

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

RAY ANTHONY YBARRA,	§	
Petitioner,	§	
	§	
v.	§	CIVIL ACTION NO: H-06-1485
	§	
NATHANIEL QUARTERMAN,	§	
Director of the Texas Department	§	
of Criminal Justice - Correctional	§	
Institutions Division,	§	
Respondent.	§	

**MEMORANDUM AND RECOMMENDATION**

Petitioner Ray Anthony Ybarra has filed a petition for writ of habeas corpus under 28 U.S.C. §§ 2241 and 2254.<sup>1</sup> Having considered the parties’ submissions and all matters of record, the court recommends that respondent’s motion for summary judgment (Dkt. 17) be granted and petitioner’s application be denied.

**BACKGROUND**

On April 10, 1996, Ybarra was convicted by a jury of capital murder and sentenced to life in prison. The Fourteenth Court of Appeals affirmed Ybarra’s conviction on October 22, 1998. Ybarra filed a petition for discretionary review, which the Texas Court of Criminal Appeals refused on June 9, 1999. Ybarra filed an application for state writ of habeas corpus on August 15, 2000. The Court of Criminal Appeals remanded the application for further factual development. After the trial court filed supplemental findings of fact and conclusions of law, the Court of Criminal Appeals denied Ybarra’s application on April 12, 2006 without

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<sup>1</sup> The district court has referred this matter to this Magistrate for report and recommendation (Dkt. 5).

written order and without a hearing. Ybarra filed the instant federal petition for writ of habeas corpus on April 25, 2006.

Respondent does not contend that Ybarra's petition is time-barred, or that he has failed to exhaust his state remedies.

### ANALYSIS

Ybarra's petition is governed by the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254 (AEDPA). Ybarra is not entitled to federal habeas relief on his claims that were adjudicated on the merits<sup>2</sup> in state court unless the state court adjudication:

- (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 state court decision may be "contrary to" federal law as determined by the Supreme Court if the state court arrives at a conclusion opposite of the Supreme Court on a question of law, or if the state court "confronts a set of facts that are materially indistinguishable from a relevant Supreme Court precedent" and reaches an opposite conclusion. *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000).

A state court decision involves an "unreasonable application" of federal law if the state court "identifies the correct governing legal principle . . . but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413. Federal habeas relief is warranted

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<sup>2</sup> A denial of habeas relief by the Texas Court of Criminal Appeals constitutes a ruling on the merits of the application. *In re Torres*, 943 S.W.2d 469, 472 (Tex. Crim. App. 1997).

only where the state court decision is both incorrect and objectively unreasonable. *Id.* at 410-11.

Ybarra seeks federal habeas relief on the following grounds:

- (1) the trial court did not afford him an opportunity to testify in his own defense;
- (2) the trial court failed to give an accomplice witness instruction;
- (3) the prosecution put on perjured testimony;
- (4) the trial court erred by refusing to allow his counsel to cross-examine Tim Shumake about Shumake's involvement in another capital murder;
- (5) he received ineffective assistance of counsel because his trial attorney failed to:
  - (a) afford him an opportunity to testify in his own defense;
  - (b) request an accomplice witness instruction;
  - (c) discover a purported plea bargain between Shumake and the State;
  - (d) discover the State-sponsored perjury; and
  - (e) discover and use impeachment evidence against Shumake and another State witness, Caine Guerrero;
- (6) the State failed to disclose impeachment evidence that would have discredited Shumake and Guerrero; and
- (7) he received ineffective assistance from his appellate counsel because his counsel did not raise the above claims in his appeal.

