UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 91-1767

(Summary Calendar)

KENNETH LERON SATTERWHITE,

Petitioner-Appellant,

versus

JAMES A. COLLINS, DIRECTOR,
Texas Department of Criminal
Justice, Institutional Division,

Respondent-Appellee.

Appeal from the United States District Court
For the Northern District of Texas
CA 4 90 946 K

July 8, 1993

Before GARWOOD, JONES, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

Defendant, Kenneth Leron Satterwhite, appeals the district court's judgment denying him habeas corpus relief. Finding no error, we affirm.

I

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* Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

Satterwhite was arrested and indicted for aggravated kidnapping. Satterwhite's court-appointed attorney subsequently gave written notice of his intent to raise an insanity defense. The court appointed a psychiatrist (a medical doctor in private practice) to examine Satterwhite. The psychiatrist found that Satterwhite was sane at the time of the offense and that he was competent to stand trial.[2]

Subsequently, Satterwhite moved to dismiss his appointed attorney and asserted his right to represent himself, pursuant to *Faretta v. California,* 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). After a lengthy pretrial hearing, the court granted Satterwhite's motion and placed his appointed attorney on "standby" status. At the hearing, Satterwhite stated that he had never been treated for a mental disorder, and had no mental disability.

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[2] The jailer intercepted two letters written to Satterwhite by a Texas Department of Corrections inmate after the court-appointed psychiatrist found Satterwhite sane at the time of the offense and competent to stand trial. In the first letter, the inmate gave Satterwhite advice on filing a motion for continuance, and instructed him on what course of action to take if he did not get a continuance: "[H]ave a nervous breakdown and go to the hospital the night before trial. Get the doc to load you down with Thorazine or something by telling him you might commit suicide. Then trial day tell the doctor you are too doped up to represent yourself at this time." State Record, Tab 6A. In a second letter, the inmate stated:

> [T]he motions I sent you were for one purpose only. And that was to get the cops stirred up so they would run to the courthouse and get the D.A. stirred up. Then with them stirred up, their concentration would not be on taking care of business. The only other reason was to stall the trial with paperwork. Both things worked like a charm.

Id.

On the morning of his trial, Satterwhite appeared in his jail clothes and refused to change into street clothes, even after the court explained to Satterwhite that it would not allow him to proceed to trial in his jail clothes, because it would violate his constitutional rights. Satterwhite then stated that he was too ill to proceed to trial. Although Satterwhite did not appear ill to the court, the court called in a doctor to examine him. Based on the doctor's testimony, the court found that Satterwhite was ill, but that the illness did not affect his mental abilities and that he was still physically able to proceed to trial. Upon Satterwhite's request, the court reappointed his standby counsel to represent him. Immediately thereafter, the court rescheduled the trial, but conducted a hearing on Satterwhite's competency after both the State and Satterwhite's appointed attorney announced that they were ready to proceed with the competency hearing. After hearing evidence, the jury found Satterwhite competent to stand trial.

About a week before his second pretrial hearing, Satterwhite stopped eating and drank only a small amount of fluids. At Satterwhite's second pretrial hearing, a doctor testified that Satterwhite might not be physically or mentally able to stand trial if he continued to fast. The doctor also testified that Satterwhite said he was fasting in order to get a fair trial. Concluding that Satterwhite was voluntarily fasting in order to delay or prevent his trial, the court denied Satterwhite's third motion for continuance. The court granted Satterwhite's motion for

state funds to hire a mental health expert of his own choice to determine his sanity at the time of the offense, with the condition that his trial would not be delayed.

