No. _____

In the Supreme Court of the United States

October Term 2021

WILLIAM SPEER,

Petitioner,

v.

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

Respondent.

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

APPENDIX TO PETITION

JOHN NICKELSON
Nickelson Law PLLC
7591 Fern Ave., Suite 1403
Shreveport, LA 71105

MAUREEN FRANCO
Federal Public Defender
Western District of Texas
TIVON SCHARDL
Chief, Capital Habeas Unit
JOSHUA FREIMAN*
DONNA F. COLTHARP
Assistant Federal Public Defenders
919 Congress Avenue, Suite 950
Austin, Texas 78701
Joshua_Freiman@fd.org
*Counsel of Record

Appendix A

Case: 13-70001 Document: 00516007669 Page: 1 Date Filed: 09/09/2021

United States Court of Appeals
for the Fifth Circuit

No. 13-70001

No. 13-70001
CONSOLIDATED WITH
No. 19-70001

WILLIAM SPEER,

Petitioner—Appellant,

versus

BOBBY LUMPKIN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent—Appellee.

Appeals from the United States District Court
for the Eastern District of Texas
USDC No. 2:04-CV-269
USDC No. 2:04-CV-269

ON PETITION FOR REHEARING EN BANC

Before JONES, STEWART, and COSTA, *Circuit Judges*.

PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing (5TH CIR. R. 35 I.O.P.), the petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service having requested that the court be polled on rehearing en banc (FED. R. APP. P. 35 and 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.

Case: 13-70001 Document: 00516007669 Page: 2 Date Filed: 09/09/2021

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

September 09, 2021

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 13-70001 Speer v. Lumpkin
USDC No. 2:04-CV-269
USDC No. 2:04-CV-269

Enclosed is an order entered in this case.

See FRAP and Local Rules 41 for stay of the mandate.

Sincerely,

LYLE W. CAYCE, Clerk

By: _____
Mary Frances Yeager, Deputy Clerk
504-310-7686

Mr. Woodson Erich Dryden
Mr. Joshua Aaron Freiman
Mr. Kyle D. Highful
Mr. Stephen M. Hoffman
Mr. John C. Nickelson

Appendix B

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED
August 9, 2021

Lyle W. Cayce
Clerk

No. 13-70001
CONSOLIDATED WITH
No. 19-70001

WILLIAM SPEER,

Petitioner—Appellant,

versus

BOBBY LUMPKIN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent—Appellee.

Appeals from the United States District Court
for the Eastern District of Texas
USDC 2:04-CV-269

ON PETITION FOR PANEL REHEARING

Before JONES, STEWART, and COSTA, *Circuit Judges*.

PER CURIAM:*

The motion for panel rehearing is GRANTED. We withdraw our prior opinion of February 25, 2021, and substitute the following:

In an earlier ruling in this procedurally complex case, a panel of our court remanded for the district court to consider whether William Speer could establish ineffective assistance of counsel at the state habeas stage. *See Speer v. Stephens*, 781 F.3d 784 (5th Cir. 2015). If he could, that might overcome his procedural default of a claim alleging that trial counsel was ineffective in failing to present mitigation evidence at the sentencing phase of his capital trial. *See id.*; *see generally Trevino v. Thaler*, 569 U.S. 413 (2013); *Martinez v. Ryan*, 566 U.S. 1 (2012). The district court ruled that Speer could not establish prejudice from any failure by counsel to adequately investigate mitigation evidence. We authorized an appeal from that ruling, *see Speer v. Lumpkin*, 824 F. App'x 240 (5th Cir. 2020), and now AFFIRM. We also AFFIRM the district court's decision to deny additional funding after it had approved $30,000 in investigation expenses.

I.

The convoluted procedural history of this case is recounted in our prior opinions. *See* 781 F.3d at 785; 824 F. App'x at 242-44. Although the parties address a number of potential issues arising out of the unusual procedural posture of the prior panel's remand, like the district court we conclude that Speer's inability to establish prejudice from any alleged failure to develop and use mitigation evidence presents the most straightforward resolution.

---

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

Claims alleging that counsel was ineffective in failing to investigate mitigation evidence—sometimes called "*Wiggins* claims" after a Supreme Court case recognizing them, *see Wiggins v. Smith*, 539 U.S. 510 (2003)—are now common in capital habeas litigation. As with other ineffective assistance of counsel claims, a petitioner must show both (1) "that counsel's representation fell below an objective standard of reasonableness" and (2) a reasonable probability that counsel's deficient performance prejudiced the petitioner. *Strickland v. Washington*, 466 U.S. 688, 700 (1984). We assume *arguendo* that Speer can establish the first prong, because he fails to establish the second.[1]

The ultimate prejudice question is whether "at least one juror would have struck a different balance" at the sentencing phase had it heard the additional mitigating evidence. *Wiggins*, 539 U.S. at 537. "In evaluating that question, it is necessary to consider *all* the relevant evidence that the jury would have had before it had [defense counsel] pursued the different path—not just the mitigation evidence [he] could have presented, but also the [aggravating] evidence that almost certainly would have come with it." *Wong v. Belmontes*, 558 U.S. 15, 20 (2009).

In conducting this necessarily speculative inquiry, *see Sears v. Upton*, 561 U.S. 945, 956 (2010), we start with the evidence the jury did have in front of it at the sentencing phase. In terms of aggravation evidence, the first and foremost fact is that the jury had just convicted Speer of committing a murder

[1] Similarly, we assume *arguendo* that Speer's *Wiggins* claim is a new one subject to *de novo* review if procedural default can be overcome because it fails the prejudice requirement even under *de novo* review. The premise of the previous panel's remand for a *Martinez/Trevino* inquiry was that Speers had procedurally defaulted this claim. 781 F.3d 786–87. In the context of a procedurally defaulted claim, there is no state court decision, so our review is *de novo*. *See Trevino v. Davis*, 829 F.3d 328, 341 (5th Cir. 2016).

while he was in prison serving a life sentence for capital murder. Speer murdered fellow prisoner Gary Dickerson in an attempt to ingratiate himself with a gang called the Texas Mafia. Not surprisingly, Dickerson's sister was the first witness during the sentencing phase.

The second government witness was Speer's codefendant from his first murder. Franklin Nanyoma recounted that 1990 incident. It began when John Collins and Nanyoma stole some checks from Collins's father, Jerry, and cashed them for $800–$900. Jerry Collins discovered what his son and Nanyoma had done and gave them until Wednesday to return the money, but they felt they had no way to do that. Speer offered to solve the dilemma by killing Jerry Collins. John Collins left the window unlocked at his father's home while Nanyoma drove Speer over. Speer got out, snuck inside, and a few minutes later there was a bang. Speer then returned calmly to the vehicle and they drove away, only to return a few minutes later when Speer decided he should check and make sure that Jerry Collins was dead. After Speer snuck back in the house and satisfied himself that Collins was dead, he and Nanyoma drove away.

Speer's mitigation case centered around two men, James Strickland and Gary Nixon, who volunteered as prison chaplains. They testified to Speer's conversion to Christianity, which apparently occurred after the state notified him that it was seeking the death penalty. These two men had seen many insincere prisoners but were convinced that Speer was sincere in his faith, especially because he had never asked them for anything. In his closing argument at the punishment phase, Speer's lawyer also cited testimony from the guilt phase that Speer did not have a disciplinary record in the prison before he killed Dickerson.

We now turn to the additional mitigation evidence that Speer argues his lawyer should have discovered. Speer contends that his lawyer should

have presented evidence of physical and verbal abuse Speer endured. His stepfather admitted using a belt to whip him.[2] His mother also whipped him with a belt and on one occasion picked him up by the throat. Speer was also beaten when he went to live with his biological father shortly before his first murder. One of those beatings resulted in black eyes and a cut on his face.

There was other domestic violence in Speer's childhood home; his stepfather would savagely beat his mother. Speer also points to verbal abuse from his stepfather and mother. Speer's stepfather, for instance, repeatedly called him "retarded" and told him he was "fat, worthless, and stupid." Drug and alcohol abuse were prevalent in his childhood home.

Speer also argues that he was bullied at school and had very few friends. Kids made fun of him because he was overweight and placed in special education classes. His cousin estimates that Speer had perhaps one real friend. To try and make friends, Speer would do most anything kids asked him to do. Once some kids convinced him to destroy a neighbor's outdoor pool. Other times it was simpler stuff like throwing a rock or jumping out of a tree. Despite Speer's efforts, these people never became his friends.

This desire to please others, which Speer already displayed in grade school, motivated both murders he committed: Speer was not involved in stealing checks from Jerry Collins, but volunteered to kill Collins as a favor to the thieves from whom Collins had demanded repayment; Speer's killing of Gary Dickerson was an attempt to ingratiate himself with gang leaders. The deep roots of this impulse, which one doctor diagnosed as dependent personality disorder, highlight what the district court described as the

[2] His stepfather later murdered his mother, but that occurred years after Speer was already imprisoned for his first murder. *See McGhee v. State*, 2011 WL 286119 (Tex. App.—Houston [1st Dist.] 2011, pet. ref'd, untimely filed) (unpublished).

double-edged nature of much of this mitigation evidence. Although much of it might have painted him in a sympathetic light, some of it also could be viewed as additional evidence of future dangerousness. *See Cullen v. Pinholster*, 563 U.S. 170, 201 (2011) (recognizing that new evidence showing a history of crime, mental illness, and drug abuse in defendant's family is "by no means clearly mitigating as the jury might have concluded that [the defendant] was simply beyond rehabilitation"); *Wong*, 558 U.S. at 26 (explaining that when evaluating prejudice a court must consider the "bad evidence [that] would have come in with the good").

In addition to the dependent personality disorder that appears to have motivated his first two murders and could continue to make Speer dangerous, the district court recognized the following as double-edged evidence: At just four years old, Speer was kicked out of daycare for injuring another student. In second grade, this violent streak reemerged when he threw a desk at his teacher. The same psychologist that found him cooperative and pleasant determined that he had longstanding, unresolved anger problems. He also set fires as a child. And one part of the "new" evidence undercuts the mitigation testimony from the prison chaplains that was presented at his trial: Speer told one psychologist in 1991 that he had recently become a Christian, years before he would tell the volunteer chaplains the same recent conversion story.

After recalibrating both the aggravating and mitigating sides of the ledger to account for the evidence that trial counsel did not present, we conclude that no juror would have reached a different conclusion. Speer has identified much more to put on the mitigation scale. But the additional mitigation evidence is not as strong as the undiscovered evidence in successful *Wiggins* cases. Take *Wiggins* itself. Trial counsel failed to introduce evidence showing that the defendant had suffered from severe

deprivation, abuse, and rape in foster care and he had no violent history (except the charged crime) to offset that mitigation evidence. *See Wiggins*, 539 U.S. at 534–35. Terry Williams was criminally neglected as a child and was a model prisoner—helping to disrupt a prison gang and find and return a guard's wallet. *Williams*, 529 U.S. at 396. And contrary to the unrebutted story the jury heard that Demarcus Sears grew up in a "stable and advantaged" environment, the defendant actually was subjected to sexual abuse and alcohol and drug abuse from an early age that left him in the first percentile of cognitive ability. *Sears v. Upton*, 561 U.S. 945, 947, 948–49 (2010). *Rompilla v. Beard* is, in some respects, closer to this case. 545 U.S. 374 (2005). The defense lawyer failed to uncover evidence of significant domestic abuse during Rompilla's childhood, though that abuse was even more severe than the evidence here.[3] Thus the mitigation evidence Speer points to, while substantial, is not as substantial as that in the cases finding prejudice from counsel's failure to fully investigate.

---

[3] The Supreme Court quoted the following from the Third Circuit's opinion:

> Rompilla's parents were both severe alcoholics who drank constantly. His mother drank during her pregnancy with Rompilla, and he and his brothers eventually developed serious drinking problems. His father, who had a vicious temper, frequently beat Rompilla's mother, leaving her bruised and black-eyed, and bragged about his cheating on her. His parents fought violently, and on at least one occasion his mother stabbed his father. He was abused by his father who beat him when he was young with his hands, fists, leather straps, belts and sticks. All of the children lived in terror. There were no expressions of parental love, affection or approval. Instead, he was subjected to yelling and verbal abuse. His father locked Rompilla and his brother Richard in a small wire mesh dog pen that was filthy and excrement filled. He had an isolated background, and was not allowed to visit other children or to speak to anyone on the phone. They had no indoor plumbing in the house, he slept in the attic with no heat, and the children were not given clothes and attended school in rags.

545 U.S. at 391–92.

But the biggest difference between Speer's *Wiggins* claim and successful ones is on the aggravating evidence side of the scale. The question of future dangerousness often focuses on the likelihood the defendant will be violent in prison (because the defense can argue that alternatives of a lengthy or lifetime prison sentence protect the general public from the defendant). *Cf. Kelly v. South Carolina*, 534 U.S. 246, 253 (2002) ("[E]vidence of violent behavior in prison can raise a strong implication of 'generalized . . . future dangerousness'" (quoting *Simmons v. South Carolina*, 512 U.S. 154, 171 (1994)). Because of the salience of the violence-in-prison concern, experts often testify about the likelihood a defendant will harm others inside the prison. *See, e.g.*, *Garcia v. Stephens*, 757 F.3d 220, 222 (5th Cir. 2014) (discussing psychologist who testified about prison security measures that can impact future dangerousness); *Scheanette v. Quarterman*, 482 F.3d 815, 821 (5th Cir. 2007) (discussing expert opinion there was an 18.8% chance defendant would be violent in prison); *Murphy v. Davis*, 737 F. App'x 693, 698, 704 (5th Cir. 2018) (discussing defense expert who testified that administrative segregation would prevent defendant from posing a danger in prison); *Griffith v. Quarterman*, 196 F. App'x 237, 239 (5th Cir. 2006) (discussing expert who testified defendant would not be dangerous in prison if he was not around women). Guesswork on that paramount consideration was not needed here. While in prison for murder, Speer murdered again. It is difficult to think of more probative evidence on whether Speer might commit violent acts while incarcerated than the fact that he already had.

For these reasons as well as the additional ones the district court discussed, it was not error to conclude that each juror would have reached the same sentencing decision even with the additional evidence that Speer now argues should have been presented at his trial.

II.

Speer also challenges the district court's refusal to grant a hearing and to issue a third order funding a mitigation expert. We review both of these claims for abuse of discretion. *Ayestas v. Davis*, 138 S. Ct. 1080, 1094 (2018) (funding request); *Schiro v. Landrigan*, 550 U.S. 465, 475 (2007) (hearing).

We start with the funding issue. Soon after our court's 2015 remand of this case to allow for the appointment of supplemental counsel, the magistrate judge approved $15,000 in "preliminary funding" for a mitigation expert.

The next year Speer asked for $30,000 more. The magistrate court judge found that the request was for services "of an unusual character of duration," so as to allow funding beyond the statute's default $7,500 cap. *See* 18 U.S.C. § 3599(g)(2). The court concluded, however, that the amount requested was "excessive." As a result, the magistrate judge approved only an additional $15,000, subject to final approval of the Chief Judge of the Court of Appeals, which was granted. In its order partially granting the funding request, the magistrate judge placed Speer "on notice that the amount approved by this order may be the final amount that will be approved in this case, and it should be treated as such."

Despite the warning, Speer later sought additional funding of $15,000 (the same amount reduced from the prior request). The magistrate judge denied the request. He first noted that the court had already approved four times the presumptive maximum in section 3599(g)(2). It next reminded Speer of the court's earlier "admonishment" that it would not approve more than $30,000. Finally, the court observed that the request $45,000 in total funding would exceed "the norm for expert funding in capital habeas proceedings."

Speer argues that the court abused its discretion in denying the additional $15,000 because it did not address considerations that *Ayestas v. Davis*, 138 S. Ct. 1080, 1094 (2018), stated can inform whether a funding request is "reasonably necessary" within the meaning of section 3599(f). Those considerations are "the potential merit of the claims that the applicant wants to pursue, the likelihood that the services will generate useful and admissible evidence, and the prospect that the applicant will be able to clear any procedural hurdles standing in his way." *Id.*

Here, however, the court did find that funding was reasonably necessary. Beyond that, it found that there was a need "for services of an unusual character or duration" that warranted funding in excess of the presumptive statutory cap. The amount of such excess funding is a highly discretionary determination. And by the time a court is considering a request for a third disbursement of funds, it is quite familiar with the case and the funding needs. We thus see no requirement that its order include the "claim-by-claim" analysis that Speer seeks. As a result, the district court did not abuse its discretion in refusing to grant more than $30,000 in funding.

We likewise see no abuse of discretion in the denial of a hearing. The prejudice analysis that the district court conducted and that we affirmed is a legal analysis that would not have benefitted from testimony.

* * *

The judgment of the district court is AFFIRMED.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

August 09, 2021

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing or Rehearing En Banc

No. 13-70001 c/w 19-70001 Speer v. Lumpkin
USDC No. 2:04-CV-269

Enclosed is a copy of the court's decision. The court has entered judgment under Fed. R. App. P. 36. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

Fed. R. App. P. 39 through 41, and 5th Cir. R. 35, 39, and 41 govern costs, rehearings, and mandates. **5th Cir. R. 35 and 40 require you to attach to your petition for panel rehearing or rehearing en banc an unmarked copy of the court's opinion or order**. Please read carefully the Internal Operating Procedures (IOP's) following Fed. R. App. P. 40 and 5th Cir. R. 35 for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if you make a nonmeritorious petition for rehearing en banc.

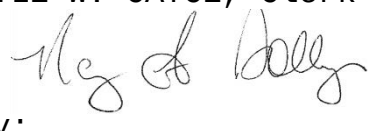
Direct Criminal Appeals. 5th Cir. R. 41 provides that a motion for a stay of mandate under Fed. R. App. P. 41 will not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate that a substantial question will be presented to the Supreme Court. Otherwise, this court may deny the motion and issue the mandate immediately.

Pro Se Cases. If you were unsuccessful in the district court and/or on appeal, and are considering filing a petition for certiorari in the United States Supreme Court, you do not need to file a motion for stay of mandate under Fed. R. App. P. 41. The issuance of the mandate does not affect the time, or your right, to file with the Supreme Court.

Court Appointed Counsel. Court appointed counsel is responsible for filing petition(s) for rehearing(s) (panel and/or en banc) and writ(s) of certiorari to the U.S. Supreme Court, unless relieved of your obligation by court order. If it is your intention to file a motion to withdraw as counsel, you should notify your client promptly, **and advise them of the time limits for filing for rehearing and certiorari**. Additionally, you MUST confirm that this information was given to your client, within the body of your motion to withdraw as counsel.

Sincerely,

LYLE W. CAYCE, Clerk



By: _____
Nancy F. Dolly, Deputy Clerk

Enclosure(s)

Mr. Woodson Erich Dryden
Mr. Joshua Aaron Freiman
Mr. Kyle D. Highful
Mr. Stephen M. Hoffman
Mr. John C. Nickelson

Appendix C

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
February 25, 2021
Lyle W. Cayce
Clerk

No. 13-70001
CONSOLIDATED WITH
No. 19-70001

WILLIAM SPEER,

Petitioner—Appellant,

versus

BOBBY LUMPKIN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent—Appellee.

