APPENDIX

THERE IS NO EVIDENCE OF GUILT IN PETITIONER'S CASE

The facts in Petitioner's case are fixed by the evidence presented in the State's discovery: the prescriptions themselves, the medical charts generated and the five audio and video recordings which comprise the entirety of the contacts between Petitioner and his employees and the undercover agents posing as patients. The only other direct evidence is the brief testimony of one of the patient-imposters.

A stenographic transcription of the clinical interviews of the patient-imposters with Petitioner was prepared by the District Attorney's office.

The recordings are correlated as to date and hour with the transcription.

The summary below is derived from the above sources.

Petitioner's Detailed Summary of the evidence

The evidence from the audio-visual recordings shows that on April 1, 2013 patient-imposter Harrell entered Petitioner's administrative office to be processed by lay personnel. They took her vital signs, identification, clinical complaint and fee of $295 and gave an extensive questionnaire to complete. Subsequently Harrell proceeded to Petitioner's private office. He and she discussed various complaints, and Harrell stated that she wanted phentermine and hydrocodone, giving a history of neck pain and the desire to lose weight.

They discussed diet at length. Petitioner stated that phentermine for two months should suffice. He declined to prescribe Hydrocodone. He prescribed Tramadol, a non-narcotic analgesic, and referred her to a pain management specialist.

On May I, 2013 Harrell returned to request Hydrocodone, because Tramadol was ineffective. Instead of prescribing Hydrocodone Petitioner discoursed about pain

management and its cost and eventually persuaded Harrell to take an increased dose of Tramadol.

Patient-imposter Cochrane on April 29, 2013 appeared at Petitioner's administrative office and like Harrell was processed and paid $295. She proceeded to consultation with Petitioner in his office.

They chatted socially briefly before discussing her desire to lose weight and pertinent history. Petitioner agreed to prescribe Phentermine, 37.5mg, daily, the manufacturer's recommended dose. They then discussed her desire for Hydrocodone. Petitioner said that he would have to have a pain management plan, including physical examination. He suggested Tramadol and recommended a dosage regimen.

On May 15, 2013 she returned to report being given Hydrocodone by Petitioner's nurse practitioner. She complains that twenty pills was not enough. Petitioner discoursed at length about the bother and expense to the patient of a pain management plan, saying he "has concern for her wallet" and will give her a week or two of Hydrocodone and referral to a pain management specialist. Finally he says to his office employee, who is completing the prescription, "Oh, Hell, give her one month's."

On July 10, 2013 Petitioner's office faxed to the pharmacy a DENIAL to refill the Hydrocodone (Norco) prescription for the reason that the patient was supposed to go to pain management.

The video of both patient-imposter encounter shows that petitioner's behavior was at all times serious, professionally appropriate and devoid of artifice. There was no conspiratorial whispering, bargaining for drugs, physical contact, inappropriate gesture or exchange of money or drugs.

Some evidence was taken

Some evidence was taken at trial before Petitioner pled guilty on August 11, 2015. It consisted of two witnesses, Mark Schilli, the DEA agent who investigated and arrested Petitioner, and Renee Harrell, one of two undercover patient-imposters.

Schiilli testified to details of DEA regulation of controlled substances. He testified that Petitioner had written "quite a few" prescriptions for narcotics for patients but did not state that the dosages were excessive or that the prescribing was in any way unlawful.

He also testified to seizing prescriptions pre-signed by Petitioner but did not characterized them as the forms required for narcotics or that they had been used to provide controlled substances to the patient-imposters or any other patients.
He further testified to seizing a romantic letter from one Christina Aust, for whom Petitioner had prescribed Dronabinal, a controlled substance, when she was in jail. He did not allege that this prescription was unlawful.

Schilli acknowledged that Petitioner's medical license showed no restriction.

Harrell testified that she presented herself as a patient and asked Petitioner for a prescription for phentermine and was provided such. She testified that she requested a prescription for hydrocodone, which he did not provide.
She testified to paying $295 for the office visit and to receiving a prescription for phentermine.
Importantly, she testified that the recording of her visit with Petitioner was true and accurate.

The extraneous acts are at best irrelevant

The State gave notice of an enormous list of extraneous bad acts, a few preposterous, some glaringly irrelevant, all inadmissible as lacking facts of consequence, since the direct evidence shows no impropriety of any kind. Texas Rules of Evidence, Rule 401.