Ybarra also has requested discovery and an evidentiary hearing in this court.<sup>3</sup>

### **1. Denial of Right to Testify**

A defendant has a right to testify in his own defense, and only the defendant may waive that right. *Emery v. Johnson*, 139 F.3d 191, 198 (5th Cir. 1997). However, the trial

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<sup>3</sup> Ybarra filed his petition *pro se*, but retained counsel to file a motion for evidentiary hearing (Dkt. 21) and to represent him at any evidentiary hearing.

court has no duty to explain that right to the defendant or to confirm that his waiver is voluntary. *U.S. v. Brown*, 217 F.3d 247, 258 (5th Cir. 2000) (citing *United States v. Leggett*, 162 F.3d 237, 246 (3d Cir. 1998)), vacated and remanded on other grounds *sub nom Randle v. U.S.*, 531 U.S. 1136 (2001). Therefore, the state court's denial of habeas relief on this ground is not contrary to, or an unreasonable application of, federal law.

## **2. Accomplice Witness Instruction**

A defendant has no constitutional right to have the testimony of an accomplice witness corroborated by independent evidence. *Brown v. Collins*, 937 F.2d 175, 182 n.12 (5th Cir. 1991). Thus, this ground or error is a matter of purely state law, not cognizable on federal habeas review. *Id.* (citing *Smith v. Phillips*, 455 U.S. 209, 221 (1982) (only federal constitutional claims are cognizable in a federal habeas proceeding)).

## **3. Perjured Testimony**

Ybarra alleges that Guerrero and Shumake perjured themselves when they testified against Ybarra at his trial. Ybarra must show that the prosecution's conduct in presenting the perjured testimony "so infected the [trial] with unfairness as to make the resulting [conviction] a denial of due process." *Barrientes v. Johnson*, 221 F.3d 741, 753 (5th Cir. 2000). A trial is fundamentally unfair in violation of due process only where "there is a reasonable probability that the verdict might have been different had the trial been properly conducted." *Id.* at 753.

To establish a due process violation based on the State's knowing use of false or misleading evidence, [a habeas petitioner] must show (1) the evidence was false, (2) the evidence was material, and (3) the prosecution knew that the evidence was false. Evidence is false if, *inter alia*, it is specific misleading

evidence important to the prosecution's case in chief. False evidence is material only if there is any reasonable likelihood that [it] could have affected the jury's verdict.

*Id.* (quoting *Nobles v. Johnson*, 127 F.3d 409, 415 (5th Cir. 1997)) (alterations in original).

Contradictory or inconsistent witness statements standing alone do not establish perjury.

*Koch v. Puckett*, 907 F.2d 524, 531 (5th Cir. 1990).

Ybarra's allegations regarding perjury by Guerrero are wholly conclusory, not specific, not supported by evidence, and thus have no probative value. *See Ross v. Estelle*, 694 F.2d 1008, 1011(5th Cir. 1983). Ybarra has not shown he is entitled to relief based on perjury by Guerrero.

In support of his perjury claim related to Shumake, Ybarra asserts that Shumake's trial testimony was contrary to statements by him contained in a 4-page statement he gave to Officer Garretson, and that Shumake recanted his statement to Garretson after trial.

The respondent contends that Shumake's purportedly contradictory statement was available to Ybarra's counsel at trial and could have been used to impeach Shumake if Ybarra's counsel believed it constituted appropriate impeachment evidence. Ybarra contends that the 4-page handwritten statement he is relying on is not the same as the document the state produced at trial.

Ybarra contends that Shumake's 4-page statement, which says that Shumake was in the victim's house and saw Ybarra hit the victim with a baseball bat, is contrary to his trial testimony. At trial, Shumake testified that he was in the victim's neighbor's garage when Guerrero ran out of the victim's house saying they needed to go because Ybarra had hit the

victim with a bat. Shumake also testified he saw who killed the victim. He did not testify at trial that he was in the house and saw Ybarra hit the victim with a bat.

During direct examination, the prosecution showed Shumake a copy of Officer Garretson's probable cause affidavit in which Garretson summarized Shumake's 4-page statement. The 4-page statement itself was not presented at trial and is not in the record. However, the substance of Shumake's statement that he was in the victim's house when he saw Ybarra hit the victim with a bat is set forth in Officer Garretson's affidavit, which is in the record. Therefore, Ybarra's counsel could have questioned him about that statement had he determined it was appropriate impeachment evidence. Ybarra's counsel might reasonably have concluded that Shumake's 4-page statement, as summarized in the Garretson affidavit, was *more* inculpatory of Ybarra than Shumake's trial testimony, and for that reason avoided the topic as a matter of trial tactics. In any event, Ybarra has not shown that his trial was fundamentally unfair due to the prosecution's failure to provide Shumake's 4-page handwritten statement.