Appeal from the United States District Court
for the Eastern District of Texas
USDC 2:04-CV-269

Before JONES, STEWART, and COSTA, *Circuit Judges*.

PER CURIAM:*

In an earlier ruling in this procedurally complex case, a panel of our court remanded for the district court to consider whether William Speer

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

could establish ineffective assistance of counsel at the state habeas stage. *See Speer v. Stephens*, 781 F.3d 784 (5th Cir. 2015). If he could, that might overcome his procedural default of a claim alleging that trial counsel was ineffective in failing to present mitigation evidence at the sentencing phase of his capital trial. *See id.*; *see generally Trevino v. Thaler*, 569 U.S. 413 (2013); *Martinez v. Ryan*, 566 U.S. 1 (2012). The district court ruled that Speer could not establish prejudice from any failure by counsel to adequately investigate mitigation evidence. We authorized an appeal from that ruling, *see Speer v. Lumpkin*, 824 F. App'x 240 (5th Cir. 2020), and now AFFIRM.

I.

The convoluted procedural history of this case is recounted in our prior opinions. *See* 781 F.3d at 785; 824 F. App'x at 242-44. Although the parties address a number of potential issues arising out of the unusual procedural posture of the prior panel's remand, like the district court we conclude that Speer's inability to establish prejudice from any alleged failure to develop and use mitigation evidence presents the most straightforward resolution.

Claims alleging that counsel was ineffective in failing to investigate mitigation evidence—sometimes called "*Wiggins* claims" after a Supreme Court case recognizing them, *see Wiggins v. Smith*, 539 U.S. 510 (2003)—are now common in capital habeas litigation. As with other ineffective assistance of counsel claims, a petitioner must show both (1) "that counsel's representation fell below an objective standard of reasonableness" and (2) a reasonable probability that counsel's deficient performance prejudiced the petitioner. *Strickland v. Washington*, 466 U.S. 688, 700 (1984). We assume

arguendo that Speer can establish the first prong, because he fails to establish the second.[1]

The ultimate prejudice question is whether "at least one juror would have struck a different balance" at the sentencing phase had it heard the additional mitigating evidence. *Wiggins*, 539 U.S. at 537. "In evaluating that question, it is necessary to consider *all* the relevant evidence that the jury would have had before it had [defense counsel] pursued the different path—not just the mitigation evidence [he] could have presented, but also the [aggravating] evidence that almost certainly would have come with it." *Wong v. Belmontes*, 558 U.S. 15, 20 (2009).

In conducting this necessarily speculative inquiry, *see Sears v. Upton*, 561 U.S. 945, 956 (2010), we start with the evidence the jury did have in front of it at the sentencing phase. In terms of aggravation evidence, the first and foremost fact is that the jury had just convicted Speer of committing a murder while he was in prison serving a life sentence for capital murder. Speer murdered fellow prisoner Gary Dickerson in an attempt to ingratiate himself with a gang called the Texas Mafia. Not surprisingly, Dickerson's sister was the first witness during the sentencing phase.

The second government witness was Speer's codefendant from his first murder. Franklin Nanyoma recounted that 1990 incident. It began when John Collins and Nanyoma stole some checks from Collins's father, Jerry, and cashed them for $800–$900. Jerry Collins discovered what his son and

[1] Similarly, we assume *arguendo* that Speer's *Wiggins* claim is a new one subject to *de novo* review if procedural default can be overcome because it fails the prejudice requirement even under *de novo* review. The premise of the previous panel's remand for a *Martinez/Trevino* inquiry was that Speers had procedurally defaulted this claim. 781 F.3d 786–87. In the context of a procedurally defaulted claim, there is no state court decision, so our review is *de novo*. *See Trevino v. Davis*, 829 F.3d 328, 341 (5th Cir. 2016).

Nanyoma had done and gave them until Wednesday to return the money, but they felt they had no way to do that. Speer offered to solve the dilemma by killing Jerry Collins. John Collins left the window unlocked at his father's home while Nanyoma drove Speer over. Speer got out, snuck inside, and a few minutes later there was a bang. Speer then returned calmly to the vehicle and they drove away, only to return a few minutes later when Speer decided he should check and make sure that Jerry Collins was dead. After Speer snuck back in the house and satisfied himself that Collins was dead, he and Nanyoma drove away.

Speer's mitigation case centered around two men, James Strickland and Gary Nixon, who volunteered as prison chaplains. They testified to Speer's conversion to Christianity, which apparently occurred after the state notified him that it was seeking the death penalty. These two men had seen many insincere prisoners but were convinced that Speer was sincere in his faith, especially because he had never asked them for anything. In his closing argument at the punishment phase, Speer's lawyer also cited testimony from the guilt phase that Speer did not have a disciplinary record in the prison before he killed Dickerson.

We now turn to the additional mitigation evidence that Speer argues his lawyer should have discovered. Speer contends that his lawyer should have presented evidence of physical and verbal abuse Speer endured. His stepfather admitted using a belt to whip him.[2] His mother also whipped him with a belt and on one occasion picked him up by the throat. Speer was also

[2] His stepfather later murdered his mother, but that occurred years after Speer was already imprisoned for his first murder. *See McGhee v. State*, 2011 WL 286119 (Tex. App.—Houston [1st Dist.] 2011, pet. ref'd, untimely filed) (unpublished).

beaten when he went to live with his biological father shortly before his first murder. One of those beatings resulted in black eyes and a cut on his face.

There was other domestic violence in Speer's childhood home; his stepfather would savagely beat his mother. Speer also points to verbal abuse from his stepfather and mother. Speer's stepfather, for instance, repeatedly called him "retarded" and told him he was "fat, worthless, and stupid." Drug and alcohol abuse were prevalent in his childhood home.

Speer also argues that he was bullied at school and had very few friends. Kids made fun of him because he was overweight and placed in special education classes. His cousin estimates that Speer had perhaps one real friend. To try and make friends, Speer would do most anything kids asked him to do. Once some kids convinced him to destroy a neighbor's outdoor pool. Other times it was simpler stuff like throwing a rock or jumping out of a tree. Despite Speer's efforts, these people never became his friends.

This desire to please others, which Speer already displayed in grade school, motivated both murders he committed: Speer was not involved in stealing checks from Jerry Collins, but volunteered to kill Collins as a favor to the thieves from whom Collins had demanded repayment; Speer's killing of Gary Dickerson was an attempt to ingratiate himself with gang leaders. The deep roots of this impulse, which one doctor diagnosed as dependent personality disorder, highlight what the district court described as the double-edged nature of much of this mitigation evidence. Although much of it might have painted him in a sympathetic light, some of it also could be viewed as additional evidence of future dangerousness. *See Cullen v. Pinholster*, 563 U.S. 170, 201 (2011) (recognizing that new evidence showing a history of crime, mental illness, and drug abuse in defendant's family is "by no means clearly mitigating as the jury might have concluded that [the defendant] was simply beyond rehabilitation"); *Wong*, 558 U.S. at 26

(explaining that when evaluating prejudice a court must consider the "bad evidence [that] would have come in with the good").

In addition to the dependent personality disorder that appears to have motivated his first two murders and could continue to make Speer dangerous, the district court recognized the following as double-edged evidence: At just four years old, Speer was kicked out of daycare for injuring another student. In second grade, this violent streak reemerged when he threw a desk at his teacher. The same psychologist that found him cooperative and pleasant determined that he had longstanding, unresolved anger problems. He also set fires as a child. And one part of the "new" evidence undercuts the mitigation testimony from the prison chaplains that was presented at his trial: Speer told one psychologist in 1991 that he had recently become a Christian, years before he would tell the volunteer chaplains the same recent conversion story.

After recalibrating both the aggravating and mitigating sides of the ledger to account for the evidence that trial counsel did not present, we conclude that no juror would have reached a different conclusion. Speer has identified much more to put on the mitigation scale. But the additional mitigation evidence is not as strong as the undiscovered evidence in successful *Wiggins* cases. Take *Wiggins* itself. Trial counsel failed to introduce evidence showing that the defendant had suffered from severe deprivation, abuse, and rape in foster care and he had no violent history (except the charged crime) to offset that mitigation evidence. *See Wiggins*, 539 U.S. at 534–35. Terry Williams was criminally neglected as a child and was a model prisoner—helping to disrupt a prison gang and find and return a guard's wallet. *Williams*, 529 U.S. at 396. And contrary to the unrebutted story the jury heard that Demarcus Sears grew up in a "stable and advantaged" environment, the defendant actually was subjected to sexual

abuse and alcohol and drug abuse from an early age that left him in the first percentile of cognitive ability. *Sears v. Upton*, 561 U.S. 945, 947, 948–49 (2010). *Rompilla v. Beard* is, in some respects, closer to this case. 545 U.S. 374 (2005). The defense lawyer failed to uncover evidence of significant domestic abuse during Rompilla's childhood, though that abuse was even more severe than the evidence here.[3] Thus the mitigation evidence Speer points to, while substantial, is not as substantial as that in the cases finding prejudice from counsel's failure to fully investigate.

But the biggest difference between Speer's *Wiggins* claim and successful ones is on the aggravating evidence side of the scale. The question of future dangerousness often focuses on the likelihood the defendant will be violent in prison (because the defense can argue that alternatives of a lengthy or lifetime prison sentence protect the general public from the defendant). *Cf. Kelly v. South Carolina*, 534 U.S. 246, 253 (2002) ("[E]vidence of violent behavior in prison can raise a strong implication of 'generalized . . . future

---

[3] The Supreme Court quoted the following from the Third Circuit's opinion:

> Rompilla's parents were both severe alcoholics who drank constantly. His mother drank during her pregnancy with Rompilla, and he and his brothers eventually developed serious drinking problems. His father, who had a vicious temper, frequently beat Rompilla's mother, leaving her bruised and black-eyed, and bragged about his cheating on her. His parents fought violently, and on at least one occasion his mother stabbed his father. He was abused by his father who beat him when he was young with his hands, fists, leather straps, belts and sticks. All of the children lived in terror. There were no expressions of parental love, affection or approval. Instead, he was subjected to yelling and verbal abuse. His father locked Rompilla and his brother Richard in a small wire mesh dog pen that was filthy and excrement filled. He had an isolated background, and was not allowed to visit other children or to speak to anyone on the phone. They had no indoor plumbing in the house, he slept in the attic with no heat, and the children were not given clothes and attended school in rags.

545 U.S. at 391–92.

dangerousness'" (quoting *Simmons v. South Carolina*, 512 U.S. 154, 171 (1994)). Because of the salience of the violence-in-prison concern, experts often testify about the likelihood a defendant will harm others inside the prison. *See, e.g.*, *Garcia v. Stephens*, 757 F.3d 220, 222 (5th Cir. 2014) (discussing psychologist who testified about prison security measures that can impact future dangerousness); *Scheanette v. Quarterman*, 482 F.3d 815, 821 (5th Cir. 2007) (discussing expert opinion there was an 18.8% chance defendant would be violent in prison); *Murphy v. Davis*, 737 F. App'x 693, 698, 704 (5th Cir. 2018) (discussing defense expert who testified that administrative segregation would prevent defendant from posing a danger in prison); *Griffith v. Quarterman*, 196 F. App'x 237, 239 (5th Cir. 2006) (discussing expert who testified defendant would not be dangerous in prison if he was not around women). Guesswork on that paramount consideration was not needed here. While in prison for murder, Speer murdered again. It is difficult to think of more probative evidence on whether Speer might commit violent acts while incarcerated than the fact that he already had.

For these reasons as well as the additional ones the district court discussed, it was not error to conclude that each juror would have reached the same sentencing decision even with the additional evidence that Speer now argues should have been presented at his trial.

* * *

The judgment denying habeas relief is AFFIRMED.

Appendix D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 13-70001

United States Court of Appeals
Fifth Circuit
FILED
August 17, 2020
Lyle W. Cayce
Clerk

Consolidated with 19-70001

WILLIAM SPEER,

Petitioner - Appellant

v.

BOBBY LUMPKIN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent - Appellee

Appeals from the United States District Court
for the Eastern District of Texas
USDC 2:04-CV-269

Before JONES, STEWART, and COSTA, Circuit Judges.

GREGG COSTA, Circuit Judge:[*]

A jury found that while William Speer was in prison for murder, he murdered again. This time he was sentenced to death. His collateral

[*] Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

challenges to his conviction and death sentence have been percolating in state and federal courts for many years. He appeals the district court's rejection of his speedy trial and *Brady* claims and seeks authorization to appeal its rejection of his ineffective assistance claims. We affirm the rejection of his speedy trial and *Brady* claims, and grant a certificate of appealability on the ineffective assistance claim**.

I.

In July 1997, Speer was serving a life sentence for capital murder. *Speer v. State*, 890 S.W.2d 87 (Tex. App.—Houston [1st Dist.] 1994, pet. ref'd). While serving that sentence in Texas prison, he was charged with murdering another prisoner, Gary Dickerson. The murder was an attempt to ingratiate himself with a gang called the Texas Mafia. The leader of the gang, Michael Constandine, wanted Dickerson dead because he believed, incorrectly, that Dickerson had caused prison officials to intercept an incoming shipment of cigarettes—a valuable prison commodity. Speer volunteered for the job. He went to Dickerson's cell with Texas Mafia member Anibal Canales on the pretext of smoking a cigarette with Dickerson. But once there, Speer choked Dickerson to death while Canales restrained his arms and feet. Speer later recapped to other Texas Mafia members that he told Dickerson in his last moments, "don't fuck with the Texas Mafia, not even in hell."

It took more than two years, until November 1999, for Speer to be indicted for capital murder. And his trial did not begin for another two years. When it finally started, the prosecution primarily relied on inmate testimony that Speer had admitted—both in person and in writing—to the attack. The jury convicted Speer. After the punishment phase, the jury answered the

** Judge Jones would deny the certificate of appealability on the ineffective assistance claim.

special questions in favor of death. The Texas Court of Criminal Appeals affirmed on direct appeal. *Speer v. State*, 2003 WL 22303983 (Tex. Crim. App. Oct. 8, 2003).

Speer next sought state postconviction relief, raising speedy trial and ineffective assistance of counsel claims. According to Speer, his counsel was constitutionally ineffective for failing to investigate or develop mitigation evidence. And Speer's right to a speedy trial was violated, he argued, because of the nearly two-year delay in trying him after the indictment issued.

The trial judge concluded that neither Sixth Amendment right had been violated, finding, among other things, that:

- Speer's trial counsel had interviewed prospective witnesses for mitigation purposes and had presented mitigating evidence during trial;
- the State did not deliberately attempt to delay trial; and
- Speer—who was already incarcerated—suffered no prejudice from the delay and asserted the speedy trial right only in a motion to dismiss that was filed two months before trial.

Adopting those findings, the Texas Court of Criminal Appeals denied relief. *Ex parte Speer*, 2004 WL 7330992 (Tex. Crim. App. June 30, 2004) (per curiam).

Speer then filed a federal habeas petition based on the same claims. Three years later, he moved the district court for a stay so he could seek state habeas relief on an alleged *Brady* violation. The district court granted the motion, and Speer filed a second habeas petition in state court.

After the state trial judge denied relief on the *Brady* claim, the Texas Court of Criminal Appeals remanded the petition for a determination of "whether [a] factual basis for the [*Brady*] claim was unavailable on the date that [Speer] filed his previous application." *Ex parte Speer*, 2008 WL 4803515, at *1 (Tex. Crim. App. Nov. 5, 2008) (per curiam). On remand, the trial judge

examined each document that Speer claimed the State had withheld, finding that:

- Speer's trial counsel had access to all but three exhibits alleged to be *Brady* material;
- every document, including the three that were withheld during trial, was available to Speer's habeas counsel when Speer first applied for postconviction relief; and
- Speer's habeas counsel asked the State to produce, but "made no attempts to view[,] the prosecutor's trial file."

Relying on those findings, the Texas Court of Criminal Appeals dismissed Speer's second petition because he could have—but did not—raise the *Brady* claim in his initial state habeas application, which constitutes an "abuse of the writ" under Texas law. *Ex parte Speer*, 2010 WL 724430, at *1 (Tex. Crim. App. Mar. 3, 2010) (per curiam); *see* TEX. CODE CRIM. PROC. ANN. art. 11.071, § 5(a).

Back in federal court, Speer filed an amended habeas petition. The district court referred the petition to a magistrate judge who recommended that each claim be denied—the *Brady* claim because of procedural default, and the other two on the merits. The district court adopted the magistrate judge's recommendation, granted Speer's request for a certificate of appealability on his speedy trial and *Brady* claims, and entered final judgment. Speer appealed. But he challenged only the district court's speedy trial and *Brady* decisions; he did not seek a certificate of appealability on his ineffective assistance claim.

During the lengthy federal habeas proceeding, the Supreme Court decided *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. 413 (2013). Those decisions meant that in Texas, ineffective assistance of habeas counsel could now qualify as cause to overcome a procedural default. *See Trevino*, 569 U.S. at 429; *Martinez*, 566 U.S. at 17–18. Speer's counsel thus

asked to withdraw, arguing that it would be a conflict of interest for him to evaluate whether his state habeas representation was ineffective. Another panel of this court denied the withdrawal motion but directed the district court to appoint "supplemental counsel for the sole purpose of determining whether Speer has additional habeas claims that ought to have been brought" under *Martinez* and *Trevino*. *Speer v. Stephens*, 781 F.3d 784, 786 (5th Cir. 2015). To that end, and without resolving any of Speer's pending claims, we remanded the petition for the district court "to consider in the first instance whether Speer [could] establish cause for the procedural default of any ineffective-assistance-of-trial-counsel claims[,] . . . and if so, whether those claims merit relief." *Id.* at 787.

On remand, the magistrate judge appointed supplemental counsel and authorized funding for Speer to conduct a mitigation investigation. Armed with those resources, Speer developed new evidence and submitted a brief that enhanced his prior ineffective assistance claim concerning the failure to discover or introduce mitigating evidence. The magistrate judge recommended that relief be denied because, even considering his new evidence, Speer did not suffer prejudice as a result of the allegedly deficient representation. That meant he could not excuse a procedural default of the ineffective-assistance claim and the claim also failed on the merits. The district court agreed and dismissed the petition with prejudice. It also declined to authorize an appeal on the ineffective assistance claim.

The upshot of this convoluted procedural history is that we have the following matters before us on the two appeals, which we have consolidated: 1) an appeal from the denial of speedy trial claim; 2) an appeal from the denial of the *Brady* claim; 3) a request to authorize an appeal on the ineffective

assistance claim; and 4) an appeal from the denial of additional funding and a hearing on the ineffective assistance claim.

II.

We begin with Speer's speedy trial claim. Because the state court denied it on the merits, our review is limited to whether that ruling was "contrary to, or involved an unreasonable application of, clearly established" Supreme Court law.[1] 28 U.S.C. § 2254(d)(1). This highly deferential standard of review is even more difficult to overcome when the claim involves "a broad, general standard whose application to a specific case can demand a substantial element of judgment." *Amos v. Thornton*, 646 F.3d 199, 205 (5th Cir. 2011) (per curiam) (quotations omitted). The right to a speedy trial, which requires the balancing of various factors, is that type of judgment-laden inquiry. *Id.*

The Sixth Amendment guarantees criminal defendants "the right to a speedy and public trial." U.S. CONST. amend. VI. Because that right is "amorphous," "imprecis[e]," "necessarily relative," and "slippery," the Supreme Court established "a balancing test, in which the conduct of both the prosecution and the defendant are weighed." *Barker v. Wingo*, 407 U.S. 514, 522, 529–30 (1972). Relevant factors include the length of the delay, the reason for it, the defendant's diligence in asserting the right, and whether the delay prejudiced the defendant. *Vermont v. Brillon*, 556 U.S. 81, 90 (2009).