ATTACHMENTS

Ex parte Smith, No. 03-17-00628-CR, 2018 Tex. App. LEXIS 3689, App.—Austin May 24, 2018) (mem. Op., not designated for publication). Petition for review was denied. *Ex parte Smith,* No. PD-0634-18, Tex Crim.App. LEXIS 681 (Crim.App. July 25, 2018)

Report and Recommendation of United States Magistrate Judge, filed May 16, 2019, Cause No. 1: 18-CV-738-LY (Smith v. Kennedy, USDC, WD Tex.)

ORDER, denying motion for certificate of appealability, USCA 5, No. 19-50487, December 18, 2019.

ORDERED that the Motion for Reconsideration is Denied, No. 19-50487, USCA 5, filed January 27, 2020

ATTACHMENT

ORDER, denying motion for certificate of appealability, USCA 5, No. 19-50487, December 18, 2019.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19-50487

A True Copy
Certified order issued Dec 18, 2

Clerk, U.S. Court of Appeals, Fi

BARLOW SMITH,

Petitioner-Appellant

v.

TERRY KENNEDY, Director, Community Supervision and Corrections Department,

Respondent-Appellee

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

O R D E R:

Barlow Smith, a licensed physician and attorney, pleaded guilty to one count of fraudulent delivery of a controlled substance by prescription, in violation of TEX. HEALTH & SAFETY CODE ANN. § 481.129(c)(1). The trial court imposed a five-year term of imprisonment, which it suspended, and placed Smith on community supervision for 10 years. Smith, who remains on community supervision, now moves this court for a certificate of appealability (COA) to appeal the district court's denial of his 28 U.S.C. § 2254 application. The district court in Smith's case adopted the report and recommendation of the magistrate judge (MJ). Smith seeks to argue on appeal that that the MJ erred in (1) including prior bad acts in his report, (2) finding that Smith's claims that the indictment failed to allege a criminal offense and that TEX.

HEALTH & SAFETY CODE ANN. § 481.129(c)(1) was unconstitutionally vague were procedurally barred and (3) further finding that Smith's showing of actual innocence was insufficient to overcome the procedural bar because the evidence that he relied on was not new. Smith also seeks authorization to argue for the first time that the MJ failed to consider his claim that a conviction rendered when no crime has been committed violates due process and seeks to assert two new arguments on appeal regarding the absence of evidence establishing corpus delecti and his ability to raise a no-evidence-of-guilt claim under state law.

To obtain a COA, Smith must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483 (2000). Smith "satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). For claims that the district court has rejected on their merits, Smith "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack*, 529 U.S. at 484; *see also Miller-El*, 537 U.S. at 338. Where, as here, the district court has denied certain claims on procedural grounds, Smith must demonstrate that reasonable jurists would find it debatable whether his § 2254 application states a valid claim of the denial of a constitutional right and whether the district court was correct in its procedural ruling. *Slack*, 529 U.S. at 484.

Smith has not made the requisite showing with respect to the claims that he raised in the district court. *See Slack*, 529 U.S. at 484. The court declines to consider the issues that Smith seeks authorization to raise for the first time on appeal. *See Black v. Davis*, 902 F.3d 541, 545 (5th Cir. 2018), *petition for*

cert. filed (U.S. June 12, 2019) (No. 18-9645); *Henderson v. Cockrell*, 333 F.3d 592, 605 (5th Cir. 2003). Accordingly, Smith's motion for a COA is DENIED.

GREGG J. COSTA
UNITED STATES CIRCUIT JUDGE

ATTACHMENT

Ex parte Smith, No. 03-17-00628-CR, 2018 Tex. App. LEXIS 3689, App.—Austin May 24, 2018) (mem. Op., not designated for publication). Petition for review was denied. *Ex parte Smith,* No. PD-0634-18, Tex Crim.App. LEXIS 681 (Crim.App. July 25, 2018)

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-17-00628-CR

Ex parte Barlow Smith

FROM THE DISTRICT COURT OF BURNET COUNTY, 424TH DISTRICT
NO. 42272B, HONORABLE EVAN C. STUBBS, JUDGE PRESIDING

MEMORANDUM OPINION

Barlow Smith appeals the district court's order denying his second application for writ of habeas corpus in which he sought relief from his conviction for the felony offense of fraudulent delivery of a controlled substance. In this habeas application, Smith raised a claim of actual innocence, challenged his indictment as failing to allege a crime, and contended that the statute under which he was indicted and convicted was void for vagueness. For the reasons that follow, we will affirm the district court's denial of the habeas application.