Ybarra's contention that Shumake recanted his statement is based on an unsworn "affidavit" from Shumake. Ybarra made this same contention before the state habeas court, which found "[t]he purported affidavits of Timothy Shumake are not credible and do not carry any evidentiary value." *Ex Parte Ybarra*, Application No. 56,845-03 at 92. A state court's determination that written statements offered by a habeas petitioner are not credible is afforded deference. *Coleman v. Quarterman*, 456 F.3d 537, 541 (5th Cir. 2006). Due process does not require the state habeas court to conduct an evidentiary hearing, even where

its conclusions depend on credibility determinations. *Livingston v. Johnson*, 107 F.3d 297, 303 (5th Cir. 1997). Ybarra has failed to rebut the presumption of correctness of the state court's credibility determination. *See Coleman*, 456 F.3d at 541. Moreover, as noted above, Shumake did not testify that he saw Ybarra hit the victim with a bat. There is no evidence that Shumake has recanted any part of his trial testimony. Ybarra has not met his burden to shown prosecutorial misconduct related to purportedly perjured testimony.

#### **4. Confrontation of Witnesses**

A defendant has a constitutional right to confront witnesses against him. But that right has limits and guarantees only "an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985). The extent of cross-examination on an appropriate subject is within the sound discretion of the trial court. *Alford v. United States*, 282 U.S. 687, 694 (1931).

Ybarra claims that his constitutional rights were violated when he was prohibited from questioning Shumake regarding a prior conviction for aggravated robbery. Shumake admitted his conviction and 25-year sentence for aggravated robbery during his direct examination. During cross-examination, Ybarra's counsel attempted to introduce evidence that the aggravated robbery charge was reduced from an original charge of capital murder. The trial court refused to allow the line of questioning, and the appellate court confirmed this ruling, because the reduction in the charge is a detail of the conviction that goes beyond what is admissible under Texas Rule of Criminal Evidence 609 regarding a prior conviction used

to impeach credibility.

Ybarra contends that the state court erred because the reduction in charge resulted from a plea bargain between Shumake and the State, and thus was admissible relevant impeachment evidence that under Texas Rule of Criminal Evidence 401.<sup>4</sup> The State appellate court noted that Ybarra's counsel objected to the trial court's ruling based on Texas Rule of Criminal Evidence 609, and did not preserve any error based on Rule 401. In his habeas proceeding, the court secured affidavits from Ybarra's lawyer, lawyers for the State in Ybarra's case, and lawyers for the State in Shumake's aggravated robbery case. All the affidavits confirm that the reduced charge was in agreement for a 25-year sentence, and contained no agreement obligating Shumake to testify against Ybarra. Ybarra's counsel confirmed during a bench conference at Ybarra's trial that Shumake was not testifying as part of a plea agreement. The lack of an agreement to testify is supported by the fact that Shumake was sentenced *prior* to Ybarra's trial. If his plea agreement had been dependent on his testimony, he would not have been sentenced until after the testimony. Ybarra's only evidence to the contrary is the purported affidavit of Shumake, which the state habeas court expressly found not credible.

The record indicates that Ybarra was given an opportunity for effective cross-examination of Shumake. Thus, there is no evidence that Ybarra's constitutional rights were violated in this regard.

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<sup>4</sup> Ybarra contends that this evidence is particularly important because Shumake was wanted on the capital murder charge at the time he implicated Ybarra in the instant case.

## 5. Ineffective Assistance of Trial Counsel

The Supreme Court has established a two-part test for determining ineffective assistance of counsel habeas 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 v. Dretke*, 420 F.3d 356, 361 (5th Cir. 2005).