But before getting to a *Barker* balancing, the defendant must make a threshold showing that the delay—measured from the date of arrest or indictment, whichever was first, *Amos*, 646 F.3d at 206—is "presumptively prejudicial." *Barker*, 407 U.S. at 530. A delay approaching one year satisfies

[1] Section 2254(d)(2) also entitles a habeas petitioner to relief if a state court's decision was "based on an unreasonable determination of the facts." 28 U.S.C. § 2254(d)(1). But Speer does not challenge the Texas Court of Criminal Appeals' factual resolutions related to this claim.

that benchmark. *See Doggett v. United States*, 505 U.S. 647, 652 n.1 (1992). That means, as the state court found, that the nearly two-year lag between Speer's indictment and trial warrants consideration of the *Barker* factors.

The length of the delay does not just trigger the balancing test, it is also a factor in it. *United States v. Molina-Solorio*, 577 F.3d 300, 305 (5th Cir. 2009) ("The longer the delay[,] . . . the heavier this factor weighs in a defendant's favor . . . ."). The state court reasonably determined that the roughly two-year delay weighs in favor of a speedy trial violation but not heavily so. *Amos*, 646 F.3d at 206–07 (noting a delay of 30 months strongly favors the accused).

As for cause, the state court found that there was no intentional delay by the state though it also did not find that the state had a good reason—like locating a witness—for the delay. This "middle ground" of negligent delay weighs slightly in Speer's favor. *Doggett*, 505 U.S. at 656–57; *see also Amos*, 646 F.3d at 207 ("Because the delay is wholly unexplained, this factor weighs in Amos's favor, but the advantage that accrues to him is small.").

While the first two factors tip slightly in Speer's favor, the state court correctly recognized that the third factor—his timeliness in asserting the right—weighs strongly against him. Speer waited nearly 22 months to raise a speedy trial concern, well beyond the delay in other cases where we have found this factor to weight against the defendant.[2] *E.g.*, *Divers v. Cain*, 698 F.3d 211, 219 (5th Cir. 2012) (17 months); *Robinson v. Whitley*, 2 F.3d 562, 569 (5th Cir. 1993) (12 months). Once Speer mentioned the speedy trial right in a motion to dismiss, the court sprung into action with a hearing just three days later and trial less than two months later. The other problem for Speer is the form his speedy trial objection took. We have long warned that a motion to dismiss, as

[2] He blames this late assertion of the right on the delay it took to appoint counsel. But his trial counsel was appointed in March 2000, 17 months before the filing of the motion to dismiss.

opposed to a request for a prompt trial, is "not a valid demand for a speedy trial." *Cowart v. Hargett,* 16 F.3d 642, 647 (5th Cir. 1994); *see also United States v. Harris*, 566 F.3d 422, 432 (5th Cir. 2009) ("A motion to dismiss the indictment, particularly when, as here, it is filed over two years after the indictment, is not evidence of a [desire to be tried promptly.]"). Speer's lack of diligence in asserting the right, and the form in which he finally did assert it, thus weighs against a speedy trial violation.

As for the final factor, the state court found that Speer did not suffer prejudice from the delay. *See also United States v. Bishop*, 629 F.3d 462, 465 (5th Cir. 2010) (recognizing that a defendant must show "actual prejudice" when the first three factors do not strongly weigh in favor of a constitutional violation); *see also Goodrum v. Quarterman*, 547 F.3d 249, 260 (5th Cir. 2008) (declining to presume prejudice when two of the first three factors strongly favored the defendant). Speer raises arguments that at most show this factor could go either way; he does not show—as he must under AEDPA—that the state court's assessment was unreasonable. Prejudice may mean "oppressive" pretrial detention, "anxiety" arising from delay, or an "impaired" defense. *Barker*, 407 U.S. at 532. "Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." *Id.*

Speer argues that he suffered each form of prejudice, beginning with his transfer from the general prison population to administrative segregation soon after Dickerson's murder. But Speer was placed in segregation for "disciplinary purposes," not because he was indicted. *Speer*, 2003 WL 22303983, at *3. He also relies on that segregation for his "enhanced" anxiety attributable to the delay, but "generalized expressions of anxiety and concern

amount to little more than a nominal showing of prejudice." *Goodrum*, 547 F.3d at 263.

That leaves the heart of the prejudice inquiry: whether the nearly two-year delay impaired Speer's defense. According to Speer, a critical witness known only as "Ellis"—an inmate who gave the prosecution an incriminating letter—was out of prison and could not be located when trial started. Without explaining why, Speer claims that the witness's unavailability "greatly prejudiced [his] ability to mount an effective defense." It is Speer's burden to explain how that witness's testimony "would have materially aided his case." *Turner v. Estelle*, 515 F.2d 853, 860 (5th Cir. 1975). He does not try to do so by contending that the witness would have contradicted the other inmates' testimony that Speer authored the incriminating letter. Indeed, the very opposite could have been true: the witness could have confirmed that Speer wrote the letter. At most, Speer has shown that he might have been prejudiced by the witness's unavailability. The possibility of prejudice is not enough, *United States v. Loud Hawk*, 474 U.S. 302, 315 (1986), especially when Speer has the AEDPA burden of showing that the state court could not have reasonably ruled against him.

The AEDPA relitigation bar dictates the outcome of this speedy trial claim. Even if Speer can show that the state court could have ruled in his favor as a de novo matter, he has not come close to showing that its balancing of the speedy trial factors to reach the opposite outcome was unreasonable. As a result, a federal court cannot grant relief on this claim.

III.

Speer also argues that he is entitled to habeas relief because the prosecution suppressed impeachment evidence. The evidence relates to Bruce Innes, a fellow inmate and Texas Mafia member. Innes gave prosecutors

incriminating letters from Speer and testified that Speer admitted to killing Dickerson. Speer argues that the prosecution suppressed documents that could have impeached Innes.

Recall that Speer did not pursue this claim until a successive state habeas application. After obtaining trial court findings on the availability of the *Brady* claim in earlier proceedings, the Texas Court of Criminal Appeals rejected this claim under the state's abuse-of-the-write rule. *See* TEX. CODE CRIM. PROC. ANN. art. 11.071, § 5(a)(1). That determination is an "independent and adequate" state ground for rejection of the federal claim that we must honor unless Speer can show cause and prejudice to overcome the procedural bar. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991).

For *Brady* claims, the cause and prejudice inquiries largely parallel the merits. *Banks v. Dretke*, 540 U.S. 668, 691 (2004). Speer can show "cause" if "the reason for his failure to develop facts in state-court proceedings was the State's suppression of the relevant evidence." *Id.* And he can show "prejudice" if "the suppressed evidence is 'material' for *Brady* purposes." *Id.*

We conclude that even if Speer can show cause—that is, suppression of impeachment evidence—he cannot show prejudice. Impeachment evidence is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985). We do not consider the suppressed evidence in a vacuum. Instead, its materiality "depends almost entirely on the value of the [undisclosed] evidence relative to the other evidence mustered by the [S]tate." *Rocha v. Thaler*, 619 F.3d 387, 396 (5th Cir. 2010) (quotations omitted). Evidence that "provides only incremental impeachment value . . . does not rise to the level of *Brady* materiality." *Miller v. Dretke*, 431 F.3d 241, 251 (5th Cir. 2005).

The state court found that only the following three pieces of evidence were suppressed:

1. an investigator's notes detailing actions that Innes took to help investigators obtain evidence against Speer;

2. an investigator's letter to a correctional officer saying that Innes was, among other things, assisting with the Dickerson investigation, corresponding with the investigator, and providing information about Texas Mafia activities; and

3. Innes's letter to an investigator attaching correspondence from one of Speer's codefendants and asking to be released from administrative segregation into the general prison population.

Speer's problem is that his trial counsel had ample other evidence that revealed even greater concerns with Innes's credibility: Innes received "sweetheart" plea deals in exchange for his testimony against Speer, he communicated with other witnesses, and he had investigators request improvements in his prison conditions and a transfer to another facility. Prosecutors fronted some of these benefits on direct examination. So the suppressed documents were, at most, "of marginal value to the defense and . . . cumulative with already presented impeachment evidence." *Murphy v. Davis*, 901 F.3d 578, 598 (5th Cir. 2018). And given that four other inmates corroborated Innes's testimony, there is not a reasonable probability that the marginally incremental impeachment value of the suppressed information would have changed the outcome. *See Bagley*, 473 U.S. at 682. The district court correctly rejected this claim.

IV.

That brings us to the ineffective assistance claim that was the subject of our earlier remand. Unlike the two we just addressed, this claim is only at the certificate of appealability stage. An appeal should be authorized if "the applicant has made a substantial showing of the denial of a constitutional

right." 28 U.S.C. § 2253(c)(2). That means reasonable jurists "could disagree" with the district court's analysis or could conclude the issues otherwise "deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). In a capital case, any doubt is resolved in favor of granting a COA. *Hughes v. Dretke*, 412 F.3d 582, 588 (5th Cir. 2005).

Given that any doubts should be resolved in favor of authorizing an appeal, we will grant a COA on the ineffective assistance claim. It involves difficult procedural questions given the unusual remand the prior panel ordered. The district court's ground for rejecting the claim—that Speer could not show prejudice to overcome a procedural default of the claim—is also at least debatable given that the prejudice inquiry asks whether "at least one juror would have struck a different balance" at the sentencing phase had it heard the mitigating evidence counsel did not present. *Wiggins v. Smith*, 539 U.S. 510, 537 (2003).

Speer also appeals two issues relating to this claim that do not require a COA: the level of funding and the lack of an evidentiary hearing. *See Norman v. Stephens*, 817 F.3d 226, 234 (5th Cir. 2016) (no COA needed to appeal denial of a hearing); *Barraza v. Cockrell*, 330 F.3d 349, 351 (5th Cir. 2003) (no COA needed to challenge funding). Because of the potential overlap of these issues with the merits ruling on the ineffective assistance claim, we will decide these issues when we resolve the underlying claim.

* * *

We AFFIRM the denial of habeas relief on the speedy trial and *Brady* claims. We GRANT a COA authorizing an appeal of the ineffective assistance claim.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

August 17, 2020

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 13-70001 cons/w 19-70001 William Speer v. Bobby Lumpkin, Director
USDC No. 2:04-CV-269

Enclosed is the non-dispositive opinion entered in the case captioned above.

The new briefing notice will issue under separate cover.

Sincerely,

LYLE W. CAYCE, Clerk

By: _____
Kenneth G. Lotz, Deputy Clerk

Mr. Woodson Erich Dryden
Mr. Joshua Aaron Freiman
Mr. Stephen M. Hoffman
Mr. John C. Nickelson

Appendix E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

WILLIAM SPEER, #999398,	§	
	§	
Petitioner,	§	
	§	
VS.	§	**CIVIL ACTION NO. 2:04cv269**
	§	
DIRECTOR, TDCJ-CID,	§	
	§	
Respondent.	§	

ORDER OF DISMISSAL

Petitioner William Speer, a death row inmate confined in the Texas Department of Criminal Justice, Correctional Institutions Division, filed the above-styled and numbered petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. He is challenging his Bowie County conviction and death sentence for capital murder.

In 2012, the Court denied Speer's petition for a writ of habeas corpus challenging his capital murder conviction. Speer filed a notice of appeal to the United States Court of Appeals for the Fifth Circuit. In the mean time, the United States Supreme Court issued *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. 413 (2013). On March 30, 2015, the United States Court of Appeals for the Fifth Circuit remanded the present case in part with instructions "to appoint supplemental counsel" and "to consider in the first instance whether Speer can establish cause and prejudice for the procedural default of any ineffective-assistance-of-trial-counsel claims pursuant to *Martinez* and *Trevino* that he may raise, and if so, whether those claims merit relief." *Speer v. Stephens*, 781 F.3d 784, 787 (5th Cir. 2015).

Supplemental counsel was appointed, and the Court authorized extensive funding for a mitigation specialist. Speer proceeded to file a brief arguing that his trial and state habeas counsel

were ineffective in investigating and presenting mitigating evidence. The Honorable Roy S. Payne, United States Magistrate Judge, to whom the case had been referred, issued a Report and Recommendation (Dkt. #102) concluding that the petition should be denied. Both parties have filed objections. Having conducted a *de novo* review of the record and pleadings, the Court overrules the objections and adopts the Magistrate Judge's findings, conclusions, and recommendations for reasons set forth below.

The Fifth Circuit summarized the rule announced in *Martinez* and *Trevino* as follows:

> To succeed in establishing cause to excuse the procedural default of his ineffective assistance of trial counsel claims, [petitioner] must show that (1) his underlying claims of ineffective assistance of trial counsel are "substantial," meaning that he "must demonstrate that the claim[s] ha[ve] some merit," *Martinez*, 132 S. Ct. at 1318; and (2) his initial state habeas counsel was ineffective in failing to present those claims in his first state habeas application. *See id.*; *Trevino*, 133 S. Ct. at 1921.

Preyor v. Stephens, 537 F. App'x 412, 421 (5th Cir. 2013), *cert. denied*, 134 S. Ct. 2821 (2014). The Fifth Circuit reaffirmed this basic approach in *Reed v. Stephens*, 739 F.3d 753, 774 (5th Cir.), *cert. denied*, 135 S. Ct. 435 (2014).

The issue in *Martinez* and *Trevino* focuses on whether trial and state habeas counsel were ineffective. The standard for evaluating ineffective assistance of counsel claims was established by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1994). *Strickland* provides a two-pronged standard, and a petitioner bears the burden of proving both prongs. 466 U.S. at 687. Under the first prong, he must show that counsel's performance was deficient. *Id.* To establish deficient performance, he must show that "counsel's representation fell below an objective standard of reasonableness," with reasonableness judged under professional norms prevailing at the time counsel rendered assistance. *Id.* at 688. Under the second prong, the petitioner must show that his attorney's deficient performance resulted in prejudice. *Id.* at 687. The *Strickland* standard

applies to ineffective assistance of counsel claims in the context of *Martinez* and *Trevino*. *See Martinez*, 566 U.S. at 14.

Speer specifically argues that his trial and initial state habeas counsel were ineffective in failing to discharge their duty of conducting an investigation into his life; thus, they failed to uncover powerful mitigating evidence. The case law is abundantly clear that "in the context of a capital sentencing proceeding, defense counsel has the obligation to conduct a 'reasonably substantial, independent investigation' into potential mitigating circumstances." *Neal v. Puckett*, 286 F.3d 230, 236-37 (5th Cir. 2002) (quoting *Baldwin v. Maggio*, 704 F.2d 1325, 1332-33 (5th Cir. 1983)), *cert. denied*, 537 U.S. 1104 (2003). The "investigation into mitigating evidence should comprise efforts to discover *all reasonably available* mitigating evidence." *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (emphasis in original).

In evaluating the issue of prejudice, courts must reweigh the quality and quantity of the available mitigating evidence, including that presented in post-conviction proceedings, against the aggravating evidence. *Williams v. Taylor*, 529 U.S. 362, 397-98 (2000); *Blanton v. Quarterman*, 543 F.3d 230, 236 (5th Cir. 2008), *cert. denied*, 556 U.S. 1240 (2009). "In evaluating that question, it is necessary to consider *all* the relevant evidence that the jury would have had before it if [the petitioner] had pursued the different path - not just the mitigation evidence [the petitioner] could have presented, but also the . . . evidence that almost certainly would have come with it." *Wong v. Belmontes*, 558 U.S. 15, 20 (2009) (emphasis in original). After reweighing all the mitigating evidence against the aggravating evidence, a court must determine whether the petitioner "has shown that, had counsel presented all the available mitigating evidence, there is a reasonable probability that a juror would have found that the mitigating evidence outweighed the aggravating evidence." *Gray v. Epps*, 616 F.3d 436, 442 (5th Cir. 2010) (quoting *Wiggins*, 539 U.S. at 534),

cert. denied, 563 U.S. 905 (2011). "The likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 112 (2011) (citing *Strickland*, 466 U.S. at 693). "[T]here is no prejudice when the new mitigating evidence 'would barely have altered the sentencing profile presented' to the decisionmaker." *Sears v. Upton*, 561 U.S. 945, 954 (2010) (citing *Strickland*, 466 U.S. at 700).

In the present case, supplemental counsel discovered and presented an extensive amount of new evidence that could have been used as mitigating evidence at trial. Much of the evidence came from Speer's previous capital murder trial, including a psychological evaluation, a neurological evaluation, a psychiatric evaluation, a social history, a certification investigation report, the testimony of Speer's mother (now deceased), and the testimony of clinical psychologist Walter Quijano. Additional evidence came from family members, including Speer's half-sister, step-father (who killed Speer's mother), cousin, and maternal aunt. The additional evidence shows, among other things, a dysfunctional family where there was physical and sexual abuse, and drug usage.

The Director appropriately characterizes the new proposed mitigating evidence as "double-edged," and "[m]itigation, after all, may be in the eye of the beholder." *Martinez v. Cockrell*, 481 F.2d 249, 258 (5th Cir. 2007) (quoting *Burger v. Kemp*, 483 U.S. 776, 794 (1987)), *cert. denied*, 552 U.S. 1146 (2008). The Fifth Circuit has observed, for example, that evidence of "brain injury, abusive childhood, and drug and alcohol problems is all 'double-edged.' In other words, even if his recent claims about this evidence is true, it could all be read by the jury to support, rather than detract, from his future dangerousness claim." *Johnson v. Cockrell*, 306 F.3d 249, 253 (5th Cir. 2002), *cert. denied*, 538 U.S. 926 (2003). The Director argues that had defense counsel presented the new proposed mitigating evidence at trial, the prosecution would have had ammunition to

explain not only why Speer committed capital murder twice, but why he would pose a future danger of killing again if merely sent back to prison. The Director summarized the new proposed mitigating evidence submitted by supplemental habeas counsel as "double-edged," which could be viewed as more aggravating than mitigating.

In his objections (Dkt. #113), Speer once again focuses on the wealth of additional mitigating evidence that could have been brought to the jury's attention. The argument is made that the new mitigating evidence shows that Speer suffered from deficits ranging from learning disabilities to emotional problems to profound abuse and neglect. He also submits a declaration from a licensed clinical psychologist, who offers an assessment based on Speer's history of psychological trauma. An argument is made that the evidence could have resulted in a sentence other than death.

The additional evidence of Speer's deficits ranging from learning disabilities to emotional problems, along with evidence of his dysfunctional family, including physical and sexual abuse, and drug usage, is indeed tragic, but such evidence could be viewed as more aggravating than mitigating. The new evidence is predominantly doubled-edged. Having reweighed all of the mitigating evidence, both old and new, against the aggravating evidence, the Court is of the opinion, and so finds, that there is *no* reasonable probability that a juror would have found that the mitigating evidence outweighed the aggravating evidence. Speer had already been convicted once of capital murder, and then he killed again. The present conviction involves a heinous gang-related murder of a prisoner by two other prisoners. The following conclusion by the Fifth Circuit is equally applicable to the present case: "the additional mitigating evidence was not so compelling, especially in light of the horrific facts of the crime, that the sentencer would have found a death sentence unwarranted." *Martinez*, 481 F.2d at 259. Speer has not proven prejudice. He has not

satisfied the requirements of *Martinez* and *Trevino*. He has not shown that he is entitled to a writ of habeas corpus.

