No. _____

(CAPITAL CASE)

IN THE

Supreme Court of the United States

HOWARD PAUL GUIDRY,
Petitioner,

v.

BOBBY LUMPKIN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Fifth Circuit denied petitioner Howard Guidry's certificate of appealability. In so doing, the Fifth Circuit ignored blatant racial discrimination during jury selection. The Fifth Circuit also refused to hear Guidry's ineffective assistance of counsel claims based on the finding that they were procedurally defaulted. Neither the State nor the courts below deny that the trial court admitted testimony that violated Guidry's confrontation rights, and that Guidry's appellate counsel failed to appeal the issue. Further, neither the State nor the courts below dispute that Guidry's trial counsel were deficient for allowing testimony that Guidry confessed, and for failing to investigate exculpatory evidence. Guidry has shown that the exculpatory evidence, either suppressed by the State or overlooked by trial counsel, would have established Guidry's innocence. On federal habeas review, the Fifth Circuit rejected these claims for one reason: Guidry's state habeas counsel failed to assert them. No one disputes that Guidry's state habeas counsel was grossly deficient in failing to assert these arguments, or that he has a long reputation for repeated incompetence. It is also undisputed that state habeas counsel could never have preserved Guidry's ineffective assistance of appellate counsel claim because Texas law required him to file Guidry's state habeas petition nine months before the Texas Court of Criminal Appeals decided Guidry's direct appeal.

This case gives rise to the following questions:

1. Whether the Fifth Circuit, in this appeal of the denial of a certificate of appealability, improperly addressed the merits of the habeas claims rather than

determining whether "jurists of reason could disagree with the district court's resolution of [petitioner's] constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Buck v. Davis*, 137 S. Ct. 759, 773 (2017).

2. Whether the State's peremptory strike of a Black juror because he belonged to the NAACP constituted unconstitutional race discrimination under *Batson v. Kentucky*, 476 U.S. 79 (1986), where the State failed to offer any credible race-neutral explanation for the strike.

3. Whether Guidry's procedural default of appellate counsel's deficient performance is excused where Texas law required him to file his habeas petition before his direct appeal was concluded.

4. Whether the State may excuse its failure to disclose exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), by asserting—with no evidence and contrary to this Court's and other Circuits' holdings—that it had an "open file policy" and without establishing that the exculpatory evidence was present in any files available to defense counsel.

5. Whether trial counsel was ineffective when, during a re-trial, they failed to object to testimony on the basis that, in an earlier habeas case, the Fifth Circuit held that very testimony violated the Confrontation Clause.

6. Whether ineffective assistance of trial counsel in a first trial that prejudiced the defendant in the second trial violates the Sixth Amendment.

7. Whether Guidry's procedural default is excused because habeas counsel failed to investigate and present exculpatory fingerprint and ballistic evidence supporting actual innocence.

RELATED CASES STATEMENT

- *State of Texas v. Howard Paul Guidry*, No. 730267, in the Criminal District Court No. 230 of Harris County, Texas, judgment entered March 21, 1997.

- *Guidry v. State*, No. 72775, in the Court of Criminal Appeals of Texas, opinion entered December 15, 1999.

- *State of Texas v. Howard Paul Guidry*, No. 7302670101A, in the Criminal District Court No. 230 of Harris County, Texas, judgment entered July 14, 2000.

- *Guidry v. State*, No. WR-47, 417-01, in the Court of Criminal Appeals of Texas, opinion entered November 13, 2000.

- *Guidry v. Dretke,* No. H-O1-CV-4140, in the United States District Court of the Southern District of Texas, Houston Division, judgment entered September 26, 2003.

- *Guidry v. Dretke*, No. 03–20991, in the United States Court of Appeals, Fifth Circuit, opinion entered, Jan. 14, 2005.

- *State of Texas v. Howard Paul Guidry*, No. 1068601, in the Criminal District Court No. 230 of Harris County, Texas, judgment entered May 17, 2006.

- *The State of Texas v. Howard Paul Guidry*, No. 1073163, in the Criminal District Court No. 230 of Harris County, Texas, judgment entered February 22, 2007.

- *Guidry v. State*, No. AP–75,633, in the Court of Criminal Appeals of Texas, opinion entered October 21, 2009.

- *Ex Parte Guidry*, No. 1073163-A, in the Criminal District Court No. 230 of Harris County, Texas, judgment entered March 14, 2012.

- *Ex Parte Guidry*, Nos. WR-47,417–02, WR–47,417–03, in the Court of Criminal Appeals of Texas, opinion entered June 27, 2012.

- *Ex parte Guidry*, Nos. WR-47,417-04 and WR-47,417-05, in the Court of Criminal Appeals of Texas, opinion entered September 19, 2018.

- *Guidry v. Davis,* No. H-13-1885, in the United States District Court of the Southern District of Texas, Houston Division, judgment entered April 13, 2020.

- *Guidry v. Lumpkin*, No. 20-70005, in the United States Court of Appeals, Fifth Circuit, opinion entered June 23, 2021.

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PETITION FOR A WRIT OF CERTIORARI

Howard Guidry respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit denying Guidry a certificate of appealability.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Fifth Circuit, amending its prior decision after denial of Petitioner's petition for rehearing *en banc*, and denying Guidry a certificate of appealability as to all of his claims, *Guidry v. Lumpkin*, 2 F.4th 472 (5th Cir. 2021), is attached as Appendix A.

The decision of the United States District Court for the Southern District of Texas, granting Texas's motion for summary judgment, denying Guidry's cross-motion for summary judgment, denying Guidry's federal habeas petition, dismissing the case with prejudice, and declining to certify any issue for appellate review, *Guidry v. Davis*, No. CV H-13-1885, 2020 WL 9260154 (S.D. Tex. Apr. 13, 2020), is attached as Appendix B.

The Order of the Texas Court of Criminal Appeals, denying applications for writs of habeas corpus, dated September 20, 2018, is attached as Appendix C.

The decision of the Texas Court of Criminal Appeals adopting the trial court's findings and conclusions denying Guidry relief on his petition for writ of habeas corpus, *Ex Parte Guidry*, Nos. WR-47,417-02, WR-47,417-03, 2012 WL 2423621 (Tex. Crim. App. June 27, 2012), is attached as Appendix D.

The Texas trial court's findings and conclusions denying Guidry relief on his

State petition for writ of habeas corpus, dated March 14, 2012, are attached as Appendix E.

The decision of the Texas Court of Criminal Appeals affirming Guidry's conviction and death sentence, *Guidry v. State*, No. AP-75,633, 2009 WL 3369261 (Tex. Crim. App. Oct. 21, 2009), is attached as Appendix F.

JURISDICTION

On June 23, 2021, the Fifth Circuit issued its decision denying Guidry a certificate of appealability as to all of his claims. App. A. Pursuant to the Supreme Court's July 19, 2021 Order, the 90-day deadline set forth in 28 U.S.C. § 2101(c) is extended to 150 days. This Court has jurisdiction under 28 U.S.C. § 1254(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The U.S. Constitution's Sixth Amendment provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. The Fourteenth Amendment provides in relevant part: "No state shall . . . deprive any person of life, liberty, or property, without due process of law[.]" *Id.* amend. XIV, § 1. The state statute that governs requests for habeas relief in Texas death-penalty cases, Tex. Code of Crim. Proc., art. 11.071, is reproduced in Appendix K.

INTRODUCTION

In 1997, Petitioner Howard Guidry was sentenced to death in Texas state court for the murder of Farah Fratta. On federal habeas review, the Fifth Circuit overturned the conviction based on (1) the unconstitutional admission of Guidry's

involuntary confession and (2) the admission of hearsay testimony from Mary Gipp that denied Guidry the right to confrontation. *Guidry v. Dretke*, 397 F.3d 306, *reh'g denied,* 429 F.3d 154 (5th Cir. 2005). The Fifth Circuit held that the trial court's errors in admitting the unconstitutional evidence were prejudicial because, "without the confession or [the hearsay] statements implicating Guidry, there is little evidence of Guidry's participation in the murder." *Id*. at 330.

Texas retried Guidry. In 2007, he was again convicted and sentenced to death. During jury selection, the State struck a Black juror because he belonged to the NAACP. The trial court found that this strike was impermissibly based on race, but allowed the strike anyway based on the prosecution's subsequent explanations.

During the second trial, the jury heard the *same* highly prejudicial testimony from Gipp that the Fifth Circuit had previously found to violate Guidry's constitutional rights. Specifically, Gipp *again* testified that someone told her that Guidry shot Farah. Guidry's trial counsel never informed the trial judge of the Fifth Circuit's earlier habeas decision finding this testimony unconstitutional.

Moreover, Guidry's trial counsel at both his first and second trials were ineffective in their handling of defense expert Scott Basinger's testimony. Before the first trial, Guidry's lawyers retained Basinger to provide mitigating testimony about Guidry's substance abuse problems. Guidry's lawyers called Basinger to testify in the first trial even though Basinger informed them—in writing—that his testimony would not help their client. During cross-examination at the first trial, Basinger stated that Guidry had confessed to him. But Basinger later admitted to Guidry's

trial counsel that, in fact, Guidry had not confessed to him; rather, he said Guidry confessed because, when he met with Guidry, they went through the text of Guidry's (involuntary) confession to the police. Basinger admitted he did not ask Guidry if Guidry committed the crime and Guidry did not say he did. The State then called Basinger at Guidry's second trial and Basinger again testified that Guidry confessed to him. The State does not deny, and the district court found, that trial counsel did not move to exclude Basinger's testimony based on their own ineffectiveness in handling his first trial testimony because they had a conflict of interest.

The Fifth Circuit denied Guidry a certificate of appealability based on the assertion that state habeas counsel defaulted all of the claims that Guidry raises in this petition except the claim that the State's peremptory strike of a Black juror because he belonged to the NAACP was impermissibly based on race.

The trial court found that NAACP membership is not race neutral, but allowed the strike anyway. The prosecutor offered some subsequent excuses for the strike, but these later explanations only reinforce that the State struck the juror because he was Black. For example, the State later claimed that it struck the Black juror because he had suffered discrimination as a Black person. The State did not ask other non-white jurors about whether they had experienced discrimination. The State also then claimed that it actually struck the Black juror because he belonged to Lakewood Church, and "people who go to Lakewood are screwballs and nuts." But the State accepted two non-Black jurors who belonged to Lakewood Church.

Moreover, it is undisputed that state habeas counsel's performance was grossly deficient—prompting Guidry even to resort to self-help, filing untimely pro se papers after he received state habeas counsel's filings months late. Guidry's ineffective assistance of counsel claims require him to prove that habeas counsel's deficiencies prejudiced him. No one disputes that his trial, appellate, and habeas counsel were deficient in various ways. To establish prejudice, Guidry is only required to show that the underlying ineffective assistance of counsel claims have "some merit." *Martinez v. Ryan*, 566 U.S. 1, 14 (2012). Guidry can establish that his attorneys' various deficiencies prejudiced him.

First, on direct appeal after the second trial, appellate counsel failed to argue that the trial court erred in allowing Gipp's hearsay testimony that Guidry shot Farah. But Texas law prevented Guidry's habeas counsel from making an ineffective assistance of appellate counsel claim because his habeas petition was due nine months *before* his appeal was decided. *See* Tex. Code Crim. Proc. art. 11.071, § 4. Therefore, Guidry could not have even known that he had an ineffective assistance of appellate counsel claim until several months after his habeas petition was filed. As a result, no court has ever reviewed this blatant and prejudicial error. The Fifth Circuit refused to consider this claim based on the assertion that "Guidry did not make this argument in the district court." This assertion is wrong: Guidry explicitly claimed in the district court that appellate counsel was ineffective because he failed to argue that the trial court erred in admitting Gipp's hearsay testimony that Guidry

killed Farah. As this Court has emphasized, once a federal claim is properly presented, a party on appeal can make any argument in support of that claim.

Second, Guidry's trial counsel's ineffectiveness in the first trial prejudiced his second trial and therefore violated his Sixth Amendment rights in the second trial. The Fifth Circuit rejected this argument, holding that "[e]ven if we assume that Guidry's first trial counsel was ineffective for putting Dr. Basinger on the stand, Guidry points to no clearly established law that ineffective assistance in a reversed trial can justify habeas relief from conviction in a second trial." App. A at 19. This holding is contrary to *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984), which confirms that the Court must evaluate counsel's performance throughout the *whole* case. As Justice Sotomayor recently recognized, the second trial must be free of taint resulting from Sixth Amendment violations in the first trial that may "'perversely skew the second trial in the prosecution's favor.'" *Kaur v. Maryland*, 141 S. Ct. 5, 6 (2020) (Sotomayor, J., respecting the denial of certiorari). The Court should clarify that a defendant's Sixth Amendment right requires this protection.

Third, the Fifth Circuit refused to consider newly discovered evidence of Guidry's actual innocence. Federal habeas counsel discovered new evidence that the State's ballistics investigator testified falsely that Guidry was arrested with the murder weapon. In truth, none of the State's multiple ballistics tests tied Guidry's gun to Farah's murder. Habeas counsel also discovered that latent fingerprints found on Farah's car the night of the murder matched another suspect. It is undisputed that trial counsel failed to present any of this evidence. This failure occurred either

because trial counsel never investigated or the State suppressed it. The Fifth Circuit concluded that trial counsel's failure to discover or present this evidence did not prejudice Guidry. But its decision relied on several factual misstatements that the State itself does not claim are true. The Fifth Circuit failed to accurately undertake the "weighty and record-intensive analysis" that is required to determine prejudice. *Andrus v. Texas*, 140 S. Ct. 1875, 1887 (2020).

STATEMENT OF THE CASE

A. Pre-trial facts.

In 1994, Robert and Farah Fratta were getting divorced. Embittered, Robert repeatedly tried to hire acquaintances to kill Farah. ROA.4626–4627. Robert discussed killing Farah with his friend James Podhorsky at the tanning salon they frequented almost daily. ROA.4642; ROA.4845. Robert gave Podhorsky Farah's schedule and offered him money and a jeep to kill Farah. ROA.4643; ROA.4845.

In November 1994, Farah's neighbors heard gunshots, and saw Farah fall in her garage. ROA.4772. They told police they saw "a shorter black male" around 5'7." ROA.3705; ROA.4664; ROA.4667. Guidry is 6'0". ROA.5230. Neither could identify Guidry as the man they saw. *Guidry,* 397 F.3d at 330. The eyewitnesses described the getaway car as a little "silver or gray" car with a burned-out headlight. ROA.4661–4662; ROA.4668–4670.

Robert and Podhorsky knew another man named Joseph Prystash because Podhorsky sold cocaine to Prystash. ROA.4629; ROA.4655. The police investigated

Prystash and his girlfriend, Mary Gipp. ROA.4929–4932. Gipp lived across from Guidry. ROA.5268. Prystash frequently stayed at Gipp's apartment. ROA.5265.

Gipp first told police Prystash was with her on the night of the murder and claimed no knowledge of Farah's death. ROA.4931–4932. Gipp was subpoenaed before the grand jury, but refused to testify. ROA.5001; ROA.5205.

The State charged Gipp with tampering with evidence, and she then agreed to cooperate with the police. ROA.5001–5003; ROA.5273–5274. Gipp changed her story, admitting she knew in advance that Prystash intended to kill Farah. ROA.5002; ROA.5270–5271. She now claimed that Prystash told her that he drove Guidry to Farah's house, where Guidry shot Farah. ROA.5002.

It is uncontroverted that Robert never met or knew Guidry. ROA.4737–5015.

On the night of Farah's death, police found latent fingerprints on the car in Farah's garage that did not match Farah, Robert, or Guidry. ROA.4671; ROA.4711.

On March 1, 1995, police arrested 18-year-old Guidry. ROA.6607. The police claimed they found Farah's murder weapon on Guidry. ROA.5003; ROA.5552–5553. Guidry confessed after an extensive police interrogation—a confession that the Fifth Circuit later declared unconstitutional because it was involuntary. *Guidry*, 397 F.3d at 328–29. The State charged Guidry with capital murder. *Id.* at 310.

B. The first trial.

Before Guidry's first trial, his lawyer Alvin Nunnery hired Scott Basinger, who claimed to possess expertise in substance abuse. ROA.5608–5609. Nunnery asked Basinger to interview Guidry. ROA.3307.

Basinger said, "Mr. Nunnery gave me little guidance on how I should conduct the interview or what he was looking for." ROA.2771. Instead, Nunnery played Basinger a tape recording of Guidry's confession and showed him a videotape of the police leading Guidry through a "reenactment" of the crime. ROA.3307.

Basinger interviewed Guidry for just an hour. ROA.2775. Basinger used that time to read through Guidry's confession to the police with Guidry. ROA.3308–3309. Basinger then sent Nunnery a summary of the meeting. ROA.2777–2778. Basinger wrote he could "offer little in the way of extenuating circumstances at the time of the murder." ROA.2778. Basinger's letter suggested that he believed Guidry had confessed to killing Farah. ROA.2777–2778. Basinger asked Nunnery to call him to discuss, but Nunnery never did. ROA.2778

Inexplicably, Nunnery still called Basinger as a witness at trial. ROA.5604–5635. On cross-examination, the prosecutor asked Basinger, "When you interviewed Howard Guidry in the Harris County Jail about the capital murder of Farah Fratta, did he admit to you that he shot her two times in the head?" Basinger answered, "He did." ROA.5624–5625.

Basinger later admitted to Nunnery his testimony was false:

> Basinger admitted to me that he did not ask Howard whether Howard shot Farah Fratta, and that Howard did not actually tell him that he had. Basinger told me that he may have said what he said because he and Howard had reviewed his alleged confession to the police that I had provided to Basinger.

ROA.3308–3309.

Gipp testified that Prystash told her that he drove Guidry to Farah's house, where Guidry shot Farah. ROA.5002.

The jury convicted Guidry, and it sentenced him to death. ROA.4574–4575.

C. The Fifth Circuit vacated the first trial's verdict.

On direct appeal, the Texas Court of Criminal Appeals ("TCCA") held that Gipp's testimony was inadmissible hearsay since she merely repeated Prystash's out-of-court statements to her that Guidry killed Farah. *Guidry v. State*, 9 S.W.3d 133, 147–52 (Tex. Crim. App. 1999). The TCCA nonetheless affirmed the conviction, reasoning that the error was harmless because of Guidry's confession. *Id.* at 152.

In the federal habeas proceeding, the Fifth Circuit held that the police violated Guidry's Fifth Amendment rights in taking his confession and that his statements were inadmissible. *Guidry*, 397 F.3d at 329. The Fifth Circuit vacated the conviction, holding that, once the confession is excluded, Gipp's hearsay testimony that violated Guidry's confrontation rights became prejudicial. *Id.* The Fifth Circuit emphasized that "without the confession or Prystash's statements implicating Guidry, there is little evidence of Guidry's participation in the murder." *Id.* at 330.

D. The second trial and the direct appeal.

The State retried Guidry for Farah's murder. During jury selection, the State struck a Black juror, Matthew Washington, after he disclosed that he was a member of the NAACP. When challenged, the prosecutor claimed that she actually struck Washington because (1) the NAACP is opposed to the death penalty; (2) he went to Lakewood Church, which is full of "screwballs and nuts"; (3) he believed that some

people commit crimes because they have no education or opportunities; (4) he had experienced discrimination in his own life; (5) he was "hesitant and uncomfortable" when answering questions; and (6) the defense might call a witness who was involved in the NAACP. ROA.9292–9293; App. A at 9. The trial court excused Washington. ROA.9293; App. I at 174–76.

Nunnery again represented Guidry. The State notified the defense that Basinger would testify as the State's witness against Guidry. ROA.2772. Trial counsel moved to quash Basinger's testimony, but they did not argue that they had provided ineffective assistance of counsel in the first trial when they put Basinger on the stand. ROA.5641–5650.

The Court denied Guidry's motion to quash, and when the prosecutor called Basinger to testify, Basinger testified that Guidry confessed. ROA.5677–5678; App. B at 65–66.

Gipp again testified that Prystash told her that Guidry killed Farah. ROA.5286; App. B at 62–63. This time, instead of directly stating what Prystash said, she testified that she told her brother what Prystash told her. *Id.* The State does not deny that this testimony was inadmissible hearsay that violated Guidry's confrontation rights. App. A at 18–19. Nor does the State deny that trial counsel failed to inform the trial court that the Fifth Circuit previously held that this testimony violated Guidry's confrontation rights. *See id.* When the prosecutor asked Gipp questions intended to elicit hearsay testimony that Howard killed Farah, trial counsel only responded with one word, "Hearsay." *See* ROA.3564; App. H at 64.

The jury convicted Guidry of capital murder and sentenced him to death. ROA.4675. On the direct appeal to the TCCA, Guidry's appellate counsel failed to argue that the trial court violated Guidry's Confrontation Clause rights by allowing Gipp to testify that Prystash told her that Guidry killed Farah. ROA.5928–5940. He only argued that Guidry's trial counsel had been ineffective in failing to prevent Gipp's testimony. *Id.*

E. The state habeas proceeding.

Jerome Godinich was appointed to represent Guidry in state post-conviction proceedings. At that time, Godinich was notorious and well known for repeatedly failing to fulfill basic duties to his clients. ROA.6398–6400. These failings included a pattern of missing crucial filing deadlines in habeas cases, just as he did with Guidry. ROA.6404–6407. Two of his clients were executed after Godinich defaulted their habeas petitions. ROA.6404–6410.

Texas attorneys have excoriated Godinich for his extreme failures to represent his clients effectively. ROA.6412–6413. One attorney opined that Godinich is "an embarrassment" to the criminal defense bar because of his inexcusable failure to timely file three habeas petitions. ROA.6415–6416. Another attorney called Godinich's failures "utterly inexcusable," "sickening," "shockingly stupid and irresponsible," "a disgrace," "inconceivable," and "disgusting." ROA.6418–6419.

On January 28, 2009, Godinich filed a petition for writ of habeas corpus in state court that raised only two issues. ROA.6280–6338. The petition claimed that Basinger's testimony was the fruit of Guidry's involuntary confession to police, and

that the State's peremptory strike of a Black juror, Matthew Washington, was impermissibly based on race because he belonged to the NAACP. *Id.* Despite repeated entreaties by Guidry's appellate counsel and Guidry himself, Godinich failed to raise the ineffective assistance claim that appellate counsel had raised in Guidry's appellate brief: trial counsel was ineffective in failing to object adequately to Gipp's hearsay testimony that violated Guidry's confrontation rights. ROA.7984–7985.

Guidry then tried to help himself, filing a pro se motion to try to preserve his claims and asking for new counsel. ROA.5737–5752; ROA.5759–5765; ROA.5804–5845. Guidry sent the court a list of claims that should have been included in his habeas petition. ROA.5759–5765. The trial court ignored the communication.

The TCCA upheld the conviction on October 21, 2009, nearly nine months after the deadline for Guidry's state habeas petition. App. F at 11. The TCCA held that the claim that trial counsel were ineffective in failing to prevent Gipp's testimony must be raised in the habeas proceeding. App. F at 7. However, the deadline had passed for filing the habeas petition and Godinich had not asserted the claim.

Twenty-one months after filing the initial petition, Godinich filed a Supplemental Application for Writ of Habeas Corpus and Evidentiary Hearing Request on October 25, 2010. He tried to raise for the first time trial counsel's ineffectiveness in failing to stop Gipp from presenting hearsay testimony that Guidry killed Farah. ROA.6340–6394. The court refused to consider this claim because it was time-barred. App. D at 1–2; *see also* App. C at 1–4.

Guidry had been trying to retain replacement pro bono counsel to replace Godinich, and was successful in doing so. ROA.5847–5848. On June 22, 2011, current habeas counsel requested leave to replace Godinich as Guidry's counsel of record. *Id.* The court denied the motion and new habeas counsel's request to make an offer of proof. *Id.*; App. C at 1–4.

F. Federal habeas counsel's investigation and discovery of exculpatory fingerprint and ballistic evidence that establish Guidry's innocence.

Guidry's current habeas counsel replaced Godinich in the federal habeas proceeding and uncovered substantial evidence undermining the conviction, either suppressed by the prosecution or overlooked by Guidry's trial counsel. Guidry's habeas counsel discovered that police knew that Joe Podhorsky's car matched the description of the getaway car: a grey/black Corvette with silver front fenders and one inoperable headlight. ROA.4988. It had human blood on the seat. ROA.4877; ROA.4720; *Fratta v. Davis*, No. 4:13-CV-3438, 2017 WL 4169235, at *18 (S.D. Tex. Sept. 18, 2017), *appeal dismissed*, No. 20-70003, 2020 WL 5200914 (5th Cir. Mar. 18, 2020).

Podhorsky had given the Corvette to Vernon Barlow, who police identified as the car's regular "driver," and the car was registered in Barlow's name. ROA.4988. Barlow, who is 5'10", matched the eyewitness description of the shooter: a young, Black, shorter male. ROA.4664; ROA.4667; ROA.5378.

The only fingerprints in Farah's crime scene file were from the car in Farah's garage on the night of her murder. ROA.4708–4736. Barlow's fingerprints matched. ROA.4710–4712; ROA.4716.

Guidry's current habeas counsel also discovered that the police tested the gun they allegedly found on Guidry. None of the ballistics tests tied the gun to Farah's murder. ROA.5555–ROA.5562.

REASONS TO GRANT THE PETITION

I. The Fifth Circuit failed to apply the certificate of appealability standard, instead deciding the case on the merits.

This Court has specifically instructed the courts of appeals that, when determining whether a petitioner is entitled to a certificate of appealability, the court should not decide the merits of the case. "The COA inquiry," this Court has explained, "is not coextensive with a merits analysis." *Buck v. Davis*, 137 S. Ct. 759, 773 (2017). Instead, "[a]t the COA stage, the only question is whether the applicant has shown that 'jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.'" *Id.* (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003)). "When a court of appeals sidesteps [the COA] process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction." *Id.* (brackets in original).

As in *Buck*, the Fifth Circuit decided the merits of Guidry's claims, not whether "jurists of reason" could debate the claims or could conclude that they are sufficiently weighty "to deserve encouragement to proceed further." *Buck*, 137 S. Ct. at 773. And, as explained below, "jurists of reason" could certainly conclude that Guidry's claims have merit or, at the least, "are adequate to deserve encouragement to proceed

further." *Id.* Accordingly, for this reason alone, this Court should vacate the judgment—perhaps summarily—and remand for the Fifth Circuit to engage in the proper analysis under *Buck*.

II. The State's peremptory strike of a Black juror because he belonged to the NAACP violated *Batson*.

"The Constitution forbids striking even a single prospective juror for a discriminatory purpose." *Flowers v. Mississippi*, 139 S. Ct. 2228, 2244 (2019); *see also Batson v. Kentucky*, 476 U.S. 79 (1986) (same). "*Batson* provides a three-step process for a trial court to use in adjudicating a claim that a peremptory challenge was based on race: 'First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race[; s]econd, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question[; and t]hird, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination.'" *Snyder v. Louisiana*, 552 U.S. 472, 476–77, (2008) (quoting *Miller-El v. Dretke*, 545 U.S. 231, 277 (2005)) (brackets added by *Snyder*); *see also Hernandez v. New York*, 500 U.S. 352, 359 (1991) (once a prosecutor offers an explanation, the preliminary issue of whether the defendant has made a prima facie case is moot).

The prosecutor's peremptory challenge of Black juror Matthew Washington was impermissibly based on race. After Washington disclosed he was a member of the NAACP, the State struck him. When challenged about the strike, the State then claimed it actually struck Washington because (1) the NAACP opposes the death penalty; (2) he went to Lakewood Church, a church full of "screwballs and nuts"; (3)

he believed that some people commit crimes because they have no education or opportunities; (4) he had experienced discrimination as a Black man; (5) he was hesitant and uncomfortable when answering some questions; and (6) it was possible that the defense would call a witness who was also an NAACP member. ROA.9292–9293; App. A at 9. These excuses are either not race-neutral as well and/or are contradicted by the record.

A. NAACP membership is not a race-neutral reason for the State's challenge of Washington.

The trial court found that NAACP membership is not a race-neutral reason to strike a juror. *See* App. I at 175–76; ROA.6547–6548. Therefore, Guidry met his prima facie case and the burden shifts to the State to "offer a race-neutral basis for striking the juror in question." *Snyder*, 552 U.S. at 476–77.

It is beyond debate that "a juror's membership in the NAACP is not a race-neutral reason for striking him." *Moeller v. Blanc*, 276 S.W.3d 656, 662 (Tex. App. 2008); *see also Somerville v. State*, 792 S.W.2d 265, 268 (Tex. App. 1990); *People v. Holmes*, 651 N.E.2d 608, 615 (Ill. App. Ct. 1995) (holding that defendant established a prima facie case of racial discrimination in the use of peremptory challenges under *Batson* where "aside from her membership in the NAACP, [the challenged juror]'s characteristics were substantially the same as those of several of the accepted jurors"); *cf. Moore v. State*, 811 S.W.2d 197, 200 (Tex. App. 1991) (membership in a minority club is not a race-neutral reason); *Randolph v. State*, 416 S.E.2d 117, 119 (Ga. Ct. App. 1992) (holding that "the possibility that juror bias is demonstrated by mere membership in [all-Black professional or social] organizations would be based

upon an impermissible assumption ultimately arising solely from the juror's race," and thus such membership would not be a race-neutral reason for striking a juror). Group bias is not a race-neutral reason. *See Chivers v. State*, 796 S.W.2d 539, 543 (Tex. App. 1990) ("By concluding that [the potential juror] had low intelligence and/or education by virtue of his occupation instead of addressing [him] with individual questions, the State based its explanation for the peremptory challenge on a group bias without showing that the group trait applied to [the potential juror] specifically. Such explanation weighs heavily against the legitimacy of the State's allegedly race-neutral argument.").

B. The prosecutor did not subsequently provide legitimate race-neutral reasons for exercising the challenge.

None of the allegedly "race-neutral" excuses for striking Washington are plausible or supported by the record. In *Snyder v. Louisiana*, the State struck a Black juror and attempted to provide two purportedly race-neutral explanations. 552 U.S. at 478. The State claimed that the juror had a work obligation that would conflict with jury service. This Court rejected the explanation as "suspicious" and "implausib[le]" because the record showed that service as a juror would not substantially interfere with the juror's work obligations, and the prosecutor "accept[ed] white jurors who disclosed conflicting obligations that appear[ed] to have been at least as serious." *Id.* at 483. This Court also rejected the second purportedly race-neutral excuse, the defendant's demeanor, because "the record [did] not show that the trial judge actually made a determination concerning [prospective juror] Mr.

Brooks' demeanor. . . . [T]he trial judge simply allowed the challenge without explanation." *Id.* at 479.

Here, the State's excuses are likewise contradicted by the record. The State claimed that membership in the NAACP is actually a race-neutral reason to strike a juror because the NAACP has stated it is opposed to the death penalty. But the prosecution's individual questioning of Washington showed the purported race-neutral explanation—opposition to the death penalty—did not apply to him and was therefore pretextual. Washington did not even know the NAACP's position on the death penalty. ROA.6536. In fact, the prosecutor was the one who informed him that the NAACP opposes the death penalty. *Id.* And even with this new information, Washington said he could still return a death verdict. ROA.6538–6539. He said he would support the death penalty if a crime was "heinous enough" and that the death penalty could provide closure for the victim's family. ROA.6534–6535. Washington stated he would listen to the evidence, and if the death penalty was one of the punishments and if he thought it was warranted, he would render that verdict. ROA.6538–6539. It was therefore improper to strike him from the jury because of his views on capital punishment. *See Witherspoon v. Illinois*, 391 U.S. 510, 522 & n.21 (1968) (prospective jurors in a capital case who express general objections to the death penalty or express conscientious or religious scruples against its infliction are qualified to serve on a jury unless they make it "unmistakably clear . . . that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them"

or whose "attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt").

The prosecutor's purported alternate reason for striking Washington—because he had experienced discrimination as a Black man—is also race-based and a pretext. "The Equal Protection Clause 'forbids the States to strike black veniremen on the assumption that they will be biased in a particular case simply because the defendant is black. The core guarantee of equal protection, ensuring citizens that their State will not discriminate on account of race, would be meaningless were we to approve the exclusion of jurors on the basis of such assumptions, which arise solely from the jurors' race.'" *Flowers*, 139 S. Ct. at 2241 (quoting *Batson*, 476 U.S. at 97–98). Such questions are permissible only if relevant to issues decided in the case. This is not a case where the juror's experience with discrimination is relevant to any issue to be decided in the case, such as an employment case alleging race discrimination. *See Davis v. Fisk Elec. Co.*, 268 S.W.3d 508, 521–24 (Tex. 2008) (permitting questions about Black jurors' experience with racial epithets and discrimination because these were the plaintiffs' allegations in the racial discrimination case). Here the prosecutor did not ask Washington about negative experiences with police, as in *Felkner v. Jackson*, 562 U.S. 594, 595 (2011). Moreover, the prosecutor's decision not to question anyone else in the venire about discrimination shows that this rationale was a pretext. *Miller-El v. Dretke*, 545 U.S. 231, 239, 246 (2005); *Reed v. Quarterman*, 555 F.3d 364, 376 (5th Cir. 2009).

The fact that Washington attended Lakewood Church was also a pretext for striking him because he was Black. The State accepted as jurors at least two non-Black members from Lakewood Church. ROA.6525; ROA.6544; ROA.6551; ROA.6556. The prosecution's acceptance of a non-Black juror with the same characteristic as a rejected Black juror demonstrates pretext. *Miller-El*, 545 U.S. at 241 (if a proffered reason for the strike of a Black prospective juror applies just as well to a white prospective juror who was accepted, that is evidence of discrimination); *Snyder*, 552 U.S. at 483–84 (same).

Nor did the prosecution meaningfully question Washington about his affiliation with Lakewood Church. ROA.6525; ROA.6544. Had the prosecutor really been interested in Lakewood Church as a potential reason for striking him, she would have questioned him about it. "[E]vidence of a prosecutor's disparate questioning and investigation of black and white prospective jurors in the case" is also relevant to whether the purported race-neutral reason for the challenge is a pretext. *Flowers*, 139 S. Ct. at 2243.

Washington's discussion of his answer to the question, "Why do you think people commit violent crimes?" demonstrates that the State's claim that was why it struck him was a pretext. Washington answered the question, "No education and no opportunities." ROA.6532. The prosecution followed up on this answer during voir dire, and Washington explained that

> It all depends on the circumstances that they grew up in. If a kid grows up, you know, no father, no mother, no income and they see their parents or whoever their guardian is doing crimes, it's only natural that they're probably going to want to follow that, if they have no outside influence

> that tells them not to do that or to show them, because they can get into a vicious cycle and they can repeat what other people in front of them have done.

ROA.6532–6533. This came after Washington said he would support the death penalty and vote for that penalty if a crime was "heinous enough". ROA.6534–6535; ROA.6538–6539. The State's claim that it struck him because he said some people commit crimes because of a lack of education or opportunities is implausible and a pretext. *See Snyder*, 552 U.S. at 473 (rejecting explanation as "suspicious" and "implausib[le]").

The record also refutes the prosecutor's claim that she struck Washington because the defense would call an NAACP member as witness. The defense timely clarified that it did not intend to call any NAACP members as witnesses. ROA.9293.

The explanation that the prosecution struck Washington because of his demeanor must be supported by an explicit finding by the trial court and there is none here. *See* App. I at 175–76; *Snyder*, 552 U.S. at 479 (no presumption that a trial court credited a demeanor-based reason for a peremptory strike where the State offered multiple reasons, some of which were deemed pretext, and the trial court made no findings about demeanor). Moreover, while Washington hesitated before responding to a prosecutor's question whether he would be able to tell other NAACP members that he "voted to give . . . another black man the death penalty," he ultimately responded that he would be able to do so. ROA.6538–6539.

In sum, there is no legitimate dispute that race was "significant" in determining who was challenged as a juror and who was not. *Miller-El*, 545 U.S. at 252; *see Snyder*, 552 U.S. at 485 (finding peremptory strike was "motivated in

substantial part by discriminatory intent"). Here the record can only mean one thing: The reason the prosecution struck Washington was because he is Black. This violated *Batson* and Guidry is entitled to a new trial. Certainly, at the least, jurists of reason could disagree with the Fifth Circuit's resolution of this claim. *Buck*, 137 S. Ct. at 773.

III. The Fifth Circuit's holding that Guidry procedurally defaulted his ineffective assistance of appellate counsel claim is contrary to this Court's precedents.

A state prisoner may overcome a procedural default "if he can show 'cause' to excuse his failure to comply with the state procedural rule and 'actual prejudice resulting from the alleged constitutional violation.'" *Davila v. Davis*, 137 S. Ct. 2058, 2064–65 (2017). "To establish 'cause' . . . the prisoner must 'show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule.'" *Id.* at 2065. "A factor is external to the defense if it 'cannot fairly be attributed to' the prisoner." *Id.*

This Court has held that where habeas counsel is ineffective in failing to allege an ineffective assistance of trial counsel claim, habeas counsel's ineffectiveness may excuse procedural default of an ineffective assistance of counsel claim. *Martinez*, 566 U.S. at 14. Procedural default is also excused where state procedural law makes it impossible as a practical matter to timely allege an ineffective assistance of counsel claim in a habeas petition. *Davila*, 137 S. Ct. at 2067.

In this case, Guidry's appellate counsel was ineffective because he failed to argue that the trial court erred in admitting Gipp's testimony because it violated

Guidry's confrontation rights, as the Fifth Circuit previously held. The Fifth Circuit erred in concluding that Guidry's default of this claim is not excused.

A. *Davila* does not preclude Guidry's ineffective assistance of appellate counsel claim, because state procedural laws made it impossible for him to make the claim.

The Court should grant certiorari and clarify that *Davila* does not apply here because Texas law made it impossible for Guidry's habeas counsel to file an ineffective assistance of appellate counsel claim. Texas required Guidry to file his habeas petition while his appeal remained pending. He therefore could not know that he had an ineffective assistance of appellate counsel claim until nine months after state law required him to file his petition. This requirement caused the procedural default. Obviously, this factor is external to Guidry, and the Fifth Circuit should have excused his procedural default.

Davila held that ineffective assistance of habeas counsel does not excuse procedural default of an ineffective assistance of appellate counsel claim. *Davila*, 137 S. Ct. at 2064–65. Relying on *Davila*, the Fifth Circuit denied Guidry's ineffective assistance of appellate counsel claim because this Court "recently held that default of an IAAC claim cannot be excused by ineffectiveness of habeas counsel." App. A at 16.

But *Davila* does not apply here: Guidry did not procedurally default his ineffective assistance of appellate counsel claim due to the ineffectiveness of his post-conviction counsel. The default occurred for an entirely different reason: Texas law made it impossible to assert the claim, because by the time that the TCCA upheld the

conviction, the deadline for Guidry's habeas petition had passed. Just as "it is difficult to assess a trial attorney's performance until the trial has ended," *Davila*, 137 S. Ct. at 2067, it is difficult to assess an appellate attorney's performance until the appeal ends. Texas law requires a petitioner to file his habeas petition during the pendency of his direct appeal. Tex. Code Crim. Proc. art. 11.071, § 4. As a result, it was impossible for Guidry to claim his appellate counsel was ineffective in failing to preserve the trial court's admission of Gipp's testimony. *Davila* therefore does not preclude Guidry's ineffective assistance of appellate counsel claim. Certainly, jurists of reason could disagree with the Fifth Circuit's resolution of this argument. *Buck*, 137 S. Ct. at 773.

B. The Fifth Circuit erroneously held that Guidry waived his ineffective assistance of appellate counsel claim.

The Fifth Circuit's holding that Guidry waived his ineffective assistance of appellate counsel claim is contrary to numerous precedents from this Court and other circuits. It is undisputed that Guidry presented his ineffective assistance of appellate counsel claim in the district court. ROA.4421–4424; ROA.9021–9024. Guidry's habeas petition expressly argued that "appellate counsel was deficient for failing to raise on direct appeal the trial court's violation of his Confrontation Clause rights in permitting Gipp's testimony." ROA.4421; ROA.9021.

The Fifth Circuit held that Guidry waived the claim because he made arguments in that court distinguishing *Davila* that were not presented in the district court. App. A at 16–17. New appellate arguments in support of a claim asserted below, however, are permissible. "Once a federal claim is properly presented, a party

can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992).

The case law illustrates the difference between a claim and an argument, and confirms that Guidry has preserved all arguments that *Davila* does not apply. In *Yee*, this Court addressed both forms of eminent domain—regulatory taking and physical taking. This Court held that the plaintiff had preserved a regulatory taking argument where the plaintiff had raised only a physical taking argument below. *Id. at* 534–35. In *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374 (1995), the Court held that the plaintiff's argument that Amtrak is part of the government and therefore subject to the First Amendment was preserved, notwithstanding that the plaintiff had "expressly disavowed it" in the district court and in the Court of Appeals. *Id.* at 378–79.

In *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010), the Court held that the petitioner's argument that the Court should invalidate a statute restricting corporate speech was preserved, even though below the appellant had only raised an argument that the court had violated the statute in the way the court applied it and the appellant had even agreed to dismiss the facial challenge by stipulation. *Id.* at 329–31.

Guidry preserved his ineffective assistance of appellate counsel claim in the district court, and therefore on appeal he could make new arguments that distinguish *Davila*. Specifically, Guidry is entitled to show that due to Texas procedures, his habeas counsel could not argue ineffective assistance of appellate counsel.

C. Guidry's ineffective assistance of appellate counsel claim would prevail if considered on the merits.

To establish that Guidry is prejudiced by procedural default of his ineffective assistance of appellate counsel claim, he must show that the argument that appellate counsel did not make has "some merit." *Martinez*, 566 U.S. at 14. Here, it is undisputed that Guidry's appellate counsel was deficient because he failed to argue that the trial court erred in admitting Gipp's testimony in the second trial because it violated Guidry's confrontation rights.

In failing to argue that Gipp's testimony violated Guidry's Confrontation Clause rights, appellate counsel prejudiced Guidry because the argument he failed to make had "some merit." A defendant is denied effective assistance of counsel on appeal that prejudices him when counsel fails to raise an issue on appeal that would justify reversal of the conviction. *Smith v. Robbins*, 528 U.S. 259, 285 (2000). To establish prejudice for ineffective assistance of appellate counsel, a petitioner must establish "a reasonable probability that, but for his counsel's unreasonable failure to file a merits brief, he would have prevailed on his appeal." *Id.* Had appellate counsel appealed admission of Gipp's testimony, there is a "reasonable probability" that the TCCA would have vacated the conviction. The Fifth Circuit previously held that Gipp's testimony in the first trial that Guidry killed Farah was inadmissible hearsay and violated Guidry's confrontation rights. *Guidry*, 397 F.3d at 329–30. The Fifth Circuit emphasized that "without the confession or Prystash's statements implicating Guidry, there is little evidence of Guidry's participation in the murder." *Id.* at 330. In the second trial, Gipp gave the same inadmissible testimony that Prystash told

her Guidry killed Farah as she gave in the first trial. If appellate counsel had presented the argument to it, the TCCA would have been bound to apply this Fifth Circuit holding and reverse the conviction. Certainly, jurists of reason could disagree with the Fifth Circuit's resolution of this claim. *Buck*, 137 S. Ct. at 773.

IV. The State failed to disclose exculpatory evidence in violation of *Brady*.

To prove a violation of *Brady v. Maryland*, 373 U.S. 83 (1963), Guidry must demonstrate the State suppressed favorable, material evidence, whether willfully or inadvertently. *See Strickler v. Greene*, 527 U.S. 263, 281–82 (1999). Guidry's prosecutor, Kelly Siegler, has an extensive history of hiding material exculpatory evidence, leading to many reversals of convictions. ROA.4070–4089.

In the district court, the only evidence before the court was that trial counsel never received from the State crime scene fingerprints that matched another suspect, Barlow. ROA.3131; ROA.3310; ROA.9184–9188. This significant exculpatory evidence was later found by federal habeas counsel, in a file for a completely different defendant. App. A at 14. In response, the State presented no evidence it disclosed the exculpatory evidence at all—no testimony, declaration, or documents whatsoever. The State argued only that Guidry could not prove suppression because he only had a declaration from two of his lawyers and there was one additional lawyer who refused to participate in his habeas proceeding. *See* State's Mot. Summ. J. at 38, *Guidry v. Davis*, No. 4:13-cv-01885 (S.D. Tex. May 28, 2019), ECF No. 98; State's Resp. in Opp'n to Appl. for Certificate of Appealability at 34, No. 20-70005 (5th Cir. Sept. 11, 2020), ECF No. 00515561711. Then the district court and the Fifth Circuit

constructed a *different* response on the State's behalf: that the claim was meritless because the State had an "open file policy" and defense counsel simply failed to investigate, App. A at 14; App. B at 38—an argument that the State never made.

