No.

In the
Supreme Court of the United States

MARLON DANTRUCE WILLIAMS,
Petitioner,

v.

LORIE DAVIS, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,
Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether *Slack v. McDaniel*, 529 U.S. 473 (2000), requires a court of appeals to issue a certificate of appealability to a prisoner to challenge a district court's holding that *Giglio v. United States*, 405 U.S. 150 (1972), permits the government to use false testimony or fail to correct such testimony to convict a defendant where the witness did not intentionally testify falsely or was not directed to testify falsely by a prosecutor.

2. Whether *Slack v. McDaniel*, 529 U.S. 473 (2000), requires a court of appeals to issue certificates of appealability to a prisoner to challenge the summary judgment dismissal of his constitutional claims that turns not upon the lack of a genuine dispute as to material facts, but upon the application of unfavorable inferences drawn by a district court.

List of Parties

All parties appear in the caption of the case on the cover page.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Constitutional Provisions

Statutes

Rules

PETITION FOR WRIT OF CERTIORARI

Marlon Williams respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The United States Court of Appeals for the Fifth Circuit's single-judge order denying the Petitioner's Application for Certificates of Appealability, *Williams v. Davis*, No. 17-20648 (5th Cir. Aug. 21, 2018), is attached to this Petition as Appendix A. The per curiam opinion of the United States Court of Appeals for the Fifth Circuit denying Petitioner's motion for reconsideration, *Williams v. Davis*, No. 17-20648 (5th Cir. Sept. 11, 2018), is attached as Appendix B. The unpublished Memorandum Opinion and Order of the United States District Court for the Southern District of Texas denying Williams's Petition for Writ of Habeas Corpus, *Williams v. Davis*, No. 4:14-CV-02098 (S.D. Tex. Oct. 10, 2017), is attached as Appendix C.

JURISDICTION

The court of appeals entered judgment denying certificates of appealability on August 21, 2018. The same court denied Williams's motion for reconsideration on September 11, 2018. This Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves a state court criminal defendant's rights to due process and the effective assistance of counsel. The Fifth Amendment to the

United States Constitution provides that "[n]o person . . . shall . . . be deprived of life, liberty or property without due process of law." The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." The Fourteenth Amendment provides that "nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

This case also involves the correct standard to be used in determining whether to grant a certificate of appealability. Under 28 U.S.C. § 2253(c), "[a] certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right."

STATEMENT OF THE CASE

Williams's case is the latest in a long line of cases in which the Fifth Circuit has correctly set out this Court's *Slack* standard for granting COAs and then disregarded it. His case requires the Court's attention because not only is the Fifth Circuit continuing to ignore this Court's binding precedent, but it has cloaked its reasoning in an inscrutable summary dismissal. The Court should grant the petition, vacate the judgment, and remand this case as a signal to the Fifth Circuit that it must issue COAs as required by governing law.

A. Factual Background

On August 9, 1999, murder eyewitness and gunshot victim Danny Swanson was shown seven photographs by Houston Police Officer Henry Chisolm, including those of suspects Derrick Turner and Marlon Williams. He did not identify anyone to the officer.

On August 12, 1999, Chisolm again met with Swanson. That day, the officer first showed him a half-hour-long video of the party attended by Turner and Williams, followed by a video lineup with Turner, and the same photo lineup he had seen on August 9th. Swanson then identified Williams as the one who had shot him and killed Tristan Thompson.

Williams's attorney, George Parnham, at a pretrial hearing on June 29, 2000, requested that the trial judge order the State to turn over any additions to the police offense report in the case because he was unsure if he had the complete report.

On the first day of trial, July 10, 2000, in a hearing in chambers, Parnham disputed the prosecutor's claim that the file had always been open and specifically referenced that he had made repeated requests to view the offense report.

At Williams's state murder trial, the prosecutor did not ask Swanson any questions about the first lineup where he did not identify Williams to the police as the shooter. Neither did Williams's trial attorney. Swanson testified that he went to the police station where the officers "wanted me to

identify the guys in the picture" and that the police told him, "Danny, you did good. You positively identified both of the guys we have picked up." Swanson identified Williams to the jury as the one who shot him and killed Thompson.

The prosecutor asked the officer at trial "did you at any time show those photographs [of Williams and Turner] to . . . Swanson?", who answered that "Yes, we did. That was on August the 12th." Chisolm told the jury that Swanson "identified Marlon Williams as the shooter." Williams's trial attorney, like the prosecutor, never questioned Chisolm about Swanson's August 9th lineup.

During the trial, the jury heard testimony from Turner, the alleged accomplice to the murder. Turner identified Williams as the shooter. Two other eyewitnesses to the shooting testified for the State. Neither of them identified Williams.

In its closing arguments, the State told the jury that Swanson "identified [Williams] so strong, so strong down at the police station, picked him out dead-on in photos and identified Derrick Turner strongly and said he wasn't the shooter."

Williams was found guilty by the jury and sentenced to life in prison for murder.

Sometime before January 23, 2012, Williams had a friend obtain a copy of a police "Nonpublic" offense report, which detailed Swanson's failure

to identify Williams in the August 9th lineup. The relevant portion of the report regarding Swanson's August 9th lineup states:

> THE PHOTO ARRAY WAS SHOWN TO DANNY [Swanson] AT 1545 HOURS. IT WAS OBVIOUS TO THIS SERGEANT THAT DAWSON [sic] RECOGNIZED SOMEONE IN THE PHOTOS SHOWN. HE BECAME VERY NERVOUS AND STATED THAT HE [sic] SO AFRAID THAT THEY ARE GOING TO FIND HIM AND SHOOT HIM AGAIN.

The report was not complete and had missing pages.

Based on the newly discovered evidence of Swanson's August 9th lineup, Williams filed a state application for a writ of habeas corpus on *Brady*, *Giglio*, and ineffective assistance of counsel claims.

The state court ordered Williams's trial attorney, Parnham, to file an affidavit responding to a number of issues arising out of Williams's application. It asked Parnham to address whether he had discovered that Swanson was shown the August 9, 1999 photo array and failed to identify Williams as the shooter. Parnham responded, "I do not recall the pre-trial efforts on the part of the State on the issue of identification of the applicant by Danny Swanson."

The state court also asked the attorney whether he believed that he should have impeached Chisolm's testimony with information that Swanson had been shown a photo array on August 9, 1999, when Chisolm testified that Swanson had not been shown the array until August 12, 1999. Parnham responded that "[t]he 3 day difference between the photo spread shown to

Danny Swanson, in my opinion, was not significant in importance in the cross-examination of Officer Chisolm."

In his affidavit, the attorney noted that it had been 17 years since he represented Williams and stated that he "was given access to the Houston Police incident report attached to" Williams's writ, but that he did not recall when he reviewed it, only that "it would have been very early on in [his] preparation for the defense of Marlon Williams." Parnham admitted, however, that he was not able to compare the copy of the report that he had at trial with the report that Williams later discovered, because he did not possess the original file Williams's case and that the records no longer exist.

B. Proceedings Below

After waiting over two years for the state courts to rule on his habeas application, Williams filed a pro se petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in federal court on July 22, 2014. On the same day he filed his petition, Williams also filed a Motion to Waive Exhaustion Pursuant to 28 U.S.C. § 2254(B)(ii). The federal district court dismissed his petition for failure to exhaust state court remedies and denied his motion to waive exhaustion requirements. The court also denied Williams a certificate of appealability.

The court of appeals granted Williams a certificate of appealability on the issue of whether he was entitled to have the exhaustion requirements set forth in 28 U.S.C. § 2254 waived based on the state court's inordinate delay,

Williams v. Stephens, 620 F. App'x 348, 349 (5th Cir. 2015), and appointed him the undersigned counsel.

The Director filed an unopposed motion to waive the exhaustion requirement pursuant 28 U.S.C. § 2254(b)(3) with respect to those claims that were raised in Williams's state habeas application, which the court of appeals granted. *Williams v. Davis*, 672 F. App'x 499, 499 (5th Cir. 2016). That court vacated the district court's judgment and remanded the case to review Williams's petition "on the merits with respect to those claims that were raised in [his] state habeas application." *Id.*

On remand in the district court, the Director filed a motion for summary judgment, which the district court granted without an evidentiary hearing, denied a certificate of appealability, and dismissed the petition. Williams applied to the court of appeals for certificates of appealability for six issues, each representing a basis for the district court's grant of the State's motion for summary judgment.

The appeals court summarily denied Williams COAs on August 21, 2018. The order gave no reasoning for its decision, stating only, "A COA is DENIED because Williams fails to make the required showing." The court denied Williams's subsequent motion for reconsideration in a per curiam ruling on September 11, 2018.

REASON FOR GRANTING THE PETITION

I. THE COURT SHOULD EXERCISE ITS SUPERVISORY POWER OVER THE FIFTH CIRCUIT.

The Court should summarily grant certiorari, vacate the court of appeals' judgment denying William's certificates of appealability, and remand the case to the appeals court because the Fifth Circuit has, once again, "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power." *See* SUP. CT. R. 10(a). The Fifth Circuit's refusal to issue Williams certificates of appealability for his meritorious constitutional habeas claims represents a "troubling" pattern of refusing to follow Supreme Court COA precedent. *See Jordan v. Fisher*, 135 S. Ct. 2647, 2652 n.2 (2015) (Sotomayor, J., joined by Ginsburg and Kagan, JJ., dissenting from denial of certiorari).

