APPENDIX

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APPENDIX A

United States Court of Appeals
for the Fifth Circuit

No. 21-40511

[Filed: February 22, 2022]

JOHN CURTIS DEWBERRY,

Petitioner—Appellant,

versus

BOBBY LUMPKIN, *Director, Texas Department of Criminal Justice, Correctional Institutions Division*,

Respondent—Appellee.

Application for Certificate of Appealability from the United States District Court for the Eastern District of Texas
USDC No. 1:05-CV-440

ORDER:

John Curtis Dewberry, an inmate confined at the Estelle Unit of the Texas Department of Criminal Justice, Correctional Institutions Division, moves for a certificate of appealability (COA) to appeal the district court's denial of his petition for habeas corpus under 28

U.S.C. § 2254. In his petition, Dewberry alleges that his trial counsel was ineffective by failing to file a motion for a new trial and "adequately investigate the case." He also contends that the district court erred in denying an evidentiary hearing, concluding that he was not entitled to a change of venue due to pretrial publicity, and holding that he had failed to show sufficient prejudice to overcome a procedural default.

To obtain a COA to appeal the denial of a § 2254 petition, the petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). "The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 327. If the district court denies relief on procedural grounds, a COA should issue if the movant demonstrates, at least, "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *McDaniel*, 529 U.S. at 484.

Dewberry fails to make the required showing as to any of his contentions. Accordingly, IT IS ORDERED that Dewberry's motion for a COA is DENIED.

Dewberry's request for an evidentiary hearing is also DENIED. *See United States v. McDaniels*, 907 F.3d 366, 370 (5th Cir. 2018).

/s/ Cory T. Wilson
CORY T. WILSON
United States Circuit Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

BEAUMONT DIVISION

CIVIL ACTION NO. 1:05cv440

[Filed: June 24, 2021]

JOHN CURTIS DEWBERRY	)
	)
VS.	)
	)
DIRECTOR, TDCJ-CID	)
	)

MEMORANDUM ORDER OVERRULING
PETITIONER'S OBJECTIONS AND
ADOPTING THE MAGISTRATE JUDGE'S
REPORT AND RECOMMENDATION

Petitioner John Curtis Dewberry, an inmate confined at the Estelle Unit of the Texas Department of Criminal Justice, Correctional Institutions Division, proceeding *pro se*, brought this petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

The court referred this matter to the Honorable Keith F. Giblin, United States Magistrate Judge, at Beaumont, Texas, for consideration pursuant to applicable laws and orders of this court. The

Magistrate Judge recommends the petition be denied and dismissed.

The court has received and considered the Report and Recommendation of United States Magistrate Judge filed pursuant to such order, along with the record, pleadings and all available evidence. Petitioner filed objections to the magistrate judge's Report and Recommendation.

The court conducted a *de novo* review of the objections in relation to the pleadings and the applicable law. *See* FED. R. CIV. P. 72(b). After careful consideration, the court concludes petitioner's objections are without merit and should be overruled.

Petitioner has failed to show either that the state court adjudication was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States or that the state court adjudication resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Particularly, when a petitioner brings an ineffective assistance claim under the AEDPA, the relevant question is whether the state court's application of the deferential *Strickland* standard was unreasonable. *See Beatty v. Stephens*, 759 F.3d 455, 463 (5th Cir. 2014). "Both the *Strickland* standard and AEDPA standard are 'highly deferential,' and 'when the two apply in tandem, review is doubly so.'" *Id.* (quoting *Harrington*, 562 U.S. at 105). Petitioner has failed to satisfy his burden.

Petitioner also requests an evidentiary hearing under *Martinez v. Ryan*, 566 U.S. 1 (2012). However, petitioner raised his underlying substantive claims in his first state application for writ of habeas corpus. *See* SHCR, Doc. 53-4 at 8-14. The Texas Court of Criminal Appeals denied petitioner's state application without written order. This is a determination on the merits. *See Singleton v. Johnson*, 178 F.3d 381, 384 (5th Cir. 1999); *Ex parte Torres*, 943 S.W. 2d 469, 472 (Tex. Crim. App. 1997). Therefore, those claims were not procedurally defaulted. Federal habeas courts are not an alternative forum for trying facts and issues which were insufficiently developed in state proceedings. *Williams v. Taylor*, 529 U.S. 420, 437 (2000). Further, under *Cullen v. Pinholster*, federal habeas review under 2254(d)(1) "is limited to the record that was before the state court that adjudicated the claim on the merits." *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011).

Additionally, the highest state court found counsel did not provide ineffective assistance. As noted in the Report, the holdings in *Martinez* and *Trevino v. Thaler*, 569 U.S. 413 (2013), do not furnish a federal habeas petitioner a vehicle for obtaining *de novo* federal habeas review of substantive constitutional claims which the petitioner litigated unsuccessfully in a state habeas corpus proceeding but now wishes to relitigate with new evidence and different counsel. *See* Report, Doc. 61 at n.1. Petitioner has failed to show either deficient performance or prejudice related to his claims against counsel. Further, petitioner has failed to show either that the state court adjudication was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme

Court of the United States or that the state court adjudication resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Accordingly, petitioner's claims should be denied.

Next, to the extent any of petitioner's claims were procedurally defaulted, petitioner has failed to show either cause or prejudice. Petitioner's procedurally defaulted claims were not substantial claims. A "substantial" claim is one that the petitioner demonstrates has "some merit." *Martinez*, 566 U.S. at 14; *Ibarra v. Davis,* 738 F. App'x 814, 817 (5th Cir. 2018). A claim of ineffective assistance of counsel can be insubstantial if "it is does not have any merit or that it is wholly without factual support," or if "the attorney in the initial-review collateral proceeding did not perform below constitutional standards." *Martinez*, 566 U.S. at 16. Petitioner's claims are without factual support of valid underlying claims showing petitioner was entitled to a favorable ruling, and the claims were not substantial claims of ineffective assistance of trial counsel.

Moreover, petitioner has not shown sufficient prejudice to overcome any procedural default. *See Ibarra*, 738 F. App'x at 817. A petitioner has an affirmative burden to prove prejudice. *Strickland*, 466 U.S. at 693. To prove prejudice, the petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at 694. A reasonable probability is one sufficient to undermine confidence in the outcome. *Id*. It is insufficient for a

defendant to show that the error had some conceivable effect on the outcome of the proceeding. *Id.* at 693. Petitioner has failed to show a reasonable probability the result of the proceeding would have been different but for counsel's alleged errors. A conceivable effect is not enough. Petitioner has failed to satisfy his standard of proof.

Finally, petitioner is not entitled to the issuance of a certificate of appealability. An appeal from a judgment denying federal habeas corpus relief may not proceed unless a judge issues a certificate of appealability. *See* 28 U.S.C. § 2253; FED. R. APP. P. 22(b). The standard for granting a certificate of appealability, like that for granting a certificate of probable cause to appeal under prior law, requires the movant to make a substantial showing of the denial of a federal constitutional right. *See Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000); *Elizalde v. Dretke*, 362 F.3d 323, 328 (5th Cir. 2004); *see also Barefoot v. Estelle*, 463 U.S. 880, 893 (1982). In making that substantial showing, the movant need not establish that he should prevail on the merits. Rather, he must demonstrate that the issues are subject to debate among jurists of reason, that a court could resolve the issues in a different manner, or that the questions presented are worthy of encouragement to proceed further. *See Slack*, 529 U.S. at 483-84. Any doubt regarding whether to grant a certificate of appealability is resolved in favor of the movant, and the severity of the penalty may be considered in making this determination. *See Miller v. Johnson*, 200 F.3d 274, 280-81 (5th Cir.), *cert. denied*, 531 U.S. 849 (2000).

Here, petitioner has not shown that any of the issues raised by his claims are subject to debate among jurists of reason. The factual and legal questions advanced by petitioner are not novel and have been consistently resolved adversely to his position. In addition, the questions presented are not worthy of encouragement to proceed further. Therefore, petitioner has failed to make a sufficient showing to merit the issuance of a certificate of appealability. Accordingly, a certificate of appealability shall not be issued.

O R D E R

Accordingly, petitioner's objections are **OVERRULED**. The findings of fact and conclusions of law of the magistrate judge are correct and the report of the magistrate judge is **ADOPTED**. A final judgment will be entered in this case in accordance with the magistrate judge's recommendations.

SIGNED this the **24** day of **June, 2021.**

/s/ Thad Heartfield
Thad Heartfield
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

BEAUMONT DIVISION

CIVIL ACTION NO. 1:05cv440

[Filed: June 24, 2021]

JOHN CURTIS DEWBERRY	)
	)
VS.	)
	)
DIRECTOR, TDCJ-CID	)
	)

FINAL JUDGMENT

This action came on before the Court, Honorable Thad Heartfield, District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered, it is

ORDERED and **ADJUDGED** that the above-styled petition for writ of habeas corpus is **DENIED** and **DISMISSED**.

All motions by either party not previously ruled on are hereby **DENIED**.

