No. 20-5941

In the Supreme Court of the United States

CHARLES VICTOR THOMPSON, PETITIONER

v.

BOBBY LUMPKIN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION
(CAPITAL CASE)

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

Petitioner's claims concern his multiple efforts to orchestrate the murder of witnesses against him as he awaited trial for shooting two people to death. Petitioner's habeas claims center on the right announced in *Massiah v. United States*, 377 U.S. 201 (1964), which prohibits the State from deliberately eliciting incriminating information from a defendant, via a government agent, without access to an attorney after the defendant's right to counsel has attached. The Texas Court of Criminal Appeals (CCA) affirmed petitioner's conviction but ordered a retrial on punishment because the State adduced evidence of petitioner soliciting an undercover investigator to kill a witness after petitioner's first attempt failed. At the punishment retrial, over the defense's objection, the State presented testimony from a fellow inmate that petitioner solicited him to murder even more witnesses after the first two attempts failed. Petitioner was again sentenced to death. The CCA upheld his sentence.

In federal court, petitioner presented two pertinent claims. First, petitioner argued that in his first trial, the use of an undercover investigator entitled him to be retried on guilt/innocence, not just punishment. Applying the deference mandated by the Antiterrorism and Effective Death Penalty Act (AEDPA) as described in *Harrington v. Richter*, 562 U.S. 86 (2011), and *Johnson v. Williams*, 568 U.S. 289 (2013), the district court rejected this claim, and the Fifth Circuit denied a certificate of appealability (COA). Second, petitioner raised a claim he omitted in state habeas: new evidence uncovered by federal-habeas counsel allegedly demonstrated that the punishment-retrial informant was a government agent under *Massiah*. Petitioner also argued that the State suppressed this information in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), and unsuccessfully requested an evidentiary hearing to shore up his claims. The Fifth Circuit affirmed the denial of an evidentiary hearing but granted a COA on petitioner's *Massiah* claim and related efforts to cure the procedural default of that claim via *Brady*. The Fifth Circuit then affirmed the denial of habeas relief because the informant's connection with the State did not render him a government agent. The questions presented are:

1. Given that petitioner undisputedly failed to develop his punishment-retrial *Massiah* claim before the CCA and did not even timely seek an evidentiary hearing on his claim in state habeas, can petitioner overcome AEDPA's barrier to evidentiary hearings under 28 U.S.C. § 2254(e)(2)?

2. Is review appropriate to correct alleged errors in the Fifth Circuit's straightforward application of *Massiah* in rejecting petitioner's punishment-retrial claim?

3. Does the presumption of merits adjudication required by *Harrington v. Richter* and *Johnson v. Williams* preclude petitioner's attempt to avoid dispositive AEDPA deference on his guilt/innocence *Massiah* claim?

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INTRODUCTION

The Court should deny certiorari on the first two questions presented, which involve petitioner's attempt to solicit a fellow inmate to kill witnesses in his capital-murder trial—namely, the witness to whom petitioner confessed intentionally shooting the two victims. Petitioner claims that the inmate, who turned informant, was actually a government agent whose testimony at resentencing violated petitioner's Sixth Amendment right to counsel under *Massiah*. Review is unwarranted for petitioner's challenges to the Fifth Circuit's rulings that AEDPA forecloses an evidentiary hearing on this claim, which petitioner undisputedly failed to develop in state court, and that the claim fails on the merits. There are no conflicts to resolve, no errors to correct, and numerous vehicle problems that make this

case a poor one to resolve questions about AEDPA or the scope of Sixth Amendment rights under *Massiah*.

Review is also unwarranted for the third question presented, which concerns a separate *Massiah* claim about information elicited by a different witness at petitioner's first trial. Before petitioner solicited his fellow inmate to kill witnesses, petitioner solicited an undercover investigator to finish the job after an even earlier plot failed. The CCA granted petitioner a new punishment trial because offering such testimony at sentencing violated petitioner's Sixth Amendment right to counsel. Petitioner contends that he should have also gotten a new guilt/innocence trial since the conversation with the undercover investigator allegedly led police to recover the murder weapon, which indicated petitioner had reloaded the gun during the crime and thus intentionally killed both victims. Petitioner challenges the denial of a COA on this claim, for which petitioner lacked any factual support that could even arguably undermine the CCA's rejection of this claim. Certiorari should be denied because there is no conflict to resolve, no basis to overcome AEDPA deference, and no claim that could justify habeas relief in any event.

STATEMENT

1. In April 1998, petitioner was in an abusive relationship with Dennise Hayslip, who had recently moved into her own apartment. 11.Reporter's Record (RR).187-90, 200-03. Around that time, Hayslip had befriended Darren Cain. 11.RR.99, 101-02. On the night of April 29-30, 1998, Hayslip told Cain that petitioner was beating her up. 11.RR.108-09. Around 2:30 a.m., Cain went to Hayslip's apartment to help her. 11.RR.109. Petitioner picked a fight with Cain; Cain gave petitioner a black eye. 11.RR.74. Police eventually escorted petitioner off the premises. 11.RR.78-81.

Around 6:00 a.m., petitioner returned with a gun and shot Cain and Hayslip. 11.RR.57, 60-63. Police found Cain lying dead inside Hayslip's apartment. 11.RR.88. Hayslip, who had been shot through the mouth and was bleeding profusely, was airlifted to the hospital. 11.RR.242-43. Hayslip never recovered from surgery. 12.RR.22-24.

Petitioner was charged with capital murder. *See* Tex. Penal Code § 19.03(a)(7)(A). At trial, the jury heard testimony from petitioner's friend Diane Zernia. Petitioner fled to Zernia's home after the shooting. 11.RR.124-32. Petitioner confessed to Zernia about how he had shot Cain and Hayslip. 11.RR.130-32. Petitioner admitted shooting Cain, then telling Hayslip, "I can shoot you too, bitch," putting the gun to her cheek, and pulling the trigger. 11.RR.132. Petitioner told Zernia that he threw the gun in a creek after fleeing Hayslip's apartment. 11.RR.135. A ballistics expert matched a recovered gun to bullets and shells found at the crime scene and testified that petitioner must have reloaded the weapon during the shooting. 11.RR.171-72, 179. The jury found petitioner guilty. Clerk's Record (CR).198.

During the punishment phase, as evidence of petitioner's ongoing danger to society, the State presented evidence that petitioner solicited the murder of Zernia. Max Cox, a Harris County Sheriff's Deputy, testified that he was approached by petitioner's cellmate, Jack Reid. 14.RR.115-40. Reid told him that petitioner had paid for Max Humphrey, an Aryan Brotherhood gang member, to kill Zernia and was looking for someone to retrieve the murder weapon to use on Zernia. 14.RR.115-40.

Gary Johnson, a Harris County D.A.'s Office investigator, went undercover posing as a hitman who could recover the gun. 14.RR.159-65. A tape recording of the meeting was played for the jury. 14.RR.168-70. After discussing the gun, petitioner complained that

Humphrey had not followed through after being paid to kill Zernia. Petitioner offered Johnson $1,500 to kill Zernia and described how to find her. State's Exhibit (SX).89.

On the jury's findings that petitioner posed a future danger and that no mitigating circumstances warranted life imprisonment, petitioner was sentenced to death. CR.212-13.

