No. 18-9227

IN THE
Supreme Court of the United States

ROBERT SPARKS,
Petitioner,
v.

LORIE DAVIS, Director. Texas Department of Criminal Justice,
Correctional Institutions Division,
Respondent.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Should a petitioner be granted a writ of certiorari to consider a procedurally defaulted claim of false testimony where no certificate of appealability (COA) was granted and the alleged falsity was corrected on cross-examination?

2. Should a petitioner be granted a writ of certiorari to consider a claim of whether the lower court should have granted a COA on whether there was an "unacceptable risk of impermissible factors" being considered by the jury wherein the state court held an evidentiary hearing and concluded the petitioner had not shown that any juror had seen the offending item?

LIST OF ALL PROCEEDINGS

State v. Sparks, No. F-0801020-J (Crim. Dist. Ct. No. 3, Dallas County, Dec. 11, 2008)

Sparks v. State, No. AP-76,099 (Tex. Crim. App. Oct. 20, 2010)

Sparks v. Texas, No. 10-8538 (U.S. Apr. 25, 2011)

Ex parte Sparks, No. 76,786-01 (Tex. Crim. App. Dec. 14, 2011)

Sparks v. Texas, No. 12-5030 (U.S. Oct. 29, 2012)

Ex parte Sparks, No. WR-76,786-02 (Tex. Crim. App. May 14, 2014)

Sparks v. Davis, No. 3:12-cv-469-N (N.D. Tex. Mar. 27, 2018)

Sparks v. Davis, No. 18-70013 (5th Cir. Dec. 4, 2018)

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page**

Constitutional Provisions

Statutes

BRIEF IN OPPPOSITION

This is a federal habeas corpus appeal brought by Petitioner Robert Sparks, a death-sentenced Texas inmate. Sparks seeks writ of certiorari from the lower court's denial of a COA. But, as shown below, the lower court acted according to established law and did not err.

STATEMENT OF THE CASE

I. Facts of the Crime

The Court of Criminal Appeals (CCA) summarized the facts of Sparks's crime as follows:

> [Sparks] was charged with intentionally and knowingly causing the deaths of Raekwon Agnew and Harold Sublet, Jr., by stabbing and cutting them with a knife, during the same criminal transaction. The record shows that on September 15, 2007, [Sparks] murdered his wife, Chare Agnew, and his 9- and 10-year-old stepsons, Harold and Raekwon, and he raped his 12- and 14-year-old stepdaughters, Garysha Brown and LaKenya Agnew. Some time after midnight, when everyone else in the house was asleep, [Sparks] put his hand over Chare's mouth and stabbed her eighteen times as she lay in her bed. He then went into the boys' bedroom. As Raekwon lay sleeping, [Sparks] woke Harold and took him to the kitchen, where he stabbed him at least 45 times. He then woke Raekwon, took him to the kitchen, and killed him in the same manner. [Sparks] dragged the boys' bodies to the living room and covered them with a comforter. He then went into the girls' bedroom and woke LaKenya. He pulled her out of bed at gunpoint, tied her up with bedsheets, and told her he had killed her mother and brothers. He showed her their bodies and told her it was her fault they were dead. Next, he woke Garysha and tied her up with electrical cords, and he tied a washcloth around her mouth. He then told LaKenya that in order to save her and her sister's life, one of the girls would have to have sex with him. LaKenya said

that she would do it. [Sparks] took her to the living room and raped her on the living room couch.

When he had finished raping LaKenya, [Sparks] took Garysha to the living room and raped her on the couch, next to her sister. Then, he made the girls stay in the bathroom with him while he took a shower. He apologized to the girls for the rapes and murders. He told them that their mother had been trying to poison him and that her death was their fault. Next, he forced both girls to go with him into the garage, where he tried, unsuccessfully, to change the license plate on his car. He took the girls back to the living room, where he lifted the comforter and showed the girls their brothers' bodies. He remarked that Raekwon was stronger than he had expected him to be. [Sparks] made the girls walk into their mother's bedroom and kiss her face, and then he put them into the bedroom closet. He started a CD player and told them that help would come when the music ended. He then locked the closet door and moved a dresser in front of it. Finally, [Sparks] left the house.

