NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

TELISA DE'ANN BLACKMAN,
Petitioner

vs.

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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QUESTION PRESENTED

Should a prisoner be substantively disadvantaged by having to meet a higher burden of proof on her *Brady/Giglio/Napue* claims because the prosecution has been successful in hiding exculpatory and material evidence until after the prisoner has had one or more federal writ applications denied on other issues in her case?

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STATEMENT OF JURISDICTION

The United States District Court for the Northern District of Texas initially had jurisdiction over Petitioner's application for writ of habeas corpus pursuant 28 U.S.C. §2254 and thereafter by order of the Fifth Circuit Court of Appeals pursuant to 28 U.S. C. §2244(b)(3).

The judgment sought to be reviewed is of a panel of the United States Court of Appeals For the Fifth Circuit that was issued on November 28, 2018, in *Telisa De'Ann Blackman vs. Lorie Davis, Director, Texas Department of Criminal Justice, Correctional Institutions Division,* 909 F.3d 772 (5th Cir. 2018). Motions for panel rehearing and rehearing *en banc* were not filed.

Jurisdiction is conferred on the Supreme Court to review judgments of a court of appeals on a writ of *certiorari* by 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

5th Amendment, United States Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Article I, Section 9, Clause 2, United States Constitution.

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

28 U.S.C. § 2244.

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.

(b)(1) A claim presented in a second or successive habeas corpus application

under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless –

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense.

(3) (A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of *certiorari*.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

(c) In a habeas corpus proceeding brought on behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of *certiorari* at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the

court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

(d)(1) A one-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.

(2) The time during which a properly filed application for State post-

conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2254.

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that –

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement

or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

. . . . . .

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

(1) resided in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless

the applicant shows that –

(A) the claim relies on –

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense.

. . . . . .

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

. . . . . .

STATEMENT OF THE CASE

At 8:03 p.m., on June 22, 2007, Cherissa Adams called 911 from her apartment and told the operator she thought she heard a gunshot in her complex, which caused her to look out the window towards another apartment. She told 911 she saw a man lying down in a doorway and a black man push him inside the apartment and close the door. App. B, FF1.[1] Eighteen to 23 minutes later, four police officers came to Ms. Adams' apartment. She directed them to apartment 219 across the walkway. The officers knocked on the door of apartment 219. Petitioner opened the door and the officers went in with guns drawn. Petitioner was standing near the body of the deceased. She told the officers, "I didn't do it. I didn't do it." She kept saying that she did not do anything. Petitioner is a black female. She was handcuffed and arrested by the officers. Handwashings to detect gunshot residue were inconclusive. A search of the apartment complex did not uncover a weapon. Blood was found on the bottom of Petitioner's socks. App. B, FF2-6, 9.

A couple of hours later, Ms. Adams was taken to the police station where she was questioned by a female police officer. The officer wrote a statement that the witness signed under oath, that said the person she saw at the apartment was a small,

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[1] Appendix B is the Findings of Facts [FF] and Conclusions of Law of the 291st District Court of Dallas County, Texas, the State habeas trial court. In a writ application by a person in custody pursuant to a state court judgment, "a determination of a factual issue made by a state court shall be presumed correct." 28 U.S.C. §2254(e)(1).

petite, black female, which was different than what she told 911. App. B, FF8, 10-11. Ms. Adams was then asked to look at a photo lineup. She picked someone else out of the lineup first, then selected Petitioner. App. B, FF12, 14, 15, 17.

Petitioner was charged with causing the death of the deceased by shooting her with a firearm, by indictment filed in the 291st District Court. Petitioner hired Mr. James Belt to represent her through the trial of her case. Petitioner was prosecuted by Ms. Tammy Kemp, an Assistant District Attorney. About a month prior to the trial of the case, Ms. Kemp interviewed Ms. Adams by telephone. In the interview, Ms. Adams told Ms. Kemp that she had picked someone else out of the lineup first and then changed her mind and selected the Petitioner. Ms. Kemp made clear written notes of this statement. App. B, FF14-15. The prosecutor did not give the notes of the interview to defense counsel nor tell him that Ms. Adams first picked someone else out of the lineup and then picked Petitioner. App. B, FF15-17.

A recording of Ms. Adams talking to 911 was preserved by the Dallas Police Department. Ms. Kemp was aware of the existence of the 911 recording and was aware that Ms. Adams said on the recording she saw a black male moving the body. Ms. Kemp did not inform defense counsel about the existence of the 911 call or its content. Defense counsel was unaware of the existence of the 911 recording and its content at the time of the trial and did not learn of the 911 recording and its content

until they were provided to him by Petitioner's current counsel, in 2011. App. B, FF18.

At Petitioner's trial, Ms. Adams was unable to identify Petitioner as the person she saw around the body, even though Petitioner was seated in the courtroom next to her counsel. Ms. Adams testified she picked a photo from the lineup, but did not say it was a photo of Petitioner. App. B, FF20. No evidence was presented that Ms. Adams had initially picked someone else out of the lineup and there was no testimony that Ms. Adams told the 911 operator she saw a black male moving the body. App. B, FF21, 22. Detective Lynette Harrison, who had presented the photographic lineup to the witness, testified that Ms. Adams chose the photograph of Petitioner saying, "This looks like the girl," and that Ms. Adams looked through the rest of the photographs and "did not change her mind in any way." App. B, FF23. On September 30, 1998, Petitioner was convicted of murder and sentenced to life imprisonment. App. B, FF 23.

Petitioner's conviction was affirmed on direct appeal, and discretionary review was denied by the Texas Court of Criminal Appeals on November 22, 2000. The issues raised in the state appellate courts related to the legal and factual sufficiency of the evidence, revealing to the venire panel Petitioner's prior felony conviction, and jury selection.

From 2002 into 2006, Petitioner filed and had denied two state court writ applications, and three federal writ applications pursuant to 28 U.S.C. §2254. The grounds raised on all of the writ applications were variations on claims of legal and factual insufficiency of the evidence, jury selection, including a claim regarding a reverse *Batson* ruling, failure to preserve error and ineffective assistance of counsel. None of the writ applications in any way raised claims of withheld exculpatory evidence nor the use of false testimony. All of Petitioner's writ applications were denied.

In October, 2008, the undersigned was hired by Petitioner's family to determine whether she was eligible for some relief through a sentence reduction or a writ of habeas corpus. After gathering and reviewing the records of Petitioner's trial, appeal and writ applications, a request was made to the Dallas County District Attorney's Office to review the State's file regarding the prosecution of Petitioner. After conferring with the Texas Attorney General's Office, the District Attorney allowed Petitioner's counsel to review the State's file. Being able to review the State's file was a significant change in the long-held policy of the District Attorney's Office that came about as a result of the election of a new District Attorney who took office in January, 2007.

Petitioner's counsel reviewed the State's file and found the notes of the

interview with witness Cherissa Adams. The notes contained the following entry: "Picked out someone else first, then changed mind & selected [defendant] (Bust photo)." Petitioner's counsel thereafter conferred with Petitioner and her prior trial, appellate and writ counsel and learned that none of them had ever seen the note nor been made aware of the facts set forth in the note. As a result, Petitioner's counsel filed an application for writ of habeas corpus with the Texas Court of Criminal Appeals, raising for the first time a claim that the State had withheld exculpatory evidence, pursuant to *Brady v. Maryland*, and a claim that the State had sponsored false testimony pursuant to *Giglio v. United* States and *Napue v. Illinois*. While that writ application was pending, the Assistant District Attorney responding to Petitioner's writ application ordered the production of the Dallas Police Department's file on the case. In the police department file was a copy of the recording of Cherissa Adams' call to 911, which was then provided to Petitioner's counsel.

A hearing was conducted in state court over four days on Petitioner's writ application resulting in the entry of Findings of Facts and Conclusions of Law. App. B. The State judge found that the fact Ms. Adams first picked out a photograph of someone else, and then picked Petitioner, and the 911 recording, were exculpatory, favorable to the Petitioner and material; that Petitioner and her counsel were unaware of this evidence at the time of the trial; and the foregoing evidence was not

reasonably available to or ascertainable by the Petitioner or any of her counsel, with the exercise of due diligence, until the evidence was provided by undersigned counsel pursuant to his investigation and Petitioner's third State writ application. The habeas court found that because of the exculpatory evidence withheld by the State, the court's confidence in the outcome of the trial was undermined. The court found there was a reasonable probability that had one or both of the foregoing items of evidence been disclosed to the defense, the outcome of the proceedings would have been different. App. B, FF32. In her conclusions of law, the State judge found that if the jury had been presented with evidence of the 911 recording and Ms. Adams' indecision about choosing Petitioner's photograph from the lineup, that it was more likely than not that a reasonable jury would not have found Petitioner guilty beyond a reasonable doubt, and that the State's withholding of the exculpatory evidence entitled Petitioner to have her conviction set aside and her case remanded for a new trial. App. B, Conclusions of Law.

The State habeas trial judge's findings and conclusions were forwarded to the Texas Court of Criminal Appeals. That court held that the withheld evidence was not material, that its confidence in the outcome of the trial was not undermined, and that Petitioner made no showing that the outcome would have been different if she had chosen not to testify. App. C, October 10, 2012. Three judges of that court would

have granted relief.

A few months after the ruling from the Court of Criminal Appeals, Petitioner filed a *pro se* application for writ of habeas corpus pursuant to 28 U.S.C. §2254, alleging that she was being unlawfully deprived of her liberty because she did not receive a fair trial as a result of the State's withholding of exculpatory and material evidence. The Fifth Circuit found that Petitioner made a *prima facie* showing that the newly discovered evidence could not have been obtained earlier with the exercise of due diligence and that the facts underlying her claim were sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable fact finder would have found her guilty of the underlying offense, as required by 28 U.S.C. §2244(b)(2)(B)(i) and (ii), and granted her application for leave to file a second and successive habeas application. App. D. Petitioner thereafter filed her second amended petition under 28 U.S.C. §2254, where she contended that she satisfied the requirements of the §2244(b)(2)(A), (B)(i) and (ii), and asserted her *Brady* and *Giglio/Napue* claims. App. E. Petitioner contended she did not have to meet the clear and convincing evidence standard of §2244(b)(2)(B)(ii) because her petition was not successive and because she met the standards for entitlement to relief on her *Brady* claims and *Giglio/Napue* false testimony claims.

The district court found that Petitioner's claims are second or successive and

held that they must meet the "jurisdictional" requirements of §2244(b)(2)(B)(i) and (ii) in order to obtain a ruling on the merits of her claims. The district court found that Petitioner could not, with the exercise of due diligence, have discovered the exculpatory evidence that was withheld, but did not meet the clear and convincing evidence standard required by §2244(b)(2)(B)(ii), and gave the Petitioner a certificate of appealability on her *Brady* and her *Giglio/Napue* claims. App. F, G and H.

On appeal, the Fifth Circuit found that Petitioner's writ application was successive pursuant to 28 U.S.C. §2244(b)(2) and, relying on its precedent, found that Petitioner, at least in part, did not satisfy the due diligence requirement for newly discovered evidence required by § 2244(b)(2)(B)(i), and did not meet the "clear and convincing evidence" requirement of §2244(b)(2)(B)(ii). *Blackman v. Davis,* 909 F.3d 772, 774 (5th Cir. 2018). The Fifth Circuit did recognize that Petitioner contends her *Brady* and *Giglio/Napue* claims are not second or successive, but did not at all address the due process anomaly demonstrated by Petitioner's case. That is, where the prosecution is successful in hiding exculpatory evidence long enough so that a petitioner files a §2254 writ application on other issues in her case, then the prosecution benefits, and the Petitioner is disadvantaged, because she must then show by clear and convincing evidence that, but for the prosecution's conduct, no reasonable fact finder would have found her guilty, rather than meet the much lower

burden of proof for a non-successive *Brady* violation, which is, had the withheld evidence been disclosed, the likelihood of a different result is great enough to undermine confidence in the outcome of the trial. *Smith v. Cain*, 132 S.Ct. 627, 630 (2012); *Wearry v. Cain*, 136 S.Ct. 1002 (2016). This same due process anomaly can also be present in a §2255 writ, as demonstrated in *Scott v. United States*, 890 F.3d 1239 (11th Cir. 2018), for which a petition for a writ of *certiorari* was filed on November 14, 2018, and is pending as No. 18-6783. In both of these cases, the prosecution benefitted from successfully withholding exculpatory evidence for many years before that evidence was discovered, because the Petitioners then had to meet the higher clear and convincing evidence standard in order to even have their claims considered on the merits. 28 U.S.C. §2244(b)(2)(B)(ii).

REASONS FOR GRANTING THE WRIT

QUESTION PRESENTED

Should a prisoner be substantively disadvantaged by having to meet a higher burden of proof on her *Brady/Giglio/Napue* claims because the prosecution has been successful in hiding exculpatory and material evidence until after the prisoner has had one or more federal writ applications denied on other issues in her case?

1. The Opinion Below Conflicts With This Court's *Brady* Jurisprudence.

In *Brady v. Maryland*, 373 U.S.83 (1963), this Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to the guilt or to punishment, irrespective of good faith or bad faith of the prosecution." *Id.* at 87. Some years later, in *United States v. Agurs*, 427 U.S. 97 (1976), this Court held that the government's duty to provide the defense with exculpatory evidence was the same, whether the defendant made a general request, a specific request or no request at all. *Id.* at 104-07. This Court also held that a *Brady* claim may arise where previously undisclosed evidence revealed the prosecution introduced trial testimony that it knew or should have known was perjury. *Id.* at 103-04. Later, in *United States v. Bagley*, 473 U.S. 667 (1985), this Court "disavowed any difference between exculpatory and impeachment evidence for *Brady* purposes, and it abandoned the distinction between the second and third *Agurs* circumstances, i.e. the 'specific – request' and 'general –

or no – request' situations. *Bagley* held that regardless of requests, favorable evidence is material, and constitutional error results from its suppression by the government, 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Kyles v. Whitley*, 514 U.S. 419, 433 (1995), quoting *United States v. Bagley*, 473 U.S. at 682. Thus, in order to establish a *Brady* violation, the claimant must show the prosecution withheld evidence, the evidence is exculpatory or favorable to the accused, and the evidence is material. *Kyles v. Whitley*, 514 U.S. 419, 432 (1995); *Smith v. Cain*, 132 S.Ct. 627, 630 (2012).

In *Kyles v. Whitley*, this Court further explained what it meant, and did not mean, by materiality. This Court explained that "a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal (whether based on the presence of reasonable doubt or acceptance of an explanation for the crime that does not inculpate the defendant) . . . . The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A 'reasonable probability' of a different result is accordingly shown when the government's evidentiary suppression 'undermines confidence in the

outcome of the trial.' *Bagley* 473 U.S. at 678, ..." *Kyles v. Whitley*, *supra* at 434. This Court went on to state that: "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles v. Whitley*, 514 U.S. at 434.

This Court has continued to address the meaning of materiality and the standard of proof that a claimant must meet an order to obtain relief for a *Brady* violation. In *Smith v. Cain*, 132 S.Ct. 617 (2012), this Court reiterated that evidence is material within the meaning of *Brady* "when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Id.* at 630, quoting *Cone v. Bell*, 556 U.S. 449, 469-470 (2009). "A reasonable probability does not mean that the defendant 'would more likely than not had received a different verdict from the evidence," only that the likelihood of a different result is great enough to 'undermine [ ] confidence in the outcome of the trial.'" *Smith v. Cain*, *supra* at 630, quoting *Kyles v. Whitley*, 514 U.S. at 434.

More recently, in *Wearry v. Cain*, 136 S.Ct. 1002 (2016), this Court again addressed the meaning of "material": "Evidence qualifies as material when there is 'any reasonably likelihood' it could have 'affected the judgment of the jury.' . . . [citing *Giglio* and quoting *Napue v. Illinois* 360 U.S. 264 (1959)] . . . To prevail on

his *Brady* claims, Wearry need not show that he 'more likely than not' would have been acquitted had the new evidence been admitted . . . . [citing *Smith v. Cain*, 132 S.Ct. 627, 629-31 (2012)] . . . He must show only that the new evidence is sufficient to 'undermine confidence' in the verdict." *Wearry v. Cain*, 136 S.Ct. at 1006.

In the opinion below, the Fifth Circuit agreed with the district court, that Petitioner "did not satisfy the requirement of Section 2244(b)(2)(B)(ii) because, taken together with the proof introduced at trial, the newly discovered evidence did not show 'by clear and convincing evidence' that, but for the prosecution's misconduct, 'no reasonable fact finder would have found her guilty' of murder." Slip Op. at 11, 909 F.3d at 779.

"Clear and convincing evidence" is an intermediate burden of proof, that is less than beyond a reasonable doubt and greater than preponderance of the evidence. *Addington v. Texas*, 441 U.S. 418, 423-25 (1979); *Schlup v. Delo*, 513 U.S. 298, 327 (1995) ("at the same time, the showing of 'more likely than not' imposes a lower burden of proof than the 'clear and convincing' standard . . . ."). Thus, the Fifth Circuit held that the Petitioner had to meet the much greater "clear and convincing evidence" burden of proof for it to even have jurisdiction to address the merits of Petitioner's claims, which is greater than the burden of proof it would have applied if it were judging the Petitioner's *Brady* and *Giglio/Napue* claims on direct appeal or

on a first §2254 writ application. If the State would have been less successful in hiding the exculpatory evidence, or more forthcoming in revealing the exculpatory evidence, Petitioner's claims would have been measured against the lower "undermine confidence in the verdict" standard required by this Court's *Brady* jurisprudence. The Fifth Circuit relied only upon §2244(b)(2)(B)(ii) and did not offer any constitutional basis for judging Petitioner's *Brady* claims by a standard that is much higher than this Court has prescribed for decades. The Fifth Circuit's opinion decides Petitioner's case in a way that conflicts with this Court's opinions, or alternatively, has decided an important issue of federal law that has not been decided by, but should be decided by, this Court

2. Petitioner's Claim Is Not, or Should Not Be Considered, Second or Successive.

The opinion below simply found that because Petitioner had previously filed, and had determined, a §2254 writ application, that the current application is 'second and successive' pursuant to § 2244(b)(2)(B)(ii), despite the fact that Petitioner's prior federal writ applications did not in any way raise a *Brady* or *Giglio/Napue* claim. The Fifth Circuit panel found that if Petitioner's claims did not meet the "clear and convincing evidence" standard, the law requires they be dismissed. The Fifth Circuit panel did not address the fact that this Court has previously rejected such a

mechanistic interpretation of what constitutes "second and successive." Instead, this Court has held that "[t]he phrase 'second or successive petition' is a term of art given substance by our prior habeas corpus cases." *Slack v. McDaniel*, 529 U.S. 473, 486 (2000).

Some years later, this Court stated that "[t]he phrase 'second or successive' is not self-defining. It takes its full meaning from our case law, including decisions predating the enactment of the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), ... [citations omitted]. . . The Court has declined to interpret 'second or successive' as referring to all §2254 applications filed second or successive in time, even when the later filings address a state-court judgment already challenged in a prior §2254 application. *See,* e.g., *Slack* 529 U.S. at 487, 120 S.Ct. 1595 (concluding that a second §2254 application was not 'second or successive' after the petitioner's first application, which had challenged the same state-court judgment, had been dismissed for failure to exhaust state remedies); . . . . . ." *Panetti v. Quarterman*, 551 U.S. 930, 943-44 (2007).

Panetti dealt with a claim by a death penalty defendant under *Ford v. Wainwright*, 477 U.S. 399 (1986), that holds the Eighth Amendment prohibits a state from carrying out a death sentence on a prisoner who is insane. *Panetti*'s first federal habeas application, that did not include a *Ford* claim, was denied on the merits. After

the conclusion of that case, prior to the time *Panetti* was to be executed, he filed his *Ford* claim, contending that he was to be executed. The State's response was that since the petitioner had previously filed a habeas application pursuant to §2254, *Panetti*'s *Ford* claim was a "second or successive" application under § 2244(b)(2), that the district court did not have jurisdiction to hear. This Court held "that Congress did not intend the provisions of AEDPA addressing 'second or successive' petitions to govern a filing in the unusual posture presented here: a §2254 application raising a *Ford*-based incompetency claim as soon as that claim is ripe." *Id.* at 945. The Court decided that a habeas claim should not be considered "second or successive" when the claim had not previously been ripe to be filed. This Court found it could not be considered "second or successive" if the claim could not have been brought before, because it was not ripe. The State's response had been that a prisoner could simply file a *Ford* claim before it was ripe, and keep it pending until such time as it became ripe. This Court rejected this solution because it actually encouraged the filing of frivolous or baseless claims for the sole purpose of not running afoul of the "second or successive" requirement of §2244(b)(2). "In the usual case, a petition filed second in time and not otherwise permitted by the terms of §2244 will not survive AEDPA's 'second or successive' bar. There are, however, exceptions. We are hesitant to construe a statute implemented to further the principles

of comity, finality, and federalism, in a manner that would require unripe (and, often, factually supported) claims to be raised as a mere formality, to the benefit of no party." *Panetti v. Quarterman*, 551 U.S. at 947.

