

***United States Court of Appeals***

FIFTH CIRCUIT  
OFFICE OF THE CLERK

LYLE W. CAYCE  
CLERK

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March 25, 2020

Mr. David J. Bradley  
Southern District of Texas, Galveston  
United States District Court  
601 Rosenberg  
Room 411  
Galveston, TX 77550-0000


No. 19-40198      Paul Crayton v. Lorie Davis, Director  
USDC No. 3:16-CV-101

Dear Mr. Bradley,

Enclosed is a copy of the judgment issued as the mandate.

Sincerely,

LYLE W. CAYCE, Clerk



By: \_\_\_\_\_  
Shawn D. Henderson, Deputy Clerk  
504-310-7668

cc w/encl:

Mr. Paul Anthony Crayton  
Ms. Elizabeth Alisse Goettert

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

\_\_\_\_\_  
No. 19-40198  
\_\_\_\_\_



A True Copy  
Certified order issued Mar 25, 2020

*Jeff W. Cayer*  
Clerk, U.S. Court of Appeals, Fifth Circuit

PAUL ANTHONY CRAYTON,

Petitioner-Appellant

v.

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

Respondent-Appellee


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

ORDER:

Paul Anthony Crayton, Texas prisoner # 1886839, was convicted by a jury of murder and aggravated assault with a deadly weapon, and he received sentences of 75 and 20 years, respectively. He now seeks a certificate of appealability (COA) to appeal the district court's denial of his 28 U.S.C. § 2254 petition challenging these convictions. Crayton contends that he was deprived of his Sixth Amendment right to an impartial jury after a local newspaper published an article about his case on the morning of voir dire, which contained inaccurate information. In addition, he maintains that the denial of two defense motions for a mistrial on the basis of the pretrial publicity constituted an abuse of discretion and a denial of due process.

To obtain a COA, Crayton 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). He will satisfy 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). To the extent that the district court rejected his claims on the merits, Crayton “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. Because the district court also dismissed claims on procedural grounds, Crayton must show “that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Slack*, 529 U.S. at 484.

Crayton has not made the requisite showing. Accordingly, his motion for a COA is DENIED. Crayton’s motion for appointment of counsel on appeal is likewise DENIED.

  
\_\_\_\_\_  
GREGG J. COSTA  
UNITED STATES CIRCUIT JUDGE

**ENTERED**

February 22, 2019

David J. Bradley, Clerk

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
GALVESTON DIVISIONPAUL ANTHONY CRAYTON,  
TDCJ #1886839

Petitioner,

VS.

LORIE DAVIS,

Respondent.

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CIVIL ACTION NO. 3:16-CV-0101

**MEMORANDUM OPINION AND ORDER**

State inmate Paul Anthony Crayton, who proceeds *pro se*, has filed a petition for a federal writ of habeas corpus (Dkt. 1) and a supporting memorandum (Dkt. 2) seeking relief from a state court conviction. Respondent Lorie Davis filed a motion for summary judgment (Dkt. 17) and a copy of the state court records (Dkt. 15, Dkt. 16). Petitioner has not filed a response to the summary judgment motion, and the time to do so has expired. The motion is ripe for decision. Having now considered the petition, briefing, all matters of record, and the applicable legal authorities, the Court determines that summary judgment should be **granted** for Respondent and that the petition should be **dismissed**.

**I. BACKGROUND****A. Procedural Background**

Petitioner Crayton is serving a 75-year sentence for murder and a concurrent 20-year sentence for aggravated assault. Crayton was tried before a jury in the 212th

Judicial District Court for Galveston County, Texas, Hon. Susan E. Criss presiding. *See* Dkt. 16-26, at 38-41 (Judgment, Case No. 11-CR-2593 (murder)); Dkt. 16-29, at 38-41 (Judgment, Case No. 11-CR-2594 (aggravated assault)).<sup>1</sup> The Court entered judgment and sentence on October 24, 2013.

Crayton appealed both convictions to the Fourteenth Court of Appeals, Cases No. 14-13-01021-CR and No. 14-13-01022-CR. On February 24, 2015, the appellate court affirmed in both cases. *Crayton v. State*, 463 S.W.3d 531 (Tex. App.–Hou. [14th Dist.] Feb. 24, 2015, no pet.); *see* Dkt. 16-19. Crayton did not file a petition for discretionary review with the Texas Court of Criminal Appeals.

Crayton then filed a *pro se* state habeas applications for each conviction. Each application was docketed with the trial court on February 9, 2016. *See* Dkt. 16-26, at 3-20 (WR-84,666-01 (murder)); Dkt. 16-29, at 3-21 (WR-84,666-02 (aggravated assault)). On February 17, 2016, the trial court entered Findings of Fact and Conclusions of Law recommending that relief be denied (Dkt. 16-26, at 33-34; Dkt. 16-29, at 33-34). On March 30, 2016, the Texas Court of Criminal Appeals denied both applications on the trial court's findings without written order (Dkt. 16-24; Dkt. 16-27).