This Court has repeatedly taken the Fifth Circuit to task in cases, like Williams's, where the appeals court has "phrased its determination in the proper terms" by citing the *Slack* COA standard and then disregarded it. *See, e.g., Buck v. Davis*, 137 S. Ct. 759, 773 (2017); *Tennard v. Dretke*, 542 U.S. 274, 283 (2004); *Miller-El v. Cockrell*, 537 U.S. 322, 330 (2003). This case is more troubling than past cases in which a litigant could see that, "[d]espite paying lipservice to the principles guiding issuance of a COA, the Fifth Circuit's analysis proceeded along a distinctly different track." *See Tennard*, 542 U.S. at 283. In Williams's case, the Fifth Circuit stated the correct *Slack* COA standard and then provided no written reasoning for

denying COAs.

This case is particularly troubling because it came to the federal district court in a highly unusual posture: Williams's constitutional habeas claims had never been reviewed by the Texas state courts. He was not trying for a second bite at the apple; he never even had his first bite.

After his state court habeas application languished for over two years in Texas courts, Williams brought a federal habeas petition. The district court denied that petition without reviewing his claims. Later, the court of appeals ordered "a full remand" to review his petition "on the merits" after the Director waived 28 U.S.C. § 2254(b)(3)'s exhaustion requirement. *Williams*, 672 F. App'x at 499.

Williams has never received a *de novo* review of the merits of his constitutional claims by the federal district court or any other court. Instead, the district court ignored well-settled Supreme Court precedent and misapplied the summary judgment standard by improperly weighing the evidence and resolving disputed issues of fact in favor of the moving party, the Director.

Williams is imprisoned for life. Only one government official, a district judge, has reviewed his constitutional claims that the government denied him due process by not disclosing that the only disinterested eyewitness to identify him at trial as the shooter did not identify him in the first photo lineup and by knowingly using this false testimony against him and then

arguing in its closing statements to the jury that the witness "identified [Williams] so strong, so strong down at the police station, picked him out dead-on in photos and identified Derrick Turner strongly and said he wasn't the shooter." That same single official was also the only one to review his constitutional claim that his counsel was ineffective by failing to impeach the eyewitness's and the police officer's false testimony.

Williams does not claim an unlimited right of review of the district court's ruling, only that afforded him under law. A COA should issue when the petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Miller-El*, 537 U.S. at 336. Williams has made such a showing. He has also shown "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack*, 529 U.S. at 484 (internal quotation and citation omitted).

A COA determination is a "threshold inquiry." *Miller-El*, 537 U.S. at 336. It "does not require full consideration of the factual or legal bases adduced in support of the claims." *Id.* This *limited* review is mandated by statute. 28 U.S.C. § 2253(c)(1) (stating that absent a COA "an appeal may not be taken to the court of appeals"). "A prisoner seeking a COA must prove something more than the absence of frivolity or the existence of mere good faith on his or her part." *Miller-El*, 537 U.S. at 338 (internal quotation and

citation omitted). This Court's standard, however, "does not require a showing that the appeal will succeed." *Id.* at 337. The showing required to satisfy § 2253(c) is "[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.* at 338 (quotation and citation omitted). "[A] claim can be debatable even though *every* jurist of reason might agree, after the COA has been granted and the case has received *full consideration*, that the petitioner will not prevail." *Id.* (emphasis added).

Williams seeks merely to argue on appeal that the district court ignored well-settled Supreme Court precedent and misapplied the summary judgment standard by improperly weighing the evidence and resolving disputed issues of fact in favor of the moving party, the Director. *See infra* Part II. He has made the showing required by § 2253(c).

It is not uncommon for this Court to summarily vacate judgments that it views as clearly out of step with its own precedents. *See, e.g., Kaupp v. Texas*, 538 U.S. 626, 630-33 (2003) (per curiam); *Kirk v. Louisiana*, 536 U.S. 635, 637-38 (2002) (per curiam); *Flippo v. West Virginia*, 528 U.S. 11, 12-14 (1999) (per curiam); *Maryland v. Dyson* 527 U.S. 465, 465 (1999) (per curiam).

It has done so earlier this year in another COA case, *Tharpe v. Seller*, 138 S. Ct. 545 (2018) (per curiam). In *Tharpe*, the Court made its own review of the record and granted a COA, stating that "review of the denial of a COA

is certainly not limited to grounds expressly addressed by the court whose decision is under review." *Id.* at 546-47. In that case, the Court even expressed its skepticism as to whether the petitioner should receive a COA at all based on the record it had reviewed. *Id.* at 546. Significantly, in Williams's case, the Fifth Circuit provided no grounds for denying him COAs and, as demonstrated below, a cursory review of the record shows that reasonable jurists could dispute the district court's basis for its summary judgment dismissal in its *de novo* review of his habeas claims on their merits. Under this Court's precedents Williams is entitled to COAs on his habeas claims.

This Court, however, may choose to simply review the merits of Williams's argument and grant him full relief on his habeas claims. *See Buck*, 137 S. Ct. at 774-75 (holding that "[w]ith respect to this Court's review, § 2253 does not limit the scope of our consideration of the underlying merits, and at this juncture we think it proper to meet the decision below and the arguments of the parties on their own terms.").

II. THE FIFTH CIRCUIT DISREGARDED THE CERTIFICATE OF APPEALABILITY STANDARD.

By refusing to issue Williams COAs, the Fifth Circuit's order "determined not only that [Williams] had failed to show any entitlement to relief but also that reasonable jurists would consider that conclusion to be beyond all debate." *See Welch v. United States*, 136 S. Ct. 1257, 1264 (2016) (citing *Slack*, 529 U.S. at 484). The Fifth Circuit's single-judge order denying

Williams COAs gave no reasoning for its decision, stating only, "[a] COA is DENIED because Williams fails to make the required showing." As demonstrated below, this determination was so manifestly wrong as to show the court of appeals disregarded this Court's standard for issuing COAs set out in *Slack*.

A. Reasonable jurists could debate whether due process permits the government to use false testimony or fail to correct such testimony to convict a defendant where the witness did not intentionally testify falsely or was not directed to testify falsely by a prosecutor.

Reasonable jurists could debate the district court's summary judgment dismissal of Williams's *Giglio* claim based on its holding that the State did not violate Williams's due process rights because "[t]he record does not reflect that either witness intentionally testified falsely or that the prosecutor directed them to do so."

Williams argues that the State knowingly used and failed to correct false testimony from Swanson and Chisolm regarding Swanson's failure to identify Williams to the police as the shooter on August 9, 1999 in violation of *Giglio*, 405 U.S. at 153.

Reasonable jurists could debate whether a witness's testimony must be intentionally false before a prosecutor has a duty to correct it. *They have.* The Third Circuit has recognized that the prosecution's duty should not be "narrowly and technically limited to those situations where the prosecutor knows that the witness is guilty of the crime of perjury." *United States v.*

Stadtmauer, 620 F.3d 238, 268 (3d Cir. 2010) (internal quotation and citation omitted). That court reasoned, "when it should be obvious to the Government that the witness' answer, although made in good faith, is untrue, it has an obligation to correct that testimony." *Id.* (internal quotation and citation omitted). The Ninth Circuit in an en banc opinion has instructed that "*Napue* [*v. Illinois,* 360 U.S. 264, 269 (1959)], by its terms, addresses the presentation of false *evidence*, not just subornation of perjury." *Hayes v. Brown*, 399 F.3d 972, 981 (9th Cir. 2005) (emphasis in original); *see Giglio*, 405 U.S. at 154-55 (reversing a conviction for *Napue* error).

Reasonable jurists could also debate whether a defendant's right to due process is violated when the prosecutor does not correct the false testimony of a witness who was not directed to testify falsely. *Giglio* plainly instructs that "[w]hether nondisclosure was a result of negligence or design," it is the responsibility of the prosecutor to correct the evidence. 405 U.S. at 154. *Brady* held that suppression of material evidence justifies a new trial "irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). The district court failed to apply this well settled law.

Williams is entitled to a COA on the issue of whether due process permits the government to use false testimony or fail to correct such testimony to convict a defendant where the witness did not intentionally testify falsely or was not directed to testify falsely by a prosecutor.

B. Reasonable jurists could debate whether Williams raised a genuine issue as to whether his attorney possessed the portion of the police report describing the eyewitness's August 9, 1999 photo lineup.

Reasonable jurists could debate whether the district court improperly "weigh[ed] the evidence" on summary judgment under Federal Rule of Civil Procedure 56 and resolved a disputed issue in favor of the moving party, the Director, namely, whether Williams's attorney possessed the disputed portion of the police report at trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

The district court dismissed all of Williams's claims as time barred and not subject to statutory tolling under 28 U.S.C. § 2244(d)(1)(B) or § 2244(d)(1)(D), and specifically dismissed Williams's *Brady* claim, by holding that Williams "raises nothing more than a metaphysical doubt about whether this portion of the [police] report [discussing the August 9th photo lineup] was available" to his attorney at trial. Williams argues that the State violated its duty under *Brady*, 373 U.S. at 87, by suppressing the evidence that Swanson, the only disinterested eyewitness to identify Williams at trial as the shooter, did not identify Williams to police as the man who shot and killed Thompson when Swanson was first shown Williams in a photo lineup.