In *Panetti*, this Court relied upon its decision in *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998), where the prisoner filed his first habeas application before his execution date was set, claiming he was incompetent to be executed, citing *Ford*. The district court had dismissed the claim as premature and the court of appeals affirmed. When the State obtained a warrant for his execution, the prisoner filed a second habeas application raising the same incompetency claim. The State argued that because the prisoner had already had one fully litigated habeas petition, that under the plain meaning of §2244(b)(2), his new petition had to be treated as successive. *Stewart v. Martinez-Villareal*, 523 U.S. at 643. This Court rejected that contention while acknowledging the petitioner had made the same claim a second time, holding that in light of the particular circumstances presented by a *Ford* claim, it would treat the two filings as a single application. *Id.* at 523 U.S. 643.

Another factor considered by this Court in determining whether a habeas claim is "second or successive" is whether the petitioner's actions constituted an abuse of the writ, as that concept had been explained in prior Supreme Court cases. Under the abuse–of–the–writ doctrine, "to determine whether an application is 'second or

successive,' the court must look to the substance of the claim the application raises and decide whether the petitioner had a full and fair opportunity to raise the claim in the prior application." *Magwood v. Patterson*, 561 U.S. 320, 345 (2010) *(Kennedy, J.*, dissenting) (citing *Panetti*, 551 U.S. at 947). "[I]f the petitioner had no fair opportunity to raise the claim in the prior application, a subsequent application raising that claim is not 'second or successive,' and [AEDPA's] bar does not apply." *Id.* at 346 (*Kennedy, J.*, dissenting) (citing *Panetti*, 551 U.S. at 947)

The common thread running through the foregoing authorities is interpreting AEDPA so that a petitioner is able to have his claim heard when it is ripe. This Court has interpreted AEDPA consistent with its prior abuse–of–the–writ cases that did not deprive a petitioner of the opportunity to have his claims heard. Ms Blackman did not have the opportunity to have her *Brady* and *Giglio/Napue* claims heard until such time as the State decided to reveal the existence of the exculpatory evidence. Petitioner never had "ripe" *Brady* and *Giglio/Napue* claims until the evidence was revealed, that is, her claims were not ripe because they were unknown to her because there was no known evidence of the claims until the State revealed the existence of the exculpatory and material evidence.

The Constitution guarantees criminal defendants a fair trial. *Delaware v. Van Arsdall*, 475 U.S. 673 (1986). A criminal defendant does not receive a fair trial when

a *Brady* violation occurs. When a *Brady* violation occurs, a defendant is entitled to a new trial. *Brady v. Maryland*, 373 U.S. at 87. Imprisoning someone based on the results of an unfair trial and then precluding any remedy at all, constitutes a suspension of the writ of habeas corpus. *See Magwood v. Patterson*, 561 U.S. at 350 (*Kennedy, J.*, dissenting); U.S. Const. art. I, § 9, cl. 2 (Suspension Clause). It also violates the Due Process Clause of the Fifth Amendment as established by *Brady* and its progeny.

Petitioner's writ should be granted because the Fifth Circuit's opinion is contrary to the foregoing authorities from this Court, the Due Process Clause and the Suspension Clause.

3. There are Conflicts Among Courts of Appeal Regarding the Application of AEDPA's Gatekeeping Requirements to *Brady* and *Giglio/Napue* Claims.

The panel opinion below adamantly declared that Petitioner's contention that her *Brady* and *Giglio/Napue* claims are not second and successive have "been rejected conclusively by this court," Slip Op. at 9; 909 F.3d at 778, and stated that the district court clearly erred to the extent that it apparently accepted the Magistrate's Judge's reasoning that in some circuits, *Brady* and related claims may not be subject to the strictures of §2244(b)(2), and hence the *Brady* claims may be independently appealed. Slip Op., at 8 n.2; 909 F.3d at 778 n.2. The Fifth Circuit

panel rejected the authorities that the district court found persuasive,[2] without examining them, which Petitioner will now do.

In *United States v. Lopez*, 577 F.3d 1053 (9th Cir. 2009), the Ninth Circuit addressed the "troublesome circumstance involving the interplay between the government's failure to make a timely disclosure of *Brady* information and the provisions of the Anti-Terrorism and Effective Death Penalty Act..... *Id.* at 1055. That court found that *Panetti v. Quarterman* is relevant to the application of AEDPA's gate keeping provisions to a *Brady* claim. "The considerations the court identified in support of its holding are not specifically limited to *Ford* claims, ..., and therefore must be considered in deciding whether other types of claims that do not survive a literal reading of AEDPA's gate keeping requirements may nonetheless be addressed on the merits. *United States v. Lopez*, *supra* at 1064. The court explained that given the nature of *Brady* claims, petitioners may often not be at fault for failing to raise such a claim in their first habeas petition, because it is the prosecutor who violates *Brady*'s disclosure obligations by not providing the favorable evidence and that such error may not be revealed until a petitioner's first habeas petition had been resolved. "Such prosecutorial error, however, does not rise to the

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[2] See App. F, Findings, Recommendation And Conclusions of the United States Magistrate Judge, pp. 25-29, Part IV, Certificate of Appealability.

level of a constitutional violation unless petitioner demonstrates a threshold level of prejudice: the undisclosed evidence must be material." *United States v. Lopez*, *supra* at 1064, citing *Strickler v. Greene*, 527 U.S. 263, 269 (1999). The Ninth Circuit went on to explain that before the passage of AEDPA, if the prosecution had failed to disclose potential *Brady* evidence until after a first habeas petition had been resolved, the petitioner could still raise the *Brady* claim in a second–in–time petition, so long as it was not barred by the abuse of the writ doctrine, which would not occur if the suppressed evidence was material. "Thus, before AEDPA, federal courts generally would have been able to reach the merits and remedy *every* meritorious *Brady* claim presented in a second–in–time petition when the 'cause' prong of the abuse–of–the–writ docxtrine was also satisfied." *United States v. Lopez*, *supra* at 1064.

The *Lopez* court found that under a literal reading of the "second or successive" provision of AEDPA, federal courts would lack jurisdiction to consider any second–in–time *Brady* claims unless petitioner demonstrates, by clear and convincing evidence, that no reasonable fact finder would have found petitioner guilty of the offense had the newly discovered evidence been available at trial." *Id.* If the "clear and convincing" provision "applies literally to every second–in–time *Brady* claim, federal courts would be unable to resolve an entire subset of meritorious *Brady* claims: those where petitioner can show the suppressed evidence establishes a

reasonable probability of a different result and is therefore material under *Brady*," but cannot meet the more demanding standard of establishing by clear and convincing evidence that no reasonable juror would have voted to convict petitioner. *Id.* The *Lopez* court found that making all second–in–time *Brady* claims subject to the "clear and convincing" standard "would completely foreclose federal review of some meritorious claims and reward prosecutors for failing to meet their constitutional disclosure obligations under *Brady*. This would seem a perverse result and a departure from the Supreme Court's abuse–of–the–writ jurisprudence, ... Barring these claims would promote finality – one of ADEPA's purposes – but it would do so only at the expense of foreclosing all federal review of meritorious claims that petitioner could not have presented to a federal court any sooner – certainly not an AEDPA goal." *Id.* at 1064-65.

The court in *Lopez* did not have occasion to decide whether *Panetti* could be viewed as supporting an exemption from AEDPA's gate keeping provisions for meritorious *Brady* claims because the court found that Lopez's *Brady* claims failed to establish materiality. The *Lopez* court held that *Brady* claims are not categorically exempt from AEDPA's gate keeping provisions and that second–in–time *Brady* claims that do not establish the materiality of the suppressed evidence are subject to dismissal pursuant to the gate keeping requirements of AEDPA. Because it did not

have to, the *Lopez* court did not "resolve the more difficult question whether *all* second–in–time *Brady* claims must satisfy AEDPA's gate keeping requirements, ..." *Id.* at 1067. However, as Petitioner herein satisfies the materiality requirements of *Brady*, as found by the State's habeas court and the district court in this case, her claim should be exempt from the gate keeping requirements of the AEDPA, §2244(b)(2)(B).

Other courts of appeal have addressed this issue in different ways. In *Evans v. Smith*, 220 F.3d 306 (4th Cir. 2000), the court held that §2244(b)(2)(B) "affords an opportunity to bring new claims where the petitioner can show that he was not at fault for failing to raise these claims previously where the claim, if meritorious, would sufficiently undermine confidence in the judgment at issue." *Id.* at 323. In *Crawford v. Minnesota*, 698 F.3d 1086, 1090 (8th Cir. 2012), the court held that all non-material *Brady* claims in second habeas petitions require authorization. In *Tompkins v. Secretary, Department of Corrections*, 557 F.3d 1257, 1260 (11th Cir. 2009), the court held that a *Brady* and *Giglio* claim that are raised in "a petition filed second–in-time and not otherwise permitted by the terms of §2244 will not survive AEDPA's 'second or successive' bar." (internal quotes omitted.)

Tompkins was a §2254 claim that a panel of the Eleventh Circuit believed was wrongly decided and requested that the *en banc* court reverse, and hold that, under

the authority of *Panetti v. Quarterman*, that an actual *Brady* violation where the petitioner, in the exercise of due diligence, could not reasonably have expected to discover the withheld exculpatory evidence, is not "second or successive" within the meaning of § 2255(h), the gate keeping provision of §2255, the statute governing writ applications originating from federal prosecutions. *Scott v. United States*, 890 F.3d 1239 (2018). The Eleventh Circuit found that "all the *Panetti* factors – the implications for habeas practice, the purposes of AEDPA, and the abuse–of–the–writ doctrine – compel the conclusion that second–in–time *Brady* claims cannot be 'second or successive' for purposes of §2255(h). And nothing *Panetti* teaches us to consider so much as hints otherwise." *Id.* at 1253. Nevertheless, the panel believed that it was bound by the decision of the prior Eleventh Circuit panel in *Tompkins v. Secretary, Department of Corrections*, and affirmed the dismissal by the district court, while at the same time urging that the *en banc* Eleventh Circuit take up the issue. The Eleventh Circuit did not accept the invitation and so a petition for writ of *certiorari* on behalf of Scott was filed in this Court on November 14, 2018, as No. 18-6783, and is pending. Petitioner Blackman and Petitioner Scott have raised the exact same issue, albeit under different statutes, that is, whether a second-in-time *Brady* claim, based on material evidence that was not available to the defense with the exercise of due diligence, may be considered "second and successive" and thereby

be subject to the "clear and convincing" evidence jurisdictional requirements of §2244(b)(2)(B)(ii) and § 2255(h).

The Petitioner requests that the Court grant review of her case because the court of appeals has rendered a decision that conflicts with decisions of other courts of appeals regarding the correct interpretation of "second and successive" in federal writs; has decided an important federal question in a way that conflicts with the relevant decisions of this Court; or alternatively, has decided an important question of federal law that has not been, but should be, settled by this Court

CONCLUSION

WHEREFORE, the Petitioner prays that the Court grant her petitioner for writ of certiorari and review the decision of the United States Court of Appeals for the Fifth Circuit.

Respectfully Submitted,

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APPENDIX

APPENDIX A

Opinion below of the United States Court of Appeals For The Fifth Circuit, *Telisa De'Ann Blackman vs. Lorie Davis, Director, Texas Department of Criminal Justice, Correctional Institutions Division*, No. 16-11820, issued November 28, 2018, revised December 26, 2018, 909 F.3d 772 (5th Cir. 2018).

REVISED DECEMBER 26, 2018
IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-11820

United States Court of Appeals
Fifth Circuit
FILED
November 28, 2018
Lyle W. Cayce
Clerk

TELISA DE'ANN BLACKMAN,

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 Northern District of Texas

Before DAVIS, JONES, and ENGELHARDT, Circuit Judges.

EDITH H. JONES, Circuit Judge:

Telisa Blackman, Texas prisoner # 848568, was convicted of murder in 1998 and sentenced to life imprisonment. In this successive Section 2254 application, she challenges her conviction under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963); *Napue v. Illinois*, 360 U.S. 264, 79 S. Ct. 1173 (1959); and *Giglio v. United States*, 405 U.S. 150, 92 S. Ct. 763 (1972). We do not reach the merits of these claims, however, because her petition does not fulfill the stringent requirements of 28 U.S.C. Section 2254(b)(2)(B) and the district court consequently erred in purporting to grant a COA on her merits claims after it had rejected the successive

petition's compliance with the statutory prerequisites. We AFFIRM the dismissal of the successive petition.

BACKGROUND

The evidence produced at trial was summarized by a Texas Court of Appeals on direct appeal:

> [Blackman] and the decedent, Lisa Davis, lived together in a lesbian relationship. One of the decedent's friends testified that the relationship was somewhat stormy and that, shortly before her death, the decedent wanted to end the relationship with appellant, although she was apprehensive about doing so.
>
> The couple lived in a second-floor apartment, accessible by an outdoor stairway to a balcony in front of the apartment. Appellant testified that, on Sunday evening, June 22, 1997, she left the apartment complex to go to a nearby convenience store, Quick Way. Upon returning, she realized she did not have her apartment key or her pass card to the apartment complex; she would have to ring the buzzer to be let into the complex. She went to the entryway of the apartment complex and, while she was standing on the sidewalk before going upstairs, she saw the decedent's feet lying on the balcony in front of their apartment. The apartment door was open, and the body was lying partially inside the apartment and partially outside. Decedent had been shot. Appellant called the decedent's name, and eventually touched the decedent, but the decedent did not respond. Appellant pulled the decedent's body inside their apartment. In doing so, she moved the decedent's feet to the side, to get them inside the apartment. She then shut the door and dialed 911. As a result of dragging the decedent's body inside the apartment complex, she got blood on her socks and shoes.
>
> Cathy Harding, a Dallas police detective, searched appellant in the homicide office at police headquarters because the only officers called to the crime scene were male; it was against department policy to have a male officer search a female suspect. Harding found blood on the soles of appellant's socks. Appellant told Harding that she had not taken her shoes off that evening.

When Daniel Krieter, a Dallas police investigator, arrived at the murder scene, appellant asked him if he remembered her from an incident that had occurred about a year earlier. Appellant had been shot by a gun, a .25 caliber Lorcin, that she owned. When the police closed their investigation into that incident, appellant reclaimed the gun from the department's property room. Appellant testified at trial that the gun was stolen some two months after she had reclaimed it in August 1995. She did not report it as stolen, however, because it was not registered. Appellant consistently denied that she had a gun on the night of the murder.

No gun was found; however, Krieter's search of the apartment revealed some spent shell casings on the floor and some live shell casings in a bureau drawer. The casings were .25 caliber and would fit a Lorcin. Appellant and the decedent had moved into the apartment only some thirty days before the decedent's death. Appellant explained that she moved in such haste she did not have time to throw out the live shell casings so she simply moved them.

Robert L. Ermatinger, a Dallas police homicide investigator, questioned appellant at the scene. Appellant told him she had gone to "the store" when the shooting occurred, although she could not say which store. When pressed, appellant said she realized while en route to the store she had forgotten her gate key and returned to the complex rather than going on to the store. When Ermatinger asked appellant at the scene if "they were a couple," that is, whether appellant and the decedent had a lesbian relationship, appellant said "they were not."

Finally, Cherissa Adams, a neighbor who lived on the first floor, testified that, on the evening of June 22, 1997, she heard a loud noise that sounded like gunfire. She looked out her window and saw a lifeless body. A young, thin girl was trying to move the body. The body's upper portion was inside an apartment. After Adams called 911, she returned to the window and continued to look out. The person who had moved the body locked the door and went downstairs. When the person looked in Adams's direction, Adams closed the blinds and moved away from the window. Adams had never seen the person before that evening and never saw her again. Adams was not able to identify appellant in court;

> at 11:35 p.m. on the night of the shooting, however, Adams did identify appellant in a photographic lineup.

Blackman v. State, No. 05-98-01750-CR, 2000 WL 5677985 (Tex. App.—Dallas May 8, 2000). Detective Lynette Harrison also testified at the trial. Harrison testified that Adams first chose Blackman's photograph from the photographic line up, and she affirmed that Adams did not "change her mind in any way" once she had identified Blackman.

Blackman was tried and convicted of murder. She was sentenced to life imprisonment. Her conviction was affirmed on appeal. The Texas Court of Criminal Appeals ("TCCA") also denied her petition for discretionary review. In 2002, Blackman filed her first state habeas petition, which was denied. She filed two federal habeas applications in 2003 and 2004, which were denied as untimely. She filed another state habeas application in 2006, which was dismissed as successive.

Blackman's mother hired new counsel, Craig Jett, in 2008. On August 27, 2009, Jett reviewed the Dallas District Attorney's Office's file on Blackman.[1] Jett found a prosecutor's note indicating that Adams had initially picked somebody else in the photographic lineup before changing her mind and identifying Blackman. Months later, in mid-2010, Jett sought out Blackman's previous counsel and determined that trial counsel, appellate counsel and writ counsel had been unaware of this evidence. Over a year later, in 2011, the District Attorney provided Jett with a recording of Adams's call to 911 the day of the murder. Adams stated in the 911 call that she saw a man lying in the doorway and a black man push him inside the apartment and close the door.

On December 17, 2010, Blackman filed another state habeas corpus petition alleging that the State failed to disclose the allegedly material

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[1] The District Attorney's Office instituted a formal open file policy for writs in 2008.

exculpatory evidence in violation of *Brady* and presented false or misleading testimony in violation of *Giglio* and *Napue*. The *Giglio/Napue* claim was based on the inconsistency between Detective Harrison's trial testimony that Adams had positively identified Blackman in the lineup and the prosecutor's note indicating hesitation. The state trial court held, after a hearing, that because of the discovery of this additional evidence, Petitioner was entitled to a new trial. The TCCA disagreed, concluded that the evidence was not material, and denied relief. *Ex parte Blackman*, No. WR-52,123-03, 2012 WL 4834113 (Tex. Crim. App. Oct. 10, 2012).

Blackman, acting pro se, then filed her third federal habeas petition on May 4, 2013. The district court transferred the case to this court to determine whether Blackman could file this successive habeas application. This court granted permission to file the successive application because Blackman had made a prima facie showing that she could satisfy the requirements of 28 U.S.C. § 2244(b)(2)(B)(i) and (ii).

Back in the district court, the state moved to dismiss Blackman's petition as time-barred pursuant to Section 2244(d)(1)(D). The district court accepted the magistrate judge's recommendation to deny this motion. Subsequently, the magistrate judge considered whether the petition met the requirements of Section 2244(b)(2)(B) for a successive petition. His recommendation concluded, under Section 2244(b)(2)(B)(i), that the factual predicate for her claims could not have been discovered earlier by exercising due diligence, but that the application must be dismissed for failing to satisfy Section 2244(b)(2)(B)(ii). The judge considered Blackman's argument that if the two critical pieces of impeachment information about Adams been timely disclosed, Blackman would not have testified at trial. The magistrate judge's opinion responded as follows:

> Even had Blackman not testified and her counsel impeached Ms. Adams's identification testimony, and even if the jury had heard that Ms. Adams first believed that she saw a black male move the decedent into the apartment and that Ms. Adams did not identify Blackman initially from the photographic array, two police officers testified that Blackman told them that she had moved decedent into the apartment upon discovering her. Blackman does not advance (and there is no evidence to support) a theory that an unidentified black male moved the body into – and then out of – the apartment prior to Blackman's coming home to discover the decedent lying outside the apartment.

The judge also rejected the contentions that one of those officers, Detective Ermatinger, who testified on rebuttal, would not have testified if Blackman herself had not taken the stand, and that Blackman's trial counsel, given access to the withheld evidence, would have successfully moved to suppress Blackman's statements. Blackman, in sum, had failed to establish by clear and convincing evidence that but for the prosecution's withholding evidence and procuring false testimony, no reasonable factfinder would have returned a guilty verdict. Notwithstanding these conclusions, the magistrate judge recommended granting a certificate of appealability ("COA") on Blackman's *Brady* and *Giglio/Napue* claims.

The district court affirmed the magistrate judge's findings in all but one particular. The court did not accept the magistrate judge's assumption that Detective Ermatinger's rebuttal testimony would have been offered even if Blackman had not testified. But the district court accepted the other findings and the ultimate conclusion that Blackman failed to meet the requirements of Section 2244(b)(2)(B)(ii). Like the magistrate judge, the district court dismissed Blackman's application for lack of jurisdiction but also granted a COA on the merits of her *Brady* and *Giglio/Napue* claims.

Blackman has appealed.

STANDARD OF REVIEW AND APPLICABLE LAW

"In a habeas corpus appeal, we review the district court's findings of fact for clear error and review its conclusions of law de novo, applying the same standard of review to the state court's decision as the district court." *Martinez v. Johnson*, 255 F.3d 229, 237 (5th Cir. 2001) (citation omitted). We review a district court's determination that it does not have jurisdiction *de novo*. *Leal Garcia v. Quarterman*, 573 F.3d 214, 217 (5th Cir. 2009).