SIGNED this the **24** day of **June, 2021.**

/s/ Thad Heartfield
Thad Heartfield
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

BEAUMONT DIVISION

CIVIL ACTION NO. 1:05cv440

[Filed: February 17, 2020]

JOHN CURTIS DEWBERRY	)
	)
VS.	)
	)
DIRECTOR, TDCJ-CID	)
	)

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

Petitioner John Curtis Dewberry, an inmate confined in the Texas Department of Criminal Justice, Correctional Institutions Division, proceeding with counsel, filed this petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

The above-styled action was referred to the undersigned magistrate judge pursuant to 28 U.S.C. § 636 and the Local Rules for the Assignment of Duties to the United States Magistrate Judge for findings of fact, conclusions of law, and recommendations for the disposition of the case.

Discussion

On November 21, 1996, following a trial by jury before the Criminal District Court for Jefferson County, Texas, petitioner was convicted of capital murder in the course of committing robbery, pursuant to Texas Penal Code § 19.03(a)(2), Cause Number 68937. On direct appeal, the Texas Court of Criminal Appeals affirmed the conviction and sentence. *Dewberry v. State*, 4 S.W.3d 735 (Tex. Crim. App. 1999). On May 22, 2000, the United States Supreme Court denied petitioner's petition for writ of certiorari.

During the pendency of his appeal, petitioner filed a state application for writ of habeas corpus. The Texas Court of Criminal Appeals denied relief on January 5, 2000. Petitioner then filed a federal petition for writ of habeas corpus. The petition was dismissed on January 22, 2001 to allow petitioner to exhaust state habeas remedies. *See Dewberry v. Director,* 4:00cv22 (E.D. Tex. Jan. 22, 2001).

Petitioner filed a second federal petition for writ of habeas corpus on March 25, 2002. The petition was dismissed without prejudice on March 31, 2005 because it contained an unexhausted claim. *See Dewberry v. Director*, 1:02cv743 (E.D. Tex. Mar. 31, 2005).

On June 22, 2005, following the Supreme Court case of *Roper v. Simmons*, 543 U.S. 551, 578-79, 125 S.Ct. 1183, 1200, 161 L.Ed.2d 1 (1985), the Court of Criminal Appeals reformed petitioner's sentence to confinement for a term of life. Petitioner then filed this petition.

The Petition

Petitioner brings this petition asserting the following grounds for review: (1) the refusal to change venue where pervasive community prejudice against petitioner existed denied him due course of law guaranteed by the Fourteenth Amendment; (2) the refusal to change venue where pervasive community prejudice against petitioner existed denied him the right to an impartial jury guaranteed by the Sixth Amendment; (3) trial counsel was ineffective for failing to reduce oral motions for continuance to writing; (4) trial counsel was ineffective for failing to diligently attempt to secure the attendance of Ramey Griffin, and for failing to set forth their diligence in their motion for continuance; (5) trial counsel were ineffective for failing to file a motion for new trial or, alternatively, the procedures employed by Jefferson County in Capital cases constructively force ineffective assistance of counsel for post-trial motions; (6) the Eighth and Fourteenth Amendment prohibit incarceration of petitioner because he is innocent of the crime for which he was convicted; (7) the trial court erred in denying petitioner's motion to suppress the evidence of an alleged confession in violation of the Fifth Amendment; (8) the state committed prosecutorial misconduct by knowingly withholding exculpatory *Brady* information, thereby violating petitioner's rights to due process under the Fifth Amendment; (9) petitioner was constructively denied his Sixth Amendment right to counsel when the defense was forced to proceed after prosecutorial misconduct was revealed; (10) the State committed prosecutorial misconduct by knowingly withholding exculpatory *Brady* information relating to

Mitch King's alleged alibi, thereby violating petitioner's rights to due process under the Fifth Amendment; and 11) petitioner's conviction violates due process under the federal constitution because it resulted from the prosecutor's active and passive use of perjured testimony relating to Mitch King's alleged alibi.

The Response

The respondent has filed a response to the court's order to show cause why relief should not be granted. The respondent denies petitioner's allegations and states that petitioner's grounds for review are without merit. Additionally, the respondent states at least four of petitioner's grounds for review are procedurally barred. Further, the respondent asserts that petitioner has failed to show the state court resolution of petitioner's claims resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. Accordingly, the respondent asserts that the petition should be denied and dismissed with prejudice.

Factual Background

The Texas Court of Criminal Appeals set out the following factual background and evidence supporting Dewberry's conviction on direct appeal:

> The egregious facts of this offense indicated [Dewberry] planned, weeks before this offense, to carry out a murder and robbery. Joshua

Vickers testified that he sold [Dewberry] a sawed-off, 20-gauge shotgun after Thanksgiving 1994. [Dewberry] told Vickers he wanted the gun for "a jack move," which Vickers understood to mean a hijack. Mitchell King, who had been staying with [Dewberry] and his brother since August 1994, testified that a week before Christmas, [Dewberry] asked King if he "knew about making some money." [Dewberry] told King he knew a man "that had some money and [Dewberry] could go and burglarize his house and take the money, get the money." [Dewberry] also told King, "he knew the guy had a lot of money, had a lot of stuff, so [they could] get some money for Christmas." King testified that [Dewberry] said they were "going to have to shoot [the owner of the house to] get our money." When King asked why [Dewberry] wanted to kill the owner, [Dewberry] replied "it was something personal" between him and the guy.

The murder of Elmer Rode was brutal. His sister, Ginger Rode, discovered Elmer's body in his apartment on Christmas Day. Officer Daniel Holloway of the Beaumont Police Department was dispatched to the scene and testified he found Elmer Rode lying on the floor in the living room. Rode's hands were tied behind his back with a telephone cord, and his feet were tied together with a belt. A pillow with bullet holes was lying across his head. After Rode's funeral, Ginger discovered her brother's pawn ticket for the .22 caliber pistol while cleaning his house. The State later proved this pistol was stolen

from Rode by [Dewberry] and/or his brother and was used to shoot Rode. The forensic pathologist testified there were four small caliber gunshot wounds and one contact shotgun wound to Rode's head. The pathologist also found evidence indicating Rode was beaten up and strangled at some point. Abrasions on Rode's wrists suggested Rode struggled against his bonds before he was killed. [FN 2]

FN 2. The pathologist testified Rode was killed "around" December 23rd.

The State also introduced evidence showing Rode was robbed. The bedroom was ransacked, and the bedroom door was removed from its hinges. A VCR in an unopened box, along with another VCR, were stolen from the residence. Rode's pickup truck was also missing. After the murder, Vickers went to [Dewberry]'s apartment where he saw two VCRs — one in an unopened box. [Dewberry] asked Vickers if he knew anyone who wanted to buy a VCR.

Mark Bilfafano provided evidence implicating both [Dewberry] and his brother in the murder and robbery of Rode. Bilfafano testified that [Dewberry], accompanied by his brother, Chris, showed up at his house on December 24th. [Dewberry] wore surgical gloves and was driving Rode's pick-up truck. Bilfafano testified he saw two VCRs and a handgun (which looked like a .22 caliber pistol) in the truck. He testified [Dewberry] was in possession of a shotgun which "looked like" the weapon that the State alleged

> [Dewberry] used to kill Rode. Bilfafano accompanied [Dewberry] and Chris to leave Rode's truck in a shopping center parking lot in Vidor, Texas. En route, Chris told Bilfafano "they killed somebody." Before leaving Vidor, [Dewberry] wiped down the truck.
>
> Bilfafano's testimony indicated [Dewberry] showed no remorse for his actions after the murder. On the way back to Beaumont, [Dewberry] threw the keys to the pickup into the Neches River. Bilfafano also saw [Dewberry] in possession of about $400 in cash. [Dewberry] told Bilfafano "we had to take care of business," that Chris "chickened out," and that "they tied [Rode] up." [Dewberry] also informed Bilfafano "they killed somebody and they just laughed about it."
>
> The evidence at trial further showed [Dewberry] and Chris exchanged the two VCRs and the .22 caliber pistol with Bobby Trevino for $50 and 5 or 6 stones of "crack." Trevino, however, refused the shotgun after Chris told him "they put a pillow over a guy and blasted him with [it]."

Dewberry v. State, 4 S.W.3d at 741-42.

Standard of Review

Title 28 U.S.C. § 2254(a) allows a district court to "entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a).

Section 2254 generally prohibits a petitioner from relitigating issues that were adjudicated on the merits in State court proceedings, with two exceptions. *See* 28 U.S.C. § 2254(d). The first exception allows a petitioner to raise issues previously litigated in the State court in federal habeas proceedings if the adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). The second exception permits relitigation if the adjudication "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). Federal habeas relief from a state court's determination is precluded "so long as fairminded jurists could disagree on the correctness of the state court's decision." *Harrington v. Richter*, 562 U.S. 86, 101 (2011).

Federal habeas courts are not an alternative forum for trying facts and issues which were insufficiently developed in state proceedings. *Williams v. Taylor*, 529 U.S. 420, 437 (2000). Further, following the Supreme Court's decision in *Cullen v. Pinholster*, federal habeas review under 2254(d)(1) "is limited to the record that was before the state court that adjudicated the claim on the merits." *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011).

A decision is contrary to clearly established federal law if the state reaches a conclusion opposite to a decision reached by the Supreme Court on a question of law or if the state court decides a case differently

than the Supreme Court has on a set of materially indistinguishable facts. *See Williams v. Taylor,* 529 U.S. 362, 412-13 (2000). An application of clearly established federal law is unreasonable if the state court identifies the correct governing legal principle, but unreasonably applies that principle to the facts. *Id.* State court decisions must be given the benefit of the doubt. *Renico v. Lett*, 559 U.S. 766, 773 (2010).