On April 12, 2016, Petitioner timely executed a *pro se* petition for writ of habeas corpus (Dkt. 1) in these proceedings.

**B. Factual Background**

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<sup>1</sup> Throughout this Memorandum, the Court's citations to specific pages in the record refer to the pagination of docket entries on the Court's electronic case filing ("ECF") system.

Petitioner was convicted for the murder of James Martin and for aggravated assault of Derrick Yell. The appellate court summarized the facts as follows:

Appellant Paul A. Crayton shot complainant James Martin several times in the parking lot of the Bourbon Street Bar. Appellant then re-entered the bar. Complainant Derrick Yell ran to the restroom and barricaded himself against the door. Appellant tried, but failed to push the door open and so resorted to firing shots through the door. Appellant then fled. On the way out of the bar, appellant fired additional shots at Martin, who lay wounded on the ground. Martin died.

Appellant was indicted for Martin's murder and for the aggravated assault with a deadly weapon of Yell. Appellant pleaded "not guilty" to each charge.

At trial by jury, appellant admitted to the conduct, but claimed he acted in self-defense. Appellant testified that he had conversations with Martin and Yell on two occasions before the incident at the Bourbon Street Bar. According to appellant, in the first conversation, Martin accused appellant of lying; in the second conversation, Martin accused appellant of threatening to harm Martin or one of Martin's family members and Martin threatened to retaliate. Appellant testified that when he arrived at Bourbon Street Bar, he saw Martin and Yell whispering to each other and appellant thought that Martin and Yell looked like they were going to harm him. Appellant testified that outside the bar, Martin pulled a gun and appellant shot him. According to appellant, appellant went back into the bar because he knew that Yell would harm him. On the way out, according to appellant, Martin was still fumbling with his gun and so appellant shot him as appellant left.

Yell testified that he had encountered appellant before the incident at Bourbon Street Bar and on that previous occasion appellant had stated that he thought Martin and Yell had "snitched" on him and informed federal authorities that appellant had committed crimes related to drug use and distribution. A patron of the bar who had known appellant since appellant was a child and who had purchased appellant a beer that evening, testified that appellant informed him that some individuals in that bar were going to die that evening. After the shooting, appellant evaded authorities for months. When appellant was finally arrested, he immediately stated to the arresting officer, "You finally got me."

*Crayton*, 463 S.W.3d at 533-34.

On October 15, 2013, the day that voir dire proceedings for Crayton's trial began, the Galveston Daily News published an article about the case (Dkt. 16-9, at 36-38) (the "Article"). The Article was on the front page, above the fold, and was accompanied by a photo of Crayton (*id.* at 36-37). It reported that, during pretrial proceedings the day before, Judge Criss had granted the defense's motion to suppress a firearm seized during the homicide investigation.<sup>2</sup> The Article also reported that the judge was considering a motion to suppress what prosecutors called a "kill list," which had names of nineteen persons whom Crayton purportedly had wanted to kill (*id.* at 38). According to the Article, one prosecutor had stated that the "kill list" contained the name of the murder victim and that the name was "scratched through" (*id.*). In court on October 15, the prosecutor stated that the victim's name in fact was not scratched through and that her representation on the previous day had been in error (Dkt. 15-15, at 5).

At voir dire, before any venire members were questioned, defense counsel moved for a mistrial based on the Article (*id.* at 63-64). The court denied the motion but stated that the potential jurors would be questioned about their exposure to the Article (*id.* at 65). The judge then called the panel in, instructed them generally about why jurors'

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<sup>2</sup> The Article also contained detail about how law enforcement had found the suppressed firearm. *See id.* at 38 ("Police searched for Crayton for months, finally arresting him Sept. 7 in Houston. Two days after Crayton's arrest, a detective went to the Galveston County Jail and searched his cellphone without a warrant . . . A detective testified he found the names of 10 people on Crayton's phone. One of them led to the discovery of a woman, who . . . allowed police to search her residence, and officers seized a bag which contained a firearm, testimony revealed. The firearm was tested, but there was no further testimony Monday about how the firearm related to the case.")

exposure to media coverage could be problematic, and informed the panel that the attorneys would be asking them questions (*id.* at 67-68). Upon examination, twelve venire members (No. 9, No. 24, No. 25, No. 30, No. 33, No. 50, No. 62, No. 68, No. 69, No. 72, No. 75, No. 79) indicated some exposure to the Article (*id.* at 68-78). Of the twelve, several said that, based on the Article, their mind had been made up (*see, e.g., id.* at 71-73 (No. 24, No. 30, and No. 33)). The entire venire panel was present for the questioning of the venire members who had seen the Article and heard some say that it had influenced them. However, the questioning did not disclose any information from the Article (*id.* at 68-78).

At the bench, out of the venire panel's hearing, defense counsel made a second motion for mistrial "based on the comments the jurors have made" and specifically cited to Venireperson No. 33's statement that defense counsel would have to do a "really good job to change his mind" (*id.* at 74). The court denied the motion, stating, "[A]t this point it's denied" (*id.*).