[Sparks] drove to his mother's house to borrow her car. He then drove to the home of his former girlfriend, Shunta Alexander, and their teenaged daughter, Brianna. He told Shunta what he had done. He gave her some money for Brianna and remarked that if there was a reward for catching him, Brianna should have it. Shunta begged him to call the police. [Sparks] called the police on his cell phone and briefly reported that he had killed his wife and two boys and he had left two girls locked in a bedroom closet. He provided the address and stated that he knew the police would trace the call if he stayed on the phone too long. He then hung up, broke his cell phone, and left Shunta's home. Later that morning, [Sparks's] cousin drove him to the Greyhound bus station, where he bought a bus ticket under an assumed name and traveled to Austin.

[Sparks] returned to Dallas a few days later. He called a police detective and asked him if the police had found an audiocassette tape he had left in the house, which he believed contained a recording of Chare or one of the children admitting that they had been conspiring against him. He thought that this tape would help his case. After his arrest, [Sparks] made a statement to police in

> which he requested testing for the presence of poison in his body, and he said that LaKenya and Garysha should be polygraphed about whether Chare had been poisoning him. He provided buccal, blood, hair, and fingernail samples to be tested for evidence of poisoning, but the lab that received the samples was not able to conduct the requested tests, and investigators were unable to locate a lab with that capability.

Sparks v. Texas, slip op. No. AP-76,099 at 2-5 (Tex. Crim. App. October 20, 2010).

II. Course of State and Federal Proceedings

Sparks was charged and convicted of capital murder for intentionally and knowingly causing the deaths of Raekwon Agnew and Harold Sublet, Jr., by stabbing and cutting them with a knife during the same criminal transaction. 1 CR 2, 2 CR 500-02.

Direct appeal to the CCA is automatic and Sparks's conviction and sentence were affirmed. *Sparks v. Texas*, slip op. No. AP-76,099 (Tex. Crim. App. October 20, 2010). Sparks petitioned this Court for certiorari review but was denied. *Sparks v. Texas*, 131 S. Ct. 2152 (2011).

While his direct appeal was pending, Sparks filed his state habeas application. *Ex parte Sparks*, No. 76,786-01, at 5. The state court entered Findings of Fact and Conclusions of Law. *Id*. at 155-62. The CCA adopted the findings of the state habeas court and denied relief. *Id.* at cover. Sparks also

petitioned for certiorari review from state habeas proceedings and was again denied. 133 S. Ct. 526 (2012).

Sparks then filed his federal habeas petition but later amended his petition. ROA.28, 94. The lower court stayed and abated federal proceedings. ROA.422-29. Sparks returned to state court and filed a successive petition raising only ground five of his federal petition. ROA.1046 (*Ex parte Sparks*, WR-76,786-02, at 2). The CCA dismissed the writ and Sparks returned to federal court and filed another amended petition. ROA.999-1000. The federal district court denied federal habeas relief and a COA. ROA.941-93. Sparks then sought and was denied a COA from the Fifth Circuit Court of Appeals. *Sparks v. Davis*, No. 18-70013 (5th Cir. Dec. 4, 2018). Sparks petitioned the lower court for rehearing which the court denied. *Sparks v. Davis*, No. 18-70013, Ord. (5th Cir. Jan. 7, 2019). Sparks now petitions for a writ certiorari from the lower court's denial of a COA. Sparks's execution has also been set for September 25, 2019.

REASONS FOR DENYING CERTIORARI REVIEW

The Rules of the Supreme Court provide that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for "compelling reasons." Sup. Ct. R. 10. In the instant case, Sparks fails to advance a compelling reason for this Court to review his case and, indeed, none exists. The opinion issued by the lower court involved only a proper and

straightforward application of established constitutional and statutory principles. Accordingly, the petition presents no important question of law to justify the exercise of this Court's certiorari jurisdiction.