Like other Federal Rules of Civil Procedure, Rule 56 "appl[ies] in the context of habeas suits to the extent [it is] not inconsistent with the Habeas Corpus Rules" or the statutory provisions governing habeas relief. *See Woodford v. Garceau*, 538 U.S. 202, 208 (2003); Rule 12 of the Rules

Governing Section 2254; FED. R. Civ. P. 81(a)(4). In a case where a state court has made findings on a prisoner's habeas claims, Rule 56's requirement that the "evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor," *Anderson*, 477 U.S. at 255, does not apply because it conflicts with section 2254's requirement that "a determination of a factual issue made by a State court shall be presumed to be correct," 28 U.S.C. § 2254(e)(1).

Rule 56, however, applies in full force in Williams's case because the Texas courts never made any fact findings on his habeas claims. The court of appeals specifically instructed the district court to review Williams's claims on their merits because the State waived 28 U.S.C. § 2254(b)(3)'s requirement that he exhaust state habeas review. *See Williams*, 672 F. App'x at 499. While the district court correctly stated that "[i]n deciding a summary judgment motion, the reviewing court must 'construe all facts and inferences in the light must favorable to the moving party,'" it failed to properly apply Rule 56's summary judgment standard.

Reasonable jurists could debate the court's grant of summary judgment on the basis of whether Williams's attorney possessed the disputed portion of the police report at trial because there are "genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson*, 477 U.S. at 250. Contravening the summary judgment standard, the court arguably failed to

view the facts and draw inferences "in the light most favorable to the party opposing the [summary judgment] motion" under Federal Rule of Civil Procedure 56. *See United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962) (per curiam).

The district court based its conclusion "that the State's file was 'open' to defense counsel once Williams was indicted and Parnham had access to the police report" before Williams' trial on three pieces of evidence: (1) Parnham's statements referencing the police report during pretrial proceedings; (2) Parnham's affidavit submitted in the state habeas proceeding stating that he had access to the police report and would have reviewed it in preparation for trial; and (3) Parnham's "reference to other information found on the same page as the photo array shown to Swanson and other witnesses on August 9, 1999."

There is, however, a genuine dispute as to whether Parnham possessed the portion of the report discussing the August 9th photo lineup. The district court incorrectly stated that "Williams presents no evidence to the contrary" that his attorney possessed the portion of the report. Williams showed that the dispute was genuine by "citing to particular parts of materials in the record" to "support the assertion," FED. R. CIV. P. 56(c), that Parnham did not possess that disputed portion of the record. These parts of the record were: (1) the statements in Parnham's own affidavit that he could not compare the copy of the report he had at trial with William's later discovered report, that

he had no recollection that when police first showed Swanson a photo lineup containing a picture of Williams on August 9, 1999, Swanson did not identify Williams, and that it had been 17 years since he represented Williams; (2) the statements by Parnham at the June 29, 2000 pretrial hearing where he cast doubt on whether he had the complete police offense report; (3) the prosecutor's entire full page statement made on the page of the July 10, 2000 hearing (incorrectly cited by the court as Parnham's statement); and, (4) a statement made by Parnham during the July 10, 2000 hearing disputing the prosecutor's claim that the file had always been open and specifically referencing that he had made repeated requests to view the offense report and was told the file was closed.

The reasonable inference that the district court should have draw in Williams's favor from these facts is that his attorney did not possess the portion of the police report describing the August 9th photo lineup. The facts adduced by Williams create a genuine issue of material fact as to whether Parnham correctly recalled after 17 years whether he had access to the disputed portion of the police report at trial. This is especially so because Parnham's later account (1) contradicts his contemporaneous expressions of skepticism about whether he possessed the complete report; (2) admits he cannot verify the documentary record because his copy of the police report was destroyed years ago; and (3) shows his lack of recollection about other

critical facts, principally, that the first time Swanson was shown Williams's picture he failed to identify him.

Williams is entitled to a COA on the issue of whether he raised a genuine issue of material fact as to whether his attorney possessed the disputed portion of the police report.

C. Reasonable jurists could debate whether the district court failed to provide Williams the required notice of its *sua sponte* basis for granting summary judgment for the Director.

The district court also relied on a *sua sponte* basis for granting the Director's motion for summary judgment, namely, "[b]ecause Parnham made reference to other information found on the same page as the photo array shown to Swanson and other witnesses on August 9, 1999, the record is evidence that Parnham had access to that page of the report."

Federal Rule of Civil Procedure 56(f) states that "[a]fter giving notice and a reasonable opportunity to respond, the court . . . may consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute." *See Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986) ("[D]istrict courts are widely acknowledged to possess the power the enter summary judgment *sua sponte*, so long as the losing party was on notice that she had to come forward with all her evidence.").

Williams, however, was given neither notice nor reasonable time to respond to this basis. *See* FED. R. CIV. P. 56(f); *see also Tolbert ex rel. Tolbert v. Nat'l Union Fire Ins. Co.*, 657 F.3d 262, 271 (5th Cir. 2011) (stating that

appeals court has "vacated summary judgments and remanded for further proceedings where the district court provided no notice prior to granting summary judgment *sua sponte*, even where summary judgment may have been proper on the merits." (internal quotation and citation omitted)).

This lack of notice was not harmless because Williams has additional evidence that disputes this basis for dismissing his claim. *See Sayles v. Advanced Recovery Systems, Inc.*, 865 F.3d 246, 249 (5th Cir. 2017) ("[T]he harmless error doctrine applies to the lack of notice required by Rule 56(f)," but such error is harmless only "if the nonmoving party admits that he has no additional evidence." (internal quotation and citations omitted)).

Reasonable jurists could debate the district court's basis for dismissing Williams's *Brady* claim on summary judgment because it is not at all clear on which "*precise page* of the police report" the disputed portion describing Swanson's August 9th lineup was found. Williams in his *pro se* Petitioner's Memorandum in Support of Petition for Writ of Habeas Corpus, states "[s]ince Applicant was only able to obtain portions of the nonpublic report, the page numbers referred to are the ones Applicant has placed on the center bottom of each page." Williams took pains to point out that the page numbering is his—not the Houston Police Department's—and that the report represented only the portions he was able to obtain, not the complete report.

Williams is entitled to a COA on the issue of whether the district court failed to provide him with the required notice of its *sua sponte* basis for granting summary judgment.

D. Reasonable jurists could debate whether the suppressed impeachment evidence of the August 9, 1999 photo lineup was material to Williams's guilt under his *Brady* and ineffective assistance of counsel claims.

Reasonable jurists could debate whether the district court improperly weighed the evidence under Rule 56 and resolved the disputed issue of whether it was material to Williams's guilt that the only disinterested witness to identify him as the man who shot and killed Thompson failed to identify him to police when first shown Williams in a photo lineup. *See Anderson*, 477 U.S. at 255.

The district court dismissed Williams's *Brady* claim holding that "Williams does not demonstrate that the result of the proceeding would have been any different if the jury had known that Swanson was too afraid to make an identification on August 9, 1999." The court dismissed his ineffective assistance of counsel claim holding that the failure to identify Swanson on August 9th "was [not] significant or material."

Williams argues that his attorney's failure to impeach a key government witness's false testimony denied him the effective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984).

Evidence is material for *Brady* and ineffective assistance of counsel claim purposes if there is a reasonable probability that had the evidence been disclosed by the prosecutor or introduced by defense counsel "the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 681-82 (1985); *Strickland*, 466 U.S. at 694. *See Mahler v. Kaylo*, 537 F.3d 494, 503-04 (5th Cir. 2018) (change in witness's testimony material because it could have been used to impeach key witness). Otherwise stated, the question properly before the district court was whether had the impeaching testimony had been presented at trial would there have been a "reasonable probability that . . . at least one juror would have harbored a reasonable doubt" as to Williams's guilt. *See Buck*, 137 S. Ct. at 776.

The portion of the police report describing eyewitness Swanson's August 9th lineup is material to the question of Williams's innocence because it could have been used to impeach the testimony of two key witnesses, Swanson and Chisolm. This portion of the report shows that when Swanson was first shown a photo of Williams by Chisolm, Swanson did not identify Williams to the officer.

This key evidence is at odds with both Swanson and Chisolm's testimony that when Swanson was first shown photos of alleged accomplice Turner and Williams, he identified Williams as the shooter. It also contradicts the State's statements in closing argument highlighting this testimony.

At trial, the prosecutor and defense counsel failed to elicit any testimony from Swanson regarding this first lineup. Instead, the jury heard Swanson testify that he went to the police station where the officers "wanted me to identify the guys in the picture" and that the police told him, "Danny, you did good. You positively identified both of the guys we have picked up."

When Chisolm testified, the prosecutor asked him on direct examination: "did you at any time show those photographs [of Williams and Turner] to the second person that was shot, uhm, Danny Swanson?" Chisolm responded, "Yes, we did. That was on August the 12th." Chisolm told the jury that Swanson "identified Marlon Williams as the shooter." Williams's attorney did not question the officer about the August 9th photo lineup.

The State relied heavily in its closing arguments on the falsehood of Swanson's immediate identification of Williams during what the jury understood to be the first time Swanson saw Williams's photo. The State argued to the jury that Swanson "identified [Williams] so strong, so strong down at the police station, picked him out dead-on in photos and identified Derrick Turner strongly and said he wasn't the shooter."

