

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

EDDIE JONES, JR.,	§	
Petitioner,	§	
	§	
v.	§	CIVIL ACTION NO: H-07-0755
	§	
NATHANIEL QUARTERMAN,	§	
Director of the Texas Department	§	
of Criminal Justice - Correctional	§	
Institutions Division,	§	
Respondent.	§	

**MEMORANDUM AND RECOMMENDATION**

Eddie Jones Jr. 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. 13) be granted and petitioner's application be denied.

**Background**

On January 23, 2003, a jury found Jones guilty of possession with intent to distribute cocaine. The court sentenced Jones to fifty years in prison. The First Court of Appeals of Texas affirmed the conviction on March 4, 2004. The Texas Court of Criminal Appeals refused his petition for discretionary review on October 6, 2004.

Jones filed a state application for writ of habeas corpus on August 29, 2005, which was denied without written order on November 29, 2006. Jones filed this federal petition on February 27, 2007. Respondent does not contend that Jones's petition is time-barred, or that

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

he has failed to exhaust his state remedies.

### **Analysis**

Jones's petition is governed by the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254 (AEDPA). Jones 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 only where the state court decision is both incorrect and objectively unreasonable. *Id.* at 410-11.

Jones seeks federal habeas relief on the following grounds:

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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).

- (1) he was denied due process in violation of the 14th Amendment because his traffic stop and detention was unlawful;
- (2) he was denied due process in violation of the 14th Amendment because consent to search was not free and voluntary;
- (3) he was denied due process and equal protection in violation of the 14th Amendment because evidence from “unattenuated official illegality” should have been suppressed;
- (4) the trial court erred by refusing to give a jury charge regarding Article 38.23 of the Texas Code of Criminal Procedure and did not instruct the jury as to the legal scope of a traffic stop;
- (5) the trial court erred by not granting a mistrial due to the prosecutor’s comments on the truthfulness of the state’s witnesses;
- (6) the trial court erred in allowing a disqualified juror to serve;
- (7) the trial court erred by not suppressing drug evidence and his statements;
- (8) he received ineffective assistance of trial counsel because counsel:
  - (a) failed to investigate and introduce evidence of illegal traffic stop;
  - (b) failed to believe petitioner’s version of events;
  - (c) failed to suppress evidence;
  - (d) failed to interview potential witnesses at the scene;
  - (e) failed to adequately present petitioner’s case at trial;
  - (f) failed to argue during trial regarding the unlawfulness of the traffic stop, detention, search and arrest;
  - (g) failed to object to prosecutor’s statements during closing argument;
  - (h) failed to allow petitioner to take the stand; and
- (9) he received ineffective assistance of appellate counsel because counsel failed to argue all of the above issues in his appeal.

Jones has requested an evidentiary hearing in this court.

Jones raised all of the grounds for relief presented here in his state habeas application.

The state court denied Jones relief. Jones has merely reasserted his arguments in his federal

application, he has not shown that the state court's decision was contrary to or an unreasonable application of federal law, or was based on an unreasonable determination of facts. For this reason, Jones is not entitled to federal habeas relief on any of his claims. The court addresses Jones's specific claims as follows.

**1. Illegal Stop and Involuntary Consent to Search (grounds 1, 2, 3, 7)**

Jones contends that his conviction should be reversed because it is based on evidence obtained pursuant to an illegal search and seizure. Jones contends that he involuntarily gave his consent to search the apartment where drugs were found and gave statements to the police while being detained during an illegal traffic stop.

On January 21-22, 2003, the trial court held a hearing on petitioner's motion to suppress evidence obtained from an allegedly illegal traffic stop. Officer Sanchez, who stopped Jones for a seat belt violation, and Officer Walker, who arrested Jones on the narcotics violation, testified and were cross-examined by Jones's counsel. According to the officers' testimony, Sanchez stopped Jones for not wearing a seat belt and asked to see his drivers license and registration. While Sanchez was reviewing the documents, Walker approached Jones, identified himself as a narcotics officer, told Jones he was not under arrest and was free to go, and asked Jones if he would answer some questions. Jones agreed. Jones told Walker that there were drugs in the apartment, that the apartment was not his but he had a key, and that the drugs belonged to him, not the person who lived there. Jones then gave a verbal consent to search the apartment.