In her objections (Dkt. #111), the Director focuses on procedural issues, including the issue of whether Speer's supplemental brief is successive and improperly presents evidence that was not first submitted to the state court. The Court's focus, however, is on the specific issue remanded by the Fifth Circuit. If Speer had satisfied *Martinez*/*Trevino*, then the issues raised by the Director would merit consideration. Such issues are moot since Speer has not made the requisite showing under *Martinez* and *Trevino*.

In conclusion, the Court is of the opinion, and so finds, that the petition for a writ of habeas corpus lacks merit.

Certificate of Appealability

"A state prisoner whose petition for a writ of habeas corpus is denied by a federal district court does not enjoy an absolute right to appeal." *Buck v. Davis*, 137 S. Ct. 759, 773 (2017). Instead, under 28 U.S.C. § 2253(c)(1), he must first obtain a certificate of appealability ("COA") from a circuit justice or judge. *Id.* Although Speer has not yet filed a notice of appeal, the court may address whether he would be entitled to a certificate of appealability. *See Alexander v. Johnson*, 211 F.3d 895, 898 (5th Cir. 2000) (A district court may *sua sponte* rule on a certificate of appealability because "the district court that denies a petitioner relief is in the best position to determine whether the petitioner has made a substantial showing of a denial of a constitutional right on the issues before the court. Further briefing and argument on the very issues the court has just ruled on would be repetitious.").

A certificate of appealability may issue only if a petitioner has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). To make a substantial showing, the

petitioner need only show that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). The Supreme Court recently emphasized that the COA inquiry "is not coextensive with merits analysis" and "should be decided without 'full consideration of the factual or legal bases adduced in support of the claims.'" *Buck*, 137 S. Ct. at 773 (quoting *Miller-El*, 537 U.S. at 336). Moreover, "[w]hen the district court denied relief on procedural grounds, the petitioner seeking a COA must further show that 'jurists of reason would find it debatable whether the district court was correct in its procedural ruling.'" *Rhoades v. Davis*, 852 F.3d 422, 427 (5th Cir. 2017) (quoting *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012)).

In this case, reasonable jurists could not debate the denial of Speer's § 2254 petition on substantive or procedural grounds, nor find that the issues presented are adequate to deserve encouragement to proceed. More specifically, the issues presented in this case on remand do not deserve encouragement to proceed. Accordingly, the Court finds that Speer is not entitled to a certificate of appealability as to his claims. It is accordingly

ORDERED that the petition for a writ of habeas corpus is **DENIED** and the case is **DISMISSED** with prejudice. It is further

ORDERED that a certificate of appealability is **DENIED**. It is finally

ORDERED that all motions not previously ruled on are **DENIED**.

So ORDERED and SIGNED this 14th day of September, 2018.

RODNEY GILSTRAP
UNITED STATES DISTRICT JUDGE

Appendix F

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

MARSHALL DIVISION

WILLIAM SPEER, #999398,	§	
	§	
Petitioner,	§	
	§	
v.	§	CIVIL ACTION NO. 2:04cv269
	§	
DIRECTOR, TDCJ-CID,	§	
	§	
Respondent.	§	

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

Petitioner William Speer, a death row inmate confined in the Texas prison system, brings this petition for a writ of habeas corpus challenging his capital murder conviction pursuant to 28 U.S.C. § 2254. The petition was referred for findings of fact, conclusions of law and recommendations for the disposition of the case.

Procedural History

Speer was sentenced to death in Bowie County, Texas, for the capital murder of Gary Dickerson, a fellow inmate. The conviction was affirmed on direct appeal. *Speer v. State*, No. 74,253, 2003 WL 22303983 (Tex. Crim. App. Oct. 8, 2003) (unpublished). Speer did not file a petition for a writ of certiorari in the United States Supreme Court.

While his direct appeal was pending, Speer filed an application for a writ of habeas corpus in state court. SHCR[1] 27-56. The trial court issued findings of fact and conclusions of law. SHCR

[1]"SHCR" refers to the state habeas clerk's record, followed by the page number. "RR" refers to the reporter's record of the transcribed testimony during trial, preceded by the volume number and followed by the page number. "Exhibit refers

106-114. Based on the trial court's findings and conclusions and its own review, the Texas Court of Criminal Appeals denied relief. *Ex parte Speer*, No. 59,101-01, 2004 WL 7330992, at *1 (Tex. Crim. App. June 30, 2004) (unpublished).

The present proceedings were initiated on July 21, 2004. On May 13, 2008, the Court issued an order granting Speer's motion to stay and abate the proceedings pursuant to *Rhines v. Weber*, 544 U.S. 269 (2005). Upon receipt of Speer's subsequent application for a writ of habeas corpus, the Texas Court of Criminal Appeals remanded the case to the trial court for further development. *Ex parte Speer*, No. WR-59,101-02, 2008 WL 4803515 (Tex. Crim. App. Nov. 5, 2008) (unpublished). The Texas Court of Criminal Appeals subsequently concluded that Speer failed to satisfy the requirements of Tex. Code Crim. Proc. Ann. art. 11.071 § 5(a), and the case was dismissed as an abuse of the writ pursuant to Tex. Code Crim. Proc. Ann. art. 11.071 § 5(c). *Ex parte Speer*, No. 59,101-02, 2010 WL 724430 (Tex. Crim. App. March 3, 2010) (unpublished).

Speer returned to this Court and filed an amended petition (Dkt. #31). On November 28, 2012, a Report and Recommendation (Dkt. #53) was issued, which included the conclusion that all five of Speer's claims should be denied. On December 14, 2012, the Report and Recommendation was adopted and judgment was entered for the Director.

The United States Court of Appeals for the Fifth Circuit remanded the case in part. *Speer v. Stephens*, 781 F.3d 784 (5th Cir. 2015). The Fifth Circuit issued instructions to appoint supplemental counsel pursuant to 18 U.S.C. § 3599 in order to give Speer the opportunity to develop ineffective assistance of counsel claims in light of the Supreme Court's recent decisions issued in *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. 413 (2013).

---

to the exhibits attached to Speer's Brief (Dkt. #101).

In accordance with the Fifth Circuit's instructions, the Court appointed supplemental counsel to represent Speer. In order to give Speer the opportunity to develop and prove his claims under *Martinez* and *Trevino*, the Court authorized funding for a mitigation specialist, Gillian E. Ross. *See* Dkt. #80. Speer proceeded to file a brief (Dkt. #89) on February 2, 2017. He argues that his trial counsel and state habeas counsel were ineffective in investigating and presenting mitigating evidence. The Director filed an answer (Dkt. #97) on September 15, 2017. Speer filed a reply brief (Dkt. #100) on October 29, 2017. On February 26, 2018, at the Court's request, Speer re-filed his brief (Dkt. #101) because of technical issues associated with the original filing.

Factual Background

On July 11, 1997, a Texas prison inmate named Gary Dickerson was strangled to death in his cell at the Barry Telford Unit in Bowie County, Texas. The events leading to his murder were as follows: A member of an African-American gang within the prison had given Dickerson money to buy contraband cigarettes from an inmate named James Baker. Prison authorities confiscated the money from Dickerson, however, before he could purchase the cigarettes. In order to stay square with the African-American gang, Dickerson told Baker to give the cigarettes directly to the African-American gang member without payment. Dickerson threatened to inform the authorities about a large shipment of contraband tobacco Baker was about to receive if Baker did not comply with his request.

Inmate Michael Constandine, the leader of a prison gang called the Texas Mafia, had also become involved with Baker's smuggling operation. Constandine himself owed money to a prison gang called the Texas Syndicate. To raise money, he decided to obtain a cut of Baker's tobacco shipment. Constandine threatened Baker with physical harm if he did not agree.

When the tobacco shipment was intercepted by authorities, all three gangs believed that Dickerson had told the authorities about Baker's operation. Dickerson asked to be placed in protective custody, and his request was granted. After a week, however, he was returned to the general population when he proved unwilling to provide further information. Within a day of being returned, he was killed.

Constandine testified that he met with three people to decide what action to take against Dickerson. Two of them were gang members: Jessie Barnes and Anibal Canales. The third was Speer, who was not a member of the gang, but was being considered for membership. Constandine ordered Speer and Canales to kill Dickerson. While Barnes acted as lookout, Speer and Canales went to Dickerson's cell on the pretext of smoking a cigarette. As Dickerson bent down to blow smoke in the vent below his toilet, Speer reached over and placed him in a choke hold until he eventually stopped breathing. 9 RR 164; 10 RR 45–46, 192–94, 252. Speer later recounted to fellow Texas Mafia members that he choked Dickerson so hard that he crushed something in his throat and that he told Dickerson as he was dying, "don't fuck with the Texas Mafia, not even in hell." 10 RR 45–47, 192–94, 254. Speer also wrote a letter to fellow inmate and prospective gang member David Ellis describing the murder. 10 RR 36–44; SX 34. In that letter, identified by several Texas Mafia members as having been written by Speer, Speer said:

> I'm in Seg for killing a snitch. He may not have snitched on the 240 packs like the police say, but he had my family's name in his mouth in 1-Building, so I made his parole come early! The Texas Mafia is not no joke. We play the game and we play to win!

10 RR 39-40, 44; SX 34.

Punishment Evidence at Trial

1. State's Evidence

The focus of the present proceeding is whether trial counsel and state habeas counsel were ineffective in investigating and presenting mitigating evidence. In order to evaluate any new evidence discovered by supplemental federal habeas counsel, the Court must also consider the evidence that was actually presented at trial relating to punishment. In addition to the evidence presented during the guilt/innocence phase of the trial, the State presented evidence at the punishment phase of the trial regarding the impact Dickerson's murder had on his family. Gail Martin, one of Dickerson's four siblings, testified about the close relationship Dickerson had with his family, and how his death devastated her, her mother, and her siblings. 13 RR 10–16.

The State then presented evidence concerning a prior capital murder committed by Speer. *Speer v. State*, 890 S.W.2d 87 (Tex. App. - Houston [1st Dist.] 1994). Speer was serving a life sentence when he murdered Dickerson. Franklin Manyoma[2], Speer's co-conspirator who himself received a seventy-five-year sentence, described in detail the murder of their friend's father, Jerry Collins, back in 1990. 13 RR 16–46. About a month before the murder, Jerry Collins's son, John, and Manyoma had cashed close to nine hundred dollars worth of checks they had stolen from Jerry Collins's checkbook. *Id.* at 19–22. Jerry Collins found out, became angry, and demanded that the boys repay the amount or he would turn them over to the police. *Id.* at 22–24. After failing to come up with a plan to repay the money, Speer volunteered to help his two friends by murdering Jerry Collins. *Id.* at 25–26. Speer stole a handgun from his mother's car, and, late one night, Manyoma drove Speer to Jerry Collins's house where John Collins purposely left a window unlocked. *Id.* at

[2]The Court notes that the records are inconsistent on whether the witness' last name was spelled "Nanyoma" or "Manyoma." For sake of consistency, his name will be spelled "Manyoma."

26–28. Manyoma waited in the car while Speer entered the house through the window, approached Jerry Collins while he was sleeping, and shot him in the head. *Id.* at 28–33. Speer then returned to the car, where he calmly described the murder to Manyoma as they drove away. *Id.* at 31–36.

2. Defense Evidence

In their punishment case, the defense presented the testimony of two prison chaplains in an attempt to demonstrate that Speer was no longer a future danger to society. 13 RR 46–105. James Strickland and Gary Nixon, both of whom had spent considerable time ministering to Speer during his incarceration, testified generally about their belief that Speer was remorseful and a sincerely "changed man" who hungered "to know more about the Lord" and "[h]ow to live by His rules." 13 RR 53–60, 82–93. Both testified they did not believe Speer to be a danger to society, and that he could be beneficial to the prison by sharing the gospel with other inmates. 13 RR 60, 92.

Speer's New Mitigating Evidence

1. Evidence From Previous Capital Murder Trial

Speer observes that there was abundant mitigating evidence from his previous capital murder trial that could have been obtained and used in preparation for his current capital murder trial. He asserts that information from that trial was easily accessible at nominal expense. The file included a psychological evaluation, a neurological evaluation, a psychiatric evaluation, a social history, a certification investigation report, the testimony of Speer's mother, and the testimony of clinical psychologist Walter Quijano. *See* Exhibits A-G.

a. Psychological Evaluation

The psychological evaluation (Exhibit A) was prepared by Ann Harrelson, a staff psychologist with the Mental Health and Mental Retardation Authority of Harris County Children's Services. The evaluation indicated that Speer had significant behavioral problems when he was a young child:

> The records reflect that at age 4 William attended counseling at Houston Child Guidance because he was kicked out of Day Care for injuring another student.
>
> ***
>
> William also stated when he was in second grade that he threw a desk at a teacher because he was angry at her.

Id. at 1, 2.

The evaluation further indicated that Speer was addicted to hard drugs and that his father bore responsibility for his addiction:

> William reportedly abused drugs in 1990 and was sent to San Angelo to reside with his father. The records suggest that during the time that William lived with his father he "got hooked on speed." The records also suggest that the father was giving him other drugs.
>
> ***
>
> William stated that he has used LSD about six times, cocaine about three times and speed or crack about ten times.

Id. at 1, 2.

The evaluation also indicated that Speer had learning disabilities:

> On the [Wide Range Achievement Test], William's [] Reading score [is] at the beginning of the 5th grade level, Spelling is at the end of the 3rd grade level and Arithmetic is at the beginning of the 6th grade level. These represent standard scores of 72, 64, and 72 respectively and suggest a learning disability relative to every academic area assessed.

Id. at 2. Ms. Harrelson also observed that Speer's score on the Cattell Culture Fair Intelligence Test estimated an IQ of 92, which places him in the average range of intellectual functioning. *Id.* at 1.

Speer finally observes that the evaluation documented that his father physically abused both him and his mother:

> William stated that he is very angry with his father because he used to hit him and used to hit his mother in front of him. William stated he feels closest to his mother.
>
> ***

> William described his father as playing mind games with him. He described these mind games as the father's abuse by making William wear dirty underwear over his head when he wet the bed as a younger child.

Id. at 2. The evaluation finally indicated that Speer had "longstanding and unresolved" anger which was "probably due to his chaotic and possibly abusive background." *Id.* at 3.

b. Neurological Evaluation

Speer further observes that information gathered in his previous trial included a neurological evaluation. Dr. Randolph W. Evans performed a neurological evaluation of Speer on March 19, 1991. He submitted a report (Exhibit B), dated March 22, 1991. The evaluation indicates that Speer reported "an over two year history of headaches." *Id.* at 1. Speer had a history of mild head injuries, such as when he fell off a bike and when he was hit by a truck. *Id.* The evaluation noted that Speer admitted using "LSD, amphetamines, and marijuana. He was in the ninth grade making A's, B's, and C's." *Id.* Dr. Evans finally issued the following impression of Speer: "This is a sixteen year old male with no evidence of significant neurological disease." *Id.* at 2.

c. Psychiatric Evaluation

Dr. Ninfa Cavazos performed a psychiatric evaluation of Speer (Exhibit C). Much like Ms. Harrelson's report, Dr. Cavazos noted Speer's drug addiction and his father's role in the addiction:

> He said, "I went to live with my real father and I lived with him for about 9 months, like one week before Christmas, that was at St. Angelo." . . . He said "my real father got drug problems, he shoots Speed, and Crack, and he gave me Coke to snort". He also said, "I've used Marijuana maybe a couple of times but never mainlining it, but yes sometimes, I crave it but sometimes I don't". He does not fulfill the DSM-III-R requirements which are needed to make a diagnosis of Drug Dependency.

Id. at 1.

The evaluation also indicated that Speer's father physically abused Speer and his mother:

> There is, however, the presence of serious drug abuse. He also said, "I got a lot of bad memories about my dad, he was always hitting on me, he was hitting on mom too".

> He said, "I had a bedwetting problem for a long time and I remember when I was maybe 2 years old, he would you know, cover my head with wet underwear, just cover my head with it, I remember that". He gave instances where the father would take the urinated undergarments and wrap them around the child's head.

Id.

Dr. Cavazos ended her report by concluding that there does not appear to be any evidence of a mental disease or a mental defect and that Speer had a rational as well as factual understanding of the proceedings against him. *Id.* at 2. She deemed him fit to proceed to trial. *Id.* at 3.

d. Social History

Probation Officer Terri McGee prepared a social history (Exhibit D). The social history indicated that Speer received counseling for one year as a four-year-old. *Id.* at 1. The social history further noted that Speer had a history of using "Marijuana, Acid, Alcohol, [and] Cocaine." *Id.*

e. Certification Investigation Report

Probation Officer Terri McGee also prepared a certification investigation report (Exhibit E). The report relates to the issue of whether Speer, a juvenile, should be certified to be tried as an adult. School records included the following assessment:

> Records from the Pasadena Independent School District Admission, Review and Dismissal/Individual indicate William was psychologically assessed on May 11, 1990 and found to be learning disabled and emotionally disturbed. The diagnostic impression is Conduct Disorder, mild in severity, Solitary Aggressive type, 312.00, Masked Depression.

Id. at 8. His mother reported that Speer "set fires until three years ago." *Id.* at 9. After summarizing the facts surrounding the crime, the psychological evaluation, the psychiatric evaluation, the electroencephalogram, the physical examination, school records, and family history, McGee issued the following evaluation:

> Professional test results indicate that William appears to be manipulative to get his needs met and requires a highly structured environment. He is competent and deemed

> fit to proceed. The evaluators do not specify the amount of time necessary to effect rehabilitation.

Id.

f. Testimony of Nancy McGhee

Speer's mother, Nancy McGhee, testified during his first murder trial. The transcript of her testimony is attached as Exhibit F. She testified that her son was living with her at the time of the offense. *Id.* at 89. She testified about his education and that "[w]hen he was in elementary school, he was diagnosed as learning disability" and that he was "removed from the main stream of the school and in special classes" most of the time. *Id.* at 90. He was placed in special classes because he was unable to "keep up with the other students" and did not "learn at the same rate they did." *Id.* She further testified that he received "a little bit of counseling" before he started kindergarten and attended the child guidance center for five or six months. *Id.* She testified that she observed that he had learning disabilities before he started elementary school. *Id.* at 91. She testified at length about a time when Speer fell and cut his head, and she specified on cross-examination that she did not believe that his condition required the attention of a doctor. *Id.* at 100.

g. Dr. Walter Quijano

Dr. Walter Quijano, a licensed clinical psychologist, also testified during Speer's first murder trial. The transcript of his testimony is attached to Speer's brief as Exhibit G. Dr. Quijano testified that he had diagnosed Speer with dependent personality disorder and provided the following explanation of the disorder:

> A dependent personality disorder is a—one of the personality disorders included in the diagnostic and statistical manual which is the classification for psychology—abnormal psychology and psychiatry.
>
> A dependent personality is one that is characterized by [a] very dependent type of lifestyle. These people are not able to—do not have the inner substance to sort of become independent and self-determining. . . . They do things for other people to the point of allowing them to make very important decisions for them . . . . [T]hey are

> constantly afraid of being abandoned by people that they feel close to. And overall these people are gullible and wish to please others.