On the morning of his trial, the court denied Satterwhite's fourth motion for continuance, and the case proceeded to trial. The jury rendered a verdict of guilty, and Satterwhite was sentenced to life imprisonment. Satterwhite's conviction was affirmed by the Texas Court of Appeals on direct appeal. *See Satterwhite v. Texas,* 697 S.W.2d 503 (Tex. App.))Eastland 1985, pet. ref'd). Satterwhite then filed three applications for a writ of habeas corpus in state court, which were denied. Subsequently, Satterwhite filed a petition for writ of habeas corpus in federal district court, which was denied on its merits.[3] Satterwhite appeals, contending that (a) he was denied effective psychiatric assistance, (b) the trial court erroneously denied his third and fourth motions for a continuance, (c) he was denied his right to a fair trial when the bailiff testified as a witness at the sentencing phase of his trial, (d) he received ineffective assistance of counsel at his competency hearing, (e) he received ineffective assistance of counsel at trial, (f) he received ineffective assistance of counsel at the evidentiary hearing held in his state habeas proceeding, and (g) his prior DWI conviction was improperly used to enhance his punishment.

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[3] This was Satterwhite's second petition for a federal writ of habeas corpus. Satterwhite's first petition was dismissed for failure to exhaust state remedies. Record on Appeal, vol. 1, at 58. Satterwhite's second petition is properly before this Court, because he has exhausted his state remedies.

II

Factual findings made by the state court shall be presumed to be correct unless the federal habeas court concludes that the state court determinations are not fairly supported by the record. 28 U.S.C. § 2254(d) (1988). The habeas petitioner has the burden of proving by convincing evidence that the state court's factual determinations were erroneous. *Sumner v. Mata,* 449 U.S. 539, 550, 101 S. Ct. 764, 771, 66 L. Ed. 2d 722 (1981). In habeas proceedings, we review the district court's findings of fact for clear error. *United States v. Woods,* 870 F.2d 285, 287 (5th Cir. 1989). We review the district court's conclusions of law de novo. *Id.*

A

Satterwhite first argues that he was denied effective psychiatric assistance because his court-appointed psychiatrist was not independent and not competent. Satterwhite also argues that because his court-appointed psychiatrist was incompetent, he should have been provided another psychiatrist of his choice.

The Supreme Court has held that "when a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires that a State provide access to a psychiatrist's assistance on this issue if the defendant cannot otherwise afford one." *Ake,* 470 U.S. at 74, 105 S. Ct. at 1091-92. "[T]he State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in

evaluation, preparation, and presentation of the defense." *Id.* at 83, 105 S. Ct. at 1096.

Satterwhite argues that his court-appointed psychiatrist was not independent because he was employed part-time by the Texas Department of Corrections ("TDC").[4] As Satterwhite concedes, he failed to present any evidence to show that his court-appointed psychiatrist was a TDC employee, and he offers no evidence on appeal. *See* Brief for Satterwhite at 7. Even if Satterwhite's allegation that his court-appointed psychiatrist was a state employee is true, Satterwhite has failed to demonstrate that the employment rendered the psychiatrist incompetent or biased. Furthermore, Satterwhite fails to point to any evidence suggesting that his appointed psychiatrist was incompetent. "Absent evidence in the record, a court cannot consider a habeas petitioner's bald assertions on a critical issue in his pro se petition . . . unsupported and unsupportable by anything else contained in the record, to be of probative evidentiary value." *Ross v. Estelle,* 694 F.2d 1008, 1011 (5th Cir. 1983). Consequently, Satterwhite's claim is meritless.[5]

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[4] Satterwhite also challenges the Texas Court of Appeals's finding that he did not make a preliminary showing that his sanity at the time of the offense was likely to be a significant factor at trial. *See Satterwhite v. State,* 697 S.W.2d at 506. That issue is moot because Satterwhite was provided with psychiatric assistance.

[5] Because Satterwhite has failed to show that his psychiatrist was incompetent and biased, we need not discuss whether he should have been provided another psychiatrist. However, we note that while an indigent defendant may have a constitutional right to a psychiatrist under certain circumstances, the indigent defendant does not have a "constitutional right to choose a psychiatrist of his personal liking or to receive funds to

B

Satterwhite next argues that the trial court erred in denying his third and fourth motions for a continuance in order to obtain psychiatric assistance to aid in his defense, claiming that this error abridged his rights to compulsory process and a fair trial under the Sixth and Fourteenth Amendments.