The question for federal review is not whether the state court decision was incorrect, but whether it was unreasonable, which is a substantially higher threshold. *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007). 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). If a higher court offered different grounds for its ruling than a lower court, then only the higher court's decision is reviewed. *Id.* "Where a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief." *Harrington*, 526 U.S. at 98; *see also Johnson v. Williams*, 568 U.S. 289, 293 (2013) (holding 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).

A determination of a factual issue made by a state court shall be presumed to be correct upon federal habeas review of the same claim. This court must accept as correct any factual determinations made by the state courts unless the petitioner rebuts the presumption of correctness by clear and convincing

evidence. 28 U.S.C. § 2254(e)(1). The presumption of correctness applies to both implicit and explicit factual findings. *See Young v. Dretke,* 356 F.3d 616, 629 (5th Cir. 2004); *Valdez v. Cockrell,* 274 F.3d 941, 948 n. 11 (5th Cir. 2001) ("The presumption of correctness not only applies to explicit findings of fact, but it also applies to those unarticulated findings which are necessary to the state court's conclusions of mixed law and fact.").

Petitioner argues that the state court's denial of relief was not an adjudication on the merits entitled to deference because of limited investigatory funds and the trial court simply adopted the findings of fact and conclusions of law prepared by the prosecution. Petitioner's argument, however, is without merit because he has "[made] no showing that the state habeas court failed independently to consider and evaluate the state's proposed findings before adopting them as its own." *Hudson v. Quarterman*, 273 F. App'x 331, 335 (5th Cir.) (rejecting similar claim), *cert. denied*, 555 U.S. 1041 (2008). The Fifth Circuit has rejected the contention that habeas findings adopted verbatim from those submitted by the State are not entitled to deference. *See id.* (rejecting assertion that deference was not required because state court adopted respondent's proposed findings and conclusions (citing *Trevino v. Johnson*, 168 F. 3d 173, 180 (5th Cir. 1999) (rejecting challenge to state habeas court's verbatim adoption of district attorney's proposed findings of fact and conclusions of law only three hours after they were filed with court)). Deference to the factual findings of a state court is not dependent upon the quality of the state court's evidentiary hearing. *See Valdez,* 274 F.3d

at 951 (holding that a full and fair hearing is not a precondition according to § 2254(e)(1)'s presumption of correctness to state habeas court findings of fact nor to applying § 2254(d)'s standards of review).

Analysis

I. Change of Venue

Petitioner's first two grounds for relief concern the trial court's refusal to change venue for the trial. In his first ground for relief, petitioner asserts that the refusal to change venue where pervasive community prejudice against petitioner existed denied him due course of law guaranteed by the Fourteenth Amendment. In his second ground, petitioner asserts that the refusal to change venue where pervasive community prejudice against petitioner existed denied him the right to an impartial jury guaranteed by the Sixth Amendment.

Petitioner filed a motion to transfer venue in the trial court, supported by affidavits. Following a controverting affidavit from the prosecution, the trial court conducted a hearing on the motion. At the conclusion of the hearing, the trial court found petitioner had not established an inherent prejudice in the community and denied the motion.

The Sixth Amendment provides to criminal defendants the right to trial by an impartial jury. With respect to pretrial publicity and prospective jurors, the Supreme Court has stated the following:

> It is not required . . . that the jurors be totally ignorant of the facts and issues involved. In

> these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and 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. This is particularly true in criminal cases. 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.

Irvin v. Dowd, 366 U.S. 717, 722-23 (1961) (citations omitted). Only in circumstances where the convictions were "obtained in a trial atmosphere that had been utterly corrupted by press coverage" has the Supreme Court overturned state court convictions due to pretrial publicity. *See Murphy v. Florida*, 421 U.S. 794, 798 (1975). The Supreme Court more recently observed that although it has overturned convictions "obtained in a trial atmosphere that was utterly corrupted by press coverage; our decisions, however, cannot be made to stand for the proposition that juror exposure to . . . news accounts of the crime . . . alone presumptively deprives the defendant of due process." *Skilling v. United States*, 561 U.S. 358, 380 (2010) (citation and internal quotation marks omitted). In the Fifth Circuit a habeas petitioner "seeking to have his conviction nullified on the ground that he was denied a fair trial

to an impartial jury 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 v. Alabama,* 623 F.2d 992, 996 (5th Cir. 1980) (citing *Irvin,* 366 U.S. at 723). "Jurors are considered fair and impartial so long as they 'can lay aside [an] impression or opinion and render a verdict based on the evidence presented in court.'" *United States v. Herrera*, 884 F.3d 511, 517 (5th Cir. 2018) (quoting *Murphy*, 421 U.S. at 800).

In this case, petitioner attempts to show that there was extensive pretrial publicity in the media. Petitioner presented affidavits of citizens stating he or she did not believe petitioner could get a fair trial, as well as media recordings of the coverage, and testimony of news related personnel. Petitioner then asks this Court to presume that he was denied his right to an impartial jury.

On direct appeal, the Court of Criminal Appeals explained that the media witnesses called by petitioner each testified that the medial coverage was fair and accurate. The court also pointed out that during the testimony of five lay witnesses "[n]ot one person stated that the media's coverage had been prejudicial or inflammatory." *Dewberry v. State*, 4 S.W. 3d at 744. Further, the Court of Criminal Appeals stated the following in rejecting petitioner's claims:

> Given the record, [petitioner] has failed to show the outside influences of the media affecting the community were so "inherently suspect," or were inflammatory, pervasive or prejudicial, as to raise doubt about the likelihood of his obtaining

> a fair and impartial jury in Jefferson County. *See Teague*, 864 S.W.2d at 510. Reviewing the juror selection process as a whole, the trial court correctly found no pervasive public prejudice existed towards [petitioner]. *See Bell*, 938 S.W.2d at 46. Hence, we conclude the trial court did not abuse its discretion in overruling [petitioner's] second motion for a change of venue.

Id. at 746.

The Supreme Court also has rejected the type of approach taken by petitioner in this case for the following reasons:

> Petitioner's argument that the extensive coverage by the media denied him a fair trial rests almost entirely upon the quantum of publicity which the events received. He has directed us to no specific portions of the record, in particular the voir dire examination of the jurors, which would require a finding of constitutional unfairness as to the method of jury selection or as to the character of the jurors actually selected. But under Murphy, extensive knowledge in the community of either the crimes or the putative criminal is not sufficient by itself to render a trial constitutionally unfair. Petitioner in this case has simply shown that the community was made aware of the charges against him and asks us on that basis to presume unfairness of constitutional magnitude at his trial. This we will not do in the absence of

> a "trial atmosphere . . . utterly corrupted by press coverage." *Murphy*, 421 U.S. at 798.

Dobbert v. Florida, 432 U.S. 282, 303 (1977). "[P]resumptive prejudice is only rarely applicable and is confined to those instances where the petitioner can demonstrate an extreme situation of inflammatory pretrial publicity that literally saturated the community in which his trial was held." *Busby v. Dretke*, 359 F.3d 708, 725-26 (5th Cir.) (citing *Mayola,* 623 F.2d at 997), cert. denied, 541 U.S. 1087 (2004).

Petitioner's case does not satisfy this standard. The quality and quantity of media coverage in this case is far less than in those cases that the courts have previously found the corrupting influence of press coverage problematic. *See Skilling*, 561 U.S. 379-381. Furthermore, petitioner's efforts to demonstrate an actual, identifiable prejudice attributable to that publicity on the part of members of his jury fall short. Therefore, petitioner's claims do not amount to a constitutional violation.

Petitioner has failed to show either that the state court adjudication was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States or that the state court adjudication resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Accordingly, petitioner's grounds for relief should be denied.

II. Effective Assistance of Counsel

Next, petitioner asserts three grounds for relief based on the alleged ineffectiveness of counsel. In his ground three, petitioner asserts that trial counsel was ineffective for failing to reduce oral motions for continuance to writing. In ground four, petitioner asserts that trial counsel was ineffective for failing to diligently attempt to secure the attendance of Ramey Griffin, and for failing to set forth their diligence in their motion for continuance. Finally, in ground five, petitioner asserts that trial counsel were ineffective for failing to file a motion for new trial or, alternatively, the procedures employed by Jefferson County in capital murder cases constructively force ineffective assistance of counsel for post-trial motions.

A. Applicable Law

When addressing the issue of what a petitioner must prove to demonstrate an actual ineffective assistance of counsel claim, courts look to the standard set forth in *Strickland v. Washington,* 466 U.S. 668 (1984). *See United States v. Grammas*, 376 F.3d 433, 436 (5th Cir. 2004). In order to show that counsel was ineffective a petitioner must demonstrate:

> First... that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the

> defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings it cannot be said that the conviction or death sentence resulted in a breakdown of the adversarial process that renders the result unreliable.

Strickland, 466 U.S. at 687.