Moreover, the argument that the State did make—that Guidry failed to provide evidence of how he obtained the fingerprint evidence—is false. As the Fifth Circuit acknowledged, "Guidry's habeas counsel found this fingerprint evidence when they asked the State to see Guidry's file. Guidry's file consisted of multiple boxes, some labeled 'Guidry,' some 'Prystash,' and some 'Fratta.'" App. A at 14. Habeas counsel discovered much of this evidence in the box labeled "Fratta." *Id.*

Under the *Strickland* standard, Guidry's initial post-conviction counsel was entitled to rely upon the State's representations that it had produced all exculpatory evidence. *Banks v. Dretke*, 540 U.S. 668, 693 (2004). It is undisputed that in response to trial counsel's request for exculpatory evidence pursuant to *Brady*, the State never identified for trial counsel fingerprint evidence obtained from Barlow, or indicated that those prints matched latent prints obtained by the police from the victim's car. ROA.3131; ROA.3310; ROA.9184–9188. The Fifth Circuit's reliance on the State's "open file policy" was error. The State cannot defeat specific evidence of non-disclosure merely by asserting generically that it had an "open-file policy." This Court has held that the State may rely on an open file policy, but only if it produces *evidence* that the allegedly suppressed exculpatory evidence was present *in the files* given to defense counsel. *Strickler*, 527 U.S. at 285–89. Here, there is no such evidence. As other circuits have noted, the argument that the Fifth Circuit accepted raises an

impossible burden for defendants. The Court should resolve this disagreement between the circuits. As the Tenth Circuit has held:

> While an "open file" policy *may* suffice to discharge the prosecution's *Brady* obligations in a particular case, it often will not be dispositive of the issue. It is not difficult to envision circumstances where the prosecution possesses, either actually or constructively, *Brady* information that for some reason is not in the "file," such as material in a police officer's file (but not in the prosecutor's file) or material learned orally and not memorialized in writing. No one could reasonably argue that under those circumstances, assuming the evidence was exculpatory, the prosecutions *Brady* obligations would be satisfied by its "open file" policy. To adopt such a holding would permit the prosecution to discharge its obligations under *Brady* by talismanically invoking the words "open file policy," and thus circumvent the purpose behind *Brady*. We believe this reading of *Brady* is too formalistic and is flawed because it fails to recognize that *Brady* material may be found in places other than a prosecutors file. The prosecution's affirmative obligation under *Brady* may often go beyond divulging what is in "the file." Thus, while a prosecution's "open file" policy is relevant and may be considered in determining whether a *Brady* violation occurred, it cannot, standing alone, be given dispositive weight.

Smith v. Sec'y of N.M. Dep't of Corr., 50 F.3d 801, 828 (10th Cir. 1995) (emphasis in original) (footnote omitted). This is exactly what the evidence demonstrates occurred here. *See also United States v. Saffarinia*, 424 F. Supp. 3d 46, 85 (D.D.C. 2020) ("[O]pen-file discovery does not relieve the government of its *Brady* obligations.") (quoting *United States v. Hsia*, 24 F. Supp. 2d 14, 29 (D.D.C. 1998)).

Guidry provided testimony from trial counsel that the exculpatory evidence was not in the files that the prosecution produced in response to requests for *Brady* materials. Were the State's vague assertion that it has an "open-file" policy—without any evidence that the disputed evidence was located *in* the file made available—sufficient to defeat a *Brady* claim, then no defendant ever has a chance of bringing a

Brady claim in an open-files jurisdiction.[1] Certainly, jurists of reason could disagree with the Fifth Circuit's resolution of this claim. *Buck*, 137 S. Ct. at 773. Indeed, the Court should resolve the circuit split and clarify the State's burden where it claims an "open file policy" satisfied its *Brady* obligations.

V. The Fifth Circuit's finding that Guidry procedurally defaulted his ineffective assistance of trial counsel claims is contrary to this Court's precedents.

Guidry may establish that procedural default of his ineffective assistance of trial counsel claims is excused by showing that his state habeas counsel was ineffective in failing to allege them. *Martinez*, 566 U.S. at 14.

A. It is undisputed that habeas counsel was deficient, and therefore the sole question as to each of Guidry's defaulted ineffective assistance of trial counsel claims is whether it had "some merit."

To establish ineffective assistance of state habeas counsel, Guidry must satisfy two elements. First, Guidry must show that his state habeas counsel's representation "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 687–88. Second, Guidry must show that the claims that state habeas counsel failed to assert have "some merit." *Martinez*, 566 U.S. at 14. Since it is undisputed that state habeas counsel was ineffective and did not exercise due care or diligence, only the second showing is at issue in this case. In determining whether Guidry's claims have "some

[1] The Fifth Circuit did not address the materiality of the *Brady* materials because it found there was no suppression. App. A at 14. The fingerprint and ballistics evidence was material, as discussed *infra*, pp. 38–40. "The materiality standard under *Brady* . . . is identical to the prejudice standard under *Strickland*." App. A at 22 (quoting *Johnson v. Scott*, 68 F.3d 106, 109–10 (5th Cir. 1995)).

merit," courts must undertake a "weighty and record-intensive analysis." *Andrus*, 140 S. Ct. at 1887.

Each claim that Guidry alleges here had more than some merit; indeed, Guidry has established a right to relief. Certainly, jurists of reason could disagree with the Fifth Circuit's resolution of this claim. *Buck*, 137 S. Ct. at 773.

B. Trial counsel were ineffective in failing to argue that the Fifth Circuit's decision that Gipp's testimony violated Guidry's confrontation rights was binding on the trial court.

Trial counsel failed to argue that the Fifth Circuit's holding that Gipp's testimony violated Guidry's Confrontation Clause rights had preclusive effect in the re-trial, and thus the trial court was bound to follow it.

1. Trial counsel never informed the trial court that the Fifth Circuit previously held that Gipp's hearsay testimony was inadmissible.

Trial counsel failed to do the one thing that would have prevented admission of Gipp's testimony in the second trial: inform the trial court of the Fifth Circuit's previous ruling that Gipp's testimony that Guidry killed Farah was unconstitutional. Had trial counsel informed the trial court of the Fifth Circuit's decision, which was binding on the trial court, there is a reasonable probability that the outcome of the second trial would have been different.

When the prosecutor asked Gipp questions intended to elicit hearsay testimony that Guidry killed Farah, trial counsel only responded, with one word, "Hearsay." *See generally* ROA.3613; App. H at 64. Contrary to the Fifth Circuit's contention that "trial counsel objected throughout Gipp's questioning and persistently objected

during the State's questioning about Gipp's statements to her brother," the record shows that trial counsel merely said "hearsay," but did not inform the trial court that the Fifth Circuit had reversed the prior conviction on this precise issue.

The issue therefore is whether trial counsel's undisputed failure to inform the trial court that Gipp's testimony was inadmissible prejudiced Guidry.

2. Trial counsel's failure to inform the trial court about the Fifth Circuit's holding that Gipp's testimony was inadmissible prejudiced Guidry.

The prejudice standard applicable to ineffective assistance of trial counsel claims is "whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Strickland*, 466 U.S. at 695. Guidry's claim that trial counsel were ineffective because they failed to inform the trial judge that the Fifth Circuit had held Gipp's hearsay testimony inadmissible has at least "some merit." There is a reasonable probability that the trial court would have prohibited Gipp's testimony because the Fifth Circuit's holding that Gipp's testimony that Guidry killed Farah violated Guidry's Confrontation Clause rights was binding on the Texas courts during the retrial. The "law-of-the-case doctrine" applies to federal habeas proceedings between federal and state courts, and "posits that when a court decides upon a rule of law, that decision should continue to govern the same issue in subsequent stages in the same case." *Woodfox v. Cain*, 772 F.3d 358, 370 (5th Cir. 2014). "[I]t is clear that the law of the case doctrine applies to subsequent proceedings on the same habeas petition." *Alaimalo v. United States*, 645 F.3d 1042, 1049 (9th Cir. 2011). This is because "in enacting [the habeas statute],

Congress sought to 'interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action.'" *Phelps v. Alameida*, 569 F.3d 1120, 1139–40 (9th Cir. 2009) (quoting *Reed v. Ross*, 468 U.S. 1, 10 (1984)). "Even after the enactment of AEDPA, '[t]he writ of habeas corpus plays a vital role in protecting constitutional rights.'" *Id.* at 1140 (quoting *Slack v. McDaniel*, 529 U.S. 473, 483 (2000)). In addition, the doctrine of issue preclusion protected Guidry from re-litigation of issues the Fifth Circuit had decided in his favor. *See Bravo-Fernandez v. United States*, 137 S. Ct. 352, 358 n.2 (2016) ("The principle that a question of fact or of law distinctly put in issue and directly determined by a court of competent jurisdiction cannot afterwards be disputed between the same parties applies to 'the decisions of criminal courts.'").

There is also a reasonable probability that the case outcome would have been different without Gipp's testimony. As the Fifth Circuit earlier concluded, "Guidry's confession having been excluded by the district court, there was scant evidence to support his conviction, other than Prystash's statements admitted through Gipp." *Guidry*, 397 F.3d at 330. "Without the confession and challenged hearsay, there is insufficient evidence to convict Guidry of murder for remuneration or promise of remuneration." *Id.* at 331.

In sum, there is a reasonable probability that had trial counsel told the trial court about the binding effect of the Fifth Circuit's decision, the trial judge would have excluded Gipp's testimony, and the outcome of the trial would have been an acquittal for Guidry. Counsel's ineffectiveness prejudiced his defense.

C. The Court should correct the Fifth Circuit's holding that Guidry cannot raise his trial counsel's ineffective assistance in his first trial when it prejudiced his defense in his second trial.

It is undisputed that Guidry's counsel were ineffective in his first trial in calling Basinger to testify and allowing him to tell the jury that Guidry had confessed. It is also without question that the ineffectiveness of Guidry's trial counsel in his first trial in calling Basinger to testify prejudiced Guidry in his second trial. App. A at 19–20. Moreover, it is undisputed that Guidry's counsel at his second trial had a conflict of interest because they were also trial counsel in his first trial, and that this conflict of interest prevented them from arguing that Basinger's testimony should be suppressed because of their own ineffectiveness. *See* App. A at 20–21; *see also Gray v. Pearson*, 526 F. App'x 331, 334–35 (4th Cir. 2013) (a conflict of interest impairs a lawyer's ability to argue his own ineffectiveness as a reason to grant his client relief).

The Fifth Circuit rejected this claim, holding that "[e]ven if we assume that Guidry's first trial counsel was ineffective for putting Dr. Basinger on the stand, Guidry points to no clearly established law that ineffective assistance in a reversed trial can justify habeas relief from conviction in a second trial." App. A at 19. The Fifth Circuit held that ineffective assistance of counsel in a first trial that prejudiced the prisoner's defense in the second trial cannot violate the Sixth Amendment in the second trial. *Id.*

This holding is unprecedented and directly contrary to *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Indeed, recently Justice Sotomayor explicitly noted that trial counsel's ineffectiveness in the first trial should not prejudice the

defense in the second trial. In *Kaur v. Maryland*, 141 S. Ct. 5 (2020) (Sotomayor, J., respecting the denial of certiorari), the trial judge held that because of the defendant's ineffective assistance of trial counsel claim, she waived her attorney client privilege with trial counsel and had to produce to the prosecution her communications with counsel. The trial court granted her a new trial because her trial counsel was ineffective. While Justice Sotomayor joined the denial of certiorari, she wrote that the disclosure of privileged information to the prosecution should not "perversely skew the second trial in the prosecution's favor." *Id.* at 6.

This Court should now likewise grant certiorari to confirm that ineffective assistance of counsel in a first trial that prejudiced the prisoner's defense in the second violates the Sixth Amendment in the second trial.

There is no temporal requirement that limits the Sixth Amendment right to effective counsel to the trial under review. Here, it is undisputed that the ineffectiveness of counsel from the first trial materially prejudiced the second trial. "[A] court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury." *Strickland*, 466 U.S. at 695. The evidence in the second trial included evidence obtained from the first trial. This Court should consider the source of that evidence before the second jury—trial counsel's ineffectiveness in the first trial. Thus, *Strickland* requires the Court to "evaluate the performance prong of *Strickland* 'in the context of the case as a whole, viewed at the time of the conduct.'" *Morris v. United States*, 118 F. App'x 72, 74 (7th Cir. 2004).

Several courts, including the Fifth Circuit in an earlier case, have correctly adhered to *Strickland* on this issue. *See United States v. Richardson*, 781 F.3d 237, 239 (5th Cir. 2015) (holding that a deceased witness's prior testimony could be introduced in the second trial "at least when the defendant has not claimed that he received ineffective assistance of counsel at the first trial"); *United States v. Murray*, 52 M.J. 671, 675 (N-M. Ct. Crim. App. 2000) (reversing because the government's use of the defendant's testimony in the first trial "brought the taint of the constitutional error of the first trial into the second trial"); *Rolon v. State*, 72 So. 3d 238, 245 (Fla. Dist. Ct. App. 2011) ("allowing the State to introduce his testimony from the first trial during its case-in-chief in the second trial brought the taint of that Sixth Amendment violation, and its concomitant due process violation, from the first trial directly into the second trial"). But here the Fifth Circuit rejected its own precedent because there are no Supreme Court cases. The Court should establish that this is a ground for habeas relief. *See Harrington v. Richter*, 562 U.S. 86, 100 (2011) (habeas relief is appropriate if the adjudication "involved an unreasonable application of" Supreme Court precedent).

D. Trial counsel were ineffective in failing to investigate or discover exculpatory fingerprint and ballistic evidence demonstrating Guidry's actual innocence.

Trial counsel were also ineffective in two other respects: failing to find evidence that Barlow's fingerprints were found on the car matching description of the getaway car and in failing to obtain evidence that the gun seized from Guidry did not match the murder weapon.

First, the Fifth Circuit stated that "Guidry's [federal] habeas counsel found this fingerprint evidence when they asked the State to see Guidry's file," and "with reasonable diligence, habeas counsel found this evidence in what the State provided." App. A at 14. Thus, if the Fifth Circuit is correct, Guidry's claim that trial counsel were not reasonably diligent and therefore ineffective had "some merit," establishing cause for procedural default. *Martinez*, 566 U.S. at 14.

Guidry also argued the State withheld or trial counsel were ineffective in failing to discover ballistics evidence proving the gun obtained from Guidry was not the murder weapon. App. A at 22. Trial counsel were deficient in failing to investigate such evidence, and they had no strategic reason for not using it. Trial counsel testified that had he been aware of this information, he would have used it. ROA.3125–3306. Neither court below addressed this testimony. App A at 22–23.

Further, trial counsel's failure to discover and present fingerprint evidence on Farah's car tying another suspect to the crime demonstrably prejudiced Guidry. There is "a reasonable probability that, but for counsel's unprofessional errors" in failing to investigate fingerprint evidence from another suspect on the victim's car, "the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. The same is true of evidence that ballistic tests failed to tie the gun Guidry carried when he was arrested to the spent rounds recovered from Farah's garage.

The Fifth Circuit held that trial counsel's failure to investigate or discover the exculpatory fingerprint and ballistic evidence did not prejudice Guidry's defense because it would not have made a difference in the outcome of the trial. But the Fifth

Circuit's prejudice analysis under *Strickland* relied on numerous blatant factual errors. The Fifth Circuit purported to find facts that the State did not even allege were true. The Court should grant certiorari because in this capital case the Fifth Circuit failed to accurately undertake the "weighty and record-intensive analysis" required for a determination of prejudice. *Andrus*, 140 S. Ct. at 1887.

1. The Fifth Circuit erred in finding that Fratta gave a gun to Guidry.

The Fifth Circuit held that "Fratta took the gun from Farah, who had purchased it, and gave it to Guidry." App. A at 23. There is no evidence for this and the State never argued this happened.

2. The Fifth Circuit erred in finding a ballistics report concluded that Guidry had the murder weapon.

The Fifth Circuit stated that one ballistic test established Guidry was arrested with the murder weapon, but does not identify the source of this belief. App. A at 23. The State's ballistics expert Charles Anderson testified Guidry had the gun when arrested. State's Resp. in Opp'n to Appl. for Certificate of Appealability at 7, No. 20-70005 (5th Cir. Sept. 11, 2020), ECF No. 00515561711. But the newly discovered ballistics evidence proved Anderson's testimony was false. The ballistics tests never tied the gun to Farah's murder. ROA.5555–5562.

3. The Fifth Circuit erred in holding that Barlow's fingerprints were on his own car, not Farah's.

The Fifth Circuit concluded that Barlow's fingerprints must have come from his own car because there were no usable prints found on Farah's car. App. A at 23. This conclusion ignores the undisputed evidence. Reports establish that

investigators in fact obtained useable prints from Farah's car. Investigators repeatedly compared prints they obtained from Farah's car to suspects' prints—including Guidry's, which did not match. ROA.4711; ROA.4716–4717; ROA.4736. It is illogical that the police would compare Barlow's prints to prints on his own car.

The State's claim that prints from Farah's car were not usable relies on the testimony of a single investigator—Harris County Detective David Ferrell—15 years after the fingerprints were taken from the crime scene. *Id*. Nobody said the prints from Farah's car were unusable until Ferrell.[2]

Accordingly, the Fifth Circuit incorrectly concluded that Guidry's ineffective assistance of trial counsel claims lacked "some merit," and Guidry established cause for his procedural default of these claims in the state court. At the least, reasonable judges could disagree with the Fifth Circuit's resolution of this claim. *Buck*, 137 S. Ct. at 773.

CONCLUSION

This Court should grant this Petition.

[2] The Fifth Circuit also erred in concluding that the description of the getaway car was different from Barlow's car. App. A at 23. Both the getaway car and the car Barlow drove were grey/black with one missing headlight. ROA.4661–4662; ROA.4668–4670.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
June 23, 2021
Lyle W. Cayce
Clerk

No. 20-70005

HOWARD PAUL GUIDRY,

Petitioner—Appellant,

versus

BOBBY LUMPKIN, *Director, Texas Department of Criminal Justice, Correctional Institutions Division*,

Respondent—Appellee.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:13-CV-1885

Before WILLETT, HO, and OLDHAM, *Circuit Judges*.

PER CURIAM:

We withdraw the court's prior opinion of April 21, 2021 and substitute the following opinion.

Howard Paul Guidry was convicted of capital murder in Texas and sentenced to death. On federal habeas corpus review, the district court granted Guidry relief, and this court affirmed the grant of relief. Guidry was retried and resentenced to death. After pursuing direct review and habeas relief in state court, Guidry again sought federal habeas corpus relief under 28 U.S.C. § 2254. The district court denied relief on all claims. Guidry now

seeks a certificate of appealability ("COA") from this court. We deny him a COA.

I.

A.

Farah Fratta ("Farah") was murdered in November 1994. Her husband, Robert Fratta ("Fratta"), had hired Joseph Prystash to kill her. Prystash enlisted his neighbor, Howard Paul Guidry, as the gunman.

On the night of the murder, a gunman approached Farah as she exited her car in her garage. The gunman shot Farah twice in the head. Farah's neighbors, the Hoelschers, heard a gunshot and Farah screaming. Mr. Hoelscher saw Farah fall and then heard a second gunshot. Then the Hoelschers watched the gunman, an African-American man, emerge from behind a large bush. The gunman got into a silver or gray car that had one headlight out, and the car drove off. The Hoeschlers could not describe the gunman in detail.

The police investigation centered on three participants: a gunman, a getaway driver, and Fratta. The police suspected Fratta because he and Farah were going through a bad divorce. Fratta openly wanted Farah dead and tried to hire people to kill her. As for the other two suspects, a woman named Mary Gipp told police that Fratta hired her boyfriend, Joseph Prystash, to kill Farah and that Prystash recruited Guidry as the gunman.

The police arrested Guidry in March 1995 as he fled from a bank robbery. At the time of his arrest, Guidry possessed a gun belonging to Fratta. Guidry also confessed to being the gunman who shot Farah. Guidry's trial focused heavily on that confession. A jury found Guidry guilty of capital murder, and he was sentenced to death in 1997.

B.

Guidry sought appellate and habeas relief in the state courts, but they found no reversible error. The state courts found that Mary Gipp's testimony was inadmissible as hearsay, but harmless because of Guidry's confession. This court found that Guidry invoked his right to counsel and that police detectives violated that right by inducing Guidry's confession. *See Guidry v. Dretke*, 397 F.3d 306, 327 (5th Cir. 2005), *abrogated by Cullen v. Pinholster*, 131 S. Ct. 1388 (2011). Because we excluded Guidry's confession, we found that Gipp's testimony was no longer harmless. Thus, we concluded that there remained "*no* evidence showing Guidry killed Farah Fratta for remuneration—the capital offense for which Guidry was convicted" and granted him habeas relief. *Id.* at 330.

Texas retried Guidry for capital murder in 2007. Because the State could no longer use Guidry's confession, it relied on testimony from Gipp that avoided hearsay, Guidry's possession of Fratta's gun, ballistics evidence, and Guidry's incriminating statements to others. The second jury found Guidry guilty of capital murder, and he was again sentenced to death.

On direct appeal, the Texas Court of Criminal Appeals ("TCCA") affirmed Guidry's conviction. *Guidry v. State*, No. AP-75,633, 2009 WL 3369261 (Tex. Crim. App. Oct. 21, 2009). Guidry also filed a state habeas application, which was denied, and his supplemental applications were dismissed as an abuse of the writ. *Ex parte Guidry*, Nos. WR-47,417-02, WR-47, 417-03, 2012 WL 2423621, at *1 (Tex. Crim. App. June 27, 2012); *see also Ex parte Guidry*, Nos. 47,417-04, WR-47, 417-05, 2018 WL 4472491, at *1 n.1 (Tex. Crim. App. Sept. 19, 2018). Finally, Guidry sought federal habeas relief under 28 U.S.C. § 2254. The district court denied his federal habeas petition and refused to grant him a COA.

Guidry now seeks a COA from this court to appeal the district court's dismissal of his § 2254 petition. *See* 28 U.S.C. § 2253(c)(1)(A). He raises four issues: (1) whether the admission of Dr. Scott Basinger's testimony was fruit of the poisonous tree; (2) whether the State's peremptory strike of a black juror violated Guidry's right to a fair and impartial jury under *Batson v. Kentucky*, 476 U.S. 79 (1986); (3) whether the State suppressed evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963); and (4) whether Guidry received ineffective assistance of trial, appellate, and habeas counsel under *Strickland v. Washington*, 466 U.S. 668 (1984).

II.

To obtain a COA to appeal the denial of a § 2254 petition, Guidry must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). *See also Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). For the claims the district court denied on the merits, a COA will issue only if Guidry shows "that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 327. For claims the district court denied on procedural grounds, a COA will issue only if Guidry shows that reasonable jurists would debate whether the district court's procedural ruling was correct and whether the petition states a valid claim of the denial of a constitutional right on the merits. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Federal courts evaluate the debatability of Guidry's constitutional claims under the Antiterrorism and Effective Death Penalty Act (AEDPA). Under AEDPA, we must not grant habeas relief for any claim adjudicated on the merits in state court unless the adjudication "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 "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)(1)–(2).

A state-court decision is "contrary to" clearly established federal law when it "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 Supreme] Court has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 413 (2000). A state-court decision is an "unreasonable application of" clearly established federal law if it "identifies the correct governing legal rule from [the Supreme Court's] cases but unreasonably applies it to the facts of the particular state prisoner's case," or if it "unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Id.* at 407. Clearly established federal law comprises "the holdings, as opposed to the dicta, of [the Supreme] Court's decisions as of the time of the relevant state-court decision." *Id.* at 412.

AEDPA is a "highly deferential standard," which "demands that state-court decisions be given the benefit of the doubt." *Renico v. Lett*, 559 U.S. 766, 773 (2010) (first quoting *Lindh v. Murphy*, 521 U.S. 320, 333 n.7 (1997); then quoting *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam)). Accordingly, even if we find that a state court incorrectly applied clearly established federal law, we only intervene if the application was objectively unreasonable. *Perez v. Cain*, 529 F.3d 588, 594 (5th Cir. 2008).

Thus, to obtain a COA, Guidry must show that "jurists of reason could disagree with the district court's conclusion that the state court's decision was not [contrary to or] an unreasonable application of clearly established federal law and was not based upon an unreasonable

determination of the facts in light of the evidence presented." *Halprin v. Davis*, 911 F.3d 247, 255 (5th Cir. 2018) (per curiam).

A.

We start with Guidry's merits claims. The first issue Guidry seeks to certify for appeal is whether the admission of Dr. Basinger's testimony was fruit of the poisonous tree. Dr. Basinger was a defense expert in Guidry's first trial. On cross-examination, the prosecution elicited that Guidry told Dr. Basinger that he shot Farah. When the State subpoenaed Dr. Basinger to testify in the second trial, Guidry objected that his statements to Dr. Basinger were the direct result of his illegally obtained confession to police. The trial court denied Guidry's motions and permitted Dr. Basinger to testify.

To support certification, Guidry argues that the use of Dr. Basinger's testimony in his second trial violated his Fifth Amendment rights under *Harrison v. United States*, 392 U.S. 219 (1968). In *Harrison*, the defendant made three confessions to police. *Id.* at 220. At trial, Harrison took the stand to testify on his own behalf. *Id.* An appellate court determined that his confessions were illegally obtained and reversed his conviction. *Id.* At the retrial, the prosecutor read Harrison's testimony from the first trial to the jury. *Id.* at 221. The Supreme Court held that Harrison's testimony in the first trial was impelled by the illegally obtained confessions, and therefore was fruit of the poisonous tree which could not be used in the second trial. *Id.* at 222. The Supreme Court made clear that its holding in *Harrison* did not extend to the testimony of third-party witnesses. *Id.* at 223 n.9. Further, the Supreme Court has clarified that "the rule announced in *Harrison*" means that "compelling the defendant to testify in rebuttal" to an inadmissible confession "precludes use of that testimony on retrial." *Oregon v. Elstad*, 470 U.S. 298, 316–17 (1985).

Here, the TCCA distinguished *Harrison* on several grounds—most notably that the testimony at issue is from a third party and that Guidry never took the stand. As the Tenth Circuit has written, "*Harrison* is applicable only where a defendant's testimony is impelled by the improper use of *his own* unconstitutionally obtained confessions *in violation of the Fifth Amendment*." *Littlejohn v. Trammell*, 704 F.3d 817, 849 (10th Cir. 2013). Accordingly, as the district court recognized, Guidry has not identified any clearly established Supreme Court precedent extending *Harrison* to his incriminating statements to his own expert. We cannot reasonably debate the district court's conclusion that Guidry's attempted extension of *Harrison* precludes relief under AEDPA. *See Premo v. Moore*, 562 U.S. 115, 127 (2011) ("[N]ovelty . . . [that] renders [a] relevant rule less than 'clearly established' . . . provides a reason to reject it under AEDPA.").

Guidry also relies on our decision in *Smith v. Estelle*, 527 F.2d 430 (5th Cir. 1976). But that case dealt only with the situation where an unlawful confession impelled the defendant himself to testify. *See id.* at 433–34. Thus, Guidry's argument fails for the same reasons his *Harrison* argument does.

In the district court, Guidry also argued that Dr. Basinger's testimony violated his right against self-incrimination because confessions made during a court-ordered psychiatric evaluation by the State are inadmissible unless the defendant is warned that the results may be used against him. *See Estelle v. Smith*, 451 U.S. 454, 469 (1981). This argument fails as well. Here, Dr. Basinger was not a court-appointed expert, but a private defense expert. Nor did he conduct a psychological examination. We held in *Powell v. Quarterman* that a defendant's rights under *Estelle v. Smith* were not violated when the examining doctor was not working for the State or the court. 536 F.3d 325, 343 (5th Cir. 2008). Thus, Guidry cannot show that jurists of reason would debate that the state-court decision did not violate clearly established federal law as determined by the Supreme Court.

Reasonable jurists could not disagree with the district court's conclusion. We deny Guidry a COA on this claim.

B.

Second, Guidry seeks a COA on whether the State's peremptory strike of potential juror Matthew Washington, a black man, violated Guidry's right to a fair and impartial jury under *Batson v. Kentucky*, 476 U.S. 79 (1986). The trial court and the district court conducted detailed analyses of this issue. Jurists of reason could not disagree with the district court's denial of Guidry's *Batson* claim. Therefore, we deny a COA on this issue.

Claims challenging race-based peremptory strikes require the application of *Batson*'s three-step test:

> First, the claimant must make a *prima facie* showing that the peremptory challenges have been exercised on the basis of race. Second, if this requisite showing has been made, the burden shifts to the party accused of discrimination to articulate race-neutral explanations for the peremptory challenges. Finally, the trial court must determine whether the claimant has carried his burden of proving purposeful discrimination.

United States v. Montgomery, 210 F.3d 446, 453 (5th Cir. 2000) (quotation omitted).

Where, as here, the district court has reached the second step of the *Batson* analysis, "we no longer examine whether a *prima facie* case exists." *United States v. Webster*, 162 F.3d 308, 349 (5th Cir. 1998). At the second step, the prosecutor's explanation need not be "persuasive, or even plausible. . . . [T]he issue is the facial validity of the prosecutor's explanation." *Purkett v. Elem*, 514 U.S. 765, 768 (1995) (per curiam) (quotations omitted). Further, "[w]here, as in this case, the trial judge has entertained and ruled on a defendant's motion charging a *Batson* violation, we review only [the district court's] finding of discrimination *vel non*. . . . In

this regard, we apply a clearly erroneous . . . standard of review." *United States v. Terrazas-Carrasco*, 861 F.2d 93, 94 (5th Cir. 1988) (citations and quotations omitted).

In a *Batson* claim, "[t]he party making the claim of purposeful discrimination bears the ultimate burden of persuasion." *Montgomery*, 210 F.3d at 453. Thus, Guidry "must show that the TCCA's factual determinations were mistaken with clear and convincing evidence, and he must also show that the district court's unwillingness to reach that conclusion was itself clear error." *Williams v. Davis*, 674 F. App'x 359, 364 (5th Cir. 2017) (per curiam).

Here, Guidry's jury was composed of one Hispanic, one Asian, two black, and eight white jurors. At the State's request, the trial court only removed one prospective juror, a Hispanic woman, for cause. The State exercised peremptory strikes against four prospective jurors. Three of them were white. The fourth was Washington, a black man.

The prosecutor gave six reasons for striking Washington: (1) his membership in Lakewood Church; (2) his opinion that people commit crimes because they have no education or opportunities; (3) his experience with discrimination; (4) his demeanor which made him hesitant and uncomfortable answering questions; (5) his active membership in the NAACP, which is opposed to the death penalty; and (6) the possibility that the defense would call a witness who was heavily involved with the NAACP.

On appeal, Guidry challenges five of the prosecutor's six reasons. First, Guidry argues that the NAACP explanation is not race-neutral. As the district court notes, there is some debate about this in the lower federal courts. *See*, *e.g.*, *United States v. Payne*, 962 F.2d 1228, 1233 (6th Cir. 1992) (holding that striking a juror for his membership in an advocacy group such as the NAACP was a race-neutral reason); *but see*, *e.g.*, *Somerville v. State*, 792

S.W.2d 265, 267–69 (Tex. App.—Dallas 1990, pet ref'd) (holding that a juror's membership in the NAACP is not a race-neutral reason for striking him). But as that debate indicates, there is no clearly established federal law as determined by the Supreme Court on this point. The district court recognized that membership in the NAACP could be "so intertwined with race to render it inherently discriminatory," but found that, in the context of all the other explanations for the strike, this reason did not show that the State was "motivated in substantial part by discriminatory intent." *Flowers v. Mississippi*, 139 S. Ct. 2228, 2244 (2019) (quotation omitted). No jurist of reason could debate that Guidry does not present clear and convincing evidence to rebut this determination as objectively unreasonable.

Second, Guidry argues that Washington's membership in Lakewood Church was clearly a pretext because the prosecutor accepted two non-black members of Lakewood Church. But as the record makes clear, the prosecutor did not always strike members of Lakewood Church. What's more, the state habeas court expressly analyzed this claim and determined that, unlike Washington, the other two Lakewood members gave "State's-oriented" responses and one of them had only recently started attending Lakewood. Guidry has not shown that jurists of reason would debate this claim.[1]

Third and fourth, Guidry argues that the prosecutor's reliance on Washington's experience with discrimination was pretextual and that the district court did not explicitly credit the prosecutor's demeanor-based reason. While the district court expressed some concern about the prosecutor relying on Washington's experience with discrimination, it

[1] Guidry does not seek relief based on religious discrimination, presumably because the Supreme Court to date has not extended *Batson* protections to religious affiliation. *See*, *e.g.*, *Davis v. Minnesota*, 511 U.S. 1115 (1994) (denying certiorari to review state supreme court decision declining to extend *Batson* to religion).

recognized that the prosecutor "did not make the comment in isolation." Rather, the district court found that the prosecution discussed this reason "as a feature of [Washington's] general disposition." This analysis indicates that the district court considered Washington's demeanor and determined that, when viewed "in light of all of the relevant facts and circumstances," these reasons were not "motivated in substantial part by discriminatory intent." *Flowers*, 139 S. Ct. 2243–44. We cannot find this conclusion debatable.

Finally, Guidry cannot debatably show by clear and convincing evidence that the prosecutor's reason that the defense would call a witness who was an NAACP member was pretext. Indeed, when the prosecutor gave this reason, he thought Washington knew the witness. Further, he did not know at the time that the defense did not intend to call that witness.

The Supreme Court has recognized that the evaluation of a prosecutor's intent when striking a juror is at bottom a determination of "credibility and demeanor," which lies "peculiarly within a trial judge's province." *Snyder v. Louisiana*, 552 U.S. 472, 477 (2008) (quotations and citations omitted). We "will not reverse a lower court's finding of fact simply because we would have decided the case differently." *Easley v. Cromartie*, 532 U.S. 234, 242 (2001) (quotations omitted).

Jurists of reason could not disagree with the district court that the state court's decision was not an unreasonable application of clearly established law as determined by the Supreme Court and was not based on an unreasonable determination of the facts. *See Halprin*, 911 F.3d at 255. We deny Guidry a COA on this claim.

III.

We turn now to Guidry's procedurally defaulted claims. "[A] federal court may not review federal claims that were procedurally defaulted in state

court—that is, claims that the state court denied based on an adequate and independent state procedural rule." *Davila v. Davis*, 137 S. Ct. 2058, 2064 (2017). Here, the TCCA found that Texas's abuse-of-the-writ doctrine, codified in Article 11.071 § 5(a) of the Texas Code of Criminal Appeals, barred Guidry from bringing a successive state habeas petition. The TCCA's dismissal "'is an independent and adequate state ground for the purpose of imposing a procedural bar' in a subsequent federal habeas proceeding." *Gutierrez v. Stephens*, 590 F. App'x 371, 384 (5th Cir. 2014) (per curiam) (quoting *Hughes v. Quarterman*, 530 F.3d 336, 342 (5th Cir. 2008)). Accordingly, we cannot reach the merits of Guidry's defaulted claims unless he overcomes the procedural bar.

"Out of respect for finality, comity, and the orderly administration of justice, a federal court will not entertain a procedurally defaulted constitutional claim in a petition for habeas corpus absent a showing of cause and prejudice to excuse the default." *Dretke v. Haley*, 541 U.S. 386, 388 (2004). But a "state prisoner may overcome the prohibition on reviewing procedurally defaulted claims if he can show cause to excuse his failure to comply with the state procedural rule and actual prejudice resulting from the alleged constitutional violation." *Davila*, 137 S. Ct. at 2064–65 (quotations omitted).

A.

First, Guidry seeks a COA for his claim that there is cause for the procedural default of his claim that the State withheld exculpatory fingerprint evidence in violation of *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

Because Guidry "acknowledges that his *Brady* claim is procedurally defaulted, we must first decide whether that default is excused by an adequate showing of cause and prejudice." *Strickler v. Greene*, 527 U.S. 263, 282 (1999). "A *Brady* violation can provide cause and prejudice to overcome

a procedural bar on a habeas claim." *Thompson v. Davis*, 916 F.3d 444, 455 (5th Cir. 2019). That's because "cause and prejudice parallel two of the three components of the alleged *Brady* violation itself." *Strickler*, 527 U.S. at 282. To establish a *Brady* violation, Guidry must prove that (1) the prosecution suppressed the evidence (cause), (2) the evidence was favorable to him, and (3) it was material to the defense (prejudice). *United States v. Stephens*, 964 F.2d 424, 435 (5th Cir. 1992). A "*Brady* claim fails if the suppressed evidence was discoverable through reasonable due diligence." *Reed v. Stephens*, 739 F.3d 753, 781 (5th Cir. 2014).

Guidry fails to satisfy the cause prong because he cannot show that the State actually suppressed this evidence. The Supreme Court has recognized that the suppression of evidence qualifies as sufficient cause for the failure to assert a *Brady* claim in state court. *See Strickler*, 527 U.S. at 282. Here, Guidry argues that the State recovered usable fingerprints from Farah's car, identified those prints as Vernon Christopher Barlow's, and then suppressed information about Barlow's involvement in the crime. Guidry states that "[i]t is undisputed that the State never disclosed to Guidry's counsel records about fingerprints obtained from Barlow, or that those prints matched latent prints obtained by the police." In support, Guidry relies on the declarations of Alvin Nunnery, who represented Guidry in his first trial, and Tyrone Moncrief, who represented Guidry at his second trial. Both lawyers state that they were never provided with and never reviewed any files relating to fingerprints or Barlow. Both lawyers also state they learned about this information from Guidry's current habeas counsel who pointed it out to them in the State's file.

Guidry's argument is unavailing. That Guidry's trial attorneys say they never saw the fingerprint evidence does not mean the State suppressed it. The State had an open file policy in this case. The prosecution has no duty under *Brady* to show defense counsel where to find exculpatory

evidence in the open file. *See United States v. Mulderig*, 120 F.3d 534, 541 (5th Cir. 1997) ("There is no authority for the proposition that the government's *Brady* obligations require it to point the defense to specific documents with a larger mass of material that it has already turned over.") (quotation omitted); *see also Mathis v. Dretke*, 124 F. App'x 865, 877 (5th Cir. 2005).

Moreover, "*Brady* does not obligate the State to furnish a defendant with exculpatory evidence that is fully available to the defendant through the exercise of reasonable diligence." *Kutzner v. Cockrell*, 303 F.3d 333, 336 (5th Cir. 2002). Guidry's habeas counsel found this fingerprint evidence when they asked the State to see Guidry's file. Guidry's file consisted of multiple boxes, some labeled "Guidry," some "Prystash," and some "Fratta." Habeas counsel states that they discovered much of this evidence in the box labeled "Fratta." Nevertheless, with reasonable diligence, habeas counsel found this evidence in what the State provided as "Guidry's file." Thus, to prove the State suppressed the evidence, Guidry must show the material was not in the State's files at the time of trial, and that the State added it later—not just that trial counsel did not see it. There is no evidence in the record that Guidry's trial counsel did not have access to the exact same material or that the State added the material after Guidry's second trial.

Because Guidry cannot show that the State suppressed the fingerprint evidence, he has failed to establish cause for defaulting his *Brady* claim. No reasonable jurist would debate the correctness of the district court's procedural ruling on Guidry's *Brady* claim. We deny a COA on this claim.[2]

[2] Because we determine that no reasonable jurist could debate that there was no cause for Guidry's procedural default of his *Brady* claim, we do not discuss the district court's thorough analysis of the materiality of this evidence under the prejudice prong of the test to overcome the procedural bar.

B.

Second, Guidry seeks a COA on whether he received ineffective assistance of counsel (IAC) under *Strickland v. Washington*, 466 U.S. 668 (1984). He alleges that his trial, appellate, and state habeas counsel were all ineffective. Under *Strickland*, a criminal defendant's Sixth Amendment right to counsel is "denied when a defense attorney's performance falls below an objective standard of reasonableness and thereby prejudices the defense." *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (per curiam). But because Guidry defaulted these claims, the procedural bar forecloses review on federal habeas unless Guidry can show cause and actual prejudice. *See Davila*, 137 S. Ct. at 2062 (citing *Coleman v. Thompson*, 501 U.S. 722 (1991)).

1.

First, to the extent Guidry makes a freestanding ineffective assistance of state habeas counsel claim divorced from his ineffective assistance of trial counsel claim, it fails to meet the COA standard. As the Supreme Court has held, "[b]ecause a prisoner does not have a constitutional right to counsel in state postconviction proceedings, ineffective assistance in those proceedings does not qualify as cause to excuse a procedural default." *Id.* at 2062–63; *see also id.* at 2065. Thus, no reasonable jurist would debate the correctness of the district court's procedural ruling on this claim.

Guidry also argues on appeal that his state habeas counsel abandoned him. *See United States v. Cronic*, 466 U.S. 648 (1984). But Guidry did not make this argument in the district court. "We have repeatedly held that a contention not raised by a habeas petitioner in the district court cannot be considered for the first time on appeal from that court's denial of habeas relief." *Johnson v. Puckett*, 930 F.2d 445, 448 (5th Cir. 1991). Accordingly, we deny Guidry a COA on this claim.

2.

Second, Guidry argues that his appellate counsel on direct appeal was ineffective. In the district court, Guidry argued that the ineffectiveness of his state habeas counsel constituted cause to overcome the procedural bar to his ineffective assistance of appellate counsel claim (IAAC).

In *Martinez v. Ryan*, 566 U.S. 1 (2012), the Supreme Court created a "narrow, 'equitable . . . qualification' of the rule in *Coleman* that applies where state law requires prisoners to raise claims of ineffective assistance of trial counsel 'in an initial-review collateral proceeding,' rather than on direct appeal." *Davila*, 137 S. Ct. at 2065 (quoting *Martinez*, 566 U.S. at 16, 17). It held that "a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance *at trial* if" state habeas counsel's ineffective assistance caused the default. *Martinez*, 566 U.S. at 17 (emphasis added).

Here, Texas requires prisoners to bring all ineffective assistance of counsel claims in state habeas proceedings. So Guidry argues the *Martinez* exception should apply to his claim of IAAC. But the Supreme Court considered this exact question in *Davila* and "decline[d]" to "extend that exception" to IAAC claims. *Davila*, 137 S. Ct. at 2062–63; *see also Murphy v. Davis*, 737 F. App'x 693, 702–03 (5th Cir. 2018) (per curiam) ("The Supreme Court has recently held that default of an IAAC claim cannot be excused by ineffectiveness of habeas counsel."). Guidry did not raise his IAAC claim in his first habeas petition and the Texas Court of Criminal Appeals dismissed his successive state habeas petition as an abuse of the writ. Because Guidry's IAAC claim is procedurally defaulted with no debatable case for excuse, we deny a COA on it.

On appeal, Guidry makes a new argument. Rather than argue that the ineffective assistance of his habeas counsel caused him to default his IAAC

claim, Guidry argues he defaulted his IAAC claim because Texas requires a petitioner to bring his habeas petition concurrently with his direct appeal. *See* TEX. CODE. CRIM. PROC. art. 11.071, § 4. However, Guidry did not make this argument in the district court, and, as noted above, "a contention not raised by a habeas petitioner in the district court cannot be considered for the first time on appeal." *Johnson*, 930 F.2d at 448. Accordingly, we deny Guidry a COA on this claim.

3.

Third, and finally, Guidry argues that his trial counsel was constitutionally deficient. He contends that reasonable jurists would debate the correctness of the district court's denial of relief. The State responds that Guidry's ineffective assistance of counsel claim is procedurally barred. Relying on the *Martinez* exception, Guidry replies that the ineffectiveness of his state habeas counsel (IASHC) provides cause to overcome the procedural default of his ineffective assistance of trial counsel (IATC).

When we have applied *Martinez* in the COA context, we have held that "to succeed in establishing cause, the petitioner must show (1) that his claim of ineffective assistance of counsel at trial is substantial—i.e., has some merit—and (2) that habeas counsel was ineffective in failing to present those claims in his first state habeas proceeding." *Garza v. Stephens*, 738 F.3d 669, 676 (5th Cir. 2013) (citing *Martinez*, 566 U.S. at 14). Mindful that the COA inquiry is "not coextensive with a merits analysis," we limit our examination to a threshold inquiry of the underlying merits. *See Buck v. Davis*, 137 S. Ct. 759, 773–74 (2017). Ineffective assistance of counsel occurs when counsel's performance was deficient and the petitioner was prejudiced by the deficient performance. *Strickland*, 466 U.S. at 687. "When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must

show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 687–88.

Here, the district court applied *Martinez* and properly held that Guidry did not show cause to excuse procedural default because he did not demonstrate that his ineffective assistance of trial or state habeas counsel claims were substantial. The district court also denied a COA. Jurists of reason could not debate the district court's conclusion. Guidry cannot show cause because his state habeas counsel was not ineffective for failing to raise a meritless IATC claim.

a.

First, Guidry argues that trial counsel was ineffective for failing to argue that Mary Gipp's testimony that Guidry killed Farah was unconstitutional hearsay. To the contrary, the record is replete with "extensive efforts" by trial counsel "to preclude, or at least limit, Gipp's testimony." As the district court catalogued, trial counsel filed a writ of state habeas corpus to prevent retrial based on Gipp's testimony. Trial counsel also tried to remove the prosecution to federal court. At pre-trial hearings, trial counsel discussed limiting Gipp's testimony and secured the State's agreement that none of the excluded hearsay evidence would be admitted under any alternate theory with one exception. Moreover, at trial, trial counsel objected throughout Gipp's questioning and persistently objected during the State's questioning about Gipp's statements to her brother.

To be sure, trial counsel could have taken other action, such as asking for a mistrial or a limiting instruction. But *Strickland* does not require trial counsel to take every possible step. Based on our review of the record, we agree with the district court that Guidry cannot overcome the procedural bar because his ineffective assistance claim based on trial counsel's handling of

Gipp's testimony lacks merit. No jurist of reason would find the district court's conclusion debatable. Thus, we deny a COA on this claim.

b.

Second, Guidry argues that his trial counsel at both his first and second trials were ineffective in their handling of defense expert Dr. Basinger and his testimony. Before the first trial, Guidry retained Dr. Basinger to investigate the impact of Guidry's substance abuse. During cross-examination at the first trial, Dr. Basinger said Guidry told him that he shot Farah twice in the head. The State presented that testimony in Guidry's second trial.

Guidry states that, "but for [his first] trial counsel's ineffectiveness, the State could not have called Dr. Basinger in its case in chief." He argues that such ineffectiveness in his first trial tainted his second trial. Even if we assume that Guidry's first trial counsel was ineffective for putting Dr. Basinger on the stand, Guidry points to no clearly established law that ineffective assistance in a reversed trial can justify habeas relief from conviction in a second trial. In habeas proceedings, AEDPA governs. Under § 2254(d)(1), a state court's decision is "contrary" to clearly established federal law if it either "applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases" or reaches a different result than a relevant Supreme Court precedent on facts that are "materially indistinguishable." *Williams*, 529 U.S. at 405–06. Here, Guidry cites only federal-circuit-court and state-court cases. Even assuming these cases are on point—and they are not— Guidry's argument fails because he cannot show that jurists of reason would debate that there is no clearly established law *as determined by the Supreme Court* that supports his position.