2. The CCA affirmed petitioner's conviction on appeal. *Thompson v. State*, 93 S.W.3d 16, 29 (Tex. Crim. App. 2001). The CCA, however, vacated petitioner's sentence and ordered a new punishment hearing. *Id.*

Four CCA judges dissented, noting that this Court had never decided "whether (or to what extent) the government may use evidence pertaining to an uncharged, extraneous offense at the trial of the charged offense." *Id.* at 30 (Keller, J., dissenting). Nor had this Court extended the Sixth Amendment to bar admission of a defendant's statements that constitute a separate crime. *Id.* at 31-32. The dissent argued that attempts to subvert a trial by soliciting the murder of a witness should not receive protection (especially not at the punishment phase) under the Sixth Amendment. *Id.* at 32-33 & nn.21-22.

3. Petitioner's punishment retrial began in October 2005. Retrial Clerk's Record (CR-R).264; 16.Retrial Reporter's Record (RR-R).1. The State adduced other evidence that petitioner solicited the murder of witnesses.

Before retrial, the State gave notice that it intended to call Robin Rhodes, an inmate whom petitioner solicited after the Humphrey and Johnson plots failed. CR-R.110. The prosecutor told the defense and the trial court that Rhodes would receive leniency in several pending criminal cases in return for honest testimony. 2.RR-R.26-29, 47. Shortly before retrial, however, defense counsel moved for a continuance upon overhearing a conversation about Rhodes's "participation in a previous capital murder trial." CR-R.210. Counsel's

"[s]ubsequent investigation le[d] Counsel to believe that Rhodes may well have been an agent of the State while he was incarcerated with this defendant, if so, his testimony is clearly inadmissible." CR-R.210. The defense argued that "there may be significant impeachment evidence" about Rhodes that the State had not disclosed. CR-R.210. The trial court denied the motion.

At trial, the jury heard about the underlying offense including that petitioner left Hayslip clinging to life, bleeding from a gunshot wound to the mouth. 16.RR-R.94, 96-97, 121-22. Zernia recounted petitioner's confession that, after shooting Cain, he put his gun to Hayslip's cheek and said, "I can shoot you, too, bitch." 16.RR-R.279.

Detective Gregory Pinkins testified about petitioner's attempts to solicit the murder of witnesses. He explained that in early July 1998, he received information that petitioner was trying to influence a witness, Diane Zernia. 16.RR-R.195-96. Pinkins obtained statements from Reid, Humphrey, and Humphrey's girlfriend. 16.RR-R.197. Based on those statements, petitioner was indicted for soliciting capital murder. 16.RR-R.200. Pinkins was "[a]bsolutely" concerned about Zernia, as money hand changed hands and a witness "could have been killed." 16.RR-R.198. Pinkins warned Zernia that her life was in danger. 16.RR-R.196. Zernia recalled an incident where petitioner called from jail and asked her to lie to the police. 17.RR-R.13-15. Petitioner's tone changed when Zernia said she would not. 17.RR-R.15. Petitioner then asked Zernia for her address. 17.RR-R.14-15. The sheriff's department posted a deputy at her door. 17.RR-R.17-18.

In addition, two jailhouse letters written by petitioner were admitted. Retrial State's Exhibit (SX-R).86A, 87A. The letters had marks signifying membership in the Aryan Brotherhood. 17.RR-R.175. In one letter, petitioner explained he had been charged with

solicitation of murder: "[T]his looks real bad for the jury to hear this.... I can't believe I was set up and sold out by a white guy." 17.RR-R.178; SX-R.87A.

The State then elicited testimony from Rhodes, who met petitioner while incarcerated in the Harris County Jail in 1998 after his parole had been revoked. 17.RR-R.133-36. Rhodes testified that in August 1998, petitioner offered Rhodes money to make some people "not appear or to disappear." 17.RR-R.138. After telling Rhodes about shooting Cain and Hayslip, petitioner described who he wanted "eliminated" and information to locate them. 17.RR-R.136-41. Petitioner gave Rhodes a "hit list" that included Zernia, Hayslip's brother, Johnson, and "snitch" Jack Reid. 17.RR-R.143-46; SX-R.92.

Rhodes then contacted his previous "handler," Officer Floyd Winkler, with whom he had worked at the Harris County Organized Crime Task Force. 17.RR-R.141. Winkler put him in touch with Mike Kelly at the prosecutor's office. 17.RR-R.141. The "hit list" was admitted into evidence. 17.RR-R.142-43; SX-R.92.

During trial, the prosecutor told the jury that the State would dismiss several pending misdemeanor cases in exchange for Rhodes's testimony. 16.RR-R.31-32. At the outset of Rhodes's testimony, the prosecutor questioned him about his previous informant work. 17.RR-R.132-35. Rhodes explained that he had worked as a paid informant for the Harris County Organized Crime Task Force. 17.RR-R.132. Rhodes also said he was expecting consideration for his testimony in this case. 17.RR-R.133-34. When asked, "Did anybody from any law enforcement agency ask you to target Charles Victor Thompson and help us gather evidence against him?," Rhodes replied, "No, not at all." 17.RR-R.134-35.

On cross-examination, Rhodes testified that he had never met petitioner before their incarceration. 17.RR-R.151. Rhodes affirmed he had worked as a paid informant many

times. 17.RR-R.152-53. He stated that during that time, "basically [he] was a full-time informant for the Harris County Organized Crime Task Force." 17.RR-R.153. He admitted testifying in *Stephens v. State*, 59 S.W.3d 377, 381-82 (Tex. App.—Houston [1st Dist.] 2001, pet. ref'd), and in *Benavides v. State*, 992 S.W.2d 511, 529-30 (Tex. App.—Houston [1st Dist.] 1999, pet. ref'd), where he received $30,000 after testifying, 17.RR-R.153-54, 159.

The defense unsuccessfully moved to strike Rhodes's testimony because the prosecution had not disclosed information about Rhodes's relationship with the State. 17.RR-R.163.

The State also presented evidence of other extraneous offenses, including a string of burglaries in 1984 that caused over $60,000 of property damage. 17.RR-R.58-67. While on probation, petitioner committed more burglaries. 17.RR-R.83-88. In 1996, petitioner was arrested for transporting aliens from Mexico. 17.RR-R.216-23.

Petitioner was again sentenced to death. CR-R.238-41. Shortly thereafter, petitioner escaped custody while awaiting prison transport. U.S. Marshals caught him the following week outside a liquor store in Shreveport, Louisiana. CNN.com, *Nabbed Killer Back in Texas* (Nov. 8, 2005), http://www.cnn.com/2005/LAW/11/07/inmate.escapes/index.html.

4. The CCA affirmed petitioner's sentence on direct appeal. *Thompson v. State*, No. AP–73,431, 2007 WL 3208755, at *6 (Tex. Crim. App. Oct. 31, 2007). Petitioner raised no claim about Rhodes's testimony.

Petitioner filed a state-habeas application following his first conviction and sentence. First State Habeas Clerk's Record (SHCR1).2-92. Petitioner's resentencing occurred while that application was pending, and petitioner filed a second application following retrial. Second State Habeas Clerk's Record (SHCR2).2-117. The trial court recommended denying relief. SHCR1.224-65, 266-67; SHCR2.218-59, 260-61. The CCA denied relief. *Ex Parte*

Thompson, WR-78,135-01, WR-78,135-02, 2013 WL 1655676, at *1 (Tex. Crim. App. Apr. 17, 2013) (per curiam).