None of the twelve venire persons who had been exposed to the Article were seated on the jury. *See* Dkt. 15-3, at 10-19 (strike lists); *id.* at 20 (jury list). After the jurors were sworn in, the judge gave them additional instructions not to take information from the internet, television, newspapers, social media, "or elsewhere," and not to discuss the case or listen to anyone discussing it (Dkt. 15-17, at 7). She further instructed them that any juror should tell her immediately if "you know of or learn of anything about the case except from the evidence admitted during the course of the trial" (*id.* at 6).



On direct appeal, Crayton raised the issue of adverse pretrial publicity from the Article, among other issues. The appellate court held that the trial court had not abused its discretion in denying either motion for mistrial (Dkt. 16-19, at 8-12). Regarding the first motion, the court affirmed the denial because at the time of the motion no venire members had been questioned about exposure to the Article, and thus “there was no evidence that any venire member had read the article, let alone been influenced by its contents” (*id.* at 10) (citing *Ocon v. State*, 284 S.W.3d 880, 885 (Tex. Crim. App. 2009)). Regarding the second motion, the court held that the trial court did not err in denying the motion based on Venireperson No. 33’s responses because the juror’s statement “did not rise to the level of an ‘extreme circumstance’ that was ‘incurable’” (*id.* at 11 (citing *Ocon*, 284 S.W.3d at 884; *Logan v. State*, 698 S.W.2d 680, 683-84 (Tex. Crim. App. 1985))).

The appellate court declined to address Petitioner’s claim under the Sixth Amendment, holding that Petitioner’s counsel had failed to preserve Sixth Amendment error at trial and limiting its review to trial counsel’s motions for mistrial. *See id.* at 7-8 (citing TEX. R. APP. P. 33.1(a); *Austin v. State*, 222 S.W.3d 801, 811 (Tex. App.—Hou. [14th Dist.] 2007, pet. ref’d)). One appellate judge wrote a separate concurrence opining that Crayton’s counsel had preserved the broader Sixth Amendment argument (Dkt. 16-20, at 2-5).<sup>3</sup> However, the concurrence ultimately concluded that Crayton’s Sixth

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<sup>3</sup> *See id.* at 4-5 (“At the time of the second motion, [defense] counsel knew that at least five veniremembers had seen the [Article] and four of them were biased against appellant as a direct result of the [A]rticle. Counsel referenced the comments of the ‘jurors’ (plural) when the

Amendment claim lacked merit because, among other factors, all venirepersons exposed to the Article had been struck from the panel and the judge had provided adequate instructions to the seated jurors (*id.* at 5-7 (citing *Gonzalez v. State*, 222 S.W.3d 446 (Tex. Crim. App. 2007); *Esquivel v. State*, 595 S.W.2d 516 (Tex. Crim. App. 1980); *Henley v State*, 576 S.W.2d 66 (Tex. Crim. App. 1978))).

Crayton filed a state habeas application for each conviction. Both applications raised the same two issues: (1) the Article had prejudiced the members of his venire and (2) he had been denied a fair trial before an impartial jury because the panel had been prejudiced by the Article but the judge twice denied a mistrial (Dkt. 16-26, at 3-20; Dkt. 16-29, at 3-21). The trial court issued Findings of Fact and Conclusions of Law recommending that habeas relief be denied. In its entirety, the Court's analysis for each application read:

This Trial Court, having reviewed the application for writ of habeas corpus pursuant to article 11.07 of the Texas Code of Criminal Procedure, finds that there is ample evidence in the record to rule on the relief sought. Therefore, there is no need for a fact-finding hearing.

The Trial Court further finds that pursuant to art. 11.07, sec. 3(c), C.C.P., there are no controverted, unresolved facts which are material to the legality of the Applicant's confinement, and that Applicant's claims have no legal merit. This Trial Court recommends that relief be denied.

(Dkt. 16-26, at 33-34; Dkt. 16-29, at 33-34). The Texas Court of Criminal Appeals denied both writ applications on the trial court's findings without written order (Dkt. 16-24; Dkt. 16-27).

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motion was made . . . Counsel used the example of the last veniremember to support the motion, but the motion was not focused on that one comment alone").

## II. LEGAL STANDARDS

### A. Pro Se Pleadings

Federal courts do not hold *pro se* habeas petitions “to the same stringent and rigorous standards as . . . pleadings filed by lawyers.” *Hernandez v. Thaler*, 630 F.3d 420, 426 (5th Cir. 2011) (internal quotation marks and citation omitted). “The filings of a federal habeas petitioner who is proceeding *pro se* are entitled to the benefit of liberal construction.” *Id.*

### B. The Anti-Terrorism and Effective Death Penalty Act

This federal petition for habeas corpus relief is governed by the applicable provisions of the Anti-Terrorism and Effective Death Penalty Act (“AEDPA”). *See Woodford v. Garceau*, 538 U.S. 202, 205-08 (2003); *Lindh v. Murphy*, 521 U.S. 320, 335-36 (1997). Under the AEDPA, federal habeas relief based upon claims that were adjudicated on the merits by the state courts cannot be granted unless the state court’s decision (1) “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) “was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” 28 U.S.C. § 2254(d); *Early v. Packer*, 537 U.S. 3, 7-8 (2002); *Cobb v. Thaler*, 682 F.3d 364, 372-73 (5th Cir. 2012).