Guidry also argues that trial counsel at his second trial was ineffective in failing to call his first trial counsel to impeach Dr. Basinger. As the

Supreme Court has recognized, "it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Strickland*, 466 U.S. at 689. "[T]he purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation," but "to ensure that criminal defendants receive a fair trial." *Id.* Thus, "the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." *Id.* at 688.

Here, Guidry argues that a single decision by trial counsel not to call his first trial counsel was deficient performance. But Guidry does not support his claim with evidence sufficient to "overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* at 689 (quotations omitted). Moreover, trial counsel took several actions to prevent the State from using Dr. Basinger's testimony in the second trial. Trial counsel sought to exclude Dr. Basinger's testimony under Fifth, Sixth, and Fourteenth Amendment theories, as well as under the attorney-client privilege. Further, during a pre-trial hearing, trial counsel cross-examined Dr. Basinger and argued to limit the scope of his testimony. We agree with the district court that trial counsel "made repeated, and zealous, efforts to exclude Dr. Basinger's testimony." Viewed in light of all the circumstances, no jurist of reason could debate the district court's finding that trial counsel's efforts met the objective standard of reasonableness.

Lastly, Guidry argues that his counsel at his second trial had a conflict of interest and therefore failed to argue that his counsel at his first trial were ineffective in putting Dr. Basinger on the stand. To establish ineffective assistance of counsel based on a conflict of interest, Guidry must show "that an actual conflict of interest adversely affected [his] counsel's performance." *Perillo v. Johnson*, 205 F.3d 775, 781 (5th Cir. 2000). Jurists of reason could

not debate this conflict claim because counsel cannot be ineffective for failing to raise a meritless claim.

Alvin Nunnery represented Guidry in his first trial and before his second trial. As the district court recognized, counsel cannot be "expected to argue his own ineffectiveness[.]" *Clark v. Davis*, 850 F.3d 770, 773 (5th Cir. 2017). While Nunnery withdrew from the case prior to Guidry's second trial, his co-counsel, Loretta Muldrow, did not. Tyrone Moncriffe was appointed and, together with Muldrow, actually represented Guidry at trial. Guidry makes no claim that Moncriffe had an actual conflict of interest. Nor does he point to clearly established law that the conflict of interest of counsel who withdraws can form the basis of an ineffectiveness claim that justifies habeas relief. But because of Muldrow's continued representation, any *Strickland* argument about trial counsel's performance in the first trial could implicate Muldrow's own effectiveness. Assuming Muldrow had an actual conflict of interest, Guidry cannot show that the conflict adversely affected his counsel's performance. As the district court found, Moncriffe and Muldrow could not have made a successful *Strickland* argument with regard to counsel's representation in the first trial. In that trial, Dr. Basinger's testimony was redundant and therefore did not cause a reasonable probability of a different result. Guidry's counsel cannot be ineffective for failing to raise a meritless *Strickland* claim. No jurist of reason could debate the district court's conclusion.

Accordingly, we agree with the district court that Guidry cannot overcome the procedural bar because his ineffective assistance claim based on trial counsel's handling of Dr. Basinger and his testimony lacks merit. No jurist of reason would find the district court's conclusion that state habeas counsel was not ineffective for failing to make a meritless IATC claim debatable. Thus, we deny a COA on this claim.

c.

Third, Guidry argues that trial and state habeas counsel were ineffective because "they did not conduct an independent investigation of the crime scene and other suspects." Guidry asserts that trial counsel failed to investigate fingerprint evidence that Guidry alleges came from Farah's car. He states that such evidence would have led trial counsel to Barlow, who better matched eyewitness descriptions. Additionally, Guidry argues that Barlow's car matched the description of the getaway car, and that human blood was found on one of the seats. Further, Guidry argues trial counsel should have investigated the hypnosis of key witnesses, ballistics evidence, and two suspects, William Planter and Bob Mann.

We note that the district court found that "the record shows that trial counsel and their investigator made efforts to interview witnesses, develop ballistics evidence, and prepare witnesses for trial." But even if we found trial counsel's performance deficient, Guidry "must show that counsel's failures prejudiced his defense." *Wiggins v. Smith*, 539 U.S. 510, 534 (2003).

To establish prejudice, a "defendant 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. The district court evaluated the materiality of all the evidence Guidry alleges counsel was ineffective for failing to investigate in its analysis of Guidry's *Brady* claims and concluded that none of it was material. "The materiality standard under *Brady* . . . is identical to the prejudice standard under *Strickland*." *Johnson v. Scott*, 68 F.3d 106, 109–10 (5th Cir. 1995). Thus, the district court concluded that "[f]or the same reasons that [Guidry] has not overcome the procedural bar of his related *Brady* claim,"

Guidry has not shown that his underlying ineffective assistance of trial counsel claim "would have merited relief." We cannot find this debatable.

First, Guidry asserts the getaway car was a "grey/black Corvette" that belonged to Barlow. But as the record indicates, eyewitness descriptions of the getaway care differed significantly from a "grey/black Corvette." Moreover, the Corvette Guidry describes actually belonged to a man named Podhorksy, not Barlow. Second, Guidry argues that Barlow's fingerprints were found on Farah's car. Again, the record indicates that the police report did not identify the car from which these fingerprints were taken. Indeed, the record suggests Barlow's fingerprints came from Podhorsky's Corvette, not Farah's car.

Third, Guidry argues that hypnosis of the eyewitnesses altered their trial testimony. But as the district court found, the hypnosis was not successful, did not produce an identification of Guidry, and did not alter the eyewitness accounts. Fourth, Guidry asserts that ballistics evidence showed the gun Guidry was arrested with was not the murder weapon. One ballistics report concluded the gun Guidry had was the murder weapon; other reports were inconclusive. But the gun also served to tie Guidry to Fratta—Fratta took the gun from Farah, who had purchased it, and gave it to Guidry. And, as the district court noted, other testimony and evidence established Guidry's role as the shooter.

Fifth, and finally, Guidry argues that there was evidence that Planter and Mann were stronger suspects. But this evidence was weak and speculative. On the other hand, the evidence against Guidry includes his possession of Fratta's gun and Dr. Basinger's testimony that Guidry told him he shot Farah. Viewed in light of all the evidence, there is no reasonable probability that the result would have been different had trial counsel investigated and presented this evidence. These ineffective assistance of

counsel claims lack merit and cannot overcome the procedural bar. No jurist of reason would find the district court's conclusion on the issue of prejudice debatable. Thus, we deny a COA on this claim.

d.

Fourth, Guidry argues that trial counsel was ineffective in investigating and presenting Guidry's mitigation case. As an initial matter, defense counsel asserts that "[t]he district court explicitly recognized that the mitigation phase of Guidry's case was 'too superficial and hurried.'" This statement is a gross mischaracterization of the district court's conclusion. The district court actually wrote: "Through extensive argument, *Guidry* describes his attorneys' investigation into punishment phase evidence as *too superficial and hurried*." (emphasis added). This type of blatant mischaracterization of the record is unacceptable and unbecoming of lawyers before our court.

Instead, the district court catalogued extensive efforts by trial counsel to investigate and gather evidence for the mitigation phase, despite time limitations placed on them by the trial court. The defense team included an investigator and a mitigation specialist. The team sought several continuances and obtained at least one. Despite being denied additional continuances, the defense team had already interviewed approximately thirty witnesses prior to trial. Additionally, trial counsel worked with Gulf Region Advocacy Center, which provided an attorney and investigators to work on Guidry's case. By the time of trial, trial counsel had interviewed approximately forty-five witnesses and sought thirty separate sets of records relevant to mitigation. Not satisfied with their investigation, trial counsel persisted in seeking continuances. Trial counsel sought time to employ a trauma specialist and a prison adaptation specialist. Trial counsel successfully had Guidry examined by a neuropsychological expert, but

decided not to call her as a witness. These efforts certainly meet, if not exceed, the objective standard of reasonableness required of counsel.

Ultimately, trial counsel called four witnesses in mitigation. Guidry now argues the mitigation presentation was "too superficial and hurried" and that trial counsel should have done more. But we have said that a court "must be particularly wary of argument[s] [that] essentially come[] down to a matter of degrees. Did counsel investigate enough? Did counsel present enough mitigating evidence? Those questions are even less susceptible to judicial second-guessing." *Dowthitt v. Johnson*, 230 F.3d 733, 743 (5th Cir. 2000) (quotation omitted). Moreover, Guidry does not show that the decision to only call four of the approximately forty-five witnesses was not a strategic decision by counsel. *See Strickland*, 466 U.S. at 690–91 (stating that "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable."). It is his burden to do so. Thus, Guidry cannot overcome the presumption that his trial counsel made such a "significant decision[] in the exercise of reasonable professional judgment." *Strickland*, 466 U.S. at 690.

Even assuming trial counsel was deficient, the district court clearly held—and the record supports—that Guidry failed to show prejudice. To establish prejudice, Guidry "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. "That requires a substantial, not just conceivable, likelihood of a different result." *Cullen v. Pinholster*, 563 U.S. 170, 189 (2011) (quotations omitted). "To assess that probability, we consider 'the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding'—and 'reweig[h] it against the evidence in aggravation.'" *Porter v. McCollum*, 558 U.S. 30, 41 (2009) (quoting *Williams*, 529 U.S. at 397–98).

Guidry does present new mitigation evidence on federal habeas review, but it is weak or contradicted by other evidence. For example, an expert witness stated that Guidry was exposed to, and the target of, "extreme domestic violence." But this assertion was flatly contradicted by Guidry's family members at trial. That expert also asserted that Guidry suffered from lead poisoning and brain problems without any testing or empirical support. Further, Guidry's evidence about his family's intergenerational poverty and his parents' difficult lives is not relevant to "an individualized determination on the basis of the character of the individual and the circumstances of the crime." *Tuilaepa v. California*, 512 U.S. 967, 972 (1994).

On the other side of the ledger, the State's evidence showed that Guidry presents a serious future danger to others whether in or out of prison. As the district court noted: (1) when Guidry was 16 he possessed weapons and was arrested for breaking into cars; (2) he later fired a gun during the course of a robbery; (3) he robbed a bank and was arrested after a police chase; (4) he attacked jail officers; (5) he possessed weapons and assaulted officers on death row; (6) he tried to escape death row; (7) on death row, he took an officer hostage and threatened to kill her; and (8) he tried to stab a hostage negotiator. This evidence doesn't even include the circumstances of Farah's murder itself. In light of this strong aggravating evidence, Guidry cannot meet the COA standard.

Because Guidry's claim of ineffective assistance of counsel at mitigation lacks merit under either the deficiency prong or prejudice prong of *Strickland*, he cannot overcome the procedural bar. No reasonable jurist would find the district court's conclusion on this ineffective assistance claim debatable. Accordingly, we deny a COA on this claim.

IV.

For the foregoing reasons, we deny a COA as to all of Guidry's claims.

APPENDIX B

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

HOWARD PAUL GUIDRY,	§	
	§	
Petitioner,	§	
	§	
v.	§	CIVIL ACTION NO. H-13-1885
	§	
LORIE DAVIS,	§	
	§	
Respondent.	§	

MEMORANDUM AND ORDER

In 1995, the State of Texas charged Howard Paul Guidry with capital murder. Guidry was convicted and sentenced to death. Several years later, this Court granted federal habeas corpus relief because of constitutional error in his conviction. The State of Texas again indicted Guidry for capital murder in 2006. This action follows a second capital conviction and death sentence.

After unsuccessfully availing himself of state court remedies, Guidry filed a federal petition for a writ of habeas corpus on June 26, 2013. (Docket Entry No. 1). Guidry amended his petition on January 25, 2019. (Docket Entry No. 60). On May 28, 2019, Respondent filed a motion for summary judgment. (Docket Entry No. 98). Guidry has filed a response and cross-motion for summary judgment. (Docket Entry No. 106). Guidry also moves to conduct discovery. (Docket Entry No. 58). This case is ripe for adjudication.

BACKGROUND

I. The Crime and Guidry's First Trial

On November 9, 1994, an unknown assailant shot Farah Fratta[1] to death. After she backed into her garage and exited her car, a man approached Farah. The gunman shot her twice in the head.

[1] To avoid confusion, the Court will refer to the victim as "Farah" and her husband as "Fratta."

Farah fell, her head resting in front of the left rear tire. Emergency medical services soon arrived, but Farah died after Life Flight took her to the hospital.

The neighbors across the street, Laura and Darren Hoelscher, witnessed some of the events surrounding Farah's murder. The Hoelschers heard a gunshot followed by Farah screaming. Mr. Hoelscher saw Farah fall to the ground and then heard a second gunshot. The Hoelschers then observed an African-American man dressed in black emerge from behind a large bush. A silver or gray car with a headlight out stopped in front of the Fratta home. The gunman got in the car and drove away. The Hoelschers, however, could not provide a detailed description of the gunman.

Because of their on-going contentious divorce proceedings, the police suspected the involvement of Farah's husband, Robert Fratta, from the outset. Fratta had vocally and repeatedly expressed his desire to see Farah murdered. Fratta had freely tried to solicit people to carry out the killing. But Fratta did not match the description of the gunman and had an alibi for the night of the murder.

The police suspected that three men were involved in the murder: a shooter, a getaway driver, and Fratta. Several months passed without the police being able to connect Fratta to the murder. During that time, however, the police began developing information that identified the two other participants in the conspiracy. A woman named Mary Gipp[2] eventually told police that Fratta hired her boyfriend Joseph Prystash to kill Farah. Prystash enlisted his neighbor Guidry as the gunman. Gipp told the police that Prystash had told her how they committed the murder: Prystash drove Guidry to the Fratta home in his silver Nissan, he waited at a payphone until Guidry called to report

[2] At the time of the second trial, Gipp had remarried and testified under the name "Mary Gipp McNeill." The Court will refer to Gipp by her maiden name to preserve continuity with the record throughout the whole of Guidry's two prosecutions.

that he had killed Farah, and then Prystash picked him up.

In March 1995, the police arrested Guidry as he fled from a bank robbery. Two factors confirmed Guidry's connection to the murder. First, a gun Guidry possessed during the bank robbery belonged to Fratta. Second, Guidry confessed to being the gunman. In a detailed statement and videotaped visit to the crime scene, Guidry provided explicit details about the conspiracy and the payment promised for the murder. Guidry's confession to the capital murder became centerpiece for the State's capital-murder prosecutions against Fratta, Guidry, and Prystash. With a prosecution strongly emphasizing that confession, a jury found Guidry guilty of capital murder and he was sentenced to death in 1997. In separate trials, Fratta and Prystash were also convicted of capital murder and sentenced to death.

II. Constitutional Error in Guidry's First Conviction

Guidry unsuccessfully sought appellate and habeas relief in the state courts. The state courts found that no reversible error warranted vacating his conviction or sentence. Years of legal challenges finally revealed that the police had violated Guidry's constitutional rights when they took his confession. To summarize, this Court found that "Guidry invoked his right to counsel during his interrogation by [Harris County Police] Detectives Roberts and Hoffman; and the detectives induced Guidry's confession by telling him, falsely, that they had spoken to his robbery-charge-attorney, [Layton] Duer, and that Duer had authorized Guidry's cooperation without Duer's being present." *Guidry v. Dretke*, 397 F.3d 306, 327 (5th Cir. 2005). This constitutional error, however, was not enough alone to warrant federal habeas relief. Other evidence still suggested Guidry's involvement in the murder, but only Gipp's testimony about the conspiracy confirmed that Guidry shot Farah *for remuneration*.

Guidry had challenged the hearsay nature of Gipp's testimony in state court, and he renewed that claim in his federal habeas petition. The most incriminating portions of Gipp's testimony were based on hearsay testimony relating to what Prystash had told her. The state courts had found that Gipp's testimony was inadmissible as hearsay, but harmless because of Guidry's confession. This Court found that, with the exclusion of Guidry's confession, Gipp's testimony was no longer harmless. Excluding Guidry's confession and Gipp's testimony from the evidentiary picture left "no evidence showing Guidry killed Farah Fratta *for remuneration* – the capital offense for which Guidry was convicted." *Guidry*, 397 F.3d at 330 (emphasis added).

Constitutional error in the taking of Guidry's confession resulted in federal habeas relief for both Fratta and Guidry. *See Fratta v. Quarterman*, 2007 WL 2872698, at *1 (S.D. Tex. 2007), *aff'd*, 536 F.3d 485 (5th Cir. 2008); *Guidry v. Dretke*, 4:01-cv-04140 (S.D. Tex), *aff'd*, 397 F.3d 306 (5th Cir. 2005). Prystash's conviction, however, withstood constitutional scrutiny because the prosecution presented evidence at trial of his own confession and because Gipp's testimony was admissible against him. *See Prystash v. Stephens*, 2016 WL 1069680, at *19 (S.D. Tex. 2016), *aff'd sub nom. Prystash v. Davis*, 854 F.3d 830 (5th Cir. 2017).

III. Guidry's Second Trial

On June 16, 2006, the State of Texas again indicted Guidry for capital murder and tried him in 2007. Six of the charging paragraphs alleged that Guidry killed Farah for remuneration. The seventh alleged that Guidry killed her during a robbery.

The trial court initially appointed the attorneys from his first trial, Alvin Nunnery and Loretta Muldrow, to represent Guidry. Nunnery eventually withdrew from the case and the trial court appointed Tyrone C. Moncriffe to represent Guidry. The Court will review the testimony and

evidence presented in the second capital prosecution against Guidry.

A. Guilt/Innocence Phase

Guidry's second trial relied on the same factual background for the crime as in his first trial. The State described the murder for jurors through the Hoelschers' testimony. Mrs. Hoelscher testified that she heard Farah scream, saw her fall to the ground, and then observed a man emerge from behind a large bush and walk to the curb. Tr. Vol. 20 at 120. Ms. Hoelscher described the man as African-American, dressed in black, and about 5'7" to 5'8" tall. Tr. Vol. 20 at 125. The man looked antsy as he waited. Tr. Vol. 20 at 130. A small silver car with one headlight out picked him up. Tr. Vol. 20 at 132. Mr. Hoelscher ran outside to get a license plate number, but could only see that it was a Texas plate. Tr. Vol. 20 at 132.

The Hoelschers could not positively identify Guidry. The State's case during the second trial could no longer highlight Guidry's confession in order to tie him to the crime. Instead, the State linked Guidry to the murder through (1) much more circumspect testimony from Gipp; (2) Guidry's possession of Fratta's gun and on ballistics testimony; and (3) Guidry's incriminating statements to others.

Gipp's testimony in the second trial avoided much of the earlier hearsay statements from Prystash, but still inculpated Guidry. Gipp set the stage by describing how Guidry, who was her neighbor, became closer and closer to Prystash as she became aware that "something bad was going to happen to Farah Fratta." Tr. Vol. 21 at 10. On the night of the murder, Gipp saw Prystash and Guidry together. Guidry wore a black shirt and black pants. Tr. Vol. 21 at 49. Gipp later wrote the serial number of a gun that Prystash had brought home with him. Tr. Vol. 21 at 60. Gipp also testified that she told her brother that Prystash and Guidry killed Farah.

The prosecution in the second trial emphasized Guidry's connection to the crime through the gun Guidry possessed when arrested. Trial testimony established that Fratta owned the gun. Tr. Vol. 21 at 198-99. The numbers Gipp wrote down after the murder matched the gun recovered from Guidry. Ballistics evidence also linked the gun to bullets fired at the crime scene.

Finally, without introducing his confession into evidence, the prosecution was still able to inculpate Guidry with statements he made. While lacking the incriminating same details of his confession to the police, the prosecution adduced testimony that Guidry made incriminating statements to a psychologist and to a reporter. Before the first trial, the defense had retained Dr. Scott Basinger, a professor at the Baylor College of Medicine, to investigate the effects of Guidry's substance abuse. During his cross-examination testimony in the first trial, Dr. Basinger said Guidry had told him that he shot Farah two times in the head. The prosecution presented that admission to the jury in Guidry's second trial. Tr. Vol. 22 at 10. The prosecution also presented the jury with portions of interviews between Guidry and a freelance reporter. Guidry made incriminating statements to the reporter about the murder weapon, the destruction of evidence, and remuneration for the killing.

The jury instructions allowed for Guidry's conviction as the gunman or as a party to the murder. Clerk's Record at 1665-77. The second jury found Guidry guilty of capital murder.

B. Penalty Phase

Under Texas law, a jury decides a capital convict's sentence by answering special issue questions. In this case, the jury had to answer three questions: (1) would Guidry be a future threat to society; (2) did Guidry himself cause the murder of Farah; and (3) did mitigating circumstances warrant a life sentence? Clerk's Record at 1689-91.

The Court will discuss the punishment-phase testimony and evidence presented by both parties in greater detail when addressing Guidry's ineffective-assistance-of-counsel claim. To summarize briefly, the prosecution presented extensive evidence of Guidry's criminal activity. As a juvenile, Guidry had burglarized vehicles and possessed weapons. As an adult, Guidry committed an aggravated robbery in which he fired a weapon. The police arrested Guidry after he committed a bank robbery with the same weapon he used to shoot Farah, a young mother who he did not know. Incarceration did not end Guidry's violence. He attempted to escape, an act which prompted the Texas Department of Criminal Justice to move all of death row to a higher security facility. Guidry took a prison officer hostage and assaulted others. He possessed weapons and violated prison regulations. While awaiting trial he assaulted a jail employee.

The defense team contacted numerous people and amassed records in preparation for the punishment hearing. The defense presented its case through four witnesses who described Guidry's childhood asthma, his loving home and family, and good character.

The jury answered Texas' special issues in a manner requiring the imposition of a death sentence.

IV. Appeal and Initial State Habeas Review

Guidry sought automatic direct review in the Texas Court of Criminal Appeals. Terrence Gaiser represented Guidry on direct appeal. Guidry's appeal raised fourteen grounds for relief. The Court of Criminal Appeals found no error in Guidry's conviction or sentence. *Guidry v. State*, No. AP-75,633 (Tex. Crim. App. Oct. 21, 2009) (not designated for publication).

Under Texas law, state habeas law proceeds concurrent to the direct appeal. *See* Tex Code Crim. Pro. art. 11.071 §4. Jerome Godinich, Jr. represented Guidry on state habeas review. In 2009,

state habeas counsel filed a habeas application raising two grounds for relief, both of which Guidry renews in federal court. In 2010, Godinich filed a supplemental habeas application ("2010 application") raising a new ground for relief. State Habeas Record at 203, 257.

During the pendency of his state habeas action, Guidry expressed dissatisfaction with Godinich's representation. Guidry unsuccessfully made repeated attempts for the appointment of new counsel. In late 2010, the attorneys who now represent Guidry agreed to appear on his behalf in state court. The state habeas court, however, would not hear Guidry's complaints about Godinich's representation. The state habeas court would not allow Guidry's current attorneys to substitute in as counsel of record.

On March 14, 2012, the trial court signed the State's proposed findings of fact and conclusions of law recommending that the Court of Criminal Appeals deny relief. The trial court recommended that the Court of Criminal Appeals ignore the 2010 application because it was, in reality, an inappropriately filed successive habeas application. On the lower court's recommendation, the Court of Criminal Appeals denied relief. The Court of Criminal Appeals also found that the 2010 application was not filed in accordance with state law and abused the habeas writ. *Ex parte Guidry*, Nos. WR-47,417-02 and WR-47,417-03 (Tex. Crim. App. Jan. 27, 2012).

GUIDRY'S FEDERAL PETITION

This Court appointed counsel to represent Guidry throughout the federal habeas process. Guidry filed a timely federal petition for a writ of habeas corpus in 2013. (Docket Entry No. 1). Guidry's petition renewed some issues he litigated in state court, but also contained numerous unexhausted claims. In 2015, Respondent moved for summary judgment (Docket Entry No. 40) and Guidry filed a response (Docket Entry No. 41). The Court, however, asked the parties to provide

briefing on the question of whether a state avenue of relief was available for the consideration of Guidry's unexhausted claims. (Docket Entry No. 42). After receiving briefing from the parties, the Court stayed and administratively closed this action to allow state review. (Docket Entry No. 48).

Guidry filed a successive state habeas application. The Court of Criminal Appeals reviewed Guidry's submission and, finding that he did not satisfy the requirements for successive state proceedings under Tex. Code Crim. Pro. art. 11.071 §5, dismissed the habeas action as an abuse of the writ. *Ex parte Guidry*, Nos. WR-47,417-04 and WR-47,417-05 (Tex. Crim. App. Sept. 19, 2018).

The Court reopened this action. (Docket Entry No. 55). Guidry subsequently amended his federal petition. (Docket Entry No. 60). Guidry's amended petition raises seven grounds for relief:

1. The State suppressed evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963).

2. The State unconstitutionally used false evidence to convict Guidry.

3. Guidry's trial, appellate, and habeas attorneys provided ineffective representation.

4. The State relied on testimony that derived from statements the police secured after violating Guidry's Fifth Amendment rights.

5. Guidry was denied an impartial jury.

6. The trial court violated Guidry's right to counsel of his choice in his first round of habeas proceedings.

7. The Eighth Amendment prohibits a State from carrying out a death sentence, both because of the length of time an inmate has been on death row and because the evolving standards of our society reject capital punishment.

Guidry also filed a motion seeking discovery on several issues. (Docket Entry No. 58). Respondent has filed an answer and summary judgment motion which argues that Guidry raised

most claims in a procedurally improper manner. (Docket Entry No. 98). Guidry has filed a response and cross-motion for summary judgment. (Docket Entry No. 106). This case is ripe for review.

LEGAL STANDARDS

The federal writ of habeas corpus exists to free a person who "is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). While the modern writ "plays a vital role in protecting constitutional rights," *Slack v. McDaniel*, 529 U.S. 473, 483 (2000), "[a] criminal trial is the main event at which a defendant's rights are to be determined, and the Great Writ is an extraordinary remedy that should not be employed to relitigate state trials." *McFarland v. Scott*, 512 U.S. 849, 859 (1994) (quotation omitted). Both traditional habeas jurisprudence and statutory guidelines define the contours of federal habeas review. Honoring principles of comity and federalism that respect the finality of state judgments, Congress has "found it necessary to impose significant limits on the discretion of federal courts to grant habeas relief." *Calderon v. Thompson*, 523 U.S. 538, 554 (1998); *see also Danforth v. Minnesota*, 552 U.S. 264, 278 (2008) (observing that the courts have "adjust[ed] the scope of the writ in accordance with equitable and prudential considerations"). Procedural and substantive limitations on the habeas writ guide this Court's consideration of Guidry's federal petition.

I. Procedural Law

Respondent contends that how Guidry has chosen to litigate his claims narrows the issues that this Court may consider on federal habeas review. "[T]wo fundamental tenets" govern "federal review of state convictions. First, a state prisoner must exhaust available state remedies before presenting his claim to a federal habeas court. . . . Second, a federal court may not review federal claims that were procedurally defaulted in state court—that is, claims that the state court denied

based on an adequate and independent state procedural rule." *Davila v. Davis*, ___ U.S. ___, 137 S. Ct. 2058, 2064 (2017). "These requirements ensure that the state courts have the first opportunity to correct any error with a state conviction and that their rulings receive due respect in subsequent federal challenges." *Skinner v. Switzer*, 562 U.S. 521, 541-42 (2011).

Respondent contends that Guidry defaulted federal consideration for all but claim four and most of claim five. Guidry raised all his other claims for the first time in his federal petition. This Court stayed adjudication of Guidry's action to allow the exhaustion of state court remedies on those claims. The Texas Court of Criminal Appeals, however, found that state law (Tex. Code Crim. Pro. art. 11.071 § 5(a)) barred Guidry from litigating those issues in a successive state habeas application. *See Ex parte Guidry*, 2018 WL 4472491, at *1 (Tex. Crim. App. 2018).

"A dismissal pursuant to Article 11.071 'is an independent and adequate state ground for the purpose of imposing a procedural bar'" in federal habeas proceedings. *Gutierrez v. Stephens*, 590 F. App'x 371, 384 (5th Cir. 2014) (quoting *Hughes v. Quarterman*, 530 F.3d 336, 341 (5th Cir. 2008)): *see also Sorto v. Davis*, 672 F. App'x 342, 348 (5th Cir. 2016). Claims one, two, three, six, seven, and eight are subject to the procedural bar. "Out of respect for finality, comity, and the orderly administration of justice, a federal court will not entertain a procedurally defaulted constitutional claim in a petition for habeas corpus absent a showing of cause and prejudice to excuse the default." *Dretke v. Haley*, 541 U.S. 386, 388 (2004). A petitioner has the burden to overcome a procedural bar. *McCleskey v. Zant*, 499 U.S. 467, 494 (1991). Guidry provides various arguments that Court should reach the merits of his procedurally barred claims. The Court will discuss each argument in the relevant section but notes that Guidry has not shown that federal review is available for any of his procedurally barred claims.

II. AEDPA

Guidry exhausted claims four and most of claim five in state court. If an inmate has presented his federal constitutional claims to the state courts in a procedurally proper manner, and the state courts have adjudicated their merits, AEDPA provides for a deferential federal review. "[T]ime and again," the Supreme Court "has instructed that AEDPA, by setting forth necessary predicates before state-court judgments may be set aside, erects a formidable barrier to federal habeas relief for prisoners whose claims have been adjudicated in state court." *White v. Wheeler*, ___ U.S. ___, 136 S. Ct. 456, 460 (2015) (quotation omitted). Under AEDPA's rigorous requirements, an inmate may only secure relief after showing that the state court's rejection of his claim was either "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or 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)(1),(2).

AEDPA review exist only to "guard against extreme malfunctions in the state criminal justice systems . . . ." *Woods v. Donald*, 575 U.S. 312, 315 (2015) (quotation omitted). To merit relief under AEDPA, a petitioner may not merely show legal error in the state court's decision. *See White v. Woodall*, 572 U.S. 415, 420 (2014) (stating being "merely wrong" or in "clear error" will not suffice federal relief under AEDPA). "[F]ocus[ing] on what a state court knew and did," *Cullen v. Pinholster*, 563 U.S. 170, 182 (2011), AEDPA requires inmates to "'show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.'" *Woodall*, 572 U.S. at 420 (quoting *Richter*, 562 U.S. at 103); *Berghuis v.*

Thompkins, 560 U.S. 370, 380 (2010); *Williams v. Taylor*, 529 U.S. 362, 413 (2000). "If this standard is difficult to meet, that is because it was meant to be." *Richter*, 562 U.S. at 102.

A petitioner challenging the factual basis for a state decision must show that it was an "unreasonable determination of the facts in light of the evidence . . . ." 28 U.S.C. § 2254(d)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003). "[A] state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance." *Wood v. Allen*, 558 U.S. 290, 301 (2010). A federal habeas court must also presume the underlying factual determinations of the state court to be correct, unless the inmate "rebut[s] the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1); *see also Miller-El*, 537 U.S. at 341; *Young v. Dretke*, 356 F.3d 616, 629 (5th Cir. 2004) ("As a federal habeas court, we are bound by the state habeas court's factual findings, both implicit and explicit.").

With those standards in mind, the Court turns to the issues presented in Guidry's federal petition. The Court will first address those claims available for federal review (claims four and five). The Court will then consider whether federal review is available for the claims Guidry defaulted in state court (claims one, two, three, six, seven, and eight).

ANALYSIS OF PROCEDURALLY PROPER CLAIMS

The Court will first consider those claims which the state courts adjudicated on the merits. Applying AEDPA's deferential standards, the Court finds that Guidry has not shown that the state court's decision was contrary to, or an unreasonable application of, federal law. *See* 28 U.S.C. § 2254(d)(1).

I. Wrongful Admission of Testimony (Claim Four)

Guidry's fourth ground for relief argues that reverberations from errors in his first trial carried into his second. Guidry's claim centers on the prosecution's use of testimony that came to light during the prosecution's cross-examination of a penalty-phase witness in his first trial. Guidry's attorneys in his first trial hired Dr. Scott Basinger, a professor at the Baylor College of Medicine with expertise in substance abuse, to determine whether Guidry's drug use affected his behavior and ability to make decisions. Before meeting with Guidry, Dr. Basinger reviewed the tape recording of his confession and the videotaped walkthrough of the crime scene. Dr. Basinger later interviewed Guidry in jail. Guidry told Dr. Basinger that he had used "fry" or "amp," which is marijuana laced with formaldehyde, on the night of the murder. Guidry also told Dr. Basigner that he was the one who shot the victim.

Two days after the interview, Dr. Basinger sent trial counsel Nunnery a summary of the interview which read, in part:

> The day of the crime, Howard smoked marijuana he bought from a dealer he regularly uses, and went back to the dealer in the company of Joe and bought two fry sticks at about 5:00 pm. He smoked at least 1½ fry sticks as Joe dropped him off at the victim's home. Initially, he was feeling high while waiting for the victim, but began coming down as he waited, and called Joe twice questioning whether he should go through with it. He stated he was more pumped-up on adrenaline than high when he shot the victim.

(Docket Entry No. 90, Ex. A). Dr. Basinger opined that, while Guidry was "high at the time of the murder," he was "was not so impaired that he was in anything like a psychotic state" and was "in control of his will and his faculties." Stating that he could "offer little in the way of extenuating circumstances at the time of the murder," Dr. Basinger asked counsel to "call . . . to discuss the report." (Docket Entry No. 90, Ex. A).

The defense called Dr. Basinger as a witness in the punishment phase of the first trial. On cross-examination, the prosecution adduced testimony that Guidry told Dr. Basinger that he shot Farah.

The State subpoenaed Dr. Basigner to testify in the second trial. Clerk's Record at 1540. The defense filed motions to exclude Dr. Basinger's testimony under various theories. Clerk's Record at 816, 829. The primary thrust of the defense's objections, however, centered on arguing that Guidry's statements to Dr. Basigner were the direct result of his illegally obtained confession. As Guidry argued in a pre-trial motion:

> Petitioner was impelled to introduce Dr. Basinger's testimony to explain his (Guidry's) state of mind and rebut the state's theory of Guidry's culpability detailed in the extra judicial confessions which contravened Petitioner's *Miranda-Edwards* guarantees. The federal court order barred the use of the confessions under the Fifth Amendment to the United States Constitution in a subsequent prosecution.
>
> But for the trial courts erroneous ruling of admissibility of Guidry's confessions Petitioner would not have been impelled to testify against himself through the use and introduction of Dr. Basinger's testimony to explain Petitioner's state of mind. Such testimony would have proved unnecessary. Thus Petitioner's use of state of mind expert testimony at the punishment phase of his error-tainted trial to rebut the illegally introduced states evidence at the guilt-innocence phase and re-offered at punishment phase does not waive his *Miranda-Edwards* guarantees.
>
> Moreover the federal court order doesn't give the state license to recycle in the new trial evidence presented by Petitioner in the error—tainted trial offered solely to minimize the harm inflicted on Guidry by the states use of the illegal confessions.

Clerk's Record at 1406-07.

The trial court held a hearing regarding the admissibility of Dr. Basinger's testimony. Tr. Vol. 4. The trial court overruled Guidry's objections and allowed Dr. Basinger to testify at trial.

Unsuccessful in his pre-trial efforts to preclude Dr. Basinger's testimony, Guidry filed emergency motions in this Court. *Guidry v. Quarterman*, 4:01-cv-4140 (S.D. Tex) (Docket Entry

Nos. 57, 58, 61). This Court denied Guidry's motions.

At trial, the prosecution called Dr. Basinger to relate Guidry's statements. Tr. Vol. 22 6-11. Specifically, the prosecution engaged Dr. Basinger in the following questioning:

> The State: . . . how did you answer any question back in 1997 when I asked did Howard Paul Guidry ever tell you that he shot Farah Fratta two times in the head? What did you answer back then?
>
> Dr. Basinger: I answered in the affirmative.
>
> The State: You said he did, did you not?
>
> Dr. Basinger: I said he did.
>
> The State: And traveling forward in time back in July of last year, July of 2006 . . . Do you recall my asking you in July of 2006 whether or not Howard Paul Guidry told you he shot Farah Fratta two times in the head and you heard that out of the mouth of Howard Guidry?
>
> Dr. Basinger: Yes.
>
> The State: And what did you say?
>
> Dr. Basinger: Yes.

Tr. Vol. 22 at 11. The defense did not ask Dr. Basinger any questions on cross-examination.

Guidry makes three primary arguments on federal habeas review. First, Guidry complains that the State's use of Dr. Basigner's testimony in the retrial violated on *Harrison v. United States*, 392 U.S. 219 (1968). Second, Guidry contends that Dr. Basinger did not warn him of his *Miranda* rights and thus the trial court should have found his statement inadmissible under *Estelle v. Smith*, 451 U.S. 454 (1981). Finally, Guidry argues that general exclusionary principles should have precluded use of his statement.

A. *Harrison*

On direct appeal, Guidry renewed his direct-causation argument: that but for the illegal admission of his confession to police, he would not have confessed to Dr. Basinger. Guidry argued that Dr. Basinger's testimony was the "fruit of the poisonous tree" of the confessions to police. Guidry focused his appellate challenge – and this subsequent federal claim – on *Harrison v. United States*, 392 U.S. 219 (1968). In *Harrison*, the defendant made three confessions to the police and then took the stand at trial to give his own version of the events surrounding the underlying crime. After an appellate court reversed his conviction because the police obtained his confessions illegally, the prosecution at the retrial read his prior testimony to jurors. The Supreme Court held that

> the petitioner testified only after the Government had illegally introduced into evidence three confessions, all wrongfully obtained, and the same principle that prohibits the use of confessions so procured also prohibits the use of any testimony impelled thereby – the fruit of the poisonous tree, to invoke a time-worn metaphor. For the essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all.

Id. at 222 (citations and footnotes omitted).

The *Harrison* Court, however, looked to see if the defendant's "trial testimony was in fact impelled by the prosecution's wrongful use of his illegally obtained confessions." *Id*. at 224. Or, in other words, "[h]aving released the spring by using the [defendant's] unlawfully obtained confessions against him, the Government must show that its illegal action did not induce his testimony." *Id*. at 225. The Supreme Court has explained the rule from *Harrison*: "If the prosecution has actually violated the defendant's Fifth Amendment rights by introducing an inadmissible confession at trial, compelling the defendant to testify in rebuttal, the rule announced in *Harrison* . . . precludes use of that testimony on retrial." *Oregon v. Elstad*, 470 U.S. 298, 316-17

(1985).

The Court of Criminal Appeals distinguished *Harrison* from the circumstances in Guidry's retrial. First, the Court of Criminal Appeals observed that the defense's use of Dr. Basinger testimony was not directly responsive to the illegal admission of Guidry's confession. In *Harrison*, "the decision to put [the defendant] on the stand was made only after the illegally obtained confessions were admitted into evidence, as were his inculpatory statements. Here, the inculpatory admission to Dr. Basinger was made before the first trial, and there is no evidence that it was in response to the admission of the illegally obtained confessions." *Guidry*, 2009 WL 3369261, at *2. The Court of Criminal Appeals found no "but for" causation between the illegal confession and Dr. Basinger's testimony. *Id*. Finally, the Court of Criminal Appeals emphasized that Guidry himself never took the stand. In contrast, the defendant in *Harrison* testified at trial. The *Harrison* Court, however, "expressly declined to extend its holding to include the testimony of a third-party witness." *Id*.

By renewing his challenge to Dr. Basinger's testimony in his federal petition, Guidry must show that the state court's decision was contrary to, or an unreasonable application of, federal law. 28 U.S.C. § 2254(d)(1). The Court of Criminal Appeals correctly found significant differences between *Harrison* and the circumstances in this case. *Harrison* did not create a blanket rule precluding the State from using any evidence or testimony in a subsequent trial. *Harrison*'s application of the exclusionary rule specifically applies only when a defendant chooses to take the stand in response to the introduction of his illegal confession. *See Harrison*, 392 U.S. at 220. "By its terms, *Harrison* is applicable only where a defendants testimony is impelled by the improper use of *his own* unconstitutionally obtained confessions *in violation of the Fifth Amendment*." *Littlejohn*

v. Trammell, 704 F.3d 817, 849 (10th Cir. 2013) (emphasis in original); *see also Elstad*, 470 U.S. at 316-17 (specifying that *Harrison* applies when the constitutional violation "compel[s] the defendant to testify in rebuttal"). Guidry has not identified any clearly established Supreme Court precedent extending *Harrison* to a defendant's incriminating statements to a third party. The novelty of Guidry's argument precludes relief under AEDPA. *See Premo v. Moore*, 562 U.S. 115, 126 (2011) ("[N]ovelty . . . [that] renders [a] relevant rule less than 'clearly established' . . . provides a reason to reject it under AEDPA.").

Further, *Harrison* did not exclude a defendant's testimony in a subsequent retrial unless it "appears that, but for the use of his confessions, the [defendant] might not have testified at all." *Harrison*, 392 U.S. at 225. *Harrison* held that "[t]he question is not whether the petitioner made a knowing decision to testify, but why. If he did so in order to overcome the impact of confessions illegally obtained and hence improperly introduced, then his testimony was tainted by the same illegality that rendered the confessions themselves inadmissible." *Id*. at 223. A defendant raising a *Harrison* claim must establish a "causal relationship between the unlawful pre-trial confession and [the] trial testimony." *Smith v. Estelle*, 527 F.2d 430, 434 (5th Cir. 1976).

Guidry argues that "his conviction in the first trial was based largely, if not entirely, on the involuntary confession he made while under custodial interrogation." (Docket Entry No. 60 at 252). While Guidry's involuntary confession was certainly a crucial and critical factor in his first conviction, it was not the only evidence against him. In Guidry's first trial, the State adduced "several factors" that "suggest[ed] Guidry's responsibility for the Fratta murder. Guidry possessed the murder weapon. Eyewitness testimony suggested that someone wearing the same clothes as Guidry did [on] the night of the murder fled from the murder scene in a car similar to Prystash's.

Prystash's girlfriend, Mary Gipp, testified that Prystash agreed to kill the victim for profit. Her testimony also established that Prystash and Guidry were friends." *Guidry v. Dretke*, 4:01-cv-4140, Docket Entry No. 36 at 17. Both "Guidry's own confession and the hearsay offered by Gipp explained Guidry's precise role in the murder-for-hire." *Id*.

Here, the introduction of Dr. Basinger's testimony came out on cross-examination by the prosecution after the defense called him as a witness to mitigate against a death sentence. Guidry has not identified any federal precedent extending *Harrison* to testimony which may have followed chronologically, but was not directly compelled by, admission of a defendant's illegally taken confession.

B. *Estelle*

Guidry also argues that Dr. Basinger's testimony violated his right against self-incrimination. Confessions made during a court-ordered psychiatric evaluation by the State are inadmissible unless the defendant is informed that the examination may be used against him. *See Estelle v. Smith*, 451 U.S. 454, 469 (1981). Guidry argues that Dr. Basigner did not inform him of his rights and, thus, the Fifth Amendment should have barred the use of his second testimony in the second trial. *See Vanderbilt v. Collins*, 994 F.2d 189, 196-97 (5th Cir. 1993).

On direct appeal, the Court of Criminal Appeals found no error in the introduction of Dr. Basinger's testimony because he "interviewed [Guidry] in 1997 as a defense expert to obtain possible mitigating evidence for punishment" and "Basigner was not acting on behalf of the police" so "the Fifth Amendment was not directly implicated." State Habeas Record at 390; *Guidry*, 2009 WL 33692621 at *2.

Guidry has not shown that his *Estelle* argument merits relief. The defense called Dr.

Basinger in the penalty phase of his first trial as a mitigation witness. Dr. Basinger was not a court-appointed expert and he did not conduct a psychological examination. *See Powell v. Quarterman*, 536 F.3d 325, 343 (5th Cir. 2008) (distinguishing *Estelle* on similar grounds). Dr. Basinger's testimony, therefore, did not directly implicate the Fifth Amendment because he was neither working for the State nor appointed by the court. Dr. Basigner worked on behalf of Guidry. *See Avila v. Quarterman*, 560 F.3d 299, 208 (5th Cir. 2009); *Hill v. Johnson*, 210 F.3d 481, 489 (5th Cir. 2000). Guidry has not shown that the state courts should have excluded Dr. Basinger's testimony in the second trial because of *Estelle*.

C. Exclusionary Rule

Finally, Guidry argues that the exclusionary rule generally should have precluded the State from relying on Dr. Basinger's testimony. The Court of Criminal Appeals found that, even though the State had violated his constitutional rights in taking his confession, Dr. Basinger's interview was sufficiently attenuated from that violation so as to allow the admissibility of trial testimony. Specifically, the Court of Criminal Appeals "look[ed] to the passage of time, [Guidry's] appointment of counsel, the hiring of an expert witness, and other preparation for trial" as factors which "[t]ogether . . . provide a sufficient break in the chain of causation stemming from the primary illegality." *Guidry*, 2009 WL 3369261, at *2. The state court's decision echos the federal attenuation doctrine which "evaluates the causal link between the government's unlawful act and the discovery of evidence." *Utah v. Strieff*, ___ U.S. ___, 136 S. Ct. 2056, 2061 (2016). The key question is whether the evidence "has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Brown v. Illinois*, 422 U.S. 590, 599 (1975). Testimony that a defendant confessed to the commission of a crime in an interview

performed by his punishment-phase mental-health expert is far removed from the police coercion that led to his confession.

In conclusion, Guidry had not shown "but for" causal link between his illegal confession and Dr. Basinger's incriminating cross-examination testimony. The state habeas court's rejection of Guidry's fourth claim was not contrary to, or an unreasonable application of, federal law. *See* 28 U.S.C. § 2254(d)(1).

II. Fair and Impartial Jury (Claim Five)

The exhausted portion of Guidry's fifth claim argues that he was denied a fair an impartial jury when the State used a peremptory strike against Matthew Washington allegedly because of his race. When the defense challenged the State's strike, the prosecutor detailed several reasons for excusing Mr. Washington, including that he belonged to the National Association for the Advancement of Colored People ("NAACP"). Guidry focuses on Mr. Washington's NAACP membership as proving that the State actually struck Mr. Washington because of his race.