"To show deficient performance, 'the defendant must show that counsel's representation fell below an objective standard of reasonableness.'" *Reed v. Stephens*, 739 F.3d 753, 773 (5th Cir. 2014) (quoting *Strickland*, 466 U.S. at 688). "Counsel's performance is judged based on prevailing norms of practice, and judicial scrutiny of counsel's performance must be highly deferential to avoid 'the distorting effects of hindsight.'" *Loden v. McCarty*, 778 F.3d 484, 494 (5th Cir. 2015) (quoting *Carty v. Thaler*, 583 F.3d 244, 258 (5th Cir. 2009)). In order to prove the prejudice prong, a petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Day v. Quarterman*, 566 F.3d 527, 536 (5th Cir. 2009). "*Strickland* asks whether it is 'reasonably likely' the result would have been different." *Harrington*, 562 U.S. at 111. Because the petitioner must prove both deficient performance and prejudice, the petitioner's failure to prove either will be fatal to his claim. *See Johnson v. Scott*, 68 F.3d 106, 109 (5th Cir. 1995).

Whether the representation was deficient is determined as measured against an objective standard of reasonableness. *See Kitchens v. Johnson*, 190 F.3d 698, 701 (5th Cir. 1999). "A conscious and informed

decision on trial tactics and strategy cannot be the basis for constitutionally ineffective assistance of counsel unless it is so ill chosen that it permeates the entire trial with obvious unfairness." *United States v. Jones*, 287 F.3d 325, 331 (5th Cir. 2002) (quoting *Garland v. Maggio*, 717 F.2d 199, 206 (5th Cir. 1983)). "There is a strong presumption that counsel's conduct falls within a wide range of reasonable professional assistance." *Woodward v. Epps*, 580 F.3d 318, 329 (5th Cir. 2009) (quoting *Romero v. Lynaugh*, 884 F.2d 871, 876 (5th Cir. 1989)).

The burden of proof in a habeas corpus proceeding attacking the effectiveness of trial counsel is upon the petitioner, who must demonstrate counsel's ineffectiveness by a preponderance of the evidence. *See Martin v. Maggio,* 711 F.2d 1273, 1279 (5th Cir. 1983). A habeas petitioner must "affirmatively prove," not just allege, prejudice. *Day,* 556 F.3d at 536. If a petitioner fails to prove the prejudice part of the test, the Court need not address the question of counsel's performance. *Id*. A reviewing court "must strongly presume that trial counsel rendered adequate assistance and that the challenged conduct was the product of a reasoned trial strategy." *Wilkerson v. Collins,* 950 F.2d 1054, 1065 (5th Cir. 1992). In determining the merits of an alleged Sixth Amendment violation, a court "must be highly deferential" to counsel's conduct. *Strickland,* 466 U.S. at 687.

Strategic decisions made by counsel during the course of trial are entitled to substantial deference in the hindsight of federal habeas review. *See Strickland,* 466 U.S. at 689 (emphasizing that "[j]udicial scrutiny

of counsel's performance must be highly deferential" and that "every effort [must] be made to eliminate the distorting effects of hindsight"). A federal habeas corpus court may not find ineffective assistance of counsel merely because it disagrees with counsel's chosen trial strategy. *See Crane v. Johnson,* 178 F.3d 309, 312 (5th Cir. 1999).

When a petitioner brings an ineffective assistance claim under the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), the relevant question is whether the state court's application of the deferential *Strickland* standard was unreasonable. *See Beatty v. Stephens*, 759 F.3d 455, 463 (5th Cir. 2014). "Both the *Strickland* standard and AEDPA standard are 'highly deferential,' and 'when the two apply in tandem, review is doubly so.'" *Id.* (quoting *Harrington*, 562 U.S. at 105).

B. Motions for Continuance

In his third ground for review, petitioner asserts that trial counsel was ineffective for failing to reduce oral motions for continuance to writing. Counsel made three oral motions for continuance. The trial court denied each motion.

The first instance occurred during a pre-trial hearing on a motion to suppress evidence in which counsel moved for a continuance to secure the presence of Steve McGraw, a sheriff's department employee. Petitioner claims McGraw was familiar with certain videotapes which had been removed from the victim's home.

The second motion for continuance was made during trial to obtain the parole records of Mitch King

based on the disclosure during trial that the prosecutor had sent a letter to the Texas board of Pardons and Paroles requesting a parole warrant be lifted for King because he was a witness in a capital murder case. Petitioner claims this was an unknown benefit to King which had not been disclosed.

The third motion for continuance was also made during trial to review a letter written to the victim. Petitioner argues the prosecution had not provided a copy of a letter to the victim from an early suspect in the case.

1. Procedural Default

An initial issue that must be addressed is procedural default. The respondent contends petitioner's allegations in grounds two and three are, in part, procedurally barred from federal habeas review. Additionally, the respondent asserts that petitioner's claim in ground five concerning the procedures employed in Jefferson County in Capital cases is procedurally barred.

A person in custody pursuant to the judgment of a state court generally must exhaust available state habeas remedies prior to filing an application in federal court. Title 28 U.S.C. § 2254 provides in pertinent part the following:

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

> (A) the applicant has exhausted the remedies available in the courts of the State; or
>
> (B)(i) there is an absence of available state corrective process; or
>
> (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

The exhaustion requirement is satisfied when the substance of the federal habeas claim has been "fairly presented" to the highest state court, i.e., the ' presents his claims before the state courts in a procedurally proper manner according to the rules of the state courts. *Baldwin v. Reese*, 541 U.S. 27, 29-33 (2004) (holding a petitioner failed to "fairly present" a claim of ineffective assistance by his state appellate counsel merely by labeling the performance of said counsel "ineffective," without accompanying that label with either a reference to federal law or a citation to an opinion applying federal law to such a claim). The exhaustion requirement is not met if the petitioner presents new legal theories or factual claims in his federal habeas petition. *Anderson v. Harless*, 459 U.S. 4, 6-7 (1982); *Riley v. Cockrell*, 339 F.3d 308, 318 (5th Cir. 2003) ("It is not enough that the facts applicable to the federal claims were all before the State court, or that the petitioner made a similar state-law based claim. The federal claim must be the 'substantial equivalent' of the claim brought before the State court."), *cert. denied*, 543 U.S. 1056 (2005); *Wilder v. Cockrell*, 274 F.3d 255, 259 (5th Cir. 2001) ("where petitioner advances in federal court an argument based on a legal theory distinct from that relied upon in the

state court, he fails to satisfy the exhaustion requirement").

If a petitioner has failed to exhaust state court remedies and the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred, the claims are procedurally defaulted for purposes of federal habeas review, irrespective of whether the last state court to which the petitioner actually presented his claims rested its decision upon an independent and adequate state ground. *Coleman v. Thompson*, 501 U.S. 722, 735 n. 1, 111 S.Ct. 2546, 2557 n. 1, 115 L.Ed.2d 640 (1991). On habeas corpus review, a federal court may not consider a state inmate's claim if the state court based its rejection of that claim on an independent and adequate procedural state ground. *See Martin v. Maxey*, 98 F.3d 844, 847 (5th Cir.1996). The procedural bar will not be considered adequate unless it is applied regularly or strictly to the great majority of similar claims. *Amos v. Scott*, 61 F.3d 333, 338 (5th Cir.), cert denied, 116 S.Ct. 557, 133 L.Ed.2d 458 (1995).

Petitioner failed to present his second, third, and fifth claims raised in this petition to the highest state court until his second state writ application which was dismissed as an abuse of the writ. Texas courts regularly and strictly apply the abuse of the writ doctrine. As a result, application of the doctrine in a state writ constitutes an independent and adequate ground for dismissal. *Emery v. Johnson*, 139 F.3d 191, 195 (5th Cir. 1997); *Fearance v. Scott*, 56 F.3d 633, 642

(5th Cir. 1995). Accordingly, petitioner's claims are unexhausted and procedurally defaulted.

A habeas petitioner can overcome a procedural default by showing cause and actual prejudice or a miscarriage of justice. *See Murray v. Carrier*, 477 U.S. 478, 488, 106 S.Ct. 2639, 2645, 91 L.Ed.2d 397 (1986). Here, however, petitioner has failed to demonstrate either cause, prejudice or a miscarriage of justice. Accordingly, petitioner is not entitled to federal habeas corpus relief on these grounds for review as the claims were not exhausted and are procedurally barred.[1]

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[1] As previously set forth, the review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits. "This backward-looking language requires an examination of the state-court decision at the time it was made." *Pinholster*, 563 U.S. at 181-82. The Supreme Court's holding in *Martinez v. Ryan*, 556 U.S. 1 (2012), furnishes a very narrow avenue for circumventing the procedural default of a claim in some cases. However, it requires a federal habeas petitioner to show that the performance of his state habeas counsel was so deficient as to preclude a state court merits review of a meritorious claim of ineffective assistance by trial counsel, thus permitting a federal habeas court to undertake a merits review of the otherwise procedurally defaulted complaint of ineffective assistance by state trial counsel. *See In re Edwards*, 865 F.3d 197, 207-08 (5th Cir.), *cert. denied*, 137 S. Ct. 909 (2017) (In order to show cause for procedural default under *Martinez* and *Trevino v. Thaler*, 569 U.S. 413 (2013), "the petitioner must show (1) that his claim of ineffective assistance of counsel at trial is 'substantial' (i.e., 'has some merit'); and (2) that his habeas counsel was ineffective for failing to present those claims in his first state habeas application.") (quoting *Beatty v. Stephens*, 759 F.3d 455, 465-66 (5th Cir. 2014)); *Prystash v. Davis*, 854 F.3d 830, 836 (5th Cir. 2017), *cert. denied*, 138 S. Ct. 649 (2018) (holding the Supreme Court's rulings in *Martinez* and *Trevino* created a narrow exception to the general rules of procedural default that applies

2. Merits of Claims

a. Motions for Continuance and Ramey Griffin

In his ground three, petitioner asserts that trial counsel was ineffective for failing to reduce oral motions for continuance to writing. The three motions for continuance were set forth above. In ground four, petitioner asserts that trial counsel was ineffective for failing to diligently attempt to secure the attendance of Ramey Griffin, and for failing to set forth their diligence in their motion for continuance.