In the court of appeals, as a jurisdictional prerequisite to obtaining appellate review of the constitutional claims raised, he was required to first obtain a COA from the court of appeals. 28 U.S.C. § 2253(c)(1)(A); *Miller-El v. Cockrell*, 537 U.S. 322, 335-36 (2003); *Slack v. McDaniel*, 529 U.S. 473, 483 (2000). The standard to be applied in determining when a COA should issue examines whether a petitioner "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Miller-El*, 537 U.S. at 336; *Slack*, 529 U.S. at 483. Sparks had to demonstrate "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack*, 529 U.S. at 484 (internal quotation marks and citation omitted); *see also Miller-El*, 537 U.S. at 336. Furthermore, the determination of whether a COA should issue must be made by viewing the petitioner's arguments through the deferential scheme set forth in 28 U.S.C. § 2254(d). *Miller-El*, 537 U.S. at 336 (noting that, in making a COA determination, "[w]e look to *the District Court's application of AEDPA* to petitioner's constitutional claims and ask whether *that* resolution was debatable amongst jurists of reason") (emphasis added). But Sparks did not

meet the standards for obtaining a COA because the arguments he advances do not amount to a substantial showing of the denial of a constitutional right. In the court below, Sparks sought a COA but the circuit court found his claim unworthy of debate among jurists of reason. Fundamentally, Sparks cannot show the circuit court's decision to deny COA was in error much less worthy of this Court's review.

II. This Court Should Not Grant Certiorari to Review His Procedurally Defaulted Claim that His Constitutional Rights Were Violated by the Testimony of the State's Expert Witness Wherein the Lower Court Refused to Grant a COA.

Sparks seeks certiorari on a procedurally defaulted claim where the lower court denied a COA. Pet. at 16-27. Sparks claims that his Eighth Amendment and Due Process rights were violated when a State's expert testified to materially inaccurate and false information. Specifically, Sparks claims that A.P. Merillat, a State's expert during the punishment phase, falsely told the jury that Sparks would initially be classified as a G-3 prisoner when arriving to prison, in spite of his past record or any other factors. *Id*. at 16. But because the lower court procedurally barred Sparks's claim, he was unable to obtain further review. Sparks fails to show this routine denial of a COA on a procedurally defaulted claim presents a compelling issue for this Court's review.

The federal district court summarized the facts surrounding Sparks's claim as follows:

> During the punishment stage, the prosecution called A.P. Merillat, a "criminal investigator with the special prosecution unit in Huntsville" to explain "the likelihood or opportunities to be violent inside the penitentiary." On direct examination, Merillat testified that Sparks would enter the state prison system, the Institutional Division of the Texas Department of Criminal Justice (TDCJ), at a G-3 classification level if he was sentenced to life in prison, and that no set of circumstances could change this. Merillat also explained that persons entering at this level would be permitted to go to the mess hall with other inmates, go the library with other inmates, go to school and medical facilities, go to visitation, and that they could work outside the walls of the prison. On cross examination by defense counsel, Merillat agreed that an offender receiving a life sentence for capital murder could be classified at the more restrictive G-4 or G-5 levels.
>
> Q. But as I just pointed out, sir, whether or not you're classified, the minimum classification for a person is G-3 and can go all the way up to an automatic classification of ad seg right off the bat, couldn't it? That's yes or no, sir. Right or wrong?
>
> A. You're wrong.
>
> Q. I'm wrong?
>
> A. Yes.
>
> Q. Couldn't be placed in ad seg?
>
> A. Very limited circumstances. But the broad way you say it is not correct.
>
> Q. He could be, couldn't he?
>
> A. He could be.
>
> Q. Could be G-4, couldn't he?

A. He could be.

Q. Could be G-5.

A. Could be.

39 RR 86-87.

> In support of his claim, Sparks presents the testimony of his expert, Frank Aubuchon, that a person sentenced to life without parole will, at best, be classified to the G-3 level, or, to the more restrictive G-4 or G-5 levels, if required. (Am. Pet. at 66 (citing Pet. Ex. #1).)