BACKGROUND

Smith, who was a doctor and a licensed attorney, was charged by indictment with three counts of fraudulent delivery of a controlled substance. *See* Tex. Health & Safety Code § 481.129. He acted pro se below. At trial, after a jury was empaneled and during the presentation of the State's evidence, Smith decided to accept a plea bargain in which he pleaded guilty to the first count of the indictment and the State waived the remaining two counts. Smith stated on the record that he had read and understood his guilty plea; that he was a licensed attorney and understood the

effect of the document; that he had signed it freely and voluntarily; that he had received all discovery; that he understood he was waiving his right to proceed with a jury trial, his right to file a motion for new trial, and his right to appeal; that the plea was in his best interest; that he "was in entire agreement with" allowing all trial exhibits to be returned and not retained by the court reporter; that he was not claiming to be incompetent; that he had not been forced, threatened, coerced, or promised anything other than the agreement to secure his plea of guilty; and said, "I'm pleading guilty because I am guilty." Based on these affirmations the district court accepted Smith's plea, ordered a presentence investigation, and set a sentencing hearing for the following month. One week before sentencing, Smith filed a motion to withdraw his guilty plea, alleging that he rendered ineffective assistance of counsel to himself and that he pleaded guilty to a "nonexistent crime." The court denied Smith's motion and sentenced Smith to five years' imprisonment, suspending imposition of the sentence, and placing Smith on community supervision for ten years. The court ordered Smith to spend fifteen days in the Burnet County Jail as a condition of his community supervision.

Smith then filed his first application for writ of habeas corpus contending that he rendered ineffective assistance of counsel to himself because he was on prescription medication for asthma that impaired his thinking. The district court denied the application, which Smith appealed. This Court affirmed the district court's order denying habeas relief, and the Texas Court of Criminal Appeals refused Smith's petition for discretionary review. *See Ex parte Smith*, No. 03-16-00048-CR, 2016 Tex. App. LEXIS 11087, at *5 (Tex. App.—Austin Oct. 12, 2016, pet. ref'd) (mem. op., not designated for publication).

Smith subsequently filed a second application for writ of habeas corpus, contending that he is actually innocent, that his indictment fails to charge a crime, and that the statute cited in his indictment is void for vagueness. The district court denied Smith's second habeas application and issued findings of fact stating that: (1) Smith's allegations regarding his actual-innocence claim were unfounded; (2) Smith's complaint about his indictment should have been raised on direct appeal or in his first post-conviction writ; (3) Smith's challenge to the constitutionality of the statute should have been raised on direct appeal or in his first post-conviction writ; and (4) Smith's application as a whole is unfounded. This appeal followed.

DISCUSSION

An applicant seeking post-conviction habeas corpus relief bears the burden of establishing by a preponderance of the evidence that the facts entitle him to relief. *Ex parte Richardson*, 70 S.W.3d 865, 870 (Tex. Crim. App. 2002); *see* Tex. Code Crim. Proc. art. 11.072. We defer almost completely to the habeas court's determination of historical facts supported by the record, especially when those factual findings rely upon an evaluation of credibility and demeanor. *Ex parte Amezquita*, 223 S.W.3d 363, 367 (Tex. Crim. App. 2006). We use the same deference when reviewing the habeas court's application of law to fact questions if the resolution of those determinations rests upon an evaluation of credibility and demeanor. *Id.* If the outcome of those ultimate questions turns upon an application of legal standards, we review the habeas court's determination de novo. *Id.*

Subsequent habeas application under article 11.072

Article 11.072 of the Texas Code of Criminal Procedure generally restricts habeas applicants to "one bite of the apple." *See* Tex. Code Crim. Proc. art. 11.072, § 9(a); *cf. Ex parte Miles*, 359 S.W.3d 647, 663-64 (Tex. Crim. App. 2012) (discussing similarly worded provisions of article 11.07). It provides that a court may not consider the merits of a subsequent habeas application unless it contains sufficient specific facts establishing that: (1) the current claims and issues have not been and could not have been presented previously in an original application or in a previously considered application filed under this article (2) because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application. Tex. Code Crim. Proc. art. 11.072, § 9(a). A factual basis of a claim is considered unavailable for purposes of this statute "if the factual basis was not ascertainable through the exercise of reasonable diligence on or before that date." *Id.* § 9(c). A legal basis of a claim is considered unavailable "if the legal basis was not recognized by and could not have been reasonably formulated from a final decision of the United States Supreme Court, a court of appeals of the United States, or a court of appellate jurisdiction of this state on or before that date." *Id.* § 9(b).