5. In April 2014, petitioner filed a federal-habeas petition. R.241-397.[1] Shortly before that, federal-habeas counsel submitted an information request to the prosecutor's office for information about Rhodes. R.598. According to petitioner, officials responded that "[n]o Robin Rhodes shows to have ever been on contract . . . with this office either directly or through the now-nonexistent Harris County Organized Crimes and Narcotics Task Force." R.598.

Petitioner moved for extra time to file an amended petition. R.597-601. According to habeas counsel, counsel noticed that a "Robert Lee" had the same Harris County identifying number and birth date as Rhodes. R.598-99. The prosecutor's office responded to a new information request about this potential alias, disclosing "a 1993 informant contract involving Robert Lee." R.599. Petitioner renewed his discover motion based on this alias. R.606. The prosecutor's office subsequently provided privileged materials from petitioner's file for *in camera* review. R.943.

Petitioner then filed an amended habeas petition. R.854-1111. The petition relied on evidence developed for the first time in federal court about claims related to Rhodes, including the 1993 Rhodes/Lee contract, R.2061-62, and documents from petitioner's prosecution file, R.946, 959 n.7; R.2063-73, R.2184, 2201.

[1] *R._* refers to the record on appeal before the Fifth Circuit.

On petitioner's motion, the district court stayed proceedings so that petitioner could exhaust his claims in state court. R.1647. Petitioner filed a subsequent state-habeas application. R.2862-3358. The CCA dismissed it "as an abuse of the writ without considering the merits of the claims." R.2857-59; *Ex parte Thompson*, WR-78,135-03, 2016 WL 922131, at *1 (Tex. Crim. App. Mar. 9, 2016) (per curiam). Petitioner then filed a second amended federal petition, which the district court denied. R.1677-931. Petitioner appealed.

6. The court of appeals granted a COA limited to whether petitioner could establish cause and prejudice to overcome procedural default of his Rhodes *Massiah* claim based on suppression of evidence under *Brady*, and, if so, whether petitioner was entitled to habeas relief from the introduction of Rhodes's testimony during resentencing. *Thompson v. Davis*, 916 F.3d 444, 463 (5th Cir. 2019) (*Thompson I*). The court affirmed the denial of an evidentiary hearing on these claims and denied a COA on petitioner's claim that any Johnson *Massiah* violation entitled him to retrial on guilt/innocence, not just punishment. *Id.* at 455, 458. The Fifth Circuit affirmed. *Thompson v. Davis*, 941 F.3d 813, 817 (5th Cir. 2019) (*Thompson II*).

REASONS FOR DENYING THE PETITION

I. This Court Should Not Grant Certiorari to Review the Application of 28 U.S.C. § 2254(e)(2).

Petitioner disputes that the district court "did not have discretion to grant" an evidentiary hearing under 28 U.S.C. § 2254(e)(2). Pet. 16-17. The only questions are whether the Fifth Circuit correctly applied the statutory requirements of AEDPA and, if not, whether any misapplication warrants review. Petitioner founders on both fronts.

A. Section 2254(e)(2) forecloses an evidentiary hearing.

1. The court of appeals' analysis comports with AEDPA, *see* 28 U.S.C. § 2254(e)(2), which "restricts the discretion of federal habeas courts to consider new evidence when deciding claims that were not adjudicated on the merits in state court," *Cullen v. Pinholster*, 563 U.S. 170, 186 (2011) (citing *Williams v. Taylor*, 529 U.S. 420, 427-29 (2000)). Section 2254(e)(2) applies if the prisoner "was at fault for failing to develop the factual bases for his claims in state court," *Bradshaw v. Richey*, 546 U.S. 74, 79 (2005) (per curiam), meaning a "lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel," *Williams*, 529 U.S. at 432. The "fault" of a "lack of diligence" by state-habeas counsel is attributed to the prisoner. *Id.* at 434; *accord id.* at 439-40; *Holland v. Jackson*, 542 U.S. 649, 652-53 (2004) (per curiam).

The Fifth Circuit identified and applied the correct AEDPA standard:

> Under 28 U.S.C. § 2254(e)(2), an applicant who has failed to develop the factual basis of a claim in the state habeas court may not obtain an evidentiary hearing in federal habeas proceedings unless two conditions are met. First, the petitioner's claim must rely on a new rule of constitutional law, or on a factual predicate that could not have been previously discovered through the exercise of due diligence. Second, the facts underlying the claim must be "sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense."

Thompson I, 916 F.3d at 458 (footnote omitted). There is no question that petitioner failed to develop the factual basis for his claims in state court and that he cannot satisfy either condition of section 2254(e)(2).

Rather, petitioner contends that the court should have looked beyond AEDPA's plain language to hold that the failure should not be attributed to him. Pet. 18-19. Citing *Williams*, petitioner argues that he cannot "be faulted for failing to uncover evidence

withheld by the prosecution." Pet. 18. This argument is a non sequitur because *Williams* involved a *Brady* claim, yet counsel's lack of diligence triggered section 2254(e)(2). *Williams*, 529 U.S. at 440. It is thus of no moment that, as petitioner contends (at 18), lower courts have "followed this Court's precedent" in *Williams*—so did the court below.

The test is not merely whether petitioner was diligent in "developing the facts of his case." Pet. 19. Section 2254(e)(2) bars a federal evidentiary hearing where the petitioner has "failed to develop the factual basis of a claim *in State court proceedings*." Diligence requires that a petitioner "at a minimum, seek an evidentiary hearing in state court in the manner prescribed by state law." *Williams*, 529 U.S. at 437. When petitioner's state-habeas counsel failed to raise his claims, there was necessarily not a "diligent" attempt, *id.* at 432, "to develop the factual basis of [the] claim[s] in State court proceedings," 28 U.S.C. § 2254(e)(2). Indeed, when Congress enacted AEDPA in 1996, it acted against the backdrop of *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992), which refused to allow new evidence based on post-conviction "counsel's negligent failure to develop the facts." *Id.* at 4. *Williams* concluded that "the opening clause of § 2254(e)(2) codifies *Keeney*'s threshold standard of diligence." 529 U.S. at 434. It follows that the statutory trigger to section 2254(e)(2)'s bar on new evidence uses "fail[]," just as in *Keeney*, to denote a failure of state-habeas counsel. 504 U.S. at 10 n.5; *see Williams*, 529 U.S. at 433-34.

The cases petitioner cites (at 19) are not to the contrary. *See Conaway v. Polk*, 453 F.3d 567, 589 (4th Cir. 2006) ("[A] diligent petitioner must 'seek an evidentiary hearing in state court in the manner prescribed by state law.'"); *Insyxiengmay v. Morgan*, 403 F.3d 657, 671 (9th Cir. 2005) (explaining that, despite counsel's requests, "Insyxiengmay was not afforded a full and fair hearing by the state court"); *Matheney v. Anderson*, 253 F.3d 1025,

1039 (7th Cir. 2001) (granting hearing on claim raised and developed in state court). Moreover, these cases granted evidentiary hearings on claims adjudicated on the merits in state court, which is no longer permissible under AEDPA following *Pinholster*, 563 U.S. at 185. Section 2254(e)(2) does not absolve petitioners from insufficient efforts to develop claims in state court. *Id.* Thus, petitioner cannot show that the court of appeals "completely failed" to consider his diligence. Pet. 19.