Guidry raised this claim both on direct appeal and on state habeas review. The state courts, particularly on state habeas review, made explicit factual findings and conclusions of law regarding this claim. AEDPA's deferential scheme guides this Court's review of Guidry's *Batson* claim.

Guidry must show that the state court decisions were contrary to, or an unreasonable application of the Supreme Court's jurisprudence flowing from *Batson v. Kentucky*, 476 U.S. 79 (1986). Under *Batson*, the prosecution violates the equal protection clause by striking potential jurors based on race. *Batson* jurisprudence has established a three-step burden shifting scheme to ascertain the State's intent when striking members of a protected category:

First, the trial court must determine whether the defendant has made a prima facie

> showing that the prosecutor exercised a peremptory challenge on the basis of race. Second, if the showing is made, the burden shifts to the prosecutor to present a race-neutral explanation for striking the juror in question. Although the prosecutor must present a comprehensible reason, the second step of this process does not demand an explanation that is persuasive, or even plausible; so long as the reason is not inherently discriminatory, it suffices. Third, the court must then determine whether the defendant has carried his burden of proving purposeful discrimination. This final step involves evaluating the persuasiveness of the justification proffered by the prosecutor, but the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.

Rice v. Collins, 546 U.S. 333, 338 (2006) (quotations and citations omitted); *see also Johnson v. California*, 545 U.S. 162, 168 (2005); *Miller-El v. Dretke*, 545 U.S. 231, 251-52 (2005). The Court must decide whether the state court's decision was contrary to, or an unreasonable application of, *Batson*.

A. Background

The jury that convicted Guidry was composed of eight white, two black, one Hispanic, and one Asian jurors. State Habeas Record at 374. The two alternate jurors were white and pacific islander. The State only removed one prospective juror for cause, and she was Hispanic. State Habeas Record at 375. The State exercised peremptory strikes against four jurors, all of whom were white except Mr. Washington. State Habeas Record at 375.

The parties questioned Mr. Washington on the penultimate day of jury selection. Mr. Washington was juror 154 of over 160 prospective jurors, and the only African-American struck by the State. State Habeas Record at 380. When the State exercised its peremptory strike against him, trial counsel asked for the trial court to "inquire of [the prosecution] on what grounds they base their decision" to use a peremptory strike against Mr. Washington "as a member of a protected class, an African-American male who gave some very race-neutral reasons about his positions and without

an agenda." Tr. Vol. Vol. 18 at 172. The state habeas court, however, observed that "trial counsel did not argue or attempt to show that the State's strike of Washington was racially motivated instead trial counsel asked the trial court to inquire of them on what grounds they base their decision." State Habeas Record at 378.

"[A] defendant satisfies the requirements of *Batson*'s first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." *Johnson*, 545 U.S. at 170. "A defendant must first make a prima facie case that race motivated the challenged strikes." *Ramey v. Davis*, 942 F.3d 241, 250 (5th Cir. 2019). The trial court allowed the prosecutor to explain the reasons for the strike, Tr. Vol. 18 at 172, moving the inquiry to the second step of the *Batson* analysis.

Under the second part of the *Batson* burden-shifting scheme, the prosecution must provide race-neutral justifications for its use of peremptory challenges. "Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Purkett v. Elem*, 514 U.S. 765, 768 (1995); *see also Hernandez v. New York*, 500 U.S. 352, 359-60 (1991). "In such cases, a 'legitimate reason' is not a reason that makes sense, but a reason that does not deny equal protection." *Elem*, 514 U.S. at 769; *see also Rice*, 546 U.S. at 338; *Johnson*, 545 U.S. at 171.

The prosecutor gave a lengthy, detailed explanation that provided several reasons for using a peremptory strike against Mr. Washington:

> To start with, he's a member of Lakewood Church. And we have a running agreement, my partner Luci Davidson and I have, since we started, that people who go to Lakewood are screwballs and nuts. I'm very familiar with that church. That's one reason that scared me about the man.
>
> The next reason is when asked why people commit violent crimes, his answer before we started talking to him today is "no education, no opportunities." In my mind,

> people who have no education, no opportunities might be bums, might be slackers, might be lazy, but that doesn't justify committing a violent crime.
>
> In addition to that, he talks about the fact that he's been discriminated against at work, and he says on those occasions, two to three of them, when he was discriminated against, 85 percent of the group that was discriminating against him was white. The other 15 percent was "other" and when pressed, he said they were Asian. That's happened on more than one occasion and the people that passed him over were white. Right after that he went right on and sort of went on to say, in everyday life, we're all treated as second-class citizens. And there's two black men on this jury that are wonderful men that didn't seem to have any issues at all about anything like that about being black men in America today. This man is different. He was very hesitant in answering my questions. He didn't seem like he was comfortable answering any of the questions. I didn't get a good feeling talking to him, unlike every other juror who I put on this jury, I didn't feel that way talking to Mr. Washington.
>
> And then, to sum it all up, he might know Jeff Strange, who's a prosecutor in Fort Bend County. In the corner – in the context of this courtroom, I can say I know Jeff Strange very, very well and knowing Jeff Strange, just because he's a prosecutor, doesn't mean anything. That doesn't mean anything in my opinion.
>
> Finally, he says he's an active member of the NAACP to the degree that he goes all the way back home to Snook, Caldwell, Burleson County, Texas, to attend the meetings that his mom and dad never miss. The NAACP's stated objective – one of them is to get rid of the death penalty, to be opposed to the death penalty, to talk to people about how to get rid of the death penalty and they are very, very much for the Legal Defense Fund, which its main objective is to oppose the death penalty.
>
> The last thing, Judge, is one of the number one advocates and supporters of the NAACP in Harris County is Quanell X. I am quite sure Mr. Washington knows who Quanell X is and Quanell X could very well be a defense witness in this trial, because Quanell X is one of the people that Howard Guidry wanted to talk to when he took a hostage on death row. So Quanell X is going to be coming up to this trial and I don't want a man who's supportive of the NAACP as Mr. Washington is to be anywhere near this jury. And those are my race-neutral, very race-neutral reasons for why I exercised a peremptory.

Guidry, 2009 WL 3369261, at *4-5. To summarize, the prosecutor explained that he struck Mr. Washington for the following reasons: (1) his membership in Lakewood Church; (2) his opinion that people commit crimes because they have no education or opportunities; (3) his experience with

discrimination; (4) his demeanor which made him hesitant and uncomfortable answering questions; (5) his active membership in the NAACP, an organization which is opposed to the death penalty; and (6) the possibility that the defense would call a witness who was heavily involved in the NAACP.

Once the State offers a race-neutral explanation, a court only asks whether the State's proffered reasons are "not inherently discriminatory." *Rice*, 546 U.S. at 336. The State's explanation need not be "'persuasive, or even plausible,'" so long as its not inherently discriminatory. *Id*. (quoting *Elem*, 514 U.S. at 767-68).

After the prosecution gave its explanations, the trial court stated: "The Court finds that the State has exercised their strike fairly and exercised for the right reasons . . . ." Tr. Vol. 18 at 175. Generally at that point the *Batson* inquiry's focus shifts "the persuasiveness of the justification" by asking whether a petitioner has "carried his burden of proving purposeful discrimination." *Elem*, 514 U.S. at 768. Here, however, trial counsel did not object to the State's race-neutral explanations or "controvert the prosecutor's observations and reasons for striking Washington." State Habeas Record at 387. The Court of Criminal Appeals observed that "[t]he defense did not attempt to demonstrate that the State's reasons were pretextual, and explicitly stated that it neither objected to nor desired to change the court's decision." *Guidry*, 2009 WL 3369261, at *5.

Trial counsel asked to "put a couple items in the record," but "not to object to the Court's opinion . . . ." Tr. Vol. 18 at 175. Trial counsel clarified that they would not call Quanell X as a witness and then explained: "As a black woman, I think I also know what the N.A.A.C.P. does, and its usually related to civil rights, not criminal matters. Additionally, the Legal Defense Fund is not limited to death penalty cases. It is also limited to any type of case where someone who's indigent

needs assistance." Tr. Vol. 18 at 175.

Guidry, nonetheless, challenged the peremptory strike on both appellate and habeas review. Given the state-court decisions relating to Guidry's *Batson* claim, and the parties' briefing on federal review, the Court will assess the prosecutor's explanations for its peremptory strike of Mr. Washington.

B. NAACP Membership

Without specifically arguing that the trial court should have ended the *Batson* inquiry at step two, Guidry seems to argue that the prosecution's reliance on the juror's NAACP membership is an inherently discriminatory factor that cannot serve as a race-neutral explanation. Mr. Washington's membership in NAACP draws concern "based on race or on the NAACP being an organization with black members, as well as members of other races." State Habeas Record at 387. Guidry claims that "the prosecution's reliance on the NAACP as a reason for striking Mr. Washington automatically required that it disallow the strike, regardless of any additional offered reasons." (Docket Entry No. 60 at 262).

Mr. Washington was the only prospective juror who listed membership in NAACP "or any other organization that is generally regarded as being opposed to the death penalty." State Habeas Record at 387. The state habeas court found that "the record supports the prosecutor's assertion that the strike of Washington was based in part on his association with an organization opposed to the death penalty rather than being based on race . . . ." State Habeas Record at 387. Here, "the prosecutor explained that the juror's NAACP membership concerned her because the NAACP seeks to abolish the death penalty in the United States." State Habeas Record at 387 (citing Tr. Vol. 17 at 174). It seems axiomatic that "a prospective juror's feelings toward the death penalty is a

legitimate concern in a death penalty case." State Habeas Record at 387. The NAACP's position on the death penalty particularly gave the prosecutor pause because Mr. Washington hesitated before expressing that he would be able to tell other NAACP members that "he voted to give another black man the death penalty." State Habeas Record at 377.

Some Texas courts have held that "a juror's membership in the NAACP is not a race-neutral reason for striking him." *Somerville v. State*, 792 S.W.2d 265, 267-69 (Tex. App. -Dallas 1990, pet. ref'd); *see also Moeller v. Blanc*, 276 S.W.3d 656, 662 (Tex. App. -Dallas 2008, pet. denied). Other courts, however, have drawn a distinction between striking jurors because of their race and because of their membership in advocacy groups. *See United States v. Payne*, 962 F.2d 1228, 1233 (6th Cir. 1992) ("affirm[ing] the district court's finding that the prosecutor offered a valid neutral explanation" when the prosecutor stated that two black jurors were excused "not because of their race but because of the advocacy groups [NAACP and Black Caucus] to which they belonged"). Some federal courts have held that "[s]triking a juror for membership in the NAACP does not alone demonstrate a *Batson* violation." *Brown v. Lewis*, 2014 WL 6871752, at *10 (N.D. Ca. 2014).

Here, the trial court did not accept membership in the NAACP itself as a sufficient explanation for the strike. The trial court explained: "Just so the record is clear I don't think membership to the N.A.A.C.P. would have any difference or bearing one way or the other. There are jurors that are Roman Catholics and for many different kinds of churches alternately oppose the death penalty as the N.A.A.C.P. So I was not swayed by that argument at all." Tr. Vol. 18 at 175-76.

Even recognizing the potential of NAACP membership as being a pretext for race, the trial court did not consider that as a sufficient independent factor to move the discussion past Guidry's

Batson objection. Given the fact that active membership in NAACP could be a factor so intertwined with race to render it inherently discriminatory, this Court will consider the whole context of the prosecution's response to the *Batson* challenge. In essence, the Court must decide whether the prosecution was sincerely concerned with Mr. Washington's affiliation with the NAACP because of its position, or rather it was a pretext for his race. Guidry's *Batson* claim depends on the other factors given by the prosecution.

C. Other Factors

1. Religious Affiliation

During jury selection, Mr. Washington "stated that he attended the Lakewood Church about twice a month that he also attended when the father of Joel Osteen the present minister was there and that his wife bought Joel Osteen's books." State Habeas Record at 376 (Tr. Vol. 18 at 151-52). The prosecution proffered his church membership as the first reason for using a peremptory strike against Mr. Washington: "To start with, he's a member of Lakewood Church. And we have a running agreement, my partner Luci Davidson and I have, since we started, that people who go to Lakewood are screwballs and nuts. I'm very familiar with that church. That's one reason that scared me about the man." Tr. Vol. 18 at 172.

Religion may be a race-neutral reason for exercising peremptory strikes. The Supreme Court has not extended the *Batson* protections to religious affiliation. *See, e.g., Davis v. Minnesota*, 511 U.S. 1115 (1994) (denying certiorari to review state supreme court decision declining to extend *Batson* to religion). Guidry now argues that the State accepted other jurors who attended Lakewood Church, demonstrating that the State's explanation was pretext. (Docket Entry No. 60 at 264).

In *Miller-El v. Dretke*, the Supreme Court held that "[i]f a prosecutor's proffered reason for

striking a black panelist applies just as well to an otherwise-similar nonblack [panelist] who is permitted to serve, that is evidence tending to prove purposeful discrimination." 545 U.S. 231, 241 (2005). Guidry argues that the comparative-juror analysis from *Miller-El* shows that the prosecution discriminated in striking a black juror. The Fifth Circuit has identified three principles that guide a comparative juror analysis:

> First, we do not need to compare jurors that exhibit all of the exact same characteristics. If the State asserts that it struck a black juror with a particular characteristic, and it also accepted nonblack jurors with that same characteristic, this is evidence that the asserted justification was a pretext for discrimination, even if the two jurors are dissimilar in other respects. Second, if the State asserts that it was concerned about a particular characteristic but did not engage in meaningful voir dire examination on that subject, then the State's failure to question the juror on that topic is some evidence that the asserted reason was a pretext for discrimination. Third, we must consider only the State's asserted reasons for striking the black jurors and compare those reasons with its treatment of the nonblack jurors.

Reed v. Quarterman, 555 F.3d 364, 376 (5th Cir. 2009) (citations omitted); *see also Smith v. Cain*, 708 F.3d 628, 636 (5th Cir. 2013).

Guidry argues that "the fact that at least two non-African-American members of the same church were acceptable jurors to the prosecution shows that membership in [Lakewood; church was a pretext." (Docket Entry No. 60 at 264). Before addressing the voir dire of other potential jurors who attended Lakewood Church, the Court observes that the state court found that the prosecution never indicated that church membership was a sufficient independent basis for striking jurors. Considering the record, the state habeas court noted that "the prosecutor did not state that she always struck members of Lakewood Church." State Habeas Record at 379. Instead, "attendance at Lakewood" was "more of a possible 'red flag' rather than a factor always prompting a strike." State Habeas Record at 394. Membership in Lakewood Church "as only a factor among many factors"

the State used when "consider[ing] prospective juror's voir dire in their entirety when exercising challenges strikes and acceptance." State Habeas Record at 383.

How church membership factored into the prosecution's decisions became more clear with the two other prospective jurors who attended Lakewood Church. Prospective jurors Lucinda Gandara and Santos Gomez both said that they attended Lakewood Church. Regarding those two jurors, the state habeas court found "it is reasonable for the State to find prospective jurors Gandara and Gomez acceptable to the State based on their not being acceptable to the defense positions independent of their attendance at Lakewood." State Habeas Record at 383. The state habeas court reviewed important distinctions between the questioning and treatment of those prospective jurors and Mr. Washington.

Questioning by the prosecutor revealed that "Gandara was a desirable State's juror and far from desirable defense juror." State Habeas Record at 380. Her "consistent State's-oriented responses" contrasted with "Washington's consistently defense-oriented *voir dire*." State Habeas Record at 382. Trial counsel asked questions and then challenged Gandara for cause. The trial court denied that challenge. Tr. Vol. 8 at 120. Trial counsel continued questioning her about "her questionnaire responses concerning her thoughts that blacks have more tendency to be more violent than other races." State Habeas Record at 381. Guidry then exercised a peremptory strike against her. Tr. Vol. 13 at 127. The state habeas court found that "it is reasonable of the State not to exercise a peremptory strike against Gandara when it was evident that the defense would likely strike her" and it was "reasonable that the State would not exercise a peremptory strike against a desirable State's juror such as Gandara." State Habeas Record at 381.

In sum, the state habeas court found that "the State's lack of a peremptory strike against

Gandara who stated that she had recently began attending Lakewood Church shows that the State did not make automatic strikes based on attendance at Lakewood Church regardless of prospective juror's race, that attendance was only a factor among many factors, and that the State considered prospective jurors voir dire in their entirety when exercising challenges strikes and acceptance." State Habeas Record at 381-82.

Gomez likewise was not a favorable juror for the defense. For instance, he "thought that blacks were more violent than other racial groups." State Habeas Record at 382. The defense moved to strike him for cause when he "gave answers indicating that he would not consider mitigation and would go straight to the death sentence." State Habeas Record at 382. Trial counsel then removed Gomez by peremptory strike. Tr. Vol. 13 at 107. The state habeas court found that it was "reasonable of the State not to exercise a peremptory strike against Gomez when it was evident that the defense would likely strike him." State Habeas Record at 383.

The state courts were not unreasonable in finding significant differences between Mr. Washington and the other jurors who attended Lakewood Church. Guidry has not shown that church membership was a pre-text for discrimination in this case.

2. Reasons Why People Commit Crime

The prosecutor gave another reason for excusing Mr. Washington by peremptory strike: "when asked why people commit violent crimes, his answer before we started talking to him today is 'no education, no opportunities.' In my mind, people who have no education, no opportunities might be bums, might be slackers, might be lazy, but that doesn't justify committing a violent crime." Tr. Vol. 18 at 172. Guidry again relies on a comparative-juror analysis to argue that the State's reasoning was mere pretext.

Guidry compares this questioning to that of Walter Crofton "who commented that his two brothers both ran into criminal trouble because of how they were brought up, a very similar answer to the one provided by Mr. Washington." (Docket Entry No. 60 at 304). On state habeas review, Guidry compared Mr. Washington to Mr. Crofton (and others) "based on a family member being in prison" which the State "did not list . . . as a reason for striking Washington" instead of his understanding of why people commit crime. State Habeas Record at 395. On federal review, Guidry focuses on Mr. Washington's comments on why a person may commit a crime.

Mr. Crofton's answers, however, are significantly different from those given by Mr. Washington. Mr. Crofton explained that his brothers ran into trouble because, after their parents separated, "they went to live with one of [their] aunts" who "gave them too much" and made them feel like "the world was theirs, like somebody owed them something because they were there." Tr. Vol. 15 at 47. Unlike Mr. Washington, Mr. Crofton "repeatedly affirmed that committing a crime was a matter of choice." State Habeas Record at 386. The questioning of Mr. Crofton was not comparable to the reason the State gave for striking Mr. Washington.

3. Previous Racial Discrimination

Finally, Guidry argues that State gave a pretextual reason when it relied on Mr. Washington's response to previous racial discrimination. The prosecutor explained:

> In addition to that, he talks about the fact that he's been discriminated against at work, and he says on those occasions, two to three of them, when he was discriminated against, 85 percent of the group that was discriminating against him was white. The other 15 percent was "other" and when pressed, he said they were Asian. That's happened on more than one occasion and the people that passed him over were white. Right after that he went right on and sort of went on to say, in everyday life, we're all treated as second-class citizens. And there's two black men on this jury that are wonderful men that didn't seem to have any issues at all about anything like that about being black men in America today. This man is different. He

> was very hesitant in answering my questions. He didn't seem like he was comfortable answering any of the questions. I didn't get a good feeling talking to him, unlike every other juror who I put on this jury, I didn't feel that way talking to Mr. Washington.

Tr. Vol. 18 at 173. Guidry argues that, "[o]n its face, the decision to strike a prospective African-American juror because he has experienced past incidents of discrimination based on his race is not race-neutral." (Docket Entry No. 60 at 269). "The prosecution did not question the non-African-American venire about their experiences with discrimination. The prosecution did question two African-American men who were seated on the jury about their experiences with racial discrimination." (Docket Entry No. 60 at 270-71).

The prosecution, however, did not make the comment in isolation. The prosecution discussed Mr. Washington's experience with racism as a feature of his general disposition. While independent of all other factors the prosecutor's statement may raise some concern, it does not when placed into the broader context of that juror's questioning, as well as that of the whole jury panel.

D. Conclusion

The ultimate inquiry in a *Batson* challenge is whether the State was "motivated in substantial part by discriminatory intent." *Flowers v. Mississippi*, ___ U.S. ___, 139 S. Ct. 2228, 2244 (2019). The prosecution offered various explanations for striking Mr. Washington. Defense counsel weakly countered one, which the trial court refused to consider in the *Batson* analysis. But that was only one of several reasons given by the prosecution. "The trial court must consider the prosecutor's race-neutral explanations in light of all of the relevant facts and circumstances, and in light of the arguments of the parties." *Id.* at 2243.

This Court's review "turns on factual determinations, and, in the absence of exceptional

circumstances, [courts] defer to state court factual findings unless we conclude that they are clearly erroneous." *Synder v. Louisiana*, 552 U.S. 472, 477 (2008) (quotation omitted). Based on the state court's findings and this Court's review, Guidry has not shown that "discriminatory intent was a substantial or motivating factor" in the peremptory strike of Mr. Washington. *Id*. at 485. In sum, the state habeas court concluded: "The Court finds that voir dire examination of Washington and a comparison of Washington with cited prospective and seated jurors show that the prosecutors single strike of a black male made on the last day of jury selection to prospective juror 154 out of a little more than 160 prospective jurors was race-neutral and that the trial courts finding that the prosecutors strike of Washington was race-neutral is not clearly erroneous." State Habeas Record at 388. Guidry has not shown that decision to be contrary to, or an unreasonable application of, federal law. *See* 28 U.S.C. § 2254(d)(1).

ANALYSIS OF PROCEDURALLY BARRED CLAIMS

Guidry raised most of his habeas claims for the first time in his federal petition. This Court stayed adjudication of this case to allow the exhaustion of state court remedies on those claims. The Texas Court of Criminal Appeals, however, found that Texas' abuse-of-the-writ doctrine, codified in Article 11.071 § 5(a) of the Texas Code of Criminal Appeals, barred Guidry from litigating a successive state habeas application. The Court of Criminal Appeals' dismissal under article 11.071 "'is an independent and adequate state ground for the purpose of imposing a procedural bar' in a subsequent federal habeas proceeding." *Gutierrez v. Stephens*, 590 F. App'x 371, 384 (5th Cir. 2014) (quoting *Hughes v. Quarterman*, 530 F.3d 336, 341 (5th Cir. 2008)): *see also Sorto v. Davis*, 672 F. App'x 342, 348 (5th Cir. 2016). This Court cannot reach the merits of the defaulted claims unless Guidry overcomes the procedural bar.

Review of a barred claim is warranted when a petitioner shows (1) cause and actual prejudice or (2) that "a constitutional violation has 'probably resulted' in the conviction of one who is 'actually innocent[.]'" *Haley v. Dretke*, 541 U.S. 386, 393 (2004) (quoting *Murray v. Carrier*, 477 U.S. 478, 496 (1986)). Guidry makes various arguments to show cause and actual prejudice for each procedurally barred claims. The Court will discuss each of Guidry's arguments to overcome the procedural bar in the context of the associated constitutional claim. However, the Court finds that Guidry has not shown that federal review is available for any of his barred claims.

I. The Suppression Of Evidence (Claim One)

In his first claim, Guidry argues that the State suppressed evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). Taken broadly, Guidry's *Brady* claim involves four categories of evidence: (1) physical evidence and eyewitness testimony connecting Guidry to the crime; (2) the State's use of hypnosis to enhance eyewitness testimony; (3) ballistics evidence;(4) information about other suspects; and (5) interviews with a freelance reporter. Guidry argues that the suppression of evidence provides cause and prejudice to overcome the procedural bar that resulted from not raising his *Brady* claim in a procedurally proper manner.

"A *Brady* violation can provide cause and prejudice to overcome a procedural bar on a habeas claim." *Thompson v. Davis*, 916 F.3d 444, 455 (5th Cir. 2019); *see also Banks v. Dretke*, 540 U.S. 668, 691 (2004). Analyzing cause and prejudice for the procedural bar analysis follows the same standards that govern a substantive *Brady* claim. "A *Brady* claim involves three elements; (1) the prosecution's suppression or withholding of evidence, (2) which evidence is favorable, and (3) material to the defense." *United States v. Stephens*, 964 F.2d 424, 435 (5th Cir. 1992). The Fifth Circuit often adds another element to the *Brady* test: "*Brady* does not obligate the State to furnish

a defendant with exculpatory evidence that is fully available to the defendant through the exercise of reasonable diligence." *Reed v. Stephens*, 739 F.3d 753, 788 (5th Cir. 2014).

The Supreme Court has recognized overlap between a substantive *Brady* claim and the showing required to overcome the procedural bar of a *Brady* claim. Cause and prejudice will generally "parallel two . . . components of the alleged *Brady* violation itself. The suppression of the [material] constitutes one of the causes for the failure to assert a *Brady* claim in the state courts, and unless those documents were 'material' for *Brady* purposes, their suppression did not give rise to sufficient prejudice to overcome the procedural default." *Strickler v. Greene*, 527 U.S. 263, 282 (1999); *see also Banks*, 540 U.S. at 691. The Court will analyze whether Guidry has shown cause and prejudice with regard to each category of evidence and, alternatively, whether his arguments merit relief.

Before turning to each element, however, the Court pauses to note that this is not the first court to consider many issues raised by Guidry's *Brady* claim. Since the beginning of legal proceedings against the three co-conspirators, each has raised interconnected claims involving interwoven issues. Other federal courts have already reviewed some issues raised by Guidry's *Brady* claim, which his co-conspirators have replicated word-for-word in their own case. The adjudication of issues by other courts must be taken into consideration in this Court's review of identical claims.

The Court would also make note of the inadequacy of Guidry's *Brady* claim: the record suggests that Guidry's trial attorneys knew about many issues which the State allegedly suppressed. Guidry's claim presupposes general unawareness by his attorneys of issues that were important in litigation filed by his co-conspirators. As the Court will discuss further below, counsel presumably knew about such issues because billing records from the trial team detail a considerable amount of

time researching and reviewing the post-conviction actions filed by Guidry's co-conspirators.

Additionally, Guidry has not made a strong showing that the State suppressed evidence from the defense. The State had an open file policy in this case. Tr. Vol. 6 at 10. The record does not contain any affidavit indicating whether Muldrow[3] reviewed the allegedly suppressed information in the State's file. Guidry instead bases his arguments on affidavits from an attorney who did not serve at the second trial and from co-counsel. Each provides statements indicating that they did not recollect certain pieces of evidence.

Guidry's *Brady* claim originates with a review of the State's file by a habeas investigator. The investigator's affidavit does not provide much explanation, but still suggests that the *Brady* material was found in the State's records. State Habeas Record at 815-17, 1236-42. The State's open file policy did not obligate them to turn the defense toward any material, if it was available in the open file. Guidry's *Brady* claim apparently assumes that the State withheld this evidence from its files, presumably only to insert it into the file at a later date. Because "[i]t is well established that the prosecution has no duty under *Brady* to give defense counsel guidance as to where in the prosecution's open file to find exculpatory evidence," *Mathis v. Dretke*, 124 F. App'x 865, 877 (5th Cir. 2005), Guidry must show that the material was not in the State's files, not just that counsel did not remember seeing it.

With that background, the Court turns to the specific material which Guidry claims was

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[3] Guidry argues: "The State repeatedly identifies Muldrow as 'lead counsel,' while not once citing to the record to support this assertion. Actually, Mr. Moncriffe was lead counsel." (Docket Entry No. 106 at 137). Muldrow submitted vouchers to the trial court as "2nd chair" counsel. Clerk's Record at 1813. Mr. Moncriffe submitted vouchers as "1st Chair" attorney. Clerk's Record at 1847. Taken as a whole, however, it is obvious that Muldrow played an integral, active, and sometimes guiding role in the defense, likely attributable to her many years of experience with Guidry's case.

withheld from the defense. Guidry must show cause and prejudice to allow federal review of each portion of his *Brady* claim.

A. Evidence Connecting Guidry to the Crime Scene

Guidry argues that the State suppressed evidence relating to fingerprints found at the crime scene, and related evidence of other suspects in the murder. Harris County Detective David Ferrell testified at trial that the police "processed the crime scene for fingerprints." Tr. Vol. 20 at 235. The police "retrieve[d] some latent prints of marginal value from the car." Tr. Vol. 20 at 236. Detective Ferrell testified that he "lifted some prints which [he] thought possibly" might be useful, but ultimately "they weren't usable[.]" Tr. Vol. 20 at 236. Detective Ferrell explained: "There were no identifications I was able to effect during the course of this case from those latent prints." Tr. Vol. 20 at 236.

Guidry, however, argues that the State recovered valuable fingerprints from Farah's car, identified those prints as coming from a man named Vernon Christopher Barlow, and then suppressed information about Barlow's involvement in the crime. Guidry constructs this argument on fingerprint analysis described in a November 15, 1994, police report prepared by Deputy Rossi. (Docket Entry No. 60, Exhibit 8). Without providing context in his report, Deputy Rossi compared "latent prints filed under case 9411092168" with "the fingerprint card containing the known fingerprints on file" for "Barlow, Vernon Christopher." Deputy Rossi's report stated:

> identified one of the impressions on the latent card marked rear edge of drivers door as being the number 6 (left thumb) finger of the above person. I identified one of the impressions on the latent card marked rear edge of drivers door as being made by the number 8 (left middle) finger of the above stated person. I identified one of the impressions on the latent card marked left front fender, ahead of wheel, as being made by the number 9 (left ring) finger of the above stated person. The latent prints were concurred with by Sgt. W. Skillen of the identification division. All latent

> prints were returned to the [Automatic Fingerprint Identification System ("A.F.I.S")]. division to be filed under the above stated case number and the fingerprint card of the above stated person will be returned to file in the identification division.

(Docket Entry No. 60, Exhibit 8). Guidry claims that, contrary to trial testimony, the police recovered usable prints from various places on Farah's car and then suppressed the fact that the fingerprints belonged to Barlow.

This is not the first court to consider the allegation that the State ignored Barlow's fingerprints in its investigation into Farah's murder. When Guidry's co-conspirator Fratta sought his second round of federal habeas relief, his petition contained a similar argument in "which some of the briefing on this point [was] taken word-for-word" from Guidry's petition. (*Fratta v. Davis*, 4:13-cv-3438, Docket Entry No. 80 at 33). The *Fratta* court considered the same theory that the police hid that they had found Barlow's prints on Farah's car. The *Fratta* court pointed out that theory linking Barlow to the murder was based almost entirely on a vague police report.

Guidry's theory of Barlow being the shooter originates with a report from his habeas investigator which associates the comparison of fingerprints with the car which Farah existed immediately before her murder. Second State Habeas Record at 1240-41. The investigator's report, however, omits the fact that the police recovered fingerprints in that same time period from another car tied to Barlow from someone once considered a suspect, James Podhorsky. In an extensive and persuasive factual discussion, the *Fratta* court determined that the police report most likely referred to Podhorsky's car:

> Almost immediately after the murder, the police investigated the possibility that James Podhorsky carried out Fratta's request to kill his wife. The police took a statement from Podhorsky the day after the murder (November 10, 1994). (Guidry, Instrument No. 2, Exhibit 10). Podhorsky told the police that the night before his "Corvette was locked up in [his] garage and no one drives it but [him]." (Guidry,

Instrument No. 2, Exhibit 10). Because a headlight was out and the Corvette "could appear to be a hatchback model car to those unfamiliar with vehicles," the police towed Podhorsky's car "for processing." (Guidry, Instrument No. 2, Exhibit 14).

Podhorsky's Corvette, however, differed in important respects from the vehicle seen by eyewitnesses. Eyewitnesses described the getaway vehicle as silver or gray. The form Podhorsky signed giving the police permission to search the Corvette described it as "black in color." (Guidry, Instrument No. 2, Exhibit 11). A police report described it as "gray/black." Podhorsky's car may have appeared superficially similar to the one eyewitnesses described, but Podhorsky testified at trial that his Corvette was "extremely loud . . . mainly set up for a dragstrip race car. . . . You would hear the car coming." Tr. Vol. 25 at 201. The eyewitness description of the getaway vehicle in no way mentioned the sound of a loud car pulling away from the Fratta residence.

Importantly, Fratta has also not provided credible evidence that Barlow's fingerprints were found on Farah's car. Fratta's *Brady* claim focuses on a November 15, 1994, police report that identified a set of prints as coming from Barlow. Instrument No. 52, Exhibit 5. Fratta assumes that the police recovered those fingerprints from "the driver's door and left front fender of the car Farah Fratta drove." Instrument No. 51 at 42 (emphasis added). The November 15, 1994, report, however, does not identify the vehicle from which the police took the fingerprints linked to Barlow. Instead, the report says that the latent fingerprints were on a card "marked rear edge of driver's door" and "left front fender, ahead of wheel." The report does not identify from what vehicle the police recovered the fingerprints.

It appears more likely that the November 15, 1994, police report refers to fingerprints found on the Corvette. A police report from November 10, 1994, indicates that Podhorsky gave permission and the police "requested a search for any traces of blood as well as latent prints" from the Corvette. Instrument No. 52, Exhibit 5; *Guidry*, Instrument No. 2, Exhibit 14. The police searched the Corvette, recovered a handgun from the car, and observed blood inside. When the police "processed the [Corvette] for latent prints[,] [s]everal of value were obtained." Instrument No. 52, Exhibit 5. On November 13, 1994, "[a]ll latent prints [from the Corvette] were subsequently forwarded to A.F.I.S. for further processing." Instrument No. 52, Exhibit 5. The report on which Fratta bases his argument states that a police officer received the A.F.I.S. envelope "request for latent print search" on November 15, 1994. While the report identifies Barlow as the individual whose prints were found, it does not specify from which vehicle the police lifted them.

Trial testimony, however, clarified that the police did not obtain any usable prints from Farah's car. An initial report stated that "some latent prints of possible value were taken from [Farah's] car." Instrument No. 52, Exhibit 5 at 14. At Fratta's

> second trial, the prosecution asked Jerry David Ferrell, a police investigator, about evidence collected from the crime scene. Officer Ferrell testified that the police tried to collect latent fingerprints from Farah's car, and "[s]ome of marginal value were obtained from the car." Tr. Vol. 23 at 259. Ferrell testified that he "didn't effect any identification based on the latent prints that [the police obtained] from the crime scene." Tr. Vol. 23 at 259. Officer Ferrell elaborated: "They were of marginal quality. So, it was a stretch at best. And we weren't able to effect any identifications on the latents that we got." Tr. Vol. 23 at 260.12
>
> Fratta does not provide any evidence to call into question the testimony that the police did not obtain usable prints from Farah's car. Fratta can only speculate that the police recovered Barlow's print from Farah's car (from which the police could not extract useable prints), suppressed that information from the defense, and at different trials provided false testimony about not recovering useful prints from the crime scene.

(*Fratta v. Davis*, 4:13-cv-3438, Docket Entry No. 80 at 33).

The *Fratta* court took into consideration all of the facts and made a reasonable determination of what had happened. In addition to the weakness of the evidence tying Podhorsky and Barlow to the killings, the *Fratta* court observed that

> [t]he State presented strong evidence linking Prystash and Guidry to the murder. Months after the crime Guidry possessed a gun which bore similar "class characteristics" to the weapon that killed Farah. Phone records showed repeated communication between Fratta and Mary Gipp's cellphone around the time of the murder. Prystash drove a car more similar to the one viewed by eyewitnesses than Podhorsky's. Prystash later acted suspiciously, doing things such as changing the broken headlight and getting rid of his car soon after the murder. Gipp provided extensive testimony about the planning of the murder and the events that transpired afterwards. Prystash told Gipp that they had killed Farah.

(*Fratta v. Davis*, 4:13-cv-3438, Docket Entry No. 80 at 33). The evidence in this case was even stronger: jurors heard testimony that Guidry had confessed to shooting Farah.

Guidry now attempts to correct errors he perceives in the analysis by the *Fratta* court. Guidry attempts to weaken Detective Ferrell's trial testimony that he could not effect "identifications . . . during the course of this case from those latent prints" Tr. Vol. 20 at 236. Guidry emphasizes that

the report on which his *Brady* claim relies was authored by Deputy Rossi, possibly to suggest either that the results were not communicated to Detective Ferrell or that the State conspired to bury the results in an attempt to pin the murder on Prystash and Guidry. Guidry bolsters his theory by emphasizing similarities between Podhorsky's Corvette and the getaway car.

However Guidry challenges the *Fratta* decision, his arguments rest on a slender reed: a vague police report. Guidry "can only speculate that the police recovered Barlow's print from Farah's car (from which the police could not extract useable prints), suppressed that information from the defense, and at different trials provided false testimony about not recovering useful prints from the crime scene." (*Fratta v. Davis*, 4:13-cv-3438, Docket Entry No. 80 at 36). Arguments that imply mishandling or conspiratorial hiding of evidence wither when compared to the incriminating record against Guidry. When considered in context of the total police investigation and evidence amassed against Guidry, "allegations about the police finding Barlow's prints on Farah's car are not credible. (*Fratta v. Davis*, 4:13-cv-3438, Docket Entry No. 80 at 39).

Guidry's weak theory based on vague reports does not prove that the police suppressed evidence of Podhorsky and Barlow's involvement in Farah's murder. Even if the defense was not aware of the police reports, the State had no duty to inform it of the tenuous and inconclusive inference that the police reports might support a theory inculpating Barlow. Speculation about the suppression of exculpatory evidence is an insufficient basis to support a *Brady* claim. *Hughes v. Johnson*, 191 F.3d 607, 630 (5th Cir. 1999). On that basis, the Court finds that Guidry has not shown cause or prejudice to overcome the procedural bar of the *Brady* claim relating to fingerprint evidence.

B. Hypnosis

Guidry says the State suppressed evidence that it had hypnotized its key eyewitness, Laura Hoelscher, causing her to deviate from her original statement to police. Information about her hypnosis, however, is not new to the prosecution against the co-conspirators. Respondent argues that, even if the prosecution did not divulge the hypnosis in Guidry's second trial, his attorneys should have know about it anyway. *Brady* does not obligate the State to furnish a defendant with exculpatory evidence that is fully available to the defendant through the exercise of reasonable diligence." *Kutzner v. Cockrell*, 303 F.3d 333, 336 (5th Cir. 2002). Guidry argues that "the State presents no evidence that Mr. Guidry's counsel should have known these witnesses were hypnotized or evidence that they were hypnotized would be in the Fratta federal habeas court file." (Docket Entry No. 106 at 151). Here, the record suggests that information about the hypnosis was not only available to, but was known to, the defense.

In 1998, Fratta raised a state habeas claim based on "[t]he prosecution's failure to disclose to the defense the fact Laura Hoelscher was hypnotized[.]" *Ex parte Fratta*, No. 31,536-02 at 39. The state habeas court found:

> . . . [Daren and Laura] Hoelschers' trial testimony was consistent with their information contained in the offense report in [Fratta's] case and the Hoelschers' written statement made short[ly] after the offense.
>
> . . . [B]ased on the substance and consistency of the information the Hoelschers supplied beginning on the night of the offense and continuing during [Fratta's] trial, [the] hypnosis did not elicit any new information from the Hoelschers; [the] hypnosis did not produce an identification of the shooter. . . the procedures used during the hypnosis are thus not relevant.

(*Fratta v. Quarterman*, 4:05-cv-3392, Docket Entry No. 18 at 55).

Fratta filed his first federal habeas petition in 2005, before the State indicted Guidry for

capital murder a second time. Fratta raised a *Brady* claim arguing that the State suppressed evidence that Laura Hoelscher had been hypnotized before trial. (*Fratta v. Quarterman*, 4:05-cv-3392, Docket Entry No. 1 at 84). In his answer and motion for summary judgment, Respondent provided more information about the hypnosis. Because the federal court granted habeas relief based on the use of Guidry's confession in Fratta's trial, the federal courts did not address the question of whether the State had suppressed information about hypnotizing of State's witnesses.

Guidry claims that, even with those parallel legal proceedings, the State suppressed evidence in his own trial. However, Guidry's trial attorneys recorded numerous hours researching and reviewing the files of his co-conspirators, including their writ actions. In a March 8, 2007 fee expense claim form, Muldrow specifically recorded numerous hours reviewing the *Fratta* habeas writ file. Clerk's Record at 1813-31. Muldrow also records that she and her co-counsel "compar[ed] Hoelschers post-conviction st[atements] w/ 3 records." Clerk's Record at 1821. The record suggests that counsel had access to, and did access, information about the hypnosis.

Guidry relies on affidavits from jurors who served at trial to argue that the hypnosis would have been material to their deliberations. Aside from the inadmissibility of those statements under Rule 606(b) of the Federal Rules of Evidence, the information in the jurors' affidavits suffers without a full airing of how the hypnosis would have played out in a full adversarial setting.

Still, Guidry has not shown that, whether suppressed or not, material about the hypnosis would have made any difference at trial. In his second federal proceedings, the *Fratta* court also considered whether the trial attorneys in that case should have used the hypnosis to impeach or exclude the Hoelscher's testimony. Framed in the context of whether Fratta's state habeas counsel should have raised a *Strickland* claim on that basis, the federal district court found:

> Fratta challenges trial counsel's questioning of the Hoelschers' because it did not address the fact that they had been hypnotized in an effort to add detail to their eyewitness accounts. In Fratta's first /habeas proceedings, however, the state habeas court found that "the hypnosis attempt was not successful" and "no new information had been obtained." State Habeas Record at 785. The state habeas court also found that "hypnosis did not elicit any new information from the Hoelschers; that hypnosis did not produce an identification of the shooter; and that the procedures used during the hypnosis are thus not relevant." State Habeas Record at 787. Given those findings, state habeas counsel could reasonably decide not to challenge trial counsel's failure to object to the Hoelshers' testimony because they had been hypnotized. Impeaching the Hoelshers would have helped the defense little, because the hypnosis was not successful and did not alter their account of events.

(*Fratta v. Davis*, 4:13-cv-03438, Docket Entry No. 80 at 59). Given that analysis, the *Fratta* court held that a reasonable trial attorney could review the hypnosis evidence and choose not to use it.

The *Brady* materiality standard is the same as a *Strickland* prejudice review. *See Johnson v. Scott*, 68 F.3d 106, 109-10 (5th Cir. 1995) ("The materiality standard under *Brady* . . . is identical to the prejudice standard under *Strickland*."). For the same reasons discussed by the *Fratta* court, Guidry has not made a strong showing of materiality under *Brady*. In fact, the finding of no materiality is stronger in this case when placed into the entire context of the trial proceedings. Whether or not differences existed in Mrs. Hoelscher's memory after hypnosis, Guidry possessed Fratta's weapon, Gipp testified about Guidry's involvement in the crime, and Guidry told others he shot Farah. Any suppression of hypnosis testimony would not measurably alter the jury's consideration of his guilt.

In short, Guidry has not shown cause or prejudice to overcome the procedural bar of his claim involving the hypnosis of witnesses.

C. Ballistic Reports

Guidry claims that the ballistics evidence developed by the State could not tie him to the

murder. Guidry was in the possession of a Charter Arms .38 caliber revolver when arrested for bank robbery. Testimony linked that weapon to Fratta. Gipp testified that, after he returned to her apartment on the night of Farah's murder, Prystash went into her bedroom and emptied the shells from a revolver. Tr. Vol. 21 at 56-58. After he threw away the casings, Prystash hid the gun. Tr. Vol. 56-57. Gipp later wrote the "serial number and . . . the name of the gun or type of gun" on a blue sticky note pad. Tr. Vol. 21 at 60. When the police arrested Guidry, he had two guns. Farah's father recognized one as a revolver his daughter had purchased, which had later ended up in Fratta's hands. Tr. Vol. 22 at 90. Testimony established that Fratta had purchased the gun Guidry possessed. Tr. Vol. 21 at 198-99.

At trial, the medical examiner testified that Farah had received two gunshot wounds to her head. Tr. Vol. 22 at 363. C.E. Anderson, a firearms examiner for the State, testified that he had performed ballistics testing in 1995 and that the gun recovered from Guidry had fired the bullet that had killed Farah. Tr. Vol. 21 at 179-80. Guidry complains that the State did not turn over reports indicating various unsuccessful attempts to identify that revolver as the one that shot Farah.

Guidry now produces various reports to show that the State repeatedly retested the ballistics evidence, both before and after his first trial. Guidry points to various ballistics reports prepared before his first trial which ended in results which Guidry's investigator describes as "inconclusive." (Docket Entry No. 60 at Exhibit 21). Guidry also emphasizes that the State performed testing before Fratta's 2009 retrial that also produced inconclusive results.

Guidry, however, has not shown that the State suppressed any ballistics. As an initial matter, it is conspicuous that Guidry's former attorneys do not mention that they did not see any ballistics evidence before trial. Guidry's former attorney Nunnery and trial counsel Moncriffe provided

detailed affidavits which explained what information they did not believe they had received from the State. The attorneys do not mention the omission of any ballistics evidence.

The record suggests that the material was available to Guidry. Guidry bases this claim on reports he attaches to his federal petition, each of which indicates that it was introduced as a State's Exhibit in a trial. While the exhibits do not specify which of the many trials held for the co-conspirators was the source of these reports, billing records from Guidry's trial attorneys indicate broad familiarity with the other legal proceedings. Guidry has not identified the source of those reports, but assumes that they were suppressed.

Additionally, the state habeas court issued specific findings that the State provided some of the information to Guidry's attorneys. Relying on testing performed in connection with Fratta's retrial, the state habeas court discussed evidence about the connection between the gun Guidry possessed and the bullet fragment the police found:

> During Robert Fratta's May, 2009 retrial, Robert Baldwin, firearms examiner, testified that he conducted ballistics testing on the partial projectile recovered from the complainant's body a partial projectile recovered from the floor of the complainant's garage, a partial projectile recovered from a life jacket in the complainant's garage, and the Charter Arms .38 Special purchased by Fratta and recovered from [Guidry] at the time of his arrest. According to Baldwin, Charlie Anderson the firearms examiner who had previously examined the cited evidence was in poor health; Baldwin further noted that his opinion was not based on Anderson's previous testing. In Baldwin's opinion, the partial projectile recovered from the garage floor was too deformed to make a comparison. Although the partial projectiles recovered from the life jacket, and the complainant's body were also damaged, Baldwin determined that both projectiles have similar class characteristics common to a Charter Arms .38 Special. The [State] provided a copy of Baldwin's testimony to both [Guidry's] habeas counsel and Prystash's habeas counsel on May 26, 2009.