This court has jurisdiction to rule on the judgment of the district court based on the issuance, by the district court or this court, of a Certificate of Appealability (COA). 28 U.S.C. § 2253(c)(1). A COA is required to specify the issue or issues on which "there is a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2) and (3); *Slack v. McDaniel*, 529 U.S. 473, 120 S. Ct. 1595 (2000).

The Antiterrorism and Effective Death Penalty Act ("AEDPA") states that second or successive habeas applications must be dismissed unless they fall into one of two exceptions. 28 U.S.C. § 2244(b)(2)(B). The exception at issue in this case requires the applicant to show:

> (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

This section is jurisdictional in nature. *Panetti v. Quarterman*, 551 U.S. 930, 942, 127 S. Ct. 2842, 2852 (2007).

APPELLATE JURISDICTION

What might have been a relatively straightforward appeal concerning the difficult requirements for filing a successive federal habeas petition has been confused by the district court's erroneous partial grant of COA and some convoluted arguments of the state. Rather than parse the complex procedural history at play, we will cut to the chase. The district court was not authorized to grant COA on the merits of Blackman's claims while also determining that her petition ultimately failed to meet the statutory prerequisites for a successive try at federal habeas relief. The Supreme Court has plainly stated that "[w]hen the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim," a COA requires a showing "at least," that reasonable jurists could debate both the procedural ruling and whether the petition states a valid constitutional claim. *Slack,* 529 U.S. at 484, 120 S. Ct. at 1604. If the petition is procedurally barred, no further inquiry should be made and no appeal is warranted. *Id.* Put otherwise, Blackman would have been able to secure a COA on the merits of her claims only if the district court had also determined that reasonable jurists could debate the court's procedural ruling. *Id.* The district court got the order of procedure exactly backward.[2] Blackman's counsel recognized the error and persuaded this court to expand the COA in an order dated May 22, 2018, pursuant to which we have jurisdiction to rule on whether the district court's

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[2] The district court clearly erred to the extent that it apparently accepted the magistrate judge's reasoning that in some circuits, *Brady* and related claims may not be subject to the strictures of Section 2244(b)(2), and hence the *Brady* claims may be independently appealed. As is explained more fully in the next section, this court holds to the contrary. *Leal Garcia v. Quarterman,* 573 F.3d 214, 220-22 (5th Cir. 2009); *Johnson v. Dretke,* 442 F.3d 901, 906-12 (5th Cir. 2006). Thus, a petitioner asserting a newly discovered *Brady* claim in a successive habeas case must pass the tests of Section 2244(b)(2) before a federal court may reach the merits.

procedural decision comported with the threshold requirements of Section 2244 (b)(2)(B).

DISCUSSION

Blackman's brief first assumes that Section 2244(b)(2)(B) controls and contends that the district court erred in dismissing her petition for failure to demonstrate that, but for the state's withheld or perjured evidence, no reasonable factfinder would have found her guilty of murder. 28 U.S.C. Section 2244(b)(2)(B)(ii). More broadly, she argues that her *Brady* and *Giglio/Napue* claims are not second or successive and that this court has not yet resolved whether *Brady* claims are subject to the requirements of Section 2244(b)(2)(B).[3]

To begin, Blackman's argument that these claims do not fit or are in tension with AEDPA's requirements for successive petitions under Section 2244(b)(2)(B) has been rejected conclusively by this court. *In re Davila*, 888 F.3d 179, 184-87 (5th Cir. 2018), applied this statutory provision to a petitioner's *Brady* claims and held that the requirements for pursuing a successive petition were not fulfilled. In *Leal Garcia*, this court emphasized that "[s]ection 2244(b)(2)(B)(i) states that claims based on a *factual* predicate not previously discoverable are successive." 573 F.3d at 221 (emphasis in original). Blackman's *Brady* and *Giglio/Napue* claims rely on precisely such previously undiscovered facts and are therefore within the purview of the statutory language. Even more pointedly, this court refused to "collapse AEDPA's due diligence requirement [section 2244(b)(2)(B)(i)] into the

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[3] Responding to Blackman's brief, the state rejects her successive petition arguments and urges in addition that at least one of her claims was not pursued within the one-year AEDPA statute of limitations. 28 U.S.C. Section 2244(d)(1)(D). Because Blackman's petition must be dismissed pursuant to Section 2244(b)(2)(B), we need not discuss the district court's conclusion that Blackman's successive claim was timely under the statute of limitations.

Brady duty..." and concluded that the statutory requirements for a successive petition must be considered prior to evaluation of the merits of the petitioner's *Brady* claim. *Johnson v. Dretke,* 442 F.3d 901, 906-911 (5th Cir. 2006). We are bound by these clear precedents and proceed to examine whether Blackman's claims satisfy the statutory requirements.

1. Section 2244(b)(2)(B)(i) Due Diligence

The district court determined that Blackman met the due diligence requirement of Section 2244(b)(2)(B)(i). We disagree, at least in part, based on *Johnson v. Dretke, supra.* In that case, the petitioner, Johnson, alleged in a successive petition that his accomplice signed a stipulation confessing to the murder Johnson was accused of committing. Johnson further alleged that, in violation of *Brady,* his accomplice testified at trial that Johnson committed the murder. Months before his conviction, however, Johnson was aware of the accomplice's indictment, guilty plea, and the submission of a stipulation and plea agreement. *Id.* at 904, 906, 908-09. This court held that Johnson could not meet the due diligence requirement of Section 2244(b)(2)(B)(i) because a reasonable attorney would have been put on notice of the existence of the accomplice's stipulation. *Id.* at 908-09. Together with the reasonable attorney standard, *Johnson* holds that under this provision, due diligence is measured objectively, not by the subjective diligence of the petitioner. *Id.* at 909-10

In this case, Adams's call to 911 was discussed at the trial by Adams and the firefighter/paramedic who responded to the scene. A reasonable attorney would have been put on notice at that time that a recording or transcript of the call may exist. Not one of Blackman's attorneys inquired as to the existence of a transcript until years after the trial. As in the *Johnson* case, they plainly failed to meet the due diligence requirement for at least this aspect of her

claims. Even assuming however, that Blackman satisfied the diligence requirement, her claims fail under Section 2244(b)(2)(B)(ii).

2. Section 2244(b)(2)(B)(ii) Innocence Requirement

The district court held that Blackman's claims did not satisfy the requirement of Section 2244(b)(2)(B)(ii) because, taken together with the proof adduced at trial, the newly discovered evidence does not show "by clear and convincing evidence" that, but for the prosecution's misconduct, "no reasonable factfinder would have found her guilty" of murder. We agree. To reiterate, all of Blackman's claims rely on (1) the 911 call in which Adams stated that she saw a man lying on the ground and a man drag the body inside the apartment, (2) the prosecutor's note stating that Adams initially picked out another person from the photographic lineup before picking Blackman, and (3) Detective Harrison's testimony that Adams did not change her mind during the photographic lineup.

But the fact that Adams was unable to identify Blackman at the defense table in court seriously undermines her theory. She was thus a dubious eyewitness even without additional impeachment evidence. Concededly, the new evidence casts a more negative light on Adams's prior identification of Blackman in the photographic lineup, but this is no more than cumulative impeachment. On the other hand, the state produced significant evidence corroborating Adams's identification and the substance of her 911 call. Officer Canales testified on direct examination that Blackman acknowledged at the scene of the crime that she had moved the body inside. Officer Harding also testified that Blackman said she moved the body back into their apartment. Blackman's contemporaneous statements placed her at the scene and moving the body of the deceased.

Significant additional evidence supports that a reasonable juror could find Blackman guilty beyond a reasonable doubt. Most provocatively, the soles of her socks had blood on them even though she denied to Detective Harding that she had taken her shoes off that evening. Detective Krieter testified that the bullets and shell casings from the fatal shots found in the apartment would fit a .25 caliber Lorcin, a pistol that Blackman admitted having owned at one point. Live shell casings and a live bullet were found in two drawers in her bedroom, although Blackman claimed she no longer had the pistol (which was never found by the investigators). Additionally, Davis's friend testified that Davis and Blackman had at least one violent argument, and about a week before her death Davis stated to her friend that she wanted out of her relationship with Blackman. The totality of the evidence does not prove clearly and convincingly, even with the additional impeachment of Adams's identification, that a reasonable jury would have been swayed to acquit Blackman. We concur with the district court that because Blackman did not surmount the standard of Section 2244(b)(2)(B)(ii), the court was required to dismiss for lack of jurisdiction.

Accordingly, we AFFIRM the judgment of the district court dismissing Blackman's successive habeas petition.

APPENDIX B

Findings of Fact And Conclusions of Law of 291st District Court of Dallas County, Texas, on Petitioner's state court writ application (July 3, 2012).

CASE NO. W97-50638-U(C)

EX PARTE	§	IN THE DISTRICT COURT
	§	
	§	291ST JUDICIAL DISTRICT
	§	
TELISA DEANN BLACKMAN	§	DALLAS COUNTY, TEXAS

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court hereby enters the following Findings of Fact and Conclusions of Law relating to the Application for Writ of Habeas Corpus in this matter.

I.

FINDINGS OF FACT

1. At 8:03 p.m. on June 22, 2007, Cherissa Adams called 911 from her apartment at the Signature Point Apartments in Dallas, Texas. Ms. Adams told the 911 operator that she thought she heard a gunshot in her apartment complex, which caused her to look out of the window of her apartment, located on the ground floor of the complex, towards another apartment in the complex. Ms. Adams told the 911 operator that she saw a man lying down in the doorway and a black man that pushed him inside the apartment and closed the door. She told the operator that she could look out her window and see straight up into the apartment where the events occurred. *Defendant's Exhibits "3", 911 Call and "5", 911 Call Log.*

2. Dallas Police Officers arrived at the apartment complex about eight minutes later, *Defendant's Exhibit "5"*, but it took ten to fifteen minutes before the officers determined where in the complex they needed to go. *Defendant's Exhibit "1", Trial RR, Vol. 2, pp. 69-70.* Four Dallas Police Officers came to Ms. Adams' apartment. She directed them to the apartment where the events occurred. The officers left and went to the apartment she pointed out. *RR 3, p. 91.*

3. The officers went to Apartment 219, which was across the walkway and upstairs, about 25 feet away from Ms. Adams' apartment. *Defendant's Exhibit "2", Trial RR, Vol.3, p. 79.*

4. The officers knocked on the door. The Defendant opened the door and the officers went in with guns drawn. The Defendant was standing near the body of Lisa Davis. The Defendant told the officers "I didn't do it. I didn't do it,". The Defendant kept saying she did not do anything. *Defendant's Exhibit "1", Trial RR, Vol. 2, pp. 73-80.*

5. Telisa Blackman, the Defendant, is a black female. *RR 5, p. 9.*

6. The Defendant was handcuffed and arrested by the officers. Officer Kreiter of the Dallas Police Department responded to the scene while the Defendant was still inside the apartment. He conducted handwashings on the Defendant to determine if the Defendant had gunshot residue on her hands. The handwashing test was inconclusive. *Defendant's Exhibit "1", pp. 87-105.*

7. After the officers left her apartment, Ms. Adams called a friend and then called her mother. After a while, some police officers came back to Ms. Adams' apartment. Ms. Adams and an officer then had a conversation about what happened. *RR. 3, pp. 91-92.*

8. A couple of hours later, Ms. Adams was taken to the police department in a squad car where she was questioned by another police officer. *RR 3, pp. 92-93.*

9. The police conducted a thorough search of the apartment and surrounding area and were not able to locate a firearm. *Defendant's Exhibit "1", p. 138.*

10. At the police department, someone else wrote a statement that Ms. Adams signed under oath. *RR 3, p. 96.*

11. Ms. Adams said in her statement that the person she saw at the apartment, whom she pointed out, was a small, petite, black female. *Defendant's Exhibit 6, Statement of Cherissa Adams; RR 3, p.94.* Ms. Adams' description of the person she saw at the other apartment changed from

initially, as stated to the 911 operator, that she had seen a black male, to when, at the police department, she stated she saw a small, petite, black female. *RR. 3, pp. 94-95.*

12. After Ms. Adams gave her statement, she was asked to look at a photographic line up. Ms. Adams understood that she had to pick the person whom she thought committed the crime. Ms. Adams assumed that the person who had committed the crime would be in the photo line up. *RR, pp. 97-100.* When Ms. Adams looked at the lineup, she was looking for the person she saw at the apartment complex because the officer had asked her to pick out the person from the picture whom she thought committed the crime. *RR 3, p. 110.*

13. Defendant, Telisa Blackman, was indicted by a grand jury for causing the death of Lisa Davis by shooting her with a firearm, in Cause No. F97-50368-U, filed in the 291st District Court of Dallas County, Texas. *RR 5, pp. 6-7.* Ms. Blackman hired Mr. James Belt, an attorney, to defend the charge. Mr. Belt began his representation before the grand jury and represented her through the trial of this case. *RR 5, p. 10.*

14. The Defendant was prosecuted by Ms. Tammy Kemp, an Assistant District Attorney with the Dallas County District Attorney's Office. *RR 2, p. 47.* About a month prior to the trial of this case, Ms. Kemp interviewed Cherissa Adams by telephone and took notes of that interview. *Defendant's Exhibit "4"* is a true and correct copy of Ms. Kemp's notes of her interview with Ms. Adams. *RR 2, pp. 48-50.*

15. In the interview, Ms. Adams told Ms. Kemp that Ms. Adams picked someone else out of the line up first and then changed her mind and selected the Defendant. Ms. Kemp wrote down this statement in her notes. *Defendant's Exhibit "4." RR 2, p. 55.*

16. Ms. Kemp did not give the notes regarding the interview of Ms. Adams to defense counsel, Mr. Belt. Ms. Kemp did not tell Mr. Belt that Ms. Adams picked somebody else out of the

line-up first and then picked out Ms. Blackman the Defendant. *RR 2, pp. 61-62.*

17. That Ms. Adams first picked out a photograph of someone other than the Defendant and then picked out the Defendant is exculpatory and favorable to the Defendant.

18. The recording of Ms. Adams talking to the 911 operator was preserved by the Dallas Police Department. Ms. Kemp was aware of the existence of the 911 recording and was aware that Ms. Adams said on the recording that she saw a black male moving the body. *RR 2, pp. 78-82.* Ms. Kemp did not inform defense counsel, James Belt, about the existence of the 911 call or its content. Mr. Belt was unaware of the existence of the 911 recording and its content at the time of the trial of Ms. Blackman's case and did not learn of the 911 recording and its content until they were provided to him by Ms. Blackman's current counsel, Mr. Jett, in 2011. *RR 5, pp. 9-31.*

19. The 911 recording and its content are exculpatory and favorable to the Defendant.

20. At Ms. Blackman's trial, when asked to identify who she saw on the apartment balcony around the body, Ms. Adams looked around the courtroom and was unable to identify any person in the courtroom as the person she saw around the body. At the time, Ms. Blackman was seated in the courtroom next to her counsel, Mr. Belt. *RR 5, p. 13; Defendant's Exhibit "1", p. 42.* Ms. Adams testified she picked out a photo from the line-up, but did not say it was a photo of the Defendant. *Defendant's Exhibit "1", pp. 43, 51-52*

21. At Ms. Blackman's trial, no evidence was presented to the jury that Ms. Adams had initially picked someone else out of the line up and then chose the Defendant from the photo line up.

22. During Ms. Blackman's trial, there was no testimony that Ms. Adams had told the 911 operator that she saw a black male moving the body into the apartment. In the trial, the prosecutor asked questions that assumed or asserted that the person Ms. Adams saw was a female. *Defendant's Exhibit "1", Trial RR, Vol.2, pp. 39, 42, 53.*

23. At Ms. Blackman's trial, Detective Lynette Harrison, who presented the photographic line up to Ms. Adams, testified that Ms. Adams chose the photograph of the Defendant, saying "This looks like the girl.", and that Ms. Adams then looked through the rest of the photographs and "did not change her mind in any way." *Defendant's Exhibit "1", Trial RR, Vol. 2, pp. 62-63.*

24. After Ms. Blackman's writ application was filed, Assistant District Attorney Christine Womble contacted Detective Ermatinger, who was the lead detective on the case against Ms. Blackman. Ms. Womble asked Mr. Ermatinger to retrieve the Dallas Police Department file so Ms. Womble could compare it to the District Attorney's file to see if there was anything that the D.A.'s office did not have. Ms. Womble searched through the Dallas Police Department file and found a cassette tape that had a recording of Ms. Adams' 911 call. The cassette recording was copied and promptly provided to Defendant's counsel, J. Craig Jett, in 2011, prior to the hearing on Ms. Blackman's Application for Writ of Habeas Corpus. The 911 recording was admitted into evidence at the writ hearing as *Defendant's Exhibit "3"*; without objection by the State. *RR 2, pp. 8-10.*

25. That Ms. Adams had picked out a photograph from the line up other than the Defendant's, before she chose the Defendant's photograph, was not made known to the Defendant or any of her counsel until the Dallas District Attorney's Office granted Mr. Jett access to its file on August 27, 2009. *Affidavit of J. Craig Jett; Affidavit of James C. Belt; Affidavit of David A. Schulman; and Affidavit of Adam L. Seidel; all attached as exhibits to Amended Application for Writ of Habeas Corpus.*

26. The information about Ms. Adams picking someone else out from the line up and the 911 recording were each material, and were not available to the Defendant at her trial, nor to any of her prior counsel until they were provided to Mr. Jett.

27. If either of the foregoing items of evidence had been provided to Mr. Belt prior to Ms. Blackman's trial, Mr. Belt would have cross-examined the State's witnesses on Ms. Adams' indecision in picking Ms. Blackman from the line up and identifying the person that she saw on the balcony as a male. Had this evidence been provided to Mr. Belt prior to trial, he would have engaged in additional avenues of investigation relating to the identification testimony and would likely have engaged in different trial strategy, at least including advising the Defendant not to testify at trial. *RR 5, pp. 13-16, 28-33.*

28. The 911 recording and its contents were withheld from the Defendant and her counsel, and they were not reasonably available to the Defendant or any of her counsel until they were provided to Ms. Blackman's current counsel in 2011, after Ms. Blackman's current writ of application was filed.

29. Ms. Blackman's claims regarding withholding the 911 recording were not reasonably ascertainable or available, with the exercise of due diligence, until the 911 recording was provided to Ms. Blackman's counsel.

30. That Ms. Adams chose another person from the photo line up, before she chose the Defendant, was withheld from the Defendant and her counsel by the State and thus was not reasonably available to the Defendant or any of her prior counsel until that information was made available to Ms. Blackman's current counsel on August 27, 2009.

31. Ms. Blackman's claims regarding Ms. Adams choosing a person from the photo line up before choosing Ms. Blackman were not reasonably ascertainable or available, with the exercise of due diligence, until that information was made available to Ms. Blackman's counsel.

32. Because the State did not provide to defense counsel the evidence that Ms. Adams picked out another photo before she chose the photo of the Defendant from the photo line up, and

because the State did not provide the defense with the 911 recording, the Court's confidence in the outcome of the trial is undermined. The Court finds that there is a reasonable probability that had one or both of the foregoing items of evidence been disclosed to the defense, the outcome of the proceeding would have been different.

II.

CONCLUSIONS OF LAW

1. The 911 recording would have been admissible at the Defendant's trial as direct and as impeaching evidence.

2. The 911 recording is exculpatory and favorable to the Defendant pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny. *United States v. Bagley*, 473 U.S. 667 (1985); *Smith v. Cain*, 132 S.Ct. 627 (2012); *Thomas v. State*, 841 S.W. 2d 399, 404 (Tex.Crim.App. 1992).

3. The 911 recording is material, such that there is a reasonable probability that, if the evidence had been disclosed to the defense, the outcome of the trial would have been different. The failure of the prosecution to disclose this evidence to the defense undermines the Court's confidence in the outcome of Ms. Blackman's trial. *Smith v. Cain*, 132 S.Ct. 627 (2012); *Kyles v. Whitley*, 514 U.S. 419, 434 (1995).

4. The failure of the prosecution to provide the 911 recording to the Defendant prior to the trial of this case violated the Defendant's right to due process of law as guaranteed by the 5th and 14th Amendments to the United States Constitution and Article 1, Sec.19, Texas Constitution

5. The Defendant's claim regarding the State's failure to provide the 911 recording to the Defendant prior to trial was not and could not have been presented in a prior application for writ of habeas corpus because the factual and, therefore legal basis for the claim, was unavailable on the date that Defendant filed her previous writ applications. The Defendant's claim regarding the due

process violation resulting from the failure to provide her with the 911 recording could not have been presented in her prior writ applications because the basis for her claim was not ascertainable through the exercise of reasonable diligence on or before the date of the prior writ applications. *Ex Parte Lemke*, 13 S.W. 3d 791, 793 (Tex.Crim.App. 2000); *Art. 11.07, §4(c) C.C.P.*

6. As a result of the due process violation of the State withholding the 911 recording, the Defendant is entitled to have her conviction set aside and a new trial granted.

7. The evidence that the witness, Cherissa Adams, had picked out a photograph of someone other than the Defendant, and then picked out a photograph of the Defendant from the photo line up, was admissible at trial as direct and impeaching evidence.