On direct appeal, petitioner argued the trial court had abused its discretion in denying the motions for

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only to a claim of ineffective assistance by state trial counsel). Petitioner has failed to satisfy his burden in this regard.

The Supreme Court has declined to extend the holdings in *Martinez* and *Trevino* beyond the context of procedurally defaulted complaints of ineffective assistance by trial counsel. *See Davila v. Davis*, 137 S. Ct. 2058, 2065-66 (2017) (declining to extend the holdings in *Martinez* and *Trevino* to a complaint of ineffective assistance by postconviction counsel and declaring that doing so would constitute an improper overruling of its prior opinion in *Coleman v. Thompson*); *Busby v. Davis*, 892 F.3d 735, 755-56 (5th Cir. 2018) (citing *Davila* and declining to extend the holdings in *Martinez* and *Thaler* beyond the context of procedurally defaulted claims of ineffective assistance by trial counsel). The holdings in *Martinez* and *Trevino* do not furnish a federal habeas petitioner a vehicle for obtaining *de novo* federal habeas review of substantive constitutional claims which the petitioner litigated unsuccessfully in a state habeas corpus proceeding but now wishes to re-litigate using new evidence and different counsel. Further, the Supreme Court has not made either *Martinez* or *Trevino* retroactive to cases on collateral reviwe, within the meaning of 28 U.S.C. § 2244." *In re Paredes*, 587 F. App'x 805 (5th Cir. 2014).

continuance. However, the Court of Criminal Appeals refused to consider petitioner's claim because "[a] motion for continuance not in writing and not sworn preserves nothing for review." *Dewberry*, 4 S.W. 3d at 755-56. Thus, petitioner argues, as he did during state habeas proceedings, that counsel's failure to preserve the motions by reducing them to writing amounted to ineffective assistance of counsel.

The appellate court also found petitioner had failed to preserve error with respect to Griffin's attendance because counsel failed to establish their diligence as required by Article 29.06 of the Texas Code of Criminal Procedure. Accordingly, for the first time in his second state habeas application, petitioner argued that counsel were ineffective for failing to meet the diligence standard. However, the Court of Criminal Appeals dismissed the writ as an abuse of the writ which, as discussed above, renders this claim procedurally barred. Further, even if the witness could have been located and had testified, petitioner has failed to show a reasonable probability the outcome of the trial would have been different.

The state habeas court found that the motions were denied because they lacked merit, not because the motions were made orally. The habeas court also noted that the motions

> were voiced in the courtroom in the middle of trial at the very time the issue alleged in counsel's objection first emerged. As shown by the record, at the time of each said motion, this Court afforded some "time latitude" and assistance for trial counsel to deal with the

> problem they had perceived without a continuance.

SHCR at 32 (Doc. 53-2 at 33).

Petitioner has failed to show that, even if counsel had properly preserved the denial of the motions, the Court of Criminal Appeals would have found the trial court's denial to be an abuse of discretion. The state habeas court stated: "Even at this late, date, long after the denial of said motions during his trial, [petitioner] has failed even to allege (let alone prove) any facts which would have **required** favorable ruling on said motions if they had been written instead of oral." SHCR at 35. Accordingly, petitioner has failed to show counsel's performance was deficient for not reducing the motions to writing.

Further, as indicated above, petitioner has failed to satisfy the prejudice prong of an ineffective assistance of counsel claim. Even assuming, *arguendo*, petitioner had established deficient performance, he must still show a reasonable probability that, but for counsel's deficient conduct, the result of the proceeding would have been different. Petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Day,* 566 F.3d at 536. As previously set forth, "*Strickland* asks whether it is 'reasonably likely' the result would have been different." *Harrington*, 562 U.S. at 111. The mere possibility of a different outcome is insufficient to prevail on the prejudice prong. *Crane*, 178 F. 3d at 312; *Ransom v. Johnson*, 126 F.3d 716, 721 (5th Cir. 1997). Petitioner has failed to do so. At most, Griffin's

testimony would have suggested King's complicity in the murder but would not have exonerated petitioner. In this case, there was a substantial amount of other evidence showing petitioner's guilt.

Petitioner has failed to satisfy his burden of proof regarding his claims and has failed to demonstrate he is entitled to relief with respect to the habeas court's determination that trial counsel's performance was constitutional in this regard. Petitioner has failed to show counsel's performance was either deficient or prejudicial.

For the reasons set forth above, petitioner has failed to show that the state court adjudication that counsel's representation was constitutional was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States or that the state court adjudication resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Accordingly, petitioner's grounds three and four should be denied.

b. Motion for New Trial

In his fifth ground for review, petitioner contends trial counsel were ineffective for failing to file a motion for new trial or, alternatively, the procedures employed by Jefferson County in Capital cases constructively force ineffective assistance of counsel for post-trial motions.

As discussed above, this claim is procedurally barred from review regarding the procedures in

Jefferson County because it was only raised in petitioner's second state application, which was dismissed as an abuse of the writ. However, assuming, *arguendo*, the claim is not barred from review, the claim lacks merit and should be denied.

In Texas, a criminal defendant has thirty days to file a motion for new trial after the date on which the trial court imposes or suspends sentence in open court. *See* TEX. R. APP. P. 21(a); *Cooks v. State*, 240 S.W.3d 906, 907-08 (Tex. Crim. App. 2007). The Fifth Circuit held "there is a Sixth Amendment right to the assistance of counsel at the motion for new trial during the post-trial, pre-appeal period, in Texas, because it is a critical stage." *McAffee v. Thaler*, 630 F.3d 383, 393 (5th Cir. 2011); *see also Cooks*, 240 S.W.3d at 911. A defendant's claim that he was denied effective assistance of counsel in connection with a motion for new trial is governed by the two-pronged *Strickland* test, which requires the defendant to demonstrate both deficient performance and prejudice by showing that, but for counsel's errors, the result of the proceeding would have been different. *McAfee*, 630 F.3d at 394.

Petitioner argues he was denied counsel at a critical stage, claiming he was "without counsel for a part of his trial." Petition at 39. However, this is incorrect. A review of the criminal record reveals that the verdict of the jury was entered on November 21, 1996, the same date as petitioner's notice of appeal was filed and counsel Douglas Barlow was appointed to represent petitioner on appeal. *See* Doc. 53-3 at 160, 187. The judgment of the trial court was entered on November

22, 1996. *See* Doc. 53-3 at 189-90. Thus, petitioner has failed to show he was denied counsel at a critical stage.

Further, to the extent petitioner attempts to argue counsel was deficient for not filing a motion for new trial or that it was impossible for counsel to have filed a motion for new trial, there is a rebuttable presumption that counsel considered and rejected the possibility of filing a motion for new trial when one is not filed inside the thirty-day deadline. *Oldham v. State*, 977 S.W.2d 354, 363 (Tex. Crim. App. 1998); *Smith v. State*, 17 S.W, 3d 60, 663 (Tex. Crim. App. 2000). A criminal defendant claiming the denial of the right to counsel must overcome this presumption to establish his claim. *See Kane v. State*, 80 S.W.3d 693, 695 (Tex. App. - Fort Worth 2002, pet ref'd). In order to show harm, the defendant must present at least one "facially plausible" claim that could have been argued in a motion for new trial. *Griffith v. State*, 507 S.W.3d 720, 722 (Tex. Crim. App. 2016). Harm results if the error deprives the defendant of a substantive or procedural right he was entitled to.

Here, petitioner argues that had a motion for new trial been filed, the motion would have complained of the following, at a minimum:

1. the inherent prejudice in the trial by the failure to change venue;

2. the surprise and resulting prejudice in preparation during the trial caused by the State's failure to timely tender exculpatory evidence; and

3. the failure of the trial court to continue the case in light of the *Brady* violations by the State.

Petition at 37.

However, petitioner has failed to show counsel's performance was deficient in this regard because no claim was procedurally defaulted as a result of the failure to file a motion for new trial. The Court of Criminal Appeals found that petitioner failed to show any specific issues of fact outside the record which were procedurally defaulted. Thus, contrary to petitioner's assertion, a motion for new trial was not necessary for "establishing a record on appeal on issues of fact that are outside the record." *Dewberry*, 4 S.W. 3d at 757. Further, petitioner has failed to show how he was prejudiced by the failure to file a motion for new trial because he has not shown any valid underlying claims.

Petitioner has failed to satisfy his burden of proof regarding his claims and has failed to demonstrate he is entitled to relief with respect to the state court's determination that trial counsel's performance was constitutional in this regard. Petitioner has failed to show counsel's performance was either deficient or prejudicial.