2. Petitioner was not diligent in any event. *Contra* Pet. 19-21. Defense counsel raised essentially the same objection to Rhodes's testimony *at trial*. 17.RR-R.163. At a minimum, this should have put state-habeas counsel on notice to develop this claim in state court. *See, e.g.*, *Hutchison v. Bell*, 303 F.3d 720, 747-48 (6th Cir. 2002) (applying section 2254(e)(2) because "petitioner was on notice of possible *Brady* material in sufficient time to raise the claims in state court"). As the district court explained, although petitioner "later learned additional information about Rhodes, it only confirms" what was known and adduced at trial. R.2768 (footnote omitted). Petitioner's assertion that he was diligent is belied by his claim in district court that his failure to raise this claim was caused by the ineffective assistance of state-habeas counsel, R.1784-85, a fruitless claim that petitioner has abandoned.

Moreover, public court records and a judicial opinion published *four years* before retrial described Rhodes's involvement with the State. *Stephens*, 59 S.W.3d at 381-82; R.1697 n.1, 1746-47. These records were equally accessible to state-habeas counsel as to federal-habeas counsel. R.1759 n.5. Moreover, petitioner did not dispute that "initial state habeas counsel *could* have discovered the 1993 dismissal, under Rhodes's alias 'Robert Lee.'" Ap-

pellant's Br. 36. A "failure to check the public records after being put on notice" is the petitioner's "own failure, and not a failure caused by the [State] or some other external factor." *Matthews v. Ishee*, 486 F.3d 883, 891 (6th Cir. 2007).

Petitioner's counterarguments mischaracterize the record. Petitioner contends that the D.A.'s office "continued to conceal evidence during state habeas proceedings by suggesting there was no additional *Brady* evidence which remained undisclosed." Pet. 20 (citing SHCR2.151). In reality, petitioner raised no such claim about Rhodes, so petitioner cannot fault the State's state-habeas responsive briefing. The State's brief addressed a separate claim that the denial of a trial continuance stymied preparation of a stronger mitigation case. SHCR2.148-52.

Petitioner argues that he was denied an evidentiary hearing when he "returned to state court to exhaust this claim." Pet. 20-21. But the state court dismissed petitioner's subsequent application as an abuse of the writ. *Ex parte Thompson*, 2016 WL 922131, at *1. Petitioner necessarily did not "seek an evidentiary hearing in state court in the manner prescribed by state law." *Williams*, 529 U.S. at 437. Petitioner's extensive reliance on federal discovery (at 20) merely underscores that his arguments were not developed in state court.

B. The purported conflict on which petitioner relies had no impact on the Fifth Circuit's analysis and ultimate rejection of his claim.

Petitioner's efforts to manufacture a certworthy issue fall short for three reasons.

First, the Fifth Circuit's decision need not bear petitioner's reading, as construing section 2254(e)(2) categorically to forbid any evidentiary hearing "on a punishment issue." Pet. 16 (emphasis omitted); *id.* at 21. Indeed, since its publication nearly two years ago, the Director has found no authority citing it for that remarkable proposition. As petitioner notes

(at 18), the Fifth Circuit has previously held that, where section 2254(e)(2)'s plain terms do not apply, that statute itself poses no obstacle to a federal evidentiary hearing. *See Harrison v. Quarterman*, 496 F.3d 419, 428 (5th Cir. 2007). Here, the Fifth Circuit merely noted that petitioner failed to develop his claim in state court and had to meet section 2254(e)(2)'s conditions. *Thompson I*, 916 F.3d at 458. Read in context, the alleged conflict is not fairly presented. *Contra* Pet. 21.

Second, even if petitioner were right about section 2254(e)(2), petitioner cannot show that the district court abused its discretion in denying an evidentiary hearing. *See Schriro v. Landrigan*, 550 U.S. 465, 468 (2007). Petitioner merely speculates that an evidentiary hearing would uncover facts contradicting the record and Rhodes's own testimony. *See infra* pp. 20-21.

Third, petitioner's arguments are futile because his underlying substantive claim is meritless for independent reasons. *See infra* Part II. Petitioner's arguments about section 2254(e)(2) are directed toward establishing that Rhodes was a government agent under *Massiah*. But that would not avoid the other obstacles to petitioner's claim.

II. The Second Question Presented (Rhodes-Based *Massiah* claim) Does Not Warrant Review.

Petitioner urges this Court to grant certiorari because the Fifth Circuit supposedly misapplied *Massiah* in conflict with other decisions. Pet. 21-27. This argument fails for at least three reasons. First, the alleged conflict is overstated and unhelpful to petitioner. Second, the Fifth Circuit correctly concluded that petitioner's *Massiah* claim failed because Rhodes was not acting as a government agent when he elicited incriminating statements from petitioner. Third, independent grounds foreclose relief.

A. No conflict warrants certiorari review.

1. This case implicates no meaningful conflict. *Massiah* prohibits "secret interrogation." *Kuhlmann v. Wilson,* 477 U.S. 436, 459 (1986). The Sixth Amendment "is not violated whenever—by luck or happenstance—the State obtains incriminating statements from the accused." *Maine v. Moulton*, 474 U.S. 159, 176 (1985). If an informant acts as a state agent and "deliberately elicit[s]" statements from a defendant whose right to counsel has attached, the Sixth Amendment is violated. *See United States v. Henry*, 447 U.S. 264, 270-71 (1980). The Fifth Circuit has explained that one is not a government agent unless he "(1) was promised, reasonably led to believe, or actually received a benefit in exchange for soliciting information from the defendant; and (2) acted pursuant to instructions from the State, or otherwise submitted to the State's control." *Creel v. Johnson*, 162 F.3d 385, 393-94 (5th Cir. 1998). Petitioner's complaints about this standard fail.

There is no conflict between *Creel* and this Court's precedent. *Contra* Pet. 25-27. Petitioner contends (at 22-25) that *Creel* conflicts with *Henry*. *Henry* is inapposite, though, because it was decided in the context of the deliberate-elicitation prong of *Massiah*, rather than the agency prong. *Henry*, 447 U.S. at 270. This Court "essentially assumed the existence of agency," *Thomas v. Cox*, 708 F.2d 132, 135 n.2 (4th Cir. 1983), because the informant was subject to a formal, ongoing agreement with government officials to obtain information for compensation, 447 U.S. at 270. In any event, the Fifth Circuit's test correctly reflects that an agent must have "acted pursuant to instructions from the State, or otherwise submitted to the State's control." *Creel*, 162 F.3d at 393. In *Henry*, the informant "was acting under instructions" from the government. 447 U.S. at 270.

Petitioner also alleges a conflict with *Moulton*, 474 U.S. at 171. Pet. 24-25. As with *Henry*, *Moulton* set no test for agency, as the informant was undisputedly acting under police instruction. 474 U.S. at 163-64; *see United States v. Li*, 55 F.3d 325, 328 (7th Cir. 1995) (explaining that agency was not at issue in *Moulton*). The sole question was whether the informant had "deliberately elicited" the statements. 474 U.S. at 174-75 & n.11.

Nor is there a conflict with other circuits. *Contra* Pet. 27. Petitioner argues that the Fifth Circuit, unlike the Third, Sixth, Seventh, and D.C. Circuits, requires proof that "government agents specifically instruct their informants to gather information." Pet. 26. On its face, the Fifth Circuit's *Creel* standard does no such thing: a petitioner can demonstrate either that the informant "acted pursuant to instructions from the State, *or otherwise submitted to the State's control*." 162 F.3d at 394 (emphasis added).