8. That Cherissa Adams had chosen the photograph of a person other than the Defendant, and then chosen a photograph of the Defendant from the photo line up, is exculpatory and favorable to the Defendant pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny. *United States v. Bagley*, 473 U.S. 667(1985); *Smith v. Cain*, 132 S.Ct. 627 (2012); *Thomas v. State*, 841 S.W. 2d 399 (Tex.Crim.App. 1992).

9. That Ms. Adams first chose the photograph of another person and then chose the photograph of the Defendant from the photo line up, is material, such that there is a reasonable probability that had the evidence been disclosed to the defense, the outcome of the trial would have been different. The failure of the prosecution to disclose the aforesaid evidence, which is favorable to the accused, undermines the Court's confidence in the outcome of the Defendant's trial. *Smith v. Cain*, 132 S.Ct. 627 (2012); *Kyles v. Whitley*, 514 U.S. 419, 434 (1995).

10. The failure of the State to inform the defense that Ms. Adams had chosen the photograph of another person, before choosing a photograph of the Defendant, violates the Defendant's 5th and 14th Amendment rights to due process of law and Art. 1, Sec. 19, Texas Const..

11. The Defendant's claim that is based upon the failure of the State to provide the defense with evidence that the witness, Ms. Adams, chose the photograph of another person from the line up and then picked out the photograph of the Defendant, could not have been raised at the time of the Defendant's prior writ applications because that evidence was being withheld by the State and, therefore, the Defendant's claims were not ascertainable through the exercise of due diligence on or before the date of the prior writ applications. *Ex Parte Lemke*, 13 S.W.3d 791 (Tex.Crim.App. 2000); *Art. 11.07, §4(c), C.C.P.*

12. Due to the State's violation of the Defendant's due process rights by withholding the information about Ms. Adams choosing of another person from the photo line up, the Defendant is entitled to have her conviction set aside and a new trial granted. *5th and 14th Amendments; Article 1, Sec. 19, Texas Constitution.*

13. Considering the evidence of the 911 recording and Ms. Adams' indecision about choosing the Defendant's photograph from the line up, along with all of the other evidence from the trial, the Court finds that it is more likely than not that a reasonable jury would not have found the Defendant guilty beyond a reasonable doubt.

14. The Defendant is entitled to have her conviction set aside and her case remanded for a new trial.

15. The Court recommends that relief be granted to the Defendant by vacating her conviction and remanding her case for a new trial.

SIGNED on 7/3, 2012.

HON. SUSAN HAWK,
JUDGE PRESIDING

APPENDIX C

Opinion of Texas Court of Criminal Appeals, *Ex Parte Telisa De'Ann Blackman*, 2012 WL 4834113 (October 10, 2012).

2012 WL 4834113
Only the Westlaw citation is currently available.

Court of Criminal Appeals of Texas.

EX PARTE Telisa Deann BLACKMAN, Applicant.

No. WR–52,123–03.
|
Oct. 10, 2012.

On Application for a Writ of Habeas Corpus, Cause No. W97–50638–U(C) in the 291st District Court, from Dallas County.

MEYERS, WOMACK, and JOHNSON, JJ., would grant relief.

ORDER

PER CURIAM.

***1** Pursuant to the provisions of Article 11.07 of the Texas Code of Criminal Procedure, the clerk of the trial court transmitted to this Court this application for writ of habeas corpus.[1] Telisa Blackman was convicted of murder and sentenced to life imprisonment. The Fifth Court of Appeals affirmed her conviction.[2]

In her application, Blackman contends, among other things, that the State failed to disclose exculpatory evidence in violation of *Brady v. Maryland,*[3] namely, a 911 call in which State's witness Cherissa Adams described the person later identified as Blackman (a female) as a man and evidence of Adams's equivocation in identifying Blackman from a photographic lineup.

The trial judge found that the 911 recording and Cherissa Adams's uncertainty in selecting Blackman from the photo line-up were favorable to Blackman, but were not disclosed. In recommending that we grant relief on her two *Brady* claims, the trial judge concluded that both "[are] material, such that there is a reasonable probability that had the evidence been disclosed to the defense, the outcome of the trial would have been different." We will defer to a trial judge's findings of fact and conclusions of law when they are supported by the record.[4] But "[w]hen our independent review of the record reveals that a trial judge's findings and conclusions are not supported by the record, [this Court] may exercise [its] authority to make contrary or alternative findings and conclusions."[5] The trial judge's conclusion that the withheld evidence is material is not supported by the record. Further, our independent review of the record reveals that Blackman fails to demonstrate the withheld evidence's materiality.

To prevail on a *Brady* claim, an applicant must show that: (1) the prosecution withheld evidence from the defense; (2) the evidence withheld is favorable to the defense; and (3) the evidence is material such that there exists a reasonable probability that, had the evidence been disclosed, the outcome at trial would have been different.[6] As the trial judge correctly identified, the materiality requirement applicable to Blackman's claims is satisfied 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."[7] A reasonable probability means that the likelihood of a different result is great enough to undermine confidence in the trial's outcome.[8] "The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense."[9] To determine whether the materiality standard is met, a court must balance the exculpatory evidence against the evidence supporting conviction.[10]

Blackman first complains that the State withheld the recording of Adams's 911 call the night of the murder, during which she reported seeing a black man move a lifeless body. Blackman is female. Blackman's second claim regarding Adams's identification of Blackman from the photographic lineup on the night of the murder stems from a note in the prosecution's case file relating to a conversation with Adams about the identification. The note reads, in part, "[p]icked out someone else first, then changed mind [and] selected [Blackman] (Bust photo)." Blackman contends, and trial counsel confirmed at the writ hearing, that if the prosecution had disclosed this evidence, the defense could have used it to impeach Adams's testimony at trial that she saw Blackman drag

a body into her apartment and might have followed a different investigative trail. Counsel also stated that, had he known this information, he would not have called Blackman as a witness and the jury would not have heard her testify about dragging the victim into her apartment.

*2 With regard to the investigative value of this withheld evidence, Blackman fails to identify what, if anything, this might have unearthed that would have sufficiently undermined confidence in the outcome at trial. Similarly, she fails to show how impeaching Adams would probably have affected the results of the proceedings, particularly given the fact that-as Blackman concedes in her memorandum in support of her application-at least one officer testified at trial that Blackman admitted to dragging the victim into her apartment. Finally, Blackman makes no showing that the outcome would probably have been different had she chosen not to testify. Relief is denied.

All Citations

Not Reported in S.W.3d, 2012 WL 4834113

Footnotes

1 *Ex parte Young,* 418 S.W.2d 824, 826 (Tex.Crim.App.1967)
2 *Blackman v. State,* No. 05–98–01750–CR, 2000 WL 567985 (Tex.App.-Dallas May 8, 2000) (not designated for publication).
3 373 U.S. 83 (1963).
4 *Ex parte Reed,* 271 S.W.3d 698, 727 (Tex.Crim.App.2008).
5 *Id.*
6 *Ex parte Miles,* 359 S.W.3d 647, 665 (Tex.Crim.App.2012); *Hampton v. State,* 86 S.W.3d 603, 612 (Tex.Crim.App.2002).
7 *United States v. Bagley,* 473 U.S. 667, 682 (1985).
8 *Smith v. Cain,* 132 S.Ct. 627, 630 (2012).
9 *United States v. Agurs,* 427 U.S. 97, 109–10 (1976); *Ex parte Miles,* 359 S.W.3d at 666.
10 *Ex parte Miles,* 359 S.W.3d at 666.

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APPENDIX D

Order Authorizing United States District Court To Consider A Successive 28 U.S.C. § 2254 Application (June 18, 2015).

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 15-10114

In re: TELISA BLACKMAN,

Movant.

Motion for an Order Authorizing
the United States District Court
for the Northern District of Texas
To Consider a Successive 28 U.S.C. § 2254 Application

Before SMITH, ELROD, and HIGGINSON, Circuit Judges.

PER CURIAM:

Telisa Blackman, Texas prisoner # 848568, moves for leave to file a second or successive application for writ of habeas corpus challenging her 1998 conviction of murder. *See* 28 U.S.C. § 2244(b)(3)(A). She asserts that she has newly discovered evidence that could have been used to impeach the identification testimony of one of the state's witnesses. She complains that the evidence was withheld in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972), and its antecedents.

Blackman must make a *prima facie* showing that her proposed application relies on either (1) "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously

unavailable" or (2) a factual predicate that "could not have been discovered previously through the exercise of due diligence." § 2244(b)(2)(A), (B)(i), (3)(C). Because Blackman relies only on a newly discovered factual predicate, she must show that the facts underlying her claims, "if proven and viewed in light of the evidence as a whole," are "sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found [her] guilty of the underlying offense." § 2244(b)(2)(B)(ii).

Blackman asserts that her *Brady* claim should not be subject to these requirements. As she concedes, this court has held otherwise. *See Leal Garcia v. Quarterman*, 573 F.3d 214, 220–22 (5th Cir. 2009); *Johnson v. Dretke*, 442 F.3d 901, 906–12 (5th Cir. 2006). "It is well-established in this circuit that one panel of this Court may not overrule another." *United States v. Segura*, 747 F.3d 323, 328 (5th Cir. 2014) (internal quotation marks and citation omitted).

Blackman contends, in the alternative, that her *Brady* and *Giglio* claims satisfy the § 2244(b)(2)(B) standard. Blackman has made a *prima facie* showing that she can satisfy the requirements of § 2244(b)(2)(B)(i). The state trial court found that the newly discovered evidence could not have been obtained earlier through the exercise of due diligence, a finding that was undisturbed by the Texas Court of Criminal Appeals and enjoys deference. Blackman has also made a *prima facie* showing that she can satisfy the requirements of § 2244(b)(2)(B)(ii). *See* § 2244(b)(3)(C). She has made a "sufficient showing of possible merit to warrant a fuller exploration by the district court." *In re Swearingen*, 556 F.3d 344, 347 (5th Cir. 2009).

The application for leave to file a second or successive habeas application is GRANTED.

APPENDIX E

Second Amended Petition Under 28 U.S.C. § 2254 For Writ of Habeas Corpus By A Person In State Custody And Brief In Support Thereof (October 26, 2015).

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

TELISA DE'ANN BLACKMAN,	§	
	§	
Petitioner,	§	
	§	
V.	§	No. 3:13-cv-2073-P-BN
	§	
WILLIAM STEPHENS, Director	§	
Texas Department of Criminal Justice	§	
Correctional Institutions Division,	§	
	§	
Respondent.	§	

SECOND AMENDED PETITION UNDER 28 U.S.C. §2254 FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY AND BRIEF IN SUPPORT THEREOF

TO THE HONORABLE DAVID HORAN, UNITED STATES MAGISTRATE JUDGE, FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION:

COMES NOW Telisa De'Ann Blackman, the Petitioner and files her second amended petition for a writ of habeas corpus pursuant to 18 U.S.C. §2254 and the Fifth and Fourteenth Amendments to the United States Constitution.

I.
PARTIES

The Petitioner is an inmate in the Texas Department of Criminal Justice, Correctional Institutional Division, as a result of a conviction and life sentence, from a prosecution in the 291st District Court of Dallas County, Texas.

The Respondent, William Stephens, is the Director of the Texas Department of Criminal Justice, Correctional Institution Division.

II.

JURISDICTION

This Court has jurisdiction over the Petitioner's writ application because she is in custody pursuant to a judgment of a court of the State of Texas in violation of the Constitution and Laws of the United States, and pursuant to an Order of the United States Court of Appeals for the Fifth Circuit that this Court has jurisdiction to consider Petitioner's subsequent writ application under 28 U.S.C. §2254. No. 15-10114, *In Re: Telisa Blackman* (5th Cir. 2015).

III.

VENUE

Venue for Petitioner's writ application is in the Northern District of Texas because the state court where the Petitioner was convicted and sentenced is located in this district. 28 U.S.C. §2241(d).

IV.

FACTUAL BACKGROUND

On June 22, 1997, the Petitioner, Telisa Blackman, and Lisa Davis, had been residing in apartment 219 at the Signature Point Apartments in Dallas, Dallas County, Texas, for less than thirty days. Cherissa Adams had lived on the ground floor of the complex for about three years. At 8:03 p.m. on that evening, Ms. Adams called 911 from her apartment and told the operator that she thought she heard a gunshot in the complex, which caused her to look out the window towards an apartment on the second floor of the complex. Ms. Adams told the 911 operator that she saw a man lying down in the doorway and a black man had pushed him inside the apartment and closed the door. She told the operator she could look out of the window and see straight up into the apartment where the events occurred. Dallas Police Officers arrived at the apartment complex about eight

minutes later, but it took 10-15 minutes before the officers determined where in the complex they needed to go. Four Dallas Police Officers came to Ms. Adams' apartment. She directed them to the apartment where the events occurred. WCR[1], Findings of Fact 1 and 2, p.235.

The officers left and went to apartment 219, which was across the walkway from Ms. Adams and on the second floor, about 25 feet from Ms. Adams' apartment. The officers first knocked on the door and then opened the door and went into the apartment with the guns drawn. Petitioner was standing near the body of Lisa Davis. The Petitioner told the officers "I didn't do it. I didn't do it". The Petitioner kept saying she didn't do anything. Petitioner is a black female. She was handcuffed and arrested by the officers. While still in the apartment, one officer conducted hand washings to determine if Petitioner had gun shot residue on her hands. The test was inconclusive. After a while, the officers came back to Ms. Adams' apartment and had a conversation with her about what had happened. WCR, Findings of Fact 2 - 7, pp. 235-36.

A couple of hours later Ms. Adams was taken to the police department in a squad car, where she was questioned by Detective Lynette Harrison. At the police department Detective Harrison wrote a statement that Ms. Adams signed under oath, stating that the person she saw at the apartment was a small, petite black female. Thus, Ms. Adams' description of the person she saw at the apartment changed from initially telling the 911 operator she had seen a black male, to telling the police officer at the station that she saw a small, petite black female. After Ms. Adams gave her statement, she was asked to look at a photographic line-up. The line-up shown to Ms. Adams contained photos of six black females. Ms. Adams understood that she had to pick out the person she thought committed the crime and assumed that the person who committed the crime would be in the photographic line-up. WCR, Findings of Fact 8 - 12, pp. 236-37. Petitioner's photograph was

[1] WCR is Writ Clerk's Record. WRR is Writ Reporter's Record. DX is Defendant's Exhibit. SX is State's Exhibit.

in the line-up, but her appearance was very different from the persons in the other photographs. Ms. Adams was not shown a line-up that included any males.

Petitioner was indicted for intentionally causing the death of Lisa Davis by shooting her with a firearm, in Cause No. F-97-50368-U, filed in the 291st District Court of Dallas County, Texas. Petitioner hired Mr. James Belt to defend the charge against her. Mr. Belt represented Ms. Blackman before the grand jury and through the trial of the case. The State was represented by Assistant District Attorney Tammy Kemp. About a month prior to the trial of the case, Ms. Kemp interviewed Ms. Adams by telephone and took notes of that interview. A true and correct copy of those notes were introduced as Defendant's Exhibit No. 4 at the state writ hearing and are contained in the State Court Records Appendix that is being filed by Petitioner; WRR, Vol. 6, DX 4. In the interview Ms. Adams told Ms. Kemp that Ms. Adams picked someone else out of the line-up first and then changed her mind and selected the Petitioner. Ms. Kemp wrote this down in her notes. Ms. Kemp did not give copies of the notes to defense counsel, Mr. Belt, and did not tell Mr. Belt that Ms. Adams picked someone else out of the line-up and then picked out the Petitioner. WCR, Findings of Fact 13-16, p. 237.

The recording of Ms. Adams talking to the 911 operator was preserved by the Dallas Police Department. Ms. Kemp was aware of the existence of the 911 recording and was aware that Ms. Adams said on the recording that she saw a black male moving the body. WRR, Vol. 2, pp 78-82. Ms. Kemp did not inform defense counsel about the existence of the 911 call or its content. Defense counsel was unaware of the existence of the 911 recording and its content at the time of the trial of Ms. Blackman's case. WCR, Findings of Fact 18, p. 238.

At Petitioner's trial, Ms. Adams was asked to identify who she saw on the apartment landing around the body. She looked around the courtroom and was unable to identify any person as the

person she saw around the body. At that time, Petitioner was seated in the courtroom next to Mr. Belt. Ms. Adams did testify that she picked out a photo from the line-up, but did not say it was a photo of Petitioner. WCR, Findings of Fact 20, p. 238.

After Ms. Adams testified, Detective Lynette Harrison was called by the state to testify. Detective Harrison testified that Ms. Adams chose the photograph of the Petitioner, saying "this looks like the girl", and that Ms. Adams then looked through the rest of the photographs and "did not change her mind in any way." See WCR, Vol. 6, Pt. 1, pp. 62-63; WCR, Findings of Fact 23, p. 239. At Petitioner's trial there was no evidence presented to the jury that Ms. Adams had initially picked someone else out of the line-up and then chose the Petitioner from the line-up. The 911 recording was not played and there was no testimony that Ms. Adams told the 911 operator that she saw a black male move the body into the apartment. WCR, Findings of Fact 21 and 22, p. 238. During the trial Ms. Kemp asked questions that assumed or asserted that the person Ms. Adams saw was a female. WCR, Vol. 2, Pt. 1, pp. 39, 42, 53. Ms. Kemp did not correct Detective Harrison's testimony that Petitioner did not "change her mind in any way" about who she saw. WCR, Findings of Fact 22, p. 238. Petitioner was convicted by the jury of the murder of Lisa Davis and was sentenced to life in prison.

In October 2008, Petitioner's mother hired the undersigned counsel to determine whether Petitioner might be eligible for some relief from her sentence. As part of the investigation a request was made to the Dallas County District Attorney's Office to be allowed to review the State's file relating to the prosecution of the Petitioner. See Doc. 46. Petitioner's Response to Respondent's Motion to Dismiss, and details therein as to sequence of events. At this time Craig Watkins had been recently elected as District Attorney of Dallas County and had changed the policy of his predecessors to allow defense counsel to review the State's file after a conviction. WCR, DX E and F; pp. 127-

136. Undersigned counsel was allowed to review Ms. Blackman's file on August 27, 2009. WCR, Findings of Fact 25, p. 238; WCR, DX B, pp. 112-116. When counsel reviewed the file, he found the notes from the prosecutor's interview with Ms. Adams. The notes contained the following entry: "picked out someone else first, then changed mind & selected [Petitioner] (Bust photo)". WRR, Vol. 6, DX 4. A copy of the aforesaid note was provided to undersigned counsel on September 2, 2009. Over the next several months undersigned counsel sought out Petitioner's prior trial, appellate and writ counsel and provided copies of the notes to them. See Doc. 46, Petitioner's Responses to Motion to Dismiss.

Over four days time from September 19 through September 26th, 2011, Susan Hawk, then judge of the 291st District Court, conducted an evidentiary hearing on Petitioner's writ application. At the hearing Petitioner established that Ms. Adams' statement to the prosecutor that she picked out a photo from the line-up and then picked out the Petitioner's photo, and the 911 call and call log, were exculpatory evidence that the prosecution was aware of and failed to turn over to the defense. WCR, Findings of Fact 17 and 19, p. 238. Petitioner proved this evidence was not available to her at trial and was not available to any of her subsequent counsel until Craig Watkins changed the District Attorney's office policy to allow defense lawyers access to the prosecution's file. Petitioner proved that she and her prior counsel were unaware of the aforesaid exculpatory evidence until undersigned counsel was given access to the State's file, which then led to the District Attorney's office reviewing the police department file and finding the 911 recording and the call log. WCR, Findings of Fact 25, p. 239. The foregoing facts relating to the discovery of the notes and 911 call and call log were not contested by the prosecution at the state court writ hearing and have not been contested by the Attorney General's Office in the proceedings in federal district court. See Doc. 38, Findings, Conclusions and Recommendations of the United States Magistrate Judge, pp. 8 - 10.

In addition, at the state writ hearing Petitioner's trial attorney, James Belt, testified that if he had been provided with the aforesaid exculpatory evidence that it would have changed his approach to the case. He testified he would have vigorously cross-examined Ms. Adams and Detective Harrison about the conflicts between their trial testimony and the statement by Ms. Adams to the prosecutor and the 911 call. Mr. Belt testified that he would have investigated the case differently and not called the Petitioner to testify. WCR, Findings of Fact 27, p. 240. The Petitioner also demonstrated how her case could have been tried differently by the use of testimony from an expert in eyewitness identification. Petitioner called as a witness, Dr. Steven Smith, a psychologist who is an expert in cognitive human psychology, which includes eyewitness identification. Dr. Smith identified a number of factors that call into question the identification evidence. Dr. Smith testified that each of the these factors could separately reduce the reliability of the identification and with all of the factors together, "it would be questionable as to whether or not the identification was accurate." WRR, Vol. 4, p. 38. Judge Hawk concluded and found that "the court's confidence in the outcome of the trial is undermined. The Court finds that there is a reasonable probability that had one or both of the foregoing items of evidence been disclosed to the defense, the outcome of the proceeding would have been different." WCR, Findings and Facts 32 and Conclusions of Law, 13, pp. 240 and 243.