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.*

**Denial of Right to Testify.** Ybarra's trial counsel submitted an affidavit to the state habeas court stating that he thoroughly discussed the matter of testifying with Ybarra and Ybarra agreed with the decision that he would not testify in his own behalf at trial. The habeas court found trial counsel's affidavit credible. While the Fifth Circuit has not yet

decided precisely what degree of substantiation is required to trigger a hearing in a right-to-testify claim, where there is no evidence of force or coercion petitioner's conclusory allegations are not sufficient to overcome the presumption of correctness of the state habeas court's factual determination. *See United States v. Martinez*, 181 F.3d 627, 628-29 (5th Cir. 1999); *see also* 28 U.S.C. § 2254(e)(1) (petitioner must rebut the presumption by clear and convincing evidence).

**Accomplice Witness Instruction.** Ybarra's counsel provided an affidavit to the state habeas court stating that he did not request an accomplice witness instruction because the record did not support one. Under Texas law, "[a] conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the offense committed." TEX. CODE CRIM. PROC. art. 38.14 (Vernon 1994). An accomplice is one who participates with a defendant before, during, or after commission of the offense, performing acts that show an understanding and a common design to do a certain act. *McFarland v. State*, 928 S.W.2d 428, 514 (Tex. Crim. App. 1996). The appellate court found that Guerrero and Shumake were not "accomplices" as a matter of law because they were not charged with the offense, and were merely present at the scene, not participants in the crime. This decision is not contrary to or an unreasonable application of any federal law.

**Adequate Investigation.** Ybarra contends that his counsel was ineffective because he failed to discover the plea bargain between Shumake and the State; failed to discover that the State was sponsoring perjury; and failed to discover impeachment evidence, in the form

of the testimony of Chris Morales, against Shumake and Guerrero. Ybarra has not met his burden to show that his counsel was ineffective according to applicable Supreme Court standards for any of these above reasons.

As noted above, Ybarra's counsel provided evidence that he was aware of the plea agreement between Shumake and the State but that agreement was not conditioned on Shumake's testimony against Ybarra. The State court also found that the State did not sponsor perjury, and that counsel adequately investigated the case. As to the affidavit of Morales, it is at best unclear whether the testimony Morales could have offered would have benefitted Ybarra. Morales saw Ybarra after the murder, at which time Ybarra was rambling and not making much sense but apparently accused Guerrero of having committed a crime. Morales told Ybarra he did not want to know about it. Given the testimony of other witnesses, Ybarra's self-serving ramblings to Morales would not likely have resulted in a different outcome.

Ybarra has not overcome the presumption of correctness of any of the State court's rulings and is not entitled to habeas relief on his ineffective assistance of counsel claims.

#### **6. State's Failure to Disclose Impeachment Evidence**

In order to succeed on a federal habeas claim based on the prosecution's failure to disclose evidence, Ybarra must prove (1) the prosecutor suppressed or withheld evidence; (2) which was favorable; and (3) material to the defense. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). To assess the materiality of undisclosed impeachment evidence, the court must "consider the nature of the impeachment evidence improperly withheld and the additional

evidence of the defendant's guilt independent of the disputed testimony." *United States v. Weintraub*, 871 F.2d 1257, 1262 (5th Cir. 1989). There can be no *Brady* violation where the defendant could have discovered the information using due diligence. *Williams v. Scott*, 35 F.3d 159, 163 (5th Cir. 1994).

Ybarra argues that the prosecution violated *Brady* by failing to disclose that Shumake participated in a capital murder 35 days before the crime for which Ybarra was convicted, and that Shumake gave an inconsistent statement before trial regarding whether he saw the incident. Ybarra's claim is without merit. The record indicates that counsel for Ybarra was aware of the allegedly withheld information during trial. He specifically attempted to question Shumake about the capital murder charge, and the substance of Shumake's prior statement was available in the affidavit of Officer Garretson. There is no support for Ybarra's *Brady* claim.