At the conclusion of the suppression hearing, the court denied Jones's motion to

suppress evidence, and allowed Jones's statements regarding his possession of the drugs found in the apartment to be admitted into evidence. Jones's challenged the admission of evidence from the allegedly illegal search and seizure on direct appeal. In affirming, the appellate court held that Jones consented to speak with the officers at the beginning of the stop for a seatbelt violation, and therefore the officers were no longer obligated to develop probable cause for his continued detention. Moreover, the court ruled that although Jones admitted to owning the drugs, Jones did not have a possessory interest in the apartment that was searched, and therefore he had no standing to challenge the search. For these reasons, the appellate court held that the trial court did not abuse its discretion in denying Jones's motion to suppress.

The record reflects that Jones's was given an opportunity for full and fair litigation of his Fourth Amendment claims. Thus, Jones's application for federal habeas relief on such ground must be denied pursuant to the Supreme Court's ruling in *Stone v. Powell*, 428 U.S. 465, 494-95 (1976), which holds:

[W]here the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas relief on the ground that evidence obtained in an unconstitutional search and seizure was introduced at trial. In this context the contribution of the exclusionary rule, if any, to the effectuation of the Fourth Amendment is minimal, and the substantial societal costs of application of the rule persist with special force.

## **2. Jury Instructions (ground 4)**

Article 38.23 of the Texas Code of Criminal Procedure provides that no evidence obtained in violation of the Constitution or state or federal law shall be admitted into

evidence against a criminal defendant. Article 38.23 requires that where there is a factual dispute, the jury should disregard any evidence that it finds was illegally obtained. *Balentine v. State*, 71 S.W.3d 763, 773 (Tex. Crim. App. 2002). The state court of appeals addressed Jones's charge of trial court error on this ground and held that there was no factual dispute regarding the traffic stop that warranted Jones's requested charge. The state habeas court also denied him relief. Jones has provided this court no basis for overturning the state habeas court's determination.

### **3. Prosecutor's Statements (ground 5)**

Jones's claims that the prosecutor bolstered the testimony of his witnesses by vouching for the truthfulness of their testimony does not support federal habeas relief. Jones cannot show that the prosecutor's conduct was so prejudicial that it deprived him of a fair trial. *Kirkpatrick v. Blackburn*, 777 F.2d 272, 281 (5th Cir. 1985). This is particularly true because defense counsel objected and the court instructed the jury to disregard the prosecutor's remarks.

### **4. Disqualified Juror (ground 6)**

The state habeas court declined to consider this ground for error because Jones did not raise it in his direct appeal. Because there is an independent and adequate state court ground for denying review of this claim, the claim is not subject to federal review. *Coleman v. Thompson*, 501 U.S. 722, 729 (1991).

### **5. Ineffective Assistance of Counsel (grounds 8, 9)**

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.*

Jones has not met his burden to show ineffective assistance of trial or appellate counsel. As to trial counsel, Jones's allegations are contrary to the record because trial counsel did object to the legality of the traffic stop and moved to suppress evidence on that ground. Moreover, counsel thoroughly questioned the state's witnesses, presented defense witnesses, and objected to the prosecutor's remarks during closing statements. Jones complains that trial counsel failed to investigate and discover the identity of the confidential

informant who gave Officer Walker information about drugs in the apartment the day of his arrest. But Jones does not explain why the identity of the informant would have made any difference in his case. Jones further complains that counsel prevented him from testifying. Trial counsel submitted an affidavit to the state habeas court stating that he did in fact discuss the advantages and disadvantages of Jones's testifying, that he informed Jones of his absolute right to do so, but advised against it, and that after being advised of his rights and the potential risks, Jones decided not to testify. The state habeas court found counsel credible. Jones clearly has not shown that the state court's rejection of his ineffective assistance claim was contrary to or an unreasonable application of federal law, or was based on an unreasonable determination of facts.

The two-pronged test of *Strickland* also applies to an ineffective assistance of appellate counsel claim. In order to succeed on an ineffective assistance of appellate counsel claim, a petitioner 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.

Jones complains that his appellate counsel failed to raise all the claims he thinks she should have. But he makes only a conclusory allegation of prejudice and does not show that any of the arguments he raises would have been successful. Again, Jones has not shown that the state court's rejection of his ineffective assistance of appellate counsel claim was contrary to or an unreasonable application of federal law, or was based on an unreasonable determination of facts.

## **6. Evidentiary Hearing**

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, Jones's contentions do not support a claim for federal habeas relief.

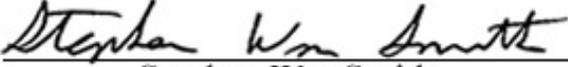
### **Conclusion and Recommendation**

For the reasons discussed above, the court recommends that Jones'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 further finds that Jones 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 February 12, 2008.

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Stephen Wm Smith  
United States Magistrate Judge