State Habeas Record at 368 n. 2.

Importantly, the record suggests that counsel was familiar with the ballistics testing. Tr. Vol.

5 at 6-7. Guidry has not made a strong showing that the information was withheld from his trial attorneys.

Guidry has also not made a strong showing of materiality. Information about the gun served two purposes: (1) link Guidry to Fratta and (2) identify Guidry as the one who shot Farah. The ballistics testimony allegedly withheld from the defense does not weaken the link between Fratta and Guidry. To the extent that the material would have given the defense a stronger argument that the ballistics testing was inconclusive, other testimony and evidence established Guidry's role as the shooter, particularly his own confession to Dr. Basinger.

Guidry has not show cause or prejudice to allow federal review of his *Brady* claim relating to ballistics evidence.

D. Information about other suspects

In the months before Farah's murder, Fratta frequently and freely talked about having her killed. His loquaciousness created a web of people with varying degrees of knowledge about the murder. As the police investigation progressed, numerous persons claimed to have information, allowing for the creation of various alternative theories with various degrees of credibility. Guidry's *Brady* claim proposes two mutually exclusive alternative theories of the murder. The Court has already discussed Guidry's argument that the State suppressed evidence indicating that Podhorsky and Barlow participated in the crime. As his second theory, Guidry proposes that the police suppressed information about an alternative theory: a man named William Planter confessed that he drove the getaway driver while Robert Mann shot Farah (or, again alternatively, Kevin Miller shot her, though he was later found hanging from a tree in his parents' yard).

Guidry's argument relies on (1) police reports mentioning Planter and (2) on affidavits from

the former attorneys who said that they did not remember any mention of Planter, Mann, or Miller. Planter has been peripherally associated with the prosecution against Fratta, Guidry, and Prystash from the beginning. As described by the Texas Court of Criminal Appeals in an appeal from Planter's prosecution for a crime after the murder:

> The record shows that [Planter], a former peace officer, contacted [Farah's father] Lex Baquer and stated that he had information concerning the murder of Baquer's daughter. After consulting the sheriff's department, Baquer met with [Planter] on two occasions, each time wearing a transmitter provided by the sheriff's department. [Planter] told Baquer that Bob Fratta, the estranged husband of Baquer's daughter, had hired two hit men to kill Baquer's daughter. The tapes from the meetings between [Planter] and Baquer show that appellant offered to kill Fratta if Baquer would pay appellant $10,000.

Planter v. State, 9 S.W.3d 156, 157 (Tex. Crim. App. 1999). The information about Planter's claimed involvement in the case was always very public and easily available to trial counsel.

Additionally, Guidry' attorneys became familiar with the theory of Planter's involvement when they reviewed Fratta's case file. Well before Guidry's retrial, Fratta similarly claimed that "Planter has revealed that he was directly involved as the driver of the getaway vehicle that night." *Fratta v. Quarterman*, 4:05-cv-3392, Docket Entry No. 1 at 89. Fratta's state habeas writ specifically addressed the prosecution's investigation into Planter and Miller. *Ex parte Fratta*, No. 31,536-02 at 33-38. With that record, trial counsel's investigation into the co-conspirators' cases, and the context of the trial as a whole, Guidry has not shown that the State suppressed information about Planter.

Guidry has not shown *Brady* materiality with regard to his argument involving other suspects. The fact an attorney may have concocted various theories of the crime based on possibly suppressed information does not make the evidence material under *Brady*. The basic theory on which Guidry

bases this claim was common to the prosecutions for Farah's murders: Fratta created an entangled web of people who he wanted to kill his wife, many of whom made statements that could be interpreted to show some degree of complicity. The theory involving Planter, however, is similar to that involving Barlow: it is based on thin evidence and on speculation made in isolation from the entirety of evidence. The theory about Planter, aside from resting on weak evidence, fails to account for Guidry's possession of Fratta's weapon, his incriminating statements, his suspicious actions the night of the killing, and his confession that he shot Farah. The Court concludes that Guidry has not shown cause or prejudice that would overcome the procedural bar of this claim.

E. The Rubac Recordings

Guidry also claims that the prosecution suppressed tape recorded conversations he had with a reporter before his second trial. On February 2, 2007, the State said that they had issued a subpoena for "a lady named Gloria Rubac, a reporter for something called Workers World." Tr. Vol. 10 at 6. Guidry had engaged in telephonic conversations with Rubac for some time, resulting in around 550 calls, with 170 of them about 20 minutes long. Tr. Vol. 22 at 64. Guidry does not complain that the State failed to turn over recordings of their conversations; he complains that they were turned over too late and in a practically inaccessible form. The State had apparently possessed the audio recordings since July 2006, but did not disclose their existence until only seventeen days before opening arguments. Tr. Vol. 10 at 6.

When the State turned over tape recordings of the conversations, trial counsel immediately requested a continuance "because that's a lot of work to do in short order in preparation for trial; and it will be very hard to try to confront this with the time frame in which we are working in." Tr. Vol. 10 at 9. The trial court denied a continuance, but told the defense to hire a court reporter to

transcribe the calls. Tr. Vol. Vol. 10 at 11. The defense, however, did not request additional resources and a transcription was not available before trial.

Guidry now claims that the tardy disclosure of the Rubac recordings violated *Brady*. "When the Government makes a late disclosure of *Brady* material, 'the inquiry is whether the defendant was prejudiced.'" *United States v. Mitchell*, 538 F. App'x 369, 370 (5th Cir. 2013) (quoting *United States v. McKinney*, 758 F.2d 1036, 1050 (5th Cir. 1985). "[A] defendant is not prejudiced if the evidence is received in time for its effective use at trial." *Powell v. Quarterman*, 536 F.3d 325, 335 (5th Cir. 2008).

Guidry's argument to overcome the procedural bar, however, fails. As an initial matter, Guidry's *Brady* claim relies on speculative assertions of prejudice. Guidry has not identified what exculpatory material is contained within the phone calls. Aside from the portions presented at trial, Guidry does not provide a transcription of the calls or any indication of what exculpatory material can be found on the tapes. To the extent that Guidry argues that the State cobbled together portions of statements to craft an inculpatory narrative, he has not shown what exculpatory features exist when placing the statements into the broader context. Guidry has failed to identify evidence that was material and favorable to his defense that was suppressed.

Also, while the State disclosed that it would use the recordings shortly before trial, the recordings were of Guidry's own words. Guidry himself knew what he had told the reporter. Guidry could have informed counsel of his own admissions, or counseled his attorneys when the State indicated that it would rely on those recordings. *See United States v. Mulderig*, 120 F.3d 534, 541 (5th Cir. 1997) (no requirement that the prosecution point to specific exculpatory material contained within a larger body of disclosed evidence).

Further, the State elicited testimony at trial that Rubac had maintained extensive notes of her conversations with Guidry. Tr. Vol. 22 at 69-70. Trial counsel could have used this summary to prepare for trial, apparently making the substance of the alleged *Brady* material available to the defense. Whether or not that amounted to effective assistance, Guidry has not shown that the substance of the trial material was not available through Rubac.

In sum, Guidry has failed to establish the *Brady* requirements and has presented nothing other than his conclusory allegations. Guidry, therefore, has not overcome the procedural bar of his *Brady* claim.

F. Conclusion of *Brady* Claim

Guidry did not raise his *Brady* claim in manner that complied with state law. Guidry has not shown cause and actual prejudice that would provide for federal review. The Court, therefore, cannot reach the substance of his arguments.

Alternatively, this Court's analysis would travel the same path as above if it could review the merits of Guidry's barred *Brady* claim. For the same reasons discussed with regard to his procedural bar arguments, the Court would deny his *Brady* claim on the merits.

II. The State Unconstitutionally Used False Evidence to Convict Guidry. (Claim Two)

Guidry claims that the State presented false evidence at trial tying the weapon Guidry possessed to Farah's shooting. Guidry's briefing on this claim relies extensively on Texas state law that precludes the presentation of false evidence at trial. (Docket Entry No. 60 at 123-28). This Court's focus is on federal, not state, law. "To establish a due process violation based on the government's use of false or misleading testimony, a petitioner must show (1) that the witness's testimony was actually false, (2) that the testimony was material, and (3) that the prosecution knew

the witness's testimony was false." *Fuller v. Johnson*, 114 F.3d 491, 496 (5th Cir. 1997). A conviction obtained by the knowing use of perjured testimony must be set aside if "the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury . . . ." *Giglio v. United States*, 405 U.S. 150, 154 (1972) (internal quotation marks omitted); *see also United States v. Agurs*, 427 U.S. 97, 103 (1976).

At trial, the State argued that "Howard Guidry is not [just] caught with the .38 that just happens to belong to Bob Fratta. Howard Guidry is caught with a .38 that belongs to Bob Fratta that also happens to be the one to have put a bullet in Bob Fratta's wife's head. What a coincidence." Tr. Vol. 23 at 42. Guidry bases his *Giglio* claim on the firearm examiner's identification of bullet fragments "as being fired" from the Charter Arms .38 found in Guidry's possession. Tr. Vol. 21 at 179. Anderson made the identification three times to verify his results. Tr. Vol. 21 at 180.

Guidry argues that the Charter Arms .38 was not the gun that shot Farah. Guidry points to two sources of information to prove that Anderson testified falsely. First, Guidry points to other ballistics results obtained by the State prior to his trial. As described in his earlier *Brady* claim, other State firearms examiners tested the gun but could not identify it as the murder weapon. For example, one report stated: "Test fired bullets fired in the above described weapon were found [to] bear inconsist[e]nt characteristics from the barrel." Second, Guidry relies on testing the State conducted after his trial. In January 2007, before Mr. Guidry's second trial, a different ballistics examiner could not identify the fragments in a manner consistent with Anderson's testimony. Thus, according to Guidry, "[e]ven if Anderson did not know that his testimony was wrong, his testimony demonstrates a manifest and reckless disregard for the truth." (Docket Entry No. 60 at 126). Further, "even if Anderson himself did know that his own testimony was false, the State indisputably knew of the

falsity." (Docket Entry No. 60 at 126).

Respondent raises two procedural defenses to this claim. First, Respondent argues that AEDPA's one-year limitations period bars federal consideration of this claim. Second, Respondent argues that Guidry procedurally defaulted his claim by rasing it for the first time in a successive state habeas application.

A. Time Bar

AEDPA enacted a strict one-year limitations period. *See* 28 U.S.C. § 2244(d)(1)(A). Guidry did not include claim two when he filed his federal habeas petition in 2013. Under Rule 2(c) of the Rules Governing Section 2254 Cases in the United States District Courts, a habeas petition must "specify all the grounds for relief available to the petitioner" and "state the facts supporting each ground." The factual and legal basis for claim two was available to Guidry when he filed his timely habeas petition. Guidry only raised this claim after he amended his federal petition years later. A habeas petition "may be amended . . . as provided in the rules of procedure applicable to civil actions." 28 U.S.C. § 2242. An inmate may run afoul of the limitations period by inserting a new habeas claim into an amendment petition.

Guidry amended his petition outside of AEDPA's limitations period. Guidry, however, argues that he has complied with AEDPA's limitations period because claim two is substantially similar to claims he raised earlier. Under Rule 15(c)(1)(B), Federal Rules of Civil Procedure, an amended pleading relates back to the date of the original pleading when "the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading." The Supreme Court has construed this provision narrowly when the AEDPA limitations period has expired. A claim is not timely made only because it

"relate[s] to the same trial, conviction, or sentence as a timely filed claim[.]" *Mayle v. Felix*, 545 U.S. 644, 664 (2005). Instead, new claims in an amended petition relate back to the original petition when tied to "a common core of operative facts." *Id*.

Claims do not relate back "when [they] assert[ ] a new ground for relief supported by facts that differ in both time and type from those the original pleading set forth." *Id*. at 650. Similarly, claims advancing introducing a new legal theory may not relate back. *See, e.g., United States v. Hicks*, 283 F.3d 380, 388 (D.C. Cir. 2002) (although "an amendment offered for the purpose of adding to or amplifying the facts already alleged in support of a particular claim may relate back . . . one that attempts to introduce a new legal theory based on facts different from those underlying the timely claims may not") (citations omitted). On one hand, Guidry's *Brady* and *Giglio* claims focus on common facts. Both rely on ballistics testing performed on the weapon Guidry possessed and bullet fragments found at the crime scene. On the other hand, Respondent persuasively argues that *Brady* and *Giglio* claims are distinct and should be pleaded individually. The Supreme Court has not yet "decide[d] whether a *Giglio* claim, to warrant adjudication, must be separately pleaded" from a *Brady* claim. *Banks v. Dretke*, 540 U.S. 668, 690 n.11 (2004). The Fifth Circuit, however, considers *Brady* and *Giglio* claims to be separate and distinct. *See Barrientes v. Johnson*, 221 F.3d 741, 752-53 (5th Cir. 2000); *Kirkpatrick v. Whitley*, 992 F.2d 491, 497 (5th Cir. 1993). Although both are based on facts discussed in his original petition, Guidry's *Giglio* claim relies on a different theory of relief than the original *Brady* claim. *Cf. United States v. Gonzalez*, 592 F.3d 675, 680 (5th Cir. 2000) (finding that "[n]ew claims of ineffective assistance of counsel do not automatically relate back to prior ineffective assistance claims simply because they violate the same constitutional provision"); *United States v. Thomas*, 221 F.3d 430, 433-34 (3rd Cir. 2000) ("[A]n amendment

under Federal Rules of Civil Procedure Rule 15(c) should not be allowed where the movant seeks to add an entirely new claim or new theory of relief."). The Court, therefore, finds that Guidry's *Gigilio* claim was available to him when he filed his initial federal petition, but he did not introduce it into these proceedings in a timely manner. This claim is time-barred. Because Guidry does not provide any equitable consideration that would allow review of its merits, this claim is denied.

B. Procedural Bar

Respondent also argues that Guidry defaulted this claim by not properly exhausting it in state court. Even though Guidry argues that the suppression of evidence forgives the procedural bar of his somewhat-related *Brady* claim, (Docket Entry No. 106 at 7-8), he does not specifically brief the procedural default of his *Giglio* claim. Guidry's failure to respond to the summary judgment motion precludes a finding that he has overcome the procedural bar.

The Court, however, finds that his briefing relating to the *Brady* claims suggests that he has not overcome the procedural bar. Over many years, the State repeatedly retested the ballistics evidence in this case, often to different results. Different experts have reached different conclusions about whether an identification could be made using the recovered bullet fragments. Ultimately, the State's testing could at least make a more tenuous connection between the gun Guidry possessed and the bullets shot at the crime scene. The State's expert in 2009 determined that, although "the partial projectiles recovered from the life jacket, and the complainant's body were also damaged," "both projectiles have similar class characteristics common to a Charter Arms .38 Special." State Habeas Record at 368 n. 2.

The State repeatedly tested the ballistics evidence and ultimately concluded, at least tenuously, that a similar weapon killed Farah. Guidry has not shown that the State's trial testimony

was false and that the prosecution knew that it was false. Further, even if the ballistics testimony could not prove that Guidry possessed the murder weapon, possession of the gun still linked him to the crime through Fratta.

Guidry has not shown cause or prejudice to overcome the procedural bar of his *Giglio* claim. The Court, therefore, cannot reach the merits of the second ground for relief.

III. Ineffective Assistance of Trial, Appellate, and Habeas Attorneys (Claim Three)

Guidry's third claim argues that he received ineffective representation at all levels of state review. Courts evaluate an attorney's efforts under *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*, a criminal defendant's Sixth Amendment rights are "denied when a defense attorney's *performance* falls below an objective standard of reasonableness and thereby *prejudices* the defense." *Yarborough v. Gentry*, 540 U.S. 1, 3 (2003) (emphasis added); *see also Rompilla v. Beard*, 545 U.S. 374, 387 (2005); *Wiggins v. Smith*, 539 U.S. 510, 520 (2003).

A court's review "of counsel's performance must be highly deferential," and made without "the distorting effects of hindsight." *Strickland*, 466 U.S. at 689. Courts assess counsel's "challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct[,]" because otherwise "[i]t is all too tempting for a defendant to second-guess counsel's assistance . . . ." *Id.* The law honors an attorney's "conscious and informed decision on trial tactics and strategy," allowing for federal relief only when "it is so ill chosen that it permeates the entire trial with obvious unfairness." *Cotton v. Cockrell*, 343 F.3d 746, 752-53 (5th Cir. 2003).

The prejudice element requires the inmate to show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine

confidence in the outcome." *Id.*

Guidry specifically argues that his trial attorneys were ineffective in the guilt/innocence phase because they: (1) failed to prevent Mary Gipp from testifying that Prystash said Guidry killed Farah; (2) ineptly handled Dr. Basinger's testimony; (3) failed to investigate key witnesses and the details of the crime: and (4) ineffectively investigated the Gloria Rubac recordings. Guidry also argues that they did not develop a punishment defense that gave jurors "an opportunity to see him in the context of his personal and multi-generational history of poverty, racism, mental illness, substance abuse, and trauma." (Docket Entry No. 60 at viii). Guidry also says that his appellate counsel and state habeas counsel provided ineffective assistance by not raising the *Strickland* claims attacking his trial representation. Additionally, Guidry seems to raise a separate constitutional claim arguing that the trial court's refusal to grant a continuance violated his Sixth Amendment rights.

Because Guidry defaulted these claims in state court, a procedural bar forecloses federal consideration unless Guidry can show cause and actual prejudice. Guidry relies on *Martinez v. Ryan*, 566 U.S. 1 (2012), to argue that deficiencies in state habeas counsel's representation provide cause. In *Martinez*, the Supreme Court created a narrow exception to the procedural bar doctrine which "treats ineffective assistance by a prisoner's state postconviction counsel as cause to overcome the default of a single claim." *Davila v. Davis*, ___ U.S. ___, 137 S. Ct. 2058, 2062 (2017). This exception, however, only applies to defaulted ineffective-assistance-of-trial-counsel claims. *See id.* at 2064-75. This Court, therefore, cannot reach the merits of any substantive claims against appellate or state habeas counsel.

A federal habeas petitioner relying on *Martinez* to show ineffective representation by state habeas counsel must make three important showings before the Court can consider the underlying

defaulted *Strickland* claim. First, an inmate must show that "his claim of ineffective assistance of counsel at trial is substantial – *i.e.*, has some merit . . . ." *Cantu v. Davis*, 665 F. App'x 384, 386 (5th Cir. 2016); s*ee also Allen v. Stephens*, 805 F.3d 617, 626 (5th Cir. 2015). Second, an inmate must "show that habeas counsel was ineffective" for not raising the underlying *Strickland* claim. *Garza*, 738 F.3d at 676. A court applies traditional *Strickland* jurisprudence and "indulge[s] a strong presumption that [habeas] counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. Courts recognize that habeas counsel "'who files a merits brief need not (and should not) raise every nonfrivolous claim, but rather may select from among them in order to maximize the likelihood of success on appeal.'" *Vasquez v. Stephens*, 597 F. App'x 775, 780 (5th Cir. 2015) (quoting *Smith v. Robbins,* 528 U.S. 259, 288 (2000)). In order to prove ineffective assistance, the defendant must demonstrate that "'a particular nonfrivolous issue was clearly stronger than issues that counsel did present.'" *Vasquez*, 597 F. App'x at 780 (quoting *Robins*, 528 U.S. at 288).

Third, even after showing cause flowing from habeas counsel's representation, an inmate still must demonstrate "actual prejudice." *Canales v. Stephens*, 765 F.3d 551, 571 (5th Cir. 2014); *see also Martinez*, 566 U.S. at 18 (remanding for an assessment of actual prejudice). The Fifth Circuit has held that, even after showing cause under *Martinez*, an inmate must show actual prejudice by "establish[ing] not merely that the errors at his trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *Hernandez*, 537 F. App'x at 542; *see also Carrier*, 477 U.S. at 488; *United States v. Frady*, 456 U.S. 152, 170 (1982). At a minimum, actual prejudice requires an inmate to show a reasonable probability that he would have been granted state habeas relief had his

habeas counsel's performance not been deficient. *See Barbee v. Davis*, 660 F. App'x 293, 314 (5th Cir. 2016)*; Newberry v. Stephens*, 756 F.3d 850, 872 (5th Cir. 2014).

Before turning to habeas counsel's choice of ineffective-assistance claims, the Court evaluates the efforts trial counsel made. Guidry's federal writ characterizes trial counsel as too busy and overburdened to represent him effectively. Further, Guidry describes one of his attorneys as being appointed too close to trial to provide any effective assistance. Guidry says that his attorneys "failed to start working in any significant amount on the case until shortly before trial." (Docket Entry No. 60 at 138).

Muldrow represented Guidry through his first trial. Her years of experience with Guidry's case offered an invaluable resource for his second trial. Referring to her decade of representing Guidry, Muldrow stated in the first hearing for his retrial: "we're more than familiar with the case; and it is a very fact-intensive case." Tr. Vol. 2 at 5. At the inception of the retrial proceedings, trial counsel understood the two most prejudicial factors against their client: Mary Gipp's testimony and Guidry's confession to Dr. Basinger. The defense made great efforts to prevent that information from coming before jurors. The defense's efforts culminated in an extraordinary emergency motion seeking to remove the criminal prosecution to federal court to preclude Gipp and Dr. Basinger from testifying. (*Guidry v. Quarterman*, 4:01-cv-4140, Docket Entry Nos. 57-59, 61). The defense's efforts were both informed and zealous.

With that background, the Court turns to the ineffective-assistance-of-counsel arguments that Guidry claims his habeas counsel should have raised.

A. Mary Gipp's Testimony

After his first capital conviction, the federal courts granted habeas relief to Guidry on two

grounds: the use of Guidry's illegal confession and the introduction of Mary Gipp's hearsay testimony. In his prior state proceedings, the State had conceded that Gipp's recitation of Prystash's statements contained hearsay, but argued that it was admissible. *Guidry*, 9 S.W.3d at 147. The federal courts found that, based on *Crawford v. Washington*, 541 U.S. 36 (2004), Gipp's recitation of Prystash's statements violated the Confrontation clause. *Guidry*, 397 F.3d at 329. The federal courts also found that the admission of those statements was not harmless error. *See id.* at 330-31. The Fifth Circuit's decision, however, left uncertainty about the extent that the State could rely on Gipp to provide testimony independent of Prystash's statements.

Trial counsel vigorously acted before trial to limit Gipp's testimony. Guidry does not challenge the bulk of Gipp's testimony which provided context to the night of the murder and also helped connect Fratta, Prystash, and Guidry together through the .38 Charter Arms revolver. Guidry, however, argues that trial counsel should have prevented the jury from hearing two portions of Gipp's testimony.

First, the State questioned Gipp about a comment she made to her brother Keith on the night of the murder:

The State:	After Joe Prystash left your apartment that night, was Keith still there?
Gipp:	Yes.
The State:	After he left, did you say anything to Keith about what you just saw happen inside your apartment?
Muldrow:	Hearsay.
The Court:	Not what she said.
Gipp:	Did I have a conversation with him?

The State: What did you say to Keith?

Gipp: I told Keith that – that Joe and –

Muldrow: Objection to anything regarding the two Joe or Howard, Your Honor.

The Court: That will be overruled. Not what she said.

Gipp: *That Joe and Howard had killed Fratta – or Farah, I'm sorry*.

Tr. Vol. 21 at 64 (emphasis added). Guidry complains that "[t]rial counsel did not move for a mistrial or for an order striking the testimony, or even for a judicial instruction to the jury to disregard the testimony." (Docket Entry No. 60 at 55).

Second, the State had Gipp read a portion of her testimony from the first trial about writing down information about the gun. Gipp previously testified that she had recorded the information "[b]ecause I knew what *they* had done was wrong and I knew [the police] would [need] it later." Tr. Vol. 21 at 81 (emphasis added); *see also* Tr. Vol. 21 at 82. The defense did not object to this statement. Guidry argues that this statement was problematic because "Gipp never heard Mr. Guidry discuss the murder, and thus the only possible source from which she could form the opinion set forth in her hearsay testimony was based upon what Prystash told her about the crime." Tr. Vol. 60 at 57.

Additionally, Guidry claims that trial counsel should have impeached Gipp's testimony through prior inconsistent statements. Guidry identifies several areas in which Gipp's testimony differed from her prior police statements or trial testimony. Guidry claims that counsel could have used those statements to impeach her credibility.

The parties discuss at great length whether Gipp's trial statements contained hearsay, whether the trial court should have admitted them, and whether the prior federal ruling granting habeas relief

should have precluded her testimony. At this stage, however, this Court's concern is not whether the trial court should have allowed those statements into evidence. The Court's concern is whether state habeas counsel should have raised a claim that trial counsel's efforts with regard to that testimony fell below constitutional expectations.

As previously discussed, the defense made extensive efforts to preclude, or at least limit, Gipp's testimony. The defense filed a state writ of habeas corpus to prevent any retrial based on Gipp's testimony. The defense tried to remove the criminal prosecution to federal court to preserve his constitutional rights. Pre-trial hearings extensively discussed potential limits on Gipp's testimony. Eventually, the defense was able to get the State to agree that "none of the excluded evidence under any alternative theory will be admitted in this trial with one exception." Tr. Vol. 3 at 4. While the record does not fully explain what that exception was, the defense aggressively acted before trial to limit Gipp's testimony.

The defense zealously objected throughout Gipp's questioning. Perhaps other attorneys may have advanced additional reasons to stop her description of the circumstances surrounding the murder. Still, when Gipp began providing testimony that would inculpate Guidry, trial counsel interrupted the flow by objecting after nearly every statement. While not asking for a mistrial or limiting instruction, the defense still continually objected when the State questioned Gipp about her statements to her brother. The trial court's abrupt responses to those objections assures that no additional effort would have limited Gipp's testimony.

True, the defense did not object after Gipp read her former testimony about the gun saying "they" had "done wrong." Given the vagueness of that statement, and placed into the greater context of the defense's efforts to limit Gipp's testimony, a reasonable habeas attorney could chose not to

raise a *Strickland* claim based on that solitary statement.

Throughout the various trials, Gipp's testimony differed on some issues of various importance. Guidry also claims that state habeas counsel should have faulted trial counsel for not impeaching her testimony with those differences. Guidry, however, fails to acknowledge the extent to which trial counsel did impeach Gipp with prior statements. Trial counsel repeatedly referred Gipp back to her earlier statements in an effort to contradict her testimony. In response, Gipp claimed that she was "giving the closest information that [she] ha[d]" based on her memory. Tr. Vol. 21 at 73. While Guidry has now identified other areas for impeachment, he has not shown that counsel was ineffective for selecting those areas used at trial. Additionally, given the specific and persistent inconsistencies trial counsel highlighted, Guidry has not shown a reasonable probability of a different result. A reasonable habeas attorney could forgo raising a *Strickland* claim based on other inconsistent statements without resulting in prejudice.

Guidry has not overcome the procedural bar of any *Strickland* claim based on Gipp's testimony.

B. Dr. Basinger's Testimony

Guidry raises additional complaints about trial counsel's handling of Dr. Basinger's testimony. Guidry argues that "[t]rial counsel were ineffective in making Scott Basinger available to the prosecution, and Mr. Guidry's counsel were ineffective for failing to raise Nunnery's ineffectiveness as a basis for suppressing Basinger's testimony in the second trial." (Docket Entry No. 60 at 162). Guidry claims that trial counsel should have called Nunnery as a witness to explain that perhaps Dr. Basinger's recollection was incorrect. Also, Guidry argues that counsel should have interviewed Dr. Basinger before the second trial. Guidry proposes other arguments and efforts

counsel could have made to stop Dr. Basinger from testifying. The Court finds that a reasonable habeas attorney, however, would not be ineffective for not raising an ineffective-assistance-of-trial-counsel claim based on Dr. Basigner's testimony for several reasons.

First, Guidry asks this Court to reach back to his initial trial and find that counsel there provided ineffective assistance, which then reverberated into his second trial proceedings. Guidry argues: "Mr. Guidry's trial counsel was ineffective 1) in the first trial for providing Basinger as a witness, and 2) in the second trial for not raising Mr. Guidry's trial counsel Alvin Nunnery's ineffectiveness for making Basinger's testimony known and available to the prosecution for use in the second trial." (Docket Entry No. 60 at 162). To support his argument that this Court could reach back and find ineffective-assistance in his first trial, Guidry cites law that is distinguishable from the instant case, such as that involving the Confrontation Clause. A reviewing court's focus should generally be on trial counsel's actions in the trial which resulted in his conviction and death sentence. Guidry has not shown that a viable *Strickland* claim could be based on a vacated conviction.

Second, Guidry's argument assumes that Muldrow would argue that the defense team, including herself, provided ineffective representation in handling Dr. Basinger's evaluation and report. Even though Nunnery had withdrawn from the case, any argument about the ineffective assistance of counsel would implicate Muldrow's own representation. Counsel cannot be "expected to argue his own ineffectiveness[.]" *Clark v. Davis*, 850 F.3d 770, 773 (5th Cir. 2017).

Third, Guidry must show that trial counsel omitted a valid objection that would have resulted in the inadmissibility of Dr. Basinger's testimony in the second trial. Guidry premises this claim on showing that Nunnery was ineffective in the first trial, which presumably involves meeting *Strickland*'s standard with regard to the first trial. Any *Strickland* argument involving Nunnery's

ineffectiveness in the first trial requires assessing the impact of Dr. Basigner's testimony on that proceeding.

In the second trial, Dr. Basinger's testimony was front and center because no other witness could tell jurors that Guidry confessed. Guidry's first jury faced a much different case than his second did. In the first trial, jurors heard Guidry's confession, watched the video walkthrough of the crime, and heard Gipp's testimony before hearing from Dr. Basigner. By the time jurors heard Dr. Basinger's testimony, they had no reason to doubt his identity as the killer. In the first trial Nunnery's alleged deficiencies did not cause a reasonable probability of a different result because the testimony was merely redundant, and far weaker than the testimony that led to Guidry's conviction. Guidry has not shown that trial counsel could have made a successful *Strickland* argument with regard to Nunnery's representation in the first trial.

Fourth, Guidry gives the impression that his attorneys in the second trial did nothing to prevent the State from presenting Dr. Basigner's testimony. On the contrary, the defense aggressively acted before trial to prevent Dr. Basinger's from testifying. The defense's written motions sought exclusion of Dr. Basinger's testimony under various federal and state law theories, including the Fifth, Sixth and Fourteenth Amendments to the Constitution. Counsel raised a similar argument that "[a]ny narrative stemming from the file of defendant's expert Scott Basinger PhD retained by his counsel pursuant to *Ake v. Oklahoma*, is work produced under the attorney-client privilege, and its secrecy is guaranteed under defendants right to effective use of counsel under the 6th and 14th Amendment to the U.S. Constitution." Clerk's Record Vol. 3 at 817; *see also* Clerk's Record Vol. 3 at 836-38. The defense based its state writ and attempt to invoke federal jurisdiction on Dr. Basinger's testimony. The trial court held a pre-trial hearing to delineate the contours of that

testimony. The State called Dr. Basinger as a witness in the pre-trial hearing and the defense cross-examined him. Tr. Vol. 4 at 38-39. The defense made repeated, and zealous, efforts to exclude Dr. Basinger's testimony. Given those efforts, Guidry has not shown that his proposed argument about effective representation in his first trial would have fared any better in the trial court.

Guidry now argues that trial counsel was ineffective because "Mr. Guidry's trial counsel did not meet with Basinger regarding his testimony in the second trial," (Docket Entry No. 60 at 58), even though trial counsel's and the investigator's billing records show meetings with Dr. Basinger well before trial. Clerk's Record at 1823; *State v. Guidry*, No. 1073163 (230th Dist. Ct., Harris Co. Tex.) Attorney Fee's Expense Claim, signed 29 June 2007. The defense's motions and arguments displayed intimate awareness of what he would say and the damage it could pose to the defense.

State habeas counsel also did not ignore potential legal claims raised by Dr. Basinger's testimony. State habeas counsel raised a claim that the trial court erred in admitting the testimony because it was the fruit of the poisonous tree. In making that argument, however, state habeas counsel raised arguments that were inapposite to Guidry's current allegation that trial counsel provided ineffective representation in the first trial. Guidry stated: "By the time of the interview by Dr. Basinger during which [Guidry] allegedly made the admission Dr. Basinger was working as a member of the defense team. The entire goal of the examination was to discover mitigation to address a likely finding of guilt based on the illegal confessions. Mr. Guidry could not have known that information he shared could be used against him." State Habeas Record at 39. State habeas counsel chose a strategy that presupposed that the defense could not have anticipated that Dr. Basinger's testimony would turn against Guidry in the future.

Guidry has proposed a different strategy, but has not shown that state habeas counsel omitted

strong claims. Guidry, therefore, has not met the *Martinez* standard for cause or shown actual prejudice. This claim is procedurally barred.

C. Key Witnesses and Details of the Crime

Guidry argues that state habeas counsel should have argued that his trial attorneys ineffectively investigated his case, particularly with respect to ballistics evidence. For the same reasons that he has not overcome the procedural bar of his related *Brady* claim, Guidry has not shown that a reasonable state habeas attorney would have advanced that claim or that it would have merited relief. Additionally, the record shows that trial counsel and their investigator made efforts to interview witness, develop ballistics evidence, and prepare witnesses for trial. Guidry's allegations of ineffective assistance do not merit *Martinez* relief.

D. Gloria Rubac's Recordings

Guidry claims that trial counsel provided ineffective assistance by not reviewing interviews between him and reporter Gloria Rubac. The trial record shows that the defense team felt blindsided by the Rubac recordings and overwhelmed by the sheer amount of the material. The defense expressed dismay as the prosecution revealed that it would rely on those tapes shortly before trial. Trial counsel told the trial court that it lacked the time or resources to review the 500 hours of recordings before trial started. Counsel argued: "The infeasibility of reviewing each and every phone call made by Mr. Guidry, particularly to potential witnesses [who would be called] in the penalty phase of his trial, has prejudiced his ability to prepare a defense and to make informed strategic choices about which individuals to call as witnesses." Clerk's Record at 1697. In essence, counsel argued that no attorney could perform competently in that situation.

Despite trial counsel's vigorous efforts, the trial court refused to postpone the trial for full

development of the Rubac recordings. Guidry has not shown what more a reasonable attorney could have done given the time limitations imposed by the trial court.

Importantly, Guidry has not shown what would have resulted from zealous efforts to review the Rubac recordings. Despite faulting his trial attorneys for not scouring the recordings, Guidry does not now cite to or quote from those recordings. Guidry has not indicated what in those 500 hours of recordings would have benefitted the defense. A successful *Strickland* claim must rest on something more than speculation about the results of additional investigation by counsel.

Guidry has not shown that a reasonable habeas attorney should have raised a *Strickland* claim based on the Rubac recordings or that failure to do so prejudiced the defense.

E. Multi-Generational Mitigating Evidence

Guidry raises a claim that his trial attorneys provided deficient representation in the investigation, preparation, and presentation of mitigating evidence. Guidry argues that trial counsel were ineffective in the penalty phase because they did not give jurors "an opportunity to see him in the context of his personal and multi-generational history of poverty, racism, mental illness, substance abuse, and trauma." (Docket Entry No. 60 at viii). As with his other *Strickland* arguments, Guidry relies on *Martinez* to overcome the procedural bar. Deciding whether state habeas counsel provided ineffective, prejudicial representation by not raising this claim requires a review of what trial counsel did, the circumstance under which they labored, and what more they could have done.

The defense approached the second trial with a background informed by the first. When the trial court appointed Muldrow on April 22, 2006, an initial trial date of July 17, 2006,was set. The defense team soon included co-counsel from his first trial, an investigator, and a mitigation

specialist. The trial court continued the trial for several months. The defense began communicating with family members long before the trial date.

In a pre-trial hearing on the day before jury selection started (January 29, 2007), however, the defense requested a continuance. The defense supported its written motion with an affidavit from an outside mitigation specialist who had been assisting the appointed mitigation investigator with trial preparation. The affidavit attested that no attorney could complete an adequate mitigation investigation within the time parameters set by the trial court. The mitigation investigator averred: "I have never seen an adequate mitigation investigation conducted in 6-8 months." State Habeas Record at 1210. The affidavit, however, noted that the defense had already interviewed "approximately 30 witnesses." While remarking that "additional avenues of investigation . . . must be pursued," the affidavit provided little information about what mitigation theories remained completely undeveloped. Clerk's Record at 1210.

In a hearing, Mr. Moncriffe told that trial court: "we would like the Court to be aware of the heightened responsibility we have as defense lawyers now, particularly in the area of mitigation, Your Honor. . . . My litigation staff has been working diligently on this case. They just don't have sufficient time." Tr. Vol. 6 at 4. Mr. Moncriffe told the trial court that proceeding under that accelerated schedule "with such a critical part of mitigation investigation denies my client of his effectiveness of counsel." Tr. Vol. 6 at 5. Muldrow complained that the late notice about a potential witness and the reintroduction of Dr. Basinger's testimony especially prejudiced the defense. The defense's request for time focused not on witnesses, but on "secur[ing] all of these documents." Tr. Vol. 6 at 7.

The prosecution, however, insisted on the accelerated time schedule. Tr. Vol. 6 at 8. The

trial court denied the motion for a continuance. Tr. Vol. 6 at 10.

The defense made extraordinary efforts, given the accelerated time line, to preserve Guidry's rights. The defense received help from an advocacy organization. Gulf Region Advocacy Center (GRACE) provided the services of an attorney, investigators, and interns. Mr. Moncriffe's billing records indicate that he regularly met with the mitigation team after his appointment. Clerk's Record at 1850-51. As the trial neared, the defense spent more time preparing for a punishment phase. Pre-trial filings indicate that the defense interviewed dozens of witnesses in preparation for the penalty phase.

The defense unsuccessfully attempted to remove the case to federal court. (*Guidry v. Quarterman*, 4:01-cv-4140, Docket Entry No. 57). The defense moved for a continuance again before the first day of the guilt/innocence phase, particularly noting the inability to "give complete mitigation defense as a result of the Court's ruling and denial of motion for continuance." Tr. Vol. 20 at 8. The trial court, however, remained inflexible on the trial date. The trial court stated: "This case occurred in 1994. Ms. Muldrow has been on the case since probably 1995. Your motion is denied." Tr. Vol. 20 at 8.

On February 26, 2007, trial counsel filed a Renewed Motion for Continuance. The week before, trial counsel had filed a "sealed affidavit documenting the names of critical witnesses who either had not been interviewed or required follow up, in addition to a list of records remaining to be collected." Clerk's Record at 1696. Still, the defense commented "in the last six months, Mr. Guidry's defense team has met with approximately 45 witnesses and has sought a total of approximately thirty (30) separate sets of records relevant to the mitigation investigation." *Id*. The defense observed that it still had not been able to collect relevant records, making it so "the Defense

has still not been able to conduct sufficient investigation to be prepared to present an adequate mitigation defense." *Id*.

The motion for a continuance also observed that it had been unable to "employ[] experts to testify regarding the impact of key events in Mr. Guidry's childhood may have had on his psychological development." *Id*. at 1697. Specifically, the defense requested more time to employ a "trauma specialist" who could "credibly explain the causes, signs and effects of early childhood trauma" including "ways in which severe childhood illness in particular can hamper normal childhood development." *Id*. at 1698. Also, Guidry requested "time to prepare a prison adaptation expert to testify at his retrial." *Id*. The trial court denied the defense's motion that same day. Tr. Vol. 24 at 8.

On January 17, 2007, the defense had Guidry examined by a neuropsycholigcal expert, Antoinette R. McGarragan. *State v. Guidry*, No. 1073163 (230th Dist. Ct., Harris Co. Tex.) Attorney Fee's Expense Claim, signed 27 June 2007. The record does not contain the written report prepared by the expert. Presumably, her results were communicated to trial counsel who made a strategic decision not to call Dr. McGarragan as a witness.

The defense called four witnesses in the penalty phase. Mr. Moncriffe examined the defense witnesses. As summarized in Guidry's petition, the defense presented the following witnesses:

- Mr. Guidry's Head Start teacher, see Amended Petition Ex. 101, (Second Trial transcript, Vol. 26, pp. 86-93) (characterized Mr. Guidry as "sickly," "a follower," and relayed a story about Mr. Guidry helping a scared child down from the top of a jungle gym); Proposed Second Amended Petition Ex. 101 (same);

- Mr. Guidry's cousin, *see id*. at 96-99 (testified that Mr. Guidry spent most of his time indoors because he suffered from asthma and used a nebulizer, and told her son to stay in school);

- The Commander of Mr. Guidry's Sea Cadets group, *see id*. at 98-101 (testifying Mr. Guidry was helpful to others, a great candidate for the Navy, but failed the physical due to high blood pressure); and

- Mr. Guidry's mother, *see id*. at 134-35 (identified several family photos and gave a short testimony about her family).

Those witnesses testified that Guidry grew up in a loving, stable home free from abuse or neglect. Despite childhood asthma which often required hospitalization, Guidry was a good-natured individual with a character inconsistent with his violence as an adult.

Guidry now claims that counsel did not do enough. Guidry presents affidavits from numerous family members who did not testify at trial. Guidry also relies on the affidavits of experts who give various opinions about his background and psychological condition. Taken broadly, Guidry's procedurally barred failure-to-present-mitigating-evidence claim faults his attorneys for not making a more-probing investigation into mitigating evidence, particularly by not developing a mental-health history, which would have resulted in a more-robust case against death.

Through extensive argument, Guidry describes his attorneys' investigation into punishment phase evidence as too superficial and hurried. But Guidry now faults his attorneys for not completing a task that he before characterized as one no attorney could complete. Moncriffe's affidavit says: "We simply did not have time to do an adequate job." (Docket Entry No. 95 at 5). In fact, Guidry repeatedly requested a continuance in state court based on an argument that contradicts the one he makes on federal review: he repeatedly argued to the trial court that no attorney could fulfill their constitutional duties. He supported that argument with affidavits from investigators and attorneys who averred that the accelerated precluded any attorney from performing effectively.

Guidry now claims that trial counsel's inept investigation precluded the jury from hearing compelling mitigating evidence. However, the record does not provide full insight into the defense's selection of witnesses. The affidavits from trial counsel and the investigators avoid discussing why, of all the witnesses interviewed, the defense selected only a few for trial. During the questioning of one witness, the prosecution hinted that Guidry had family members commit not to testify. Tr. Vol. 26 at 109. The parties have not developed the record concerning the prosecution's insinuation that Guidry himself limited his attorneys' ability to craft a punishment defense. In the end, this Court's concern is whether state habeas counsel was ineffective by not challenging what trial counsel did with the available information.

Despite the enormous amount of information supporting Guidry's federal habeas arguments, the ability to craft a robust *Strickland* claim does not mean that habeas counsel was deficient for not doing so. In the ineffective-assistance-of-habeas-counsel context, the cause test uses the *Strickland* standard. *See Edwards v. Carpenter*, 529 U.S. 446, 451 (2000) (stating that when showing cause "[n]ot just any deficiency in counsel's performance will do, however; the assistance must have been so ineffective as to violate the Federal Constitution"); *Carrier*, 477 U.S. at 492 ("Attorney error short of ineffective assistance of counsel does not constitute cause[.]"). A habeas attorney "need not (and should not) raise every nonfrivolous claim, but rather may select from among them in order to maximize the likelihood of success on appeal." *Vasquez v. Stephens*, 597 F. App'x 775, 779 (5th Cir. 2015) (quotations omitted).

A reasonable state habeas attorney may view some of the evidence which Guidry presents with some skepticism. Guidry now argues that "[i]mportantly, trial counsel's failure to conduct a thorough life history investigation prevented them from presenting to the jury compelling evidence

that severe health issues, parental neglect, familial instability, community violence, mental illness, intellectual disability, and substance abuse all marred Mr. Guidry's childhood and teenage years." (Docket No. 60 at 126). True, affidavits provide much greater detail and specificity about Guidry's life, but the Court approaches some of that information with caution.

For example, some declarants say they were not contacted by the defense, when defense records suggest otherwise. For instance, Guidry's cousins Adrienne Pillette and De'Jaune Pillette say that contact with his current attorneys "was the first time anyone from Howard Guidry's defense team has ever contacted me." (Docket Entry No. 62 at 2, Docket Entry No. 70 at 2). Eva Lee says "[n]o one working on Howard's case ever interviewed me." (Docket Entry No. 75 at 3). The sealed affidavit of investigator Aimee Solway, however, includes their names on a list of witnesses contacted before trial, even if not "sufficiently interviewed." (Docket Entry No. 63).

One expert witnesses describes "extreme domestic violence" in the Guidry home and that Guidry "was the target of abuse himself," but he does not reveal the source of that information. The expert contradicts trial testimony from family members that Guidry grew up in a loving home in which he was not abused. Tr. Vol. 26 at 93, 107.[4] In particular, Guidry's mother did not describe any abuse. The same expert takes information about lead paint in his grandmother's house to assume that Guidry suffered from lead poisoning. The expert assumes that Guidry had brain problems from

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[4] The suggestion that Guidry was abused only comes from the report of Dr. Jethro W. Toomer. Dr. Toomer does not disclose the source of that information or describe why such information contrasts so sharply with the trial testimony and that contained by other declarants who would have observed that level of abuse. The Court observes that various courts throughout the nation have found Dr. Toomer's conclusions not credible, refused to accept his diagnosis, or found that he overstated his results. *See Fults v. GDCP Warden*, 764 F.3d 1311, 1320 (11th Cir. 2014); *Commissioner v. Roney*, 79 A.3d 595, 632 (Pa. 2013); *Gore v. State*, 120 So.3d 554, 557 (Fla. 2013); *Fults v. Upton*, 2012 WL 884766, at *5 (N.D. Ga. 2012); *Zommer v. State*, 31 So.3d 733, 749 (Fla. 2010).

eating fish from contaminated water, without any testing or empirical support for his conclusions. Expert opinions formed without testing and based on speculation does not help the Court's evaluation of whether an attorney provided constitutionally sufficient representation.