No newly discovered or newly available evidence presented to support actual-innocence claim

In his first issue, Smith claims that he is actually innocent because his indictment failed to allege a criminal offense. A claim of actual innocence is cognizable in a post-conviction habeas corpus proceeding. *Ex parte Robbins*, 360 S.W.3d 446, 458 (Tex. Crim. App. 2011). One type of actual innocence claim—which Smith presents here—is a bare claim of actual innocence or a "*Herrera*-type" claim. *Id.*; *see Herrera v. Collins*, 506 U.S. 390, 313-14 (1993). A *Herrera* claim

of actual innocence is a substantive claim in which the applicant argues his innocence based solely upon newly discovered evidence, evidence that was neither introduced at trial nor available to the defense to introduce at trial. *Ex parte Robbins*, 360 S.W.3d at 458; *see Ex parte Elizondo*, 947 S.W.2d 202, 208 (Tex. Crim. App. 1996) (noting that actual-innocence claim in *Herrera* was not challenge to proceedings leading to conviction but only claim that execution of innocent person would violate Eighth Amendment of United States Constitution). Because a *Herrera* claim of actual innocence attacks the conviction directly, an "extraordinarily high" standard applies. *Ex parte Robbins*, 360 S.W.3d at 458 (citing *Schlup v. Delo*, 513 U.S. 298, 315-16 (1995); *Ex parte Elizondo*, 947 S.W.2d at 209).

To be entitled to relief on a *Herrera* actual-innocence claim in a post-conviction application for writ of habeas corpus, the applicant must show by clear and convincing evidence that he would be acquitted based on evidence that is newly discovered or newly available. *Ex parte Elizondo*, 947 S.W.2d at 209; *Ex parte Brown*, 205 S.W.3d 538, 545 (Tex. Crim. App. 2006) (defining "newly discovered evidence" as evidence that was not known to applicant at time of trial and could not have been known to him even with exercise of due diligence). The habeas applicant cannot rely on evidence or facts that were available at the time of his plea, trial, or post-trial motions. *Ex parte Brown*, 205 S.W.3d at 545-46 (noting that "[a] claim of actual innocence is not an open window through which an applicant may climb in and out of the courthouse to relitigate the same claim before different judges at different times").

Here, Smith acknowledges that he provided no newly discovered or newly available evidence in support of his actual-innocence claim. But in his view, the *Herrera* standard does not

apply because "[i]n Appellant's case no crime was committed. No new evidence is required." Smith contends that he pleaded guilty to a "nonexistent crime" because the captions for the counts in his indictment referred to the Penal Code instead of the Health and Safety Code, although the indictment cited the correct section number for the felony offense of fraudulent delivery of a controlled substance. *See Ex parte Smith*, 2016 Tex. App. LEXIS 11087, at *2 n.1 (noting that Smith did not pursue this contention in his first habeas application). In support of his contention, Smith relies on a case addressing federal habeas claims under title 28, section 2254 of the United States Code. *See McQuiggin v. Perkins*, 569 U.S. 383, 392 (2013) (providing that in "extraordinary" cases,"[a] credible showing of actual innocence may allow a prisoner to pursue his constitutional claims . . . on the merits notwithstanding the existence of a procedural bar to relief"); *see also* 28 U.S.C. § 2254 (addressing federal courts' review of certain habeas-corpus claims). Smith failed to show that the law on federal habeas claims applies to his habeas claim under Texas law. *See Ex parte Crook*, No. 08-08-00313-CR, 2010 Tex. App. LEXIS 5959, at *12 (Tex. App.—El Paso July 28, 2010, pet. ref'd) (not designated for publication) (concluding that case concerning habeas-corpus applications under title 28, section 2254 of United States Code was "not controlling" as to habeas-corpus application under article 11.072 of Texas Code of Criminal Procedure).

In the absence of any newly discovered or newly available evidence to support his actual-innocence claim—which Smith acknowledges he did not provide—we conclude that Smith cannot show his entitlement to habeas relief. *See Ex parte Elizondo*, 947 S.W.2d at 209; *Ex parte Brown*, 205 S.W.3d at 545. We overrule Smith's first issue.