Federal courts look to the “last reasoned opinion” as the state court’s “decision.” *Salts v. Epps*, 676 F.3d 468, 479 (5th Cir. 2012); *see Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018). “Where a state court’s decision is unaccompanied by an explanation,” and

the lower courts did not issue a reasoned opinion, “the habeas petitioner’s burden still must be met by showing there was no reasonable basis for the state court to deny relief.” *Harrington v. Richter*, 526 U.S. 86, 98 (2011); see *Johnson v. Williams*, 568 U.S. 289, 293 (2013) (holding that there is a rebuttable presumption that the federal claim was adjudicated on the merits when the state court addresses some claims, but not others, in its opinion).

Review under the AEDPA is “highly deferential” to the state court’s decision. *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam). To merit relief under AEDPA, a petitioner may not merely show legal error in the state court’s “decision.” *White v. Woodall*, 517 U.S. 415, 419 (2014) (stating being “merely wrong” or in “clear error” will not suffice federal relief under AEDPA). AEDPA review exists only to “guard against extreme malfunctions in the state criminal justice systems.” *Woods v. Donald*, 135 S. Ct. 1372, 1376 (2015) (internal citation and quotation marks omitted). “[F]ocus[ing] on what a state court knew and did,” *Cullen v. Pinholster*, 563 U.S. 170, 182 (2011), AEDPA requires inmates to “show that the state court’s ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.” *Woodall*, 572 U.S. at 419-20 (quoting *Richter*, 562 U.S. at 103). “If this standard is difficult to meet, that is because it was meant to be.” *Richter*, 562 U.S. at 102.

For questions of law or mixed questions of law and fact adjudicated on the merits in state court, this Court may grant habeas relief under 28 U.S.C. § 2254(d)(1) only if the

state court decision “was contrary to, or involved an unreasonable application of, clearly established” Supreme Court precedent. *See Kittelson v. Dretke*, 426 F.3d 306, 318 (5th Cir. 2005). Under the “contrary to” clause, this Court may afford habeas relief if the state court “reaches a legal conclusion in direct conflict with a prior decision of the Supreme Court or if it reaches a different conclusion than the Supreme Court on materially indistinguishable facts.” *Matamoros v. Stephens*, 783 F.3d 212, 215 (5th Cir. 2015) (internal quotation marks and citations omitted). To constitute an “unreasonable application” of clearly established federal law, the state court’s determination “must be objectively unreasonable, not merely wrong; even clear error will not suffice.” *Woods*, 135 S. Ct. at 1376 (internal citation and quotation marks omitted).

On factual issues, the AEDPA precludes federal habeas relief unless the state court’s adjudication of the merits was based on an “unreasonable determination of the facts in light of the evidence presented in the state court proceeding.” *See* 28 U.S.C. § 2254(d)(2); *Martinez v. Caldwell*, 644 F.3d 238, 241-42 (5th Cir. 2011).

### **C. Summary Judgment Standard in Habeas Corpus Proceedings**

In ordinary civil cases, a district court considering a motion for summary judgment is required to construe the facts of the case in the light most favorable to the non-moving party. *See Anderson v. Liberty Lobby*, 477 U.S. 242, 255 (1986). “As a general principle, Rule 56 of the Federal Rules of Civil Procedure, relating to summary judgment, applies with equal force in the context of habeas corpus cases.” *Clark v. Johnson*, 202 F.3d 760, 764 (5th Cir. 2000). However, AEDPA modifies summary

judgment principles in the habeas context, and Rule 56 “applies only to the extent that it does not conflict with the habeas rules.” *Smith v. Cockrell*, 311 F.3d 661, 668 (5th Cir. 2002), *overruled on other grounds by Tennard v. Dretke*, 542 U.S. 274 (2004); *see Torres v. Thaler*, 395 F. App’x 101, 106 n.17 (5th Cir. 2010). “Therefore, § 2254(e)(1)—which mandates that findings of fact made by a state court are presumed to be correct—overrides the ordinary summary judgment rule that all disputed facts must be construed in the light most favorable to the nonmoving party.” *Smith*, 311 F.3d at 668.

### III. ANALYSIS

Crayton’s federal petition lists four claims for relief, all of which concern the venirepersons’ exposure to the Article: (1) his voir dire proceedings were improperly influenced by the Article regarding a suppressed firearm and a “kill list,” which twelve venirepersons saw or heard about; (2) he was denied a fair trial with an impartial jury when some venire members answered questions about the Article in front of the entire venire panel and a mistrial was denied; (3) the trial court improperly denied trial counsel’s motion for a mistrial based on prejudice to the Petitioner from the Article; and (4) his trial was tainted by a “constitutional violation” because the prosecution was responsible for the adverse publicity, which was not cured by the judge’s instructions (Dkt. 1, at 6-7). His four arguments will be addressed as two issues: first, that he was denied his Sixth Amendment right to a fair trial before an impartial jury (Claims 1, 2, and 4); and second, that the trial court erred when denying his motions for a mistrial (Claims 2 and 3).