ROA.966-968 (*see also* Pet. Appx B, at 26-28).

As the court found, this claim was not raised in Sparks's direct appeal or initial state habeas proceedings. ROA.968 (*see also* Pet. Appx B, at 28). But during the district court proceedings, the court granted an agreed to stay of proceedings to allow this claim to be presented to the state court in a subsequent state habeas application. *Id*. During the abeyance, the CCA dismissed the subsequent state application "as an abuse of the writ without considering the merits of the claim." *Id*. (citing *Ex parte Sparks*, No. WR-76,786-02, 2014 WL 2002211, at *1 (Tex. Crim. App. May 14, 2014); ROA.1000.

Based on both the correction of Merillat's testimony on cross-examination and Sparks's failure to properly present the claim to the state courts for review, the lower court denied Sparks relief. ROA.972-974 (*see also* Pet. Appx B, at 32-34). But Sparks argued to the court, as he does here, that

his claim should not be defaulted as he could demonstrate the cause and prejudice exception. Specifically, Sparks argued that the State improperly suppressed evidence under *Brady v. Maryland,* 373 U.S. 83, 87 (1963).

This Court announced in *Brady*, that due process requires the State to disclose exculpatory or impeachment evidence that is material to the defense. 373 U.S. at 87. In order to establish a Fourteenth Amendment violation under *Brady*, the petitioner must demonstrate that (1) the prosecution suppressed evidence; (2) that was favorable to the defense; (3) material to either guilt or punishment; and (4) was not discoverable using due diligence. *Graves v. Cockrell*, 351 F.3d 143, 153-54 (5th Cir. 2003); *Rector v. Johnson*, 120 F.3d 551, 558 (1997). Relatedly, a criminal defendant is denied due process when the State knowingly uses perjured testimony at trial or allows untrue testimony to go uncorrected. *Faulder v. Johnson*, 81 F.3d 515, 519 (5th Cir. 1996) (citing *Giglio v. United States*, 405 U.S. 150 (1972); *Napue v. Illinois*, 360 U.S. 264 (1959)). To obtain relief on such a claim, a petitioner must show that (1) the testimony was false, (2) the State knew the testimony was false, and (3) the testimony was material. *Kutzner v. Johnson*, 242 F.3d 605, 609 (5th Cir. 2001); *Pyles v. Johnson*, 136 F.3d 986, 996 (5th Cir. 1998); *Faulder*, 81 F.3d at 519. In order to show that the statements were material, the petitioner must establish that there is a reasonable likelihood that the false testimony could have affected the jury's verdict. *United States v. Agurs*, 427 U.S. 97, 103 (1976);

Spence v. Johnson, 80 F.3d 989, 997 (5th Cir. 1996); *Kirkpatrick v. Whitley*, 992 F.2d 491, 497 (5th Cir. 1993).

But Sparks's allegations fail because he has wholly fallen short of proving any of the required elements. As the lower court held,

> Here, Sparks's claim centers around the allegedly-false testimony of the state's expert witness. Parsing the testimony for signs that the jury may have been confused or misinformed is unnecessary in this case, however, because it is undisputed that all parties were aware of Merillat's testimony—the alleged "cause" in this case—while it was happening. Indeed, Sparks's defense attorney focused on correcting Merillat's testimony during his cross examination. To the extent that the testimony may have been inaccurate, therefore, Sparks can hardly claim that he was unaware of its inaccuracy.

Sparks v. Davis, No. 18-70013, slip Op. at 6, (*see also* Pet. Appx A, at 6). Sparks complains that this ruling contravenes this Court's ruling in *Banks v. Dretke,* 540 U.S. 688, 696 (2004), forcing him to "seek" what the prosecutor allegedly "hid." Pet. at 24. But Sparks fails to recognize, as the lower court clearly did, that nothing was "hidden." To the extent, Merillat's testimony was false, that fact was discovered at trial and not later.