Smith failed to raise complaint about his indictment in his prior habeas application

In his second issue, Smith complains that because the captions for each count of his indictment referred to the Penal Code instead of the Health and Safety Code, his indictment failed to allege a crime and that those captions "are misleading to a person of common understanding" and prejudiced him. Smith raised a similar argument in his motion to withdraw his guilty plea, in which he alleged that he pled guilty to a "nonexistent crime" because the heading of his indictment referred to the Penal Code instead of the Health and Safety Code. Smith did not pursue that contention in his first habeas application.

As we have noted, we may not consider the merits of a subsequent habeas application unless it contains sufficient specific facts establishing that: (1) the current claims and issues have not been and could not have been presented previously in an original application or in a previously considered application filed under this article (2) because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application. *See* Tex. Code Crim. Proc. art. 11.072, § 9(a). Smith fails to explain why he failed to raise this complaint about his indictment in his prior habeas application. We overrule Smith's second issue.

Smith failed to raise challenge to vagueness of statute in his prior habeas application

In his third issue, Smith contends that the statute under which he was indicted and convicted, section 481.129(c)(1) of the Health and Safety Code, is void for vagueness, both facially and as applied to him. Smith did not challenge the vagueness of the statute for his conviction in his first habeas application, and he provides no explanation why this challenge to the statute could not have been presented beforehand. *See id.* Further, the Texas Court of Criminal Appeals has held that

unless a statute has already been declared unconstitutional through a binding judicial determination, a person finally convicted of a criminal offense may not bring a facial constitutional challenge to the statute of his conviction for the first time in a post-conviction habeas proceeding. *Ex parte Beck*, 541 S.W.3d 846, 859-60 (Tex. Crim. App. 2017). The statute that Smith challenges in his second habeas application has not been declared unconstitutional. *Cf. id.* We overrule Smith's third issue.

CONCLUSION

We affirm the district court's order denying Smith's application for habeas corpus relief.

Jeff Rose, Chief Justice

Before Chief Justice Rose, Justices Goodwin and Field

Affirmed

Filed: May 24, 2018

Do Not Publish

ATTACHMENT

Report and Recommendation of United States Magistrate Judge, filed May 16, 2019, Cause No. 1: 18-CV-738-LY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

BARLOW SMITH,	§	
Petitioner,	§	
	§	
V.	§	**A-18-CV-00738-LY**
	§	
TERRY KENNEDY, Director, Burnet	§	
Community Supervision and Corrections,	§	
Respondent.	§	

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

TO: THE HONORABLE LEE YEAKEL
UNITED STATES DISTRICT JUDGE

The Magistrate Judge submits this Report and Recommendation to the District Court pursuant to 28 U.S.C. § 636(b) and Rule 1(e) of Appendix C of the Local Court Rules. Before the Court are Petitioner Barlow Smith's Application for Habeas Corpus Relief under 28 U.S.C. § 2254 (ECF No. 1), Respondent's Answer (ECF No. 16), and Petitioner's Reply (ECF No. 18). Petitioner is pro se and has paid the full filing fee in this matter. For the reasons set forth below, the undersigned finds the application for a writ of habeas corpus should be denied.

BACKGROUND

Respondent Terry Kennedy is the Director of Burnet County Community Supervision and Corrections. Smith is serving a term of community supervision imposed by the 424th District Court of Burnet County, Texas, pursuant to his conviction for fraudulent delivery of a controlled substance.

STATEMENT OF THE CASE

A. State Court Proceedings

Smith was indicted on January 7, 2014. (ECF No. 17-2 at 4). Smith's retained counsel entered an appearance on April 11, 2014, and withdrew on January 30, 2015. (ECF No. 17-2 at 9, 14-15). Smith, who was a doctor and a licensed attorney, elected to proceed pro se at trial. The following factual and procedural background was found by the Third Court of Appeals:

> Smith was charged by indictment with three counts of fraudulent delivery of a controlled substance. *See* Tex. Health & Safety Code § 481.129.[1] He proceeded to trial, but after a jury was empaneled and the State's evidence began, he decided to accept a plea bargain in which he pled guilty to the first count of the indictment and the State waived the remaining two counts. Smith stated on the record that he had read and understood his guilty plea; that he was a licensed attorney and understood the effect of the document; that he had signed it freely and voluntarily; that he had received all discovery; that he understood he was waiving his right to proceed with a jury trial, his right to file a motion for new trial, and his right to appeal; that the plea was in his best interest; that he "was in entire agreement with" allowing all trial exhibits to be returned and not retained by the court reporter; that he was not claiming to be incompetent; that he had not been forced, threatened, coerced, or promised anything other than the agreement to secure his plea of guilty; and that, "I'm pleading guilty because I am guilty." Based on these affirmations the district