**A. Sixth Amendment Claim**

Petitioner claims that he was deprived of his Sixth Amendment right to a fair trial because twelve venirepersons were exposed to the Article and thus prejudiced against him, and because the entire panel (including members eventually seated on the jury) heard comments from venirepersons who had been exposed to the Article. He further argues that the judge's instructions did not cure the prejudice. In his memorandum, Petitioner states that he is raising the broader Sixth Amendment argument identified by the concurring opinion on direct appeal (Dkt. 2, at 1). Petitioner mostly tracks the analysis in the concurring opinion but then reaches the opposite conclusion, arguing that the factors identified in the opinion weighed in favor of granting a mistrial (*id.* at 4-7).

The Sixth Amendment guarantees a criminal defendant the right to a fair trial before an impartial jury. *Skilling v. U.S.*, 561 U.S. 358, 377 (2010); *Mayola v. State of Ala.*, 623 F.2d 992, 996 (5th Cir. 1980). The Supreme Court has held that juror impartiality does not require that jurors be ignorant of the facts or issues involved. *Skilling*, 561 U.S. at 381 (“scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case” (quoting *Irvin v. Dowd*, 366 U.S. 717, 722 (1961))). Rather, a defendant seeking relief due to adverse pretrial publicity “ordinarily must demonstrate an actual, identifiable prejudice attributable to that publicity on the part of members of his jury.” *Mayola*, 623 F.2d at 996. If a juror has a “preconceived notion” as to the accused, but can nevertheless render a verdict based on the evidence, the juror is sufficiently impartial:

To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

*U.S. v. Lipscomb*, 299 F.3d 303, 344 (5th Cir. 2002) (internal quotation marks and citations omitted). Even in cases of “inflammatory” pretrial publicity that “saturates” a community, raising a presumption of prejudice to the defendant, the prosecution “can usually rebut this presumption through voir dire that ferrets out such prejudice.” *Id.* (discussing *Rideau v. Louisiana*, 373 U.S. 723 (1963)).

Respondent argues that some of Petitioner's Sixth Amendment claims are procedurally barred because they are “based upon objections to or comments made by venire members other than number 33.” *See* Dkt. 17, at 10 n. 2. Federal habeas review is procedurally defaulted if a state court “clearly and expressly bases its dismissal of a prisoner's claim on a state procedural rule, and that procedural rule provides an independent and adequate ground for dismissal.” *Rocha v. Thaler*, 626 F.3d 815, 820 (5th Cir. 2010) (internal quotation marks and citation omitted). As stated above, the appellate court held that Petitioner had failed to preserve error beyond the arguments raised in his two motions for mistrial, basing its holding on Texas Rule of Appellate Procedure 33.1(a). *See* Dkt. 16-19, at 8 (citing TEX. R. APP. P. 33.1(a); *Austin*, 222 S.W.3d at 811).<sup>4</sup> Because this ruling was based on an independent and adequate state

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<sup>4</sup> The state habeas court did not enter an order explaining its reasoning for denying relief on this claim. *See* Dkt. 16-26, at 33-34 (on habeas review, state trial court determined without elaboration that “there are no controverted, unresolved facts which are material to the legality of the Applicant's confinement, and that Applicant's claims have no legal merit”); Dkt. 16-29, at



ground, it bars federal review of those claims that the appellate court dismissed as unpreserved.

In any event, Petitioner's Sixth Amendment argument lacks merit. The fact that some venirepersons had formed an impression based on the Article is insufficient to show a violation of Petitioner's Sixth Amendment rights. As stated above, no member of the panel who had been exposed to the Article actually served on the jury. A claim that a jury was not impartial "must focus . . . on the jurors who ultimately sat." *Ross v. Okla.*, 487 U.S. 81, 85-86 (1988); *see Jones v. Dretke*, 375 F.3d 352, 356 (5th Cir. 2004); *Mayola*, 623 F.2d at 996. Moreover, to the extent Petitioner argues that the seated jurors, none of whom had seen or heard about the Article, were influenced when they heard the attorneys question other venirepersons about the Article, mere exposure to publicity is insufficient to demonstrate a constitutional violation. *See Skilling*, 561 U.S. at 381 (ignorance of the facts or issues involved is not required). Petitioner does not identify any seated jurors who purportedly were prejudiced, and identifies no reason why the voir dire in this case was not sufficient to ensure jurors who would "render a verdict based on the evidence presented in court." *See Lipscomb*, 299 F.3d at 344; *U.S. v. Beckner*, 69 F.3d 1290, 1291-92 (5th Cir. 1995).