For the reasons set forth above, petitioner has failed to show that the state court adjudication that counsel's representation was constitutional was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States or that the state court adjudication resulted in a decision that was based on an unreasonable determination of the facts in light of

the evidence presented in the state court proceeding. Accordingly, petitioner's grounds should be denied.

III. Actual Innocence

Next, in ground six, petitioner asserts that the Eighth and Fourteenth Amendments prohibit incarceration of petitioner because he is innocent of the crime for which he was convicted. Petitioner asserts that new evidence of the prosecution's star witness's guilt for this offense has been discovered. Petitioner contends that the affidavit of Jack R. Ytuarte not only exculpates petitioner, but it also tends to inculpate Mitch King, the prosecution's star witness.

In *McQuiggin v. Perkins,* 569 U.S. 383, 386 (2013), the Supreme Court held that "actual innocence, if proved, serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar ... or ... expiration of the statute of limitations." However, the Court cautioned that such claims of actual-innocence are rare, explaining that "a petitioner does not meet the threshold requirement unless he persuades the district court, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." *Id.,* citing *Schlup v. Delo,* 513 U.S. 298, 329 (1995); *see also House v. Bell,* 547 U.S. 518, 538 (2006) (emphasizing that the *Schlup* standard is "demanding" and seldom met).

A credible claim of actual innocence requires that the petitioner support his allegations of constitutional error with "new reliable evidence - whether it be exculpatory scientific evidence, trustworthy eyewitness

accounts, or critical physical evidence - that was not presented at trial." *Schlup,* 513 U.S. at 324. Absent a claim of constitutional error supporting a claim of actual innocence, a free-standing claim of actual innocence relevant to the guilt of a prisoner does not state a basis for federal habeas relief. *See In re Swearingen*, 556 F.3d 344, 348 (5th Cir. 2009); *Lucas v. Johnson*, 132 F.3d 1069, 1075-76 (5th Cir. 1998).

Here, contrary to petitioner's assertion, Ytuarte's affidavit merely inculpates King and does not either directly or indirectly exculpate petitioner. Further, even assuming the existence of some new evidence and that a bare claim of actual innocence could state a cognizable ground for federal habeas relief, the Supreme Court has stated that, even if a "truly persuasive" showing of actual innocence would warrant federal habeas relief, the threshold for such a claim would be "extraordinarily high." *See Herrera v. Collins*, 506 U.S. 390, 417 (1993).

The state habeas court found that the record established there was other evidence in this case which was amply sufficient to support the jury's verdict of guilty even in light of the "newly discovered evidence." SHCR at 26-30 (Doc. 53-2 at 27-31). The court found the record established the following: That the jury heard about Dewberry's admissions of guilt; his own brother made statements to friends that he and petitioner had killed Rode; that Dewberry and his brother were found in possession of Dean Rode's property, as well as the murder weapons, the day after the killing; and forensics evidence indicated the weapons found in their possession were the murder

weapons. SHCR at 26 (Doc. 53-2 at 27). Additionally, the court found Ytuarte's affidavit merely inculpates King; it does not either directly or indirectly exculpate petitioner, and it does not aver that King was the actual killer or that petitioner was not. SHCR at 27 (Doc. 53-2 at 28). Further, the court noted that Ytuarte's affidavit is based solely on hearsay, one more reason the affidavit falls short of "truly persuasive" evidence of actual innocence. These findings are supported by the record in this case. Therefore, petitioner has failed to set forth a truly persuasive showing of actual innocence and his claims do not satisfy the extraordinarily high threshold for an actual innocence claim. Accordingly, petitioner has failed to meet his burden of proof and his claim should be denied.

For the reasons set forth above, petitioner has failed to show that the state court adjudication was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States or that the state court adjudication resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Accordingly, petitioner's grounds should be denied.

IV. Trial Court Error

In ground seven, petitioner argues that the trial court erred in denying petitioner's motion to suppress the evidence of an alleged confession in violation of the Fifth Amendment. Petitioner claims that on the day of his arrest he had consumed alcohol, had taken excessive prescription medication, and had smoked

marijuana. At the time of his arrest, petitioner claims police shot his dog in front of him. For these reasons, petitioner claims he was in a state of drug and alcohol intoxication and at times was seeing double. Additionally, petitioner asserts he was in a state of shock from the shooting of his dog. Petitioner also complains of the environment of the interview room and states that during his interrogation, he made repeated requests to see his father. He contends his request to see his father is the functional equivalent of a request to maintain his silence. Accordingly, he argues that any confession which followed this request was taken in violation of the Fifth Amendment and *Miranda v. Arizona*, 384 U.S. 436 (1966).

The respondent asserts that petitioner's specific argument that his request to see his father was the functional equivalent of a request to maintain his silence is procedurally barred because he did not raise it before the Texas Court of Criminal Appeals. Instead, on direct appeal, petitioner raised the claim that his request to talk to his father was the functional equivalent of a request for counsel. Accordingly, the respondent argues that the claim was not exhausted and is procedurally barred.

"It is not enough that the facts applicable to the federal claim were all before the State court, or that the petitioner made a similar state-law based claim. The federal claim must be the 'substantial equivalent' of the claim brought before the State court." *Riley v. Cockrell*, 339 F.3d 308, 318 (5th Cir. 2003) (internal citations omitted). Further, "where petitioner advances in federal court an argument based on a legal theory

distinct from the relied upon in the state court, he fails to satisfy the exhaustion requirement." *Wilder v. Cockrell*, 274 F.3d 255, 259 (5th Cir. 2001). Accordingly, petitioner's claim, as presented now, is unexhausted. Further, petitioner has failed to show cause, prejudice or a miscarriage of justice; therefore, the claim is procedurally barred. Alternatively, petitioner's claim is without merit for the reasons set forth below.

In *Miranda v. Arizona*, the Supreme Court held that, "[i]f the individual [under interrogation] states that he wants an attorney, the interrogation must cease until an attorney is present." *Miranda v. Arizona*, 384 U.S. 436, 474, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Further, the Court held in *Edwards v. Arizona* that once the accused asserts his right to counsel, all further interrogation by the authorities must cease "until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." *Edwards v. Arizona* 451 U.S. 477, 484–85, 101 S.Ct. 1880, 68 L.Ed. 2d 378 (1981). "If the police do subsequently initiate an encounter in the absence of counsel (assuming there has been no break in custody), the suspect's statements are presumed involuntary and therefore inadmissible as substantive evidence at trial, even where the suspect executes a waiver and his statements would be considered voluntary under traditional standards." *McNeil v. Wisconsin*, 501 U.S. 171, 177, 111 S.Ct. 2204, 115 L.Ed.2d 158 (1991).

The Supreme Court has explained that an accused individual's invocation of the right to remain silent

must be unambiguous. *See Berghuis v. Thompkins*, 560 U.S. 370, 381 (2010); *Davis v. United States*, 512 U.S. 452, 459 (1994). In order to fully invoke his rights under *Miranda*, an individual must make an unambiguous statement "that can reasonably be construed to be an expression of a desire for the assistance of an attorney." *Soffar v. Cockrell*, 300 F.3d 588, 595 (5th Cir.2002) (citing *Davis*, 512 U.S. at 459). For an individual to successfully invoke his right to remain silent, requiring police to suspend questioning, a defendant must state, for example, that he wishes to remain silent or that he does not want to talk with the police. *Berghuis*, 560 U.S. at 382. An individual's equivocal or ambiguous act, omission, or statement, however, is not enough to invoke the right and cut off questioning. *Id.* If an accused makes a statement concerning invocation of *Miranda* rights that is ambiguous or equivocal, or makes no statement, the police are not required to end the interrogation or to clarify whether the accused wants to invoke his or her *Miranda* rights. *Id*. at 381 (citing *Davis*, 512 U.S. at 459). "*Davis* established a bright-line rule, under which a statement either is such an assertion of the right to counsel or it is not." *Id.* (internal citation omitted).

Petitioner challenged the denial of his motion to suppress on direct appeal because of his state of intoxication and the alleged coercive atmosphere. The Texas Court of Criminal Appeals observed that while petitioner testified he was extremely intoxicated, the two interrogating officers testified that appellant did not appear intoxicated, his eyes were not bloodshot and he did not smell of marijuana. *See Dewberry*, 4 S.W.3d at 747-48. The court held that the trial court did not

abuse its discretion in denying petitioner's motion to suppress because the record evidence supported the trial court's conclusions. *Id.* at 748. The court found that the record in this case fails to show petitioner requested the assistance of counsel. *Id.* at 747. Further, when one of the interrogators told petitioner he could call an attorney if he wanted, petitioner responded that "he had not 'done anything wrong. I don't need a lawyer.'" *Id*. The court concluded, given the record in this case, that petitioner's "request did not amount to a clear and unambiguous invocation of his right to counsel." *Id.* Petitioner has also failed to show his request to speak to his father amounted to an invocation of his right to remain silent or that he made an unequivocal or unambiguous assertion of his right to remain silent. Moreover, in light of the overwhelming evidence against petitioner in this case, any possible error in admitting petitioner's confession was harmless. *See Hopkins v. Cockrell*, 325 F.3d 579, 585 (5th Cir. 2003).

For the reasons set forth above, petitioner has failed to show that the state court adjudication was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States or that the state court adjudication resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Accordingly, petitioner's ground for review should be denied.

