

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

Jeremy Lee Conlin,	§	
TDCJ-CID No. 1293724	§	
Petitioner,	§	
	§	
vs.	§	Civil Action H-07-1578
	§	
Nathaniel Quarterman, Director,	§	
Texas Department of Criminal Justice,	§	
Correctional Institutions Division,	§	
Respondent.	§	
	§	

Memorandum and Recommendation

Before the court is *pro se* prisoner Jeremy Lee Conlin’s 28 U.S.C. § 2254 habeas corpus petition¹ and respondent Quarterman’s motion for summary judgment (Dkt. 24). Quarterman’s motion should be granted and Conlin’s petition denied.

Background

Conlin pled guilty on February 24, 2005 to second-degree felony sexual assault of a 16 year-old girl and was sentenced by a Montgomery County, Texas district court to ten years in prison. Conlin’s conviction became final on June 30, 2005. Conlin filed several state applications for writ of habeas corpus, only one of which was denied on the merits, without

¹ Dkt. Nos. 1, 5, 46. Because Dkt. No. 1 is 128 pages long, the Clerk’s office entered it as five separate documents. The court will reference this pleading according to docket number, part number, and page number. For example, page one of part five of docket number one shall be referred to as: Dkt. 1-5, p. 1.

written order or hearing based on the findings of the trial court. *Ex parte Conlin*, App. No. 64,230-02 (November 8, 2006).

Aside from several § 1983 actions, Conlin has filed two previous federal habeas petitions, neither of which resulted in rulings on the merits. *See Conlin v. Lange*, No. H-06-1817, 2006 WL 3246040 at * 4-5 (S.D. Tex. 2006) (dismissing habeas claims without prejudice for failure to exhaust state remedies); *Conlin v. Dottie*, Civil Action No. H-06-3304 (S.D. Tex. 2007) (granting voluntary dismissal at petitioner's request).

Unexhausted Claims

The claims that Conlin did not raise in his state habeas petition decided on the merits are unexhausted and therefore procedurally barred. *See Ruiz v. Quarterman*, 504 F.3d 523, 525 (5th Cir. 2007). These claims include Conlin's assertions that:

- (1) He received ineffective assistance of counsel because his trial attorney:
 - (a) did not give him proper notice;
 - (b) failed to investigate inconsistent witness statements;
 - (c) failed to consult with him;
 - (d) held an actual conflict of interest due to his loyalties to the state;
 - (e) retaliated against him;
 - (f) failed to challenge the unlawful arrest, search and indictment.

- (2) The state court failed to grant an evidentiary hearing, which would have allowed him to confront witnesses against him.

Because these claims are procedurally barred, this court cannot address them.

Remaining Claims

Conlin makes copious allegations regarding the circumstances surrounding his conviction and appeal. These allegations may be grouped under seven headings: (1) he received ineffective assistance of counsel; (2) his indictment was defective; (3) there was insufficient evidence to support his conviction; (4) his guilty plea was involuntary and based on incomplete information; (5) his prosecution was malicious and based on fabricated evidence; (6) he was not awarded due process; and (7) his state habeas proceedings were constitutionally defective.

In habeas cases at the summary judgment stage, state court findings of fact are presumed correct unless the petitioner can rebut the presumption by “clear and convincing evidence.” *Smith v. Cockrell*, 311 F.3d 661, 668 (5th Cir. 2002). Further, under AEDPA, which governs this case,² habeas petitioners may not obtain habeas relief with respect to any claim that was adjudicated by the state court on the merits unless they show that the 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.

² *Lindh v. Murphy*, 521 U.S. 320, 336 (1997) (holding that AEDPA governs petitions filed after April 24, 1996).

28 U.S.C.A. § 2254 (d).³

With respect to claims (1) through (6), Conlin has not met his threshold burden of demonstrating that the state habeas court denial of those claims constituted either an unreasonable application of federal law, as determined by the Supreme Court, or an unreasonable determination of the facts in light of the evidence. Rather than showing how the Texas Court of Appeals erred, Conlin merely alleges error, cites inapplicable authority, and reiterates the same arguments he made on appeal and in his state application for writ of habeas corpus. For those of Conlin's claims which have already been adjudicated on the merits by the Texas Court of Appeals,⁴ his failure to show how that adjudication was insufficient under AEDPA mandates denial of relief. *Ylst v. Nunnemaker*, 501 U.S. 797, 806 (1991).

³ Further, where a habeas applicant requests an evidentiary hearing on a claim, as Conlin does here, but has failed to develop the factual basis for that claim in state court proceedings, the court shall not hold an evidentiary hearing unless the applicant shows that:

- (A) the claim relies upon: (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 the constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e)(2) (2005). Here, the court notes that it has already denied Conlin's request for an evidentiary hearing. Dkt. 39. Conlin has since filed several pleadings objecting to this ruling and renewing his requests. These new requests do not provide the court with any reason to revise its ruling and are, therefore, denied.

⁴ *See Singleton v. Johnson*, 178 F. 3d 381, 384 (5th Cir. 1999) (defining requirements for a merits adjudication).

Conlin's remaining claim (7) challenges the state habeas proceeding itself. In particular, Conlin complains that: *Crawford* and hearsay violations occurred in his state habeas proceeding; the state habeas court failed to grant him an evidentiary hearing; and his attorney fabricated evidence and violated attorney/client privilege by being a paid informer for the state and by submitting a false affidavit in petitioner's state habeas proceeding.⁵

Claims of infirmities in state habeas proceedings are not cognizable on federal habeas review. *Duff-Smith v. Collins*, 973 F.2d 1175, 1182 (5th Cir. 1992). "An attack on a state habeas proceeding does not entitle the petitioner to habeas relief in respect to his conviction, as it is an attack on a proceeding collateral to the detention and not to the detention itself." *Nichols v. Scott*, 69 F.3d 1255, 1275 (5th Cir. 1995). Even assuming they were cognizable, Conlin's claims are not well taken in any event. The trial court which issued findings of fact and rulings of law on Conlin's second state habeas application was permitted to resolve fact issues by requesting and considering affidavits. TEX. CODE. CRIM. PROC. ANN. Art. 11.07 § 3(d); *see also Ex parte Davila*, 530 S.W.2d 543, 545 (Tex. Crim. App. 1975) (holding that evidentiary hearings are not required in state habeas proceedings).

Moreover, there is no evidence in the record to suggest that Conlin's attorney was a paid informer for the state. To the contrary, the state habeas court expressly ruled that Conlin's counsel had served him well. Conlin asserts that his counsel violated the attorney/client privilege by submitting an affidavit in his habeas proceedings, but the

⁵ Dkt. 1-1, pgs. 12, 17-18, 21; Dkt. 1-2, pgs. 4, 15, 21; Dkt. 1-4, pgs. 8-10; Dkt. 1-5, pgs. 12, 14-17.

attorney/client privilege ceases to apply once a prisoner charges his attorney with ineffective assistance of counsel. *Black v. Collins*, 962 F.2d 394, 402 n.5 (5th Cir. 1992). Consequently, these last remaining claims of Conlin's must be denied.

Conclusion and Recommendation

For these reasons, it is recommended that Quarterman's motion be granted and that Conlin's petition be denied. All other pending motions and requests for relief are denied as moot.

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 September 5, 2008.



Stephen Wm Smith
United States Magistrate Judge