected the claims on adequate and independent state procedural grounds.

A state court defaults a claim on independent and adequate state procedural grounds even if it alternatively rejected the claim on the merits as well. *Harris v. Reed*, 489 U.S. 255, 264 n.10 (1989). The Fifth Circuit has recognized the Texas procedural default rule, which bars claims that should have been raised on direct appeal. *Brewer v. Quarterman*, 466 F.3d 344, 347 (5th Cir. 2006) (citing *Ex Parte Gardner*, 959 S.W.2d 189, 199 (Tex. Crim. App. 1996)). In addition, a Texas court will traditionally only allow habeas review of claims pertaining to jurisdictional defects or denials of constitutional rights. *Ex Parte Banks*, 769 S.W.2d 539, 540 (Tex. Crim. App. 1989). The *Banks* rule and the *Gardner* rule, in which the failure to raise a claim on direct appeal bars habeas review, may be considered independent and adequate state procedural grounds because they have been recognized as being “regularly followed” and “evenhandedly applied.” *See, e.g., Brewer*, 466 F.3d at 347.

Saxer failed to raise these claims on direct appeal. *See Saxer*, 115 S.W.3d. at 768. The state habeas court explicitly denied relief for claims (a) and (b) pursuant to the *Gardner* rule because the court refused to review such record claims “for the first time on application for writ of habeas corpus.” *Ex parte Saxer*, at 164. The state court denied relief for claim (c) concerning jury bias associated with pretrial publicity because the claim was based on “purely statutory grounds,” which traditionally does not qualify for habeas review. *Ex parte Saxer*, at 164-65 (citing *Banks*, 769 S.W.2d at 540); *see also* Tex. Code Crim. Proc. Ann. art. 35.16 (2005) (providing reasons for challenge for cause in selection of jury, including jury bias). Therefore, all three claims are procedurally barred from federal review unless Saxer

can show cause for the default or that failure to consider the claims will result in a fundamental miscarriage of justice. *Coleman*, 501 U.S. at 750.

Saxer attempts to show cause for default for claims (a) and (b) by arguing that the legal writings and case law on the effects of the September 11 terrorist attacks were still developing at the time of appeal and, therefore, the basis of the claim was not reasonably available at the time of trial. In Saxer's other filings, however, he cites to an article written in 1990 which discusses the psychological effects of terrorist activities on individuals. Moreover, Saxer filed for a continuance in state trial court in light of the terrorist attacks, which the trial court denied. *Ex parte Saxer*, at 212. The article and the continuance request demonstrate that the claims were reasonably available both at the time of trial and during his appeal. Therefore, Saxer has failed to adequately show cause for the procedural default. Furthermore, Saxer has not presented any evidence showing that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." *See Murray*, 477 U.S. at 496. Therefore, Saxer has not met his burden to overcome the procedural bar for federal habeas review for these claims.

2. Admission of Extraneous Acts

Saxer claims that the admission of evidence of two extraneous acts violated his right to a fair trial. Over objection, the trial court first permitted evidence that Saxer had told Lisa Garcia that if he discovered who had helped his wife move out of their apartment, he would kill them. The trial court also permitted, over objection, evidence that Saxer had used the

drug methamphetamine with Patrick Sparks the morning of the murder. Saxer contends that, because it was never established that Saxer knew the victim assisted his wife in moving out, the statement is not relevant to prove an evidentiary fact which inferentially lead to a motive for the slaying.⁷ *Saxer*, 115 S.W.3d at 783. Also, because the evidence of methamphetamine use was admitted to show Saxer’s state of mind, the State additionally needed to show what effects the drug would usually have on a person. *Id.* at 784. Saxer concludes that there was no link between the extraneous acts and elements of the crime, so neither act should have been admitted. The dissenting judge in *Saxer v. State* concluded similarly that the incriminating testimony was “significantly weakened by credibility questions and is dominated by the relating of circumstances that at times requires strained inferences to reach an incriminating conclusion. I can only conclude that the errors did affect Saxer’s substantial rights.” *Id.* at 793.