V.

GROUNDS FOR RELIEF

1. The Prosecution Withheld Exculpatory And Material Evidence.

The Prosecution withheld from the defense a 911 call from an eye witness and a log of that call that was made immediately after the witness said she heard a gunshot and wherein she stated that she saw a black male pull a body into an apartment. Petitioner is a black female. The witness

later testified that she saw a black female around the body of deceased. Prior to trial the witness told the prosecutor that she initially choose the photo of another from a photo line-up, then changed her mind and choose the photo of the Defendant. This statement was withheld from the defense. At trial a police officer testified that the witness choose the photograph of the Defendant from the photo line-up and did not change her mind in anyway about her identification. The 911 call, the call log and the statement from the witness are all favorable to the Defendant, and are material, and yet were withheld from the defense. The failure of the state to give this evidence to the defense violated Defendant's rights to due process of law as guaranteed by the Fifth and Fourteenth Amendments, United States Constitution. Therefore Petitioner's conviction should be vacated and she should be granted a new trial.

2. The State Presented False and Misleading Testimony to The Jury.

The process of presenting the photo line-up and the photo line-up itself were suggestive. The Prosecution elicited testimony that the photo line-up was not suggestive and elicited testimony from a police officer that the witness had not changed her mind in identifying the Defendant. The foregoing was false and misleading testimony that was presented to the jury in violation of the Defendant's right to due process of law as guaranteed by Fifth and Fourteenth Amendments to the United States Constitution. Therefore, Petitioner's conviction should be vacated and she should be granted a new trial.

3. The Petitioner is Innocent Under *Schlup v. Delo*, 513 U.S. 298 (1995).

If the State had not suppressed the exculpatory evidence, used suggestive line-up procedures and used false testimony in violation of the Due Process Clauses of the Fifth and Fourteenth Amendments, no juror acting reasonablely would have voted to find her guilty beyond a reasonable doubt. Any procedural bars to considering the Petitioner's constitutional claims are overcome by

the prosecution's suppression of exculpatory evidence and use of false testimony. Therefore, Petitioner's conviction should be vacated and she should be granted a new trial.

VI.

BRIEF IN SUPPORT

1. The Prosecution's Withholding of Exculpatory and Material Evidence Entitles Petitioner to a New Trial.

In its landmark case of *Brady vs. Maryland*, 373 U.S. 83 (1963), the Supreme Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87. Some years later in *United States vs. Agurs,* 427 U.S. 97 (1976), the Court held that the failure of the defendant to request favorable evidence did not leave the government free of its obligation to provide such evidence. In that case, the Supreme Court identified three situations in which a *Brady* claim might arise. The first was where previously undisclosed evidence revealed that the prosecution introduced trial testimony that it knew or should have known was perjured. *Id.* at 103-04. The second situation was where the Government failed to comply with a defense request for disclosure of some specific kind of exculpatory evidence, and third, where the Government failed to volunteer exculpatory evidence that was not requested by the defense or only requested in a general way. *Id.* at 104-07. In a continuing evolution of *Brady* law, in *United States vs. Bagley*, 473 U.S. 667 (1985), the Supreme Court "disavowed any difference between exculpatory and impeachment evidence for *Brady* purposes, and it abandoned the distinction between the second and third *Agurs* circumstances, *i.e.* the 'specific-request' and 'general-or no request' situations. *Bagley* held that regardless of request, favorable evidence is material, and constitutional error results from its suppression by the government, 'if there is a

reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Kyles v. Whitley*, 514 U.S. 419, 433 (1995), quoting *United States vs. Bagley*, 473 U.S. at 682.

In *Kyles vs. Whitley*, *supra,* the Court elaborated on what it meant by materiality, and what it did not mean, by explaining four aspects of materiality discussed in *United States vs. Bagley.* First, the Supreme Court explained that "a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal (whether based on the presence of reasonable doubt or acceptance of the an explanation for the crime that does not inculpate the defendant). . . . . The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A 'reasonable probability' of a different result is accordingly shown when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.' *Bagley,* 473 U.S. at 678, ..." *Kyles v. Whitley, supra* at 434; *United States v. Brown*, 650 F.3d 581, 588 (5th Cir. 2011). A reasonable probability is less than "more likely than not." *Id.*

"The second aspect of *Bagley* materiality bearing emphasis here is that it is not a sufficiency of evidence of test. A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict. The possibility of an acquittal on a criminal charge does not imply an insufficient evidentiary basis to convict. One does not show a *Brady* violation by demonstrating that some of the inculpatory evidence should have been excluded, but by showing that the favorable evidence could reasonably be taken to put the case in a such a different light as to undermine confidence in the verdict." *Id.* at 434-35.

Thirdly, the Supreme Court stated that "once a reviewing court applying *Bagley* has found constitutional error there is no need for further harmless - error review." *Id.* at 435. The court explained that even if a harmless - error inquiry were to apply, a *Bagley* error could not be treated as harmless, since 'a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different,' . . . . . necessarily entails the conclusion that the suppression must have had substantial and injurious effect or influence in determining the jury's verdict". *Id.* at 535 (internal quotation marks omitted). "In sum, once there has been *Bagley* error as claimed in this case, it cannot subsequently be found harmless . . . ." *Id.* at 436; *United States v. Brown,* 650 F.3d at 588-89.

The fourth aspect of *Bagley* that the Supreme Court stressed is that in determining whether suppressed evidence is material, the suppressed evidence is to be considered collectively not item by item. *Kyles v. Whitley*, *supra* at 436; *United States vs. Brown,* 650 F.3d at 588. "On habeas review, we followed the established rule that the state's obligation under *Brady vs. Maryland*, 373 U.S. 83, S.Ct. 1194, 10 L.Ed.2d 215 (1963), to disclose evidence favorable to the defense, turns on the cumulative effect of all such evidence suppressed by the government, and we hold that the prosecutor remains responsible for gaging that effect regardless of any failure by the police to bring favorable evidence to the prosecutor's attention." *Kyles vs. Whitley*, *supra* at 421.

The Supreme Court noted that the Fifth Circuit analysis in *Kyles vs. Whitley* was on a series of independent materiality evaluations, rather than the cumulative evaluation required by the *United States vs. Bagley*. The Supreme Court then went on to engage in a detailed analysis of the withheld evidence and how the inclusion of that evidence in the trial may have changed the nature of the trial itself. The Court stated that the disclosure of prior statements of two alleged eyewitness would have resulted in a markedly weaker case for the prosecution an a markedly stronger one for the defense

because the value of the two witnesses would have been substantially reduced or destroyed by raising a substantial implication that the prosecutor had coached the witness to make a false statement. *Kyles vs. Whitley, supra* at 441-43. The Court noted that the exculpatory evidence that was not disclosed would not have simply impeached the witnesses, but would have raised opportunities to attack not only the probative value of crucial physical evidence and the circumstances in which it was found, but also the thoroughness and even the good faith of the investigation. *Kyles vs. Whitley, supra* at 445. The Supreme Court reviewed all of the various issues raised by the evidence that was withheld and concluded they could not be confident that the jury's verdict would have been the same if the withheld evidence had been heard by the jury. *Kyles vs. Whitley, supra* at 453.

Despite the Supreme Court's elaboration on the meaning of materiality, federal courts still seem to have had problems applying the concept. The Supreme Court attempted to clarify the meaning of materiality in *Smith vs. Cain*, 132 S.Ct. 627 (2012). In this case the Supreme Court granted certiorari to review the decision of the Louisiana Supreme Court. The issue was whether the only eye witnesses' prior inconsistent statements were material to the determination of Smith's guilt. The court reiterated that evidence is material within the meaning of *Brady* "when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Smith vs. Cain, supra* at 630, quoting *Cone vs. Bell,* 556 U.S. 449, 469-470 (2009). "A reasonable probability does not mean that the defendant 'would more likely than not have received a different verdict with the evidence,' only that the likelihood of a different result is great enough to 'undermine [ ] confidence in the outcome of the trial.'" *Smith vs. Cain, supra* at 630, quoting *Kyles vs. Whitley,* 514 U.S. 419, 434 (1995).

The issue in *Smith vs. Cain,* was how to weigh, or how a jury might weigh, the undisclosed statements of the eyewitness that directly contradicted his trial testimony. The majority opinion recited several reasons advanced by the state and the dissent why the jury might have discounted the witnesses undisclosed statements. The majority acknowledged that the jury may have discounted the inconsistent statements, but the majority had "no confidence that it *would* have done so ." *Smith vs. Cain, supra* at 630. The point made by the Supreme Court is that in determining materiality, the question is not whether the state can come up with a plausible reason why the excluded evidence may have been discounted by the jury, but whether, when considering the cumulative effect of all of such evidence that was suppressed by the government, whether one's confidence in the original verdict is undermined. This is a lessor standard than whether it is more likely or not that the Petitioner would have been acquitted. "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles vs. Whitley,* 514 U.S. at 434. "A reasonable probability does not mean that the defendant 'would more likely than not have received a different verdict with the evidence,' only that the likelihood of a different result is great enough to 'undermine [ ] confidence in the outcome of the trial.'" *Smith vs. Cain,* 132 S.Ct. 627, 630 (2012), quoting *Kyles vs. Whitley*, 514 U.S. at 434 (1995).

The Fifth Circuit determined that Petitioner is asserting a second or successive claim pursuant to 28 U.S.C. §2244(b)(2)(B). Under that statute the Petitioner has to show that the factual predicate for her claim could not have been discovered previously through the exercise of due diligence and that "the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense." 28 U.S.C.

§2244(b)(2)(B)(ii). This is a higher standard than the Supreme Court has adopted relating to the withholding of exculpatory evidence, beginning with *Brady vs. Maryland* and continuing through *Smith vs. Cain.* However, based on the unique nature of Petitioner's *Brady* claim, Petitioner urges that this Court should apply the standard set forth in *Kyles vs. Whitley* and *Smith vs. Cain.*

In *United States vs. Lopez*, 577 F.3d 1053 (9th Cir. 2009), the Ninth Circuit noted that when habeas petitioners seek a second in-time writ based on a claim of newly discovered exculpatory evidence pursuant to *Brady vs. Maryland* and its progeny, petitioners will not be at fault for not raising the claim in their initial habeas petition. *United States vs. Lopes, supra* at 1064. This is due to the fundamental nature of a *Brady* claim, which is based on the concealing, whether intentional or not, of exculpatory evidence from the defense. A petitioner cannot reasonably be expected to raise a *Brady* claim in a first habeas petition if the concealed evidence is not discovered by the petitioner until after the first petition is adjudicated. The Ninth Circuit found that a rule which would cause *Brady* claims to be considered second or successive would foreclose federal review of some meritorious claims and reward prosecutors for failing to meet their obligations. Thus, if the exculpatory evidence remained hidden long enough, the petitioner would lose his remedy, or his legal burden would be greater, and the prosecutors unlawful conduct would go unrecognized and unpunished. This would be a perverse result and a departure from the rationale behind AEDPA, *Id.* at 1064-65, also citing *Strickler vs. Greene,* 527 U.S. 263 (1999), and contrary to the Supreme Court's holdings about how *Brady* claims must be treated. See *Smith vs. Cain, supra.* It would also be contrary to be "equitable principles [that] have traditionally governed the substantive law of habeas corpus." *Holland v. Florida*, 560 U.S. 631 (2010); *McQuiggan v. Perkins,* 133 S.Ct. 1924, 1934 (2013).

The "clear and convincing evidence" standard set forth in 28 U.S. §2244(b)(2)(B)(ii) is a higher standard than that set forth in the Supreme Court's *Brady* jurisprudence. Under the statutory standard, a person who files and has decided a §2254 writ application before discovering that the prosecution had concealed exculpatory evidence is required to bear this greater burden in order to acquire relief from a wrongful conviction. Said another way, a person who is the victim of a *Brady* violation, but who discovers the exculpatory evidence soon enough to include his *Brady* claim in a motion for new trial, on direct appeal, or in a first writ application, has a lesser burden to bear than does a person who spent ten years in prison and filed an unrelated first writ application, before the exculpatory evidence is discovered. The standard for obtaining relief for a *Brady* violation should be the same no matter when the exculpatory evidence is discovered.

In Petitioner's case she is in no way at fault for the concealment of the exculpatory evidence by the prosecution. She is fortunate that a new district attorney was elected who changed the policy and culture of that office to allow access to its files and to seek out exculpatory evidence from the police. Without those events Ms. Blackman would have no opportunity at all to receive a new trial. Whether her fortune is good or not, about when the exculpatory evidence was discovered, should have no bearing on the legal standard she has to meet in order to receive a new trial. Accordingly, in deciding Petitioner's writ application this Court should employ the legal standard set forth in *Kyles vs. Whitley* and *Smith vs. Cain* in determining materiality and thus, whether the Petitioner is entitled to a new trial due to the State's violation of its duty to reveal exculpatory evidence to her. The Court can do so in three ways: (1) apply the rule established in *Kyles vs. Whitley* and *Smith vs. Cain* because the State continued to withhold the exculpatory evidence for years after Petitioner's trial and for two years after Petitioner's counsel began seeking such evidence, as the Ninth Circuit has done; (2) recognize a constitutional, equitable, federal common law right under the Due Process Clause of the

Fifth and Fourteenth Amendments for *Brady's* violations, outside of §2254 and §2244; or (3) find unconstitutional that portion of 28 U.S.C. §2244(b)(2)(B)(ii) that requires employment of the clear and convincing evidence standard for *Brady* violations discovered after an applicant's first federal writ.

Alternatively, when considering the exculpatory evidence that was withheld in conjunction with the evidence admitted at trial, Petitioner has established by clear and convincing evidence that, but for the constitutional error, no reasonable fact finder would have found the Petitioner guilty of the underlying offense beyond a reasonable doubt. 18 U.S.C. 2244 (b)(2)(B)(ii).

2. The State's Use of False Testimony.

In *Mooney v. Holohan*, 294 U.S. 103 (1935), the Supreme Court first established the general proposition that a prosecutor's knowing and intentional use of perjured testimony in obtaining a conviction violates the defendant's due process rights and denies him a fair trial. This principle was expanded in *Alcorta v. Texas*, 355 U.S. 28 (1957), to forbid the prosecutor's passive use of perjured testimony. The Court held that the prosecutor's knowing failure to correct inculpatory, perjured testimony also violates due process. In *Napue v. Illinois*, 360 U.S. 264, 269 (1959), the Supreme Court expanded the *Mooney* principle and held that the prosecutor's knowing failure to correct perjured testimony, even if it relates only to the credibility of a witness, constitutes a violation of due process. In *Giglio v. United States,* 405 U.S. 150, 154 (1972), the Supreme Court recognized that in certain circumstances knowledge of perjured testimony may be imputed to a prosecutor who lacks actual knowledge of falsity. Testimony has been "used" by the State when it has been presented to the jury from a State's witness. *Alcorta v. Texas*, 355 U.S. at 30-31(1957). The prosecutor's failure to correct false testimony violates a defendant's due process rights. *Alcorta v. Texas, supra at 31; Napue v. Illinois*, 360 U.S. at 269; *United States v. Anderson*, 574 F.2d 1347 (5th Cir. 1978); *United*

States v. Barham, 595 F.2d 231 (5th Cir. 1979). While cases in the past have referred to false testimony as being "perjured testimony" or involving perjury, "it is sufficient if the testimony is false and misleading to the trier of fact." See *Napue v. Illinois*, 360 U.S. 369; *Alcorta v. Texas*, 355 U.S. at 32. There is no need for a defendant to show that a witness knew the testimony was false or otherwise harbored a sufficient culpable mental state to render the witness subject to prosecution for perjury. A defendant claiming use of false testimony does not depend on a showing that the witness' specific factual assertions are technically incorrect or false. It is sufficient that the witness' testimony gives the trier of fact a false impression. *Alcorta v. Texas, supra; Napue v Illinois, supra.*

The prosecutor's notes clearly show that Ms. Adams told the prosecutor, well prior to trial, that when Ms. Adams viewed the photo line-up, that she first choose the photograph of a person other than the Petitioner, then changed her mind and chose the photograph of the Petitioner. Contrary to this testimony, the police officer testified that Ms. Adams chose the Petitioner's photograph and did not "change her mind in any way". WRR, Vol. 6, p. 63. At best, the police officer left a false impression that the prosecutor did not correct. At worse, the police officer lied and the prosecutor knowingly failed to correct the lie. Either way, the evidence shows that the prosecution used false testimony to convict Petitioner. It is clear that the prosecutor knew that Officer Harrison's testimony was false because the prosecutor had specifically made the note that Ms. Adams said she initially picked out a photograph of someone other than the Petitioner and then changed her mind. WRC, Finding of Fact 15, p. 237. That the prosecutor made such a clear note of Ms. Adams' statement reflects knowledge on the part of the prosecutor of the falsity of the police officer's statement that Ms. Adams did not "change her mind in any way." In addition, the prosecutor knew about the 911 call where Ms. Adams said that she saw a black male around the body on the porch. WRR, Findings of Fact 17, p. 238. As Ms. Adams later picked a black female out of the photo line-up, it is clear that

she changed her mind about that. This is also contrary to the police officer's testimony. At trial, the only testimony placing Petitioner at the apartment at the time of the shooting was from Detective Harrison. The identification of the Petitioner as the person "around the body" did not come from Ms. Adams, but came from the officer who had provided demonstratively false testimony to the jury. Based on the credibility issues with Ms. Harrison's testimony one could not really even be sure that Ms. Adams chose the photograph of the Petitioner on her own, and was not the result of some suggestion by the police officer. In fact, Ms. Adams testified that Detective Harrison suggested that the person who was guilty of the crime was in the line-up. Even at trial, Ms. Adams did not say she chose the photograph of the Petitioner. All she said was she picked out a photograph from the photographic line-up.

There was not simply a conflict between what Ms. Adams said to the prosecutor prior to trial and Detective Harrison's testimony at trial. There was no dispute about what was said on the 911 recording. The Prosecutor admitted that she made a note about Ms. Adams picking out one photo and then another. The habeas judge heard the testimony and observed the demeanor of Ms. Adams and Ms. Kemp at the hearing. Although Ms. Kemp denied that she failed to turn over the 911 call and the statement of Ms. Adams to defense counsel, the judge found that Ms. Kemp failed to give both to defense counsel. WRC, Findings of Fact 25, 26, 28, 29 and 31, pp. 239-41. Petitioner has proved that Detective Harrison's testimony was false and that the prosecution either failed to correct the false testimony, or intended to aid and abet the rendition of that false testimony.

Without the false testimony of Detective Harrison the jury would have been left with equivocal identification testimony. If the prosecution had turned over the exculpatory evidence to the defense, the jury would have been left with testimony that Ms. Adams initially identified a black man as being over the body and, we hope, testimony from Detective Harrison that Ms. Adams had

exhibited indecision about her choice of the photo in the line-up. Certainly the false testimony of Detective Harrison contributed to the conviction of the Petitioner.

3. Petitioner Meets the Standard of *Schlup vs. V. Delo.*

In *Schlup vs. Delo,* 513, U.S. 298 (1995), the Supreme Court decided what would be the standard of proof where a habeas petitioner couples a claim of innocense with a showing of violation of his constitutional rights in the criminal proceeding that resulted in his conviction and sentence. The Court had to decide whether to adopt the standard set forth in *Sawyer vs. Whitley*, 505 U.S. 333 (1992), or the standard set forth in *Murray vs. Carrier*, 477 U.S. 478 (1986). The Supreme Court explained that "Schlup's claim of innocense, ..., is procedural, rather than substantive. His constitutional claims are based not on his innocence, but rather on his contention that the ineffectiveness of his counsel . . . . . ., and the withholding of evidence by the prosecution, ..., denied him the full panoply of protections afforded to criminal defendants by the Constitution." *Schlup vs. Delo,* 513 U.S. at 314. There was a procedural obstacle to *Schlup* being able to present his constitutional claims because he had been unable to establish "cause and prejudice" sufficient to excuse his failure to present his evidence in support of his first federal petition. The Supreme Court found that *Schlup* could obtain review of his constitutional claims only if he fell within the narrow class of cases that implicated a fundamental miscarriage of justice. "Schlup's claim of innocence is offered only to bring him within this'narrow of cases'." *Schlup vs. Delo*, 513 U.S. at 315.