Id. at 32-33. Dr. Quijano testified that he diagnosed Speer as having dependent personality disorder. *Id.* at 33. Dr. Quijano specifically testified that Speer's dependent personality disorder could be a contributing factor in his decision to commit murder:

> Q: Would it be consistent in the case of William Keith Speer that a contributing factor in his decision to commit the murder [with] which he is charged could very well be from his dependent personality disorder?
>
> A: Yes.
>
> Q: And it would not be—he would not need to have external stimulus such as the promise of money in order to commit that offense; is that correct?
>
> A: That is true.

Id. at 35.

2. New Evidence

a. Melissa Yeldell

Speer also submits new evidence that was discovered by supplemental federal habeas counsel. He initially submitted a declaration from his half-sister, Melissa Yedell (Exhibit H). She specified that Speer's lawyers never contacted her before Speer's capital murder trial and that she was willing and able to testify. *Id.* at ¶ 16. She stated that her mother, Nancy McGhee, was murdered by her father, Randy McGhee. *Id.* at ¶ 1. She stated that she was aware that Speer's father, Richard Speer, abused her mother when they were still married and would beat her bloody. *Id.* at ¶ 2. She indicated that her mother had serial sexual relationships with men other than her father. *Id.* at ¶ 4. She states that she would have testified about the multigenerational sexual abuse that plagued her mother's family, including the abuse that her mother personally suffered. *Id.* at ¶ 5. She would have testified about how her mother abused Speer and, on one occasion, how she held him up by the throat in the

hallway of their home. *Id.* at ¶ 9. She would have testified that Speer was in special education classes and that he was still wetting his bed until he was 16 years old. *Id.* at ¶ 10.

b. Randy McGhee

Speer also submits a declaration from his step-father, Randy McGhee (Exhibit I). McGhee states that Speer's lawyers never contacted him before Speer's capital murder trial. *Id.* at ¶ 52. He specified that he is incarcerated for the homicide of Nancy McGhee in 2008. *Id.* at ¶ 1. He was with Speer from about the time he was 7 years old until he was arrested when he was 16. *Id.* at ¶ 2. He states that Richard Speer was Nancy's second husband and that she "cheated on him, and he beat her up." *Id.* He provided several examples of Richard Speer physically abusing Nancy McGhee. *Id.* at ¶¶ 9, 11. He would have testified about Richard Speer's and Nancy McGhee's drug abuse, as well as his own. *Id.* at ¶ 20. He stated that Nancy McGhee was a weed freak, and she smoked it every day. *Id.* at ¶ 22. She smoked weed in front of Speer. *Id.* at ¶ 23.

McGhee states that he would have testified that Nancy McGhee was "never what [he] would call a mother to [Speer]." *Id.* at ¶ 26. She was quick tempered with him. *Id.* He recalled her showing him some kindness, but he mainly recalled her yelling at him. *Id.* McGhee noted that Speer had problems as a kid, including bedwetting as a teenager. *Id.* at ¶ 32. Speer received "some angry whuppings from her" due to bedwetting. *Id.* at ¶ 34. He noted that Speer "got the belt if he popped off to . . . his mom or if he did something he wasn't supposed to do, or he made a mess and didn't clean it up." *Id.* at ¶ 37. In 1990, Nancy McGhee sent Speer to live with his father in San Angelo, but Speer came back after his father physically assaulted him. *Id.* at ¶¶ 42, 46. McGhee finally stated that he would have testified about Speer's relationship with Frank Manyoma, his co-defendant in the 1990 murder, which began shortly after his return from San Angelo. *Id* at ¶ 48.

c. Crystal Barton

Speer next submitted a declaration from his first cousin, Crystal Barton (Exhibit J). She states that she was never contacted by Speer's trial counsel, state habeas counsel, or anyone acting on their behalf. *Id.* at ¶ 33. She added that she was available and willing to testify at Speer's trial. *Id.* She observed that Nancy McGhee was her aunt, who was murdered by Randy McGhee. *Id.* at ¶ 7. She noted that Speer "had a very hard time at school. He was fat and in special education, very shy and timid. He got bullied a lot." *Id.* at ¶ 8. She noted that she and Speer were only a year apart in age, and they were like brother and sister. *Id* at ¶ 15. She added that Speer "came from a very abusive family. One of his stepfathers, Randy, killed his mom, so that tells you a lot." *Id.* She noted that her mother talked to Nancy McGhee about Randy McGhee frequently whipping Speer. *Id.* at ¶ 18. She added that she "bonded" with Speer because they "were dealing with the same type of abuse." *Id.* at ¶ 21. She noted that Nancy McGhee sent Speer to live with his father and that he was different when he returned. *Id.* at ¶¶ 25-26. She explained that Speer had been using drugs, and he was mentally messed up. *Id.* at ¶ 26. It was during this time that Speer started hanging out with Frank Manyoma. *Id.* at ¶ 27. The first murder followed. "When Nancy found out [Speer] had killed another human being, she told him that she would never see him again. She said she would never put money on his books. Then she was murdered by the man who abused [Speer]." *Id.* at ¶ 30. Barton said she attended Speer's first trial and was surprised when she observed that "he was pale and had lost so much weight." *Id.* at ¶ 32. She states that she started crying, and the judge threw her out of court. *Id.*

d. Cynthia Brechen

Speer next submitted a declaration from his maternal aunt, Cynthia Brechen, who is Crystal Barton's mother (Exhibit K). She states that she was never contacted by Speer's trial counsel, his

state habeas counsel, or anyone acting on their behalf. *Id.* at ¶ 46. She was available and willing to testify at Speer's trial. *Id.* She spent a great deal of time discussing the problems of the extended family, much of which did not involve Speer. Nonetheless, she noted that Speer was an unhappy child and that Randy McGhee mistreated him. *Id.* at ¶ 4. She understood that her sister sent Speer to live with his father, in part, because of Randy McGhee. *Id.* at ¶ 5. She noted that Speer had changed when he came back from San Angelo and was using drugs. *Id*. at ¶ 8. She stated that kids picked on Speer and called him "fat and dumb." *Id.* at ¶ 9. She stated that Frank Manyoma caused Speer to do things that he would not otherwise do. *Id.* at ¶ 13. She discussed how Richard Speer abused Nancy McGhee. She noted that Nancy McGhee used marijuana and that it made her happy. *Id.* at ¶ 25. She discussed Nancy McGhee's problems extensively. She ended her declaration discussing the circumstances of Nancy McGhee being murdered by Randy McGhee. *Id.* at ¶¶ 44-46.

3. Trial Counsel's Efforts to Discover Mitigating Evidence

Speer focuses next on the efforts of his trial attorneys to investigate his background and to discover mitigating evidence. David Carter and Richard Dodson were appointed to represent Speer on March 31, 2000 (Exhibits L, M). Less than two weeks later, Dodson telephoned Speer's trial attorney from his first capital murder trial, Roger S. Bridgewater, III, in order to obtain information that could prove useful. He sent a follow-up letter, which includes the following request:

> As we discussed over the telephone recently, David Carter and myself have been appointed to represent William Speer, who has been charged with capital murder in Bowie County, Texas, arising out of a death at the Texas Department of Corrections, Barry Telford Unit. Mr. Speer has indicated that when you represented him on his prior charge in Harris County, that a psychological evaluation was conducted. We are in need of any and all information which might be of benefit to Mr. Speer in the present trial. It would be most appreciated if you could check your file to see if, in fact, there was a psychological evaluation conducted on Mr. Speer, or, if you may have

> any other information regarding his childhood, and the facts and circumstances surrounding his prior offense.
>
> I have enclosed an authorization, signed by Mr. Speer, which permits your release [of] this information.

Letter from R. Dodson to R. Bridgewater (Exhibit N). The letter is dated April 12, 2000. *Id.* The letter was resent on May 2, 2000. *Id.* So far as the files of Dodson and Carter disclose, Bridgewater never provided them any information.

Speer also submitted copies of the contemporaneous time and expense records submitted by his trial attorneys (Exhibit O). Dodson's records document the preparation of the letter that was sent to Bridgewater. It documents trips to the Telford Unit to talk to Speer. It also documents that he talked to Speer's father, Richard Speer, on one occasion. Several entries mention telephone conferences and meetings with investigators. Carter's records indicate that he spoke to Speer on two occasions. The records do not show that the attorneys talked to any other members of the family. The records are consistent with the declarations of family members stating that they were never contacted by the attorneys or their team.

Speer notes that it does not appear that the attorneys ever received a copy of Bridgewater's file containing a copy of the psychiatric evaluation performed by Dr. Ninfa Cavazos. On the other hand, it does appear that they received a copy of the psychiatric evaluation from the State's Special Prosecution Unit ("SPU") five days before the trial (Exhibit P).[3]

Speer argues that the record shows that his trial attorneys performed only the most cursory of investigations into his background before he was incarcerated for murder. Moreover, the transcript from the punishment phase of the trial (Exhibit Q) reveals that they called only James Strickland and

[3]It is noted that Exhibit P is the same as Exhibit C, except that Exhibit P records when the evaluation was transmitted to Mr. Dodson.

Gary Nixon as witnesses during the punishment phase of the trial. The Court notes that Speer took the stand only to the extent that he advised the Court that he did not wish to testify and that he was satisfied with the testimony of Strickland and Nixon. *Id.* at 107-08.

4. State Habeas Counsel's Efforts to Discover Mitigating Evidence

Speer finally focuses on the efforts of his state habeas counsel to investigate his background and to discover mitigating evidence. Craig Henry was appointed to represent Speer on May 2, 2002. Order Appointing Writ Attorney (Exhibit R). On October 2, 2002, Henry filed a motion for the appointment of a mitigation specialist (Exhibit S). Speer notes that Henry acknowledged in the motion that the services of a mitigation specialist was needed to effectively investigate and prepare an application for a writ of habeas corpus and to discharge his professional obligations to Speer. *Id.* at 2. Henry specified that based on his "investigation as of this date, it is apparent that trial counsel failed to conduct an adequate life history investigation in preparation for the sentencing phase of [Speer's] trial." *Id.* Henry revealed that he had contacted Lisa Milstein, an experienced mitigation specialist, and that it "is anticipated that an adequate mitigation investigation of the case will require approximately 200 hours. Milstein's normal and customary hourly rate for such services is $70.00 per hour." *Id.* at 6. The trial court approved the motion with "expense not to exceed $2500 without court approval" (Exhibit T).

On March 4, 2003, Henry filed a motion seeking a ninety day extension of time to file an application for a writ of habeas corpus (Exhibit U). The motion made no mention of Milstein or the need for additional money for mitigation services. The motion was granted (Exhibit V). Henry filed an application for a writ of habeas corpus in state court (Exhibit W) on June 18, 2003. The application includes a claim that trial counsel failed to investigate or present evidence which would have mitigated

against the imposition of the death penalty. *Id.* at 4-14. Speer describes the discussion of the claim as boilerplate. He notes that the discussion does not include any evidence supporting the claim.

The State's response (Exhibit X) to the state application includes affidavits from Speer's trial attorneys. Dodson's affidavit included the following statement:

> II.
>
> During the course of my representation of him, I conducted an investigation into William Speer's background for purposes of developing potential evidence in mitigation of the death penalty. Those matters investigated included Mr. Speer's past criminal record, psychological evaluations and family history. I participated in interviews with a number of individuals who were either family members or acquaintances of Mr. Speer prior to trial. These interviews were conducted for purposes of developing, evaluating and potentially presenting evidence in mitigation of the death penalty.
>
> III.
>
> Mr. Carter and I consulted about our investigation, information generated thereby and the nature of mitigating evidence ultimately presented to the Court. We also advised Mr. Speer about the nature of mitigating evidence which would be presented on his behalf.

Id. at 25-26. *See also* SHCR 93-94. Carter's affidavit contains identical language. Exhibit X at 28-29. *See also* SHCR 90-91.

The state trial court issued Findings of Fact and Conclusions of Law (Exhibit Y). With respect to the issue of whether trial counsel investigated and presented evidence which would have mitigated against the imposition of the death penalty, the trial court entered the following findings of fact:

> 5. [Speer's] trial counsel investigated Mr. Speer's past criminal record, psychological evaluations, and family history to develop mitigating evidence during the punishment phase of the trial. [Affidavit of David Carter and Richard Dodson]
>
> 6. [Speer's] trial counsel interviewed prospective witnesses for purposes of mitigation during the punishment phase of the trial to include family members and friends. [Affidavit of David Carter and Richard Dodson]

> 7. [Speer's] trial counsel advised and consulted with [Speer] regarding the punishment phase of the trial and the mitigation evidence available for this purpose[] prior to and during trial of this cause. [Affidavit of David Carter and Richard Dodson]
>
> 8. This Court finds that [Speer's] trial counsel conducted interviews and investigated facts relating to mitigation issues during the punishment phase of the trial.
>
> 9. The Court finds that [Speer's] trial counsel presented mitigating evidence during the trial of this cause.

Id. at 2. *See also* SHCR 107. The trial court went on to issue the following conclusions of law with respect to the ground for relief:

> 1. [Speer] has failed to show that his counsel's performance was deficient. *Strickland v. Washington*, 466 U.S. 668 (1984).
>
> 2. Even if counsel's performance had been deficient, [Speer] has failed to show that counsel's performance resulted in egregious errors which deprived [Speer] of a fair trial. *Strickland* at 691.
>
> 3. [Speer] fails to show deficient performance, much less harm, based on the allegation of ineffective assistance of counsel for failure to adequately investigate and interview witnesses for punishment. *Strickland*.
>
> 4. Counsel cannot be considered ineffective for making reasonable strategic decisions after consultation with [Speer], not to present certain evidence for purposes of mitigation.
>
> 5. [Speer] fails to show that he received ineffective assistance of counsel, in violation of U.S. CONST. amends VI, VIII, and XIV and TEX. CONST. art. I, §§ 10, 13, 19.

Exhibit Y at 6. *See also* SHCR 111. The Texas Court of Criminal Appeals subsequently denied the application for a writ of habeas corpus based on the trial court's findings and conclusions and its own review. *Ex parte Speer*, 2004 WL 7330992, at *1.

In response to the state court findings and conclusions, Speer submits an affidavit from state habeas counsel, Craig Henry (Exhibit AA). Henry observed that "trial counsel did not retain a

mitigation specialist or conduct an adequate life history investigation in preparation for the sentencing phase of his trial." *Id.* at 1. He recognized the need for a mitigation specialist and received an order from the trial court to appoint Milstein as a mitigation specialist. *Id.* at 1-2. Nonetheless, he never received a report from Milstein. He states that he did not discharge his obligation to ensure that Milstein conducted the mitigation investigation or secure the appointment of another mitigation investigator. *Id.* at 2. Henry acknowledges that no mitigation investigation was conducted beyond his preliminary interviews with some members of Speer's family. *Id*.

Discussion and Analysis

1. Exhaustion Issues

The Fifth Circuit remanded the case with instructions to appoint supplemental federal habeas counsel in order to give Speer the opportunity to develop ineffective assistance of counsel claims in light of *Martinez* and *Trevino*. Consistent with the Fifth Circuit's instructions, supplemental federal habeas counsel conducted an investigation in order to determine whether trial and state habeas counsel were ineffective. The investigation focused whether trial and state habeas counsel discharged their duty to uncover and present mitigating evidence, as required by the Supreme Court in *Wiggins v. Smith*, 539 U.S. 510 (2003). This endeavor inevitably involved the discovery and presentation of new evidence that had not been presented to the state courts.

The analysis of Speer's claim should begin with a discussion of the exhaustion requirement. State prisoners bringing petitions for a writ of habeas corpus are required to exhaust their state remedies before proceeding to federal court unless "there is an absence of available State corrective process" or "circumstances exist that render such process ineffective to protect the rights of the applicant." 28 U.S.C. § 2254(b)(1). In order to exhaust properly, a state prisoner must "fairly present" all of his claims to the state court. *Picard v. Connor*, 404 U.S. 270, 275 (1971). In Texas, all claims must be

presented to and ruled upon the merits by the TCCA. *Richardson v. Procunier*, 762 F.2d 429, 432 (5th Cir. 1985). When a petition includes claims that have been exhausted along with claims that have not been exhausted, it is called a "mixed petition," and historically federal courts in Texas have dismissed the entire petition for failure to exhaust. *See, e.g., Galtieri v. Wainwright*, 582 F.2d 348, 355 (5th Cir. 1978) (en banc).

The exhaustion requirement, however, was profoundly affected by the procedural default doctrine that was announced by the Supreme Court in *Coleman v. Thompson*, 501 U.S. 722 (1991). The Court explained the doctrine as follows:

> In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

Id. at 750. As a result of *Coleman*, unexhausted claims in a mixed petition are ordinarily dismissed as procedurally barred. *Fearance v. Scott*, 56 F.3d 633, 642 (5th Cir.), *cert. denied*, 515 U.S. 1153 (1995). *See also Finley v. Johnson*, 243 F.3d 215, 220 (5th Cir. 2001). Such unexhausted claims are procedurally barred because if a petitioner attempted to exhaust them in state court, they would be barred by Texas abuse-of-the-writ rules. *Fearance*, 56 F.3d at 642. The procedural bar may be overcome by demonstrating either cause and prejudice for the default or that a fundamental miscarriage of justice would result from the court's refusal to consider the claim. *Id.* (citing *Coleman*, 501 U.S. at 750-51). Dismissals pursuant to abuse of writ principles have regularly been upheld as a valid state procedural bar foreclosing federal habeas review. *See Moore v. Quarterman*, 534 F.3d 454, 463 (5th Cir. 2008); *Hughes v. Quarterman*, 530 F.3d 336, 342 (5th Cir. 2008), *cert. denied*, 556 U.S. 1239 (2009); *Coleman v. Quarterman*, 456 F.3d 537, 542 (5th Cir. 2006), *cert. denied*, 549 U.S. 1343 (2007).

In the case at bar, Speer is presenting new evidence that was not submitted to the Texas Court of Criminal Appeals. Until just recently, the claim would have undoubtedly been dismissed as procedurally barred in light of the decision by the TCCA dismissing it as an abuse of the writ. However, the Supreme Court opened the door slightly for a showing of cause and prejudice to excuse the default in *Martinez* and *Trevino*. In *Martinez*, the Supreme Court answered a question left open in *Coleman*: "whether a prisoner has a right to effective counsel in collateral proceedings which provide the first occasion to raise a claim of ineffective assistance at trial." 566 U.S. at 8 (citing *Coleman*, 501 U.S. at 755). The Court held:

> Where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance of counsel at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.

Id. at 17.

The Supreme Court extended *Martinez* to Texas in *Trevino*. Although Texas does not preclude appellants from raising ineffective assistance of trial counsel claims on direct appeal, the Court held that the rule in *Martinez* applies because "the Texas procedural system - as a matter of its structure, design, and operation - does not offer most defendants a meaningful opportunity to present a claim of ineffective assistance of trial counsel on direct appeal." *Trevino*, 569 U.S. at 428. The Court left it to the lower courts to determine on remand whether Trevino's claim of ineffective assistance of counsel was substantial and whether his initial state habeas attorney was ineffective. *Id.* at 429.