V. Prosecutorial Misconduct

In his eighth ground for review, petitioner alleges that the state committed prosecutorial misconduct by knowingly withholding exculpatory *Brady* information, thereby violating petitioner's rights to due process under the Fifth Amendment. Petitioner claims the prosecution failed to disclose before trial that the prosecutor had attempted by telephone and in writing to have the parole warrant of Mitch King recalled. Petitioner also claims the prosecution failed to timely disclose a copy of a letter from Phillip Sprouse to the victim that warned him to be wary of Sundown Fissette. Petitioner complains further that several potentially exculpatory witnesses' names and contact information were not tendered to the defense team.

A claim of prosecutorial misconduct is actionable on federal habeas review only where the alleged misconduct so infected the trial with unfairness as to make the resulting conviction a denial of due process. *Darden v. Wainwright*, 477 U.S. 168, 181 (1986). Prosecutorial misconduct, when alleged in habeas corpus proceedings, is reviewed to determine whether it "so infected the [trial] with unfairness as to make the resulting [conviction] a denial of due process." *Barrientes v. Johnson*, 221 F.3d 741, 753 (5th Cir. 2000). "Due process does not afford relief where the challenged evidence was not the principal focus at trial and the errors were not so pronounced and persistent that it permeates the entire atmosphere of the trial." *Gonzales v. Thaler*, 643 F.3d 425, 430 (5th Cir. 2011). A violation of the due process only occurs when the alleged conduct deprived the petitioner of his right to

a fair trial. A trial is fundamentally unfair if there is a reasonable probability that the verdict might have been different had the trial been properly conducted. *See Foy v. Donnelly*, 959 F.2d 1307, 1317 (5th Cir. 1992). Only in the most egregious situations will a prosecutor's improper conduct violate constitutional rights. *Ortega v. McCotter*, 808 F.2d 406, 410-11 (5th Cir. 1987).

Due process is violated when the prosecution withholds evidence that is both favorable to the accused and "material to either guilt or to punishment." *Brady v. Maryland,* 373 U.S. 83, 87 (1963). This rule covers evidence that might be used for impeachment purposes. *Edmond v. Collins,* 8 F.3d 290, 293 (5th Cir. 1993). "A *Brady* claim involves three elements; 1) the prosecution's suppression or withholding of evidence, 2) which evidence is favorable, and 3) material to the defense." *United States v. Stephens,* 964 F.2d 424, 435 (5th Cir. 1992). Materiality is defined as "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceedings would have been different." *United States v. Bagley,* 473 U.S. 667, 682 (1985).

The state habeas court made the following findings of fact regarding petitioner's claims on state habeas review:

As To Applicant's First Item
(Mitch King Claim)

. . .

2. Nowhere in the application does writ counsel even allege, let alone demonstrate, that King was in fact aware of the prosecutor's said

requests to the Parole Board. Applicant only assumes, in wholly conclusory allegations, that said evidence was "exculpatory" as "impeachment evidence" so as to require disclosure under *Brady*. In the absence of any allegation and proof of fact to support this conclusion, this item is thus not entitled to consideration in collateral post-conviction habeas corpus. Since applicant has not demonstrated that King even knew of the prosecutor's subject parole request, it is impossible to say that his testimony was influenced thereby, let alone to show that the State bargained with him to procure it.

3. **In any event**, this information about the parole requests **was** disclosed to applicant during the trial, and applicant was able to obtain King's parole record and thoroughly question King before the jury about the entire matter during the trial. King explicitly and unequivocally testified that he was never even aware of the subject parole warrant events until they were made known to him during defense counsel Hamm's cross-examination. Defense counsel was also successful in obtaining King's parole record and the testimony of his parole officer in time to present it to the jury during the trial, and that such testimony and parole record only further confirmed the prosecutor's assurance to the trial court that no "bargain" was ever offered to or struck with Mitch King in the course of the subject parole warrant

proceedings to induce his testimony at the trial. This Court further finds that King had given a detailed statement of all the matters reflected in his testimony to the Beaumont police officers on January 3rd, 1995, the very night that the officers were informed that he might have some knowledge of the events described therein. Said statement was given by King well before any of the subject parole warrant events occurred, and it is entirely consistent with his trial testimony. A copy of it is attached to the State's Answer herein as Exhibit B.

As To Applicant's Second Item
(The Sprouse/ Fissette Claim)

4. As to this item, this Court finds that the State did inform defense counsel well before the trial began about the Sprouse letter and of Sundown Fissette's being "an early suspect" in the case. In addition, this Court finds applicant himself already had personal knowledge of Fissette's involvement with the deceased, as shown in his confession.

5. In any event, even if, arguendo, such evidence had not been "disclosed" prior to the trial, this Court finds that it **was** certainly made known to the defense during the trial, and that defense counsel was reasonably able to and did sufficiently investigate, evaluate, and present the testimony of both Sprouse and Fissette to the jury.

As To Applicant's Third Item
(The "Potentially Exculpatory Witness" Claim)

6. Applicant alleges absolutely no facts whatsoever to support his claim that anything in this multifarious item presents a violation of his due process rights under *Brady*. His **only** "factual" allegation as to this ground is found in the second sentence of the second paragraph on page 9 of his Application, viz.:

> "The defense also objected that several potentially exculpatory witnesses names and contact information were not furnished to the defense."

7. Nowhere in this Application does he ever specify just which witnesses he has in mind, just what "potential" exculpatory testimony any of them might have supplied, just what the "contact information" is, or just why and how any such testimony or information is "potentially exculpatory" so as to require disclosure under *Brady*.

SHCR 12-14 (Doc. 53-2 at 13-15). The court concluded that their findings of fact conclusively show that petitioner failed to satisfy the requirements of either *Ex parte Maldonado*, 688 S.W.2d 114 (Tex. Crim. App. - 1985), or *Brady*. SHCR at 18 (Doc. 53-2 at 19). The court further concluded that petitioner "failed to allege or prove in his pleading or from the record (1) that the State actually failed to disclose any of the three items of evidence enumerated in his Application; (2) that any

of said items were in fact 'exculpatory'; or (3) that any one or all of said three items of evidence was material, such that there is a reasonable probability sufficient to undermine confidence in the outcome that had it been disclosed to the defense, the result of the trial would have been different." SHCR at 19-20 (Doc. 53-2 at 20-21).

Here, petitioner concedes the exculpatory information was actually disclosed at trial and not some later date, but argues that the late disclosure adversely affected trial counsel's preparation for trial and for a defense. Petitioner argues counsel was unprepared due to the "surprise" disclosure at trial and wanted to fully investigate.

Petitioner's argument was rejected by the state court which found that counsel had been able to obtain King's parole record and thoroughly question King before the jury about the entire matter during the trial. Additionally, King explicitly and unequivocally testified that he was never even aware of the subject parole warrant events until they were made known to him during cross-examination. Further, defense counsel was also successful in obtaining King's parole record and the testimony of his parole officer in time to present it to the jury during the trial, and that such testimony and parole record confirmed that there was no bargain between King and prosecutors. Moreover, the state court found that the statement given by King well before any of the subject parole warrant events occurred was entirely consistent with his trial testimony. Accordingly, petitioner has failed to show his trial was fundamentally unfair by showing the

outcome of the proceedings would have been different if the state had made a more timely disclose of the information.

Next, the state court found counsel was informed of the Sprouse letter well before trial began and that Fissette was an early suspect in the case. Additionally, petitioner's confession revealed he had personal knowledge of Fissette's involvement. Finally, petitioner has failed to show a *Brady* violation with respect to any potential witnesses where he has failed to show the materiality of any potential testimony or how he was harmed by a failure to disclose.

For the reasons set forth above, petitioner has failed to show that the state court adjudication was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States or that the state court adjudication resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Accordingly, petitioner's grounds should be denied.

VI. Denial of Right to Counsel

In his ninth ground for review, petitioner contends he was constructively denied his Sixth Amendment right to counsel when the defense was forced to proceed after prosecutorial misconduct was revealed. Petitioner asserts that when the judge denied his motions for continuance and mistrial and forced him to continue with the case despite the alleged prosecutorial misconduct, the result was that the state's witnesses were not subjected to the "crucible of meaningful

adversarial testing" by effective cross-examination. Petitioner contends the court prevented counsel from assisting the accused during a critical stage of the proceeding and interfered with the ability of counsel to make independent decisions about how to conduct the defense. Petitioner argues this is a case where prejudice should be presumed under *United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984).

In *Cronic*, the Supreme Court recognized that a defendant might be constructively denied counsel even though an attorney had been appointed to represent him. A constructive denial of counsel occurs, however, in "only a very narrow spectrum of cases where the circumstances leading to counsel's ineffectiveness are so egregious that the defendant was in effect denied *any meaningful assistance at all." Martin v. McCotter*, 796 F.2d 813, 820 (5th Cir. 1986) (quoting *Chadwick v. Green*, 740 F.2d 897, 901 (11th Cir. 1984). In contrast to a *Strickland* claim, "*Cronic* applies in those cases in which defense counsel 'entirely fails to subject the prosecution's case to a meaningful adversarial testing.'" *Haynes v. Cain*, 298 F.3d 375, 377 (5th Cir. 2002) (en banc) (quoting *Bell*, 535 U.S. at 697). "[A]n attorney's failure must be complete," and "the difference between the situations addressed by *Strickland* and *Cronic* is not of degree but of kind." *Id.* "When the defendant receives at least some meaningful assistance, he must prove prejudice in order to obtain relief for ineffective assistance of counsel." *Gochicoa v. Johnson*, 238 F.3d 278, 285 (5th Cir. 2000) (quoting *Goodwin v. Johnson*, 132 F.3d 162, 176 n.10 (5th Cir. 1997)). Petitioner bears the burden of proving a constructive denial of

counsel. *See Childress v. Johnson*, 103 F.3d 1221, 1228-29 (5th Cir. 1997).