The Supreme Court found that Schlup's claim differed in two important respects from a *Herrera vs. Collins*, 506 U.S. 390 (1993), claim of actual innocence. "First, *Schlup's* claim of innocence does not by itself provide a basis for relief. Instead, his claim for relief depends critically on the validity of his *Strickland* and *Brady* claims. Schlup's claim of innocence is thus 'not itself a constitutional claim, but instead a gateway to which a habeas petitioner must pass to have his

otherwise barred constitutional claim considered on the merits'." *Schlup vs. Delo,* 513 U.S. at 315, quoting *Herrera vs. Collins,* 506 U.S. at 404. Secondly, and "[m]ore importantly, a court's assumption about the validity of the proceedings that resulted in conviction are fundamentally different in Schlup's case than in Herrera's. In *Herrera*, Petitioner's claim was evaluated on the assumption that the trial that resulted in his conviction had been error free. . . . . *Schlup*, in contrast, accompanies his claims of innocence with an ascertain of constitutional error at trial. For that reason, Schlup's conviction may not be entitled to the same degree of respect as one, such as *Herrera's,* that is the product of an error - free trial." *Id.* at 316. The Court concluded that Schlup's claim of innocense in conjunction with his claims of constitutional violations need carry less of a burden than an actual innocence claim under *Herrera vs. Collins.* "[I]f the habeas court were merely convinced that those new facts raised sufficient doubt about Schlup's guilt to undermine confidence in the result of the trial without the assurance that the trial was untainted by constitutional error, Schlup's threshold showing of innocence would justify a review of the merits of the constitutional claims. *Id.* at 317.

The Supreme Court held that the *Carrier* "probably resulted" standard must govern the miscarriage of justice inquiry when a petitioner raises a claim of actual innocence to avoid a procedural bar for the consideration of the merits of his Constitutional claims. *Id.* at 326-27. "The *Carrier* standard requires the habeas petitioner to show that 'a constitutional violation has probably resulted in the conviction of one who is actually innocent.' 477 U.S. at 496. To establish the requisite probability, the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in the light of new evidence. The petitioner thus is required to make a stronger showing than that needed to establish prejudice. At the same time, the showing of 'more likely than not' imposes a lower burden of proof than the 'clear and convincing' standard required under

Sawyer." *Id.* at 327. The court explained that the *Carrier* standard requires a petitioner to show that he is "actually innocent" which means "a petitioner must show that it is more than likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *Id.*

The Supreme Court went on to make other observations about this standard. It explained that in assessing the adequacy of the petitioner's showing, a district court is not bound by the rules of admissibility that would govern at trial. Instead, the reviewing tribunal is to consider the probative force of relevant evidence that was either excluded or unavailable at trial. *Id.* at 327-28. "The consideration in federal habeas proceedings of a broader array of evidence does not modify the essential meaning of 'innocence.' The *Carrier* standard reflects the proposition, firmly established in our legal system that the line between innocence and guilt is drawn with reference to a reasonable doubt. . . . . [T]he analysis must incorporate the understanding that proof beyond a reasonable doubt marks the legal boundary between guilt and innocence." *Id.* at 328. The meaning of actual innocence as formulated by *Carrier* and in *Schlup vs. Delo*, is "that no reasonable juror would have found the defendant guilty. It is not the district court's independent judgment as to whether reasonable doubt exists that the standard addresses; rather the standard requires the district court to make a probabilistic determination about what reasonable, properly instructed jurors would do." *Id.* at 329. In making that determination, the court must presume that "a reasonable juror would consider fairly all of the evidence presented. It must also be presumed that such a juror would conscientiously obey the instructions of the trial court requiring proof beyond a reasonable doubt." *Id.* at 239.

The court further explained that the standard adopted in *Schlup vs. Delo* is not the equivalent of the standard of *Jackson vs. Virginia*, 443 U.S. 307 (1979), that governs review of claims of insufficient evidence, where a court accepts the credibility of the existing evidence. Instead, under the standard adopted in *Schlup,* "the newly presented evidence may indeed call into question the

credibility of the witnesses presented at trial. In such a case, the habeas court may have to make some credibility assessments." Also, instead of a court focusing on what a jury "could" had done, "the habeas court must consider what reasonable triers of fact are likely to do. Under this probabilistic inquiry, it makes sense to have a probabilistic standard such as 'more likely than not'. Thus, though under *Jackson* the mere existence of sufficient evidence to convict would be determinative of petitioner's claim, that is not true under *Carrier.*" *Id.* at 330. Therefore, a "petitioner's showing of innocence is not insufficient solely because the trial record contained sufficient evidence to support the jury's verdict." *Id.* at 331. A district court "must assess the probative force of the newly presented evidence in connection with the evidence of guilt adduced at trial." *Id.* at 332. Thus, under the *Schlup vs. Delo* standard, a habeas court must evaluate the newly discovered evidence in conjunction with the trial evidence and consider how the new evidence would likely have changed the presentation of evidence, including what evidence would have been added to the trial and what evidence may not have been presented.

In *McQuiggin vs. Perkins*, 133 S.Ct. 1924 (2013), the petitioner sought to avoid a statute of limitations bar to the filing of his §2254 writ by reliance on a *Schlup vs. Delo* claim of innocence. The Supreme Court had to decide to whether AEDPA's limitations provision could be overridden by a claim of innocence. The Supreme Court held that the equitable miscarriage of justice consideration would override AEDPA's statute of limitations if the petitioner bore of burden of showing innocence under *Schlup vs. Delo*. "The text of §2244(d)(1) contains no clear command countering the courts' equitable authority to invoke the miscarriage of justice exception to overcome expiration of the statute of limitations governing a first federal habeas petition." *McQuiggin vs. Perkins,* 133 S.Ct. 1924, 1934 (2013). However, the Supreme Court did hold that the timing of presentation of an applicant's claim is a factor relevant to evaluating the reliability of a petitioner's proof of innocence. "To invoke the

miscarriage of justice exception to AEDPA's statute of limitations, we repeat, that petitioner 'must show that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence.' *Schlup*, 513 U.S. at 327. . . . unexplained delay in presenting new evidence bears on the determination whether the petitioner has made the requisite showing. . . . . As we stated in *Schlup,* '[a] the court may consider how the timing of the submission and the likely credibility of [a petitioner's] affiants bear on the probable reliability of . . . . . evidence [of actual innocence].'" *McQuiggin vs. Perkins, supra* at 1935. The Supreme Court went on to explain that "[f]ocusing on the merits of a petitioner's actual-innocence claim and taking account of delay in that context, rather than treating timeliness as a threshold inquiry, is tuned to the rationale underlying the miscarriage of justice exception — *i.e.*, ensuring 'that federal constitutional errors do not result in the incarceration of innocent persons.'" *McQuiggin vs. Perkins*, 133 S.Ct. at 1035-36, quoting *Herrera vs. Collins*, 506 U.S. 404.

McQuiggin really has no application to petitioner's case. First, there is not a credibility issue about the newly discovered evidence in this case. The newly discovered evidence is an actual 911 call, the actual call log, and the actual notes of the prosecutor. They are what they are. The issue is not whether they are credible. The issue in this case will be whether the consideration of this evidence in conjunction with the other evidence, will be such that a court cannot have confidence in the outcome of the original trial, or that a reasonable jury would not have found the petitioner guilty beyond a reasonable doubt. The timing of the discovery of the evidence and the presentation of the evidence by Petitioner in her subsequent petition cannot have a bearing on the credibility of her claim. Even if the Petitioner has run afoul the AEDPA statute of limitations, it is only by a few months and only for a part of the factual component of her claims. The timing of filing Petitioner's claim has no effect on the States ability to respond to her contentions. Petitioner's *Brady* claims that are based on

the 911 call and the prosecutor's notes are intertwined with the claims of false testimony by the officers and the suggestive line-up procedures. The Supreme Court has clearly stated that a habeas court should look at the cumulative effect of the withheld evidence in deciding whether that evidence was material, and whether a reasonable juror would have found the Defendant guilty beyond a reasonable doubt when considering such evidence, and how it would have changed the dynamics of the Petitioner's trial. Under the facts of Petitioner's case, the holding in *McQuiggin vs. Perkins* is not relevant other than to reaffirm the holding of *Schlup vs. Delo*, which Petitioner contends provides a separate claim for relief as part of the equitable exception to AEDPA.

WHEREFORE, the Petitioner prays that the Court consider all of the newly discovered evidence, all of the evidence from the writ hearing; and the evidence admitted at Petitioner's trial and find:

1. the prosecution withheld exculpatory and material evidence from the Petitioner;
2. the prosecution used false and misleading testimony in Petitioner's trial;
3. the Petitioner is legally innocent under *Schlup v. Delo*;
4. the Court's confidence in the outcome of Petitioner's trial is undermined;
5. it is more likely than not no reasonable juror would have convicted her in light of the new evidence;
6. Petitioner has established by clear and convincing evidence that, but for the constitutional error no reasonable fact finder would have found Petitioner guilty beyond a reasonable doubt;
7. the conduct of the prosecution violated the Petitioner's Fifth and Fourteenth Amendment rights to due process of law; and

8. Petitioner is entitled to have her conviction vacated and to have a new trial or have the charge against her dismissed.

Respectfully Submitted,

/s/ J. Craig Jett

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing *Second Amended Petition Under 28 U.S.C. §2254 for Writ of Habeas Corpus by a Person in State Custody and Brief in Support Thereof* was served upon the Texas Attorney General's office by electronic filing on October 26th, 2015.

/s/ J. Craig Jett
J. CRAIG JETT

APPENDIX F

Findings, Conclusions, And Recommendations of the United States Magistrate Judge (September 20, 2016).

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

TELISA DE'ANN BLACKMAN,	§	
	§	
Petitioner,	§	
	§	
V.	§	No. 3:13-cv-2073-M-BN
	§	
LORIE DAVIS, Director	§	
Texas Department of Criminal Justice,	§	
Correctional Institutions Division,[1]	§	
	§	
Respondent.	§	

FINDINGS, CONCLUSIONS, AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

An application for writ of habeas corpus pursuant to 28 U.S.C. § 2254 filed by Petitioner Telisa De'ann Blackman, a Texas prisoner, represented by counsel, is again before this Court. The operative habeas application, Blackman's second amended petition, *see* Dkt. No. 54, was filed after the United States Court of Appeals for the Fifth Circuit preliminary authorized Blackman to proceed as to a successive Section 2254 habeas application., *see In re Blackman*, No. 15-10114 (5th Cir. June 18, 2015) (per curiam) [Dkt. No. 37]; 28 U.S.C. § 2244(b)(2)(B), (b)(3)(C).

Blackman asserts that, during her state murder trial in Dallas County, Texas, the prosecutor withheld exculpatory and material evidence, *see Brady v. Maryland*, 373 U.S. 83 (1963), and also used false and misleading testimony, *see Giglio v. United*

[1] Lorie Davis has succeeded William Stephens as Director of the Texas Department of Criminal Justice, Correctional Institutions Division, and, as his successor, she is "automatically substituted as a party." FED. R. CIV. P. 25(d).

States, 405 U.S. 150, 153 (1972), and *Napue v. Illinois*, 360 U.S. 264, 271 (1959), and she further asserts that she is legally innocent under *Schlup v. Delo*, 513 U.S. 298 (1995).

Although this action was reassigned to Chief Judge Barbara M. G. Lynn after the retirement of then-Chief Judge Jorge A. Solis, *see* Dkt. No. 83, it remains referred to the undersigned United States magistrate judge pursuant to 28 U.S.C. § 636(b) and a standing order of reference from Judge Lynn.

As the current action was initiated upon Blackman's filing of a third Section 2254 habeas application, and because, in preliminarily authorizing the filing of this successive action, the Fifth Circuit found merely that Blackman has "made a *prima facie* showing that she can satisfy the requirements of" Section 2244(b)(2)(B), and she thus "has made a 'sufficient showing of possible merit to warrant a fuller exploration by the district court,'" Dkt. No. 37 at 2 (quoting *In re Swearingen*, 556 F.3d 344, 347 (5th Cir. 2009)), this Court now "must conduct a 'thorough' review to determine if the [habeas application] 'conclusively' demonstrates that it does not meet [the Antiterrorism and Effective Death Penalty Act's ("AEDPA")] second or successive motion requirements," *Reyes-Requena v. United States*, 243 F.3d 893, 899 (5th Cir. 2001) (quoting *United States v. Villa-Gonzalez*, 208 F.3d 1160, 1165 (9th Cir. 2000)); *see* 28 U.S.C. § 2244(b)(4) ("A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.").

Because a thorough review reveals that Blackman has not shown that "the facts underlying the [claims presented in this successive habeas application], if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found [her] guilty of the underlying offense," 28 U.S.C. § 2244(b)(2)(B)(ii), the undersigned issues the following findings of fact, conclusions of law, and recommendation that the Court should dismiss Blackman's successive habeas application for lack of jurisdiction but also grant Blackman a certificate of appealability as to her *Brady* claim and her claim under *Giglio/Napue*.

Applicable Background

Blackman was charged by indictment with the June 22, 2007 murder of Lisa Davis, her roommate with whom she also was romantically involved. She pleaded not guilty, proceeded to trial by jury, and was found guilty on September 30, 1998. She was sentenced to life imprisonment.

Blackman timely appealed; the Dallas Court of Appeals affirmed her conviction and sentence, *see Blackman v. State*, No. 05-98-01750-CR, 2000 WL 567985 (Tex. App. – Dallas May 8, 2000); and her petition for discretionary review was refused by the Texas Court of Criminal Appeals (the "CCA"), *see Blackman v. State*, PDR No. 1293-00 (Tex. Crim. App. Nov. 22, 2000).

Below are the facts of this case as heard at Blackman's trial and summarized by the Dallas Court of Appeals:

[Blackman] and the decedent, Lisa Davis, lived together in a lesbian

relationship. One of the decedent's friends testified that the relationship was somewhat stormy and that, shortly before her death, the decedent wanted to end the relationship with [Blackman], although she was apprehensive about doing so.

The couple lived in a second-floor apartment, accessible by an outdoor stairway to a balcony in front of the apartment. [Blackman] testified that, on Sunday evening, June 22, 1997, she left the apartment complex to go to a nearby convenience store, Quick Way. Upon returning, she realized she did not have her apartment key or her pass card to the apartment complex; she would have to ring the buzzer to be let into the complex. She went to the entryway of the apartment complex and, while she was standing on the sidewalk before going upstairs, she saw the decedent's feet lying on the balcony in front of their apartment. The apartment door was open, and the body was lying partially inside the apartment and partially outside. Decedent had been shot. [Blackman] called the decedent's name, and eventually touched the decedent, but the decedent did not respond. [Blackman] pulled the decedent's body inside their apartment. In doing so, she moved the decedent's feet to the side, to get them inside the apartment. She then shut the door and dialed 911. As a result of dragging the decedent's body inside the apartment complex, she got blood on her socks and shoes.

Cathy Harding, a Dallas police detective, searched [Blackman] in the homicide office at police headquarters because the only officers called to the crime scene were male; it was against department policy to have a male officer search a female suspect. Harding found blood on the soles of [Blackman]'s socks. [Blackman] told Harding that she had not taken her shoes off that evening.

When Daniel Krieter, a Dallas police investigator, arrived at the murder scene, [Blackman] asked him if he remembered her from an incident that had occurred about a year earlier. [Blackman] had been shot by a gun, a .25 caliber Lorcin, that she owned. When the police closed their investigation into that incident, [Blackman] reclaimed the gun from the department's property room. [Blackman] testified at trial that the gun was stolen some two months after she had reclaimed it in August 1995. She did not report it as stolen, however, because it was not registered. [Blackman] consistently denied that she had a gun on the night of the murder.

No gun was found; however, Krieter's search of the apartment revealed some spent shell casings on the floor and some live shell casings in a

> bureau drawer. The casings were .25 caliber and would fit a Lorcin. [Blackman] and the decedent had moved into the apartment only some thirty days before the decedent's death. [Blackman] explained that she moved in such haste she did not have time to throw out the live shell casings so she simply moved them.
>
> Robert L. Ermatinger, a Dallas police homicide investigator, questioned [Blackman] at the scene. [Blackman] told him she had gone to "the store" when the shooting occurred, although she could not say which store. When pressed, [Blackman] said she realized while enroute to the store she had forgotten her gate key and returned to the complex rather than going on to the store. When Ermatinger asked [Blackman] at the scene if "they were a couple," that is, whether [Blackman] and the decedent had a lesbian relationship, [Blackman] said "they were not."
>
> Finally, Cherissa Adams, a neighbor who lived on the first floor, testified that, on the evening of June 22, 1997, she heard a loud noise that sounded like gunfire. She looked out her window and saw a lifeless body. A young, thin girl was trying to move the body. The body's upper portion was inside an apartment. After Adams called 911, she returned to the window and continued to look out. The person who had moved the body locked the door and went downstairs. When the person looked in Adams's direction, Adams closed the blinds and moved away from the window. Adams had never seen the person before that evening and never saw her again. Adams was not able to identify [Blackman] in court; at 11:35 p.m. on the night of the shooting, however, Adams did identify [Blackman] in a photographic lineup.

2000 WL 567985, at *1-*2.

Blackman filed her first state habeas application on January 16, 2002, *see Ex parte Blackman*, No. 52,123-01, and her writ was denied by the CCA on April 24, 2002. She filed her first federal habeas application in this Court on July 19, 2002. *See Blackman v. Cockrell*, No. 3:02-cv-1559-G, 2003 WL 21782254 (N.D. Tex. Apr. 18, 2003). That application was denied as time-barred. *See id.* at *2-*3. And this Court also denied a second federal habeas application filed by Blackman for the same reason. *See*

Blackman v. Dretke, No. 3:04-cv-1834-P, 2004 WL 2173444 (N.D. Tex. Sept. 8, 2004), *rec. adopted*, 2004 WL 2468819 (N.D. Tex. Nov. 2, 2004).

Blackman filed her second state habeas application on October 10, 2005, *see Ex parte Blackman*, No. 52-123-02, and that writ was denied by the CCA on March 1, 2006. Blackman, represented by counsel, filed a third state habeas application on December 17, 2010. *See Ex parte Blackman*, No. 52,123-03.

The third state application was filed after the Dallas County District Attorney's Office (the "DA") granted Blackman's counsel access to its file on August 27, 2009. *See* Dkt. No. 13-24 at 112, ¶ 25 (state-habeas trial court findings of fact and conclusions of law). Once Blackman's counsel had access to the DA's file, he discovered notes from the prosecutor – never turned over to defense counsel – indicating that Ms. Adams had told the prosecutor, in an interview one month prior to trial, "that Ms. Adams picked someone else out of the line up first and then changed her mind and selected [Blackman]." *Id.* at 110-11, ¶¶ 15, 16.

In addition to the notes, counsel also obtained a cassette recording of the 911 call Ms. Adams made the day of the murder.

> Ms. Adams told the 911 operator that she thought she heard a gunshot in her apartment complex, which causes her to look out of the window of her apartment, located on the ground floor of the complex, towards another apartment in the complex. Ms. Adams told the 911 operator that she saw a man lying down in the doorway and a black man that pushed him inside the apartment and closed the door. She told the operator that she could look out her window and see straight up into the apartment where the events occurred.

Id. at 108, ¶ 1.

As to the discovery of the 911 recording, the state-habeas trial court found the following:

> After Ms. Blackman's [third] writ application was filed, Assistant District Attorney Christine Womble contacted Detective Ermatinger, who was the lead detective on the case against Ms. Blackman. Ms. Womble asked Mr. Ermatinger to retrieve the Dallas Police Department file so Ms. Womble could compare it to the District Attorney's file to see if there was anything that the D.A.'s office did not have. Ms. Womble searched through the Dallas Police Department file and found a cassette tape that had a recording of Ms. Adams' 911 call. The cassette recording was copied and promptly provided to Defendant's counsel, J. Craig Jett, in 2011, prior to the hearing on Ms. Blackman's [third] Application for Writ of Habeas Corpus. The 911 recording was admitted into evidence at the writ hearing ... without objection by the State.

Id. at 112, ¶ 24; *see also id.* at 111, ¶ 18 ("The recording of Ms. Adams talking to the 911 operator was preserved by the Dallas Police Department. Ms. Kemp[, the prosecutor,] was aware of the existence of the 911 recording and was aware that Ms. Adams said on the recording that she saw a black male moving the body. Ms. Kemp did not inform defense counsel, James Belt, about the existence of the 911 call or its content. Mr. Belt was unaware of the existence of the 911 recording and its content at the time of the trial of Ms. Blackman's case and did not learn of the 911 recording and its content until they were provided to him by [Mr. Jett] in 2011." (internal record citations omitted)).

On July 3, 2012, and after the benefit of an evidentiary hearing, the state-habeas trial court found that the prosecutor's notes concerning her meeting with Ms. Adams one month prior to trial and the 911 recording where both favorable evidence, suppressed by the State, and material. *See* Dkt. No. 13-24 at 108-16. That court

recommended that Blackman's conviction be vacated and that her case be remanded for a new trial. *See id.* at 116.