"`When a denial of a continuance forms a basis of a petition for a writ of habeas corpus, not only must there have been an abuse of discretion but it must have been so arbitrary and fundamentally unfair that it violates constitutional principles of due process.'" *Schrader v. Whitley,* 904 F.2d 282, 288 (5th Cir.) (quoting *Hicks v. Wainwright,* 633 F.2d 1146, 1148 (5th Cir. Unit B Jan. 1981)), *cert. denied,* 498 U.S. 903, 111 S. Ct. 265, 112 L. Ed. 2d 221 (1990). There is no mechanical test for deciding when a continuance is so arbitrary as to violate due process; it depends on the circumstances and the reasons presented to the trial judge at the time the request is denied. *Id.*; *Ungar v. Sarafite,* 376 U.S. 575, 589, 84 S. Ct. 841, 849, 11 L. Ed. 2d 921 (1964). If an abuse of discretion is demonstrated, the petitioner must show that there is a reasonable probability that the verdict might have been different had the continuance been granted. *Schrader,* 904 F.2d at 288.

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hire his own." *Ake,* 470 U.S. at 83, 105 S. Ct. at 1096; *see also Granviel v. Lynaugh,* 881 F.2d 185, 191 (5th Cir. 1989), *cert. denied,* 495 U.S. 963, 110 S. Ct. 2577, 109 L. Ed. 2d 758 (1990) ("The state is not required to permit defendants to shop around for a favorable expert.").

As discussed in the preceding subsection, Satterwhite was examined by a psychiatrist who concluded that he was sane at the time of the offense and competent to stand trial. Satterwhite did not have a right to delay the trial so that he could seek out a psychiatric opinion more to his liking. *See supra* n.5. In addition, the record supports the trial court's belief that the requests for continuance were made only to delay the trial, and that therefore Satterwhite was trying to manipulate the legal system. After Satterwhite's appointed psychiatrist opined that he was sane at the time of the offense and competent to stand trial, a state prison inmate instructed Satterwhite to pretend to have a nervous breakdown on the eve of his trial, obtain drugs from a doctor, and then tell the court that he was too "doped up" to proceed to trial. *See supra* n.2. Subsequently, on the morning of his trial, Satterwhite refused to change into street clothes after the court told him that it would not let him proceed to trial in his jail clothes. *See* State Record, Tab 8, at 159. Satterwhite also claimed to be too sick to proceed to trial, despite evidence that his illness did not affect his mental or physical capacity to do so. *See id.*; *id.* Tab 3, at 68-117. Furthermore, after a jury found that he was competent to stand trial, Satterwhite stopped eating, apparently in an effort to become too weak to proceed to trial. *See id.* Tab 6, at 19-55; *id.* Tab 6A, State Ex. #8. Based on these circumstances, we find no abuse of discretion in the denial of the motions for continuance.

C

Satterwhite contends that he was denied his right to a fair trial when the bailiff testified at the sentencing phase of his trial. Jack Perry acted as bailiff during Satterwhite's two-day trial. During the sentencing phase of Satterwhite's trial, Perry testified that Satterwhite had a bad reputation in the community. Satterwhite claims that prejudice should be presumed because the bailiff's dual role constituted a per se constitutional violation.

In *Turner v. Louisiana,* 379 U.S. 466, 85 S. Ct. 546, 13 L. Ed. 2d 424 (1965), the Supreme Court reversed the conviction of a defendant where the two principal witnesses for the prosecution were deputy sheriffs who acted as bailiffs at the defendant's trial. *See id.* at 467, 85 S. Ct. at 547. The deputies investigated the crime, apprehended and extracted a confession from the defendant, and testified about those events at trial. *Id.* The deputies were in close and continual contact with the jurors in and out of the courtroom during the three-day trial. *Id.* at 468, 85 S. Ct. at 547. The deputies drove the jurors to eating establishments for their meals, and to their hotel each night. *Id.* The deputies also ate with the jurors, conversed with them, and did errands for them. *Id.* There was no evidence that the deputies had discussed the case with the jury. *Id.* at 469, 85 S. Ct. at 547. Nevertheless, without requiring a showing of actual prejudice, the Supreme Court held that the defendant's right to due process and a fair trial were violated by the intimate and continuous association between the deputies and the jury. *See id.* at 474, 85 S. Ct. at 550. Similarly, in *Gonzalez v. Beto,* 405 U.S. 1052, 92 S. Ct.