[1] The indictment charged that, on two separate occasions, Smith provided a prescription for phentermine (a potentially addictive appetite-suppressant similar to an amphetamine) to two different individuals, and also alleged he provided one of those individuals a prescription for hydrocodone on a third date. (ECF No. 17-2 at 4-5). In a Notice of Intention to Use Extraneous Offenses, Prior Convictions, and Bad Acts, the State alleged Smith had prescribed drugs to 13 named individuals without examination "throughout course of his practice;" delivered drug prescriptions for other than a valid medical purpose in the course of his professional practice; pre-signed blank prescriptions "throughout course of his practice" in Burnet, Llano, San Saba, and Blanco counties; and engaged in sexual activity with three patients during the course of his professional practice in Burnet, Llano, San Saba, and Blanco counties. (ECF No. 17-2 at 1-12). In a second notice the State further alleged Smith failed to practice medicine in an acceptable professional manner; failed to safeguard against potential complications; prescribed dangerous drugs without first establishing a proper professional relationship with the patient; wrote prescriptions for or dispensed prescriptions to persons he knew or should have known were abusing dangerous drugs or controlled substances; had his license to practice medicine in New York revoked; was sanctioned by the Texas Medical Board for professional misconduct in 2009, 2011, and 2014, and had his Texas medical license suspended in 2014. (ECF No. 17-2 at 40-45). In a supplemental notice the State revealed its intent to introduce evidence Smith engaged in offensive touching of an 18 year-old girl, and solicited a murder in 2011. (ECF No. 17-2 at 52).

> court accepted Smith's plea, ordered a presentence investigation, and set a sentencing hearing for the following month. One week before sentencing, Smith filed a motion to withdraw his guilty plea, alleging that he provided himself with ineffective assistance of counsel. The court denied Smith's motion and sentenced him to five years' imprisonment, suspending imposition of the sentence, and placing him on community supervision for ten years. The court ordered Smith to spend fifteen days in the Burnet County Jail as a condition of his community supervision.
>
> Smith then filed an application for writ of habeas corpus contending, as he did in his motion to withdraw his guilty plea, that he provided himself with ineffective assistance of counsel because he was on prescription medication for asthma that impaired his thinking. The trial court denied the application and issued findings of fact stating that Smith's ineffective assistance allegations were unfounded, that his plea was freely and voluntarily made, and that his application as a whole was frivolous.

Ex parte Smith, No. 03-16-00048-CR, 2018 WL 2347012, at *1 (Tex. App.–Austin 2018, pet. ref'd). Smith appealed the denial of habeas relief, asserting he "provided himself with ineffective assistance of counsel." *Id.* at *2. He also argued the habeas trial court erred by not considering evidence outside the record supporting his claims of ineffective assistance. *Id.* at *1. The Third Court of Appeals affirmed the denial of state habeas relief, and the Court of Criminal Appeals denied a petition for discretionary review. *Id.* at *2.

Smith filed a second application for state habeas relief asserting a claim of actual innocence, challenging the indictment as failing to allege a crime, and contending Texas Health & Safety Code § 481.129(c) was void for vagueness. *Id.* at *1. The trial court denied relief, finding all of Smith's claims "unfounded." *Id.* at *2. Smith appealed the trial court's denial of habeas relief. The Third Court of Appeals denied Smith's claim of actual innocence because he did not provide any newly discovered or newly available evidence to support the claim. *Id.* at *3. The appellate court found his claim regarding the indictment procedurally defaulted and his claim regarding the constitutionality

of Texas Health & Safety Code § 481.129 procedurally defaulted and without merit. *Id.* at *3-4. The Court of Criminal Appeals denied a petition for discretionary review. (ECF No. 17-31).

B. Smith's Federal Habeas Claims

In his federal habeas petition Smith asserts he is entitled to federal habeas relief because he is actually innocent. Smith alleges the "entirety" of the evidence against him is "five audio-visual discs" showing his contact with undercover officers, and that the discs "show no criminal conduct of any kind." (ECF No. 1 at 5). Broadly construing his pleadings, Smith further asserts insufficiency of the indictment and that Texas Health & Safety Code § 481.129 is unconstitutionally vague. (ECF No. 1-2 at 16, 19, 21).