Regardless, courts recognize that some type of direction or control is required. *See, e.g.*, *United States v. Ocean*, 904 F.3d 25, 33 (1st Cir. 2018) ("[a] successful *Massiah* objection requires a defendant to show, at a bare minimum, that the person with whom he conversed had previously been enlisted for that purpose by the authorities"); *United States v. Brink*, 39 F.3d 419, 423 (3d Cir. 1994) ("[a]n inmate who voluntarily furnishes information without instruction from the government is not a government agent"). Merely expecting to benefit from information does not make one an "agent." *Massiah*, 377 U.S. at 206. Agency contemplates a principal's control. *See* Restatement (Third) of Agency § 1.01. Thus, entrepreneurial inmates are not government agents. *See, e.g.*, *United States v. Birbal*, 113 F.3d 342, 346 (2d Cir. 1997); *United States v. Watson*, 894 F.2d 1345, 1348 (D.C. Cir. 1990).

The cases petitioner cites (at 26) are not to the contrary. In *Brink*, for instance, the Third Circuit explained that a combination of an informant's "tacit agreement with the government" to receive potentially favorable sentencing treatment and the government's deliberate placing of the informant in a cell with another inmate to obtain information from the inmate could amount to a *Massiah* violation. 39 F.3d at 424. The Sixth Circuit likewise considers all "facts and circumstances" surrounding agency. *Ayers v. Hudson*, 623 F.3d 301, 310-12 (6th Cir. 2010). In *Ayers*, the state intentionally placed an informant in proximity to the defendant so he could procure additional information. *See id.* at 305. The Seventh Circuit similarly looks to "[t]raditional principles of agency," *Li*, 55 F.3d at 328 (no *Massiah* violation when "[t]he evidence demonstrated no government control over [the informant's] actions"). The D.C. Circuit has looked to similar circumstances, albeit without requiring proof the state instructed the informant to focus on a specific defendant. *United States v. Sampol*, 636 F.2d 621, 630-42 (D.C. Cir. 1980) (per curiam).

Insofar as there is a split of authorities, it is between courts like those above and those that arguably require proof that the government instructed an informant to obtain information about a specific defendant. *See, e.g.*, *United States v. LaBare*, 191 F.3d 60, 65-66 (1st Cir. 1999); *Moore v. United States*, 178 F.3d 994, 999 (8th Cir. 1999); *Birbal*, 113 F.3d at 346. Some courts have suggested that employing a roving informant—that is, one who is instructed to collect information from all available defendants—could violate the Sixth Amendment. *Birbal*, 113 F.3d at 346 (citing *United States v. York*, 933 F.2d 1343, 1357 (7th Cir. 1991), *overruled on other grounds by Wilson v. Williams*, 182 F.3d 562 (7th Cir. 1999)

(en banc)).[2] But these cases are unhelpful since petitioner does not contend that Rhodes had such instructions. Indeed, the premise of petitioner's argument is that he need not show instruction or control at all.

2. Even if there were a meaningful conflict, it would not help petitioner. Petitioner bore the burden of proof in establishing agency. *See Moore*, 178 F.3d at 997, 999; *Lightbourne v. Dugger*, 829 F.2d 1012, 1020 (11th Cir. 1987) (per curiam). Petitioner attacks the second, instruction-or-control element of the Fifth Circuit's *Creel* test. Pet. 21-22, 25-26. But as the Fifth Circuit explained, petitioner has "not met his burden as to either element" of *Creel*. *Thompson II*, 941 F.3d at 816. Petitioner's claim would thus fail even if, as he contends, he need not prove that Rhodes was "specifically instruct[ed] . . . to gather information." Pet. 25-26.

Nor does petitioner identify any circuit's caselaw that, if applied, would render Rhodes an "agent." Petitioner does not contend that he can show government efforts to focus informants on particular suspects. *See, e.g.*, *Birbal*, 113 F.3d at 346. Petitioner does not contend that Rhodes knew petitioner before their incarceration. *See Matteo v. Superintendent, SCI Albion*, 171 F.3d 877, 894-95 (3d Cir. 1999) (en banc) (relying on preexisting acquaintance as evidence of agency). He identifies no "combination of circumstances" demonstrating that the State "intentionally created a situation" for Rhodes to extract information from petitioner. *Ayers*, 623 F.3d at 315-16; *accord Brink*, 39 F.3d at 424.

[2] Petitioner also cites *United States v. O'Dell*, 73 F.3d 364 (7th Cir. 1995), for this proposition. Pet. 26. Such unsigned orders, however, are nonprecedential. *See* 7th Cir. R. 32.1(b), (d).

Finally, petitioner cannot benefit from the rule he seeks. Below, petitioner conceded that this Court "has not formally defined the term 'government agent' for Sixth Amendment purposes." R.963 (quoting *Matteo*, 171 F.3d at 893). It would be improper to apply a novel rule retroactively by holding that Rhodes was a government agent. *See Teague v. Lane*, 489 U.S. 288, 311-14 (1989) (plurality op.). A conviction cannot be collaterally attacked unless "a state court considering [the defendant's] claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule [he] seeks was required by the Constitution." *Goeke v. Branch*, 514 U.S. 115, 118 (1995) (per curiam). No precedent compels the conclusion that Rhodes was an agent.

B. The Fifth Circuit correctly determined that Rhodes was not a government agent.

Because petitioner "has shown no evidence that the State controlled—or even consented to—Rhodes's informant activity, there is no valid *Massiah* claim that could have affected the outcome of the punishment retrial." *Thompson II*, 941 F.3d at 817. Rhodes testified that he *did not* act on any instructions or orders from the State. 17.RR-R.134-35. Relying on *Henry*, petitioner argues that it is "irrelevant that the [government] did not intend for the informant to take affirmative steps to secure incriminating information." Pet. 23. But unlike in *Henry*, there is no evidence that Rhodes contacted prosecutors to inform them that he had access to valuable information, that the State gave directions to Rhodes, or that the State housed him with petitioner for information. *See* 447 U.S. at 266-67.

Rhodes was not an agent merely because he may have reasonably expected to benefit from information. The record does not indicate that Rhodes sought or was promised any benefits before obtaining information from petitioner. *See* R.2063. Even if Rhodes saw an

opportunity to help himself, *see Thompson II*, 941 F.3d at 816; 17.RR-R.141, this Court has never set the bar for agency so low, *see Henry*, 447 U.S. at 274; *accord Kuhlmann*, 477 U.S. at 459.

Nor can petitioner argue that Rhodes's prior paid-informant status turned him "into a perpetual agent." *Thompson II*, 941 F.3d at 817. Courts routinely reject such once-an-informant-always-an-informant agency arguments. *See, e.g.*, *Moore*, 178 F.3d at 999; *United States v. Rosa*, 11 F.3d 315, 329-30 (2d Cir. 1993); *Watson*, 894 F.2d at 1348. Nor did Rhodes's 1993 informant contract indicate that Rhodes "was acting under [Officer] Winkler's instructions when he spoke with [petitioner] in jail nearly five years after the contract's 90-day term had expired." *Thompson II*, 941 F.3d at 817.

Petitioner blames the Fifth Circuit for denying him an evidentiary hearing to develop more evidence. Pet. 27. But petitioner does not explain how he could overcome Rhodes's testimony denying that the government instructed him to solicit information from petitioner. *See* 17.RR-R.134-35. There is "no credible evidence that Rhodes had any contact with the State regarding [petitioner] until *after* he had discussed the solicitation plot with [petitioner] and obtained his hit list." *Thompson II*, 941 F.3d at 816-17. Petitioner merely speculates (at 24-25) that the State knew Rhodes had access to him before petitioner incriminated himself. *See* R.1773-74. Petitioner contends that the Fifth Circuit erred in dismissing such speculation. Pet. 22. But petitioner offered no evidence that favorable inferences should be drawn from the record. *Thompson II*, 941 F.3d at 817. As the court of appeals explained, court cannot speculate that such evidence might materialize. *Id.*

C. Independently, petitioner's claim would fail because it is foreclosed by procedural default, *Teague v. Lane*, and AEDPA's bar on new evidence.