1503, 31 L. Ed. 2d 787 (1972), the Supreme Court summarily reversed the conviction of a defendant where the county sheriff was the key prosecution witness and the bailiff of the jury, holding that the sheriff's dual role infringed upon the defendant's right to due process under the Turner doctrine. *See id.* at 1052, 92 S. Ct. at 1503.

"The basic teaching of [Turner] is that when the custodian of the jury who had continuous and intimate contact with the jury testifies about matters which are more than merely uncontroverted or formal aspects of the case and the credibility of the officer is a factor, then the accused had been denied due process." *Crawford v. Beto,* 385 F.2d 156, 157 (5th Cir. 1967), *cert. denied,* 393 U.S. 862, 89 S. Ct. 143, 21 L. Ed. 2d 130 (1968). The Supreme Court in *Turner,* however, "did not set down a rigid, *per se* rule automatically requiring the reversal of any conviction whenever any Government witness comes into contact with the jury." *Gonzalez,* 405 U.S. at 1054, 92 S. Ct. at 1505. Accordingly, in *Bowles v. State of Texas,* 366 F.2d 734 (5th Cir. 1966), we declined to hold that the sheriff's dual role as witness and bailiff resulted in a per se violation of the defendant's constitutional rights. See *id.* at 738; *see also Crawford v. Beto,* 385 F.2d at 157 (discussing *Bowles*). To determine whether a conviction must be reversed, "[t]he facts of each case must be examined to determine what impact the [bailiff]'s testimony had on the jury." *Id.* (although bailiff's contact with jury was probably sufficiently intimate and continuous so as to satisfy *Turner's* contact test, no

constitutional violation because bailiff's testimony was either corroborated by other witnesses or was uncontradicted and therefore, not harmful); *see also Bowles,* 366 F.2d at 736 (assuming that bailiff's contacts with jurors were too continuous and intimate under *Turner*, defendant's constitutional rights were not violated because bailiff's testimony was corroborated by other witnesses, and was uncontroverted); *Johnson v. Wainwright,* 778 F.2d 623, 627 (11th Cir. 1985) (Recognizing that *Turner* did not establish a per se rule of reversal, the court held that "[w]hen either the individual's official contact with the jury or his participation in the prosecution is so minimal in the juror's eyes as to have a de minimis impact on the jury's deliberations for all apparent purposes, some showing of actual prejudice must be made."), *cert. denied,* 484 U.S. 872, 108 S. Ct. 201, 98 L. Ed. 2d 152 (1987).

Assuming, but not deciding that Perry's contacts were too continuous and intimate under *Turner,*[6] the impact of Perry's participation in the prosecution was de minimis. Unlike the bailiffs in *Turner* and *Gonzalez,* Perry was not a key witness for the prosecution during the guilt-innocence phase of the trial. As a reputation witness, Perry testified during the sentencing phase of Satterwhite's trial only that Satterwhite had a bad reputation

[6] As bailiff during the guilt-innocence phases of Satterwhite's trial, Perry attended to the needs of the jurors. *See* State Record, Tab H, at 17. For instance, he provided refreshments and gave information to the jurors about vending machines. *See id.* During both the guilt-innocence and punishment phase of Satterwhite's trial, Perry also escorted the jury to and from the jury room for deliberations. *Id.*

in the community. *See* State Record, Tab 10, at 187. Satterwhite did not object to or controvert Perry's testimony. *Id.* at 187, 191-223. Furthermore, Perry's testimony was cumulative because two other witnesses also testified that Satterwhite had a bad reputation. See *id.* at 188-91. Therefore, even if the jury gave complete credence to Perry's testimony, no harm resulted from the testimony. Perry's dual role as bailiff and reputation witness does not require reversal of Satterwhite's conviction.