The court dismissed Williams's *Brady* claim, however, holding that "Williams does not show that the evidence at issue (Swanson's refusal to identify anyone on August 9, 1999, because he feared for his life), would have made any difference in this case." It reasoned that "[i]mpeachment evidence is not material where testimony of the witness who might have been

impeached is strongly corroborated by additional evidence supporting a guilty verdict." The district court similarly dismissed his ineffective assistance of counsel claim by holding that Swanson's failure to identify Williams as the shooter on August 9th "was [not] significant or material." The court stated that Swanson's identification testimony was corroborated by (1) Swanson's August 12th lineup identification, (2) Swanson's trial identification of Williams, and (3) alleged co-conspirator Derrick Turner's testimony. The court also stated that (4) there were "other eyewitnesses who described Williams as the shooter."

As an initial matter, the way the court framed its *Brady* holding demonstrates its misapplication of the Rule 56 summary judgment standard: "Williams does not show that the evidence at issue (Swanson's refusal to identify anyone on August 9, 1999, because he feared for his life), would have made any difference in this case." This is also demonstrated by the district court's reasoning in support of dismissal of Williams's ineffective assistance of counsel claim: "[i]mpeaching Officer Chisholm [sic] with information showing that Swanson was too afraid to make an identification on August 9, 1999, would likely have reinforced the fact that Swanson was in fear for his life from the shooter, whom he positively ('a hundred percent') identified as Williams."

On summary judgment, the court is required to view the facts and draw inferences "in the light most favorable to the party opposing the

[summary judgment] motion." *Diebold, Inc.*, 369 U.S. at 655. Instead, it inferred, without any basis in the text of the report that the "SOMEONE" in the officer's narrative that "IT WAS OBVIOUS TO THIS SERGEANT THAT DAWSON [sic] RECOGNIZED SOMEONE IN THE PHOTOS SHOWN" and the "THEY" in Swanson's statement to the officer "HE [sic] SO AFRAID THAT THEY ARE GOING TO FIND HIM AND SHOOT HIM AGAIN" was Williams, not the alleged accomplice, Turner.

Even more significantly, Swanson's identification testimony is not "strongly corroborated" by additional evidence. The witness's purported August 12th photo lineup and trial identifications of Williams cannot corroborate his identification testimony. The logic of the court's reasoning is circular: It posits that Swanson's identification testimony that Williams was the shooter, which could have been impeached by his failure to identify Williams during the August 9th lineup, is "strongly corroborated" by his other identification testimony at trial and on August 12th. Swanson's initial failure to identify Williams when shown his photo in a lineup *necessarily* calls into question his later purported identifications of Williams. *Cf. Kyles v. Whitley*, 514 U.S. 419, 444 (1995) ("[T]he evolution over time of a given eyewitness's description can be fatal to its reliability."); *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977) (reliability depends in part on the accuracy of prior description); *Neil v. Biggers*, 409 U.S. 188, 199 (1972) (reliability of identification following impermissibly suggestive line-up

depends in part on accuracy of witness's prior description). These later purported identifications do not corroborate his identification testimony; they are a part of his identification testimony. Swanson's first failure to identify Williams is material to his later purported identifications.

Nor can alleged accomplice Turner's testimony "*strongly* corroborate" Swanson's identification testimony because he is, after all, an alleged accomplice. Eyewitness Swanson's testimony is needed to corroborate alleged accomplice Turner's testimony to find Williams guilty, not the other way around. *See, e.g., Cool v. United States*, 409 U.S. 100, 103 (1972) (per curiam) ("[A]n accomplice may have a special interest in testifying, thus casting doubt upon his veracity.); *Crawford v. United States*, 212 U.S. 183, 204 (1909) ("[T]he evidence of such a[confessed accomplice] ought to be received with suspicion, and with the very greatest care and caution.").

Finally, the court claimed Swanson's identification testimony is "strongly corroborated" because there were "other eyewitnesses who described Williams as the shooter." The court, however, failed to say who these other witnesses were besides Swanson and Turner or cite to where in the record these witness descriptions can be found. Significantly, neither of the only two other eyewitnesses to the shooting who testified at trial identified Williams as the shooter.

Reasonable jurists could debate the court's conclusion that the suppressed description of Swanson's August 9th lineup found in the police report was not material to the question of Williams's guilt.

E. Reasonable jurists could debate whether Williams's attorney's failure to impeach a key government witness's false testimony regarding the only disinterested eyewitness's identification testimony of Williams as the killer denied him the effective assistance of counsel.

Reasonable jurists could debate whether the district court improperly weighed the evidence under Rule 56 and resolved the disputed issue of whether his attorney was ineffective in failing to impeach the government's key witnesses Swanson and Chisolm's false testimony in favor of the moving party, the Director. *See Anderson*, 477 U.S. at 255.

The district court dismissed Williams's ineffective assistance of counsel claim by holding that Swanson's failure to identify Williams as the shooter on August 9th "was [not] significant or material," as discussed above, and also on the basis that Williams "does not demonstrate that his counsel's strategic decision was deficient."

Williams argues that he was deprived of the effective assistance of counsel when his counsel failed to impeach the government's key witnesses Swanson and Chisolm's highly prejudicial false testimony. *See Strickland*, 466 U.S. at 687; *Peoples v. Lafler*, 734 F.3d 503, 513 (6th Cir. 2013) ("Failure to impeach the credibility of key witnesses with known false testimony is an egregious error in a criminal case.").

The district court granted the Director's motion for summary judgment on Williams's ineffective assistance of counsel claim, holding that "Williams does not show that [the three-day difference between photo spreads] was significant or material and he does not demonstrate that his counsel's strategic decision was deficient."

Reasonable jurists could debate whether Chisolm's testimony was material, as discussed above. *See supra* Part II.D. It was, in fact, essential to the State's case against Williams. As the State emphasized during its closing arguments: "you heard Officer Chisolm told [sic] you, [Swanson] identified [Williams] so strong down, so strong down at the police station, picked him out dead-on in photos and identified Derrick Turner strongly and said he wasn't the shooter."

Trial counsel's conclusory statement—made 17 years after the fact—that "[t]he 3 day difference between the photo spread shown to Danny Swanson, in my opinion, was not significant in importance in the cross-examination of Officer Chisolm" is his only basis for not impeaching Chisolm's false testimony. This alone cannot be a reasonable basis for counsel overcoming the "egregious error" of failing to impeach a "key witness[ ] with known false testimony." *Peoples*, 734 F.3d at 513.

As an additional basis for granting summary judgment, the court reasoned that "[i]mpeaching Officer Chisholm [sic] with information showing that Swanson was too afraid to make an identification on August 9, 1999,

would likely have reinforced the fact that Swanson was in fear for his life from the shooter, whom he positively ('a hundred percent') identified as Williams." This basis, however, does not appear *anywhere* in Parnham's affidavit.

Reasonable jurists could debate whether the court improperly turned the summary judgment standard on its head by adopting of this invented trial strategy, which viewed the facts and drew inferences in the light most favorable to the moving party, the Director, not Williams. *See Diebold,* 369 U.S. at 655.

Williams is entitled to a COA on the issue of whether his attorney's failure to impeach a key government witnesses' false testimony regarding the only disinterested eyewitness's identification testimony of Williams as the killer denied him the effective assistance of counsel.

F. Reasonable jurists could debate whether the State's suppression of the disputed portion of the police report was a state created impediment to the discovery of this evidence that tolled AEDPA's statute of limitations.

Reasonable jurists could debate the district court's justifications for dismissing all of Williams's claims on statute of limitations grounds. The court held "Williams does not demonstrate that statutory tolling is available under 28 U.S.C. § 2244(d)(1)(B) or § 2244(d)(1)(D)" by finding that he "does not . . . establish that he was impeded by state action or that the facts

underlying his claims could not have been discovered previously if due diligence had been used."

As discussed above, the district court dismissed Williams's entire habeas petition as untimely holding that Williams did not demonstrate that statutory tolling is available because he "raise[d] nothing more than a metaphysical doubt about whether this portion of the report [discussing the August 9th photo lineup] was available." As an additional basis for this wholesale dismissal of Williams's claim, the district court found that Williams gave "no explanation for his decision to wait over a decade before requesting a copy of the police report or pursuing collateral review."

The court erred in granting summary judgment on statute of limitations grounds because Williams met his burden by showing there *is* a genuine dispute as to the material fact of whether his attorney possessed this portion of the report by "citing to particular parts of materials in the record" to "support th[is] assertion." FED. R. CIV. P. 56(c). The court also did not view the facts and draw inferences "in the light most favorable to the party opposing the [summary judgment] motion." *See Diebold,* 369 U.S. at 655. If it had, the court would have concluded from the facts in the record cited by Williams there was sufficient evidence to find that his trial counsel did not possess the entire police report, as discussed above, *see supra* Part II.B. In addition, if the court had properly applied the summary judgment standard, it would have concluded from the absence in the trial record of any mention of

Swanson's August 9th lineup, that while Williams obviously knew that a police report existed, he had absolutely no way to suspect that it contained information about an August 9th lineup viewed by Swanson. Similarly, if the court had viewed the facts in the light most favorable to Williams, it would have concluded from his statement and the accompanying letter from the Harris County District Attorney's Office that Williams obtained the police report sometime shortly before January 23, 2012, rather than before March 12, 2011, the date the Director in her motion for summary judgment claims is relevant for statute of limitations purposes.