1. Petitioner's claim is procedurally defaulted. *Id.* at 816; *see Coleman v. Thompson*, 501 U.S. 722, 729 (1991). Petitioner's arguments largely track defense counsel's objection at trial that Rhodes was a state agent. R.1778 n.9 (citing 17.RR-R.163); CR-R.210. Texas courts "should have [had] the first opportunity to review this claim and provide any necessary relief." *O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999); *accord Williams*, 529 U.S. at 437. Petitioner failed to raise any claim attacking Rhodes in his first two state-habeas applications. The CCA dismissed petitioner's third application under article 11.071, section 5, of the Texas Code of Criminal Procedure as an abuse of the writ. *Ex parte Thompson*, 2016 WL 922131, at *1. A dismissal under Article 11.071 is an independent and adequate state ground that procedurally bars federal-habeas relief. *See Hughes v. Quarterman*, 530 F.3d 336, 342 (5th Cir. 2008).

Petitioner cannot excuse his untimely failure to bring his claims on the ground that the State suppressed information about Rhodes. In *Banks v. Dretke*, 540 U.S. 668 (2004), this Court noted that the suppression and materiality elements of a *Brady* claim mirrored cause and prejudice, so a meritorious *Brady* claim raised in state court was able to overcome a procedural default. *Id.* at 691. But this Court has never held that *Brady* allegations are sufficient to overcome all procedural barriers for all claims. Cause is shown only when the factual basis of the claim was "reasonably unknown" to counsel. *Amadeo v. Zant*, 486 U.S. 214, 222 (1988).

Here, the factual basis for petitioner's *Massiah* claim was known well before state habeas and raised at trial as grounds to strike Rhodes's testimony. R.1778 n.9 (citing 17.RR-

R.163). Failing to raise a claim for which state-habeas counsel is on notice is attributable to the petitioner, not the State. *See McCleskey v. Zant*, 499 U.S. 467, 502 (1991). Even if petitioner could establish an untimely disclosure *for trial*, it would not excuse the default in habeas proceedings. *See, e.g.*, *Henry v. Ryan*, 720 F.3d 1073, 1083 (9th Cir. 2013) ("Henry was clearly aware of the state's alleged *Brady* violation long before federal habeas proceedings commenced."); *Cannon v. Gibson*, 259 F.3d 1253, 1269 (10th Cir. 2001). Where "the factual basis for the claim" is "reasonably available to" the petitioner or his counsel from another source through the exercise of reasonable diligence, petitioner cannot fault the State. *Strickler v. Greene*, 527 U.S. 263, 283 & n.24 (1999); *United States v. Sipe*, 388 F.3d 471, 478 (5th Cir. 2004). Petitioner "either knew, or should have known, of the essential facts permitting him to take advantage of any exculpatory evidence." *Lawrence v. Lensing*, 42 F.3d 255, 257 (5th Cir. 1994); *accord Coleman v. Mitchell*, 268 F.3d 417, 438 (6th Cir. 2001). At a minimum, because petitioner failed timely to raise *Brady* or *Massiah* claims concerning Rhodes in state habeas, this case is a poor vehicle to decide whether meritorious *Brady* arguments could excuse state-habeas counsel's failure to press his claim.

Nor can petitioner establish suppression. The "defense knew much of the allegedly suppressed information before trial," R.588, and the relevant information about Rhodes was elicited during his testimony, R.2763-67; *see, e.g.*, 17.RR-R.132-34 (Rhodes's testimony regarding his previous informant activity). Petitioner argued in federal habeas that the "Constitutional problem" was that Rhodes was "a full time informant." R.1746. That fact was adduced at trial. 17.RR-R.153 ("basically I was a full-time informant"). Petitioner stated that "much of the factual basis of this claim was available to state habeas counsel," R.1785, and discoverable from an appeal published years before the retrial, *Stephens*, 59 S.W.3d at

381-82, *see* R.1697 n.1, 1746-47. Citing a state-habeas finding indicating the same, the district court found that "[t]rial counsel's thorough cross-examination of Rhodes demonstrated an intricate understanding of his past interaction with the State." R.2766 (footnote omitted) (citing SHCR1.250 (¶ 104) (state-habeas finding that Rhodes was "effectively cross-examined")). No clear and convincing evidence overcomes that finding, which must be presumed correct. *See* 28 U.S.C. § 2254(e)(1).

Moreover, the information on which petitioner relies is immaterial. It is largely "cumulative of testimony" that "Rhodes, a longtime, full-time informant who frequently testified in exchange for money, spoke with [petitioner] and obtained his hit list on August 21, 1998." *Thompson II*, 941 F.3d at 817. Any "incremental" additional evidence merely confirmed Rhodes's testimony. *Miller v. Dretke*, 431 F.3d 241, 251 (5th Cir. 2005). Rhodes denied talking to petitioner at the State's behest. 17.RR-R.134-35. Rhodes admitted he worked with the Harris County Organized Crime Task Force. 17.RR-R.132. Rhodes explained that *after* petitioner solicited him and gave him a "hit list," Rhodes contacted an Organized Crime Task Force officer and gave him the list. 17.RR-R.141. On cross-examination, Rhodes described his history as a paid informant. 17.RR-R.152-59. Insofar as petitioner argues he needed the Lee contract to show that Rhodes had an "open-ended," "information-gathering" role, *Thompson I*, 916 F.3d at 456, a contract to provide information on narcotics cases, which ended years before trial, does not reflect that role, R.2768 n.23. Regardless, the public *Stephens* materials and Rhodes's own testimony provided grounds to argue that Rhodes's prior information-gathering role was "open-ended," so petitioner cannot fault the State on that basis.

Petitioner identifies no prosecution records that affect this result. At the outset, such records make this case a poor vehicle for petitioner's arguments. This Court would have to decide a threshold issue: the extent to which defense counsel is entitled to specific contents of a prosecutor's work file before trial. At one point, the prosecution explained that its "open file" would not include the "prosecutor's notes and work product." 2.RR.5. Claims that petitioner was entitled to more are undeveloped and ill-suited for certiorari review.

In any event, the documents on which petitioner relies do not support the inferences he seeks. Petitioner relies on a memo explaining that Rhodes received information from petitioner on August 21, 1998, and contacted investigator Kelly five days later. R.2063-64. Ultimately, instead of proving that the State directed petitioner to obtain information, this evidence confirms that after petitioner gave Rhodes his "hit list," Rhodes contacted a "handler" at the Harris County Organized Crime Unit and was put in touch with an investigator from the D.A.'s Office to whom he provided the list. 17.RR-R.141; SX-R.92. Petitioner refers to a handwritten note that states "contacted Floyd, get in hand." R.2184. "Floyd" likely refers to Rhodes's "handler" Floyd Winkler. 17.RR-R.141. But that does not mean that Winkler contacted Rhodes, let alone directed him to get information from petitioner. The documents track Rhodes's testimony and provide no suggestion Rhodes was acting under the State's direction. 17.RR-R.141 (answering affirmatively when asked, if *after* getting the list, "Did Winkler set you up with an investigator from the District Attorney's office?").