The Fifth Circuit subsequently summarized the rule announced in *Martinez* and *Trevino* as follows:

> To succeed in establishing cause to excuse the procedural default of his ineffective assistance of trial counsel claims, [petitioner] must show that (1) his underlying claims

> of ineffective assistance of trial counsel are "substantial," meaning that he "must demonstrate that the claim has some merit," *Martinez*, 132 S. Ct. at 1318; and (2) his initial state habeas counsel was ineffective in failing to present those claims in his first state habeas application. *See id.*; *Trevino*, 133 S. Ct. at 1921.

Preyor v. Stephens, 537 F. App'x 412, 421 (5th Cir. 2013), *cert. denied*, 134 S. Ct. 2821 (2014). "Conversely, the petitioner's failure to establish the deficiency of either attorney precludes a finding of cause and prejudice." *Sells v. Stephens*, 536 F. App'x 483, 492 (5th Cir. 2013), *cert. denied*, 134 S. Ct. 1786 (2014). The Fifth Circuit reaffirmed this basic approach in *Reed v. Stephens*, 739 F.3d 753, 774 (5th Cir.), *cert. denied*, 135 S. Ct. 435 (2014). The Fifth Circuit has also reiterated that a federal court is barred from reviewing a procedurally defaulted claim unless a petitioner shows both cause and actual prejudice. *Hernandez v. Stephens*, 537 F. App'x 531, 542 (5th Cir. 2013), *cert. denied*, 134 S. Ct. 1760 (2014). To show actual prejudice, a petitioner "must establish not merely that the errors at his trial created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *Id.* (citations omitted) (emphasis in original).

It should be noted that the Director correctly observes that Speer previously presented a *Wiggins* claim in this case, which was denied by the Court. The Director thus argues that it should be dismissed pursuant to 28 U.S.C. § 2244(b)(1). Speer, on the other hand, argues that the claim is unexhausted because it is "material and significantly different and stronger than what he presented to the state court." *See Wessinger v. Cain*, No. 04-637-JJB-SCR, 2012 WL 1752683, at *1 (MD. La. May 16, 2012).

The Fifth Circuit has held that "[t]he exhaustion requirement is not satisfied if the petitioner 'presents *material* additional evidentiary support in the federal court that was not presented to the state court.'" *Lewis v. Quarterman*, 541 F.3d 280, 284 (5th Cir. 2008) (quoting *Dowthitt v. Johnson*, 230 F.3d 733, 745 (5th Cir. 2000)). A court must accordingly ask whether a claim is "in a significantly

different and stronger evidentiary posture than it was before the state courts." *Dowthitt*, 230 F.3d at 746 (citation omitted).

In the present case, Speer's state habeas counsel presented no evidence in support of the claim. State habeas counsel, Craig Henry, acknowledges that no mitigation investigation was conducted beyond his preliminary interviews with some members of Speer's family. By comparison, current supplemental federal habeas counsel has submitted extensive evidence in support of the claim, including evidence from Speer's previous capital murder trial and affidavits from family members. The new evidence places Speer's *Wiggins* claim in a significantly different and stronger evidentiary posture than it was before the state courts. As such, it is unexhausted. Nonetheless, Speer may only proceed with an unexhausted and procedurally barred claim if he can satisfy the requirements of *Martinez* and *Trevino*. The Fifth Circuit specifically remanded the case for a determination whether Speer can develop ineffective assistance of counsel claims in light of *Martinez* and *Trevino.* The question before the Court is whether Speer has made the requisite showing under *Martinez* and *Trevino*.

2. Ineffective Assistance of Counsel

The standard for evaluating ineffective assistance of counsel claims was established by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1994). *Strickland* provides a two-pronged standard, and a petitioner bears the burden of proving both prongs. 466 U.S. at 687. Under the first prong, he must show that counsel's performance was deficient. *Id.* To establish deficient performance, he must show that "counsel's representation fell below an objective standard of reasonableness," with reasonableness judged under professional norms prevailing at the time counsel rendered assistance. *Id.* at 688. Under the second prong, the petitioner must show that his attorney's deficient performance resulted in prejudice. *Id.* at 687. To satisfy the prejudice prong, the habeas 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. An ineffective assistance of counsel claim fails if a petitioner cannot satisfy either the deficient performance or prejudice prong; a court need not evaluate both if he makes an insufficient showing as to either. *Id.* at 697. The *Strickland* standard applies to ineffective assistance of counsel claims in the context of *Martinez* and *Trevino*. *See Martinez*, 566 U.S. at 14.

Speer specifically argues that his attorneys were ineffective in failing to discharge their duty of conducting an investigation into his life; thus, they failed to uncover powerful mitigating evidence. The case law is abundantly clear that "in the context of a capital sentencing proceeding, defense counsel has the obligation to conduct a 'reasonably substantial, independent investigation' into potential mitigating circumstances." *Neal v. Puckett*, 286 F.3d 230, 236-37 (5th Cir. 2002) (quoting *Baldwin v. Maggio*, 704 F.2d 1325, 1332-33 (5th Cir. 1983)), *cert. denied*, 537 U.S. 1104 (2003). *See also Woods v. Thaler*, 399 F. App'x 884, 891 (5th Cir. 2010), *cert. denied*, 563 U.S. 991 (2011). "Mitigating evidence that illustrates a defendant's character or personal history embodies a constitutionally important role in the process of individualized sentencing, and the ultimate determination of whether the death penalty is an appropriate punishment." *Riley v. Cockrell*, 339 F.3d 308, 316 (5th Cir. 2003) (citation omitted), *cert. denied*, 543 U.S. 1056 (2005). In assessing whether counsel's performance was deficient, courts look to such factors as what counsel did to prepare for sentencing, what mitigation evidence he had accumulated, what additional "leads" he had, and what results he might reasonably have expected from those leads. *Neal*, 286 F.3d at 237. The reasonableness of counsel's investigation involves "not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins*, 539 U.S. at 527. "[C]ounsel should consider presenting . . . [the defendant's]

medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience, and religious and cultural influences." *Id.* at 524 (citing ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases § 11.8.6, at 133 (1989)). The Supreme Court stressed in *Wiggins* that the "investigation into mitigating evidence should comprise efforts to discover *all reasonably available* mitigating evidence." *Id.* (emphasis in original).

3. Deficient Representation of State Habeas Counsel

To satisfy *Martinez* and *Trevino*, Speer must show that both trial counsel and state habeas counsel were ineffective. *Preyor*, 537 F. App'x at 421. Speer begins his analysis by focusing on state habeas counsel, Craig Henry. Henry recognized the critical necessity of conducting an extensive mitigation investigation before filing an application for a writ of habeas corpus in Speer's behalf. The state trial court granted Henry's motion to appoint Lisa Milstein as Speer's mitigation specialist and approved funding for her work. Milstein provided no report or information relevant to mitigation in Speer's case, and Henry admittedly "did nothing to discharge [his] obligation to ensure that Ms. Milstein conducted the mitigation investigation she had been appointed to conduct, or to secure the appointment of another mitigation investigator." *See* Declaration of C. Henry (Ex. AA) at ¶ 9. Thus, no mitigation investigation beyond Henry's preliminary interviews with some of the members of Speer's family was ever conducted during the state habeas corpus proceedings. *Id.* at ¶ 10.

Speer argues that his situation is comparable to that of his co-defendant, Anibal Canales. The Fifth Circuit discussed Canales' case as follows:

> We turn next to Canales's claim that he received ineffective assistance of trial counsel during the sentencing phase of his trial. Canales argues his trial counsel was ineffective because he failed to thoroughly investigate and present mitigation evidence. He also argues that the performance of his state habeas counsel fell below an objective standard of reasonableness. Canales's state habeas counsel did not conduct a mitigation investigation due to a misunderstanding of funding for habeas investigations: his state

> habeas counsel thought his funding was capped at $25,000, and so he only dedicated $2,500 to investigationcand most of that went to issues related to innocence. Both parties agree, however, that funding was not capped at $25,000.
>
> First, we agree with Canales that the performance of his state habeas counsel fell below an objective standard of reasonableness. The Supreme Court recently considered a similar situation in which the trial attorney failed to request additional funding to replace an inadequate expert because of a mistaken belief about the amount of funding available. *Hinton v. Alabama,* ___ U.S. ___, 134 S. Ct. 1081, 1088, 188 L.Ed.2d 1 (2014) (per curiam). The Court held that the trial lawyer's decisions cbased not on any strategic choice but on a mistaken belief that available funding was capped [at a certain amount]" constituted deficient performance. *Hinton,* 134 S.Ct. at 1088-89. Similarly, Canales's state habeas counsel did not make a strategic choice to forego a mitigation investigation. Instead, he chose not to pursue that claim in any depth because he thought he could not receive any additional funding to pursue those claims. Accordingly, his performance fell below an objective standard of reasonableness.

Canales v. Stephens, 765 F.3d 551, 569 (5th Cir. 2014).

Speer argues that Henry's performance likewise fell below an objective standard of reasonableness. Milstein was appointed to serve as Speer's mitigation investigator, and Henry knew that she was inadequate because she provided him no report or information relevant to his case. Henry also knew that funding had been approved by the trial court. The trial court's order specified that the expenses were "not to exceed $2500 without court approval." Exhibit T. But instead of requesting the appointment of a different mitigation specialist after not receiving a report from Milstein, Henry did nothing. Henry admits he did nothing. Speer persuasively argues that state habeas counsel's performance fell below an objective standard of reasonableness with respect to the duty to investigate the issue of mitigating evidence.

4. Deficient Representation of State Trial Counsel

Speer argues that trial counsel's performance likewise fell below an objective standard of reasonableness with respect to the duty to discover all reasonably available mitigating evidence. This

issue was developed during the state habeas corpus proceedings. Richard Dodson's affidavit included the following statement:

> II.
>
> During the course of my representation of him, I conducted an investigation into William Speer's background for purposes of developing potential evidence in mitigation of the death penalty. Those matters investigated included Mr. Speer's past criminal record, psychological evaluations and family history. I participated in interviews with a number of individuals who were either family members or acquaintances of Mr. Speer prior to trial. These interviews were conducted for purposes of developing, evaluating and potentially presenting evidence in mitigation of the death penalty.
>
> III.
>
> Mr. Carter and I consulted about our investigation, information generated thereby and the nature of mitigating evidence ultimately presented to the Court. We also advised Mr. Speer about the nature of mitigating evidence which would be presented on his behalf.

SHCR 93-94. David Carter's affidavit contains identical language. SHCR 90-91. The state trial court accordingly found that "trial counsel investigated Mr. Speer's past criminal record, psychological evaluations, and family history to develop mitigating evidence during the punishment phase of the trial" and "trial counsel interviewed prospective witnesses for purposes of mitigation during the punishment phase of the trial to include family members and friends." SHCR 107.

Speer, in turns, submits extensive evidence to support an argument that the amount of effort actually put into the discovery of mitigating evidence was deficient. Trial counsel's time and expense records and files disclose the entirety of their "mitigation investigation," consisting of (1) speaking with Speer's father, Richard Speer, twice by telephone and once in person, two days before trial; (2) interviewing two volunteer prison chaplains who had no knowledge about Speer's pre-incarceration life; (3) sending a letter to Speer's former lawyer, Roger Bridgewater; and (4) reviewing Dr. Ninfa

Cavazos' April 1991 psychiatric evaluation after the prosecution faxed it to them less than a week before trial. Exhibit O.

Speer's trial counsel did not retain a mitigation specialist. Counsel did not interview other multiple members of Speer's family who were available to testify and would have provided mitigation evidence to the jury had they been asked to do so. Despite knowing that the record from Speer's previous Harris County capital murder conviction might contain a psychological evaluation, counsel never retrieved or reviewed the suit record. Counsel neither requested nor obtained a psychological, psychiatric, or medical evaluation of Speer. Speer argues that they conducted only the most cursory of investigations and ultimately presented only the testimony of two volunteer prison chaplains in an effort to have his life spared. Speer argues that trial counsel's performance fell well short of the requirements set forth by the Supreme Court in *Wiggins* and related cases.

Speer's critique of trial counsel's efforts to comply with the duty to discover all reasonably available mitigating evidence is compelling. The representation provided to him is in the same league as that provided to co-defendant Anibal Canales, which led the Fifth Circuit to conclude that his "claim of ineffective assistance of trial counsel during sentencing [was] substantial." *Canales*, 765 F.3d at 571. The Court assumes, without deciding, that trial counsel's representation on this issue fell below an objective standard of reasonableness. Thus, the remaining issue is prejudice. *Id.*

4. Prejudice

In evaluating the issue of prejudice at capital sentencing, courts must reweigh the quality and quantity of the available mitigating evidence, including that presented in post-conviction proceedings, against the aggravating evidence. *Williams v. Taylor*, 529 U.S. 362, 397-98 (2000); *Blanton v. Quarterman*, 543 F.3d 230, 236 (5th Cir. 2008), *cert. denied*, 556 U.S. 1240 (2009). "In evaluating that question, it is necessary to consider *all* the relevant evidence that the jury would have had before

it if [the petitioner] had pursued the different path - not just the mitigation evidence [the petitioner] could have presented, but also the . . . evidence that almost certainly would have come with it." *Wong v. Belmontes*, 558 U.S. 15, 20 (2009) (emphasis in original). After reweighing all the mitigating evidence against the aggravating evidence, a court must determine whether the petitioner "has shown that, had counsel presented all the available mitigating evidence, there is a reasonable probability that a juror would have found that the mitigating evidence outweighed the aggravating evidence." *Gray v. Epps*, 616 F.3d 436, 442 (5th Cir. 2010) (quoting *Wiggins*, 539 U.S. at 534), *cert. denied*, 563 U.S. 905 (2011). "The likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 112 (2011) (citing *Strickland*, 466 U.S. at 693). "[T]here is no prejudice when the new mitigating evidence 'would barely have altered the sentencing profile presented' to the decisionmaker." *Sears v. Upton*, 561 U.S. 945, 954 (2010) (citing *Strickland*, 466 U.S. at 700). The inquiry requires a court to engage in a "probing and fact-specific analysis." *Id.* at 955. The *Strickland* standard in analyzing the prejudice prong "necessarily requires a court to 'speculate' as to the effect of the new evidence - regardless of how much or how little mitigation evidence was presented during the initial penalty phase." *Id.* at 956.

In the present case, the evidence at trial showed a cold and calculated murder. It was a heinous gang related murder of a prisoner by other prisoners. Gang leaders ordered Speer and others to kill the victim because the gang had a financial stake in contraband. Speer personally choked the victim to death, crushing his throat in the process. Following the murder, Speer bragged to other gang members about his role in the murder. Under Texas substantive law, the circumstances of the charged offense were sufficient to support an affirmative finding of future dangerousness. *White v. Dretke*, 126 F. App'x 173, 177 (5th Cir.), *cert. denied*, 546 U.S. 940 (2005). The evidence presented at trial also revealed that Speer had previously been convicted of capital murder. In that case, he shot the

victim in the head while he was sleeping. Clearly, Speer still posed a future danger to others despite his life sentence because he murdered again while confined in prison.

The mitigating evidence presented at trial came from two prison chaplains, who testified that they did not believe that he was a danger to society and that he could be beneficial to the prison by sharing the gospel with other inmates. 13 RR 60, 92. The additional mitigating evidence submitted by supplemental habeas counsel consists of records from Speer's previous capital murder trial in which he received a life sentence. The new evidence also includes a declaration from Speer's half-sister, Melissa Yeldell, who could have offered testimony about physical and sexual abuse in the family. The additional evidence includes a declaration from Speer's step-father, Randy McGhee, who is serving time for killing Speer's mother. The additional evidence includes declarations from other family members, Crystal Barton and Cynthia Brechen, who would have been able to discuss physical and sexual abuse, along with drug usage.

The Director correctly observes that Speer's proposed additional mitigating evidence is laced throughout with damaging evidence. Such evidence includes the following:

- Speer was kicked out of daycare when he was only four years old for injuring another student.
- In second grade, Speer threw a desk at his teacher.
- He constantly abused drugs, including methamphetamine, LSD, cocaine, and crack cocaine.
- He was manipulative in order to meet his needs.
- The psychologist who examined him stated the following: "William evidenced considerable resentment and hostility. He also evidenced considerable anxiety in the testing situation. William can be rather shrewd and he did evidence considerable aggressive impulses."
- Physical exams revealed no evidence of significant neurological disease. Thus, his behavior cannot be excused on that basis.

- Speer exhibited poor insight and judgment according to his psychiatric examination.
- A psychological assessment by his school in 1990 stated that Speer was emotionally disturbed and had a conduct disorder of a Solitary Aggressive type.
- A report by the Harris County Juvenile Probation Department noted that "[t]he mother does indicate that [Speer] set fires until three weeks ago."

The Director further observed that the evidence from Dr. Quijano was particularly damaging with respect to Speer's dependent personality type, which led him to believe that Speer probably allowed others to persuade him to murder Collins. That same dependent personality type is seen again in the murder of Gary Dickerson.

With respect to all of the evidence of Speer's dysfunctional family - all of it is intertwined with a general pattern: Speer has a disorder that predisposes him to do anything to please others, including committing crimes and murder. The Director appropriately observes that the additional evidence from family members of physical and sexual abuse, along with drug abuse, is tragic, but much of it happened to his mother, cousins, aunt, and others and is thus of little mitigating value.

The Director appropriately characterized the new proposed mitigating evidence as""double-edged," and noted that "[m]itigation, after all, may be in the eye of the beholder." *Martinez v. Cockrell*, 481 F.2d 249, 258 (5th Cir. 2007) (quoting *Burger v. Kemp*, 483 U.S. 776, 794 (1987)), *cert. denied*, 552 U.S. 1146 (2008). The Fifth Circuit has observed that evidence of "brain injury, abusive childhood, and drug and alcohol problems is all 'double-edged.' In other words, even if his recent claims about this evidence is true, it could all be read by the jury to support, rather than detract, from his future dangerousness claim." *Johnson v. Cockrell*, 306 F.3d 249, 253 (5th Cir. 2002), *cert. denied*, 538 U.S. 926 (2003). Had defense counsel presented the new proposed mitigating evidence at trial, the

prosecution would have had ammunition to explain not only why Speer committed capital murder twice, but why he would pose a future danger of killing again if merely sent back to prison. The new proposed mitigating evidence submitted by supplemental habeas counsel is "double-edged," and could be viewed as more aggravating than mitigating.

The Court stresses that the additional evidence of Speer's dysfunctional family, including physical and sexual abuse, and drug usage, is indeed tragic, but such evidence could be viewed as more aggravating than mitigating.

Having reweighed all of the mitigating evidence, both old and new, against the aggravating evidence, the Court is of the opinion, and so finds, that there is *no* reasonable probability that a juror would have found that the mitigating evidence outweighed the aggravating evidence. The following conclusion by the Fifth Circuit is equally applicable to the present case: "the additional mitigating evidence was not so compelling, especially in light of the horrific facts of the crime, that the sentencer would have found a death sentence unwarranted." *Martinez*, 481 F.2d at 259. Speer has not proven prejudice. He has not shown that he is entitled to federal habeas corpus relief.