Additionally, some of the evidence developed after trial, such as that relating to intergenerational poverty and difficulty in his parents' own childhood and lives, adds little to the jury's consideration of an "individualized determination on the basis of the character of the individual and the circumstances of the crime." *Tuilaepa v. California*, 512 U.S. 967, 972 (1994); *see also Batiste v. Davis*, 2017 WL 4155461, at *19 (S.D. Tex. 2017) ("Any evidence of intergenerational mitigating evidence did not have strong relevance to the special issues.").

Comparing the number of witnesses and evidence amassed before trial with the witnesses called in the penalty phase, the Court must presume that counsel made strategic decisions about the way to present evidence. *See Strickland*, 466 U.S. at 690. In the end, Guidry has amassed affidavits or declarations from numerous individuals on federal review. These statements follow similar themes: Guidry was raised in a poor community; he suffered extensively from asthma as a youth, with numerous complications and impairments in activity; he lost loved ones as a youth; he was slow and had minor speech problems; and notwithstanding his problems Guidry was easy-going, likeable, and helpful. Much of that information came before the jury, in outline form, at trial. The additional mitigation evidence presented is "largely cumulative and differ[s] from the evidence presented at trial only in detail, not in mitigation thrust." *Villegas v. Quarterman*, 274 F. App'x 378, 384 (5th Cir. 2008). Court "must be particularly wary of arguments that essentially come down to a matter of degrees. Did counsel investigate enough? Did counsel present enough mitigating evidence? Those questions are even less susceptible to judicial second-guessing." *Dowthitt v. Johnson*, 230 F.3d 733,

743 (5th Cir. 2000) (internal quotation marks and citation omitted); *see also Kitchens v. Johnson*, 190 F.3d 698, 703 (5th Cir. 1999). To the extent that Guidry has verified the unpresented evidence, it is not "shocking and starkly different than that presented at trial." *Blanton v. Quarterman*, 543 F.3d 230, 239-40 n.1 (5th Cir. 2008).

Against that information, the Court must consider how it would have fit into the broader context of the trial proceedings. The prosecution presented strong evidence of the future danger Guidry would pose. At age sixteen Guidry possessed weapons and was arrested for burglarizing cars. Guidry later fired shots while robbing an auto parts store. Guidry was arrested after a police chase following a bank robbery. Guidry attacked jail officers while waiting for his first trial. When sent to death row Guidry assaulted officers and possessed weapons. In addition to violating rules, Guidry attempted to escape death row. While on death row Guidry took a jail officer hostage and threatened to kill her. During that episode, Guidry tried to stab a hostage negotiator. And the jury would also consider the circumstance of the murder itself – Guidry confessed to firing into the head of a young mother at close range for a small amount of money.

Juries twice gave Guidry a death sentence based on information not fundamentally different from some of what he now faults counsel for not raising. However cursory or inartful the presentation of the defense's mitigating case, Guidry has not shown that the case he has crafted on federal review would fare any better. In this circuit, "actual prejudice" resulting from state habeas counsel's efforts requires the petitioner to "establish not merely that the errors at his trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *Moore v. Quarterman*, 534 F.3d 454, 463 (5th Cir. 2008); *see also Hernandez v. Stephens*, 537 F. App'x 531, 542 (5th Cir. 2013); *Barrientes v.*

Johnson, 221 F.3d 741, 769 (5th Cir. 2000). Prejudice means "[t]here is a reasonable probability that he would have been granted state habeas relief had the evidence been presented in the state habeas proceedings." *Newbury v. Stephens*, 756 F.3d 850, 872 (5th Cir. 2014). Given the strong evidence against him, the similarity of the case presented at trial, weaknesses in the evidence on which Guidry now relies, and a review of the whole trial, the Court finds that Guidry has not shown that he meets *Martinez*'s actual prejudice prong.

This is not to say that the work of trial counsel during Guidry's punishment phase was perfect. Trial counsel made efforts to prepare for a mitigation defense. Counsel repeatedly asked for more time and resources, supporting those requests with experts' opinions that no attorney could render constitutionally effective representation within the parameters set by the trial court. Counsel made decisions about what to present, which while not clear from the record, relied on the assistance of expert help. But trial counsel's efforts would not only be impaired by the limitations placed on it by the trial court, but also by Guidry's violent past which did not improve with incarceration. Efforts to cast Guidry's childhood in a favorable light would dim against the dark violence of his adult life. While not ideal, Guidry has not shown constitutional error in his habeas proceedings or, if the matter were fully available for federal review, in his trial either. *Martinez* does not provide a basis for reviewing this claim.

F. Denial of a Continuance

In his initial federal petition, Guidry raised an unexhausted claim arguing that the trial court's denial of a continuance violated his Sixth Amendment rights. (Docket Entry No. 1 at 73). Guidry's amended petition does not raise that issue as a separate constitutional claim, but still contains briefing to that effect. Guidry has not overcome the procedural bar of that claim. Additionally,

Guidry does not make a compelling argument for relief. The trial court granted one continuance and allowed an additional six months before trial. Guidry requested more time on the eve of trial. The circumstances created by time limitations were far from ideal, but Guidry has not shown that the denial of a continuance was so fundamentally unfair as to violate his constitutional rights as a separate ground for relief.

G. Conclusion and Cumulative Effect of *Strickland* Claims

Guidry asks this Court to find cumulative error in counsel's efforts. As the Court has not found error, there is nothing to cumulate.

In conclusion, *Martinez* does not provide a basis for overcoming the procedural bar of Guidry's *Strickland* claim. Even if it did, the same analysis would require the Court to deny the merits of this claim. The Court, therefore, denies Guidry's *Strickland* claim.

IV. Non-Cognizable Claims (Claims Six and Seven)

Federal law precludes this Court from granting relief on Guidry's sixth and seventh grounds for relief. In claim six, Guidry argues that the state habeas court violated his constitutional right to counsel of his choice. As previously discussed, the state habeas court refused to substitute in Guidry's counsel of choice. Guidry claims that this created a structural defect that merits habeas relief. The Constitution, however, does not guarantee an inmate a right to counsel in state post-conviction proceedings, much less counsel of choice. *See Pennsylvania v. Finley*, 481 U.S. 551 (1987); *Murray v. Giarratano*, 492 U.S. (1989). To rule otherwise would require the creation of new constitutional law.

Second, Guidry's seventh claim argues that the Eighth Amendment prohibits a State from carrying out a death sentence, either because of the length of time an inmate has been on death row

or because the evolving standards of our society reject capital punishment. The Supreme Court has never held that the Eighth Amendment imposes a duty to execute a death sentence expeditiously. *See Reed v. Quarterman*, 504 F.3d 465, 488 (5th Cir. 2007); *Lackey v. Johnson*, 83 F.3d 116, 117 (5th Cir. 1996); *White v. Johnson*, 79 F.3d 432, 439-40 (5th Cir. 1996). Further, the Supreme Court has "time and again reaffirmed that capital punishment is not per se unconstitutional." *Glossip v. Gross*, ___ U.S___, 135 S. Ct. 2726, 2739 (2015). To rule otherwise would require the creation of new constitutional law.

A federal court cannot grant habeas relief on a "new" rule of constitutional law. Under *Teague v. Lane*, 489 U.S. 288 (1989), a new rule is one not "*dictated* by precedent existing at the time the defendant's conviction became final." *Id*. at 301 (emphasis in original); *see also Lambrix v. Singletary*, 520 U.S. 518, 527-28 (1997). The non-retroactivity principle from *Teague* precludes habeas relief on Guidry's sixth and seventh claims.

V. Unexhausted Portion of Claim Five

In his initial federal petition, Guidry's fifth claim raised an argument that he was denied a fair and impartial jury because the jurors knew he had previously been convicted and sentenced to death for Farah's murder. Guidry emphasized that one juror had apparently heard about the prior conviction and sentence. He also cites various places in the record whether the prosecution, either explicitly or inferentially, referenced his prior trial or that of his co-conspirators. Guidry inadvertently omitted that portion of claim five from his second amended petition. (Docket Entry No. 104). The Court will consider those arguments as if Guidry raised them in his second amended petition. (Docket Entry No. 112).

Guidry did not exhaust this issue in state court. Guidry has not made any specific argument

that cause and actual prejudice exist to overcome the procedural bar of the issue. The Court finds that a procedural bar forecloses federal review.

Alternatively, the Court finds that Guidry has not made a strong showing for relief. The Constitution promises trial by "a panel of impartial, indifferent jurors." *Irvin v. Dowd*, 366 U.S. 717, 722 (1961) (quotation omitted). "Qualified jurors need not, however, be totally ignorant of the facts and issues involved." *Murphy v. Florida*, 421 U.S. 794, 799-800 (1975). "A juror is presumed to be biased when he or she is apprised of such inherently prejudicial facts about the defendant that the court deems it highly unlikely that the juror can exercise independent judgment, even if the juror declares to the court that he or she will decide the case solely on the evidence presented." *Willie v. Maggio*, 737 F.2d 1372, 1379 (5th Cir. 1984).

Guidry points to various places in the record which he alleges indicated that he, and his co-conspirators, had been previously convicted and sentenced to death. Some of those comments are of no moment. For instance, the prosecution told jurors that they "need not worry . . . about the fate of Robert Fratta or Joe Prystash." Tr. Vol. 22 at 30. Also, the State once mentioned the passage of years since the crime. Tr. Vol. 23 at 35. Neither of those statements, however, directly imparted information about Guidry's prior conviction and sentence.

Because the punishment phase focused on Guidry's behavior while incarcerated, Guidry points to two occasions when witnesses referred to "death row." In both occasions, the trial court instructed jurors not to consider that testimony. Tr. Vol. 25 at 134, 251. The trial court then threatened the prosecution with a mistrial if its witnesses continued referring to death row. Tr. Vol. 25 at 27,72. The trial court did not specifically caution jurors, however, one time when the prosecution mentioned that Guidry had been housed in "maximum security." Tr. Vol. 27 at 43. That

random statement, however, was insufficient to permeate the penalty hearing with unfairness.

Guidry also points to an unnotarized statement from Melton Brock, one of the jurors who served at trial. Mr. Brock says that "[d]uring the trial, I was aware that Howard had previously been convicted for the murder of Farah Fratta. I knew that I was serving on a second trial." (Docket Entry No. 11). Aside from evidentiary concerns about this document, the Court observes that Mr. Brock does not allege that the alleged knowledge had any influence on his consideration of the issues. It is not clear whether Brock raised his hand during group voir dire when the trial court asked if any juror knew about the case, but during individual questioning Mr. Brock indicated that he had not formed an opinion about Guidry's guilt or innocence. Tr. Vol. 13 at 8. Mr. Brock affirmed that he could presume Guidry innocent unless the State proved otherwise. Tr. Vol. 13 at 129. The Court cannot disturb the presumption that Mr. Brock would do otherwise based on hypothetical inferences from an unnotarized document.

Even if Guidry had exhausted this claim in state court, the Court finds that Guidry has not made a showing that knowledge of his prior conviction and death sentence so permeated his trial with prejudice that he was denied a fair trial. The Court would deny the unexhausted portion of Guidry's fifth claim if the merits were fully available for federal review.

DISCOVERY

Guidry seeks discovery in the form of obtaining various documents and deposing one of the trial prosecutors. (Docket Entry No. 59). Civil litigants generally "may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case." FED. R. CIV. P. 26(b). Nevertheless, "it is clear that there was no intention to extend to habeas corpus, as a matter of right, the broad discovery provisions" available to other civil

litigants. *Harris v. Nelson*, 394 U.S. 286, 295 (1969). Rule 6(a) of the Rules Governing Section 2254 Cases provides the standard governing discovery in federal habeas cases. Rule 6(a) requires leave of the court before discovery becomes available. A federal court may authorize discovery only "for good cause" and "may limit the extent of discovery." The Supreme Court has tethered the "good cause" clause of Rule 6(a) to an inmate's burden to show an entitlement to federal habeas relief, *Bracy v. Gramley*, 520 U.S. 899, 908-09 (1997), but has otherwise not extensively discussed what showing constitutes good cause. The Court finds that discovery is not reasonably necessary because Guidry is not entitled to an evidentiary hearing in this case, Supreme Court precedent prevents the introduction of new facts for claims adjudicated on the merits, and Guidry has not shown that this Court can reach the merits of his unexhausted claims.

"[R]equests for discovery in habeas proceedings normally follow the granting of an evidentiary hearing . . . ." Advisory Committee Notes to Rule 6. The Advisory Committee Notes to Rule 6 observe that "there may be instances in which discovery would be appropriate" before an evidentiary hearing, but the purpose of any "pre-hearing discovery [would be to] show an evidentiary hearing to be unnecessary . . . ." *See also Blackledge v. Allison*, 431 U.S. 63, 81 (1997) (including discovery among "a variety of measures in an effort to avoid the need for an evidentiary hearing"); *East v. Scott*, 55 F.3d 996, 1000-01 (5th Cir. 1995) (discovery is a means of deciding whether an evidentiary hearing is *not* necessary). The Court finds that no evidentiary is necessary to resolve the issues in Guidry's case.

Insofar as Guidry's discovery requests would support the habeas claims he exhausted in state court, the Supreme Court in *Cullen v. Pinholster*, 563 U.S. 170 (2011), held that a federal court's AEDPA review may look only at the facts developed in state court. *Pinholster* held that "evidence

introduced in federal court has no bearing on § 2254(d)(1) review . . . ." 563 U.S. at 185; *see also Williams v. Thaler*, 684 F.3d 597, 603 (5th Cir. 2012). Federal precedent has used *Pinholster* to limit the federal habeas court's ability to develop new facts in the federal habeas process, including through discovery. *See Soffar v. Stephens*, 2014 WL 12642575, at *2 (S.D. Tex. 2014) ("Presumably, good cause cannot exist for discovery that would result in evidence a court cannot consider.").

Insofar as Guidry seeks discovery on his procedurally barred claims, a petitioner cannot show good cause for discovery on a claim in federal court if procedural impediments preclude considering the merits of that claim. *See Rucker v. Norris*, 563 F.3d 766, 771 (8th Cir. 2009); *Williams v. Bagley*, 380 F.3d 932, 975 (6th Cir. 2004); *Campbell v. Dretke*, 117 F. App'x 946, 959 (5th Cir. 2004); *Royal v. Taylor*, 188 F.3d 239, 249 (4th Cir. 1999); *Calderon*, 144 F.3d at 621; *In re Pruett*, 133 F.3d 275, 277 n.1 (4th Cir. 1997); *see also Thompson v. Stephens*, 2014 WL 2765666, at *2 (S.D. Tex. 2014) ("As a threshold matter, however, a court must also take into account the procedural posture of an inmate's claims. A petitioner cannot show good cause if a federal court cannot reach the merits of the disputed claims."). A petitioner cannot "demonstrate that he is entitled to relief" when procedural impediments prevent full federal review. *Bracy*, 520 U.S. at 908-09.

The Court notes that Guidry has not shown good cause for the development of the claims he raises in his petition. The Court, therefore, denies the request for discovery in this case.

CERTIFICATE OF APPEALABILITY

Under AEDPA, a prisoner cannot seek appellate review from a lower court's judgment without receiving a Certificate of Appealability ("COA"). *See* 28 U.S.C. § 2253(c). Guidry has not yet requested that this Court grant him a COA, though this Court can consider the issue *sua sponte*.

See Alexander v. Johnson, 211 F.3d 895, 898 (5th Cir. 2000). "The COA statute establishes procedural rules and requires a threshold inquiry into whether the circuit court may entertain an appeal." *Slack v. McDaniel*, 529 U.S. 473, 482 (2000). A court may only issue a COA when "the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

The Fifth Circuit holds that the severity of an inmate's punishment, even a sentence of death, "does not, in and of itself, require the issuance of a COA." *Clark v. Johnson*, 202 F.3d 760, 764 (5th Cir. 2000). The Fifth Circuit, however, anticipates that a court will resolve any questions about a COA in the death-row inmate's favor. *See Hernandez v. Johnson*, 213 F.3d 243, 248 (5th Cir. 2000). The Supreme Court has explained the standard for evaluating the propriety of granting a COA on claims rejected on their merits as follows: "Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy §2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack*, 529 U.S. at 484; *Miller-El*, 537 U.S. at 336-38. On the other hand, a district court that has denied habeas relief on procedural grounds should issue a COA "when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. *Slack*, 529 U.S. at 484; *Miller-El*, 537 U.S. at 336-38. Unless the prisoner meets the COA standard, "no appeal would be warranted." *Slack*, 529 U.S. at 484.

Having considered the merits of Guidry's petition, and in light of AEDPA's standards and controlling precedent, this Court determines that a COA should not issue.

CONCLUSION

The Court **GRANTS** Respondent's motion for summary judgment, **DENIES** Guidry's cross-motion for summary judgment, and **DENIES** Guidry's federal petition for a writ of habeas corpus. The Court **DISMISSES** this case **WITH PREJUDICE**. The Court will not certify any issue for appellate review.

The Clerk is directed to provide copies of this order to the parties.

SIGNED at Houston, Texas on April 13, 2020.

VANESSA D. GILMORE
UNITED STATES DISTRICT JUDGE

APPENDIX C

PS

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

WR-47,417-04 and WR-47,417-05

EX PARTE HOWARD PAUL GUIDRY

ON APPLICATIONS FOR WRITS OF HABEAS CORPUS CAUSE NO. 1073163-B IN THE 230TH DISTRICT COURT HARRIS COUNTY

Per curiam.

O R D E R

These are subsequent applications for writs of habeas corpus filed pursuant to the provisions of Texas Code of Criminal Procedure Article 11.071, § 5.

Applicant was originally convicted of capital murder and sentenced to death in March 1997 for the 1994 shooting death of Farah Fratta. Applicant unsuccessfully challenged his 1997 conviction and sentence in this Court on direct appeal and in an initial 11.071 writ application. *See Guidry v. State*, 9 S.W.3d 133 (Tex. Crim. App.

1999); *Ex parte Guidry*, No. WR-47,417-01 (Tex. Crim. App. Nov. 8, 2000). However, applicant subsequently obtained federal habeas relief. *See Guidry v. Dretke*, 2003 U.S. Dist. LEXIS 26199 (S.D. Tex. Sept. 25, 2003); *Guidry v. Dretke*, 397 F.3d 306 (5th Cir. 2005).

The State retried applicant in February and March 2007, and the new jury also convicted him of capital murder. The evidence supporting the jury's verdict generally showed that, at the time of her death, Farah Fratta ("Farah") and her husband, Robert Fratta ("Fratta") were involved in a bitter divorce and child-custody proceeding. Fratta recruited an acquaintance, Joseph Prystash, to kill or find someone to kill Farah for remuneration. Prystash, in turn, enlisted applicant, who was a neighbor of Prystash's then-girlfriend, Mary Gipp. On the evening of November 9, 1994, applicant hid outside of Farah's residence until she returned home. As Farah was getting out her car in the garage, applicant entered the garage and killed her with two close-range and contact gunshots to the head.

According to the new jury's answers to the special issues, the trial court again sentenced applicant to death. *See* TEX. CODE CRIM. PROC. art. 37.071, § 2(b)(2). This Court affirmed applicant's 2007 conviction and sentence on direct appeal. *Guidry v. State*, No. AP-75,633 (Tex. Crim. App. Oct. 21, 2009) (not designated for publication). We also denied relief on his initial post-conviction application for writ of habeas corpus challenging that 2007 conviction and sentence, and we dismissed his first subsequent writ

application challenging the same. *See* TEX. CODE CRIM. PROC. ANN. Art. 11.071; *Ex parte Guidry*, Nos. WR-73,329-02 & WR-73,329-03 (Tex. Crim. App. June 27, 2012).

In his instant applications, filed in the trial court on October 31, 2016, and February 15, 2017, respectively, applicant again challenges his 2007 capital murder conviction and death sentence.[1] This Court received the instant applications on April 16, 2018.

Applicant does not number the claims he presents in either of these applications. However, in his application filed in the trial court on October 31, 2016, applicant appears to raise four general categories of allegations: (1) allegations that the State violated its duties of disclosure under *Brady v. Maryland*, 373 U.S. 83 (1963); (2) claims asserting that he received ineffective assistance of trial, appellate, and previous habeas counsel; (3) record-based claims; and (4) "other" claims. This last category of claims includes: an allegation that applicant was unconstitutionally denied the counsel of his choosing in prior post-conviction proceedings; a claim pursuant to Justice Stevens's dissent from the denial of certiorari in *Lackey v. Texas*, 514 U.S. 1045 (1995); and a claim that evolving standards of decency prohibit the death penalty as a punishment for murder.

In his application filed in the trial court on February 15, 2017, applicant raises all

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[1] Applicant styled his February 15, 2017 filing as an "amended" version of the subsequent writ application he filed in the trial court on October 31, 2016. However, Applicant raises an additional claim in his February 2017 filing—specifically, an allegation that "The State Used False Evidence to Obtain [Applicant's] Conviction in Violation of the Due Process Clause." Therefore, Applicant's February 2017 filing is properly designated pursuant to Article 11.071 as another subsequent writ application, and we have assigned it a separate writ number.

of the same claims he raised in the application he filed in the trial court on October 31, 2016. However, applicant also raises an additional claim that the State used false evidence to secure his 2007 capital murder conviction.[2]

We have reviewed both applications and find that applicant has failed to satisfy the requirements of Article 11.071, § 5(a). Accordingly, we dismiss both applications as an abuse of the writ without considering the merits of the claims.

IT IS SO ORDERED THIS THE 19TH DAY OF SEPTEMBER, 2018.

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[2] *See supra* note 1.

APPENDIX D

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NOS. WR-47,417-02 AND WR-47,417-03

EX PARTE HOWARD PAUL GUIDRY

ON APPLICATION FOR WRIT OF HABEAS CORPUS IN CAUSE NO. 1073163 IN THE 230TH DISTRICT COURT HARRIS COUNTY

Per Curiam.

O R D E R

These are post conviction applications for writ of habeas corpus filed pursuant to the provisions of Texas Code of Criminal Procedure article 11.071.

On March 21, 1997, applicant was found guilty of the capital murder of Farah Fratta, and was sentenced to death on March 26. In 1999, this Court affirmed his conviction on direct appeal. *Guidry v. State,* 9 S.W.3d 133 (Tex. Crim.App. 1999). In 2000, this Court denied applicant's application for habeas corpus. In 2003, the federal district court granted relief on a petition for writ of habeas corpus, ordering a new trial. *Guidry v. Dretke*, 2003 U.S. Dist. LEXIS 26199 (S.D. Tex. 2003) (relief based on the admission of what the district court found to be two illegally obtained confessions to police officers). The Fifth Circuit

affirmed on January 14, 2005. *Guidry v. Dretke,* 397 F.3d 306 (5th Cir. 2005). In applicant's second trial for capital murder, he was found guilty on February 22, 2007, and was sentenced to death on March 1 of that year. We affirmed his conviction. *Guidry v. State*, No. AP-75,633 (Tex. Crim. App. Oct. 21, 2009)(not designated for publication). On January 28, 2009, applicant timely filed in the trial court his initial application for writ of habeas corpus from his second conviction pursuant to Article 11.071. On October 25, 2010, applicant filed a "supplemental" application for writ of habeas corpus. Both of applicant's writs were received in this Court on April 12, 2012. In his initial writ, applicant presents two allegations challenging the validity of his conviction and resulting sentence. The trial court did not hold an evidentiary hearing. The trial court entered findings of fact and conclusions of law recommending that the relief sought be denied.

This Court has reviewed the record with respect to the allegations made by applicant. We adopt the trial judge's findings and conclusions. Based upon the trial court's findings and conclusions and our own review, we deny both allegations as procedurally barred.

Applicant's October 25, 2010 filing is a subsequent application that must be reviewed under Article 11.071, Section 5(a). We have reviewed the three claims. Applicant's claims fail to meet the dictates of Article 11.071, §5. Accordingly, we dismiss his subsequent application.

IT IS SO ORDERED THIS THE 27TH DAY OF JUNE, 2012.

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APPENDIX E

Cause No. 1073163-A

EX PARTE	§	IN THE 230TH DISTRICT COURT
	§	OF
HOWARD PAUL GUIDRY, Applicant	§	HARRIS COUNTY, TEXAS

RESPONDENT'S AMENDED PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Court, having considered the applicant's application for writ of habeas corpus, the Respondent's Original Answer, and official court documents and records in cause nos. 1073163 and 107316-A, makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. The applicant, Howard Paul Guidry, was indicted and convicted of the felony offense of capital murder in cause no. 1073163 in the 230TH District Court of Harris County, Texas.[1]

2. The applicant was represented during trial by counsel Loretta Muldrow and Tyrone Moncriffe.

3. On March 1, 2007, the trial court assessed the applicant's punishment at death by lethal injection after the jury affirmatively answered the first special issue and negatively answered the mitigation special issue (XVIII R.R. at 4-7).

4. On December 21, 2009, the Court of Criminal Appeals affirmed the applicant's capital murder conviction in an unpublished opinion. *Guidry v. State,* No. AP-75,633 (Tex. Crim. App. Dec. 21, 2009)(not designated for publication).

FACTS OF THE OFFENSE

5. The Court finds that, on November 9, 1994, the applicant shot and killed the

[1] The applicant was originally indicted and convicted of capital murder in 1997 in cause no. 830265 in the 230TH District Court of Harris County, Texas, but subsequently obtained federal habeas relief and was re-indicted in cause no. 1073163.

complainant, Farrah Fratta, in her garage after her estranged husband Robert Fratta, the applicant's co-defendant, sought the help of co-defendant Joseph Andrew Prystash to find someone to murder the complainant (XX R.R. at 33-100).

6. The applicant lived with his sister next door to Mary Gipp, co-defendant Prystash's girlfriend, at the Millstone Apartments, where Prystash often stayed and where he frequently talked to the applicant (XXI R.R. at 22-31).

7. On November 9, 1994, Gipp left her cell phone in her unlocked car when she got home from work and saw the applicant, dressed in dark clothing, waiting for Prystash (XX R.R. at 47-9, 53).

8. Prystash changed into black clothing when he arrived at the apartment and left driving a silver Nissan with a burned-out headlight (XX R.R. at 51-3).

9. Laura Hoelscher, the complainant's across-the-street neighbor, and her husband Daren heard a pop or gunshot and a woman scream a little after 8:00 p.m., saw the complainant fall beside her car inside her lighted garage across the street from the Hoelscher's front window, and then heard another pop (XX R.R. at 113-6, 141-4).

10. Hoelscher, who called 911, saw an average-size black man, about 5'7" or 5'8", who was wearing black clothes and standing by a bush by the complainant's garage, get into the passenger seat of a small silver/gray car with a burned-out headlight that pulled up to the curb a couple of minutes later (XX R.R. at 118-9, 124-32, 144-9).

11. The complainant suffered two gunshot wounds to the head: a non-fatal, close wound that entered and exited the left side of her head, and a fatal gunshot wound that entered the back of her head, perforated her brain and ended up in her right temporal lobe (XX R.R. at 203-9).

12. Robert Fratta, who arrived at the shooting scene with his children, stated that he had been to Wyatt's Cafeteria and St. Mary's Catholic Church with his children and gave consent for his car to be searched; $1,050 in cash was found in his glove box and an

address book with Mary Gipp's name was in his car (XX R.R. at 190, 194-8)(XXI R.R. at 123-6, 129-41).

13. Mary Gipp testified that Prystash returned to the apartment around 8:30 p.m.; that she saw the applicant going to his apartment when Prystash opened the door; that Prystash unloaded a gun, put the gun in the closet and put shell casings in the garbage; and, that Prystash again left the apartment that night and fixed the burned-out headlight on the Nissan the day after the murder (XX R.R. at 54-6, 66).

14. After Prystash left the apartment, Gipp retrieved the gun and wrote the following gun information on a blue piece of paper: Police Bulldog .38 S.P.L. Charter Arms Corp, Stratford, Connecticut, serial no. 771590; Gipp also retrieved the two shell casings from the trash but later threw them away (XX R.R. at 61-3).

15. Gipp did not make any phone calls on her cell phone on the day of the offense (XX R.R. at 44-5).

16. The State presented evidence of phone records showing numerous calls made the evening of the offense between Mary Gipp's cell phone to her home phone, Mary Gipp's cell phone to Robert Fratta's phone and a Wyatt's Cafeteria payphone, Mary Gipp's cell phone to the complainant's home phone, Mary Gipp's cell phone to a pay phone at Davis Food City, St. Mary's Magdalene Catholic Church phone to Robert Fratta's pager, and St. Mary's Magdalene Catholic Church phone to a pager leased by Mary Gipp for Prystash (XXI R.R. 92-107, 213).

17. Debra Normile Schaps, a volunteer at St. Mary Magdalene Church, testified about phone calls Fratta made from the church that evening in response to being paged (XX R.R. at 168-79).

18. On March 1, 1995, the applicant was carrying a backpack that he dropped immediately after he was taken into custody, and State's Exhibit 60, the Charter Arms Bulldog .38 Special, serial number 771590, was recovered from the applicant's backpack (XXI R.R. at 154-60). *See Finding No. 14, supra.*

19. A fired bullet fragment, State's Exhibit 50, was recovered from the garage floor near the complainant's car the night of the offense; a projectile, State's Exhibit 49, was recovered from a child's life preserver hanging on the complainant's garage wall; a deformed bullet, State's Exhibit 51, was recovered from the complainant's brain during autopsy (XX R.R. at 209, 227-30).

20. Charlie Anderson, firearms examiner, testified that he examined State's Exhibits 49, 50 and 51, the projectiles recovered at the scene of the offense and the projectile recovered from the complainant's body, and State's Exhibit 60, the Charter Arms Bulldog .38 Special recovered from the applicant's backpack, and, in Anderson's opinion, State's Exhibit 49, the projectile recovered from the life preserver in the complainant's garage, was fired in State's Exhibit 60 (XXI R.R. at 178-81).[2]

21. Federal records showed that Robert Fratta purchased State's Exhibit 60, the Charter Arms Bulldog .38, on October 31, 1982, and Lex Baquer, the complainant's father, identified State's Exhibit 60 as the gun the complainant asked him to keep at one point and the gun he returned to Robert Fratta in June, 1994 (XXI R.R. at 166-71, 195-8)(XXII R.R. at 91-2).

22. Scott Basinger testified as a defense expert during the punishment phase of the applicant's first trial in 1997, and, during his testimony at the applicant's second trial, Basinger acknowledged that he remembered answering affirmatively during the 1997 cross-

[2] During Robert Fratta's May, 2009 retrial, Robert Baldwin, firearms examiner, testified that he conducted ballistics testing on the partial projectile recovered from the complainant's body, a partial projectile recovered from the floor of the complainant's garage, a partial projectile recovered from a life jacket in the complainant's garage, and the Charter Arms .38 Special purchased by Fratta and recovered from the applicant at the time of his arrest. According to Baldwin, Charlie Anderson, the firearms examiner who had previously examined the cited evidence, was in poor health; Baldwin further noted that his opinion was not based on Anderson's previous testing. In Baldwin's opinion, the partial projectile recovered from the garage floor was too deformed to make a comparison. Although the partial projectiles recovered from the life jacket and the complainant's body were also damaged, Baldwin determined that both projectiles have similar class characteristics common to a Charter Arms .38 Special. The Respondent provided a copy of Baldwin's testimony to both the applicant's habeas counsel and Prystash's habeas counsel on May 26, 2009. *See State's Writ Exhibit A, certified letter to habeas counsel.*

examination when asked if the applicant told him that he had shot the complainant twice in the head (XXII R.R. at 6-11).

23. Nyandre Perry, a jail inmate, testified that he met the applicant around November, 1994; that the applicant gave him a .38 Police Bulldog revolver in late November, 1994; and, that Perry kept the gun at his mother's house until March 1, 1995 (XXII R.R. at 14-25, 30-6).

24. Kenno Henderson, a jail inmate, testified that he met the applicant when Nyandre Perry introduced them around Christmas, 1994; that he, Perry and the applicant were in a car about a month before March 1, 1995, and the applicant told Perry some guy owed him $1,000 for doing something (XXII R.R. at 41-54).

DEFENSE EVIDENCE AT GUILT-INNOCENCE

25. Denise Everett, the applicant's sister, testified that she and the applicant grew up in Abbeville, Louisiana; that she moved to Houston in 1990; that the applicant moved in with her in August, 1994; that she lived next door to Mary Gipp at the Millstone Apartments; and, that Joseph Prystash often stayed with Gipp (XXII R.R. at 100-2).

26. Francisco Avila, Harris County Sheriff's deputy, testified that he was familiar with the daily operations of the Harris County Jail and that the *Houston Chronicle* was accessible to inmates on a daily basis (XXIII R.R. at 6).

PUNISHMENT EVIDENCE

27. Punishment evidence was presented that the applicant was arrested for burglarizing cars in a parking lot in Abbeville, Louisiana when he was sixteen; that a .380 handgun with two rounds in the magazine were recovered from the applicant's father's car located in the same parking lot as the burglarized cars; that the applicant was arrested close to a pickup under which a ten-inch steel knife was recovered; and, that the applicant was adjudicated a delinquent and given a suspended sentence (XXIV R.R. at 28-40, 42-6, 57-60).

28. On February 11, 1995, a Houston Auto Zone store was robbed by two armed black males, one wearing a ski mask and one not wearing a mask; the masked man's gun, State's Exhibit 83, was fired during the robbery and a .380 caliber shell, State's Exhibit 151, was recovered from the store after the robbers fled in a gray Ford Escort with Louisiana plates (XXIV R.R. at 61, 98, 109, 112-4).

29. On March 1, 1995, the applicant and three other men robbed the Klein Bank of approximately $20,000; the applicant was arrested after being pursued on foot when the applicant ran from the gray Ford Escort that stopped after being chased by two motorcycle police officers after the robbery (XXIV R.R. at 126-31, 141, 154, 157, 178-9, 198).

30. The applicant was carrying a backpack from which packets of wrapped money fell while the applicant was fleeing; bundles of money with the bank wrappers still on them were recovered from the applicant's pockets when he stopped fleeing; the applicant's backpack contained three ski masks, approximately $20,000, a .380 live round, and three guns: State's Exhibit 60, the Charter Arms .38 Police Bulldog firearm; State's Exhibit 82, an Arminius gun loaded with 6 live rounds, and State's Exhibit 83, a flat gun that looked like a machine gun (XXIV R.R. at 210-5,220-7).

31. Robert Baldwin, firearms examiner, tested State's Exhibit 83, the Cobra M12 .380 semiautomatic recovered from the applicant's backpack; State's Exhibit 82, the Arminius revolver recovered from the applicant's backpack; State's Exhibit 60, the Charter Arms .38 recovered from the applicant's backpack; State's Exhibit 152, a fired .38 Plus P cartridge recovered from the driver's seat of the Ford Escort; and, State's Exhibit 151, a fired .380 auto Fiocchi brand cartridge case recovered from the Auto Zone robbery (XXIV R.R. at 118-21).

32. In Baldwin's opinion, State's Exhibit 151 [recovered from Auto Zone robbery] was fired from State's Exhibit 83, the .380 auto recovered from the applicant's backpack; Baldwin was not able to identify State's Exhibit 152 [recovered from Ford Escort after Klein Bank robbery] to either firearm but he was able to eliminate it as having been fired from

State's Exhibit 60; Baldwin could not eliminate State's Exhibit 152 as being fired in State's Exhibit 82, the Arminius revolver, although he could not definitely say that it was (XXIV R.R. at 121).

33. The applicant gave a written statement, State's Exhibit 157, admitting that he and three other men robbed the Klein Bank using his sister's gray Ford Escort (XXIV R.R. at 38-41).

34. On January 12, 1997, the applicant was charged with felony aggravated assault of a public servant after he attacked a deputy in the Harris County Jail and two other deputies were needed to get the struggling applicant off the attacked deputy (XXIV R.R. at 44-62).

35. On November 27, 1998, the applicant and six other inmates housed in a high security unit at Ellis I, a prison unit in Huntsville, planned and attempted to carry out an elaborate escape from the prison unit (XXIV R.R. at 239-51).

36. On July 6, 1999, the applicant refused to pass his food tray to a correctional officer at the Terrell Unit – a violation of rules because objects on the tray can be used as weapons (XXVI R.R. at 46-9).

37. On February 21, 2000, the applicant and inmate Ponchai Wilkerson took correctional guard Jeannette Bledsoe hostage at the Terrell Unit and held her for over thirteen hours while they repeatedly threatened to kill her (XXV R.R. at 131-242).

38. The applicant grabbed Bledsoe by the feet, slung her across the floor, put a weapon – a steel rod with a sharpened point - at her throat, and threatened to kill her when a prison response team got close to the dayroom where the applicant and Wilkerson were holding Bledsoe hostage(XXVI R.R. at 37).

39. During the hostage situation, the applicant tried to stab Michael Countz, one of the hostage negotiators, in the stomach with his sharpened metal weapon and just missed by inches (XXV R.R. at 254-6).

40. On June 1, 2000, the applicant was verbally aggressive to Terrell Unit correctional officer Paul Tolley and charged Tolley when the cell door opened, pinned him to the wall, and started to kick him before being subdued by another officer (XXVI R.R. at 50-5).

41. On September 7, 2003, a sharpened spoon was found hidden in a rolled magazine in the applicant's cell at the Terrell Unit, and a black widow spider was found inside a jar in the applicant's cell – both violations of prison rules (XXVI R.R. at 59-65).

42. On June 8, 2004, a handcuff key was found in the applicant's shoe during a strip search at the Terrell Unit (XXVI R.R. at 68-71).

43. On July 30, 2005, a stinger – two razors fastened to the end of an extension cord – was found in the applicant's cell (XXVI R.R. at 76-7).

44. On September 28, 2006, an altered hot pot device – a potential weapon that can be used to heat water beyond the normal limit so that boiling water could be thrown on someone - was found in the applicant's cell at the Harris County Jail; also, three broken razors were found in the applicant's cell with one razor attached to a comb – a potential weapon (XXVI R.R. at 79-82).

DEFENSE PUNISHMENT EVIDENCE

45. Mary Diggs, the applicant's head-start teacher in Abbeville, Louisiana when he was four years old, testified that the applicant helped a scared child climb down the monkey bars while in head-start; that the applicant was a sickly child with asthma and more of a follower; and, that he often sent her drawings he had done (XXVI R.R. at 86-90).

46. Dana Comeaux, the applicant's cousin, testified that she knew the applicant's parents and spent time in his home in Louisiana; that the applicant loved wieners and smoked sausage; that the applicant, who had asthma as a child, used a nebulizer and stayed in the house a lot; that the applicant played baseball; that he became interested in art as he got older and drew a picture of Rosa Parks for her; that she often talked to the

applicant on the phone while he was in custody and he was always upbeat; and, that the applicant encouraged her children in the right direction (XXVI R.R. at 94-100).

47. Harold Jones, retired Navy, testified that he recruited the applicant into Sea Cadets, an organization Jones started in Abbeville, Louisiana, to give youngsters an opportunity and direct them to the Navy; that the applicant was a leader and helpful to others; that Jones thought he would make a good Navy SEAL but he failed his physical because of "high blood;" and, that he moved to Houston to live with his sister and supposedly to join the Texas National Guard (XXVI R.R. at 120-6).

48. Joyce Guidry, the applicant's mother, testified that she was a former baker and her deceased husband was a truck driver; that she had a hard pregnancy with the applicant who had severe asthma but it did not prevent him from trying to have a normal childhood of playing baseball and swimming; that the applicant struggled in school and missed a lot of head-start but not too much after head-start; that she did not know if the applicant was using drugs when he was caught breaking into cars; that he moved to Houston to live with his sister Denise and become an X-ray technician; and, that Denise obtained a college degree and had a good job working with computers (XXVI R.R. at 130-7).

First Ground: Batson claim

49. The Court finds that the applicant presents the following arguments in his *Batson* claim: that the State's strike of Matthew Washington, prospective juror #154, was allegedly not race-neutral; that the State allegedly cannot strike prospective juror Washington for relating his experiences as a black male, as seated jurors #94 and 97 allegedly did; and, that two prospective jurors, #79 and #149, were members of Lakewood Church, as was Washington, and were acceptable to the State.

50. The Court finds that the applicant's advanced his *Batson* claim on direct appeal of his conviction and that the Court of Criminal Appeals rejected the claim, noting that the trial court's credibility finding concerning the prosecutor's race-neutral explanations will not be overturned unless clearly erroneous and that the record does not indicate that the trial

court's ruling that the prosecutor's reasons for the strike of Washington were race-neutral was clearly erroneous. *Guidry,* slip op. at 9-10.

ETHNICITY OF SEATED, ALTERNATE, AND STRUCK JURORS

51. The Court finds, based on the race listed by the prospective jurors on the short juror information form, the following jurors were seated in the applicant's case – a total of 8 white, 2 black, 1 Hispanic, and 1 Asian jurors:

SEATED JURORS	SEATED JURORS	SEATED JURORS	SEATED JURORS
#9 Elizabeth Ximenez Hispanic	#19 Todd Harmon black	#27 Robert Gillette white	#43 Cal Monteith white
#81 Melton Brock white	#94 Dereck Culver white	#97 Walter Crofton black	#103 March White white
#114 John William Reihl white	#117 Gengshen Liu Asian	#144 Nicholas Goodwin white	#164 Deborah Castillo white

52. The Court finds, based on the race listed by the prospective jurors on the short juror information form, that the following were seated as alternate jurors: (XIX R.R. at 58-9, 74-5).

ALTERNATE JUROR	ALTERNATE JUROR
#166 Gayle Morrison white	#168 Richard Masis Pacific Islander

53. The Court finds, based on the race listed by the prospective jurors on the short juror information form, the following prospective jurors were challenged and excused for cause by the applicant:

EXCUSED FOR CAUSE BY APPLICANT	EXCUSED FOR CAUSE BY APPLICANT	EXCUSED FOR CAUSE BY APPLICANT
#20 Irma Friedrichs Hispanic	#39 Carla Craig white	#73 Charlene Dean white
#76 Kathleen Natalson white	#86 Margo McFarland white	#145 Christopher Mesbit white

54. The Court finds, based on the race listed by the prospective juror on the short juror information form, the following prospective juror was challenged and excused for cause by the State:

EXCUSED FOR CAUSE BY STATE
#155 Rebecca Alanis Hispanic

55. The Court finds, based on the race listed by the prospective jurors on the short juror information form, the following prospective jurors were peremptorily struck by the applicant:

PEREMPTORY STRIKES BY APPLICANT	PEREMPTORY STRIKES BY APPLICANT	PEREMPTORY STRIKES BY APPLICANT
#42 Marilyn Osborne white	#55 Jonathan Lynn Green white	#56 Robin Richardson white
#60 Cod Shaklee white	#79 Lucinda Gandara Hispanic	#131 Karen Hill white
#139 Luis Gonzalez Hispanic	#145 Kenneth Pepperdene white	#149 Santos Gomez Hispanic
#151 Linda Winfree white	#153 Bobby Atnip white	_ _ _ _ _ _ _ _ _ _

56. The Court finds, based on the race listed by the prospective jurors on the short juror information form, the following prospective jurors were peremptorily struck by the State:

PEREMPTORY STRIKE BY STATE	PEREMPTORY STRIKE BY STATE	PEREMPTORY STRIKE BY STATE	PEREMPTORY STRIKE BY STATE
#90 Betty Wright white	#96 Carl Farnie white	#104 Bonnie Stasney white	#154 Matthew Washington black

57. The Court finds, based on the *voir dire* record, that Betty Wright, a white prospective juror struck by the State, was not sure if she could make a death penalty decision (XIX R.R. at 44-6); that Carl Farnie, a white prospective juror struck by the State, said he "could not imagine doing anything more than a life sentence (XIV R.R. at 78, 82); and, that Bonnie Stasney, a white prospective juror struck by the State, stated that a reason could always be found for why someone went in the wrong direction and that she got into counseling to help people (XV R.R. at 91-2).

58. The Court finds that any prospective jurors excused by agreement between the applicant and the State are not included among the comparative analysis.

***VOIR DIRE* AND STATE'S STRIKE OF PROSPECTIVE JUROR MATTHEW WASHINGTON - #154**

59. The Court finds that, during *voir dire* examination, prospective juror Matthew Washington stated that he attended the Lakewood Church about twice a month; that he also attended when the father of Joel Osteen (the present minister) was there; and, that his wife bought Joel Osteen's books (XVIII R.R. at 151-2).

60. The Court finds that Washington also asserted during *voir dire* that his wife's car was towed because the handicapped sticker fell down; the tow truck driver said Washington's wife arrived during the towing and pushed him; and, charges were filed against Washington's wife but Washington thought they were dropped (XVIII R.R. at 155).

61. During *voir dire,* Washington stated that his brother was a police officer in Travis County, Washington, but Washington had no interest in law enforcement and did not think about his brother's job a lot (XVIII R.R. at 152-3).

62. During *voir dire,* Washington stated that he knew somebody in high school who went to prison for drugs; that he thought that prison could possibly rehabilitate people; that people committed violent crimes because of lack of education and opportunities; that it might not be their fault a lot of times; that it depended on the circumstances in which the person grew up; and, that a lot of times someone could drop out of school, not be able to get a job, commit a violent crime to get money, be out stealing and just happen to have a

gun and shoot someone if that person tried to stop them even though the shooter might not have intended to kill anybody (XVIII R.R. at 157-60).

63. After being asked about his membership in the NAACP during *voir dire* examination, Washington stated that he went to meetings here and there, mostly "political" stuff; that he went to meetings about once a month from his family's home in Burleson County; and, that his parents attended meetings all the time (XVIII R.R. at 161).