Petitioner argues that "handwritten notes produced by the D.A.'s Office appear to state that on August 13, 1998, Rhodes was already 'talking to Mike Kelly,' the District Attorney investigator" handling the Rhodes' solicitation investigation. Pet. 13 (citing R.2201). Petitioner appears to be referencing a note that has "/13/98" written in the margin. R.2201.

Petitioner contends that this indicates that Rhodes was "talking to Mike Kelly" *before* petitioner gave Rhodes the list of names. Pet. 13. Instead, like Rhodes's testimony, that date appears next to the words "inmate contacted by Charles," consistent with the date petitioner contacted Rhodes, not the date Rhodes contacted Kelly. R.2201.

Ultimately, such information is neither exculpatory nor impeaching, let alone material. *Cf. Banks*, 540 U.S. at 691. No new information about Rhodes "would have excluded him from testifying or made any greater impact in the jury's consideration of his testimony than that known at trial." R.2768-69. Petitioner cannot show "constitutional error in the State's use of Rhodes's testimony." R.2762.

2. Petitioner's claim is also meritless for several independent reasons. First, petitioner's claim is *Teague*-barred and meritless because this Court has never held that evidence of an extraneous offense, obtained in violation of *Massiah*, is inadmissible at punishment in another case. *See Goeke*, 514 U.S. at 118. The Sixth Amendment does not forbid interrogation for charges unrelated to charged offenses. *Moulton*, 474 U.S. at 176. A court at the time of petitioner's retrial could reasonably have concluded that evidence of an extraneous offense obtained through a *Massiah* violation is not subject to the exclusionary rule at punishment, or that a defendant's attempts to distort sentencing proceedings are admissible despite *Massiah*. *See, e.g.*, *Kansas v. Ventris*, 556 U.S. 586, 591-92 (2009); *United States v. Pineda*, 692 F.2d 284, 288 (2d Cir. 1982). In *Ventris*, this Court recognized that *Massiah* is a prophylactic right. *See* 556 U.S. at 591-92. Petitioner would fail any "balancing test" applicable to whether the evidence must be suppressed. *Id.* at 591. *Contra, e.g.*, *Estelle v. Smith*, 451 U.S. 454, 465-66 (1981) (rejecting a distinction between guilt/innocence and capital sentencing concerning the Fifth Amendment's protection against self-incrimination).

Petitioner's claim also fails because his Sixth Amendment right to counsel had not attached. There is no right to counsel in soliciting the murder of witnesses. *See, e.g.*, *United States v. Kidd*, 12 F.3d 30, 33 (4th Cir. 1993). The right attaches only "at or after the time that judicial proceedings have been initiated . . . 'whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.'" *Fellers v. United States,* 540 U.S. 519, 523 (2004) (quoting *Brewer v. Williams*, 430 U.S. 387, 398 (1977)). No Sixth Amendment right to counsel attaches to uncharged crimes that are merely "factually related" to the charged offense. *Texas v. Cobb*, 532 U.S. 162, 167-68 (2001). Petitioner had been charged with capital murder and soliciting Johnson to murder Zernia—not the separate crime of soliciting Rhodes to kill Zernia. *See Henderson v. Quarterman*, 460 F.3d 654, 661-63 (5th Cir. 2006); R.2198-99. Nor had petitioner been charged for the crimes of soliciting Rhodes to kill other witnesses, like Zernia's brother. 17.RR-R.146; SX-R.92.

And even if there was error, it was harmless. *See Arizona v. Fulminante*, 499 U.S. 279, 310 (1991). Rhodes's testimony that petitioner attempted to solicit murder was cumulative of other evidence, so it had no "substantial and injurious effect . . . [on] the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). Petitioner's jailhouse letters corroborate his attempt to have Zernia killed and his affiliation with the Aryan Brotherhood, a violent, white-supremacist prison gang. *See* 17.RR-R.175-78; SX-R.86A, 87A. Even before the two plots at issue, Detective Pinkins explained that petitioner had transferred money to the girlfriend of an Aryan Brotherhood gang member in petitioner's original murder-for-hire plot to silence Zernia. 16.RR-R.197-202.

Even if petitioner were retried on punishment, there is little chance of a different outcome. Indeed, the case for future dangerousness has grown stronger since petitioner's last

sentencing, when petitioner escaped custody and led U.S. Marshals on an interstate manhunt. *See supra* p. 7.

3. Because petitioner's state-habeas counsel failed to develop this claim, AEDPA precludes petitioner from using any new evidence to prove his *Massiah* claim. *See* 28 U.S.C. § 2254(e)(2); *Williams*, 529 U.S. at 432. Section 2254(e)(2) applies whether a prisoner seeks to introduce new evidence through a live evidentiary hearing, *see supra* Part I, or by written submission, *see Holland*, 542 U.S. at 653.

III. Certiorari Review on the Third Question Presented (Johnson-Based *Massiah* Claim) Is Unwarranted Because There Are Multiple Vehicle Problems and the Fifth Circuit Correctly Denied a COA.

In petitioner's direct appeal, the CCA ordered resentencing because, during the original punishment-phase trial, the State improperly admitted a recording of petitioner soliciting undercover-investigator Johnson to murder Zernia. *Thompson*, 93 S.W.3d at 22-29. Petitioner contends that he was also entitled to a retrial on guilt/innocence. The Fifth Circuit correctly applied AEDPA in holding that the "state court adjudicated th[is] claim on the merits," that petitioner identified nothing "to overcome that presumption," and that "[j]urists of reasons would not debate the district court's application of AEDPA deference to this claim." *Thompson I*, 916 F.3d at 454.

A. Issues concerning *Richter* and *Johnson* are not fairly presented, and the underlying claim cannot support habeas relief.

1. The question about AEDPA deference is not fairly presented. *Contra* Pet. 33. Petitioner contends that "when 'a state court rejects a federal claim without expressly addressing that claim, a federal habeas court must presume that the federal claim was adjudicated on the merits—but that presumption can in some limited circumstances be rebutted.'" Pet.

29 (quoting *Johnson*, 568 U.S. at 301). The presumption of merits adjudication can be rebutted only when evidence "leads very clearly to the conclusion that a federal claim was inadvertently overlooked in state court." *Johnson*, 568 U.S. at 301. Such evidence is absent here.

There is no question that the CCA adjudicated petitioner's claim because it was not silent. *Cf. id.* at 292. On direct appeal, petitioner argued that the recovery of the gun was inextricably intertwined with the information obtained by Johnson. Appellant's Br. 28; Suppl. Appellant's Br. 2. After the CCA ordered resentencing, petitioner filed a pro se motion for rehearing, arguing that the violation harmed him at guilt/innocence, not just at punishment. While the motion was initially granted, it was subsequently dismissed as improvidently granted. *Thompson v. State*, 108 S.W.3d 269, 269 (Tex. Crim. App. 2003) (per curiam). Thus, petitioner cannot invoke the CCA's "subsequent granting of the motion for rehearing" as "proof that the TCCA simply failed to address the claim at issue." Pet. 30 & n.10. The state court "heard and evaluated the evidence and the parties' substantive arguments" and decided "the intrinsic rights and wrongs of [the] case." *Johnson*, 568 U.S. at 302 (emphasis omitted).