As set forth above, petitioner has failed to show prosecutorial misconduct. Further, the court's denial of petitioner's motions for continuance and mistrial and the continuation of the trial in this case do not fall within the narrow spectrum of cases described in *Cronic*. The state court found counsel "were able to (and did) very effectively represent [petitioner] as to this aspect of the case." SHCR at 22 (Doc. 53-2 at 23). The court found that counsel made effective use of the evidence after the late disclosure and the adverse rulings on his motions for continuance. The court also found counsel presented the testimony of both Sprouse and Fissette and conducted appropriate relevant direct and cross-examination of all of the above witnesses. SHCR at 22-23 (Doc. 53-2 at 23-24). Counsel thus provided "some meaningful assistance to petitioner." *See Craker v. McCotter*, 805 F.2d 538, 542 (5th Cir. 1986). Therefore, petitioner has failed to show the state court's determination was an unreasonable application of either *Strickland* or *Cronic* under § 2254(d).

For the reasons set forth above, petitioner has failed to show that the state court adjudication was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States or that the state court adjudication resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Accordingly, petitioner's grounds should be denied.

VII. Due Process - King's Alleged Alibi

In his tenth ground for review, petitioner contends the state committed prosecutorial misconduct by knowingly withholding exculpatory *Brady* information relating to Mitch King's alleged alibi, thereby violating petitioner's rights to due process under the Fifth Amendment. In a related eleventh ground for review, petitioner asserts that his conviction resulted from the prosecutor's active and passive use of perjured testimony relating to King's alleged alibi, in violation of the Due Process Clause. Petitioner argues that the prosecution violated *Brady* by suppressing a statement Bumper Griffin made to police in which Griffin explained he was not with King prior to their meeting in Louisiana.

The respondent asserts that petitioner's claims are procedurally barred. Further, the respondent contends that, regardless of whether the claims are procedurally barred, petitioner cannot establish a constitutional violation that would support federal habeas relief.

A. Procedural Bar

Petitioner's claims were dismissed by the state court as an abuse of the writ. Petitioner claims the State actively suppressed the statement of Bumper Griffin which is cause to excuse the procedural default of the claim. However, the fact that Griffin claimed he was not with King in Austin, Texas before Christmas was told to a defense investigator, and the defense desired for him to testify almost two months prior to trial. *See* Petition at 35-36 (Doc. 1 at 41-42). This information was known to the defense before the time

of trial as it formed the basis for one of counsel's motions for continuance of the trial. *See* SHCR at 60-61 (Doc. 53-2 at 61-62). Therefore, the factual basis for petitioner's claim was reasonably available to petitioner's counsel both on direct appeal and during the initial state habeas proceeding. *See* 4 SCHR at 6-7 (Doc. 40-1 at 9-10). Accordingly, petitioner has failed to show cause for failing to properly raise the claims to the highest state court in a procedurally correct manner, and the claim is procedurally barred. Further, even if it is found that petitioner established cause for failing to properly raise his claims, petitioner has not established the necessary prejudice to overcome the procedural bar. In the alternative, as set forth below, petitioner's claims are without merit.

B. Merits

Assuming, *arguendo*, petitioner's claims are not procedurally barred, petitioner's claims are without merit for the reasons set forth below.

1. Withholding Evidence

As previously discussed, due process is violated when the prosecution withholds evidence that is both favorable to the accused and "material to either guilt or to punishment." *Brady,* 373 U.S. at 87. This rule covers evidence that might be used for impeachment purposes. *Edmond,* 8 F.3d at 293. "A *Brady* claim involves three elements; 1) the prosecution's suppression or withholding of evidence, 2) which evidence is favorable, and 3) material to the defense." *Stephens,* 964 F.2d at 435. Materiality is defined as "a reasonable probability that, had the evidence been disclosed to the defense,

the result of the proceedings would have been different." *Bagley,* 473 U.S. at 682.

The duty to disclose applies even in the absence of a request by the defendant. *Strickler v. Greene*, 527 U.S. 263, 280 (1999). Under *Brady*, even an inadvertent nondisclosure has the same impact on the fairness of the proceedings as deliberate concealment. *Strickler*, U.S. at 288. The prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf, including police. *Kyles v. Whitley*, 514 U.S. 419, 437-38 (2002).

Here, even assuming petitioner could prove the first two elements of a *Brady* violation, he must also show a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *See Bagley*, 473 U.S. at 675; *Thompson v. Davis*, 941 F.3d 813, 816 (5th Cir. 2019). Petitioner has failed to make the requisite showing that there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceedings would have been different. The information was known to the defense and King was cross-examined at trial. Griffin's statement that he was not with King at the time of the victim's murder, while it might have impeached the portion of King's testimony regarding his location at the time of the murder, it would not have established petitioner had no involvement in the commission of the crime. Accordingly, petitioner has failed to show a constitutional violation.

2. Perjured Testimony

In his eleventh ground for review, petitioner asserts that his conviction resulted from the prosecutor's active and passive use of perjured testimony relating to King's alleged alibi, in violation of the Due Process Clause.

The Due Process Clause forbids the State from knowingly using perjured testimony. *See Beltran v. Cockrell*, 294 F.3d 730, 736 (5th Cir. 2002) (citing *Napue v. Illinois*, 360 U.S. 264, 270 (1959)). However, in order for an allegation of perjured testimony to constitute a due process violation, a petitioner must show that the prosecution knowingly presented materially false evidence to the jury. *See Koch v. Puckett*, 907 F.2d 524, 531 (5th Cir. 1990) (citing *United States v. Martinez-Mercado*, 888 F.2d 1484, 1492 (5th Cir. 1989)).

To the extent petitioner may argue that the unknowing use of false testimony violates the Due Process Clause, and assuming, *arguendo*, that the claim is not procedurally barred, such claim is without merit. No Supreme Court case holds that the state's unknowing use of false testimony violates the Due Process Clause. *See Piere v. Vannoy*, 891 F.3d 224, 227-28 (5th Cir. 2018). Thus, to the extent petitioner argues that the state unknowingly presented false testimony, he fails to allege a federal constitutional error. *Id.* at 229.

Here, petitioner has failed to establish the State used false testimony. To prevail on a claim that the Government used perjured testimony, petitioner must show (1) that the evidence presented was false; (2) that

the evidence was material; and (3) that the prosecution knew that the evidence was false. *Carter v. Johnson*, 131 F.3d 452, 458 (5th Cir. 1997), *cert. denied* 523 U.S. 1099, 118 S.Ct. 1567, 140 L.Ed.2d 801 (1998). The perjured testimony is material "only where 'the false testimony could in any reasonable likelihood have affected the judgment of the jury.'" *Knox v. Johnson*, 224 F.3d 470, 478 (5th Cir. 2000) (quoting *Giglio v. United States*, 405 U.S. 150, 154 (1972)), *cert. denied*, 532 U.S. 975 (2001). Petitioner cannot satisfy this standard.

Petitioner has shown discrepancies in King's testimony. However, discrepancies in testimony alone do not establish the knowing use of perjured testimony. *Balles v. Lynaugh*, 835 F.2d 126, 127 (5th Cri. 1988); *see also Kutzner v. Johnson*, 242 F.3d 605, 609 (5th Cir. 2001) ("Conflicting or inconsistent testimony is insufficient to establish perjury."). Contrary to petitioner's contention, the evidence put forth does not establish that the testimony at issue was actually false or that the prosecution had actual knowledge the testimony was allegedly false. Given the record it this case, petitioner has failed to establish that the prosecution used false testimony. Further, in light of the other overwhelming evidence against him, petitioner has failed to show there is a reasonable probability the evidence could have affected the judgment of the jury or that the result of the proceedings would have been different. Accordingly, petitioner has failed to show a constitutional violation, and his grounds for review should be denied.

Recommendation

Petitioner's petition for writ of habeas corpus should be denied and dismissed.

Objections

Within fourteen days after being served with a copy of the magistrate judge's report, any party may serve and file written objections to the findings of facts, conclusions of law and recommendations of the magistrate judge. 28 U.S.C. § 636 (b)(1)(C).

Failure to file written objections to the proposed findings of facts, conclusions of law and recommendations contained within this report within fourteen days after service shall bar an aggrieved party from the entitlement of *de novo* review by the district court of the proposed findings, conclusions and recommendations and from appellate review of factual findings and legal conclusions accepted by the district court except on grounds of plain error. *See Douglass v. United Services Automobile Association*, 79 F.3d 1415, 1417 (5th Cir. 1996) (en banc); 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72.

SIGNED this the 17th day of February, 2020.

/s/ Keith F. Giblin
KEITH F. GIBLIN
UNITED STATES MAGISTRATE JUDGE