But the CCA disagreed and found that Blackman had failed to show that the suppressed evidence was material:

> Blackman first complains that the State withheld the recording of Adams's 911 call the night of the murder, during which she reported seeing a black man move a lifeless body. Blackman is female. Blackman's second claim regarding Adams's identification of Blackman from the photographic lineup on the night of the murder stems from a note in the prosecution's case file relating to a conversation with Adams about the identification. The note reads, in part, "[p]icked out someone else first, then changed mind [and] selected [Blackman] (Bust photo)." Blackman contends, and trial counsel confirmed at the writ hearing, that if the prosecution had disclosed this evidence, the defense could have used it to impeach Adams's testimony at trial that she saw Blackman drag a body into her apartment and might have followed a different investigative trail. Counsel also stated that, had he known this information, he would not have called Blackman as a witness and the jury would not have heard her testify about dragging the victim into her apartment.
>
> With regard to the investigative value of this withheld evidence, Blackman fails to identify what, if anything, this might have unearthed that would have sufficiently undermined confidence in the outcome at trial. Similarly, she fails to show how impeaching Adams would probably have affected the results of the proceedings, particularly given the fact that – as Blackman concedes in her memorandum in support of her application – at least one officer testified at trial that Blackman admitted to dragging the victim into her apartment. Finally, Blackman makes no showing that the outcome would probably have been different had she chosen not to testify. Relief is denied.

Ex parte Blackman, No. WR–52,123–03, 2012 WL 4834113, at *1-*2 (Tex. Crim. App. Oct. 10, 2012) (per curiam).

In responding initially to this federal petition, Respondent chose to defend against Blackman's claims on the merits. *See* Dkt. No. 19; *see also id.* at 6-7 (merely

asserting, but then failing to develop, "the complicated intricacies of the timebar issue at this time"). While Respondent did not raise the issue of whether Blackman's third federal habeas application should be considered successive within the meaning of AEDPA, the Court was obligated to answer that question to determine whether there is subject-matter jurisdiction. *See Leal Garcia v. Quarterman*, 573 F.3d 214, 219 (5th Cir. 2009) ("AEDPA requires a prisoner to obtain authorization from the federal appellate court in his circuit before he may file a 'second or successive' petition for relief in federal district court. Without such authorization, the otherwise-cognizant district court has no jurisdiction to entertain a successive § 2254 petition." (footnotes omitted)).

On February 18, 2015, Judge Solis accepted the undersigned's findings of fact, conclusions of law, and recommendation that this petition is truly successive – because the claims asserted are "based on facts that were merely undiscoverable," *Stewart v. United States*, 646 F.3d 856, 863 (11th Cir. 2011); *see also Leal Garcia*, 573 F.3d at 221 (numerically subsequent petitions attacking the same conviction but "based on newly discovered *evidence*" are nevertheless successive because "Section 2244(b)(2)(B)(i) states that claims based on a *factual* predicate not previously discoverable are successive" (emphasis in original)) – and that the petition therefore should be transferred to the Fifth Circuit for appropriate action, *see Blackman v. Stephens*, No. 3:13-cv-2073-P-BN, 2015 WL 694953 (N.D. Tex. Feb. 18, 2015) ("*Blackman I*").

On June 18, 2015, a panel of the Fifth Circuit preliminary authorized Blackman to proceed, first rejecting her argument "that her *Brady* claim should not be subject to

[the] requirements" of 28 U.S.C. § 2244(b) but then finding alternatively that she made *prima facie* showings "that her *Brady* and *Giglio* claims satisfy the § 2244(b)(2)(B) standard." Dkt. No. 37 at 2.

On February 26, 2016, the Court denied Respondent's motion that the Court dismiss this action as time-barred. *See Blackman v. Stephens*, No. 3:13-cv-2073-P-BN, 2016 WL 777695 (N.D. Tex. Jan. 19, 2016), *rec. adopted*, 2016 WL 759564 (N.D. Tex. Feb. 26, 2016) ("*Blackman II*").

And, on May 4, 2016, the Court conducted oral argument as to the claims in the operative, successive habeas application.

Legal Standards and Analysis

I. This Court's "second-gatekeeper" function as to jurisdiction and the dual requirements of 28 U.S.C. § 2244(b)(2)(B)

"The filing of a second or successive § 2254 application is tightly constrained by the provisions of AEDPA," *Case v. Hatch*, 731 F.3d 1015, 1026 (10th Cir. 2013), "[o]ne purpose of [which] is to enforce the preference for the state's interest in finality of judgment over a prisoner's interest in additional reviews," *Johnson v. Dretke*, 442 F.3d 901, 909 (5th Cir. 2006) (citing *Calderon v. Thompson*, 523 U.S. 538, 557 (1998)). To further this purpose, "AEDPA sets out a bifurcated procedure before conferring jurisdiction over an inmate's successive claim." *Swearingen v. Thaler*, Civ. A. No. H-09-300, 2009 WL 4433221, at *10 (S.D. Tex. Nov. 18, 2009), *dismissal of successive habeas pet. aff'd*, 421 F. App'x 413 (5th Cir. 2011) (per curiam).

While the Fifth Circuit has preliminarily authorized Blackman to file an

application presenting claims that are successive – because she has shown "that it is 'reasonably likely' that [the] successive petition meets section 2244(b)'s 'stringent requirements,'" *id.* (quoting *In re Morris*, 328 F.3d 739, 740 (5th Cir. 2003)) – that decision "is 'tentative' in that a district court must dismiss the habeas action that the circuit has authorized if the petitioner has not satisfied the statutory requirements," *id.* (quoting *Reyes-Requena*, 243 F.3d at 899 (in turn quoting *Bennett v. United States*, 119 F.3d 468, 469 (7th Cir. 1997)); internal quotation marks omitted); *see In re Swearingen*, 556 F.3d at 349 ("We reiterate that this grant is tentative in that the district court must dismiss the motion that we have allowed the applicant to file, without reaching the merits, if the court finds that the movant has not satisfied the § 2244(b)(2) requirements for the filing of such a motion." (citations omitted)); *see also Jordan v. Sec'y, Dep't of Corrs.*, 485 F.3d 1351, 1358 (11th Cir. 2007) (stating that it makes "no sense for the district court to treat [a court of appeals's] *prima facie* decision as something more than it is or to mine [the circuit court's] order for factual ore to be assayed" and directing that "[t]he district court is to decide the § 2244(b)(1) & (2) issues fresh, or in the legal vernacular, *de novo*" (citations omitted)).

Here, the applicable statutory requirements mandate that "[a] claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless

> (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (ii) the facts underling the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and

> convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2244(b)(2).

As implied above, these "gate-keeping requirements are jurisdictional in nature, and must be considered prior to the merits of a § 2254 petition." *Case*, 731 F.3d at 1027 (citing *Panetti v. Quarterman*, 551 U.S. 930, 942-47 (2007)); *see In re Swearingen*, 556 F.3d at 347 ("[B]efore addressing the merits of the successive petition, the district court must independently determine whether the petition actually satisfies the stringent § 2244(b)(2) requirements."); *Johnson*, 442 F.3d at 910 ("[T]he merits of *Brady* cannot be collapsed with the due diligence requirements of § 2244(b)(2)(B)(i)." (citing *Kutzner v. Cockrell*, 303 F.3d 333, 337 (5th Cir. 2002))); *see also Case*, 731 F.3d at 1027 (observing that Section 2244(b)'s requirement "that a successive habeas corpus application 'shall be dismissed' unless the gate-keeping requirements are met ... clearly speaks to the power of the court to entertain the application, rather than any procedural obligation of the parties" and "also sets forth a 'threshold limitation on [the] statute's scope,' providing further indication that the gate-keeping requirements are jurisdictional rules, not mere claim-processing rules" (quoting *Gonzalez v. Thaler*, 132 S. Ct. 641, 648 (2012))).

Blackman "bears the burden of demonstrating that [her] petition does in fact comply with the statute, and the [Fifth Circuit has directed that the] district court shall dismiss the petition unless that showing is made." *Moore v. Dretke*, 369 F.3d 844, 845 n.1 (5th Cir. 2004).

II. Due diligence under 28 U.S.C. § 2244(b)(2)(B)(i)

As to the first prong of Section 2244(b)(2)(B) – a petitioner's due diligence as to discovery of the factual predicate of his claims – the Fifth Circuit clarified recently that "the time of 'discovery' [is] the time at which the matter was first litigated in the federal habeas proceeding." *In re Masterson*, 638 F. App'x 320, 326 (2016) (per curiam) (citing *Kutzner*, 303 F.3d at 336 ("Kutzner fails to demonstrate that prosecutorial misconduct in this regard prevented him from discovering the factual basis of his successive claims at the time his first habeas petition was *litigated*."); emphasis added in *Masterson*).

Here, in determining that Blackman made a *prima facie* showing as to this prong, the Fifth Circuit relied on the state-habeas trial court's finding "that the newly discovered evidence could not have been obtained earlier through the exercise of due diligence, a finding that was undisturbed by the Texas Court of Criminal Appeals and enjoys deference." Dkt. No. 37 at 2; *see also* Dkt. No. 13-24 at 110-11, ¶¶ 15, 16, 18 (noting that the first evidence supporting Blackman's third state habeas application was not discovered until August 2009).

Similarly, this Court has denied Respondent's motion to dismiss this action as time-barred under 28 U.S.C. § 2244(d)(1)(D), and, in denying that motion, the Court observed that is "clear" "that all of [Blackman's] current habeas claims turn on vital facts discovered by her current habeas counsel no sooner than August 27, 2009, the date on which he first discovered the prosecutor's notes," *Blackman II*, 2016 WL 777695, at *7 – which occurred more than seven years after Blackman filed her first

federal habeas petition (and more than five years after she filed her second).

The two inquiries, one under Section 2244(b) and the other under Section 2244(d), serve different purposes. *Cf. Watts v. Cain*, Civ. A. No. 12-1039, 2013 WL 2422777, at *5 (E.D. La. June 3, 2013) ("The Fifth Circuit has recognized that, when considering motions [for leave to file a successive habeas petition] pursuant to § 2244(b), it does not have a developed record and cannot determine whether the one-year statute of limitations should be statutorily or equitably tolled" and, "[a]s a result, a determination of compliance with § 2244(d) is left to" the district court "as a threshold matter." (citation omitted)).

> [But t]here is an obvious linguistic and interpretative similarity between the application of due diligence to the one-year statute of limitations issue under § 2244(d)(1)(D) ... and the due diligence requirement with regard to newly discovered evidence that would allow a second or successive habeas petition under § 2244(b)(2)(B)(i).

Pabon v. United States, 990 F. Supp. 2d 254, 259 (E.D.N.Y. 2013); *see also Melson v. Allen*, 548 F.3d 993, 999 (11th Cir. 2008) ("Although we have not defined due diligence with respect to a § 2244(d)(1)(D) claim, we have addressed it in the analogous context of a second federal habeas petition which is based on newly discovered facts." (citation omitted)), *vacated on other grounds*, 561 U.S. 1001 (2010); *Gimenez v. Ochoa*, Civ. No. 12-1137 LAB (BLM), 2013 WL 8178829, at *20 (S.D. Cal. Nov. 22, 2013), *rec. adopted*, 2014 WL 1302463 (S.D. Cal. Mar. 28, 2014) ("His inability to satisfy [Section 2244(b)(2)(B)(i)] necessarily means he has not satisfied 28 U.S.C. § 2244(d)(1)(D) either."), *aff'd*, 821 F.3d 1136 (9th Cir. 2016).

Therefore, for the reasons that the Court found that Blackman's current claims

are not time-barred, *see Blackman II*, 2016 WL 777695, the undersigned recommends that the Court now find that the same claims are not procedurally-barred, *see In re Young*, 789 F.3d 518, 529 (5th Cir. 2015) ("We find that Young's claims regarding [whether] Kemp and Hutchinson [lied in their testimony] are not time barred by 28 U.S.C. § 2244(d)(1)(D), or procedurally barred by 28 U.S.C. § 2244(b)(2)(B)(i).").

III. Constitutional error under 28 U.S.C. § 2244(b)(2)(B)(ii)

Under Section 2244(b)(2)(B)'s second prong, the Court does not view Blackman's "arguments through the lens of the deferential scheme laid out in 28 U.S.C. § 2254(d)." *Kutzner*, 303 F.3d at 339 (quoting *Barrientes v. Johnson*, 221 F.3d 741, 772 (5th Cir. 2000)). In fact, at this stage – before the Court is satisfied that it possesses jurisdiction over Blackman's successive habeas petition – the Court does not even consider the merits of her claimed constitutional violations. *See In re Swearingen*, 556 F.3d at 347; *see also Case*, 731 F.3d at 1032 (If "we reach the merits, we will apply the deferential standards of § 2254 in determining whether an actual constitutional violation occurred. To require a full showing at this stage would collapse the § 2254 inquiry into § 2244, making § 2244 redundant." (citation omitted)).

Instead, "subparagraph (B)(ii) requires the applicant to identify a constitutional violation and show that he would not have been found guilty 'but for' the violation." *Case*, 731 F.3d at 1032. This standard of review "has been described as 'a strict form of 'innocence,' ... roughly equivalent to the Supreme Court's definition of 'innocence' or 'manifest miscarriage of justice' in *Sawyer v. Whitley*." *Johnson*, 442 F.3d at 911 (quoting 2 RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE &

PROCEDURE § 28.3e, at 1459-60 (5th ed. 2005) (citing *Sawyer v. Whitley*, 505 U.S. 333 (1992))); *accord In re Brown*, 457 F.3d 392, 395 (5th Cir. 2006); *Case*, 731 F.3d at 1031-32.

Blackman "has successfully identified a *Brady* violation," for example, so the Court "must determine whether the newly discovered evidence, based on the record as a whole, would lead every reasonable juror to a conclusion of 'not guilty.'" *Case*, 731 F.3d at 1032; *see also id.* at 1033 (describing the analysis as three-fold: (1) "start with the evidence produced at trial, (2) add 'evidence allegedly kept from the jury due to an alleged constitutional violation,' *Sawyer*, 505 U.S. at 349, and (3) determine whether it is 'clear and convincing,' 'in light of the evidence as a whole,' that 'no reasonable factfinder would have' convicted [Blackman]. 28 U.S.C. § 2244(b)(2)(B)(ii)." (brackets in original omitted)); *In re Martinez*, No. 09-10191, 2009 WL 585616, at *2 (5th Cir. Mar. 9, 2009) (per curiam) ("Martinez cannot meet his burden of demonstrating that no reasonable juror would have convicted him had Monique Walker produced the evidence at trial that she asserts in her affidavit, which is largely cumulative of evidence the jury rejected." (citations omitted)); *Swearingen*, 2009 WL 4433221, at *24 ("Congress has tethered this Court's analysis to how a reasonable juror would view the whole of the evidence as it was at trial and as it is now.").

Because the same newly discovered evidence supports the *Brady* violation and the *Giglio/Napue* violation that Blackman has identified, the undersigned will analyze those identified violations together. *Cf. Ogle v. Johnson*, 696 F. Supp. 2d 1345, 1362-63 (S.D. Ga. 2009) ("A prosecutor's duty not to knowingly present false evidence is related

to, but conceptually distinct from, the prosecutor's duty to reveal exculpatory evidence to the defense." (citing *Brown v. Wainwright*, 785 F.2d 1457, 1464 (11th Cir. 1986))); *Brady*, 373 U.S. at 87 (suppression of material evidence justifies a new trial "irrespective of the good faith or bad faith of the prosecution"). But the undersigned first takes up Blackman's separate claim of innocence under *Schlup v. Delo*, 513 U.S. 298 (1995).

While *Schlup* concerns the treatment of "constitutional claims procedurally defaulted in state court that have never been evaluated by a state or federal court," *Case*, 731 F.3d at 1036 (citing *Schlup*, 513 U.S. at 314-15; *House v. Bell*, 547 U.S. 518 (2006)), Blackman claims that she "is innocent under *Schlup v. Delo*," because, "[i]f the State had not [committed the identified constitutional violations], no juror acting reasonably would have voted to find her guilty beyond a reasonable doubt," and, accordingly, "[a]ny procedural bars to consider [her] constitutional claims are overcome by the prosecution's suppression of exculpatory evidence and use of false testimony." Dkt. No. 54 at 8-9; *see also id.* at 24 ("The Supreme Court has clearly stated that a habeas court should look at the cumulative effect of the withheld evidence in deciding whether that evidence was material, and whether a reasonable juror would have found the Defendant guilty beyond a reasonable doubt when considering such evidence, and how it would have changed the dynamics of the Petitioner's trial. Under the facts of Petitioner's case, ... *Schlup vs. Delo* ... provides a separate claim for relief as part of the equitable exception to AEDPA.").

As Blackman acknowledges, *see* Dkt. No. 54 at 19-20, a claim under *Schlup* is

not the same as an actual innocence claim under *Herrera v. Collins*, 506 U.S. 390 (1993). That said, an actual innocence claim, standing alone, likely does not survive "the plain language" of Section 2244(b)(2)(B)(ii). *In re Everett*, 797 F.3d 1282, 1290 (11th Cir. 2015) (per curiam) ("Under the plain language of the statute, § 2244(b)(2)(B)(ii) requires both clear and convincing evidence of actual innocence *and a constitutional violation*, which we have referred to as the 'actual innocence plus' standard. *In re Davis*, 565 F.3d 810, 823 (11th Cir. 2009). Unlike a 'typical constitutional claim,' such as one arising under *Brady v. Maryland*, 373 U.S. 83,(1963), *Giglio v. United States*, 405 U.S. 150 (1972), or *Strickland v. Washington*, 466 U.S. 668 (1984), 'the statutory language does not readily accommodate' a freestanding claim of actual innocence. *Davis*, 565 F.3d at 823. Therefore, Everett's first claim fails to meet the statutory criteria. *See* 28 U.S.C. § 2244(b)(2)(B)(ii)." (emphasis in original)); *accord Gimenez v. Ochoa*, 821 F.3d 1136, 1143 (9th Cir. 2016); *Case*, 731 F.3d at 1038-39.

Schlup, too, likely has little to do with claims presented in a successive habeas application. As the United States Court of Appeals for the Tenth Circuit explained in *Case*:

> [T]he Supreme Court recognizes a difference between *Schlup/House* claims and claims under subparagraph (B)(ii). As it said in *House*, rejecting an argument that AEDPA superseded the *Schlup* standard, § 2244(b)(2)(B)(ii) does not "address[ ] the type of petition at issue here – a first federal habeas petition seeking consideration of defaulted claims based on a showing of actual innocence. Thus, the standard of review in these provisions is inapplicable." 547 U.S. at 539. In short, *Schlup* and *House* provide little guidance here since they dealt with procedurally defaulted habeas claims, which are evaluated under a different standard than successive habeas petitions. See 513 U.S. at 306.

731 F.3d at 1037 (footnote omitted).

But, as alleged here, Blackman's claim under *Schlup* merges into the Section 2244(b)(2)(B)(ii) analysis as to jurisdiction. For example, she claims that she is innocent under *Schlup* because of the *Brady* and *Giglio/Napue* violations that she has identified, and she further claims that no reasonable juror "would have voted to find her guilty" but for the constitutional violations that she has identified. Dkt. No. 54 at 8-9, 24. *Compare id., with Case*, 731 F.3d at 1032 ("In sum, subparagraph (B)(ii) requires the applicant to identify a constitutional violation and show that [she] would not have been found guilty "but for" the violation. Here, [Blackman] has successfully identified a *Brady* violation[and a *Giglio/Napue* violation], so [the Court] must determine whether the newly discovered evidence, based on the record as a whole, would lead every reasonable juror to a conclusion of 'not guilty.'").

Therefore, for the purpose of determining whether the Court has jurisdiction over the claims in this successive petition, because Blackman identifies no newly discovered evidence tethered solely to her *Schlup* claim – that is, the newly discovered evidence identified also supports her "typical constitutional claims" (under *Brady* and *Napue/Giglio*) – the Court need not decide now whether Blackman's *Schlup* claim is viable on its own.

But, before turning to the newly discovered evidence in the form of the prosecutor's notes and the 911 recording – which could have been used to impeach the testimony of Ms. Adams, the only eyewitness, and counter a Dallas police detective's account of Ms. Adams's identification of Blackman – it is important to reiterate that,

for present purposes, it is not necessary to analyze, for example, the materiality of this evidence, *see, e.g.*, *Rocha v. Thaler*, 619 F.3d 387, 393, 397 (5th Cir. 2010), or whether, in light of this evidence, the government knowingly used, or failed to correct, false testimony, *see, e.g.*, *United States v. Mason*, 293 F.3d 826, 828 (5th Cir. 2002). Instead, the Court's "task is to look to the evidence the jury heard at trial, augmented by evidence from [the prosecutor's notes and the 911 recording], and then to make 'a probabilistic determination about what reasonable, properly instructed jurors would do.'" *Case*, 731 F.3d at 1039 (quoting *House*, 547 U.S. at 538 (quoting in turn *Schlup*, 513 U.S. at 329)). "The court's function is not to make an independent factual determination about what likely occurred, but rather to assess the likely impact of the evidence on reasonable jurors." *House*, 547 U.S. at 538.

To begin, then, there is no dispute that Ms. Adams was the only eyewitness. More accurately, she was the only witness to place Blackman at the apartment at the time of the shooting – seconds after Ms. Adams heard what she later identified as a gunshot. *See* Dkt. No. 13-7 at 40 ("I heard a loud noise and I went to my back window and looked out. And I saw a lifeless body on the floor and I saw a young, thin girl trying to move around the body."); *see also id.* at 55-56.