Petitioner contends that the Fifth Circuit "incorrectly applied this Court's precedent because it failed to consider whether the [CCA] had evaluated the evidence and parties' substantive arguments." Pet. 30. But the CCA's affirmance of petitioner's conviction represented a rejection of all of his guilt/innocence claims, and its decision is entitled to deference. *See Richter*, 562 U.S. at 99. Any silence about "whether the *Massiah* violation at [petitioner]'s first trial prejudiced the guilt/innocence phase of that proceeding," Pet. 31, cuts in favor of merits adjudication, not against it, *see Richter*, 562 U.S. at 99. When AEDPA refers

to the "claim" adjudicated in state court, it means "an asserted federal basis for relief from a state court's judgment of conviction." *Gonzalez v. Crosby*, 545 U.S. 524, 530 (2005). If the state court rejected "an asserted federal basis for relief," *id.*, it adjudicated the claim that asserted that federal basis for relief. There is no conflict with this Court's precedent. *Contra* Pet. 31.

Moreover, none of the cases petitioner relies on (at 29-32) establishes the principle petitioner invokes. Petitioner's authorities deal with situations in which a state court fails to decide a petitioner's federal claim, such as when a court rules on a state-law claim without deciding federal issues. *See Bennett v. Superintendent Graterford SCI*, 886 F.3d 268, 284 (3d Cir. 2018) (state court expressly refused to rule on federal claim on grounds that it was deciding a state-law question); *Gonzales v. Thaler*, 643 F.3d 425, 430 (5th Cir. 2011) (state court "decided only a state-law evidentiary claim"). Another concerned a federal claim addressed with respect to the state trial court but overlooked as the alleged error also applied to the state appellate court. *Murdaugh v. Ryan*, 724 F.3d 1104, 1121 (9th Cir. 2013) ("in light of the state post-conviction court's otherwise careful consideration and evaluation of every other claim," evidence indicated that the state court overlooked petitioner's Eighth and Fourteenth Amendment claims for violation of his right to individualized capital sentencing). None of these cases involves a scenario like here.

2. Because the presumption of merits adjudication applies, petitioner cannot contend that any aspect of his claim should have been reviewed de novo. *Contra* Pet. 31-33. Petitioner argues that "the state court adjudicated an element of a federal claim but specifically failed to address another element of that federal claim." Pet. 33. Petitioner contends that the CCA failed to consider whether the *Massiah* violation prejudiced his guilt/innocence

phase as well as his punishment phase. *See* Pet. 31-32. The CCA's actions reflect otherwise. *Thompson*, 108 S.W.3d at 269.

Also, neither this Court's decision in *Wiggins v. Smith*, 539 U.S. 510 (2003), nor *Rompilla v. Beard*, 545 U.S. 374 (2005), held that this distinction strips a state-court decision of AEDPA deference. *Rompilla* and *Wiggins* involved *Strickland* claims, for which prejudice is an element of ineffective assistance under the Sixth Amendment. *See Wiggins*, 539 U.S. at 534. For the most part, the cases cited by petitioner (at 32 & nn. 13-14) involve distinguishable situations where one of *Strickland*'s two prongs was not adjudicated by the state court, or where the state court overlooked a Sixth Amendment claim altogether.[3]

As petitioner also notes, courts have read *Richter* and *Johnson* as overruling *Rompilla*. Pet. 32 (citing *Childers v. Floyd*, 642 F.3d 953, 969 n.18 (11th Cir. 2011) (en banc)). *Richter* confirms that "the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief." *See* 562 U.S. at 98. Section 2254(d)(1) does not call for a subjective inquiry into what the state-court judges actually had in mind when they rejected a prisoner's claim on the merits. *See id.* at 98-99. At a minimum, this additional issue makes the case a poor vehicle to resolve the question presented.

B. The Fifth Circuit correctly denied a COA.

The rule petitioner seeks cannot help him because the claim concerning petitioner's guilt/innocence phase is not debatable. *Contra* Pet. 28. Petitioner contends that the court of

[3] Petitioner cites dicta from *Salts v. Epps*, 676 F.3d 468, 480 n.46 (5th Cir. 2012), as "explaining that portions of claims not addressed by state courts are reviewed *de novo*." Pet. 32. *Salts*, however, applied de novo review because the state-court adjudication was contrary to clearly established federal law and thus not entitled to AEDPA deference. 676 F.3d at 480 (citing 28 U.S.C. § 2254(d)(1)). There is no conflict with *Salts*. Pet. 32 & n.14.

appeals erroneously denied a COA "on the procedural issue of whether *de novo* review was proper." Pet. 28. But debatability on the procedural ruling is not enough, as petitioner cannot demonstrate that his constitutional claim is debatable. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Review is inappropriate because petitioner cannot prevail under the rule he seeks.

Petitioner's substantive claim—that the murder weapon was recovered because of information obtained by Johnson in violation of the Sixth Amendment—lacks evidentiary support. *Contra* Pet. 27-28. The record belies any inference that police found the gun because of Johnson. *Thompson I*, 916 F.3d at 454-55. Information that petitioner conveyed to Johnson about the gun "was duplicative of the police's existing knowledge, namely the hand-drawn map provided to Reid and Zernia's account of [petitioner]'s confession." *Id.*; *see* 11.RR.135 (Zernia's testimony); 14.RR.158-65, 174-76 (Johnson's testimony). Police furnished Johnson with a map of the location of the gun "so that he would have knowledge [of where the gun was] in talking with" petitioner. 14.RR.125; SX-R 88 (map). Petitioner does not dispute these facts.

Nor did petitioner object to the gun's admission at trial. Had he done so, the State would have established that the gun was admissible because it was discovered either from a source independent of "any constitutional violation" involving Johnson or that its discovery was inevitable. *Nix v. Williams*, 467 U.S. 431, 443 (1984). At a minimum, the underdeveloped facts of petitioner's claim pose a significant vehicle problem.

Moreover, the CCA's basis for granting petitioner a punishment retrial has itself been "called into question" by this Court. *Rubalcado v. State*, 424 S.W.3d 560, 572 & n.61 (Tex. Crim. App. 2014) (citing *Ventris*, 556 U.S. at 591-92); *see supra* pp. 4, 25. Because the Sixth

Amendment is offense-specific and Johnson gathered information on a separate, uncharged solicitation offense, petitioner cannot establish a *Massiah* violation, especially considering *Teague*. *See Ventris*, 556 U.S. at 591-92; *Moulton*, 474 U.S. at 176. Moreover, Johnson's testimony was not offered at guilt/innocence, so petitioner cannot fault that stage of his trial on *Massiah* grounds. *See Thompson*, 108 S.W.3d at 275 (Keasler, J., concurring in part).

Finally, even if the gun could have been excluded, its admission was harmless. *See Brecht*, 507 U.S. at 637. There was overwhelming evidence that petitioner intentionally killed Hayslip by shooting her point-blank in the face. *Thompson I*, 916 F.3d at 455; *see, e.g.*, 11.RR.131-32 (Zernia's testimony that petitioner confessed to shooting Hayslip after shooting Cain). Petitioner put his gun to Hayslip's cheek, said, "I can shoot you too, bitch," and fired. 11.RR.132. Petitioner then fled, leaving Hayslip "drowning in her own blood and suffocating on the swollen remnants of her severed tongue." *Thompson I*, 916 F.3d at 455. In light of such strong evidence that the murder weapon "was not crucially important, let alone dispositive" in proving intent, reasonable jurists would not debate this claim. *Id.*; *see Penry v. Johnson*, 532 U.S. 782, 795-96 (2001).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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