ANALYSIS

A. The Antiterrorism and Effective Death Penalty Act of 1996

The Supreme Court summarized the basic principles established by the Court's many cases interpreting the 1996 Antiterrorism and Effective Death Penalty Act ("AEDPA") in *Harrington v. Richter*, 562 U.S. 86, 97-100 (2011). Section 2254(d) permits the granting of federal habeas relief when the state court's decision "was contrary to" federal law as clearly established by the holdings of the Supreme Court; when the state court's decision involved an "unreasonable application" of such law; or when the decision "was based on an unreasonable determination of the facts" in light of the record before the state court. *Id.* at 100. Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law, or if the state court decides a case differently than the Supreme Court on a set of materially indistinguishable facts. *Thaler v. Haynes*, 559 U.S. 43, 47 (2010); *Mitchell v. Esparza*, 540 U.S. 12, 16 (2003). Under the unreasonable application clause of § 2254(d), a federal

court may grant the writ if the state court identifies the correct governing legal principle from the Supreme Court's decisions, "but unreasonably applies that principle to the facts of the prisoner's case." *Dowthitt v. Johnson*, 230 F.3d 733, 741 (5th Cir. 2000) (quotation marks and citation omitted).

B. Merits

1. Actual innocence

Smith asserts his "actual innocence" of the crime of conviction. He alleges:

> . . . the recordings of the patient-imposters with [Smith] are entirely bland; there is no evidence in the recordings of their consultations with [Smith] of other money changing hands; the patient-imposters paid in advance for and received a medical evaluation; that there were no offers of money or sex for drugs, admissions of addiction, pleas to assuage craving or withdrawal from drugs, very high doses of controlled substances nor issuing of multiple prescriptions to be filled each at a different pharmacy, or inappropriate behavior by [Smith] inconsistent with valid medical purpose nor implications that [Smith] was part of a criminal enterprise designed to amass drugs; that the video of both patient-imposter encounters shows that [Smith's] behavior was at all times serious, professionally appropriate and devoid of artifice; that there was no conspiratorial whispering, bargaining for drugs, physical contact, inappropriate gesture or exchange of money for drugs.

(ECF No. 1-2 at 4). Smith raised a claim of actual innocence in his second state habeas action. The state habeas trial court, which was also the convicting court, found this claim "unfounded" and procedurally barred. (ECF No. 17-23 at 123). The Third Court of Appeals denied the claim on appeal.

The controlling United States Supreme Court precedent is stated in *Herrera v. Collins*, 506 U.S. 390, 400 (1993): "Claims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding." Smith argues the Supreme Court has

recognized a free-standing claim of actual innocence, citing *House v. Bell*, 547 U.S. 518, 126 S. Ct. 2064 (2006). However, in *House* the Supreme Court explicitly *declined* to recognize a free-standing federal claim of actual innocence. 547 U.S. at 554-55. Because a free–standing claim of actual innocence is not cognizable on federal habeas review, this claim must be denied.

2. Indictment

Smith argues he was denied due process because the specific acts alleged in the indictment did not constitute a crime and because the indictment failed to specify the illegal purpose for which Smith allegedly wrote the prescriptions. (ECF No. 1-2 at 4-6, 16-17). The Third Court of Appeals found this claim procedurally barred when presented in Smith's second state habeas action because it was not raised in his first state habeas action. The state court's application of a procedural bar precludes the Court's review of the merits of Smith's claim of an infirm indictment. *Brewer v. Quarterman*, 466 F.3d 344, 347 (5th Cir. 2006); *Soria v. Johnson*, 207 F.3d 232, 249, n.23 & n.24 (5th Cir. 2000). The only exception allowing the Court to reach the claim requires that Smith show "cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). The "fundamental miscarriage of justice" exception applies when the petitioner presents "new" evidence establishing their factual innocence. *Schlup v. Delo*, 513 U.S. 298, 327 (1995); *Fairman v. Anderson*, 188 F.3d 635, 644 (5th Cir. 1999).

Smith asserts the audio-visual records are "new evidence" establishing his innocence because the trial was terminated prior to the introduction of the videos. (ECF No. 1-2 at 3; ECF No. 18 at 3). The Fifth Circuit Court of Appeals recently held evidence does not qualify as "new" if the evidence was "'always within the reach of [the petitioner's] personal knowledge or reasonable investigation.'"