Williams is entitled to a COA on the issue of whether the State's suppression of the disputed portion of the police report describing the eyewitness's August 9, 1999 photo lineup was a state-created impediment to the discovery of this impeachment evidence that tolled AEDPA's statute of limitations.

CONCLUSION

For all of the foregoing reasons, Williams's case is an extraordinary one deserving of review by this Court. COAs should have been granted in this case and would have been had the Fifth Circuit not ignored this Court's clear precedent. Granting certiorari, vacating the court of appeals' judgment denying Williams's certificates of appealability, and remanding the case to the appeals court is warranted not only to secure fair appellate review for

Williams, but to ensure that this Court's decisions will not continue to be ignored.

Respectfully submitted.

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DATED: December 10, 2018

APPENDIX TABLE OF CONTENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-20648

MARLON DANTRUCE WILLIAMS,

Petitioner-Appellant

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent-Appellee

Appeal from the United States District Court
for the Southern District of Texas

O R D E R:

Marlon Dantruce Williams, Texas prisoner # 935987, seeks a certificate of appealability (COA) to appeal the dismissal as time barred and on the merits of his 28 U.S.C. § 2254 application challenging his murder conviction. Williams raises claims based on *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972), and a related claim of ineffective assistance of counsel. He further argues that the district court's alternative finding that his § 2254 application was untimely was erroneous and that the district court improperly failed to give notice of one of the bases on which it granted summary judgment.

A COA may issue only if Williams makes a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see Slack v. McDaniel*,

529 U.S. 473, 484 (2000). For a claim that was dismissed on procedural grounds, the movant must show "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. For claims that were dismissed on the merits, a movant must show "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 v. Cockrell*, 537 U.S. 322, 327 (2003). A COA is DENIED because Williams fails to make the required showing.

STUART KYLE DUNCAN
UNITED STATES CIRCUIT JUDGE

A True Copy
Certified order issued Aug 21, 2018

Tyle W. Cayce

Clerk, U.S. Court of Appeals, Fifth Circuit

APPENDIX B Order of the United States Court of Appeals for the Fifth Circuit, *Williams v. Davis*, No. 17-20648 (5th Cir. Sept. 11, 2018)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-20648

MARLON DANTRUCE WILLIAMS,

Petitioner - Appellant

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent - Appellee

Appeal from the United States District Court
for the Southern District of Texas

Before SMITH, HIGGINSON, and DUNCAN, Circuit Judges.

PER CURIAM:

A member of this panel previously denied appellant's motion for certificate of appealability. The panel has considered appellant's opposed motion for reconsideration. IT IS ORDERED that the motion is DENIED.

APPENDIX C Memorandum Opinion and Order of the United States District Court for the Southern District of Texas (Houston Division), *Williams v. Davis*, No. 4:14-CV-02098 (S.D. Tex. Oct. 10, 2017)

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

MARLON DANTRUCE WILLIAMS, TDCJ #935987, Petitioner,	§	
v.	§	CIVIL ACTION NO. H-14-2098
LORIE DAVIS, Director, Texas Department of Criminal Justice - Correctional Institutions Division, Respondent.	§	

MEMORANDUM OPINION AND ORDER

Marlon Dantruce Williams (TDCJ #935987) has filed a Petition for a Writ of Habeas Corpus By a Person in State Custody ("Petition") (Docket Entry No. 1) challenging his murder conviction in Harris County cause number 820802 under 28 U.S.C. § 2254. Respondent has filed Respondent Davis's Motion for Summary Judgment With Brief in Support ("Respondent's MSJ") (Docket Entry No. 30) arguing that the Petition is barred by the governing one-year statute of limitations and, alternatively, the claims lack merit. Williams has filed Petitioner's Response to Respondent's Motion for Summary Judgment With Brief in Support ("Petitioner's Response") (Docket Entry No. 34). After considering all of the pleadings, the state court records, and the applicable law, the court will grant Respondent's MSJ and will dismiss this action for the reasons explained below.

I. Background and Procedural History

Williams seeks federal habeas corpus review of a conviction that was entered against him in the 178th District Court for Harris County, Texas, on July 14, 2000.[1] The Petition is based, in part, on evidence in the form of a police report that Williams discovered several years after his conviction became final. What follows is a chronology of the offense, investigation, and trial that led to the murder conviction against Williams, as well his belated efforts to challenge that conviction on state and federal habeas review.

A. The Offense and Investigation

At approximately 10:15 a.m. on July 10, 1999, two black males entered the Southern Style Clip Joint Barbershop (the "Barbershop") in Houston, Texas.[2] The men were looking for the Barbershop's owner (Frederick LeBlanc), who was known as "B."[3] Tristan Thompson was working as one of the barbers that day.[4] When Thompson told the men that B had not yet arrived at the Barbershop, one of the men shot Thompson in the head, killing him.[5] The same man then

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[1]Judgment, Docket Entry No. 28-1, p. 27. For purposes of identification all page citations refer to the page number imprinted by the court's electronic filing system, CM/ECF.

[2]Complaint, Docket Entry No. 27-1, p. 6.

[3]Id.

[4]Id.

[5]Id.

turned the gun on another barber, Danny Swanson ("Swanson"), and shot him in the right hip.[6] The man fired another shot before leaving the Barbershop.[7]

Sergeant G.J. Novak of the Houston Police Department ("HPD"), who investigated the case with Officer Henry F. Chisholm, subsequently received an anonymous tip through Crime Stoppers, identifying Derrick Turner and Marlon Dantruce Williams as the two men who entered the barbershop, killing Thompson and wounding Swanson.[8] After viewing a live line-up on August 10, 1999, which included Turner but not Williams, two witnesses identified Turner as the person they saw shoot Thompson and Swanson.[9] As a result, murder charges were filed against Turner.[10] When Swanson saw a videotape of the same lineup on August 12, 1999, Swanson identified Turner as being present, but positively identified Williams from a separate photo array as the man who shot him and killed Thompson in the Barbershop on July 10, 1999.[11] Turner subsequently gave a statement to police, admitting that he was present in the

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[6] Id. Swanson is mistakenly identified as "Danny Dawson" in the Complaint and other documents. To avoid confusion, the court will refer to him only as Danny Swanson.

[7] Id.

[8] Id.

[9] Id. at 7.

[10] Id.

[11] Id.

Barbershop, but that Williams was the shooter.[12] Based on this information, a grand jury returned an indictment against Williams, charging him with Thompson's murder in Harris County cause number 820802.[13]

B. The Pretrial and Trial Proceedings

Before trial defense counsel filed a motion for the State to disclose the identity of the confidential informant who made the anonymous tip to Crime Stoppers, which led to Williams' identification and arrest.[14] After conducting an in camera review of the information provided to police, the trial court denied defense counsel's request to disclose the confidential informant's identity.[15]

On July 10, 2000, the day that a jury trial was set to commence in the 178th District Court of Harris County, Williams' defense counsel requested a continuance to secure the presence of eyewitness Melvina Francis Page, who had identified Derrick Turner

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[12]Court Reporter's Record, vol. 6, Docket Entry No. 25-8, pp. 10-15.

[13]Indictment, Docket Entry No. 27-1, p. 14.

[14]Motion for Discovery and Inspection, Docket Entry No. 27-1, p. 25; Court Reporter's Record, vol. 1A, Docket Entry No. 25-3, pp. 10-14.

[15]Court Reporter's Record, vol. 2, Docket Entry No. 25-4, pp. 18-22.

as the shooter, and two other witnesses.[16] The motion for a continuance was denied.[17]

At trial, the State presented evidence that the offense stemmed from a "yacht party" in Kemah, Texas, that was attended by around a hundred people who were filming a music video for a local rap group on the night of July 9, 2000.[18] At that party Williams and Turner were injured during a fight with Frederic LeBlanc and some of his associates.[19] The day after the yacht party Williams and Turner went to the Barbershop to confront LeBlanc.[20]

Danny Swanson testified that Williams was the man who walked into the Barbershop on July 10, 1999, and shot him in the hip after he shot and killed Tristan Thompson without any provocation.[21] Turner also testified as a State's witness, identifying Williams as the man who killed Thompson and shot Danny Swanson in the

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[16]Motion for Continuance, Docket Entry No. 28-1, p. 3; Court Reporter's Record, vol. 2, Docket Entry No. 25-4, pp. 4-5.

[17]Court Reporter's Record, vol. 2, Docket Entry No. 25-4, p. 18.

[18]Court Reporter's Record, vol. 5, Docket Entry No. 25-7, pp. 149-50, 152-53; Court Reporter's Record, vol. 6, Docket Entry No. 25-8, pp. 114-16.

[19]Court Reporter's Record, vol. 5, Docket Entry No. 25-7, pp. 155-60; Court Reporter's Record, vol. 6, Docket Entry No. 25-8, pp. 116-21.

[20]Court Reporter's Record, vol. 5, Docket Entry No. 25-7, pp. 161-70.

[21]Court Reporter's Record, vol. 5, Docket Entry No. 25-7, pp. 16-63.