Ms. Adams testified that she went "back and forth to the window" "about three times." *Id.* at 43. She testified that she saw Blackman on the balcony with the body the first time but that, by the last time she looked out, the body was no longer on the balcony. *See id.* Instead, Adams testified that, by then, Blackman "was locking the door and walking down the stairs." *Id.* at 43-44; *see also id.* at 60-61 (Ms. Adams confirming

that she saw Blackman twice – first, on the balcony moving the body, and a second time, leaving the apartment). Ms. Adams further testified that, "after [Blackman] locked the door," "[s]he looked in Adams's direction." *Id.* at 44; *see also id.* at 56. According to Ms. Adams, "[a]pproximately fives minutes" elapsed between the time that she first saw Blackman on the balcony until she then saw Blackman leaving the apartment. *See id.* at 66.

At Blackman's trial, Dallas Police Detective Lynette Harrison testified concerning the manner in which Ms. Adams identified Blackman from a photographic line-up on June 22, 1997. *See* Dkt. No. 13-7 at 68-77. Detective Harrison testified that Ms. Adams recognized Blackman as the person who committed the crime, and, according to Detective Harrison, Ms. Adams looked "through the photographs and picked out the photo of the defendant and said, 'This is the girl that I saw.'" *Id.* at 69. From the witness stand at trial, Detective Harrison identified Blackman as the person whose picture Ms. Adams identified. *See id.* at 69-70. As to Ms. Adams's ability to identify Blackman – whose photo was placed in the middle of the line-up – the prosecution elicited the following testimony from Detective Harrison:

> Q. Did Ms. Adams carefully review each photograph to the best of your recollection?
>
> A. Yes, she did.
>
> ....
>
> Q. Was Ms. Adams able to identify the defendant when she initially came to her photograph?
>
> A. Yes, she did. She stopped at the photograph and said, "This looks like the girl."
>
> Q. Did you give her any further instructions?
>
> A. I told her to look through the rest of the photographs and make sure.

Q. Did she do that?
A. Yes, she did.
Q. Did she change her mind in any way?
A. No, she did not.

Id. at 71-72

As to this testimony, the newly discovered evidence reflects, first, that Ms. Adams told the 911 operator that she saw a man lying down in the doorway and that a black man pushed him inside the apartment and closed the door and, second, that, when the prosecutor interviewed Ms. Adams one month prior to trial, Ms. Adams informed the prosecutor – as reflected in the prosecutor's notes – that she picked someone else out of the line-up first and then changed her mind and selected Blackman.

The certainty with which Ms. Adams identified Blackman, a certainty that was not impeached at trial, was an important aspect of the State's case. But Ms. Adams also testified that she witnessed someone – she testified that it was Blackman – drag the decedent into the apartment.

Blackman herself testified that she moved the decedent into the apartment upon discovering her in the doorway after returning from the store. *See* Dkt. No. 13-8 at 47-49. And, while Blackman states that she would not have testified at her trial had her counsel been provided the newly discovered evidence, *see, e.g.*, Dkt. No. 67-1 at 11-12, two Dallas police officers testified that Blackman told them that she moved the body into the apartment.

Officer Isidoro Negrete testified, on direct examination, that upon encountering

Blackman, she only kept repeating "I didn't do anything" and did not tell him that she moved the victim. *See* Dkt. No. 13-7 at 82-83 ("Did she say anything else? No, ma'am. She just repeated those words over and over."). But Officer Luis E. Canales testified, also on direct examination, that, other than repeating that she did not do it, Blackman also "told us that she went to the store and when she came back she walked up the stairs. She saw the deceased laying in the doorway and that she pulled her in and closed the door and locked it in fear that whoever had done it would return," *id.* at 90. Similarly, when called as a rebuttal witness, Detective Robert A. Ermatinger testified that he spoke with Blackman in private at the scene, in a patrol car, and stated:

> I asked her what happened that night. She said that she had left to go to the store. When she returned she found Ms. Davis laying on top of the balcony near the doorway and she had been bleeding. She said she tried to pull her back in the apartment, which she did.

Dkt. No. 13-8 at 80. According to Detective Ermatinger, Blackman further told him "that when she was trying to pull the deceased in the apartment she was waving her arms, trying to get somebody to help her and call the police." *Id.* at 81.

Even had Blackman not testified and her counsel impeached Ms. Adams's identification testimony, and even if the jury had heard that Ms. Adams first believed that she saw a black male move the decedent into the apartment and that Ms. Adams did not identify Blackman initially from the photographic array, two police officers testified that Blackman told them that she had moved decedent into the apartment upon discovering her. Blackman does not advance (and there is no evidence to support) a theory that an unidentified black male moved the body into – and then out of – the

apartment prior to Blackman's coming home to discover the decedent lying outside the apartment. And, while Blackman argues that Detective Ermatinger would not have testified had Blackman herself not testified, because his testimony was only offered as rebuttal to her's, *see, e.g.*, Dkt. No. 67-1 at 12-13, there is no reason to believe that his testimony would not have come in on direct examination – just like Officer Canales's testimony regarding Blackman moving the body into the apartment.

Moreover, the Court should not accept Blackman's argument that counsel likely would have moved to suppress her statements to the officers on June 22, 1997. *See id.* at 8 ("From the current record, without any [Article] 38.22 warnings, it is likely that the Defendant's oral statements that were made in response to custodial interrogation could have been suppressed. In state court, unlike in federal court, oral statements made in response to custodial interrogation without Article 38.22 warnings are not admissible. *However, it is also quite possible that Mr. Belt had wanted the jury to hear Ms. Blackman's statements to the police officer when they arrived at her apartment.* If Mr. Belt had planned for the Defendant to not testify it is likely he would have tried to suppress her statements made after she was arrested." (emphasis added)).

Trying to get into the mind of Blackman's trial counsel, to advocate for one of two alternative, reasonable trial strategies, and then also accepting that the trial court would have granted a motion to suppress had one been filed engages in a level of speculation far from the task at hand – which is to augment the evidence that the jury heard at trial with the suppressed evidence and then to "make 'a probabilistic determination about what reasonable, properly instructed jurors would do.'" *House*, 547

U.S. at 538 (quoting *Schlup*, 513 U.S. at 329).

Particularly given the testimony at trial corroborating a key component of Ms. Adams's testimony – that shortly after shots were fired, someone moved the decedent into the apartment, where, later, she was discovered with Blackman – the facts underlying Blackman's constitutional claims, accepted as true "and viewed in light of the evidence as a whole," are not "sufficient to establish by clear and convincing evidence," 28 U.S.C. § 2244(b)(2)(B)(ii) – evidence that "exonerate[s,]" *In re Pruett*, 609 F. App'x 819, 823 (5th Cir. 2015) (per curiam) – "that, but for constitutional error, no reasonable factfinder would have found [Blackman] guilty of the underlying offense," 28 U.S.C. § 2244(b)(2)(B)(ii).

Therefore, because Blackman has not established this second statutory requirement, the Court lacks jurisdiction over her successive Section 2254 habeas application, and the application should be dismissed.

IV. Certificate of appealability

In preliminary authorizing the filing of this successive habeas action, a panel of the Fifth Circuit rejected Blackman's argument that her *Brady* claim should not be subject to Section 2244(b)(2). *See* Dkt. No. 37 at 2 ("As she concedes, this court has held otherwise. *See Leal Garcia v. Quarterman*, 573 F.3d 214, 220-22 (5th Cir. 2009); *Johnson v. Dretke*, 442 F.3d 901, 906-12 (5th Cir. 2006). 'It is well-established in this circuit that one panel of this Court may not overrule another.'" (citation omitted)). Rejecting Blackman's argument under the prior-panel rule certainly made sense at the time that the Fifth Circuit decided to send this matter back to the district court for

fuller exploration as to whether all requirements of Section 2244(b)(2) are met. But there is authority outside of this circuit regarding the conflict that appears inherent between claims under *Brady* that are both timely and material but also successive – because a subsequent petition attacking the same conviction but "based on newly discovered *evidence*" is nevertheless successive as "Section 2244(b)(2)(B)(i) states that claims based on a *factual* predicate not previously discoverable are successive," *Leal Garcia*, 573 F.3d at 221 (emphasis in original) – and the showing required under Section 2244(b)(2)(B)(ii) that must be made before the Court can consider the state court's adjudication of such *Brady* claims.

As the United States District Court for the Eastern District of Missouri has explained:

> Several circuit courts have confronted the issue of whether claims brought pursuant to *Brady* are subject to the AEDPA's second or successive petition restrictions. Most circuits are in agreement that *Brady* claims are not exempt from the second or successive restrictions. *See, e.g.*, *Quezada v. Smith*, 624 F.3d 514, 520 (2d Cir. 2010) (applying § 2244(b) to *Brady* claim); *In re Siggers*, 615 F.3d 477, 479 (6th Cir. 2010) (same); *Tompkins v. Secretary, Dept. of Corrections*, 557 F.3d 1257, 1259-60 (11th Cir. 2009) (holding that all second-in-time *Brady* claims are subject to AEDPA's gatekeeping provisions); *Evans v. Smith*, 220 F.3d 306, 323 (4th Cir. 2000) (same); *see also Johnson v. Dretke*, 442 F.3d 901, 911 (5th Cir. 2006) ("a successive petitioner urging a *Brady* claim may not rely solely upon the ultimate merits of the *Brady* claim in order to demonstrate due diligence under § 2244(b)(2)(B) where the petitioner was noticed pretrial of the existence of the factual predicate's ultimate potential exculpatory relevance").
>
> The Ninth Circuit, on the other hand, has ruled that *Brady* claims are not categorically exempt from the gatekeeping provisions, although second-in-time *Brady* claims that do not establish the materiality of the suppressed evidence are subject to dismissal. *United States v. Lopez*, 577 F.3d 1053, 1064-68 (9th Cir. 2009); *see also King v. Trujillo*, 638 F.3d 726,

733 (9th Cir. 2011).

> Although the Eighth Circuit has not clearly stated that all *Brady* claims in second § 2255 motions require preauthorization regardless of materiality, the Court of Appeals has indicated that if the movant raises only nonmaterial *Brady* claims, finding such claims to be second or successive is consistent with the AEDPA's goals of "finality, prompt adjudication, and federalism." *See Crawford v. Minnesota*, 698 F.3d 1086, 1090 (8th Cir. 2012) (quoting *Evans*, 220 F.3d at 321).

Settle v. United States, No. 4:13cv1852, 2013 WL 5421985, at *2 (E.D. Mo. Sept. 26, 2013) (some citations modified); *see also Huff v. United States*, Civ. A. No. H-12-3785 & Crim. No. H-02-742, 2015 WL 5252129, at *3 (S.D. Tex. Sept. 8, 2015) (similar analysis); *cf. Gage v. Chappell*, 793 F.3d 1159, 1165 (9th Cir. 2015) ("We acknowledge that Gage's argument for exempting his *Brady* claim from the § 2244(b)(2) requirements has some merit. Under our precedents as they currently stand, prosecutors may have an incentive to refrain from disclosing *Brady* violations related to prisoners who have not yet sought collateral review. *See Lopez*, 577 F.3d at 1064-65. But as a three-judge panel, we are bound to follow [circuit precedent holding claims in which the factual predicate existed at the time of the first habeas petition qualify as second or successive under AEDPA]. *See Miller v. Gammie*, 335 F.3d 889, 899 (9th Cir. 2003) (en banc)." (citation modified)).

While the undersigned believes that Blackman has not passed Section 2244(b)(2)(B)(ii)'s high bar, whether her timely (but nevertheless successive) claim under *Brady* is material, for example, is certainly a closer question. *See Harris v. Thompson*, 698 F.3d 609, 628 (7th Cir. 2012) ("*Smith [v. Cain*, 132 S. Ct. 627 (2012),] shows that impeachment of the inculpatory testimony of the only eyewitness is material to an

accused's defense."); *Dennis v. Wetzel*, 966 F. Supp. 2d 489, 517 (E.D. Pa. 2013) ("When the Commonwealth['s suppression of evidence] denied Dennis the ability to impeach the most important eyewitness in the government's case, it denied him a fair trial."); *cf. Sholes v. Cain*, Civ. A. No. 06-1831, 2008 WL 2346151, at *7 (E.D. La. June 6, 2008) ("Even if Gillard's testimony had been impeached and he was entirely discredited, his testimony was in no way crucial to petitioner's conviction. Gillard did not see the shooting. The only relevance of his testimony is that it placed petitioner in the residence immediately after the shooting; however, that fact was also established through the eyewitness testimony of both Jones and McKay. Accordingly, Gillard's testimony was, at best, merely cumulative."); *Quinones v. Portuondo*, No. 00 Civ.8126PACRLE, 2005 WL 2812234, at *5 (S.D.N.Y. Oct. 21, 2005) ("[T]here is no reasonable possibility that disclosure of the potential impeachment material could have affected [the] verdict, given that a second eyewitness ... provided independent identification testimony. A new trial is generally not required when the testimony of a witness is corroborated by other testimony, or when the suppressed impeachment evidence merely furnishes an additional basis on which to impeach a witness whose credibility has already been shown to be questionable." (citing *United States v. Payne*, 63 F.3d 1200, 1210 (2d Cir. 1995)); *United States v. Avellino*, 136 F.3d 249, 257 (2d Cir. 1998) ("[W]here the undisclosed evidence merely furnishes an additional basis on which to challenge a witness whose credibility has already been shown to be questionable or who is subject to extensive attack by reason of other evidence, the undisclosed evidence may be cumulative, and hence not material.").

The case for a successful *Brady* claim here is certainly better than the petitioner's in *Johnson v. Dretke*, in which a panel of the Fifth Circuit held that, "[i]n light of the plain text of AEDPA and our caselaw, we must conclude that a successive petitioner urging a *Brady* claim may not rely solely upon the ultimate merits of the *Brady* claim in order to demonstrate due diligence under § 2244(b)(2)(B) *where* the petitioner was noticed pretrial of the existence of the factual predicate and of the factual predicate's ultimate potential exculpatory relevance." 442 F.3d at 911 (emphasis added).

The undersigned therefore further finds that Blackman's *Brady* and *Giglio/Napue* claims are "adequate to deserve encouragement to proceed further," *Slack v. McDaniel*, 529 U.S. 473, 484 (2000), and recommends that the Court grant Blackman a certificate of appealability as to these claims pursuant to 28 U.S.C. § 2253(c), Federal Rule of Appellate Procedure 22(b), and Rule 11 of the Rules Governing Habeas Corpus Cases Under Section 2254.

Recommendation

The Court should dismiss this successive habeas application for lack of jurisdiction but also grant a certificate of appealability as to the *Brady* claim and the claim under *Giglio/Napue*.

A copy of these findings, conclusions, and recommendation shall be served on all parties in the manner provided by law. Any party who objects to any part of these findings, conclusions, and recommendation must file specific written objections within 14 days after being served with a copy. *See* 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72(b).

In order to be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and specify the place in the magistrate judge's findings, conclusions, and recommendation where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the magistrate judge is not specific. Failure to file specific written objections will bar the aggrieved party from appealing the factual findings and legal conclusions of the magistrate judge that are accepted or adopted by the district court, except upon grounds of plain error. *See Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1417 (5th Cir. 1996).

DATED: September 20, 2016

DAVID L. HORAN
UNITED STATES MAGISTRATE JUDGE

APPENDIX G

Order Accepting In Part The Findings, Conclusions, and Recommendations of The United States Magistrate Judge (November 30, 2016).

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

TELISA DE'ANN BLACKMAN,	§	
	§	
Petitioner,	§	
	§	
V.	§	No. 3:13-CV-2073-M-BN
	§	
LORIE DAVIS, Director	§	
Texas Department of Criminal Justice,	§	
Correctional Institutions Division,	§	
	§	
Respondent.	§	

ORDER ACCEPTING IN PART THE FINDINGS, CONCLUSIONS, AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

After making an independent review of the pleadings, files, and records in this case, the Findings, Conclusions, and Recommendation of the United States Magistrate Judge dated September 20, 2016 [Dkt. No. 87]; the objections filed by Petitioner Telisa De'Ann Blackman [Dkt. No. 89], to which no response was filed; the objections filed by Respondent Lorie Davis [Dkt. Nos. 90 & 91] and Petitioner's response to those objections [Dkt. No. 92], the Court finds that the Findings, Conclusions, and Recommendation of the Magistrate Judge are correct with one exception, and they are accepted in part with the following modification.

As reflected in the Magistrate Judge's analysis, in deciding whether Petitioner has met her burden under 28 U.S.C. § 2244(b)(2)(B)(ii), to show "the facts underlying the [claims presented in her successive habeas application], if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing

evidence that, but for constitutional error, no reasonable factfinder would have found [her] guilty of the underlying offense," the Court's "task is to look to the evidence the jury heard at trial, augmented by evidence [that supports Petitioner's current claims, which evidence could have been used to impeach a prosecution witness, Ms. Cherissa Adams], and then to make 'a probabilistic determination about what reasonable, properly instructed jurors would do,'" *Case v. Hatch*, 731 F.3d 1015, 1039 (10th Cir. 2013) (quoting *House v. Bell*, 547 U.S. 518, 538 (2006) (in turn quoting *Schlup v. Delo*, 513 U.S. 298, 329 (1995))).

In support of Petitioner's assessment as to how the evidence at trial would have been different had she had access to the impeachment evidence, Petitioner argued that, had the evidence to impeach Ms. Adams been available to her trial counsel, Petitioner would not have testified. Petitioner also asserted that the jury would not have heard the trial testimony of a Dallas police detective whose testimony was offered as a rebuttal to Petitioner's.

The Magistrate Judge accepted Petitioner's first contention, as to her own testimony, but found that, even if Petitioner had not testified, there was no reason to believe that Detective Robert L. Ermatinger's rebuttal testimony would not have been offered as direct testimony in the State's case-in-chief, "just like Officer [Luis E.] Canales's testimony regarding Blackman moving the body into the apartment." Dkt. No. 87 at 22-24.

While the Court does not accept the finding that the Court should assume that Detective Ermatinger's testimony would have been presented in the State's case-in-

chief had Petitioner not testified, the Magistrate Judge's ultimate conclusion – that Petitioner has failed to carry her burden under Section 2244(b)(2)(B)(ii) and therefore this Court lacks jurisdiction over her successive petition – does not turn on that finding alone. In other words, even if the Court does not accept the particular finding that "there is no reason to believe that [Detective Ermatinger's] testimony would not have come in" during the State's case-in-chief, that testimony would have been cumulative and the Findings, Conclusions, and Recommendation are amply supported.

IT IS, THEREFORE, ORDERED that Respondent Davis's Unopposed Motion for Extension of Time to File Objections to the Findings, Conclusions, and Recommendation of the Magistrate Judge [Dkt. No. 88] is **GRANTED**, the Findings, Conclusions, and Recommendation of the United States Magistrate Judge are accepted in part as explained above and the Court **DISMISSES** this successive habeas application for lack of jurisdiction pursuant to 28 U.S.C. § 2244(b)(2), but also **GRANTS** a certificate of appealability as to Petitioner's claims that, during her state murder trial in Dallas County, Texas, the prosecutor withheld exculpatory and material evidence, *see Brady v. Maryland*, 373 U.S. 83 (1963), and also used false and misleading testimony, *see Giglio v. United States*, 405 U.S. 150, 153 (1972), and *Napue v. Illinois*, 360 U.S. 264, 271 (1959).

SO ORDERED this 30 day of November, 2016.

Barbara M. G. Lynn

BARBARA M. G. LYNN
CHIEF JUDGE

APPENDIX H

Judgment of district court, dismissing Petitioner's 28 U.S.C. § 2254 application for writ of habeas corpus (November 30, 2016).

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

TELISA DE'ANN BLACKMAN,	§	
	§	
Petitioner,	§	
	§	
V.	§	No. 3:13-CV-2073-M
	§	
LORIE DAVIS, Director	§	
Texas Department of Criminal Justice,	§	
Correctional Institutions Division,	§	
	§	
Respondent.	§	

JUDGMENT

This action came on for consideration by the Court, and the issues having been duly considered and a decision duly rendered, it is ORDERED, ADJUDGED and DECREED that Petitioner's successive application for writ of habeas corpus is DISMISSED for lack of jurisdiction.

The Clerk shall transmit a true copy of this Judgment and the Order accepting the Findings, Conclusions, and Recommendation of the United States Magistrate Judge to Petitioner.

SIGNED this 30 day of November, 2016.

Barbara M G Lynn

BARBARA M. G. LYNN
CHIEF JUDGE

APPENDIX I

Judgment of United States Court of Appeals for the Fifth Circuit entered on November 28, 2018, affirming the judgment of the district court.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
November 28, 2018
Lyle W. Cayce
Clerk

No. 16-11820

D.C. Docket No. 3:13-CV-2073

TELISA DE'ANN BLACKMAN,

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 Northern District of Texas

Before DAVIS, JONES, and ENGELHARDT, Circuit Judges.

J U D G M E N T

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is affirmed.

Certified as a true copy and issued as the mandate on Dec 20, 2018

Attest: Lyle W. Cayce

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