Although the state habeas court did not address this issue, the court of appeals determined that these two acts were not extraneous evidence, and therefore the decision to admit the evidence was proper. *Saxer*, 115 S.W. at 776, 780-81. The court found relevance to Garcia’s testimony, “although under a very slim reed.” *Id.* at 776. The court further stated that, “Ms. Garcia’s testimony does provide the fact-finder with some evidence of possible homicidal tendencies on Saxer’s part. As it was relevant to show Saxer’s mental state a few days prior to the murder, it was also admissible under [Texas Rules of Evidence] Rule 404b

⁷ Saxer’s argument on this claim essentially follows that of the dissenting judge in *Saxer v. State*. 115 S.W.3d at 783-85.

as it had relevance apart from mere character conformity. As for Ms. Garcia's testimony being substantially more unfairly prejudicial than probative, we see it as a close question. However . . . the effect of Ms. Garcia's testimony is not unfairly prejudicial 'because the prejudicial effect lies in its probative value rather than [in] an unrelated matter.' *See Robbins v. State*, 27 S.W.3d 245, 251 (Tex. App.–Beaumont 2000), *aff'd*, 88 S.W.3d 256 (Tex. Crim. App. 2002). Ultimately we cannot say the trial court erred in its balancing of the factors under [Texas Rules of Evidence] Rule 403, especially the 'need' of the State for the extraneous act/offense testimony." *Saxer*, 115 S.W.3d at 776. Because the evidence was introduced to show Saxer's state of mind a few days before the murder, it was held to be relevant and the admission not in error. *Id.*

The court of appeals continued with a lengthy discussion on the methamphetamine issue, calling it "the most vexing of any of Saxer's extraneous act/offense complaints." *Saxer*, 115 S.W.3d at 776. The lengthy discussion of the court of appeals' role in reviewing a trial court's admission of evidence, the verbatim testimony between the attorneys and the trial court, and admissibility under the Texas Rules of Evidence need not be discussed at length here. *See Saxer*, 115 S.W.3d at 776-81. After balancing all of the evidence on whether the trial court should have excluded Saxer's drug-use the morning of the murder, the court of appeals stated that it was "unable to say the trial court abused its discretion in admitting the methamphetamine-ingestion testimony of Patrick Sparks." *Id.* at 780-81.

A federal court does not “sit to review the mere admissibility of evidence under state law” or errors in the application of state law. *Little v. Johnson*, 162 F.3d 855, 862 (5th Cir. 1998). In other words, evidentiary rulings are not cognizable on federal habeas corpus review unless a specific constitutional right was impeded or the ruling rendered the trial fundamentally unfair. *Cupit v. Whitley*, 28 F.3d 532, 536 (5th Cir. 1994). A federal court may only decide whether the conviction violated the Constitution or other federal law. *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). “A state trial court’s evidentiary rulings will mandate habeas relief when errors are so extreme that they constitute a denial of fundamental fairness.” *Little*, 162 F.3d at 862. “Thus, only when wrongfully admitted evidence has played a crucial, critical, and highly significant role in the trial will habeas relief be granted.” *Id.*

By this standard, Saxer does not establish that the evidentiary rulings were constitutionally impermissible. Admission of this evidence did not deny him a fundamentally fair trial, and the state court decision was not unreasonable under the AEDPA.

3. Cumulative Error

___ In his final ground for relief, Saxer asserts a claim under the cumulative error doctrine, stating that all of the previously alleged errors, when combined, denied him due process. The Fifth Circuit has recognized an independent claim based on cumulative error, but only where “(1) the individual errors involved matters of constitutional dimensions rather than mere violations of state law; (2) the errors were not procedurally defaulted for habeas

purposes; and (3) the errors ‘so infected the entire trial that the resulting conviction violates due process.’” *Westley v. Johnson*, 83 F.3d 714, 726 (5th Cir. 1996). Cumulative error can therefore provide a colorable basis for federal habeas corpus relief, but “[m]eritless claims-or claims that are not prejudicial-cannot be cumulated, regardless of the total number raised.” *Derden v. McNeel*, 978 F.2d 1453, 1461 (5th Cir. 1992) (en banc). As discussed above, all of Saxer’s claims are either procedurally barred or without merit. He has not demonstrated constitutional error in any of his claims, and therefore, there are no errors to aggregate. As a result, Saxer’s cumulative error claim should be denied.

CONCLUSION AND RECOMMENDATION

For the reasons discussed above, the court recommends that Saxer’s application for writ of habeas corpus be denied with prejudice. The court further finds that Saxer 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 rulings. *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 § 2254 Cases; 28 U.S.C. § 636(b)(1)(c); Fed. R. Civ. P. 72.

Signed at Houston, Texas, on August 14, 2007.


Stephen Wm Smith
United States Magistrate Judge