As a final matter, the Director appropriately argues that Speer's ineffective assistance of trial counsel claim remains procedurally barred in light of his inability to prove prejudice under *Coleman*. Speer has not shown prejudice in order to excuse the procedural default. Overall, Speer has not shown prejudice under *Strickland* on the merits of his ineffective assistance of trial counsel claim and, concomitantly, has not shown prejudice in order to excuse the procedural default. Speer is not entitled to federal habeas corpus relief.

The Director also argues that Speer's claim is successive and should be dismissed under 28 U.S.C. § 2244(b)(1). Moreover, Speer has neither sought nor obtained permission from the Fifth Circuit to file a successive petition. It is once again noted that the Fifth Circuit remanded the case in

order to give Speer the opportunity to develop ineffective assistance of counsel claims in light of *Martinez* and *Trevino*. Speer has been unable to satisfy the purpose of the remand; thus, a discussion of other issues is moot. Once again, Speer is not entitled to federal habeas corpus relief.

Certificate of Appealability

"A state prisoner whose petition for a writ of habeas corpus is denied by a federal district court does not enjoy an absolute right to appeal." *Buck v. Davis*, 580 U.S. ___, 137 S. Ct. 759, 773 (2017). Instead, under 28 U.S.C. § 2253(c)(1), he must first obtain a certificate of appealability ("COA") from a circuit justice or judge. *Id.* A certificate of appealability may issue only if a petitioner has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). To make a substantial showing, the petitioner need only show that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). The Supreme Court recently emphasized that the COA inquiry "is not coextensive with merits analysis" and "should be decided without 'full consideration of the factual or legal bases adduced in support of the claims.'" *Buck*, 137 S. Ct. at 773 (quoting *Miller-El*, 537 U.S. at 336). Moreover, "[w]hen the district court denied relief on procedural grounds, the petitioner seeking a COA must further show that 'jurists of reason would find it debatable whether the district court was correct in its procedural ruling.'" *Rhoades v. Davis*, 852 F.3d 422, 427 (5th Cir. 2017) (quoting *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012)).

In this case, it is respectfully recommended that reasonable jurists could not debate the denial of Speer's supplemental claim on procedural or substantive grounds, nor find that the issues presented are adequate to deserve encouragement to proceed. *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003)

(citing *Slack*, 529 U.S. at 484). Accordingly, it is respectfully recommended that the Court find that Speer is not entitled to a certificate of appealability.

Recommendation

It is accordingly recommended that the petition for a writ of habeas corpus be denied with respect to the claim remanded by the Fifth Circuit and the case be dismissed with prejudice. A certificate of appealability should be denied.

Within fourteen (14) days after receipt of the magistrate judge's report, any party may serve and file written objections to the findings and recommendations contained in the report.

A party's failure to file written objections to the findings, conclusions and recommendations contained in this Report within fourteen days after being served with a copy shall bar that party from *de novo* review by the district judge of those findings, conclusions and recommendations and, except on grounds of plain error, from appellate review of unobjected-to factual findings and legal conclusions accepted and adopted by the district court. *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1430 (5th Cir. 1996) (*en banc*).

SIGNED this 25th day of June, 2018.

ROY S. PAYNE
UNITED STATES MAGISTRATE JUDGE

Appendix G

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

MARSHALL DIVISION

WILLIAM SPEER, #999398	§	
VS.	§	CIVIL ACTION NO. 2:04cv269
DIRECTOR, TDCJ-CID	§	

O R D E R

Before the Court are Petitioner William Speer's motion to suspend and reset deadlines (Dkt. #83), second motion for additional mitigation funding (Dkt. #84), and sealed second application for additional mitigation funding (Dkt. #85). He is asking for additional funding for his mitigation expert, Gillian E. Ross, and for suspension of the deadlines. In the alternative, he asks for a sixty-day extension of all briefing deadlines.

On March 30, 2015, the Fifth Circuit remanded the present case, in part, with instructions "to appoint supplemental counsel" and "to consider in the first instance whether Speer can establish cause and prejudice for the procedural default of any ineffective-assistance-of-trial-counsel claims pursuant to *Martinez* and *Trevino* that he may raise, and if so, whether those claims merit relief." *Speer v. Stephens*, 781 F.3d 784, 787 (5th Cir. 2015).

The Court has issued two orders granting Speer's motions for expert assistance pursuant to 18 U.S.C. § 3599(f). Chief Circuit Judge Carl E. Stewart has approved both orders, with the second order being approved on July 26, 2016. Funding has been approved in the amount of $30,000, which is four times the amount provided by 18 U.S.C. § 3599(g)(2). In the last order issued by this Court, Speer was placed on notice that the amount approved may be the final amount that will be approved

in this case, and he should treat it as such. Despite the admonishment, Speer is asking for an additional $15,000. In total, he is asking for six times the statutory amount, which far exceeds the norm for expert funding in capital habeas proceedings. The Court simply cannot certify to the Fifth Circuit that additional funding should be approved. The request for additional funding will be denied, although Speer's alternative request for a sixty-day extension of time of all briefing deadlines will be granted. It is therefore

ORDERED that the motion to suspend and reset deadlines (Dkt. #83) is **GRANTED** to the extent that all briefing deadlines are extended by sixty days. It is further

ORDERED that the second motion for additional mitigation funding (Dkt. #84) is **DENIED**. It is further

ORDERED that Speer shall file a brief on the issue of prejudice no later than February 1, 2017. It is further

ORDERED that the Director has sixty days from the filing of the brief to file a response. It is finally

ORDERED that Speer has fourteen days from the filing of a response to file a reply.

The parties are placed on notice that no additional extensions of time will be granted in the absence of good cause.

SIGNED this 30th day of November, 2016.

ROY S. PAYNE
UNITED STATES MAGISTRATE JUDGE

Appendix H

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
March 30, 2015
Lyle W. Cayce
Clerk

No. 13-70001

WILLIAM SPEER,

Petitioner - Appellant

v.

WILLIAM STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent - Appellee

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

Before HIGGINBOTHAM, OWEN, and SOUTHWICK, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

In *Martinez* v. *Ryan*[1] and *Trevino* v. *Thaler*[2] the Supreme Court held that a habeas petitioner's procedural default of an ineffective assistance of trial counsel claim could be excused by a federal habeas court if, under certain circumstances, the petitioner received ineffective assistance of counsel during the state collateral review process.[3]

[1] 132 S. Ct. 1309 (2012).
[2] 133 S. Ct. 1911 (2013).
[3] *See Martinez*, 132 S. Ct. at 1318-19; *Trevino*, 133 S. Ct. at 1921.

Now pending before this court is a motion by the petitioner's federal habeas counsel to withdraw as counsel. Counsel argues that because he also represented the petitioner during state habeas proceedings, it would be a conflict of interest for him to now determine whether his state conduct was ineffective. Speer also requests the appointment of new counsel to investigate whether he has any viable claim under the rule established in *Martinez* and *Trevino*.

We do not read the Supreme Court's narrowly crafted decisions in *Martinez* or *Trevino* to require in this case the appointment of additional federal habeas counsel. Those cases provide only that the federal habeas court is not procedurally barred from hearing a prisoner's ineffective assistance of trial counsel claim if the petitioner's state habeas counsel was constitutionally ineffective.[4] They do not create a constitutional right to counsel on collateral review. They only offer remedial relief from procedural bars to the presentation of federal claims attending that defective performance.[5]

It is said that the petitioner is entitled to counsel on habeas review and that means conflict-free counsel. That there is no such constitutional right to counsel on collateral review aside, the petitioner enjoyed that right. The lawyer here had no conflict in arguing the constitutional claim of ineffective

---

[4] *See Martinez*, 132 S. Ct. at 1320 (emphasizing the "limited nature" of the exception to the procedural default rule); *see also Trevino*, 133 S. Ct. at 1922 (Roberts, C.J., dissenting) ("We were unusually explicit about the narrowness of our decision [in *Martinez*].").

[5] We also do not interpret the Supreme Court's recent decision in *Christeson v. Roper*, 135 S. Ct. 891 (2015), as supporting appointment of new or additional counsel for Speer. The Court considered whether to appoint new counsel when the possible claim of ineffective assistance of counsel had already been identified. The default was the failure of state habeas attorneys to contact their client until after the time for filing for habeas had expired; that delay made equitable tolling the only possible avenue for relief, which required arguing their own ineffectiveness. *Id.* at 892-93. Substitute counsel therefore needed to be appointed. *Id.* at 895-96. The obvious distinction is that Speer seeks counsel to search the record for whether there was any as-yet-unidentified default by state habeas counsel.

trial counsel to the federal court. It signifies that the petitioner continues to enjoy all the rights *Martinez* and *Trevino* afford.

The petitioner's present lawyer is conflicted only in the sense that every lawyer charged to examine the performance of counsel is conflicted in that task when the performance is his own. That has no bearing on counsel's charge to argue the substantive claim of ineffective assistance of trial counsel. We do not read the Supreme Court as requiring a second federally appointed lawyer to plow the same ground ably plowed by the first federally appointed lawyer with no suggestion or hint of any shortcoming on his part. By this manner of reason there is no end to the succession of potential appointments, for each previous lawyer might have been ineffective.

Though we do not interpret *Martinez* or *Trevino* as creating the right to new counsel that Speer insists those cases do, our task is not done. 18 U.S.C. § 3599 authorizes federal judges to appoint counsel for indigent federal habeas defendants in capital cases.[6] We may also appoint supplemental counsel in federal habeas proceedings.[7] We conclude that this authority should be used in the present case in the interest of justice. Under that power, and mindful of the systematic benefits of efficiently resolving all potential claims as early in the habeas process as possible, we direct the appointment of supplemental counsel for the sole purpose of determining whether Speer has additional habeas claims that ought to have been brought.

The congressional grant of appointment power in habeas cases came in response to the challenges petitioners face in the complex and difficult law of the death penalty. This authority enables federal appointments of separate counsel for state and federal habeas, an answer to today's perceived problem.

---

[6] 18 U.S.C. § 3599(a)(2).

[7] *Id.* (court may appoint "one or more attorneys").

In a case like this one, where present counsel has been actively engaged in this litigation for several years, and moves only late in the process for new counsel, that second appointment in the discretion of the district court may be of counsel who, while independent, counsel, would benefit from the often rich resource of the counsel who has been through the state habeas process and who has prosecuted the federal habeas action with no hint of inability.[8] Such action is faithful to Congress's clear intent to promote continuity of representation in federal habeas actions.[9]

We support this practical answer in service of the larger goals of finality and federalism even though for now its dress is not unlike a solution in search of a problem. We note in passing that we do not know whether the quality of representation by state habeas counsel who have subsequently been appointed as federal habeas counsel will result in such number of claims of ineffective assistance of counsel claims as to justify this belt-and-suspenders treatment, with its attendant problems of coordination and inefficiencies between the two attorneys, trade-offs which do the petitioner no service.[10] This empirical

---

[8] Here, for example, the underlying constitutional violations alleged in the habeas petition were a speedy trial and *Brady* claim. No ineffectiveness of trial counsel claims were raised either at the federal district court or before our court.

[9] *See* 18 U.S.C. § 3599(e) ("Unless replaced by similarly qualified counsel upon the attorney's own motion or upon motion of the defendant, each attorney so appointed shall represent the defendant throughout every subsequent stage of available judicial proceedings."). Under the plain text of the statute, existing counsel *must* continue unless excused by the court, which we decline to do in this instance, in light of the fact that any conflict appears to have been cured by the appointment of supplemental counsel to address a specific legal question: whether any procedural default of ineffective assistance of trial counsel claims by state habeas counsel may be excused.

[10] At the onset of the federal habeas litigation, the district judge may, of course, appoint as single federal habeas counsel a lawyer who did not participate in the state habeas action. We appoint limited, supplemental counsel here so as not to lose the benefits and expertise of existing counsel, with all the inefficiencies that transition in representation would entail.

Our decision addresses the universe of cases where petitioner's counsel in his federal petition was also his state habeas counsel. We do not reach, and express no opinion on, the separate question of whether the federal district judge should appoint the lawyer who

question is, in any event, beyond the scope of our decision. Its answer must lie in the United States District Courts, informed by their own experiences.

We express no opinion on whether any new claims would be barred by the Antiterrorism and Effective Death Penalty Act.[11] New claims, if any, must be resolved by the district court in the first instance.

Construing present counsel's motion to withdraw as a motion for the appointment of supplemental counsel, we GRANT the motion for the appointment of new supplemental counsel. Because the claims he brings are yet unresolved, we DENY the motion of present counsel to withdraw. We REMAND THIS CASE IN PART to the district court solely to appoint supplemental counsel consistent with this opinion and the requirements of 18 U.S.C. § 3599, and to consider in the first instance whether Speer can establish cause for the procedural default of any ineffective-assistance-of-trial-counsel claims pursuant to *Martinez* and *Trevino* that he may raise, and if so, whether those claims merit relief. We retain jurisdiction in the remainder of the case and STAY proceedings pending the conclusion of the district court's review.

---

prosecuted the state collateral review as federal counsel at the beginning of the federal habeas action.

[11] *See* 28 U.S.C. § 2254.

No. 13-70001

PRISCILLA R. OWEN, Circuit Judge, concurring:

I concur in the appointment of additional counsel essentially for the reasons set forth in my concurring opinion in *Mendoza v. Stephens*, No. 12-70035, -- F.3d -- (5th Cir. 2015) (OWEN, J. concurring).

Appendix I

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

MARSHALL DIVISION

WILLIAM SPEER,	§	
Petitioner,	§	
vs.	§	Civil Action No. 2:04cv269
RICK THALER, Director, Texas Department of Criminal Justice, Correctional Institutions Division,	§	
Respondent.		

ORDER AND JUDGMENT

This matter came before the Court on Petitioner William Speer's ("Speer's") application for a writ of *habeas corpus*. On January 24, 2012, this case was referred to the Hon. Roy S. Payne, United States Magistrate Judge. On Nov. 28, 2012, Judge Payne entered a Report and Recommendation in which he recommended that the Court deny all five claims in Speer's application. Pursuant to 28 U.S.C. § 636 (b)(1)(C), Speer could have obtained *de novo* review of his claims by this Court, by filings objections within fourteen days of the entry of the Magistrate Judge's Report and Recommendation. Speer did not do so.

It is therefore ORDERED that the Magistrate Judge's Report and Recommendation is adopted by this Court, and

JUDGMENT is entered for the Respondent, Rick Thaler, on all five claims in Speer's application.

So ORDERED and SIGNED this 14th day of December, 2012.

RODNEY GILSTRAP
UNITED STATES DISTRICT JUDGE

Appendix J

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

MARSHALL DIVISION

WILLIAM SPEER,	§	
Petitioner	§	
vs	§	No. 2:04cv269
RICK THALER, Director Texas Department of Criminal Justice, Correctional Institutions Division,	§	
Respondent.	§	

REPORT AND RECOMMENDATION

William Speer ("Speer") an inmate confined to the Texas Department of Criminal Justice, Institutional Division, filed an application for a writ of *habeas corpus* pursuant to 28 U.S.C. § 2254. Speer challenged his capital murder conviction and death sentence imposed by the 5th Judicial District Court of Bowie County, Texas, in cause No. 16820, styled *The State of Texas vs. William Speer.* Pursuant to 28 U.S.C. §636, this case was referred to the undersigned United States Magistrate Judge for a Report and Recommendation for disposition of the application. For the reasons set forth below, the court should deny the application.

Facts

On July 11, 1997, a Texas prison inmate named Gary Dickerson was strangled to death in his cell at the Barry Telford Unit in Bowie County, Texas. The events leading to his murder were as follows: A member of an African-American gang within the prison had given Dickerson money to buy contraband cigarettes from an inmate named James Baker. The prison

authorities confiscated the money from Dickerson, however, before he could purchase the cigarettes. In order to stay square with the African American gang, Dickerson told Baker to give the cigarettes directly to the African-American gang member. Dickerson threatened to inform the authorities about a large shipment of contraband tobacco Baker was about to receive if Baker did not comply with his request.

Inmate Michael Constandine, the leader of a prison gang called the Texas Mafia, had also become involved with Baker's smuggling operation. Constandine himself owed money to a prison gang called the Texas Syndicate. To raise money, he decided to obtain a cut of Baker's tobacco shipment. Constandine threatened Baker with physical harm if he did not agree.

When the tobacco shipment was intercepted by authorities, all three gangs believed that Dickerson had told the authorities about Baker's operation. Dickerson asked to be placed in protective custody, and his request was granted. After a week, however, he was returned to the general population, when he proved unwilling to provide further information. Within a day of being returned, he was killed.

Constandine testified that he met with three people to decide what action to take against Dickerson. Two of them were gang members: Jessie Barnes and Anibal Canales. The third was Speer, who was not a member of the gang, but was being considered for membership. Constandine ordered Speer and Canales to kill Dickerson. While Barnes acted as lookout, Speer and Canales went to Dickerson's cell on the pretext of smoking a cigarette. Speer choked Dickerson to death while Canales held his arms and feet.

Procedural history

On November 4, 1999, Speer was indicted for capital murder pursuant to Texas Penal Code §19.03 (6), killing while incarcerated. After a jury trial, he was convicted and on October 30, 2001, the jury answered the special issues in a manner such that the trial court sentenced him to death. The Texas Court of Criminal Appeals affirmed Speer's conviction and sentence in an unpublished opinion. *Speer v. State,* No.74253 slip op. (Tex. Crim. App. Oct. 8, 2003) (unpublished). Speer did not seek a writ of *certiorari* from the Supreme Court of the United States.

On June 18, 2003, Speer filed a petition for post-conviction relief with the Texas Court of Criminal Appeals. On April 30, 2004, the trial judge entered findings of fact and conclusions of law and recommended that Speer's petition be denied. In an unpublished opinion, the Texas Court of Criminal Appeals adopted the trial court's findings and conclusions and denied Speer's petition. *Ex Parte Speer*, No. 59,101-01 slip op. (Tex. Crim. App. June 30, 2004) (unpublished). On May 30, 2005, Speer filed an application for a writ of *habeas corpus* with this Court.

On June 6, 2008, the Court stayed these proceedings so that Speer could return to state court and exhaust a new claim. On March 3, 2010, the state court dismissed Speer's successive petition, and on March 27, 2010, Speer filed an amended application for a writ of *habeas corpus*, containing the new claim, with this Court.

Claims

Speer raised five claims in his amended petition for a writ of *habeas corpus*:

1. His counsel rendered ineffective assistance by failing to investigate or present evidence that would have mitigated against his receiving the death penalty.

2. The trial court denied him a fair and impartial jury by excusing a prospective juror on the basis of his personal views about the death penalty.

3. The prosecution's facial expressions during cross examination and his comments about the credibility of a defense witnesses denied Speer a fair trial.

4. The two-year delay between Speer's indictment and the beginning of his trial violated his right to a speedy trial.

5. The State deprived him of due process of law when it withheld material evidence and knowingly allowed false testimony to be presented.