Barbershop.[22] This testimony was further corroborated by additional witnesses who did not see the shooter's face, but identified Williams as the shooter by describing distinctive items of clothing that he was wearing when the shooting occurred.[23]

There were conflicting accounts during the police investigation about which man, Williams or Turner, opened fire that day killing Thompson and injuring Swanson. Officer Chisholm testified that Swanson strongly identified Williams as the shooter and Turner as the non-shooter after viewing a photographic line-up on August 12, 1999,[24] but that Melvina Francis Page made a "strong tentative identification" of Turner as the shooter, clarifying that she was 90% sure of her identification.[25] Page's young son, Robert McCaa, also identified Turner as the shooter.[26] Page's mother, Linda McCaa, recognized Turner as one of the men who entered the Barbershop, but identified Williams as the shooter.[27]

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[22]Id. at 143-190; Court Reporter's Record, vol. 6, Docket Entry No. 25-8, pp. 6-16.

[23]Court Reporter's Record, vol. 5, Docket Entry No. 25-7, pp. 102-43.

[24]Court Reporter's Record, vol. 6, Docket Entry No. 25-8, pp. 162-5, 170-71.

[25]Court Reporter's Record, vol. 6, Docket Entry No. 25-8, p. 165.

[26]Id. at 186.

[27]Id. at 166-67, 187.

On July 13, 2000, the jury found Williams guilty as charged in the Indictment.[28] On July 14, 2000, the trial court sentenced Williams to life imprisonment,[29] consistent with the jury's verdict on punishment.[30]

C. Williams' Direct Appeal

On direct appeal Williams argued that the trial court erred by denying his pretrial motion to disclose the identity of the confidential informant.[31] An intermediate court of appeals rejected the argument and affirmed the conviction on October 17, 2001. See Williams v. State, 62 S.W.3d 800 (Tex. App. – San Antonio 2001, no pet.).[32] Because Williams did not file a petition for discretionary review by the Texas Court of Criminal Appeals, his conviction became final when the time to seek further review expired on November 16, 2001, 30 days after the appellate court's decision.

D. State Collateral Review

More than a decade after his conviction became final Williams asked an unidentified friend to contact HPD and request a copy of

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[28]Verdict, Docket Entry No. 28-1, p. 18.

[29]Judgment in Cause No. 820802, Docket Entry No. 28-1, p. 27.

[30]Verdict on Punishment, Docket Entry No. 28-1, p. 25.

[31]Appellant's Brief, Docket Entry No. 26-1, p. 9.

[32]Opinion dated October 17, 2001, in Williams v. State, No. 04-00-646-CR, Docket Entry No. 26-6, pp. 1-3.

the police report in his case.[33] Williams does not specify when he received the police report. When he reviewed the report, Williams noted that it contained information that Danny Swanson initially declined to identify anyone as the shooter in this case when he was shown a photographic line-up on August 9, 1999.[34] The report states, in pertinent part, as follows:

> . . . THE PHOTO ARRAY WAS SHOWN TO DANNY AT 1545 HOURS. IT WAS OBVIOUS TO THIS SERGEANT THAT [SWANSON] RECOGNIZED SOMEONE IN THE PHOTOS SHOWN. HE BECAME VERY NERVOUS AND STATED THAT HE [WAS] SO AFRAID THAT THEY ARE GOING TO FIND HIM AND SHOOT HIM AGAIN. HE STATED THAT HE HAD NOT WORKED SINCE THIS INCIDENT NOR HAD [HE] GONE HOME . . . .[35]

In a supplemental entry to the police report on August 12, 1999, Sergeant Novak showed Swanson the photo array again:

> [SWANSON] WAS THEN ASKED IF HE WOULD VIEW THE PHOTO ARRAY PREPARED IN THIS CASE TO SEE IF [HE] MIGHT RECOGNIZE ANYONE. HE WAS AGAIN TOLD THAT HE WAS UNDER NO OBLIGATION TO IDENTIFY [ANYONE]. HE AGAIN STATED THAT HE FEARED FOR HIS SAFETY AND THAT THEY MIGHT COME AFTER HIM. HE WAS ASSURED THAT SHOULD HE RECEIVE ANY THREATS OF RETALIATION HE SHOULD NOTIFY THIS SERGEANT IMMEDIATELY . . . . [SWANSON] WAS MAKING EVERY EXCUSE HE COULD NOT TO VIEW THE PHOTOS. IT WAS VERY OBVIOUS THAT DANNY [SWANSON] FEARS FOR HIS SAFETY SHOULD HE IDENTIFY THE SHOOTER IN THIS CASE. . . .[36]

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[33]Petitioner's Memorandum in Support of Petition for Writ of Habeas Corpus (2254) ("Petitioner's Memorandum"), Docket Entry No. 5, p. 2 n.1; p. 4 n.3

[34]HPD Current Information Report, Incident No. 089633699, Exhibit A to Petitioner's Memorandum, Docket Entry No. 5-2, pp. 2-16.

[35]Id. at 7.

[36]Id. at 12-13.

Swanson then identified Williams as the man who shot him and killed Tristan Thompson in the Barbershop on July 10, 1999.[37]

In an Application for a Writ of Habeas Corpus Seeking Relief From Final Felony Conviction Under Code of Criminal Procedure, Article 11.07 ("State Habeas Application") that was executed and filed on February 24, 2012,[38] Williams argued that the police report contains evidence that Swanson "failed" to identify him as the shooter on August 9, 1999, which is "exculpatory" because it casts doubt on the credibility of the identification that Swanson made when he was shown the photo array again on August 12, 1999.[39] Because his trial attorney did not question Swanson or Officer Chisholm about Swanson's initial failure to identify him as the shooter, Williams surmised that the State must have suppressed this exculpatory evidence of his "actual innocence" and that Officer Chisholm's testimony about Swanson's identification was "false."[40] Asserting these claims along with several others, Williams raised the following grounds for relief on state court review:

> (1) Williams was denied a fair trial due to prosecutorial misconduct because the State -
>
> (a) suppressed exculpatory evidence from the police report showing that Danny Swanson

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[37]Id.

[38]Exhibit A to Respondent's MSJ, Docket Entry No. 30-1, pp. 2-15.

[39]Id. at 7.

[40]Id. at 7, 10.

failed to identify him initially at a photographic line-up on August 9, 1999;

(b) withheld or omitted evidence from the police report showing that Swanson viewed a videotape of the yacht party, but failed to identify Williams from that footage;

(c) directed a police officer (Officer Chisholm) to testify falsely about when Swanson was shown a photographic line-up; and

(d) presented false evidence and argument about whether Melvina Page's identification of Derrick Turner as the shooter was "tentative."

(2) Williams was denied effective assistance of counsel before his trial because his defense attorney failed to:

(a) adequately prepare for trial by conducting an independent investigation beyond the information provided by the State;

(b) locate three witnesses (Melvina Page, Robert McCaa, Linda McCaa, and Reandrea Adams) who were critical to the defense;

(c) locate, interview, and subpoena Melvina Page, Robert McCaa, Linda McCaa, and Reandrea Adams; and

(d) interview Danny Swanson or Frederic LeBlanc before trial.

(3) Williams was denied effective assistance of counsel during his trial because his defense attorney failed to file a motion to suppress Swanson's in-court identification after learning during the trial that police had shown Swanson a video of the yacht party.

(4) Williams was denied effective assistance of counsel during his trial because his defense attorney failed to:

(a) correct the misleading testimony about whether Melvina Page's pretrial identification of Turner as the shooter was tentative;

(b) impeach Officer Chisholm's false testimony about when Swanson was shown the photographic line-up;

(c) impeach Officer Chisholm and Sergeant Novak about whether they showed Swanson the yacht party video, in which Williams was "prominently" shown, before he identified Williams as the shooter.

(5) There is "newly discovered" evidence in the form of a "nonpublic" police report that contains exculpatory information about Swanson's failure to identify Williams on August 9, 1999, which shows that Williams is "actually innocent."[41]

This State Habeas Application remains pending in state court without an adjudication on the merits.[42]

E. Williams' Federal Habeas Proceeding

On July 18, 2014, Williams executed and filed the pending pro se federal Petition, raising the same grounds for relief that he presented in his State Habeas Application.[43] The court initially dismissed the Petition without prejudice after observing that Williams's State Habeas Application remained pending in state court and that he had not yet exhausted available remedies as required by 28 U.S.C. § 2254(b) by presenting his claims for adjudication to

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[41]Id. at 7-11.

[42]Harris County District Clerk's Office, State v. Williams, Cause No. 820802-A, at http://www.hcdistrictclerk.com (last visited October 4, 2017).

[43]Petition, Docket Entry No. 1, p. 11. Because Williams filed his Petition while incarcerated, the mail box rule applies, meaning that the date he placed his pleadings in the prison mail system, July 18, 2014, is considered to be the filing date. See Spotville v. Cain, 149 F.3d 374, 378 (5th Cir. 1998).

the Texas Court of Criminal Appeals.[44] Noting that Williams's State Habeas Application had been pending for several years without any activity, the Fifth Circuit vacated this court's dismissal order and remanded the case after the State waived the exhaustion requirement.[45]

The respondent has now moved for summary judgment, arguing that the police report that Williams claims to have recently discovered was available to defense counsel at the time of trial.[46] To the extent that his claims are based on the trial record and could have been raised previously if due diligence had been used, the respondent contends that the Petition must be dismissed because it is barred by the governing one-year statute of limitations on federal habeas corpus review.[47] The respondent argues, in the alternative, that all of Williams' claims are without merit.[48]

Williams, who has filed a response to Respondent's MSJ with the assistance of counsel,[49] disputes that the entire police report

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[44]Memorandum Opinion and Order dated July 25, 2014, Docket Entry No. 3.