Hancock v. Davis, 906 F.3d 387, 390 (5th Cir. 2018) (quoting *Moore v. Quarterman*, 534 F.3d 454, 465 (2008)). The record indicates the audio-visual recordings were within Smith's personal knowledge at the time of the trial and, therefore, the recordings do not constitute newly discovered or newly available evidence. Smith has not shown cause for or prejudice arising from his default of this claim, and he has not produced "new" evidence establishing his factual innocence. Because this claim is procedurally barred, habeas relief on this claim must be denied.

3. Unconstitutionally vague statute

Smith contends Texas Health & Safety Code § 481.129(c)(1) is void for vagueness. The Third Court of Appeals found this claim both procedurally barred and without merit. Even when a state court finds a claim procedurally barred, but then reaches the merits of that claim in the alternative, the state court's reliance on the procedural default still constitutes an independent and adequate ground which bars federal habeas review. *Harris v. Reed*, 489 U.S. 255, 264 & n.10 (1989); *Cotton v. Cockrell*, 343 F.3d 746, 754 (5th Cir. 2003); *Corwin v. Johnson*, 150 F.3d 467, 473 (5th Cir. 1998). Smith fails to show adequate cause for, or prejudice arising from, his procedural default of this claim, and he has not established a fundamental miscarriage of justice. Because this claim is procedurally barred, habeas relief on this claim must be denied.

RECOMMENDATION

It is therefore **RECOMMENDED** that the Application for Writ of Habeas Corpus be **DENIED.**

CERTIFICATE OF APPEALABILITY

An appeal may not be taken from a final order in a habeas corpus proceeding "unless a circuit justice or judge issues a certificate of appealability." 28 U.S.C. § 2253(c) (1)(A). Pursuant to Rule 11

of the Federal Rules Governing Section 2254 Cases, the district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. A certificate of appealability may issue only if a petitioner has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). The Supreme Court fully explained the requirement associated with a "substantial showing of the denial of a constitutional right" in *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). In cases where a district court rejected a petitioner's constitutional claims on the merits, "the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.* "When a district court denies a habeas petition on procedural grounds without reaching the petitioner's underlying constitutional claim, a certificate of appealability should issue when the petitioner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.*

In this case, reasonable jurists could not debate the denial of Smith's section 2254 petition on substantive or procedural grounds, nor find that the issues presented are adequate to deserve encouragement to proceed. *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003) (citing *Slack*, 529 U.S. at 484). Accordingly, it is respectfully recommended that the Court shall not issue a certificate of appealability.

OBJECTIONS

The parties may file objections to this Report and Recommendation. A party filing objections must specifically identify those findings or recommendations to which objections are being made. The District Court need not consider frivolous, conclusive, or general objections. *Battles v. United*

States Parole Comm'n, 834 F.2d 419, 421 (5th Cir. 1987). A party's failure to file written objections to the proposed findings and recommendations contained in this Report within fourteen (14) days after the party is served with a copy of the Report shall bar that party from de novo review by the district court of the proposed findings and recommendations in the Report and, except upon grounds of plain error, shall bar the party from appellate review of unobjected-to proposed factual findings and legal conclusions accepted by the district court. *See* 28 U.S.C. § 636(b)(1)(C); *Thomas v. Arn*, 474 U.S. 140, 150-153 (1985); *Douglass v. United Servs. Auto. Assoc.*, 79 F.3d 1415 (5th Cir. 1996) (en banc).

SIGNED this 5th day of February, 2019.

ANDREW W. AUSTIN
UNITED STATES MAGISTRATE JUDGE

ATTACHMENT

ORDERED that the Motion for Reconsideration is Denied, No. 19-50487, USCA 5, filed January 27, 2020

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 19-50487

BARLOW SMITH,

Petitioner - Appellant

v.

TERRY KENNEDY, Director, Community Supervision and Corrections Department,

Respondent - Appellee

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

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Before SMITH, COSTA, and HO, Circuit Judges.

PER CURIAM:

IT IS ORDERED that Smith's motion for leave to file out of time the motion for reconsideration is GRANTED. A member of this panel previously denied appellant's motion for a certificate of appealability. The panel has considered appellant's motion for reconsideration.

IT IS FURTHER ORDERED that the motion for reconsideration is DENIED.