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33-34 (same). Therefore, the Court looks to the appellate opinion as the "last reasoned opinion" on the issue. *See Wilson*, 138 S. Ct. 1194-95 ("where, as here, the last reasoned opinion on the claim explicitly imposes a procedural default, we will presume that a later decision rejecting the claim did not silently disregard that bar and consider the merits," quoting *Ylst v. Nunnemaker*, 510 U.S. 797, 803 (1991)); *Caldwell v. Davis*, \_\_\_ F. App'x \_\_\_, 2018 WL 6600968, at \*3 (5th Cir. Dec. 13, 2018) (looking through state habeas proceedings to "last reasoned opinion," which was issued on direct review).

For all of the foregoing reasons, Petitioner has failed to demonstrate that the state appellate court, which issued the last reasoned opinion on his claims, made a determination was contrary to clearly established federal law or an unreasonable application of the law to the facts of his case. *See* 28 U.S.C. § 2254(d). Habeas relief therefore is denied.

**B. Mistrial Rulings**

Petitioner also argues that habeas relief is warranted because the trial court erred when it denied his counsel's two motions for a mistrial based on the Article. His second and third grounds for relief state as follows:

Fair Trial with Impartial Jury Denied[:] Some voir[] dire members admitted reading the newspaper the morning of voir[] dire and w[ere] question[ed] by the trial judge after that she instructed the panel members not to discuss the article but some had admitted to that already in front of the whole panel [and] also what they thought about defendant's guilt or innocence. Mistrial denied.

Motion for Mistrial Denied[:] Defense counsel stated that defendant could not receive a fair trial after a prejudiced newspaper article was presented. Defense counsel offered the article into evidence stated grounds for objection and ask[ed] for mistrial and was denied.

(Dkt. 1, at 6-7; *see* Dkt. 2, at 4-7 (citing *Ocon*, 284 S.W.3d at 884; *Gonzalez*, 222 S.W.3d at 449; *Esquivel*, 595 S.W.2d at 519)). This issue was squarely presented to, and decided by, the state court, which held on direct appeal that the trial court did not abuse its discretion in denying either motion for mistrial. *See* Dkt. 16-19, at 9-12) (citing, *inter alia*, *Ocon*, 284 S.W.3d at 884-85; *Logan*, 698 S.W.2d at 683-84). *See also* Dkt. 16-20

(concurring opinion concluded that the trial court did not abuse its discretion when denying motions for mistrial).

“Federal habeas relief cannot be had absent the allegation by a plaintiff that he or she has been deprived of some right secured to him or her by the United States Constitution or the laws of the United States.” *Malchi v. Thaler*, 211 F.3d 953, 957 (5th Cir. 2000) (internal quotations and citation omitted). Given that no venirepersons who were exposed to the Article were actually seated on the jury, Petitioner has not shown that the trial court’s denial of his motion for a mistrial was an error “so extreme that it constitutes a denial of fundamental fairness” under the Due Process Clause. See *Hernandez v. Dretke*, 125 F. App’x 528, 529 (5th Cir. 2005) (quoting *Bridge v. Lynaugh*, 838 F.2d 770, 772 (5th Cir. 1988)); *Brown v. Dretke*, 419 F.3d 365, 376 (5th Cir. 2005). Additionally, the harmless error standard applies in these habeas proceedings and requires a petitioner to show “a substantial or injurious effect” on the verdict in his case. See *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993); *Dorsey v. Stephens*, 720 F.3d 309, 318 (5th Cir. 2013). Because Petitioner has not shown an identifiable prejudice on the part of any seated juror, he fails to make the required showing under *Brecht*.

For all of the foregoing reasons, Petitioner has failed to demonstrate that the state appellate court, which issued the last reasoned opinion on his claims, made a determination was contrary to clearly established federal law or an unreasonable application of the law to the facts of his case. See 28 U.S.C. § 2254(d). Habeas relief therefore is denied.

#### IV. CERTIFICATE OF APPEALABILITY

Habeas corpus actions under 28 U.S.C. § 2254 or § 2255 require a certificate of appealability to proceed on appeal. 28 U.S.C. § 2253(c)(1); *Miller-El v. Cockrell*, 537 U.S. 322, 335-36 (2003). Rule 11 of the Rules Governing Section 2254 Cases requires a district court to issue or deny a certificate of appealability when entering a final order that is adverse to the petitioner.

A certificate of appealability will not issue unless the petitioner makes “a substantial showing of the denial of a constitutional right,” 28 U.S.C. § 2253(c)(2), which requires a petitioner to demonstrate ““that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.”” *Tennard v. Dretke*, 542 U.S. 274, 282 (2004) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). Under the controlling standard, a petitioner must show “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.” *Miller-El*, 537 U.S. at 336 (internal citation and quotation marks omitted). Where denial of relief is based on procedural grounds, the petitioner must show not only that “jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right,” but also that they “would find it debatable whether the district court was correct in its procedural ruling.” *Slack*, 529 U.S. at 484.

A district court may deny a certificate of appealability, *sua sponte*, without requiring further briefing or argument. *Alexander v. Johnson*, 211 F.3d 895, 898 (5th Cir.