[45]Williams v. Davis, No. 14-20543 (5th Cir. Dec. 29, 2016) (per curiam), Docket Entry No. 16, p. 2.

[46]Respondent's MSJ, Docket Entry No. 30, pp. 27-28.

[47]Id. at 28-42.

[48]Id. at 42-95.

[49]Counsel appears to have been appointed by the Fifth Circuit for the purpose of Williams' appeal.

was available at trial and argues that at least three of his claims are based on evidence that was only discovered by Williams after trial; the page of the police report that showed that Danny Swanson initially "failed" to identify Williams from a photographic line-up on August 9, 1999.[50] Arguing that this page must have been suppressed, Williams contends that the Petition is not untimely with regard to Claims 1a, 1c, and 4b.[51] Williams does not address the timeliness or merits of his other claims (Claims 1b, 1d, 2a-d, 3, 4a, 4c, and 5), which are not based on the police report; and he appears to concede that they are time-barred. As a result, the court will not consider those claims further.

II. Standard of Review

The Respondent's MSJ is governed by Rule 56 of the Federal Rules of Civil Procedure, which applies in a federal habeas corpus proceeding to the extent that it does not conflict with the Rules Governing Section 2254 Proceedings in the United States District Courts. See Smith v. Cockrell, 311 F.3d 661, 668 (5th Cir. 2002) ("[Rule 56] applies only to the extent that it does not conflict with the habeas rules."), abrogated on other grounds by Tennard v. Dretke, 124 S. Ct. 2562 (2004).

Under Rule 56 a reviewing court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any

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[50]Petitioner's Response, Docket Entry No. 34, pp. 5, 24-26.

[51]Id. at 5, 16-24.

material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); see also Celotex Corp. v. Catrett, 106 S. Ct. 2548, 2552 (1986). A fact is "material" if its resolution in favor of one party might affect the outcome of the suit under governing law. Anderson v. Liberty Lobby, Inc., 106 S. Ct. 2505, 2510 (1986). An issue is "genuine" if the evidence is sufficient for a reasonable jury to return a verdict for the nonmoving party. Id.

In deciding a summary judgment motion, the reviewing court must "construe all facts and inferences in the light most favorable to the nonmoving party." Dillon v. Rogers, 596 F.3d 260, 266 (5th Cir. 2010) (internal citation and quotation marks omitted). However, the non-movant cannot avoid summary judgment simply by presenting "'[c]onclusional allegations and denials, speculation, improbable inferences, unsubstantiated assertions, and legalistic argumentation." Jones v. Lowndes County, Mississippi, 678 F.3d 344, 348 (5th Cir. 2012) (quoting TIG Insurance Co. v. Sedgwick James of Washington, 276 F.3d 754, 759 (5th Cir. 2002)). If the movant demonstrates the absence of a genuine issue of material fact, the burden shifts to the non-movant to provide "'specific facts showing that there is a genuine issue for trial,'" Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., 106 S. Ct. 1348, 1356 (1986), or, in the context of federal habeas corpus review, an evidentiary hearing under 28 U.S.C. § 2254(e)(2).

III. Discussion

A. Statute of Limitations

According to the Antiterrorism and Effective Death Penalty Act of 1996 (the "AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (1996), all federal habeas corpus petitions filed after April 24, 1996, are subject to a one-year limitations period found in 28 U.S.C. § 2244(d), which provides as follows:

> (d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of--
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1). Because the pending Petition was filed well after April 24, 1996, the one-year limitations period clearly applies. See Flanagan v. Johnson, 154 F.3d 196, 198 (5th Cir. 1998) (citation omitted).

To the extent that Williams challenges a state court judgment of conviction, the statute of limitations began to run pursuant to § 2244(d)(1)(A) when his time to pursue direct review expired. Because Williams did not file a petition for discretionary review with the Texas Court of Criminal Appeals after his conviction was affirmed on October 17, 2001, his time to pursue direct review expired thirty days later on November 16, 2001.[52] That date triggered the statute of limitations, which expired one year later on November 16, 2002. The Petition, which is dated July 18, 2014, is nearly 12 years late and is time-barred unless a statutory or equitable exception applies.

B. Statutory Tolling

Williams asserts that he is entitled to tolling of the statute of limitations until the time that his friend obtained a copy of the police report from HPD.[53] Williams does not dispute that defense counsel had access to the police report before trial. However, because defense counsel did not cross-examine Swanson or Officer Chisholm about Swanson's initial failure to make an identification from the photo array that he was shown on August 9, 1999, Williams reasons that this page of the report must have been

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[52]See Tex. R. App. P. 68.2(a) (the time to seek a petition for discretionary review expires 30 days after the intermediate court issues its opinion); see also Roberts v. Cockrell, 319 F.3d 690, 694 (5th Cir. 2003) (observing that a conviction "becomes final when the time for seeking further direct review in the state court expires").

[53]Petitioner's Response, Docket Entry No. 34, pp. 25-26.

suppressed.[54] Williams therefore contends that tolling is warranted because he was subject to state action that impeded him from filing three of his grounds for relief (Claims 1a, 1c, and 4b) in a timely manner.[55] See 28 U.S.C. § 2244(d)(1)(B). Alternatively, Williams argues that these grounds for relief rely on a factual predicate that could not have been discovered previously if due diligence had been used.[56] See 28 U.S.C. § 2244(d)(1)(D).

The record confirms that defense counsel had access to the police report before Williams' trial. The respondent has provided an affidavit from Williams' trial attorney, George Parnham.[57] Parnham conceded in that affidavit that he had little recollection of his pretrial preparation because substantial time has passed since the case was tried 17 years ago.[58] Parnham confirms, however, that he had access to the police report in Williams' case and would have reviewed a copy "very early on in [his] preparation for the defense of Marlon Williams."[59] Although Parnham could not recall the exact date that he reviewed the police report, he and his private investigator used the report to identify and interview witnesses who identified Derrick Turner as the shooter on the same

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[54] Id. at 17.

[55] Id. at 24.

[56] Id.

[57] Affidavit of George J. Parnham ("Parnham Affidavit"), Exhibit A to Respondent's MSJ, Docket Entry No. 30-1, pp. 17-21.

[58] Id. at 19-20.

[59] Id. at 18.

page that Williams claims was suppressed.[60] Parnham also recalled Swanson's positive identification as the result of being shown a photo spread by HPD and determined that it was not suggestive or that there was any "viable suppression issue."[61]

The record confirms that the State's file was "open" to defense counsel once Williams was indicted and Parnham had access to the police report, which he referenced on several occasions during pretrial proceedings.[62] Because Parnham made reference to other information found on the same page as the photo array shown to Swanson and other witnesses on August 9, 1999, the record is evidence that Parnham had access to that page of the report.[63] Williams presents no evidence to the contrary. Williams' speculation that defense counsel must have lacked access to the precise page of the police report showing that Swanson was too afraid to make an identification on August 9, 1999, when defense counsel referenced information from the same page of that report during pretrial proceedings, raises nothing more than a metaphysical doubt

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[60] Id. at 18-19 (noting identifications that were made by Melvina Page, her son, Robert McCaa, and her mother, Linda McCaa, and documented on the same page that Williams' claims were suppressed); HPD Current Information Report, Incident No. 089633699, Docket Entry No. 5-2, p. 7.

[61] Parnham Affidavit, Exhibit A to Respondent's MSJ, Docket Entry No. 30-1, p. 20.

[62] Court Reporter's Record, vol. 1A, Docket Entry No. 25-3, pp. 10-11, 15; Court Reporter's Record, vol. 2, Docket Entry No. 25-4, p. 15; Court Reporter's Record, vol. 3, Docket Entry No. 25-5, p. 13.

[63] Court Reporter's Record, vol. 3, Docket Entry No. 25-5, p. 13 (referencing information about the confidential informant).

about whether this portion of the report was available, which is not sufficient to preclude summary judgment. See Matsushita, 106 S. Ct. at 1356 (the party opposing summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts"); McCarty v. Hillstone Restaurant Group, Inc., 864 F.3d 354, 357 (5th Cir. 2017) (observing that the non-movant's burden "will not be satisfied by 'some metaphysical doubt as to the material facts, by conclusory allegations, by unsubstantiated assertions, or by only a scintilla of evidence'") (quoting Little v. Liquid Air Corp., 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc)).

Williams gives no explanation for his decision to wait over a decade before requesting a copy of the police report or pursuing collateral review. Williams does not otherwise establish that he was impeded by state action or that the facts underlying his claims could not have been discovered previously if due diligence had been used. Because Williams does not demonstrate that statutory tolling is available under 28 U.S.C. § 2244(d)(1)(B) or § 2244(d)(1)(D), the Petition is untimely, and the respondent is entitled to summary judgment on all of petitioner's claims. Alternatively, the claims briefed by Williams in response to Respondent's MSJ (Claims 1a, 1c, and 4b) lack merit for reasons discussed briefly below.