64. The Court finds that, when the State proceeded to question Washington about the NAACP's stance on the death penalty, Washington said that he went to meetings "maybe once, twice a year," that he could not say what the NAACP's "overall" position on the death penalty was; but, that Washington acknowledged that the Legal Defense Fund was part of the NAACP and that one of the Fund's primary goals was opposition to the death penalty (XVIII R.R. at 163).

65. The Court finds that Washington's *voir dire* statements about the NAACP occurred after he was asked what he thought about the death penalty and he stated that "I suppose it would warrant it," meaning if the crime was sufficiently heinous (XVIII R.R. at 161).

66. The Court finds that, during *voir dire,* the prosecutor specifically stated that she was asking questions about Washington's involvement in the NAACP because he had listed his involvement in a group opposed to the death penalty (XVIII R.R. at 165).

67. The Court finds that, when the prosecutor asked Washington if he thought he would be able to tell NAACP members and his parents that he voted to give another black man the death penalty, Washington said, "yes, I think I would," but that the prosecutor noted that Washington hesitated before answering the question (XVIII R.R. at 165).

68. The Court finds that, during *voir dire,* Washington stated that he had been discriminated against at work concerning promotions; that there was maybe one non-Caucasian in the group of seven or eight people who decided promotions; and, that he had been passed over twice by people who were white (XVIII R.R. at 166).

69. The Court finds that, during *voir dire,* Washington stated that "in everyday life you can be treated like somebody is trying to avoid you or like you don't really matter," and that people working in a nice store could walk right by and not even say anything but would speak to "non-black" people right away (XVIII R.R. at 167).

70. The Court finds that, in response to question 68 on the juror questionnaire form [In your opinion, how are Blacks treated in America today?], Washington answered, "in a lot of cases as second class citizens, mostly in corporate America."

71. The Court finds that, during *voir dire*, Washington stated that he thought that money affected the justice that some people received (XVIII R.R. at 168).

72. The State moved to exercise a peremptory strike at the conclusion of Washington's *voir dire* examination, and trial counsel made a motion after Washington was outside the room, stating that Washington was an African-American, a member of a protected class, and requested that the State give the basis of its decision (XVIII R.R. at 171-2).

73. The Court finds that the trial counsel did not argue or attempt to show that the State's strike of Washington was racially motivated; instead, trial counsel asked the trial court "to inquire of them on what grounds they base their decision" (XVIII R.R. at 172).

74. The Court finds that the prosecutor stated that she and co-counsel had a running agreement to try their hardest not to put anyone on the jury who goes to Lakewood Church and that Washington seemed a pretty devout member, and that Washington's explanation as to why people commit violent crimes did not justify violent crimes (XVIII R.R. at 172).

75. The Court finds that the prosecutor also cited, as reasons for striking Washington, his discrimination at work by a mostly white group and his being passed over for promotions by white people, his description of blacks being treated as second-class citizens in everyday life, and the contrast between his attitude and the attitude of two black men who had been seated on the jury (XVIII R.R. at 173).

76. The Court finds that the prosecutor also cited Washington's hesitation in answering the prosecutor's questions and his not seeming comfortable answering them and noted that she did not get a good feeling when talking to Washington as she did when talking to the accepted jurors (XVIII R.R. at 173).

77. The Court finds that the prosecutor also noted that Washington's knowing Jeff Strange, a white prosecutor in Fort Bend County, did not mean anything (XVIII R.R. at 173).

78. The Court finds that the prosecutor further noted the fact that Washington was an active member in the NAACP to the extent that he goes home to attend meetings that his parents never miss; that one of the NAACP's stated objections is opposition to the death penalty; that Quanell X is a supporter of the NAACP in Houston and the prosecutor was sure Washington knew who Quanell X was; and, that Quanell X might be a witness in the applicant's case because the applicant wanted to talk to him when the applicant took a guard hostage on death row (XVIII R.R. at 174).

79. The Court finds that the prosecutor did not state that she always struck members of Lakewood Church, as evidenced by the State's acceptance of prospective jurors #79 and #149; that the prosecutor specifically stated that Washington's membership was "one reason" that scared me about the man" (XVIII R.R. at 172); and, that the record supports the prosecutor's assertion that Washington's membership in Lakewood Church was one among several reasons the prosecutor offered as a basis for the peremptory strike.

80. The Court finds that the prosecutor articulated several other reasons for striking Washington: his explanations for why people commit violent crimes, his experience of discrimination, his hesitancy in answering questions, his appearance of discomfort while answering questions, his membership and involvement in the NAACP – an organization against the death penalty - and his likely familiarity with potential witness Quanell X, an anti-death penalty activist.

81. The Court finds that the trial court, after the State listed its reasons for exercising a peremptory strike against Washington, concluded that the "State has exercised their strikes fairly and exercised for the right reasons other than race neutral (sic)" (XVIII R.R. at 175).

82. The Court finds that, on direct appeal of the applicant's conviction, the Court of Criminal Appeals noted that the applicant "did not attempt to demonstrate that the State's reasons were pretextual, and explicitly stated that it neither objected to nor desired to change the court's decision" (XVIII R.R. at 172). *Guidry,* slip op. at 9.

83. The Court finds that Washington was prospective juror #154 out of a little over 160 prospective jurors, and he was the only African-American struck by the State.

COMPARATIVE ANALYSIS OF PROSPECTIVE JURORS #79 AND #149 – MEMBERS OF LAKEWOOD CHURCH – TO STATE'S STRIKE OF WASHINGTON

84. The Court finds that prospective jurors #79 and 149 were peremptorily struck by the applicant (XIII R.R. at 127)(XVIII R.R. at 107).

LUCINDA GANDARA - # 79 – DEFENSE STRIKE

85. The Court finds that, during *voir dire* examination, Lucinda Gandara, prospective juror #79, stated that she grew up in the Catholic Church but recently started going to Lakewood, and that gave herself a 7 out of a scale of 1 through 10, with 10 being someone who always gave the death penalty and 1 being someone who never gave the death penalty (XIII R.R. at 103-4).

86. Gandara stated that she did not have good role models and "ran the streets" when younger, but she certainly never had any inclination to kill anyone; that she managed put herself through college even though she came from a dysfunctional family, had no real guidance, and her father was an abusive alcoholic (XIII R.R. at 98-106).

87. The Court finds that Gandara thought that people have to take responsibility for their actions even though there might be mitigating circumstances (XIII R.R. at 100, 105-6)(XVIII R.R. at 172).

88. The Court finds that Gandara had previously served on a jury where the defendant was black and there was one female black juror who did not want to convict, and that the black juror kept talking about mitigating circumstances but Gandara "couldn't see that" and thought race was an issue (XIII R.R. at 106).

89. In response to trial counsel's *voir dire* questions, Gandara said that she would "kind of wonder" why the defense was not saying anything [presenting evidence] if the prosecutor proved its case beyond a reasonable doubt (XIII R.R. at 119-20).

90. The Court, based on Gandara's *voir dire* examination, finds that Gandara was a desirable State's juror and far from desirable defense juror: she did not tolerate excuses or justifications and would "wonder" why the defense chose not to present evidence.

91. Trial counsel challenged Gandara for cause and the trial court denied the challenge (XIII R.R. at 120).

92. The Court finds that trial counsel continued *voir dire* examination of Gandara and questioned Gandara's questionnaire responses concerning her thoughts that blacks have more tendency to be more violent than other races; that some people have been sentenced to life when they should have maybe gotten death; and, that it was a burden on taxpayers to support them the rest of their life (XIII R.R. at 126-7).

93. The Court finds that trial counsel exercised a peremptory strike against Gandara (XIII R.R. at 127).

94. The Court finds that it is reasonable of the State not to exercise a peremptory strike against Gandara when it was evident that the defense would likely strike her, and the Court further finds it reasonable that the State would not exercise a peremptory strike against a desirable State's juror, such as Gandara.

95. The Court finds that the State's lack of a peremptory strike against Gandara, who stated that she had recently began attending Lakewood Church, shows that the State did not make automatic strikes based on attendance at Lakewood Church, regardless of prospective jurors' race; that attendance was only a factor among many factors; and, that

the State considered prospective jurors' *voir dire* in their entirety when exercising challenges, strikes, and acceptance.

96. The Court finds that the State did not strike Gandara, an Hispanic, who gave consistent State's-oriented responses in contrast to Washington's consistently defense-oriented *voir dire.*

SANTOS GOMEZ - # 149 – DEFENSE STRIKE

97. The Court finds that, during trial counsel's *voir dire* examination, prospective juror Santos Gomez stated that "something had to have happened for [the applicant] to be here today" (XVIII R.R.at. at 100).

98. The Court finds that Gomez thought that blacks were more violent than other racial groups, based on what Gomez read in the papers and saw on TV, not based on his personal feelings, and that Gomez initially stated that he could not consider probation for someone who intentionally took a life, although he changed his stance after the trial court went over an earlier hypothetical (XVIII R.R. at 100-2).

99. The Court finds that Gomez thought that the best argument for the death penalty was that if someone took a life, his should be taken (XVIII R.R. at 104).

100. The Court finds that Gomez gave answers indicating that he would not consider mitigation and would go straight to the death sentence but again backtracked, claiming misunderstanding, when questioned more by the trial court after trial counsel moved to strike him for cause (XVIII R.R. at 105-6).

101. The Court finds that Gomez, who indicated on his questionnaire that he went to Lakewood Church one to three times a month, sometimes less, stated that he could not be sure that he would not have an anxiety attack at trial (XVIII R.R. at 94, 107).

102. The Court finds that trial counsel exercised a peremptory strike against Gomez (XVIII R.R. at 107).

103. The Court finds, based on Gomez's *voir dire* examination, that Gomez was less than an ideal defense juror.

104. The Court finds that it is reasonable of the State not to exercise a peremptory strike against Gomez when it was evident that the defense would likely strike him.

105. The Court finds that the State's lack of a peremptory strike against Gomez, who indicated that he attended Lakewood Church one to three times a month, shows that the State did not make automatic strikes based on attendance at Lakewood Church, regardless of prospective jurors' race; that attendance was only a factor among many factors; and, that the State considered prospective jurors' *voir dire* in their entirety when exercising challenges, strikes, and acceptance.

106. The Court finds that the State did not strike Gomez, an Hispanic, who exhibited an anti-defense orientation, in contrast to Washington's consistently defense-oriented *voir dire.*

107. The Court finds that it is reasonable for the State to find prospective jurors Gandara and Gomez acceptable to the State based on their not being acceptable to the defense, positions independent of their attendance at Lakewood.

108. The Court finds that the State's reasonable and race-neutral decisions not to exercise peremptory strikes against Gandara and Gomez do not obviate or impact the State's decision and race-neutral reasons to exercise a peremptory strike against Washington.

COMPARATIVE ANALYSIS OF SEATED JURORS #97 AND 94 (SIC) TO WASHINGTON RE EXPERIENCES AS "BLACK" MEN

DERECK CULVER - #94 – SEATED JUROR

109. The Court finds that prospective juror #94, Dereck Culver, listed his race as white on the juror information form.

110. The Court finds that, on Culver's juror information form, Culver answered question 65 [Have you, a family member or close personal friend ever been discriminated against in anyway?] by stating "to (sic) white for black community and to (sic) black for white community.

111. The Court finds that, during Culver's *voir dire* examination, he stated that he was in a rap/hip-hop music group and that he had a bad experience with law enforcement "[t]hinking my friends were criminals because of color" (XIV R.R. at 55-6).

112. The Court finds that, during Culver's *voir dire* examination, he stated that the "crowd of people that we were surrounded with mostly [was] African-American and Hispanic" (XIV R.R. at 56), but Culver affirmed that it would not affect him, that everyone had "their little hang-ups" but he did not think like that or look at people that way (XIV R.R. at 57).

113. The Court finds that Culver identified himself as white and did not relate his experiences as a "black" male in society.

114. The Court finds that the State did not list having family members in prison as a reason for striking prospective juror Washington so seated juror Culver having family who served time in prison is not relevant for comparison purposes.

WALTER CROFTON – # 97 - SEATED JUROR

115. The Court finds that, during the State's *voir dire* examination, when Walter Crofton, juror #97 and a black male, was asked about his answer on the questionnaire about how blacks are treated in America today, the following exchange occurred:

> Q And then we asked you the question, in your opinion, how are blacks treated in America today? And your answer was, Depends on who you ask. What were you thinking about when you answered that way?
>
> A Well, because some people you can ask and all they have is complaints. You know, they never see the good side of anything. And maybe they have a rough life or have problems with people or don't know how to communicate with people. And so it just depends on when you ask them and what time you ask. Because some of us go through a lot of changes and it doesn't matter because you're black or white. I don't know, I guess it's just your life and how you live it.
>
> Q How about you, how would you answer the question? Asking you, how are blacks treated in America today?
>
> A How would I answer, me personally?

Q Yes, sir.

A I would say I'm treated fair to where I am now for what I'm doing. But then if I looked at the other side of how some people did, I would say no. But that's a decision that person would have to make. Because like, say, the question about the prejudices, I never really, say, just experience it although I know it's always around and it's always there. Prejudice doesn't necessarily have to come from another race. It could be one of your own. It's just like I say, just how you perceive your life. You just have to work with it. You have to make it work with you.

Q Mr. Crofton, I think we have this question in here to get to this next question.

A Okay.

Q Do you think based on your life experience and people that are close to you, blacks are treated unfairly as far as their involvement with the criminal justice system?

A Well, that's kind of like a hard question because – well, if you listen to a lot of outside conversation, then, yes, but like the Judge said, if you think to yourself and just rely on yourself and your own decision then, no, because sometimes they get treated because of what they do. And if you do these things, then you know there's a consequence and nobody can just say, I guess, determine how easy or how hard it's going to be or how your life is going to be if you choose to do these things. So you have a choice.

(XV R.R. at 40-2).

116. The Court finds that juror Crofton's responses concerning his experiences as a black male are significantly different from prospective juror Washington who gave specific examples of being discriminated against by non-blacks and being passed over for promotions by whites.

117. The Court finds, based on Crofton's *voir dire* and juror information, that he did not assert any specific slights or discrimination that he personally encountered as a black male and noted that an individual had to chose how to live his life, and the Court finds that Crofton's significantly different responses than Washington's affirm the prosecutor's assertion that there was a difference between Washington's attitude and the attitude of the two seated black jurors.

118. The Court finds that juror Crofton, during *voir dire* examination, repeatedly affirmed that committing a crime was a matter of choice, (XV R.R. at 58-9).

119. The Court finds that the State did not list having family members in prison as a reason for striking prospective juror Washington so seated juror Crofton having family who served time in prison is not relevant for comparison purposes.

TODD HARMON - #19 – SEATED JUROR

120. The Court finds that the experiences of Todd Harmon, a seated juror, #19 and a black male,[3] are also different than the experiences of Washington as a black male.

121. The Court finds that, during *voir dire* examination, Harmon related that the military made him a better person and more responsible; that he thought about going into law enforcement after the military but did not because of the pay; and, that the death penalty was necessary in certain circumstances (VIII R.R. at 34-5, 38).

122. The Court finds that even though Harmon had an uncle who had been in and out of prison, Harmon stated that his uncle "chose the wrong path," and he did not think that his uncle had been treated unfairly by anyone in the system (VIII R.R. at 36, 39).

123. The Court finds that Harmon did not think that an indictment meant that someone was guilty; that he strongly believed that a person is innocent until proven guilty; that he thought that he could answer the first special issue "no" based on the evidence even it was against eleven other jurors; and, that "people have been known to change" and he would have to consider that (VIII R.R. at 43-54).

124. The Court finds that Harmon, unlike Washington, related no experiences of daily discrimination or job-related discrimination as a black male; that Harmon's response to question 68 on the juror questionnaire form - that "some [blacks] are stereotyped" - does not relate specific discrimination; and, that Harmon's significantly different responses than

[3] Todd Harmon, juror #19, was a black male accepted by the State and was a seated juror. Although the applicant refers to #94, Dereck Culver a white male, when arguing that the State did not exercise peremptory strikes against two black seated jurors, based on their experience as black males, the comparative analysis of jurors includes #19, Todd Harmon, a seated black juror.

Washington's affirm the prosecutor's assertion that there was a difference between Washington's attitude and the attitude of the two seated black jurors.

COMPARATIVE ANALYSIS CONCERNING WASHINGTON'S NAACP MEMBERSHIP

125. The Court finds that, during *voir dire* examination of prospective juror Washington, the prosecutor explored and questioned Washington's degree of involvement in the NAACP and the organization's political views toward the death penalty, not its racial views (XVIII R.R. at 161-3).

126. The Court finds that, after questioning Washington about his involvement in the NAACP, the prosecutor explained that the juror's NAACP membership concerned her because the NAACP seeks to abolish the death penalty in the United States (XVIII R.R. at 174).

127. The Court finds that a prospective juror's feelings toward the death penalty is a legitimate concern in a death penalty case.

128. The Court finds, according to the juror questionnaires of all seated jurors, alternate jurors, prospective jurors struck by the applicant, prospective jurors struck by the State, and prospective jurors excused for cause by the applicant and the State, that Washington is the only person who listed membership in the NAACP or any other organization that is generally regarded as being opposed to the death penalty.

129. The Court finds that, during *voir dire* examination, Washington gave various answers concerning how often he attended NAACP meetings (XVIII R.R. at 162-3, 174).

130. The Court finds that the applicant did not controvert the prosecutor's assertions during *voir dire* concerning the prosecutor's observations and reasons for striking Washington.

131. The Court finds that the record supports the prosecutor's assertion that the strike of Washington was based, in part, on his association with an organization opposed to the death penalty, rather than being based on race or on the NAACP being an organization with black members, as well as members of other races.

132. The Court finds that the prosecutor's strike of Washington is factually distinguishable from the situation in *Sommerville v. State*, 792 S.W.2d 265, 267-9 (Tex.App. – Dallas 1990, pet. ref'd), where the State struck a black juror without questioning his degree of involvement in the NAACP, his knowledge of the NAACP's involvement with the D.A.'s office, and his ability to follow the law and where the struck juror was a desirable State's juror for a case involving rape since the juror had a relative who had been raped and since the juror indicated that the defendant was likely guilty because he had been indicted.

CLIMATE OF ALLEGED RACISM AND SEXISM AT DISTRICT ATTORNEY'S OFFICE

133. The Court finds that the applicant fails to note or show that any personal misdeed of any former elected District Attorney is professionally attributed to over two hundred prosecutors, including the prosecutors in the applicant's case.

134. The Court finds that the applicant fails to show historical evidence of racial bias in the selection of Harris County juries in contrast to the situation in *Miller-El* where the Dallas District Attorney's Office at that time relied on a manual for jury selection that outlined reasons for excluding minorities from a jury. *See Miller-El v. Dretke,* 545 U.S. 231 (2005).

RACE-NEUTRAL STRIKE OF PROSPECTIVE JUROR MATTHEW WASHINGTON - #154

135. The Court finds that *voir dire* examination of Washington and a comparison of Washington with cited prospective and seated jurors show that the prosecutor's single strike of a black male, made on the last day of jury selection to prospective juror #154, out of a little more than 160 prospective jurors, was race-neutral and that the trial court's finding that the prosecutor's strike of Washington was race-neutral is not clearly erroneous.

Second Ground: testimony of Scott Basinger:

136. The Court finds that, on direct appeal of the applicant's conviction, the Court of Criminal Appeals rejected the applicant's claim – that he now advances on habeas - that the

admission of Scott Basinger's testimony violated his rights, pursuant to U.S. CONST. amend. V. and TEX. CODE CRIM. PROC. art. 38.23.

137. The Court finds that, during the applicant's first trial in 1997 for the capital murder of the complainant, the applicant hired Dr. Scott Basinger, Ph.D. as a mitigation expert; that Basinger testified at punishment during the 1997 trial concerning the applicant's drug use; and, that Basinger acknowledged during cross-examination that the applicant admitted to Basinger that he had shot the complainant twice in the head (XXVI 1R.R. at 293-313).[4]

138. The Court finds that, after the applicant's 1997 conviction for capital murder, the applicant obtained habeas relief from a federal district court based on the admission in the applicant's first trial of his illegally obtained confessions, and the applicant's case was remanded to the trial court for a new trial. *See Guidry v. Cockrell,* No. H-01-CV-4140 (S.D. Tex. Sept. 11, 2002 (not designated for publication), *aff'd, Guidry v. Dretke,* 397 F.3d 306 (5TH Cir. 2005).

139. The Court finds that on July 17, 2006, during pretrial motion hearings before the applicant's second trial for the capital murder of the complainant, the trial court denied the applicant's motion to quash the State's subpoena of Basinger – a motion for which the applicant argued that Basinger's 1997 testimony would not have been available to the State but for the applicant's conviction that the federal district court subsequently overturned (IV R.R. at 4, 8-11).

140. The Court finds that, during the applicant's second trial, the State, over objection, called Basinger as a guilt-innocence witness; that Basinger acknowledged that he testified as a defense expert for the applicant in 1997; that he remembered the prosecutor asking him in 1997 if the applicant told Basinger that he shot the complainant in the head

[4] The appellate record of the applicant's first trial is cited as "1R.R."

two times; and, that Basinger acknowledged that he answered the question affirmatively in 1997 (XXII R.R. at 8-11).

141. The Court finds that, during direct appeal of the applicant's conviction, the Court of Criminal Appeals found that Basinger interviewed the applicant in 1997 as a defense expert to obtain possible mitigation evidence for punishment; that Basinger was not acting on behalf of the police; and, that the Fifth Amendment was not directly implicated. *Guidry,* slip op. at 3-4.

142. The Court finds that defense counsel, acting as effective counsel, would have prepared mitigation evidence regardless of whether the applicant confessed to the offense; and, that the applicant's statement to Basinger was not compelled by the State's use of the applicant's confession during the applicant's first trial.

143. The Court finds that there was evidence to charge and convict the applicant with capital murder, notwithstanding the applicant's confession that was later found to be involuntary, as evidenced by the jury's finding of guilt when the applicant was re-tried without the use of his confession.

144. The Court finds that, on direct appeal of the applicant's conviction, the Court of Criminal Appeals found that the applicant's case is distinguishable from the circumstances in *Harrison v. United States,* 392 U.S. 219, 220-6 (1968), where the Supreme Court reversed Harrison's second conviction, holding that Harrison only testified to overcome the impact of his confessions that were subsequently found to have been illegally obtained and his former testimony was introduced into evidence during his second trial. *Guidry,* slip op. at 4 n.10.

145. The Court finds that, on direct appeal of the applicant's conviction, the Court of Criminal Appeals found *Harrison* distinguishable, in part, because Harrison chose to testify in his first trial, unlike the applicant who never testified at trial, and because the Supreme Court specified that the holding in *Harrison* "was limited to the testimony of a defendant who is compelled to testify on his own behalf because of the introduction of an illegally obtained confession." *Guidry,* slip op. at 4-5.

146. The Court finds that, on direct appeal of the applicant's conviction, the Court of Criminal Appeals noted that the Supreme Court, in *Harrison,* "expressly declined to extend its holding to include the testimony of a third-party witness," and that the Court of Criminal Appeals declined to do so in the applicant's case. *Guidry,* slip op. at 5.

147. The Court finds that, on direct appeal of the applicant's conviction, the Court of Criminal Appeals noted that even if it is considered that the applicant's admission to Basinger may not have come to light but for the illegal actions of the police, "exclusion may not be premised on the mere fact that a constitutional violation was a 'but-for' cause of obtaining evidence. Our cases show that 'but-for' causality is only a necessary, not a sufficient, condition for suppression." *Guidry,* slip op. at 5 (quoting *Hudson v. United States,* 547 U.S. 586, 592 (2006)).

148. The Court finds that, on direct appeal of the applicant's conviction, the Court of Criminal Appeals, noting that even if it is considered that the applicant's admission to Basinger may not have come to light but for the illegal actions of the police, concluded that there was "a sufficient break in the chain of causation stemming from the primary illegality," considering the passage of time in the applicant's case, the applicant's appointment of counsel, the hiring of an expert witness, and other trial preparation. *Guidry,* slip op. at 5-6.

149. The Court adopts the Court of Criminal Appeals' direct appeal analysis and holdings concerning the admission of Basinger's testimony, including the holding that Basinger's testimony was admissible, and additionally finds that the applicant's admission to Basinger and Basinger's testimony concerning the admission was not responsive to the applicant's confessions; that the applicant's admission to Basinger did not contradict or attempt to contradict his confessions; that the applicant's admission to Basinger is similar to a defendant's admission to any other party, such as a friend or cellmate; and, that the applicant was motivated to talk to Basinger to mitigate his blameworthiness, not to contradict or rebut his confessions.

Supplemental" claim = Subsequent Writ

150. The Court finds that the applicant timely filed his initial application for writ of habeas corpus, cause no. 1194597-A, on January 28, 2009, and that the State received notice of the applicant's initial writ on February 2, 2009, and timely filed its response on July 27, 2009.

151. The Court finds that the applicant advanced the following two claims in his initial writ of habeas corpus, filed on January 28, 2009: alleged *Batson* error and alleged error concerning the admission of Basinger's testimony.

152. The Court finds that the applicant filed a pleading entitled "Supplemental Application for Writ of Habeas Corpus and Evidentiary Hearing Request" on October 25, 2010.

153. The Court finds that the applicant, in his supplemental writ filed on October 25, 2010, again advanced the alleged *Batson* error and alleged error concerning the admission of Basinger's testimony, and the Court further finds that the applicant's supplemental writ contains the following new claim: alleged ineffective assistance of counsel based on trial counsel's lack of objection to Mary Gipp's alleged hearsay testimony

154. The Court finds that TEX. CODE CRIM. PROC. art. 11.071, § 4(a) allows habeas counsel 180 days from the date of appointment or 45 days after the date the State's brief is filed on direct appeal – whichever comes later – to file an application for writ of habeas corpus, and that § 4(b) allows habeas counsel a one-time extension of 90 days to file the writ, upon a showing of good cause.

155. The Court finds, pursuant to TEX. CODE CRIM. PROC. art. 11.071, § 5(f), that "[i]f an amended or supplemental application is not filed within the time specified under Section 4(a) or (b), the court shall treat the application as a subsequent application under this section."

156. The Court finds, pursuant to court records, that habeas counsel was appointed on August 7, 2007 and that the State's direct appeal brief was filed on September 15, 2008,

so the applicant's initial writ, filed January 28, 2009, was timely filed within the window of time set forth in TEX. CODE CRIM. PROC. art. 11.071, §§ 4(a) and 4(b). *See Finding No. 154, supra.*

157. The Court finds that because the applicant's new claim was not filed until October 25, 2010 – almost two years after the applicant filed his initial writ – the applicant's new claim was not filed within the time limits set forth in TEX. CODE CRIM. PROC. art. 11.0071, § 4(a) or 4(b), and the applicant's new claim is a subsequent writ application, pursuant to TEX. CODE CRIM. PROC. art. 11.071, § 5(f). *See Findings Nos. 154 and 155, supra.*

158. The Court finds that, pursuant to TEX. CODE CRIM. PROC. art. 11.071, § 5 (a)(1), a court may not considered the merits of a subsequent writ until and after the Court of Criminal Appeals determines that the applicant has met the requirements of filing a subsequent writ, specifically, that the subsequent writ contains sufficient specific facts establishing that the current claim could not have been presented previously in a timely initial application or in a previously considered application because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application.

159. The Court finds that the factual and legal basis of the applicant's subsequent writ claim – alleged ineffective assistance of counsel for failing to object to Gipp's testimony as alleged hearsay and a denial of the confrontation clause – was available on the date the applicant filed his initial writ and the claim could have been presented in the applicant's timely initial writ.

160. The Court finds that the applicant, in his subsequent writ – his new writ claim filed October 25, 2010 - refers to the Court of Criminal Appeals' direct appeal opinion delivered on October 21, 2009, in which the Court of Criminal Appeals rejected the same ineffective assistance of counsel claim based on not objecting to Gipp's alleged hearsay, stating that "the issue is more appropriately addressed in an application for writ of habeas corpus where defense counsel will have the opportunity to explain his acts or omissions." *Guidry,* slip op. at 7.

161. The Court finds that the Court of Criminal Appeals' reference to habeas being a more appropriate forum for litigation of an ineffective of counsel claim does not obviate the statutory requirements of TEX. CODE CRIM. PROC. art. 11.071, in particular, the requirements of §5 concerning the treatment of subsequent writs.

CONCLUSIONS OF LAW

First Ground: Batson claim

1. The applicant's *Batson* claim concerning the State's peremptory strike of prospective juror Matthew Washington was raised and rejected on direct appeal of the applicant's conviction. *Guidry,* slip op. at 8-10. According, the claim need not be addressed in the instant habeas proceeding or any subsequent proceedings. *See Ex parte Acosta,* 672 S.W.2d 470, 472 (Tex. Crim. App. 1984)(holding that reviewing court need not address previously raised and rejected issues).

2. In the alternative, the applicant fails to show that the trial court erred in finding that the State's expressed reasons for striking prospective juror Washington were race-neutral; the applicant fails to show *Batson* error. *Guidry,* slip op. at 9-10; *see Batson v. Kentucky,* 476 U.S. 79 (1986); *see also* TEX. CODE CRIM. PROC. art. 35.261.

3. A comparative analysis of jurors shows that the applicant fails to establish discrimination. *See and cf. Reed v. Quarterman,* 555 F.3d 364 (5TH Cir. 2009)(employing type of comparative analysis of jurors used by Supreme Court in *Miller-El v. Dretke,* 545 U.S. 231 (2005)).

4. The applicant fails to show disparate treatment between prospective juror Washington and prospective jurors Lucinda Gandara (#79) and Santo Gomez (#149), all attendees of Lakewood Church, based on the prosecutor's articulating several race-neutral reasons for striking Washington, and in light of attendance at Lakewood being more of a possible "red flag," rather than a factor always prompting a strike, and in light of the significantly different *voir dire* examinations showing that both Gandara and Gomez were

more desirable State's jurors, as opposed to Washington who showed defense-oriented leanings, i.e., his explanation/justification for why people commit violent crimes. *See and cf. Young v. State,* 283 S.W.3d 854, 868 (Tex. Crim. App. 2009)(holding defendant's claim of State's disparate treatment of prospective juror struck by defense and black prospective juror struck by State not borne out by record when State argued more likely that defense would strike former prospective juror so State need not waste a peremptory).

5. The applicant fails to show disparate treatment between prospective juror Washington and seated jurors #97 and #94, based on their experience as "black" males for the following reasons: seated juror 94, Dereck Culver, lists his race as white, and the responses of seated juror 94, Walter Crofton, concerning his experiences as a black male are significantly different than those of prospective juror Washington who gave specific examples of being discriminated against by non-blacks and being passed over for promotions by whites. *See and cf. Reed v. Quarterman,* 555 F.3d 364 (5TH Cir. 2009)(employing type of comparative analysis of jurors used by Supreme Court in *Miller-El v. Dretke,* 545 U.S. 231 (2005)).

6. The applicant fails to show disparate treatment between prospective juror Washington and seated juror #19, Todd Harmon, concerning their experiences as black males, based on Harmon relating no specific daily or job-related discrimination, unlike Washington. *Id.*

7. The applicant fails to show disparate treatment between prospective juror Washington, and seated jurors Culver, Crofton, and Harmon, based on a family member being in prison because the State did not list having family members in prison as a reason for striking Washington so Culver, Crofton, and Harmon having family who served time in prison is not relevant for comparison purposes. *Id.*

8. The applicant fails to show that the State's strike of prospective juror Washington, based, in part, on his membership in the NAACP, is not race-neutral, in light of the prosecutor's exploring and questioning Washington's degree of involvement in the

NAACP, the organization's political, not racial view, and the NAACP's view opposing the death penalty before striking Washington. *Cf. Sommerville v. State,* 792 S.W.2d 265, 267-69 (Tex.App. – Dallas 1990, pet. ref'd)(holding that prosecutor's explanation that he struck a juror because of his NAACP membership was not race-neutral when prosecutor did not question juror about his degree of involvement in the NAAC or his knowledge of the NAACP's involvement in the D.A.'s Office and where juror seemed to be desirable State's juror); *see also Young,* 283 S.W.3d 868-9 (holding non-discriminatory State's striking of prospective juror for membership in Outreach Ministries, group that visits prison inmates).

9. The applicant fails to show that the State's strike of prospective juror Washington based, in part, on his membership in an organization known for an anti-death penalty stance, is not race-neutral even if the prosecutor erroneously inferred Washington's level of involvement in the NAACP. *Id.* at 869 (noting inconsequential whether prosecutor was accurate in assertion that sole purpose of Outreach Ministries was rehabilitation; trial court not required to find *Batson* violation simply because proffered explanation proved to be incorrect).

10. The applicant fails to show disparate treatment in the State's strike of prospective juror Washington, based, in part, on his membership in the NAACP, an organization known for its anti-death penalty stance, in light of Washington being the only prospective juror who listed membership in an organization commonly known to be opposed to the death penalty. *See and cf. Reed v. Quarterman,* 555 F.3d 364 (5TH Cir. 2009)(employing type of comparative analysis of jurors used by Supreme Court in *Miller-El v. Dretke,* 545 U.S. 231 (2005)).

11. The applicant fails to show that his constitutional rights were violated by the State's race-neutral strike of prospective juror Washington – the State's only strike of a member of a minority, made on the last day of juror selection to prospective juror #154, out of a little more than 160 prospective jurors.

Second Ground: testimony of Scott Basinger

12. Because the applicant's habeas claim concerning the admission of the testimony of Scott Basinger was raised and rejected on direct appeal, such claim need not be addressed in the instant habeas proceeding or any subsequent proceedings. *Guidry,* slip op. 2-6; *Ex parte Acosta,* 672 S.W.2d at 472 (holding that reviewing court need not address previously raised and rejected issues).

13. In the alternative, the applicant fails to show that the admission of Basinger's testimony violated his constitutional rights, pursuant to U.S. CONST. amend. V. *See Guidry,* slip op. at 3-4 (holding that applicant was never "exposed to the 'the cruel trilemma of self-accusation, perjury or contempt'" because Basinger was working on behalf of the applicant, not the police when the applicant made admission to Basinger); *see also Colorado v. Connelly,* 479 U.S. 157, 164-6 (1986)(holding that only coercion resulting from official action invalidates confession).

14. The applicant fails to show that his case is analogous to the Supreme Court's holding in *Harrison v. United States,* 392 U.S. 219 (1968), or that the *Harrison* holding should be extended to the applicant's case, or that the testimony of Basinger – a third party – compelled the testimony of the applicant. *Guidry,* slip op. at 4-5.

15. In the alternative, even if it considered that the applicant's admission to Basinger may not have come to light but for the illegal actions of the police, "exclusion may not be premised on the mere fact that a constitutional violation was a 'but-for-cause of obtaining evidence;" further, there was "a sufficient break in the chain of causation stemming from the primary illegality," considering the passage of time in the applicant's case, the applicant's appointment of counsel, the hiring of an expert witness, and other trial preparation. *Guidry,* slip op. at 5-6 (quoting *Hudson v. United States,* 547 U.S. 586, 592 (2006)); *see also Pham v. State,* 175 S.W.3d 767, 772-4 (Tex. Crim. App. 2005)(holding evidence only "obtained" in violation of law if there is causal connection between violation

and collection of such evidence); *Bell v. State,* 724 S.W.2d 724 S.W.2d 780, 798 Tex. Crim. App. 1986).

16. The applicant fails to show that his rights, pursuant to U.S. CONST. amend. V and TEX. CODE CRIM. PROC. art. 38.23, were violated by the admission of Basinger's testimony; the applicant fails to show that Basinger's testimony is the "fruit of the poisonous tree." *See and cf. Chavez v. State,* 9 S.W.3d 817, 820 (Tex. Crim. App. 2000)(noting must be causal connection between improper police conduct and collection of evidence before evidence can be excluded under art. 38.23); *Hudson,* 547 U.S. at 592 (citing *Wong Sun v. United States*, 371 U.S. 471, 487-488 (1963)).

"Supplemental" claim = Subsequent Writ

17. Because the applicant's supplemental claim alleging ineffective assistance of counsel based on trial counsel's lack of hearsay and/or confrontation clause objection to Gipp's testimony was filed after the time-window set forth in TEX. CODE CRIM. PROC. art. 11.071, § 4 (a) or (b), the applicant's supplemental claim is a subsequent writ, pursuant to art. 11.071, § 5(f).

18. The applicant fails to demonstrate that his conviction was unlawfully obtained. Accordingly, it is recommended to the Texas Court of Criminal Appeals that relief be denied in the applicant's initial application for writ of habeas corpus, cause no. 1073163-A, filed January 28, 2009, consisting of the applicant's *Batson* claim and his claim concerning the admission of Basinger's testimony.

19. The applicant's fails to show that his subsequent writ, i.e., his "supplemental" claim, could not have been raised in his initial application for writ of habeas corpus. Accordingly, it is recommended to the Texas Court of Criminal Appeals that the applicant's subsequent writ, consisting of the claim of ineffective assistance of counsel based on lack of objection to Gipp's specified testimony, be dismissed as abuse of the writ, pursuant to TEX. CODE CRIM. PROC. art. 11.071, § 5.

Cause No. 1073163-A

EX PARTE	§	IN THE 230TH DISTRICT COURT
	§	OF
HOWARD PAUL GUIDRY, Applicant	§	HARRIS COUNTY, TEXAS

ORDER

THE CLERK IS HEREBY **ORDERED** to prepare a transcript of all papers in cause no. 1073163-A and transmit same to the Court of Criminal Appeals, as provided by Article 11.071 of the Texas Code of Criminal Procedure. The transcript shall include certified copies of the following documents:

1. all of the applicant's pleadings filed in cause number 1073163-A, including his application for writ of habeas corpus and his motion to amend application for postconviction writ of habeas corpus by a person sentenced to death;

2. all of the Respondent's pleadings filed in cause number 1073163-A, including the Respondent's Original Answer;

3. this court's findings of fact, conclusions of law and order denying relief in cause no. 1073163-A, finding that the applicant's claim filed October 25, 2010 is a subsequent writ, and recommending that the applicant's subsequent writ, filed October 25, 2010, be dismissed as abuse of the writ;

4. any Proposed Findings of Fact and Conclusions of Law submitted by either the applicant or Respondent, including Respondent's Amended Proposed Findings of Fact and Conclusions of Law, in cause no. 1073163-A; and,

5. the indictment, judgment, sentence, docket sheet, and appellate record in cause no. 1073163, unless they have been previously forwarded to the Court of Criminal Appeals.

THE CLERK IS FURTHER **ORDERED** to send a copy of the court's findings of fact and conclusions of law, including its order, to applicant's counsel: Jerome Godinich; 929 Preston; Suite 200; Houston, TX 77002 and to and to Respondent: Roe Wilson; Harris County District

Attorney's Office; 1201 Franklin, Suite 600; Houston, Texas 77002.

BY THE FOLLOWING SIGNATURE, THE TRIAL COURT ADOPTS THE RESPONDENT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW IN CAUSE NO. 1073163-A.

SIGNED this 14 day of March, ~~2011.~~ 2012 BH

Belinda Hill

BELINDA HILL
Presiding Judge
230TH District Court
Harris County, Texas

APPENDIX F

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

AP-75,633

HOWARD PAUL GUIDRY, Appellant

v.

THE STATE OF TEXAS

On Direct Appeal from Case No. 1073163 of the
230th Judicial District Court,
Harris County

WOMACK, J., delivered the opinion of the Court, in which KELLER, P.J., and JOHNSON, KEASLER, HERVEY, HOLCOMB, and COCHRAN, JJ., joined. MEYERS and PRICE, JJ., concurred in the judgment.

The appellant challenges his conviction for capital murder[1] for his part in the 1994 shooting of Farah Fratta. Pursuant to the jury's answers to the special punishment issues, the trial

[1] See PENAL CODE § 19.03(a)(2) & (3).

judge sentenced the appellant to death.[2] The appellant raises fourteen points of error on this direct appeal. Finding no error, we shall affirm the trial court's judgment.

PROCEDURAL BACKGROUND

On March 21, 1997, the appellant was found guilty of the capital murder of Farah Fratta, and he was sentenced to death on March 26. In 1999, this court affirmed his conviction on direct appeal.[3] In 2000, this court denied the appellant's application for habeas corpus. In 2003, the United States District Court for the Southern District of Texas granted relief on a petition for writ of habeas corpus, ordering a new trial.[4] The Court of Appeals for the Fifth Circuit affirmed on January 14, 2005.[5] In the appellant's second trial for capital murder, he was found guilty on February 22, 2007, and was sentenced to death on March 1 of that year. This is his direct appeal from that conviction.

TESTIMONY OF DR. BASINGER

In points of error one through three, the appellant contends that the trial court erred in admitting the testimony of Dr. Scott Basinger, in violation of his rights under the Fifth Amendment and under Article 38.23 of the Code of Criminal Procedure.[6] Dr. Basinger was hired by the appellant as a mitigation expert for the punishment phase of his first trial. During the

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[2] See CODE CRIM. PROC. art. 37.071, § 2(b), (c), & (g).

[3] *Guidry v. State,* 9 S.W.3d 133 (Tex. Cr. App. 1999).

[4] *Guidry v. Dretke*, 2003 U.S. Dist. LEXIS 26199 (S.D. Tex. 2003). The appellant was granted relief based on the admission of what the district court found to be two illegally obtained confessions to police officers.

[5] *Guidry v. Dretke,* 397 F.3d 306 (5th Cir. 2005).

[6] This statute provides, in part, "No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case."

course of an interview with the appellant in preparation for that trial, the appellant admitted to Dr. Basinger that he had committed the murder. On cross-examination at the trial, the prosecutor asked Dr. Basinger whether the appellant had admitted to the shooting. Over defense objection, Dr. Basinger responded in the affirmative. In the second trial, Dr. Basinger was called as a fact witness by the prosecution and was asked about his testimony at the previous capital trial. Over objection, Dr. Basinger again testified that the appellant had admitted to the murder. The appellant now argues that his statements to Dr. Basinger were compelled by the illegal admission of his confessions to police, and that the admission to Dr. Basinger was the "fruit of the poisonous tree" of the confessions to police. He also argued that the admission to Dr. Basinger was obtained in violation of Article 38.23, and that, but for the illegally obtained confessions to police, the appellant would not have made an incriminating statement to Dr. Basinger.

The Fifth Amendment to the Constitution of the United States prevents the prosecution from using "statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."[7]

In this case, Dr. Basinger was not working on behalf of the police when the appellant's admission was made to him. Rather, he was working on behalf of the appellant himself as an

[7] *Miranda v. Arizona,* 384 U.S. 436, 444 (1966).

expert witness.[8] In short, the appellant was never "exposed to the 'the cruel trilemma of self-accusation, perjury or contempt.'"[9] Thus, the Fifth Amendment is not directly implicated.

The appellant further argues that his admission to Dr. Basinger is the "fruit of the poisonous tree," where the primary violation was the evidence of illegally procured confessions to police admitted at the appellant's first capital trial. The appellant contends that but for the illegally obtained confessions, Dr. Basinger never would have testified at trial, because no trial ever would have taken place. Relying heavily on *Harrison v. United States,*[10] the appellant claims that Dr. Basinger's testimony was compelled by the admission of the illegally obtained confessions to the police, and was therefore inadmissible.

The case at bar is distinguishable from *Harrison* for two reasons. First, the decision to put Harrison on the stand was made only after the illegally obtained confessions were admitted into evidence, as were his inculpatory statements. Here, the inculpatory admission to Dr. Basinger was made before the first trial, and there is no evidence that it was in response to the admission of the illegally obtained confessions. Second, in *Harrison* the defendant himself chose to testify at trial, unlike here, where the testimony originated from a witness other than the defendant. *Harrison* specified that it was limited to the testimony of a defendant who is compelled to testify

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[8] *See Wilkerson v. State*, 173 S.W.3d 521 (Tex. Cr. App. 2005). In *Wilkerson*, the defendant made inculpatory statements to a Child Protective Services caseworker which were admissible, even though the defendant was in custody at the time, because the caseworker was not working on behalf of the police.

[9] *Michigan v. Tucker*, 417 U.S. 433, 445 (1974), quoting *Murphy v. Waterfront Commission*, 378 U.S. 52, 55 (1964).

[10] 392 U.S. 219 (1968). In *Harrison*, the defendant testified at his own trial after his previous confessions were entered into evidence. The confessions were subsequently deemed to have been obtained illegally, and the defendant was granted a new trial. At the second trial, the defendant's former testimony was introduced into evidence. The defendant contended that his former testimony was inadmissible at the second trial because he had been compelled to testify due to the introduction of the tainted confessions. The Court held that the former testimony was inadmissible because the defendant testified only to overcome the impact of the illegally obtained confessions, after the confessions were admitted. The Court reversed his second conviction.

on his own behalf because of the introduction of an illegally obtained confession. In that case, the Court expressly declined to extend its holding to include the testimony of a third-party witness. [1]1 Accordingly this court declines to do so.

Furthermore, although the admission to Dr. Basinger may not have come to light but for the illegal actions of police, "exclusion may not be premised on the mere fact that a constitutional violation was a 'but-for' cause of obtaining evidence. Our cases show that 'but-for' causality is only a necessary, not a sufficient, condition for suppression."[12] "Rather, the more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come by at the exploitation of that illegality or instead by means sufficiently distinguishable as to be purged of the primary taint.'"[13] Attenuation can occur when the causal connection is remote. [4]1

In *Bell v. State* this court announced factors in determining attenuation, which included the furnishing of *Miranda* warnings, the temporal proximity of the arrest and the confession, the presence of intervening circumstances, and the purpose and flagrancy of the official misconduct.[15] In applying those factors to this case, we look to the passage of time, the appellant's appointment of counsel, the hiring of an expert witness, and other preparation for trial. Together, they provide a sufficient break in the chain of causation stemming from the

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[11] *Harrison,* 392 U.S., at 224 n.2.

[12] *Hudson v. United States,* 547 U.S. 586, 592 (2006).

[13] *Wong Sun v. United States,* 371 U.S. 471, 487-88 (1963) (quoting MAGUIRE, EVIDENCE OF GUILT 221 (1959)).