2000). After careful review of the record and the applicable law, the Court concludes that reasonable jurists would not find its assessment of the claims debatable or wrong. Because the petitioner does not allege facts showing that his claims could be resolved in a different manner, a certificate of appealability will not issue in this case.

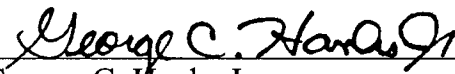
V. **CONCLUSION**

For the reasons stated above the Court **ORDERS** that:

1. Respondent's motion for summary judgment (Dkt. 17) is **GRANTED**. The petition for a writ of habeas corpus (Dkt. 1) is **DISMISSED**.
2. A certificate of appealability is **DENIED**.

The Clerk will provide a copy of this order to the parties.

SIGNED at Galveston, Texas, this 22nd day of February, 2019.

  
\_\_\_\_\_  
George C. Hanks Jr.  
United States District Judge

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 19-40198

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PAUL ANTHONY CRAYTON,

Petitioner - Appellant

v.

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

Respondent - Appellee

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

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Before SMITH, COSTA, and HO, Circuit Judges.

PER CURIAM:

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

1107

PETITION FOR WRIT OF HABEAS CORPUS

AND MEMORANDUM OF LAW

IN SUPPORT THEREOF

Statement Of Facts

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*[Handwritten signature]*  
CLERK

Paul Anthony Crayton was tried and convicted of murder and aggravated assault with a deadly weapon. In an effort to overturn his convictions, he presented an argument, as one of three grounds for appeal, an issue he claims he was denied an impartial jury based on an article published in the local newspaper the day voir dire begun. Eleven out of 78 veniremen on the panel had read the article.

On the morning of voire dire, a Galveston County newspaper reported that the trial court had suppressed evidence of a firearm and was considering suppressing a "kill list" — a list of names with the complainant's name struck through. Paul Anthony Crayton, Petitioner, complains that the newspaper article was unfairly prejudicial and twice moved for a mistrial. The merits of Petitioner's broader Sixth Amendment argument was not addressed on review by the majority on direct appeal. This is the focus of Petitioner's habeas corpus pursuit. Petitioner had preserved his Sixth Amendment right to a fair and impartial trial by and through his two motions for mistrial, even though Petitioner's complaints had focussed on a newspaper article that was published on the morning of voir dire, and because Petitioner's defense counsel had not

even **seen** the article until after the voir dire had begun. There-  
fore Petitioner had not waived his complaints by only moving for  
a mistrial.

Petitioner's defense counsel was advised of the newspaper  
article before the voir dire had begun, but did not obtain a copy  
of the article until lunchbreak later that day, after the trial  
had already commenced. Before the venire panel re-entered the  
courtroom, Petitioner's counsel clearly stated the grounds of the  
objection: "Judge, [the article] is so prejudicial that I don't  
see how [Petitioner] can get a fair trial with that out there in  
the public". Petitioner's counsel offered the article into evi-  
dence for the judge and asked for a mistrial.

The State responded that it could question the venire panel  
about its exposure to the newspaper article. If members of the  
panel had read the article, the State proposed that it should ask  
"whether or not they can listen to what evidence is presented to  
them in trial and not anything that they read in the newspaper".  
Petitioner's defense counsel countered, "Judge, one of my fears  
is we start this trial, the jurors that haven't read this news  
article and a couple days into it, some family members say, 'Hey,  
you're on that hit list case, aren't you?', because that's what  
the public is going to know this as after this point". The trial  
judge denied the motion for mistrial.

When a defendant is surprised by some event at trial, he  
should request a continuance to allow time to prepare or to find  
witnesses to rebut the surprise. See, e.g., Wood v. State, 18 S.W.  
3d. 642, 650 (Tex. Crim. App. 2000). A continuance of this nature  
is usually short and requires that the trial be put on hold. A



continuance would not have been an appropriate remedy in this case because the trial had already begun. The judge would have had to continue the case for weeks or months to allow the taint of the publicity to pass. It is simply not practical to send an entire panel of 80 people away for months. A mistrial is more appropriate.

The majority of the reviewing court incorrectly assumed that if the trial judge had granted a mistrial, then the case would have restarted immediately with a new venire panel. Nothing in the rules of procedure requires a trial judge to immediately restart a case after a mistrial. If the judge believe that the adverse publicity requires a mistrial, the parties would have to discuss how to long to wait for a reset.

A defendant is not required to file a change of venue in response to adverse publicity. Any measure to delay the trial until the taint of the publicity has passed is sufficient. See Sheppard v. Maxwell, 384 U.S. 333, 363 (1966) ("[W]here there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates or transfer it to another county not so premeated with publicity."); Lopez v. State, 628 S.W. 2d 77, 81 (Tex. Crim. App. [Panel Op.] 1982); Henley v. State, 576 S.W. 2d 66, 75-76 (Tex. Crim. App. 1978). By objecting to the adverse publicity and asking for a mistrial, Petitioner **preserved his broader complaint that he was denied a right to an impartial jury.**

Upon Petitioner's second "Motion for Mistrial", the majority of the reviewing court mischaracterized the second motion for mistrial as a motion based solely on the comments of one veniremember,

and the majority faults defense counsel for not requesting an instruction to disregard. Petitioner's second motion was a continuation of the earlier motion for mistrial focusing on the adverse effects of the newspaper article.