C. Alternatively, the Claims Lack Merit

1. The Brady Claim (Claim 1a)

Williams claims that the prosecution violated his right to due process under Brady v. Maryland, 83 S. Ct. 1194 (1963), by

suppressing a page from the police report that showed that Danny Swanson was too afraid to identify the shooter from a photo array that he was shown on August 9, 1999. In Brady the Supreme Court held that the government violates due process when it fails to disclose evidence favorable to the accused where such evidence is "material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Id. at 1196-97. The government's duty to disclose extends to both impeachment and exculpatory evidence. See United States v. Bagley, 105 S. Ct. 3375, 3380 (1985). Thus, to establish a Brady violation, a defendant must prove that: (1) evidence was withheld or suppressed by the prosecutor, either willfully or inadvertently; (2) the evidence was favorable to the defendant, either because it was exculpatory or because it has impeachment value; and (3) the evidence was material such that prejudice ensued. See Strickler v. Greene, 119 S. Ct. 1936, 1948 (1999). Evidence is material under Brady "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Bagley, 105 S. Ct. at 3383.

For reasons discussed previously, Williams has not shown that any portion of the police report was suppressed or that his defense counsel lacked access to it before trial. Williams' unsupported suspicion that a page was missing from the police report is "purely speculative" and cannot support a Brady claim. See Hughes v. Johnson, 191 F.3d 607, 629-30 (5th Cir. 1999) (citing United States

v. Pretel, 939 F.2d 233, 240 (5th Cir. 1991)); see also Murphy v. Johnson, 205 F.3d 809, 814 (5th Cir. 2000) ("Allegations that are merely 'conclusionary' or are purely speculative cannot support a Brady claim.").

More importantly, Williams does not show that the evidence at issue (Swanson's refusal to identify anyone on August 9, 1999, because he feared for his life), would have made any difference in this case. It is undisputed that Swanson identified Williams as the shooter on August 12, 1999, when Swanson reiterated that he was "very scared" and feared for his safety.[64] Swanson also identified Williams as the shooter at trial.[65] Swanson's identification was corroborated by Derrick Turner and other eyewitnesses who described Williams as the shooter.[66] Impeachment evidence is not material where the testimony of the witness who might have been impeached is strongly corroborated by additional evidence supporting a guilty verdict. See United States v. Weintraub, 871 F.2d 1257, 1262 (5th Cir. 1989) (citing United States v. Risken, 788 F.2d 1361, 1375 (8th Cir. 1986)); see also Rocha v. Thaler, 619 F.3d 387, 396-97 (5th Cir. 2010).

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[64]HPD Current Information Report, Incident No. 089633699, Docket Entry No. 5-2, pp. 12-13.

[65]Court Reporter's Record, vol. 5, Docket Entry No. 25-7, pp. 16-63.

[66]Id. at 143-190; Court Reporter's Record, vol. 6, Docket Entry No. 25-8, pp. 6-16.

Because Williams does not demonstrate that the result of the proceeding would have been any different if the jury had known that Swanson was too afraid to make an identification on August 9, 1999, he does not raise a genuine issue of material fact on whether a Brady violation occurred. Therefore, the respondent is entitled to summary judgment on this claim.

2. The *Giglio* Claim (Claim 1c)

Williams contends that the prosecutor violated his right to due process under Giglio v. United States, 92 S. Ct. 763 (1972), when she directed Swanson and Officer Chisholm to testify falsely about when Swanson was shown a photographic line-up. The State violates due process when it knowingly presents false evidence at trial or allows untrue testimony to go uncorrected. See Giglio, 92 S. Ct. at 766; see also Napue v. People of the State of Illinois, 79 S. Ct. 1173, 1177 (1959). To establish a due process violation based on the government's use of false or misleading testimony, a habeas petitioner must demonstrate the following: "(1) the witness gave false testimony; (2) the falsity was material in that it would have affected the jury's verdict; and (3) the prosecution used the testimony knowing it was false." Reed v. Quarterman, 504 F.3d 465, 473 (5th Cir. 2007) (citing May v. Collins, 955 F.2d 299, 315 (5th Cir. 1992)).

Williams takes issue with testimony showing that Swanson identified Williams as the shooter from a photo array that he was

shown on August 12, 1999. Williams argues that the testimony is "actually false" because Swanson was first shown the photo array on August 9, 1999, but he did not actually make an identification at that time.[67] Officer Chisholm testified that on August 12, 1999, Swanson positively identified Williams as the shooter.[68] Swanson testified generally to the identification that he made after viewing a photographic line-up, without specifying the particular date that he made the identification.[69] The record does not reflect that either witness intentionally testified falsely or that the prosecutor directed them to do so. Williams fails to establish a violation of Giglio or show that he is entitled to relief on this issue. Accordingly, the respondent is entitled to summary judgment on this claim.

3. Ineffective Assistance of Counsel (Claim 4b)

Assuming that defense counsel had a complete copy of the police report, Williams contends that he was ineffective for failing to impeach Officer Chisholm about Swanson's initial failure to identify him on August 9, 1999.[70] Claims for ineffective assistance of counsel are governed by the standard found in

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[67]Petitioner's Response, Docket Entry No. 34, p. 19.

[68]Court Reporter's Record, vol. 6, Docket Entry No. 25-8, pp. 145, 159-161.

[69]Court Reporter's Record, vol. 5, Docket Entry No. 25-7, pp. 53-60.

[70]Petitioner's Response, Docket Entry No. 34, pp. 5, 16-24.

Strickland v. Washington, 104 S. Ct. 2052 (1984). To prevail under the Strickland standard a defendant must demonstrate (1) that his counsel's performance was deficient and (2) that the deficient performance prejudiced the defense. Id. at 2064. "Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable." Id.

"To satisfy the deficient performance prong, 'the defendant must show that counsel's representation fell below an objective standard of reasonableness.'" Hoffman v. Cain, 752 F.3d 430, 440 (5th Cir. 2014) (quoting Strickland, 104 S. Ct. at 2064), cert. denied, 135 S. Ct. 1160 (2015). This is a "highly deferential" inquiry; "[t]here is 'a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" Id. (quoting Strickland, 104 S. Ct. at 2065).

To satisfy the prejudice prong, "[t]he 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." Strickland, 466 U.S. at 694. A habeas petitioner must "affirmatively prove prejudice." Id. at 693. A petitioner cannot satisfy the second prong of Strickland with mere speculation and conjecture. See Bradford v. Whitley, 953 F.2d 1008, 1012 (5th Cir. 1992). Conclusory allegations are insufficient to demonstrate either deficient performance or actual prejudice. See Day v. Quarterman, 566 F.3d 527, 540-41 (5th Cir. 2009); see also Lincecum

v. Collins, 958 F.2d 1271, 1279-80 (5th Cir. 1992) (stating that an ineffectiveness claim based on speculation or conclusional rhetoric will not warrant relief).

In response to this claim, Parnham states that the three-day difference between the photo spreads shown to Swanson on August 9 and 12, 1999, were "not significant in importance in the cross-examination of Officer Chisolm."[71] Williams does not show that it was significant or material and he does not demonstrate that his counsel's strategic decision was deficient. Impeaching Officer Chisholm with information showing that Swanson was too afraid to make an identification on August 9, 1999, would likely have reinforced the fact that Swanson was in fear for his life from the shooter, whom he positively ("a hundred percent") identified as Williams.[72] Although Williams disagrees, he has not overcome the substantial deference that Strickland requires where defense counsel's strategic decisions are concerned. Strickland, 104 S. Ct. at 2065 ("Judicial scrutiny of counsel's performance must be highly deferential."). Based on this record, Williams has not established deficient performance or actual prejudice and he has not demonstrated that he was denied effective assistance of counsel. Therefore, the respondent is entitled to summary judgment on this claim.

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[71]Parham Affidavit, Exhibit A to Respondent's MSJ, Docket Entry No. 30-1, p. 21.

[72]Court Reporter's Record, vol. 5, Docket Entry No. 25-7, pp. 57-60.

Because all of Williams' remaining claims (Claims 1b, 1d, 2a-d, 3, 4a, 4c, and 5) are time-barred or have been abandoned for reasons stated previously, Williams does not establish that he is entitled to federal habeas corpus relief. Accordingly, the Petition will be denied and this case will be dismissed.

IV. Certificate of Appealability

Rule 11 of the Rules Governing Section 2254 Cases requires a district court to issue or deny a certificate of appealability when entering a final order that is adverse to the petitioner. A certificate of appealability will not issue unless the petitioner makes "a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), which requires a petitioner to demonstrate "that 'reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.'" Tennard v. Dretke, 124 S. Ct. 2562, 2565 (2004) (quoting Slack v. McDaniel, 120 S. Ct. 1595, 1604 (2000)). Where denial of relief is based on procedural grounds, the petitioner must show not only that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right," but also that they "would find it debatable whether the district court was correct in its procedural ruling." Slack, 120 S. Ct. at 1604.

A district court may deny a certificate of appealability, sua sponte, without requiring further briefing or argument. See

Alexander v. Johnson, 211 F.3d 895, 898 (5th Cir. 2000). For reasons set forth above, this court concludes that jurists of reason would not debate whether any procedural ruling in this case was correct or whether the petitioner states a valid claim for relief. Therefore, a certificate of appealability will not issue.

V. Conclusion and Order

The court **ORDERS** as follows:

1. Respondent Davis's Motion for Summary Judgment (Docket Entry No. 30) is **GRANTED**.

2. The Petition for a Writ of Habeas Corpus By a Person in State Custody filed by Marlon Dantruce Williams (Docket Entry No. 1) is **DISMISSED with prejudice**.

3. A certificate of appealability is **DENIED**.

The Clerk shall provide a copy of this Memorandum Opinion and Order to the parties.

SIGNED at Houston, Texas, on this 10th day of October, 2017.

SIM LAKE
UNITED STATES DISTRICT JUDGE