D

Satterwhite next argues that he received ineffective assistance of counsel at his competency hearing because he did not have enough time to consult his court-appointed counsel. Satterwhite claims that he was prejudiced because he was unable adequately to demonstrate his history of mental illness and to produce adequate testimony from lay witnesses. Satterwhite argues that he did not have sufficient consultation time because the court conducted his competency hearing immediately after reappointing standby counsel to represent him. Satterwhite contends that his counsel was unprepared, yet announced that he was ready to proceed with the competency hearing only because he was inexperienced.

Satterwhite cites *United States v. Cronic,* 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984), contending that he was constructively denied the assistance of counsel, and that therefore his conviction must be overturned because prejudice is presumed. A defendant is constructively denied counsel if 1) the defendant is denied counsel at a critical stage of the defendant's trial, or 2)

counsel entirely fails to subject the prosecution's case to meaningful adversarial testing. *Id.* at 659, 104 S. Ct. at 2047. Unless the defendant can show that the case squarely falls within *Cronic,* the defendant must rebut a presumption that *Strickland v. Washington,* 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), should apply. *Woodard v. Collins,* 898 F.2d 1027, 1029 (5th Cir. 1990).

After carefully reviewing the record, we conclude that Satterwhite was not constructively denied counsel, and that *Strickland* applies. First, there is no evidence that counsel was totally absent or prevented from assisting Satterwhite during the competency hearing. Second, Satterwhite's counsel did not fail to subject the prosecution's case to meaningful adversarial testing. Satterwhite's counsel was familiar with the case, having been appointed on January 17 (over a month before the competency hearing, which was held on February 20) and having acted as standby counsel since February 11. *See* State Record, Tab 2, at 40; *id.* Tab 8, at 5-6. Counsel put on the testimony of two lay witnesses, Satterwhite's parents, about his problems understanding and communicating. *See id.* Tab 5, 26-52. He also presented testimony of a substance abuse counselor who had treated Satterwhite for alcohol addiction. *See id.* at 10-26. Furthermore, counsel cross-examined all of the state's witnesses. *See id.* at 55, 59-60, 65-66, 75-78, 80-81. The fact that a lawyer is inexperienced does not justify a presumption of ineffectiveness. *See Cronic,* 466 U.S. at 665, 104 S. Ct. at 2050.

As Satterwhite has failed to rebut a presumption that *Strickland* applies, he must prove that 1) his counsel's performance was deficient, and 2) the deficient performance prejudiced his defense, in order to prevail on his ineffective assistance of counsel claim. *See Strickland,* 466 U.S. at 668, 104 S. Ct. at 2052. To establish prejudice, Satterwhite must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S. Ct. at 2068. Satterwhite claims in a conclusory manner that because he did not have sufficient consultation time with counsel,[7] he was unable adequately to show his history of mental illness and to produce adequate testimony from lay witnesses. Although the record contains evidence of previous treatment for substance abuse, see State Record, Tab 5, at 11-25, there is no evidence in the record suggesting that Satterwhite had a history of mental illness. In fact, Satterwhite testified at his first pretrial hearing that he had never been treated for a mental disorder and that he had no mental disability. See id. Tab 2, at 8, 35. Furthermore, he testified specifically that he had no mental incompetence that would prevent him from going to trial if someone else represented him. Id. at 35. In addition, at the