At the time of the second motion, Petitioner's defense counsel knew at least five veniremembers had seen the newspaper article and four of them were biased against Petitioner as a direct result of the article. Petitioner's defense counsel referenced the comments of the "jurors" (plural) when the motion was made, clearly arguing that the newspaper article had unfairly prejudiced Petitioner. Petitioner's defense counsel used the example of the last veniremember to support the motion, but the motion was not focussed on the one comment alone.

Petitioner contends that the trial court did abuse its discretion by denying the mistrial. A trial court ruling on a motion for mistrial is reviewed for an abuse of discretion. See Ocon v. State, 284 S.W. 3d 880, 884 (Tex. Crim. App. 2009). In determining whether the trial court abused its discretion in this case, conclusions can be drawn from the reasoning of cases where a trial court denied a continuance in the face of adverse publicity and those cases that discuss a change of venue due to adverse publicity. Both types are analyzed under an abuse of discretion standard. See Esquivel v. State, 595 S.W. 2d 516, 519 (Tex. Crim. App. 2007) (continuance); Gonzales v. State, 222 S.W. 3d 446, 449 (Tex. Crim. App. 2007) (change of venue).

Several factors have been examined to determine whether pre-trial publicity has unfairly prejudiced Petitioner's right to an

impartial jury. One factor is that the newspaper article was inaccurate and inflammatory that gave rise to concern of adverse publicity. See Esquivel, 95 S.W. 2d at 519; Gonzales, 222 S.W. 3d at 451. A second factor is that the newspaper article giving adverse publicity became knowledgable on the morning of voir dire by some of the members of the venire panel. See Gonzales, 222 S.W. 3d at 452 and note 29. Another factor is that the State was responsible for the adverse publicity. See Henly, 576 S.W. 2d at 71-72. Although the publicity was not widespread, it was pervasive and the venire panel had actually learned of the publicity, and it was hopeless that the issue of adverse from the newspaper article [had been] cured by instructions. See Gonzales, S.W. 3d at 450. Clearly a constitutional violation had occurred at that time of the Petitioner's defense counsel's motion and what was later discovered. Id. at 450-51.

The article in the Petitioner's case had been published in The Dially News being featured on the front page of the newspaper, above the fold. The article included a picture of Petitioner, and its headline read "Firearm, 'kill list at center pf hearing". The article detailed the events of the preious day's pretrial hearing on the motion to suppress. The opening paragraph begun: "A firearm seized during a homicide investigation apparently won't be presented as evidence during the trial of a murder defendant, who was accused of keeping a Kill list".

The article described how and where the suppressed firearm was found, and the judge's ruling that the firearm would not be admitted at trial. The article also discuss whether the judge would suppress a journal entry that contained a list of nineteen names of people who had been labled as "snitches". During the

pretrial hearing, the prosecutor described the journal entry as a "kill list", and said that the complainant's name was scratched through on that list. That same description was repeated in the newspaper article, which said that the judge had still not ruled on whether the "kill list" would be admitted.

Before voir dire had begun, the judge granted a motion to suppress the "kill list". The prosecutor admitted that she had ~~misspoken~~ <sup>misspoken</sup> the day before, clarifying that the complainant's name had not been struck through on the list. The prosecutor also informed the judge about the newspaper article. Petitioner's defense counsel approached the bench and objected to the adverse publicity.

The factors outlined above weigh in favor of a mistrial: the information was inaccurate and inflammatory; the pretrial publicity had unfairly prejudiced Petitioner's right to an impartial jury; and it was the State that was responsible for the unfairly prejudicial information — describing it as a "kill list" and that the complainant's name was struck through on the list. Facts under the scenario that there being no evidence in the record regarding the number of subscribers to the Daily News or whether many copies were sold; that there was no testimony from any witness that Petitioner would have been unable to a fair trial; that whether the judge appeared to be familiar with the newspaper and may have known that it had a limited circulation; that the judge may have had previous venire panels with similar publicity issue, and knew only a small percentage of the panel would have actually read the article, despite the fact it was revealed during voir dire that only 12 members of the 80-member panel had read the ar-

ticle; that no one was allowed to discuss the content of the article in front of the other panel members; that all who had seen the article were struck from the jury; and that the judge instructed the actual jury panel numerous times to not read any articles about the case or not to discuss the case with anyone are irrelevant, if not ludicrous, in light of (cases cited) to conclude that the adverse publicity did not prevent Petitioner from obtaining a fair trial with an impartial jury. Therefore, the trial court did abuse its discretion by denying the motions for mistrial.

THANK YOU

Paul Anthony CRAYTON  
TDCJ # 1886839 PROSE

of June 10, 2020