[14] *See Nardone v. United States*, 308 U.S. 338, 341 (1939).

[15] 724 S.W.2d 780 (Tex. Cr. App. 1986).

primary illegality. We conclude that Dr. Basinger's testimony was admissible. Points one, two, and three are overruled.

JURY UNANIMITY

In points of error four through seven, the appellant argues that the court's charge to the jury denied his right to a unanimous verdict, thus violating several constitutional provisions. In order to preserve a complaint for appellate review, a party generally must have presented a timely request, objection, or motion that states the specific grounds for the desired ruling, if they are not apparent from the context of the request, objection or motion.[16] A statute specifically requires that a defendant object to the charge of the court.[17] In the case before us, there was no objection to the charge at trial, and thus the issue was not preserved under that statute.

According to this court's construction of another statute, when error in the charge was not called to the trial court's attention, a judgment of conviction will be reversed only on a showing that the defendant was denied a fair trial.[18] The eighth point of error argues that there was a denial of a fair trial because the charge allowed the jury to convict without agreeing unanimously whether the defendant committed murder for remuneration or murder in the course of committing burglary.[19] This charge did not deny the appellant a fair trial. Indeed, it was not erroneous.[20]

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[16] R. APP. P. 33.1(a).

[17] *See* CODE CRIM. PROC. art. 36.14.

[18] *Almanza v. State*, 686 S.W.2d 157 (Tex. Cr. App. 1984) (construing CODE CRIM. PROC. art. 36.19).

[19] Under Section 19.03(a)(2) of the Penal Code, a person commits capital murder if he intentionally causes the death of an individual in the course of committing or attempting commit any of several offenses, including burglary. Under Section 19.03(a)(3), a person commits capital murder if he intentionally or knowingly causes the death of an individual for remuneration or the promise of remuneration.

[20] *Kitchens v. State*, 823 S.W.2d 256 (Tex. Cr. App. 1991), *cert. denied*, 504 U.S. 958 (1992) (not fundamental error to submit, in one paragraph of the charge, alternative theories of capital murder committed in the course of committing robbery or sexual assault).

"When an indictment alleges different methods of committing capital murder in the conjunctive, the jury may properly be charged in the disjunctive. … The unanimity requirement is not violated by instructing the jury on alternative theories of committing the same offense …."[21]

Points four through eight are overruled.

EFFECTIVE ASSISTANCE OF COUNSEL

In his ninth and tenth points of error, the appellant complains that he was denied his right to effective assistance of counsel under the Sixth Amendment to the Constitution of the United States because his attorney neither objected to, nor requested a hearing on the admissibility of, the testimony of Mary Gipp-McNeill.

As this court has previously noted,[22] since the record does not usually reflect the reasoning or motivation behind counsel's actions or inactions, it is rarely possible to assess such a claim fairly on direct appeal. Because of this, the appellant will rarely be able to meet the first prong of the *Strickland* test, which is to show that counsel's performance fell below an objective standard of reasonableness.[23] Absent a motion for new trial and an examination of counsel's strategy, the record is not sufficiently developed, and the issue is more appropriately addressed in an application for writ of habeas corpus where defense counsel will have the opportunity to explain his acts or omissions. Points nine and ten are overruled.

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[21] *Martinez v. State*, 129 S.W.3d 101 (Tex. Cr. App. 2004) (overruling claim that it was error for the trial court to permit the prosecutor to argue that the jury need not unanimously agree whether the murder was committed in the course of robbery or sexual assault).

[22] See *Mata v. State,* 226 S.W.3d 425, 430 (Tex. Cr. App. 2007); *Roberts v. State,* 220 S.W.3d 521, 533 (Tex. Cr. App. 2007).

[23] *See Strickland v. Washington*, 466 U.S. 688 (1984).

BATSON CHALLENGE

In his eleventh point of error, the appellant contends, under authority of *Batson v. Kentucky*,[24] that the trial court erred in overruling his objection to the State's exercise of a peremptory challenge in violation of the Equal Protection Clause of the Fourteenth Amendment.

A defendant objecting under *Batson* must make a *prima facie* showing of racial discrimination in the State's exercise of its peremptory challenges.[25] The burden then shifts to the State to provide race-neutral explanations for its peremptory strikes.[26] If the State articulates race-neutral explanations, the burden shifts back to the defense to show that the State's reasons are pretexts for discrimination.[27] The trial court must rule as to whether the defense has carried its burden of proving purposeful discrimination.[28] This determination is accorded great deference and will not be overturned on appeal unless the ruling is clearly erroneous. [9]2

Here, the defense objected under *Batson* to the State's use of a peremptory challenge against Venireman Matthew Washington. The court inquired into the prosecution's reasons for the peremptory challenge. The prosecution explained:

> To start with, he's a member of [name omitted] Church. And we have a running agreement, my partner Luci Davidson and I have, since we started, that people who go to [that church] are screwballs and nuts. I'm very familiar with that church. That's one reason that scared me about the man.

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[24] 476 U.S. 79, 81 (1986).

[25] *Herron v. State,* 86 S.W.3d 621, 630 (Tex. Cr. App. 2002); *Mathis v State,* 67 S.W.3d 918, 924 (Tex. Cr. App. 2002).

[26] *Herron,* 86 S.W.3d, at 630.

[27] *Ibid.*

[28] *Ibid.*

[29] *Ibid.*

> The next reason is when asked why people commit violent crimes, his answer before we started talking to him today is "no education, no opportunities." In my mind, people who have no education, no opportunities might be bums, might be slackers, might be lazy, but that doesn't justify committing a violent crime.
>
> In addition to that, he talks about the fact that he's been discriminated against at work, and he says on those occasions, two to three of them, when he was discriminated against, 85 percent of the group that was discriminating against him was white. The other 15 percent was "other" and when pressed, he said they were Asian. That's happened on more than one occasion and the people that passed him over were white. Right after that he went right on and sort of went on to say, in everyday life, we're all treated as second-class citizens. And there's two black men on this jury that are wonderful men that didn't seem to have any issues at all about anything like that about being black men in America today. This man is different. He was very hesitant in answering my questions. He didn't seem like he was comfortable answering any of the questions. I didn't get a good feeling talking to him, unlike every other juror who I put on this jury, I didn't feel that way talking to Mr. Washington.
>
> And then, to sum it all up, he might know Jeff Strange, who's a prosecutor in Fort Bend County. In the corner – in the context of this courtroom, I can say I know Jeff Strange very, very well and knowing Jeff Strange, just because he's a prosecutor, doesn't mean anything. That doesn't mean anything in my opinion.
>
> Finally, he says he's an active member of the NAACP to the degree that he goes all the way back home to Snook, Caldwell, Burleson County, Texas, to attend the meetings that his mom and dad never miss. The NAACP's stated objective – one of them is to get rid of the death penalty, to be opposed to the death penalty, to talk to people about how to get rid of the death penalty and they are very, very much for the Legal Defense Fund, which its main objective is to oppose the death penalty.
>
> The last thing, Judge, is one of the number one advocates and supporters of the NAACP in Harris County is Quanell X. I am quite sure Mr. Washington knows who Quanell X is and Quanell X could very well be a defense witness in this trial, because Quanell X is one of the people that Howard Guidry wanted to talk to when he took a hostage on death row. So Quanell X is going to be coming up to this trial and I don't want a man who's supportive of the NAACP as Mr. Washington is to be anywhere near this jury. And those are my race-neutral, very race-neutral reasons for why I exercised a peremptory.

The trial court found that the State exercised its challenge fairly and for race-neutral reasons. The defense did not attempt to demonstrate that the State's reasons were pretextual, and explicitly stated that it neither objected to nor desired to change the court's decision.

As the Supreme Court stated in *Miller-El v. Cockrell:*[30]

[30] 537 U.S. 322, 340 (2003).

> "[T]he issue comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible. Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy . . . In the context of direct review, therefore, we have noted that "the trial court's decision on the ultimate question of discriminatory intent represents a finding of fact of the sort accorded great deference on appeal" and will not be overturned unless clearly erroneous . . . ."[31]

Since the record does not indicate that the trial court's ruling was clearly erroneous, point of error eleven is overruled.

VICTIM-IMPACT EVIDENCE

In points of error twelve through fourteen, the appellant claims that the trial court erred in overruling his objection to the admission of testimony about the effect of extraneous offenses. Since the only objection at trial was to relevance, it is the only ground preserved for appeal. We shall not address the appellant's Eighth and Fourteenth Amendment arguments which are made for the first time on appeal.

Paulette Scott, Chantal Peve, Gene Hovermale, and Jeanette Bledsoe were called as witnesses for the prosecution at the punishment phase of the trial. Each of them testified as to the effect an extraneous offense, committed by the appellant, had on them. (The appellant robbed the first three witnesses at a bank. The fourth witness was a prison guard whom the appellant took hostage.) The trial court overruled the appellant's objections.

Article 37.071, Section 2(a)(1) of the Code of Criminal Procedure provides that "evidence may be presented by the state and the defendant or the defendant's counsel as to any matter that the court deems relevant to sentence …."

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[31] *Miller-El*, 537 U.S., at 339, citing *Wainwright* v. *Witt,* 469 U.S. 412, 428 (1985); *see also Watkins v. State,* 245 S.W.3d 444, 457 (Tex. Cr. App. 2008).

As this court stated in *Roberts v. State*,[32] "'Victim impact' evidence is evidence of the effect of an offense on people *other* than the victim."[33] The "offense" in question is the one that is at issue in the guilt stage of the trial. In this case, the testimony was about the effect of extraneous crimes on the victims of those crimes.[34] The testimony at issue in this case is not victim-impact evidence, and referring to it as such only serves to confuse the issue. The testimony offered here was admissible under Article 37.071 and was relevant to the future-dangerousness issue.[35] Points of error twelve, thirteen, and fourteen are overruled.

The trial court's judgment is affirmed.

Delivered October 21, 2009.
Do not publish.

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[32] 220 S.W.3d 521 (Tex. Cr. App. 2007).

[33] *Id.,* at 531, citing *Garcia v. State*, 126 S.W.3d 921, 929 (Tex. Cr. App. 2004). *See also Guevara v. State*, 97 S.W.3d 579, 583 (Tex. Cr. App 2003); *Mathis v. State*, 67 S.W.3d 918, 928 (Tex. Cr. App 2002).

[34] As this court recently explained in *Hayden v. State,* __ S.W.3d __, __, 2009 WL 928569, *3, 2009 Tex. Crim. App. LEXIS 510, *8-9) (Tex. Cr. App., PD-0860-07, April 8, 2009), "[i]n the past, we have occasionally referred to 'victim impact evidence' as a broad category that includes both victim character evidence and victim impact evidence. (*E.g. Salazar,* 90 S.W.3d at 355.) Regrettably, this imprecision has become entrenched in this state's jurisprudence. Victim 'impact' evidence is evidence of the effect of the victim's death on other people."

[35] CODE CRIM. PROC. art. 37.071, § 2(b)(1) ("whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society …").

APPENDIX G

REPORTER'S RECORD
VOLUME 22 OF 30 VOLUMES
TRIAL COURT CAUSE NO. 1073163

COURT OF CRIMINAL APPEALS NO. AP-75,633

STATE OF TEXAS	) IN THE DISTRICT COURT
	)
V.	) OF HARRIS COUNTY, TEXAS
	)
HOWARD PAUL GUIDRY	) 230TH JUDICIAL DISTRICT

TRIAL ON THE MERITS

On the 21st day of February, 2007, the following proceedings came on to be held in the above-titled and numbered cause before the Honorable Doug Shaver, Judge Presiding, held in Houston, Harris County, Texas.

Proceedings reported by computerized stenotype machine.

GINA BENCH
DEPUTY OFFICIAL COURT REPORTER
230TH DISTRICT COURT
HARRIS COUNTY, TEXAS

THE JURY: Good morning.

THE COURT: Ms. Siegler.

SCOTT F. BASINGER, Ph.D.

having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MS. SIEGLER:

Q Sir, could you tell us all your name, please?

A My name is Scott Basinger, B-a-s-i-n-g-e-r.

Q And what do you do for a living?

A I'm the associate dean at Baylor College of Medicine.

Q Can you give the jury the benefit of your educational training and your background?

A I have a Ph.D. in molecular biology. I have expertise in the molecular biology of the nervous system in the brain. I have also been trained in human behavior. I work in the field of addiction and addiction medicine.

Q And as part of your training and as part of your job, are you also called upon to be an expert witness in those areas and to testify in that regard?

A I am.

Q You have been before in the past?

A I have been.

Q As a matter of fact, Dr. Basinger, are you here

today because you've been subpoenaed to be here today?
A I am.
Q And that's the only reason you're here?
A Correct.
Q As someone who's testified previously in other cases in other trials -- you've done that, have you not, sir?
A I have, yes.
Q And because you've testified before, you're familiar with the way the rules work in the courtroom, the rules of evidence, that sort of thing?
A Somewhat, yes.
Q And as an expert witness, you appreciate that when you're called down to testify as an expert by one side, the other side has a right to ask you questions?
A I am.
Q And that's called cross-examination?
A Correct.
Q And you are familiar with the phrase that in Texas under our rules, cross-examination is what's called wide open cross-examination?
A I wasn't familiar with that, but --
Q Now you are?
A I am now.
Q And you understand that that means when one

side calls you about a certain subject, the other side has a right to ask you about everything. There's no limit on the cross-examination?

A Apparently that's true.

Q And you also understand as a doctor, as a Ph.D., that when you're called to testify as an expert for either side, one side or the other, any privilege that you have as an expert with that attorney is waived once you hit the witness stand?

MS. MULDROW: That's a misstatement of the law. It's depending upon the circumstances.

THE COURT: That will be sustained.

Q (By Ms. Siegler) Do you understand the difference, Dr. Basinger, between a consulting expert only and a testifying expert?

A I do not.

Q Dr. Basinger, are you a proponent or an opponent of the death penalty?

MS. MULDROW: That's irrelevant, Your Honor.

THE COURT: That's sustained.

Q (By Ms. Siegler) Were you called upon, sir, back in 1997 to interview Howard Paul Guidry, the defendant in this case?

A I was.

Q And do you recognize Mr. Guidry in the courtroom today?
A I do.
Q Back in 1997 were you called to interview Howard Paul Guidry by Howard Paul Guidry's lawyers?
A Yes.
Q Not by the State?
A Correct.
Q And did you interview him?
A I did.
Q On one occasion?
A On one occasion.
Q And as a result of that interview, were you later called to court to testify as a defense expert witness?
A I was.
Q And was that back in 1997?
A Yes.
Q Obviously Howard Guidry's lawyers asked you questions back in 1997?
A They did.
Q And then you were passed to the prosecutors?
A I was.
Q And in that case you were passed to be asked questions of by me, were you not?

A That is correct.

Q And I'm the one who asked you the questions back in 1997?

A Yes.

Q Do you recall back in 1997, Dr. Basinger, that I asked you whether or not you ever asked Howard Paul Guidry if he told you he shot Farah Fratta two times in the head?

A I remember you asking me that, yes.

Q And did you answer my question back then?

A I did.

Q And what was your answer to that question back then?

MS. MULDROW: Same objections as previously lodged before, Your Honor.

THE COURT: That's overruled. The Court's ruling will remain the same.

MS. MULDROW: And ask for a running objection.

THE COURT: You have it.

A To be specific, I never asked Howard Paul Guidry if he had shot --

MS. MULDROW: Nonresponsive, Your Honor.

THE COURT: That's sustained.

Q (By Ms. Siegler) Did you answer my question --

how did you answer my question back in 1997 when I asked you did Howard Paul Guidry ever tell you that he shot Farah Fratta two times in the head? What did you answer back then?

A I answered in the affirmative.

Q You said he did, did you not?

A I said he did.

Q And then traveling forward in time to back in July of last year, July of 2006 --

MS. MULDROW: And, Your Honor, I'm going to object to the substance of anything regarding a matter that was not before this jury. It's strictly a legal issue being brought at this time.

THE COURT: That's overruled.

Q (By Ms. Siegler) Do you recall my asking you in July of 2006 whether or not Howard Paul Guidry told you he shot Farah Fratta two times in the head and you heard that out of the mouth of Howard Guidry?

A Yes.

Q And what did you say?

A Yes.

Q As an expert witness called down to testify in court, Dr. Basinger, do you appreciate that when lawyers decide to put you on the stand, they make those decisions, weighing the points they hope to make versus

the points that might hurt them depending on cross-examination?

A I agree.

MS. MULDROW: Speculation, Your Honor.

THE COURT: That's overruled.

A I appreciate that.

Q (By Ms. Siegler) You know that's the way it works?

A I know that's the way it works.

Q Every single time we put a witness on the stand we cross our fingers and hope for the good points and hope the bad points don't hurt us.

A I imagine that's true.

MS. SIEGLER: Pass the witness.

THE COURT: Cross-examine?

MS. MULDROW: No questions, Your Honor.

THE COURT: Is he free to go?

MS. SIEGLER: Yes, he is.

MS. MULDROW: Yes.

THE COURT: You're free to go. Thank you, Doctor.

Call your next.

MS. SIEGLER: The State calls Nyandre Perry.

And Deputy Resendez, he's going to be in

the back.

MS. MULDROW: May we approach, Your Honor?

THE COURT: Yes.

(At the Bench)

MS. MULDROW: Judge, just so the record is clear, Mr. Perry was a witness in the punishment phase of the prior trial regarding extraneous under 404(b) and I just want a proffer from the State of the purpose of this particular witness at this phase of the case.

THE COURT: What is he going to testify to?

MS. SIEGLER: First of all, Judge, he understands fully he's not to talk about punishment evidence, the bank robbery, any other robberies, the fact they were smoking dope together all the time, and all the other crimes he committed. His purpose for being called today is to tell the jury that Howard Guidry gave him the murder weapon back in '94, November of 1994. So he can put the murder weapon in the hands of Guidry well before the four months --

THE COURT: Your objection is overruled. On that limited purpose.

(Open court.)

THE COURT: Do you want to raise your right hand for us?

(Witness sworn.)

NYANDRE PERRY,

having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MS. SIEGLER:

Q Sir, could you tell us all your name, please?

A Nyandre Xavier Perry.

Q What first name do you go by?

A Dre.

Q Your last name is Perry?

A Yes, ma'am.

Q Mr. Perry, tell the jury how old you are.

A 33.

Q And tell the jury why it is you're wearing an orange jumpsuit.

A Bench warranted from TDC for Guidry trial.

Q Okay. And you're currently being incarcerated in the Harris County Jail, are you not?

A Yes, ma'am.

Q What's your birth date?

A 9-1-73.

Q Where did you grow up?

APPENDIX H

REPORTER' RECORD
VOLUME 21 OF 30 VOLUMES
TRIAL COURT CAUSE NO. 1073163

COURT OF CRIMINAL APPEALS NO. AP-75,633

STATE OF TEXAS	)IN THE DISTRICT COURT
	)
V.	)OF HARRIS COUNTY, TEXAS
	)
HOWARD PAUL GUIDRY	)230TH JUDICIAL DISTRICT

TRIAL ON THE MERITS

On the 20th day of February, 2007, the following proceedings came on to be held in the above-titled and numbered cause before the Honorable Doug Shaver, Judge Presiding, held in Houston, Harris County, Texas.

Proceedings reported by computerized stenotype machine.

GINA BENCH
DEPUTY OFFICIAL COURT REPORTER
230TH DISTRICT COURT
HARRIS COUNTY, TEXAS

Gina Bench, CSR

A I was probably just afraid of getting caught. I mean, I don't know.

Q (By Ms. Siegler) I'm sorry. I didn't hear you.

A Probably getting caught. I mean, I just threw them out.

Q After Joe Prystash left your apartment that night, was Keith still there?

A Yes.

Q After he left, did you say anything to Keith about what you just saw happen inside your apartment?

MS. MULDROW: Hearsay.

THE COURT: Not what she said.

A Did I have a conversation with him?

Q (By Ms. Siegler) What did you say to Keith?

A I told Keith that -- that Joe and --

MS. MULDROW: Objection to anything regarding the two Joe or Howard, Your Honor.

THE COURT: That will be overruled. Not what she said.

A That Joe and Howard had killed Fratta -- or Farah, I'm sorry.

Q (By Ms. Siegler) How did Keith -- not what he said -- how did Keith react?

A He freaked out.

MS. MULDROW: Irrelevant.

APPENDIX I

REPORTER'S RECORD
VOLUME 18 OF 30 VOLUMES
TRIAL COURT CAUSE NO. 1073163

COURT OF CRIMINAL APPEALS NO. AP-75,633

STATE OF TEXAS	)IN THE DISTRICT COURT
	)
V.	)OF HARRIS COUNTY, TEXAS
	)
HOWARD PAUL GUIDRY	)230TH JUDICIAL DISTRICT

VOIR DIRE

On the 14th day of February, 2007, the following proceedings came on to be held in the above-titled and numbered cause before the Honorable Doug Shaver, Judge Presiding, held in Houston, Harris County, Texas.

Proceedings reported by computerized stenotype machine.

GINA BENCH
DEPUTY OFFICIAL COURT REPORTER
230TH DISTRICT COURT
HARRIS COUNTY, TEXAS

A Whenever I can, but when you've got twins, it's kind of hard now.

Q When you have a small child, it's hard. Any questions of us at all?

A No.

Q You will listen to the evidence fairly and objectively?

A Right.

Q Promise to do that?

A Yes.

Q And you will base your decision solely on the evidence presented and nothing more?

A Yes.

Q Okay. Thank you, sir.

THE COURT: Ms. Siegler?

MS. SIEGLER: Judge, the State will exercise a peremptory.

MS. MULDROW: We have a motion.

THE COURT: If you will wait outside for just a moment, please. The bailiff will let you outside.

(Venireperson No. 154 exited courtroom.)

THE COURT: Ms. Muldrow.

MS. MULDROW: Your Honor, I would like to address the Court's attention to Juror No. 154, Matthew

Washington, as a member of a protected class, an African-American male who gave some very race-neutral reasons about his positions and without an agenda. The State has executed a peremptory challenge against Mr. Washington and I would ask the Court to inquire of them on what grounds they base their decision.

THE COURT: Ms. Siegler.

MS. SIEGLER: Judge, the reasons that I exercised the peremptory on Mr. Washington are the following: To start with, he's a member of Lakewood Church. And we have had a running agreement, my partner Luci Davidson and I have, since we started, that people who go to Lakewood are screwballs and nuts. I'm very familiar with that church. We try our hardest not to put anybody who goes to Lakewood regularly on any jury, and he's a pretty devout member of Lakewood Church. That's one reason that scared me about the man.

The next reason is when asked why people commit violent crimes, his answer before we started talking to him today is no education, no opportunities. In my mind, people who have no education, no opportunities might be bums, might be slackers, might be lazy, but that doesn't justify committing a violent crime. And that's the answer that he came up with when he answered his questionnaire for us yesterday.

In addition to that, he talks about the fact he's been discriminated at work and he says in those occasions two to three of them when he was discriminated against, 85 percent of the group that was discriminating against him was white. The other 15 percent was "other" and when pressed, he said they were Asian. That's happened on more than one occasion and the people that passed him over were white. Right after that he went right on and sort of went on to say, in everyday life we're all treated as second class citizens. And there are two black men on this jury that are wonderful men that didn't seem to have any issues at all about anything like that about being black men in America today. This man is different. He was very hesitant in answering my questions. He didn't seem like he was comfortable answering any of the questions. I didn't get a good feeling talking to him, unlike every other juror who I put on this jury, I didn't feel that way talking to Mr. Washington.

And then to sum it all up, he might know Jeff Strange, who's a prosecutor in Fort Bend County. In the corner -- in the context of this courtroom, I can say I know Jeff Strange very, very well and knowing Jeff Strange, just because he's a prosecutor, doesn't mean anything. That doesn't mean anything in my opinion.

Finally, he says that he's an active member of the N.A.A.C.P. to the degree that he goes all the way back home to Snook, Caldwell, Burleson County, Texas, to attend the meetings that his mom and dad never miss. The N.A.A.C.P.'s stated objective -- one of them is to get rid of the death penalty, to be opposed to the death penalty, to talk to people about how to get rid of the death penalty and they are very, very much for the Legal Defense Fund, which its main objective is to oppose the death penalty.

The last thing, Judge, is one of the No. 1 advocates and supporters of the N.A.A.C.P. in Harris County is Quanell X. I am quite sure Mr. Washington knows who Quanell X is and Quanell X could very well be a defense witness in this trial, because Quanell X is one of the people that Howard Guidry wanted to talk to when he took a hostage on death row, that he brought in to want to mediate to and bond with, to try and get better privileges going on on death row. So Quanell X is going to be coming up in this trial and I don't want a man who's as supportive of the N.A.A.C.P. as Mr. Washington is to be anywhere near this jury. And those are my race-neutral, very race-neutral reasons for why I exercised a peremptory.

THE COURT: All right. The Court finds

that the State has exercised their strike fairly and exercised for the right reasons other than race neutral.

MS. MULDROW: May I put a couple items in the record, and not to object to the Court's opinion, but I want to state for the record that I have absolutely no intentions of ever calling Quanell X or letting him cross the path to a chair. As a black woman, I think I know also what the N.A.A.C.P. does, and it's usually related to civil rights, not criminal matters. Additionally, the Legal Defense Fund is not limited to death penalty cases. It is also limited to any type of case where someone who's indigent needs assistance.

I'm not trying to change the Court's opinion; however, I do ask that the Court take Questionnaire No. 154 of this juror and place that as part of the appellate record.

THE COURT: What was that last one?

MS. MULDROW: His questionnaire, make that part of the appellate record.

THE COURT: We can do that. Questionnaire No. 154 will be added to the appellate record. Mark that as Court's Exhibit No. 1.

Just so the record is clear, I don't think membership to the N.A.A.C.P. would have any

difference or bearing one way or the other. There are jurors that are Roman Catholics and for many different kinds of churches alternately oppose the death penalty as the N.A.A.C.P. So I was not swayed by that argument at all. The Court also happens to know Jeff Strange.

MS. MULDROW: I don't know him.

THE COURT: Bring me No. 155 -- or whatever our next number is, Alanis, and tell Mr. Washington he can go home.

(Venireperson No. 155 present.)

REBECCA ALANIS,

called as a prospective juror, testified as follows:

VOIR DIRE EXAMINATION

BY THE COURT:

Q Come have a seat with me, please. Could you pronounce your name for me, please?

A Alanis.

Q Do you remember this morning when I was talking to the group of you and I explained this particular defendant is charged with capital murder?

A Yes.

Q So you know if he's found guilty as he's charged, then the jury would just have one of two punishments, either a life sentence or the death penalty. Do you understand that?

APPENDIX J

United States Court of Appeals for the Fifth Circuit

No. 20-70005

HOWARD PAUL GUIDRY,

Petitioner—Appellant,

versus

BOBBY LUMPKIN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent—Appellee.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:13-CV-1885

ON PETITION FOR REHEARING EN BANC

Before WILLETT, HO, and OLDHAM, *Circuit Judges*.

PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing, (5TH CIR. R. 35 I.O.P.), the petition for panel rehearing is DENIED. No member of the panel or judge in regular active service having requested that the court be polled on rehearing en banc, (FED. R. APP. P. 35 and 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.

APPENDIX K

Vernon's Ann.Texas C.C.P. Art. 11.071

Art. 11.071. Procedure in death penalty case

Effective: September 1, 2015

Currentness

Sec. 1. Application to Death Penalty Case

Notwithstanding any other provision of this chapter, this article establishes the procedures for an application for a writ of habeas corpus in which the applicant seeks relief from a judgment imposing a penalty of death.

Sec. 2. Representation by Counsel

(a) An applicant shall be represented by competent counsel unless the applicant has elected to proceed pro se and the convicting trial court finds, after a hearing on the record, that the applicant's election is intelligent and voluntary.

(b) If a defendant is sentenced to death the convicting court, immediately after judgment is entered under Article 42.01, shall determine if the defendant is indigent and, if so, whether the defendant desires appointment of counsel for the purpose of a writ of habeas corpus. If the defendant desires appointment of counsel for the purpose of a writ of habeas corpus, the court shall appoint the office of capital and forensic writs to represent the defendant as provided by Subsection (c).

(c) At the earliest practical time, but in no event later than 30 days, after the convicting court makes the findings required under Subsections (a) and (b), the convicting court shall appoint the office of capital and forensic writs or, if the office of capital and forensic writs does not accept or is prohibited from accepting an appointment under Section 78.054, Government Code, other competent counsel under Subsection (f), unless the applicant elects to proceed pro se or is represented by retained counsel. On appointing counsel under this section, the convicting court shall immediately notify the court of criminal appeals of the appointment, including in the notice a copy of the judgment and the name, address, and telephone number of the appointed counsel.

(d) Repealed by Acts 2009, 81st Leg., ch. 781, § 11.

(e) If the court of criminal appeals denies an applicant relief under this article, an attorney appointed under this section to represent the applicant shall, not later than the 15th day after the date the court of criminal appeals denies relief or, if the case is filed and set for submission, the 15th day after the date the court of criminal appeals issues a mandate on the initial application for a writ of habeas corpus under this article, move for the appointment of counsel in federal habeas review under 18 U.S.C. Section 3599. The attorney shall immediately file a copy of the motion with the court of criminal appeals, and if the attorney fails to do so, the court may take any action to ensure that the applicant's right to federal habeas review is protected, including initiating contempt proceedings against the attorney.

(f) If the office of capital and forensic writs does not accept or is prohibited from accepting an appointment under Section 78.054, Government Code, the convicting court shall appoint counsel from a list of competent counsel maintained by the presiding judges of the administrative judicial regions under Section 78.056, Government Code. The convicting court shall reasonably compensate as provided by Section 2A an attorney appointed under this section, other than an attorney employed by the office of capital and forensic writs, regardless of whether the attorney is appointed by the convicting court or was appointed by the court of criminal appeals under prior law. An attorney appointed under this section who is employed by the office of capital and forensic writs shall be compensated in accordance with Subchapter B, Chapter 78, Government Code.[1]

Sec. 2A. State Reimbursement; County Obligation

(a) The state shall reimburse a county for compensation of counsel under Section 2, other than for compensation of counsel employed by the office of capital and forensic writs, and for payment of expenses under Section 3, regardless of whether counsel is employed by the office of capital and forensic writs. The total amount of reimbursement to which a county is entitled under this section for an application under this article may not exceed $25,000. Compensation and expenses in excess of the $25,000 reimbursement provided by the state are the obligation of the county.

(b) A convicting court seeking reimbursement for a county shall certify to the comptroller of public accounts the amount of compensation that the county is entitled to receive under this section. The comptroller of public accounts shall issue a warrant to the county in the amount certified by the convicting court, not to exceed $25,000.

(c) The limitation imposed by this section on the reimbursement by the state to a county for compensation of counsel and payment of reasonable expenses does not prohibit a county from compensating counsel and reimbursing expenses in an amount that is in excess of the amount the county receives from the state as reimbursement, and a county is specifically granted discretion by this subsection to make payments in excess of the state reimbursement.

(d) The comptroller shall reimburse a county for the compensation and payment of expenses of an attorney appointed by the court of criminal appeals under prior law. A convicting court seeking reimbursement for a county as permitted by this subsection shall certify the amount the county is entitled to receive under this subsection for an application filed under this article, not to exceed a total amount of $25,000.

Sec. 3. Investigation of Grounds for Application

(a) On appointment, counsel shall investigate expeditiously, before and after the appellate record is filed in the court of

criminal appeals, the factual and legal grounds for the filing of an application for a writ of habeas corpus.

(b) Not later than the 30th day before the date the application for a writ of habeas corpus is filed with the convicting court, counsel may file with the convicting court an ex parte, verified, and confidential request for prepayment of expenses, including expert fees, to investigate and present potential habeas corpus claims. The request for expenses must state:

(1) the claims of the application to be investigated;

(2) specific facts that suggest that a claim of possible merit may exist; and

(3) an itemized list of anticipated expenses for each claim.

(c) The court shall grant a request for expenses in whole or in part if the request for expenses is timely and reasonable. If the court denies in whole or in part the request for expenses, the court shall briefly state the reasons for the denial in a written order provided to the applicant.

(d) Counsel may incur expenses for habeas corpus investigation, including expenses for experts, without prior approval by the convicting court or the court of criminal appeals. On presentation of a claim for reimbursement, which may be presented ex parte, the convicting court shall order reimbursement of counsel for expenses, if the expenses are reasonably necessary and reasonably incurred. If the convicting court denies in whole or in part the request for expenses, the court shall briefly state the reasons for the denial in a written order provided to the applicant. The applicant may request reconsideration of the denial for reimbursement by the convicting court.

(e) Materials submitted to the court under this section are a part of the court's record.

(f) This section applies to counsel's investigation of the factual and legal grounds for the filing of an application for a writ of habeas corpus, regardless of whether counsel is employed by the office of capital and forensic writs.

Sec. 4. Filing of Application

(a) An application for a writ of habeas corpus, returnable to the court of criminal appeals, must be filed in the convicting court not later than the 180th day after the date the convicting court appoints counsel under Section 2 or not later than the 45th day after the date the state's original brief is filed on direct appeal with the court of criminal appeals, whichever date is later.

(b) The convicting court, before the filing date that is applicable to the applicant under Subsection (a), may for good cause shown and after notice and an opportunity to be heard by the attorney representing the state grant one 90-day extension that begins on the filing date applicable to the defendant under Subsection (a). Either party may request that the court hold a hearing on the request. If the convicting court finds that the applicant cannot establish good cause justifying the requested extension, the court shall make a finding stating that fact and deny the request for the extension.

(c) An application filed after the filing date that is applicable to the applicant under Subsection (a) or (b) is untimely.

(d) If the convicting court receives an untimely application or determines that after the filing date that is applicable to the applicant under Subsection (a) or (b) no application has been filed, the convicting court immediately, but in any event within 10 days, shall send to the court of criminal appeals and to the attorney representing the state:

(1) a copy of the untimely application, with a statement of the convicting court that the application is untimely, or a statement of the convicting court that no application has been filed within the time periods required by Subsections (a) and (b); and

(2) any order the judge of the convicting court determines should be attached to an untimely application or statement under Subdivision (1).

(e) A failure to file an application before the filing date applicable to the applicant under Subsection (a) or (b) constitutes a waiver of all grounds for relief that were available to the applicant before the last date on which an application could be timely filed, except as provided by Section 4A.

Sec. 4A. Untimely Application; Application Not Filed

(a) On command of the court of criminal appeals, a counsel who files an untimely application or fails to file an application before the filing date applicable under Section 4(a) or (b) shall show cause as to why the application was untimely filed or not filed before the filing date.

(b) At the conclusion of the counsel’s presentation to the court of criminal appeals, the court may:

(1) find that good cause has not been shown and dismiss the application;

(2) permit the counsel to continue representation of the applicant and establish a new filing date for the application, which may be not more than 180 days from the date the court permits the counsel to continue representation; or

(3) appoint new counsel to represent the applicant and establish a new filing date for the application, which may be not more than 270 days after the date the court appoints new counsel.

(c) The court of criminal appeals may hold in contempt counsel who files an untimely application or fails to file an application before the date required by Section 4(a) or (b). The court of criminal appeals may punish as a separate instance of contempt each day after the first day on which the counsel fails to timely file the application. In addition to or in lieu of holding counsel in contempt, the court of criminal appeals may enter an order denying counsel compensation under Section 2A.

(d) If the court of criminal appeals establishes a new filing date for the application, the court of criminal appeals shall notify the convicting court of that fact and the convicting court shall proceed under this article.

(e) Sections 2A and 3 apply to compensation and reimbursement of counsel appointed under Subsection (b)(3) in the same manner as if counsel had been appointed by the convicting court, unless the attorney is employed by the office of capital and forensic writs, in which case the compensation of that attorney is governed by Subchapter B, Chapter 78, Government Code.

(f) Notwithstanding any other provision of this article, the court of criminal appeals shall appoint counsel and establish a new filing date for application, which may be no later than the 270th day after the date on which counsel is appointed, for each applicant who before September 1, 1999, filed an untimely application or failed to file an application before the date required by Section 4(a) or (b). Section 2A applies to the compensation and payment of expenses of counsel appointed by the court of criminal appeals under this subsection, unless the attorney is employed by the office of capital and forensic writs, in which case the compensation of that attorney is governed by Subchapter B, Chapter 78, Government Code.

Sec. 5. Subsequent Application

(a) If a subsequent application for a writ of habeas corpus is filed after filing an initial application, a court may not consider the merits of or grant relief based on the subsequent application unless the application contains sufficient specific facts establishing that:

(1) the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application filed under this article or Article 11.07 because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application;

(2) by a preponderance of the evidence, but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt; or

(3) by clear and convincing evidence, but for a violation of the United States Constitution no rational juror would have answered in the state's favor one or more of the special issues that were submitted to the jury in the applicant's trial under

Article 37.071, 37.0711, or 37.072.

(b) If the convicting court receives a subsequent application, the clerk of the court shall:

(1) attach a notation that the application is a subsequent application;

(2) assign to the case a file number that is ancillary to that of the conviction being challenged; and

(3) immediately send to the court of criminal appeals a copy of:

(A) the application;

(B) the notation;

(C) the order scheduling the applicant's execution, if scheduled; and

(D) any order the judge of the convicting court directs to be attached to the application.

(c) On receipt of the copies of the documents from the clerk, the court of criminal appeals shall determine whether the requirements of Subsection (a) have been satisfied. The convicting court may not take further action on the application before the court of criminal appeals issues an order finding that the requirements have been satisfied. If the court of criminal appeals determines that the requirements have not been satisfied, the court shall issue an order dismissing the application as an abuse of the writ under this section.

(d) For purposes of Subsection (a)(1), a legal basis of a claim is unavailable on or before a date described by Subsection (a)(1) if the legal basis was not recognized by or could not have been reasonably formulated from a final decision of the United States Supreme Court, a court of appeals of the United States, or a court of appellate jurisdiction of this state on or before that date.

(e) For purposes of Subsection (a)(1), a factual basis of a claim is unavailable on or before a date described by Subsection (a)(1) if the factual basis was not ascertainable through the exercise of reasonable diligence on or before that date.

(f) If an amended or supplemental application is not filed within the time specified under Section 4(a) or (b), the court shall treat the application as a subsequent application under this section.

Sec. 6. Issuance of Writ

(a) If a timely application for a writ of habeas corpus is filed in the convicting court, a writ of habeas corpus, returnable to the court of criminal appeals, shall issue by operation of law.

(b) If the convicting court receives notice that the requirements of Section 5 for consideration of a subsequent application have been met, a writ of habeas corpus, returnable to the court of criminal appeals, shall issue by operation of law.

(b-1) If the convicting court receives notice that the requirements of Section 5(a) for consideration of a subsequent application have been met and if the applicant has not elected to proceed pro se and is not represented by retained counsel, the convicting court shall appoint, in order of priority:

(1) the attorney who represented the applicant in the proceedings under Section 5, if the attorney seeks the appointment;

(2) the office of capital and forensic writs, if the office represented the applicant in the proceedings under Section 5 or otherwise accepts the appointment; or

(3) counsel from a list of competent counsel maintained by the presiding judges of the administrative judicial regions under Section 78.056, Government Code, if the office of capital and forensic writs:

(A) did not represent the applicant as described by Subdivision (2); or

(B) does not accept or is prohibited from accepting the appointment under Section 78.054, Government Code.

(b-2) Regardless of whether the subsequent application is ultimately dismissed, compensation and reimbursement of expenses for counsel appointed under Subsection (b-1) shall be provided as described by Section 2, 2A, or 3, including compensation for time previously spent and reimbursement of expenses previously incurred with respect to the subsequent application.

(c) The clerk of the convicting court shall:

(1) make an appropriate notation that a writ of habeas corpus was issued;

(2) assign to the case a file number that is ancillary to that of the conviction being challenged; and

(3) send a copy of the application by certified mail, return receipt requested, or by secure electronic mail to the attorney representing the state in that court.

(d) The clerk of the convicting court shall promptly deliver copies of documents submitted to the clerk under this article to the applicant and the attorney representing the state.

Sec. 7. Answer to Application

(a) The state shall file an answer to the application for a writ of habeas corpus not later than the 120th day after the date the state receives notice of issuance of the writ. The state shall serve the answer on counsel for the applicant or, if the applicant is proceeding pro se, on the applicant. The state may request from the convicting court an extension of time in which to answer the application by showing particularized justifying circumstances for the extension, but in no event may the court permit the state to file an answer later than the 180th day after the date the state receives notice of issuance of the writ.

(b) Matters alleged in the application not admitted by the state are deemed denied.

Sec. 8. Findings of Fact Without Evidentiary Hearing

(a) Not later than the 20th day after the last date the state answers the application, the convicting court shall determine whether controverted, previously unresolved factual issues material to the legality of the applicant's confinement exist and shall issue a written order of the determination.

(b) If the convicting court determines the issues do not exist, the parties shall file proposed findings of fact and conclusions of law for the court to consider on or before a date set by the court that is not later than the 30th day after the date the order is issued.

(c) After argument of counsel, if requested by the court, the convicting court shall make appropriate written findings of fact and conclusions of law not later than the 15th day after the date the parties filed proposed findings or not later than the 45th day after the date the court's determination is made under Subsection (a), whichever occurs first.

(d) The clerk of the court shall immediately send to:

(1) the court of criminal appeals a copy of the:

(A) application;

(B) answer;

(C) orders entered by the convicting court;

(D) proposed findings of fact and conclusions of law; and

(E) findings of fact and conclusions of law entered by the court; and

(2) counsel for the applicant or, if the applicant is proceeding pro se, to the applicant, a copy of:

(A) orders entered by the convicting court;

(B) proposed findings of fact and conclusions of law; and

(C) findings of fact and conclusions of law entered by the court.

Sec. 9. Hearing

(a) If the convicting court determines that controverted, previously unresolved factual issues material to the legality of the applicant's confinement exist, the court shall enter an order, not later than the 20th day after the last date the state answers the application, designating the issues of fact to be resolved and the manner in which the issues shall be resolved. To resolve the issues, the court may require affidavits, depositions, interrogatories, and evidentiary hearings and may use personal recollection.

(b) The convicting court shall hold the evidentiary hearing not later than the 30th day after the date on which the court enters the order designating issues under Subsection (a). The convicting court may grant a motion to postpone the hearing, but not for more than 30 days, and only if the court states, on the record, good cause for delay.

(c) The presiding judge of the convicting court shall conduct a hearing held under this section unless another judge presided over the original capital felony trial, in which event that judge, if qualified for assignment under Section 74.054 or 74.055, Government Code, may preside over the hearing.

(d) The court reporter shall prepare a transcript of the hearing not later than the 30th day after the date the hearing ends and file the transcript with the clerk of the convicting court.

(e) The parties shall file proposed findings of fact and conclusions of law for the convicting court to consider on or before a date set by the court that is not later than the 30th day after the date the transcript is filed. If the court requests argument of counsel, after argument the court shall make written findings of fact that are necessary to resolve the previously unresolved facts and make conclusions of law not later than the 15th day after the date the parties file proposed findings or not later than the 45th day after the date the court reporter files the transcript, whichever occurs first.

(f) The clerk of the convicting court shall immediately transmit to:

(1) the court of criminal appeals a copy of:

(A) the application;

(B) the answers and motions filed;

(C) the court reporter’s transcript;

(D) the documentary exhibits introduced into evidence;

(E) the proposed findings of fact and conclusions of law;

(F) the findings of fact and conclusions of law entered by the court;

(G) the sealed materials such as a confidential request for investigative expenses; and

(H) any other matters used by the convicting court in resolving issues of fact; and

(2) counsel for the applicant or, if the applicant is proceeding pro se, to the applicant, a copy of:

(A) orders entered by the convicting court;

(B) proposed findings of fact and conclusions of law; and

(C) findings of fact and conclusions of law entered by the court.

(g) The clerk of the convicting court shall forward an exhibit that is not documentary to the court of criminal appeals on request of the court.

Sec. 10. Rules of Evidence

The Texas Rules of Criminal Evidence apply to a hearing held under this article.

Sec. 11. Review by Court of Criminal Appeals

The court of criminal appeals shall expeditiously review all applications for a writ of habeas corpus submitted under this article. The court may set the cause for oral argument and may request further briefing of the issues by the applicant or the state. After reviewing the record, the court shall enter its judgment remanding the applicant to custody or ordering the applicant's release, as the law and facts may justify.

Credits

Added by Acts 1995, 74th Leg., ch. 319, § 1, eff. Sept. 1, 1995. Amended by Acts 1997, 75th Leg., ch. 1336, §§ 1 to 5, eff. Sept. 1, 1997; Acts 1999, 76th Leg., ch. 803, §§ 1 to 10, eff. Sept. 1, 1999; Acts 2003, 78th Leg., ch. 315, §§ 1 to 3, eff. Sept. 1, 2003; Acts 2005, 79th Leg., ch. 787, § 13, eff. Sept. 1, 2005; Acts 2005, 79th Leg., ch. 965, § 5, eff. Sept. 1, 2005; Acts 2007, 80th Leg., ch. 593, § 3.06, eff. Sept. 1, 2007; Acts 2009, 81st Leg., ch. 781, §§ 2 to 5, eff. Sept. 1, 2009; Acts 2009, 81st Leg., ch. 781, § 11, eff. Jan. 1, 2010; Acts 2011, 82nd Leg., ch. 1139 (H.B. 1646), § 1, eff. Sept. 1, 2011; Acts 2013,

83rd Leg., ch. 78 (S.B. 354), § 2, eff. May 18, 2013; Acts 2015, 84th Leg., ch. 1215 (S.B. 1743), §§ 1 to 5, eff. Sept. 1, 2015.

Notes of Decisions (200)

Footnotes

1 V.T.C.A., Government Code § 78.051 et seq.

Vernon's Ann. Texas C. C. P. Art. 11.071, TX CRIM PRO Art. 11.071
Current through the end of the 2021 Regular and Second Called Sessions of the 87th Legislature. Some statute sections may be more current, but not necessarily complete through the whole Session. See credits for details.

End of Document