[7] Satterwhite's claim that he did not have sufficient time to consult his counsel alone is not sufficient to show prejudice. *See Murray v. Maggio,* 736 F.2d 279, 282 (5th Cir. 1984) ("Brevity of consultation time between a defendant and his counsel, alone, cannot support a claim of ineffective assistance of counsel."); *Diaz v. Martin,* 718 F.2d 1372, 1378 (5th Cir. 1983) (same), *cert. denied,* 466 U.S. 976, 104 S. Ct. 2358, 80 L. Ed. 2d 830 (1984); *Jones v. Estelle,* 622 F.2d 124, 127 (5th Cir.) (same), *cert. denied,* 449 U.S. 996, 101 S. Ct. 537, 66 L. Ed. 2d 295 (1980).

competency hearing, Satterwhite's court-appointed psychiatrist opined that Satterwhite was competent to stand trial. See id. Tab 5, at 67-81. Satterwhite fails to allege any additional facts with regard to his mental competence that would have been discovered had he had more time to consult with his appointed counsel, and therefore fails to demonstrate that the result of his competency hearing would have been different. The district court did not err in finding Satterwhite's ineffective assistance of counsel claim meritless.

E

Satterwhite claims that he was denied effective assistance of counsel at trial because 1) he did not have a psychiatrist of his choice to aid in his defense, 2) his counsel was inexperienced, 3) his counsel failed to object to the bailiff's testimony at the sentencing phase of his trial.

Satterwhite apparently argues that he was constructively denied counsel because he did not have a psychiatrist of his choice to aid in the evaluation, preparation, and presentation of his insanity defense. A reversible constitutional error may be shown "when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." *Cronic,* 466 U.S. at 659-60, 104 S. Ct. at 2047. We find no constitutional error. Satterwhite was appointed a competent psychiatrist who concluded that he was not insane at the

time of the offense.[8] Although Satterwhite was dissatisfied with the psychiatrist's conclusions, he did not have the right to obtain another psychiatrist of his choice, who would give a more favorable opinion. *See supra* n.5. Consequently, Satterwhite was not constructively denied counsel.

Satterwhite also claims that he was denied effective assistance of counsel under *Strickland*. We disagree. Satterwhite's argument that his counsel was ineffective merely because he was young and inexperienced is meritless. *See Cronic,* 466 U.S. at 665, 104 S. Ct. at 2050. Satterwhite also contends that his appointed counsel was ineffective because he failed to object to the admission of the bailiff's testimony at the sentencing phase of trial. We reject that claim, because Satterwhite fails to show prejudice. *See* discussion *supra* part II.C.

F

Satterwhite next argues that he was denied effective assistance of counsel at the evidentiary hearing held in his state habeas proceeding on the jury bailiff issue. *See id*. On federal habeas review we will not consider the adequacy of counsel in state habeas proceedings except insofar as counsel's performance might relate to an abuse of the writ. *Green v. McGougan,* 744 F.2d 1189, 1190 (5th Cir. 1984). The district court correctly found that

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[8] *See* discussion *supra* part II.A. In addition, the record is devoid of any evidence that even suggests that Satterwhite was insane at the time of the offense.

Satterwhite did not receive ineffective assistance of counsel at the evidentiary hearing.

G

Lastly, Satterwhite claims that his prior DWI conviction is void, and was therefore improperly used to enhance his punishment. Satterwhite states that he cannot properly address the issue, however, until further investigation is done, and requests that this Court contact his court-appointed counsel, and order him to submit an affidavit. *See* Brief for Satterwhite at 17. Satterwhite also asks that we order the trial court reporter to submit a copy of the tape recording of the trial. *Id.* Federal Rule of Appellate Procedure 28(d) "requires that the appellant's argument contain the reasons he deserves the requested relief `with citation to the authorities, statutes and parts of the record relied on.'" *Weaver v. Puckett,* 896 F.2d 126, 128 (5th Cir.) (quoting Fed. R. App. P. 28(d)), *cert. denied,* 498 U.S. 966, 111 S. Ct. 427, 112 L. Ed. 2d 411 (1990). Because Satterwhite fails to argue this issue in his brief, his claim is abandoned. *See id.*

III

For the foregoing reasons, the district court's judgment is **AFFIRMED**.