Further, the district court found that Merillat's testimony was not false as any alleged falsity was corrected on cross-examination. ROA.969 (*see also* Pet. Appx B, at 29). The court also found that to the extent Sparks was relying upon administrative policies, the evidence was not suppressed and was equally available to both sides. ROA.969-70 (*see also* Pet. Appx B, at 29-30). Finally,

the court found that Sparks's dueling expert opinions fail to provide evidence that Merillat's testimony was false. ROA.970 (*see also* Pet. Appx B, at 30). Sparks argues that regardless of the cross-examination, the jury was left with a false impression. Pet. at 17. But Sparks is unable to overcome the record facts that the jury was given correct information. 39 RR 867-87; ROA.974. He further asserts that the district court "simply omitted the final question" from the above cited exchange. Pet. at 17. This is the testimony to which Sparks refers:

> Q. So your testimony while ago what I called throwing a skunk over there you're basically saying is we know what the minimum is but we have no idea what its actually gonnna be for Robert Sparks. That's what you're basically saying isn't it
>
> A. No, you're wrong.

39 RR 87. But this testimony is insufficient to overcome Merillat's correct testimony. It is just as likely Merillat was responding to trial counsel's claim that he had "throw[n] a skunk over there" than he was denying the testimony he had just given. Moreover, even assuming some erroneous impression was left with the jury, Sparks cannot demonstrate materiality. Weighing Merillat's testimony against the brutal and vicious attack by Sparks on his own family which included the murder of two children and the rapes of two others, Sparks cannot do so. *Graves*, 351 F.3d at 153-54; *Agurs*, 427 U.S. at 103.

Given Sparks's failure to demonstrate that the lower court incorrectly found the claim procedurally defaulted, much less that it improperly refused him a COA or that there is any merit in his underlying claim, Sparks is not even entitled to mere error correction. This Court should deny him a writ of certiorari.

III. This Court Should Deny Certiorari Review of Sparks's Claim That the Lower Court Improperly Denied a COA on His Claim That His Right to an Impartial Jury Was Violated by a Bailiff Wearing a Syringe Tie Just Prior to Punishment Deliberations.

In his second claim, Sparks contends the jury was improperly influenced during the punishment phase by the bailiff's necktie that displayed a syringe. Pet, at 28-35. Sparks claims that he does not have to show that individual jurors were aware of the tie but rather whether "an unacceptable risk is presented of impermissible factors coming into play." Pet. at 28 (quoting *Holbrook v. Flynn*, 475 U.S. 560, 570 (1986)). In the lower courts, Sparks failed to demonstrate that *Flynn* is the correct standard or that such an unacceptable risk is possible without any evidence that any juror saw the tie. The lower court refused him a COA on this issue. And Sparks fails to demonstrate that failure is worthy of a writ of certiorari.

This Court has held that a juror is exposed to an external influence when he receives information not admitted into evidence. *Tanner v. United States*, 483 U.S. 107, 117 (1987). If a defendant proves that a "private communication,

contact, or tampering" is received by a juror, the burden shifts to the government to prove that the contact with the juror was not harmful. *Remmer v. United States*, 347 U.S. 227, 229 (1954). But the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias. *Smith v. Phillips*, 455 U.S. 209, 215 (1982). And the ultimate question is whether the improper external intrusion affected the jury's deliberations and thereby its verdict. *United States v. Olano*, 507 U.S. 725, 739 (1993). But these are direct appeal cases, thus the Fifth Circuit has held, "*Remmer* provides [only] our starting point for determining the Supreme Court's clearly established law regarding external influences on a jury." *Oliver v. Quarterman*, 541 F.3d 329, 335 (5th Cir. 2008). Indeed, the court clarified that "under *Remmer*, if prejudice is likely from the jury's consultation of an external influence, the court may place the burden of rebutting that presumption on the state . . . . [h]owever, on habeas review, we do not use the normal harmless error analysis." *Id.* at 341 (internal citations omitted). Instead, a federal court must assess the prejudicial impact of a constitutional error in a state court criminal trial under the "substantial and injurious effect" standard set forth in *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). *Oliver,* 541 F.3d at 341. But regardless of the standard to be applied, because Sparks cannot demonstrate that any juror saw the tie, he cannot demonstrate either

a "substantial and injurious effect" or actual prejudice as he was granted a hearing to do.