#### **7. Ineffective Assistance of Appellate Counsel**

The two-pronged test of *Strickland* also applies to Ybarra's ineffective assistance of counsel on appeal claim. In order to succeed on an ineffective assistance of appellate counsel claim, Ybarra must show that the issues he argues should have been raised are not frivolous, and would have been successful. *Smith v. Robbins*, 528 U.S. 259, 285 (2000). Appellate counsel is not ineffective for failing to raise issues on appeal where the record does not show the existence of trial errors with arguable merit. *Hooks v. Roberts*, 480 F.2d 1196, 1198 (5th Cir. 1973). Appellate counsel is not required to argue every conceivable issue on appeal; counsel is required to use professional judgment to determine which nonfrivolous issues to

pursue on appeal. *Jones v. Barnes*, 463 U.S. 745, 749 (1983). There is no requirement that appellate counsel consult with the client about what claims to pursue on appeal. *Hooks*, 480 F.2d at 1197.

Ybarra's counsel provided an affidavit to the state habeas court attesting that he exercised professional judgment, and conferred with Ybarra, in deciding not to pursue the claims now asserted by Ybarra. The State court's decision that Ybarra's appellate counsel was not ineffective is not contrary to or an unreasonable application of federal law.

#### **8. Evidentiary Hearing and Discovery**

As noted above, factual determinations made a State court are presumed to be correct. 28 U.S.C. § 2254(e)(1). Where an applicant has failed to develop the factual basis for his claim in State court proceedings, the court shall not hold an evidentiary hearing unless the claim relies on a new rule of constitutional law with retroactive application or a factual predicate that could not have previously been discovered, and the facts underlying the claim would be sufficient to establish by clear and convincing evidence that absent constitutional error no reasonable factfinder would have found the petitioner guilty. 28 U.S.C. § 2254(e)(2).

The Supreme Court recently ruled that in deciding whether to grant an evidentiary hearing, a federal court must consider whether such a hearing would enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief. *Schriro v. Landrigan*, 127 S. Ct. 1933, 1940 (2007). The court must take into account the deferential standards prescribed by § 2254 when deciding whether an evidentiary

hearing is appropriate. *Id.* If the record refutes the applicant's factual allegations or otherwise precludes habeas relief, the district court is not required to hold an evidentiary hearing. *Id.*

In this case, the factual record was fully developed in the State proceedings. There is no need for an evidentiary hearing in this case. A hearing here would serve no purpose other than to impermissibly second-guess the credibility decisions of the State courts. As the court has explained above, Ybarra's contentions do not support a claim for federal habeas relief.

Ybarra asks for discovery on the issue of whether Shumake committed perjury. A habeas petition may be permitted discovery for good cause upon leave of court. *Lave v. Dretke*, 416 F.3d 372, 380 (5th Cir. 2005). The decision to deny discovery is within the court's discretion. *Id.* In order to show good cause, a petition must demonstrate that "a factual dispute, if resolved in the petitioner's favor, would entitled him to relief and the state has not afforded the petitioner a full and fair evidentiary hearing." *Id.* at 381.

The basis for Ybarra's contention is the alleged inconsistency between Shumake's trial testimony and his statement to Officer Garretson, and the "affidavit" of Shumake recanting his statement. However, all of the above information was available to Ybarra at trial. The record indicates that the substance of the four-page statement that is at the heart of Ybarra's claim was contained in the probable cause affidavit of Officer Garretson. There is no indication that the 4-page handwritten statement itself is necessary to any of Ybarra's claims. There is no factual dispute as to the content of Schumake's statements. Ybarra has

not shown a need for discovery.

**CONCLUSION AND RECOMMENDATION**

For the reasons discussed above, the court recommends that Ybarra's petition be denied. None of the challenged state court rulings have been shown to be incorrect, much less objectively unreasonable, under federal law. The court orders that Ybarra's motion for discovery (Dkt. 13) and motion for an evidentiary hearing (Dkt.21) are denied.

The court further finds that Ybarra 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 June 28, 2007.



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Stephen Wm. Smith  
United States Magistrate Judge