Sparks did not object to the bailiff's tie at trial. ROA.950 (*see also* Pet. Appx B, at 10). But during state habeas proceedings, Sparks received a hearing in state court to present evidence showing that the jurors saw and were influenced by the tie. SHCR 157-58. Sparks called the bailiff to testify. Bailiff Moorhead testified he sat behind Sparks and his attorneys in the courtroom, was wearing a lanyard in front of the tie that would have covered the image, and was also wearing a coat, and holding a stun-belt box. SHRR 12-40. Bailiff Moorehead also testified that he complied with an instruction relayed by defense counsel to tuck his tie into his shirt. SHRR 19. Sparks also called his investigator who testified to the measurements from the bailiff's chair to the jury and argued he could see the tie from that distance. SHRR 40-46. But the investigator also admitted he did not factor in the bailiff's clothing, lanyard, stun-belt box, the attorneys and security with the defendant, or the presence of computers on the desk blocking the jury's view. SHRR 48-50.

In response, the State called Sparks's trial attorneys. Paul Johnson testified he made an off the record objection and received an instruction for the bailiff to conceal the tie which was complied with. SHRR 55-57. Johnson did not believe anyone had seen the tie. SHRR 56-57. Lalon Peale confirmed Johnson's testimony. SHRR 71-73. Additional witnesses confirmed that the tie

was unlikely to have been seen by the jury. ROA.952-54. Finally, the State produced an affidavit from the jury foreperson who said she had not seen the tie and had no knowledge of it affecting the jurors. SHCR 76-77.

Based on this testimony and additional documents, the state court found that Sparks had not shown that any juror saw the tie. SHCR 157-58. The district court found that Sparks was unable to demonstrate the findings were unreasonable. ROA.954-55 (*see also* Pet. Appx B, at 14-15). Sparks's argument that the lower courts incorrectly decided the case under *Remmer* rather than *Flynn* is insufficient to compel this Court's attention. Under either standard, Sparks had to demonstrate that at least one juror viewed the tie.

Further, even assuming that the lower court should have applied the *Flynn* standard for a case on habeas review, Sparks seeks to expand *Flynn's* purview. In *Flynn*, this Court was addressing whether the presence of four uniformed officers immediately behind the defendant was an "inherently prejudicial practice." There is no doubt that the jurors in *Flynn's* case viewed the troopers. Sparks wants to go further than *Flynn* permits and argue the mere presence of one bailiff in the offending tie creates "an unacceptable risk" of influence. But Sparks cannot provide any case that supports this radical view. And, Sparks's citations to *Carey v. Musladin,* 549 U.S. 70 (2006), also do not support his proposition. Pet. at 29. *Musladin* held that a state court did not unreasonably find that multiple victims' family members wearing buttons

didn't rise to the level of inherent prejudice. 549 U.S. at 77. If Musladin could not be granted federal habeas relief despite the fact that the jurors clearly saw the buttons, Sparks cannot show that he is entitled to relief when the jurors did not see the offending tie.

Sparks committed a heinous crime which resulted in the murders of two young children. He is unable to overcome the overwhelming testimony which forms the basis of the state courts' factual findings. Thus, the district court did not err in relying on these findings which are given great deference. The Fifth Circuit did not err in refusing a COA. And this Court should not grant certiorari to issue an advisory opinion.

CONCLUSION

For the foregoing reasons, the Court should deny Sparks's petition for writ of certiorari.

Respectfully submitted,

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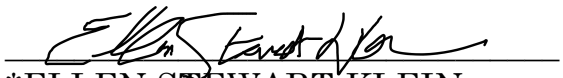

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