Standard of review

Title 28 U.S.C. § 2254 (d) provides that relief in *habeas corpus* may not be granted with respect to any claim which was adjudicated on the merits in state court proceedings unless the adjudication of the claim resulted in a decision that was either (1) contrary to, or the result of an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States, or (2) based upon an unreasonable determination of the facts in light of the evidence presented in the State court proceedings. A state court determination which is objectively unreasonable meets the requirements of 28 U.S.C. § 2254 (d)(1). *Woodford v. Visciotti,* 537 U.S. 19, 27 (2002). Pure questions of law and mixed questions of law and fact are reviewed under 28 U.S.C. § 2254 (d)(1), while pure questions of fact are reviewed under 28 U.S.C. § 2254 (d)(2). *Moore v. Johnson*, 225 F.3d 495, 501 (5th Cir. 2000), *cert. denied*, 532 U.S. 949 (2001). Factual findings made by the state court are accepted unless rebutted by clear and convincing evidence. 28 U.S.C. §2254 (e)(1).

28 U.S.C. § 2254 (b) generally prohibits granting relief on claims not previously presented to the state courts. If a federal application contains any such claims, the federal court will attempt to allow the applicant to return to state court and present them to the state court in a

successive petition, either by dismissing the entire petition without prejudice, *see Rose v. Lundy*, 455 U.S. 509, 522 (1982), or by staying the federal proceedings, s*ee Rhines v. Weber*, 544 U.S. 269, 277 (2005).

If the federal court is convinced that the state court would refuse to consider the merits of such a successive petition, however, the federal court will treat the unexhausted claims as if the state court had already refused to hear them on procedural grounds. *See Finley v. Johnson*, 243 F.3d 215, 220 (5th Cir. 2001). The federal court generally does not review procedurally defaulted claims unless the applicant can establish either that he had good cause for failing to fairly present his claims, and he would be prejudiced by not being given an opportunity to do so in the federal court, or that the federal court's failing to address the claims would result in a fundamental miscarriage of justice. *See Coleman v. Thompson,* 501 U.S. 722, 750 (1991). If it is not entirely clear that the state court would refuse to hear a successive petition containing the new claims, however, the federal court will allow the state court the first opportunity to consider them. *See Wilder v. Cockrell,* 274 F.3d 255, 262-63 (5th Cir. 2001).

Analysis of claims

Claim 1: Speer's first claim is that his counsel rendered ineffective assistance by failing to investigate or present evidence that would have mitigated against his receiving the death penalty. This claim was adjudicated on the merits by the state court, *see* State Habeas Transcript ("SHTr") Vol. 1, pp. 107 and 111, so the question for this Court is whether the state court's denial of the claim was based upon an unreasonable determination of the facts in light of the evidence presented in the state court proceedings.

The Supreme Court has held that counsel has a duty to make reasonable investigation into

mitigating evidence. *See Wiggins v. Smith,* 539 U.S. 510 (2003). The state court found that Speer's counsel investigated his past criminal record, psychological evaluations, and his family history, by interviewing family members and friends. *See* Findings of Fact 5 - 9. Its findings were based upon identical affidavits submitted by Richard Dodson and W. David Carter, Speer's defense counsel.

The affidavits stated:

> During the course of my representation of him, I conducted an investigation into William Speer's background for purposes of developing potential evidence in mitigation of the death penalty. Those matters investigated included Mr. Speer's past criminal record, psychological evaluations and family history. I participated in interviews with a number of individuals who were either family members or acquaintances of Mr. Speer prior to trial. These interviews were conducted for purposes of developing, evaluating and potentially presenting evidence in mitigation of the death penalty. [Co-counsel] and I consulted about our investigation, information generated thereby and the nature of mitigating evidence ultimately presented to the court. We also advised Mr. Speer about the nature of [the] mitigating evidence which would be presented on his behalf.

See SHTr pp. 89-94. Speer contends that his trial counsel performed no investigation whatsoever:

> To be clear, we are dealing here with counsel's complete, rather than partial, failure to investigate whether there was potentially mitigating evidence that could be presented during the punishment phase of Mr. Speer's trial. . . [Trial counsel's] failure to investigate and offer any mitigating evidence relevant to Mr. Speer's background was professionally unreasonable and deficient performance in the context of this case. Mr. Speer's lawyers can offer no rational explanation for their behavior. With their client's life at stake, these attorneys quite simply failed to investigate or produce the only evidence that offered a realistic chance of saving Mr. Speer from execution.

See Amended Petition, p. 13. Implicit in Speer's contention that his counsel did no investigation is the argument that the state court's finding that counsel did perform considerable investigation was unreasonable. Because the state court's finding was based upon the affidavits of counsel, the burden on Speer is to show that these affidavits were clearly false.

Speer cites to no evidence which contradicts his counsel's affidavits. Mere allegations to the contrary are insufficient to establish that the state court's crediting of his attorney's affidavit testimony was unreasonable. Because the state court's denial of Speer's ineffective assistance claim was based upon factual determinations which were not unreasonable in light of the evidence presented in his state post-conviction proceedings, the Court should deny Speer's first claim.

Claim 2: Speer's second claim is that the trial court denied him a fair and impartial jury by excusing a prospective juror on the basis of his personal views about the death penalty. This claim was adjudicated on the merits by the state court, *see* SHTr. pp. 107-108 and 112, so the question for this Court is whether the state court's denial of the claim was contrary to, or the result of an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States, or based upon an unreasonable determination of the facts in light of the evidence presented in the state court proceedings.

A trial judge cannot excuse a prospective juror for cause simply because he or she voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. *Witherspoon v. Illinois*, 391 U.S. 510, 522 (1968). The decisive question is "whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *See Wainwright v. Witt*, 469 U.S. 412, 424 (1985). In the present case, it is undisputed that Viramontes, the prospective juror at issue, had scruples against the infliction of the death penalty. The issue for the court is whether the trial judge's determination - that Viramontes' scruples against the death penalty would have prevented or substantially impaired the performance of his duties as a juror in accordance with

his instructions and his oath - was unreasonable in light of the answers he gave during his *voir dire*.

Viramontes initially stated that it was "pretty hard for me to believe in the death penalty," then stated that he did not think he would hesitate to impose it in the case of someone murdering a child, but he thought that was the only situation in which he would impose the death penalty. Viramontes indicated that he was aware that this case involved a prisoner killing another prisoner, and stated that he could not be responsible for imposing a death sentence in this case. After the prosecution explained the special punishment issues, Viramontes was asked whether he could answer those issues truthfully, based upon the evidence, and he replied, "Well, I believe I can." He was then asked two clarifying questions:

> Q: Would you be willing, and could you answer these questions, based on the evidence, regardless of the outcome, life or death, would you answer these questions truthfully, based on the evidence?
>
> A: Oh, I could answer these questions, sure.
>
> Q: Okay, but could you answer them in such a way that you possibly – possibly, that you know that he would have to get the death penalty?
>
> A: No.

Viramontes then answered the remaining questions from both the prosecution and defense counsel in a manner consistent with these responses. *See* Reporter's Record ("RR") Vol. 8, pp. 30-50.

In light of Viramontes' consistent answers that he would not be able to vote to impose the death penalty in any case that did not involve a child killing, the state court's determination -

that the trial court did not err in excusing Viramontes for cause, because his personal objections to the death penalty would have prevented or substantially impaired his ability to discharge his duties as a juror in accordance with the instructions and his oath - was not unreasonable. The Court should deny Speer's second claim.

Claim 3: Speer's third claim is that the prosecution's facial expressions during cross-examination and his comments about the credibility of a defense witnesses denied Speer a fair trial. This claim was adjudicated on the merits by the state court, *see* SHTr. pp. 112-113, so the question for this Court is whether the state court's denial of the claim was contrary to, or the result of an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States, or based upon an unreasonable determination of the facts in light of the evidence presented in the state court proceedings.

Speer points out that the prosecution called testifying witnesses liars on two occasions. The first occasion was during cross-examination of a defense witness named Terry Abbott. Abbott testified that around the time of the murder, he looked towards Dickerson's cell and saw Dickerson, his cell mate Tim Rice, and two other inmates, Richard Driver and Sam Brown, but he did not see either Speer or Canales. On cross-examination, the prosecution got Abbott to admit that after looking towards Dickerson's cell, he left the area for between five to fifteen minutes to return to his cell and make a cup of coffee, and that during that time, Speer and Canales could have entered Dickerson's cell and killed him. Also during cross-examination, the prosecutor got Abbott to admit that Speer was a friend of his, and to admit that he was a practicing pagan.

The alleged misconduct occurred when the prosecutor questioned Abbott about two

letters which had already been admitted into evidence, and which the prosecution contended had been written by Speer. In one, the writer admits to killing a snitch, despite the fact that the snitch might not have actually snitched about 240 packs of cigarettes, as the police said. This letter was unsigned. Another letter was signed "Stay Puff," and referred to "taking action," and mentioned several people's nicknames, but did not specifically discuss the crime at issue. The handwriting in the two notes was quite similar, and Speer's thumb print was found on one of the letters. The prosecution did not offer any expert handwriting analysis testimony, and it attempted to use Abbott's testimony to further connect the two letters to Speer. Abbott admitted that Speer's nickname was "Stay Puff." He also admitted that he often passed "kites" (letters or notes) between inmates. When questioned about the exhibits, however, he said that he did not recognize the letters, did not recognize Speer's handwriting, and did not recognize Speer's signature. The prosecutor, apparently unsatisfied by Abbott's response, proceeded to ask a series of questions about the two letters:

> Q. I'm going to ask you, Mr. Abbott, in your understanding of prison language, of living in prison, what you think this means. I'm not asking what the writer meant. I'm asking what you think this means. Okay?
>
> A. Yes, sir.
>
> Q. And we're going to see if we think you're telling the truth here.
>
> * * * * *
>
> Q. (Reading letter) "my own family, Bro, God damn, it hurts really bad, and what tops it off even more, we, being me, Ham, J.B. and B.F., did not tell him or

anyone else we were going to do it. We did not talk, we acted." Who do you think (he's) talking about here? Does that mean anything to you?"

DEFENSE COUNSEL: I'm sorry. I object to the question that asks him what it means, judge.

Q. I'm not asking him what it means, judge.

THE COURT: Just let him finish.

Q. I'm sorry.

DEFENSE COUNSEL: I'm objecting to him making this witness to speculate what that means without some foundation of some term as an inmate he recognizes.

Q. I'm not even asking for the truth of the matter. I think this man is lying, and I want to see if he is going to tell the truth.

DEFENSE COUNSEL: And I'm objecting to the side bar.

THE COURT: Sustain that. Just answer the question, sir, if you understand it. What does that mean to you? I'll let you answer that, and then we're finished with this.

Q. Does this mean anything to you?

A. Repeat that last part, would you please?

THE COURT: Just show it to him.

Q. "What really tops it off even more was we, being me, Ham, J.B. and B.F., did not tell him or anyone else we were going to do it."

A. (It) means they were going to do something they weren't supposed to do, yeah.

Q. Who is "they?"

> A. Whoever is in that kite right there.
>
> Q. That doesn't mean anything to you about who that might be?
>
> THE COURT: Okay, that's enough. That's enough, Mr. Mullin. Sustain beyond that.

RR Vol. 11, pp. 32-34.

Attorneys are prohibited from offering personal opinions about the credibility of witnesses, although they may characterize a witness as not credible if such characterization is supported by discrepancies between the witness' testimony and known facts. *Compare United States v. Moore*, 710 F.2d 157, 159 (4th Cir.), *cert. denied,* 464 U.S. 862 (1983) (improper for a prosecutor to directly express his opinion as to the veracity of a witness) *with United States v. Tullos*, 868 F.2d 689, 696 (5th Cir.), *cert. denied sub nom Blanton v. United States,* 490 U.S. 1112 (1989) (prosecutor's characterizing defendant as a liar when defendant's testimony is at odds with evidence was not improper).

In the present case, the prosecutor's statement, "I think this man is lying and I want to see if he is going to tell the truth," is the type of statement which is specifically prohibited. Further, during the cross-examination, the prosecutor compounded his error by making facial expressions and shaking his head during the witness's testimony. The record shows that the Court sustained the objection to the prosecutor's statement that he thought Abbott was lying, and also that the Court instructed the prosecutor not to make faces or shake his head. *See* RR Vol. 11, pp. 34, 36.

The question for the Court is whether the prosecutor's misconduct was so prejudicial that it rendered the trial fundamentally unfair. *See Darden v. Wainwright,* 477 U.S. 168, 180 (1986). Although tying the two letters to each other and to Speer was important, whether Abbott was

telling the truth about not having seen the letters, or about whether he was familiar with Speer's handwriting or signature, was not crucial to either the prosecution's case, or to Speer's defense. However improper the prosecutor's actions may have been in this instance, his actions did not render the trial fundamentally unfair.

The second occasion was during closing arguments in the punishment determination phase of the trial. The prosecution called Randy Burroughs, a regional director of the Texas Mafia, to authenticate and explain an October 2000 letter that he had written to Joe Henry, another Texas Mafia gang member. In that letter, Burroughs states that he had not heard from J.R. [Steiner], the president of the gang, and needed Henry to pass along the information contained in the letter to Steiner, then back to him [Burroughs] with instructions as to what to do. Because Burroughs was due to be released on January 1, 2001, he said that it was important for Henry to hurry.

> One of the items concerned the crime at issue. Burroughs' letter stated:
>
> > [Canales] just got shipped here from [the Beto unit]. Doyal Wayne [Hill] did a videotape against [Canales] and William Speer. I didn't believe it, but Will showed me the transcript to the video! I read it all. They just shipped Doyal Wayne to a P.C. program on Eastham, he gets out in December. I have his home address and all. I will be going home in January. After 23 years I am ready!

Later in the letter, Burroughs said:

> > Mike Bennett is on level 3, Craig . . . is on level 2. Greyhound is on level one. William is here with me. [Canales] is on D-pod level 1. Bruce Richards' bitch ass is here with me. Her daddy Charlie Ray just got shipped to Eastham with Doyal Wayne. He is Christian now. . . . P.S. Remember I go home in January and need to hear from [Steiner] before then.

At the punishment phase of the trial, the State had the burden of proving beyond a reasonable doubt that there is a probability that Speer would commit acts of criminal violence

which would constitute a continuing threat to society. The prosecution contended that Speer passed along the transcript of Hill's testimony in his trial to Burroughs, knowing that the Texas Mafia would retaliate against Hill for testifying against him (Speer) and Canales. When the prosecution questioned Burroughs, however, he testified that the "Will" who showed him the transcript of Hill's testimony was not William Speer, but was an inmate named Herman Speer, and he (Burroughs) had used the name "Will" to confuse authorities, in case the letter was intercepted. Burroughs also testified that he was not seeking permission to retaliate against Hill, who was his best friend.

During closing arguments, the prosecutor said:

> [Burroughs] needs to hear from J.R. Steiner, the president of the Texas Mafia about what to do about Doyal Wayne Hill. He is not asking for permission to go have ice cream with him, he's asking permission from J.R. Steiner, do you want me to kill him for testifying. And where did the transcript come from, folks? "I didn't believe it, but Will showed me the transcript to the video." And on the stand, in trying to cover for William Speer, [Burroughs] said "Oh, there is no Will." [Burroughs] had just said ". . . against [Canales] and William Speer, I didn't believe it, but Will showed it to me." Folks, [Burroughs] lied to you about "There is no Will, that's a code name." He sat on that stand, and twice today – I hope you can recollect this – twice on that stand, after saying "There is no Will, that's a code name," he sat there and called this man Will.

RR Vol. 12, p. 54.

As opposed to his remark about witness Abbott, which was phrased "I think this man is lying," and was not based upon any evidence, the prosecutor's statement that witness Burroughs lied to the jury was a fair inference, based upon the discrepancy between Burroughs's calling Speer "Will" during his testimony and his contending that the "Will" in his letter did not refer to Speer. In this circumstance, the prosecutor's statement that the witness lied in his testimony is not misconduct. *See United States v. Tullos*, 868 F.2d at 696.

Because the first time the prosecutor said a witness was lying was not so prejudicial that it denied Speer a fundamentally fair trial, and because the second time the prosecutor said a witness was lying the statement was not improper, the state court's rejection of this claim was not the result of unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States in *Darden v. Wainwright*. The Court should deny Speer's third claim.

Claim 4: Speer's fourth claim is that he was denied a speedy trial. This claim was adjudicated on the merits by the state court, so the question for this Court is whether the state court's denial of the claim was contrary to, or the result of an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States, or based upon an unreasonable determination of the facts in light of the evidence presented in the state court proceedings.

The right to a speedy trial is guaranteed by the Sixth Amendment to the Constitution. Rather than set a particular time limit, however, the Supreme Court set forth a four part test for determining whether an accused's right to a speedy trial has been abridged. Those elements are:

1. The length of the delay
2. The reason for the delay
3. Whether (and when) the accused asserted his right to a speedy trial, and
4. The prejudice (if any) resulting from the delay.

See Barker v. Wingo, 407 U.S. 514, 530 (1972).

Regarding the first element, the "delay" is defined as the time between the date the defendant is arrested and/or formally charged and the date the trial begins. *United States v. Marion*, 404 U.S. 307, 320 (1971). It is not necessary to consider the effect of any of the other three factors unless the delay is presumptively prejudicial. *Barker v. Wingo*, 407 U.S. at 530-32.

In the present case, Speer was charged with capital murder on November 4, 1999, and his trial began on October 16, 2001, a total of 611 days. The state court concluded that the delay in this case was presumptively prejudicial, *see* SHTr. p.113, Conclusion of Law No. 18, and neither party to this proceeding disputes that finding. Accordingly, the Court must consider the effect of the three remaining elements of the *Barker v. Wingo* test.

Regarding the second element, the state court made no finding as to the reason for the delay in bringing Speer to trial, although it did specifically find that there was no deliberate attempt by the state to delay the trial. *See* SHTr. p.113, Conclusion of Law No. 20. Again, neither party takes issue with this conclusion. Deliberate attempts to delay the trial are weighed heavily in favor of the accused while neutral reasons such as crowded dockets or clerical errors are weighed less heavily. *Id*. Because the court did not make any finding other than a lack of deliberateness on the state's part, the second part of the *Barker v. Wingo* test also weighs in Speer's favor, although not heavily.

Regarding the third element, the state court concluded that Speer failed to request a trial date prior to filing a motion to dismiss for failure to provide a speedy trial. *See* SHTr. p.113, Conclusion of Law No. 19, and that he filed a motion to dismiss the indictment with prejudice on the grounds that his right to a speedy trial had been violated on August 20, 2001, the court held a hearing on the motion on August 23, 2001, and at that hearing the court set his case for trial to begin on October 16, 2001. *See* SHTr. p. 110-11, Findings of Fact Nos. 37-39. Speer takes some issue with the state court's conclusion, contending that because he was placed in Administrative segregation after the killing, and because his original appointed counsel withdrew and new counsel was not appointed until March 31, 2000, his ability to request a speedy trial was

impeded by the state. Although Speer seems to imply that he would have requested a speedy trial had he had access to counsel earlier, this implication is belied by the fact that he did not mention his right to a speedy trial for over sixteen months after his second counsel was appointed.

Even if the Court construes Speer's motion to dismiss as an assertion of his right to a speedy trial, it does not help his argument, because the trial court convened a hearing on this motion a mere three days after it was filed, and set a trial date for less than two months later. In other words, once Speer asserted his right to a speedy trial, the court quickly accommodated him. The third element of the *Barker v. Wingo* test weighs against Speer.

Regarding the fourth and final part, the state court concluded that Speer was not prejudiced by the delay in bringing his case to trial. *See* SHTr. p.114, Conclusion of Law No. 21. Prejudice is determined in light of the three interests protected by the speedy trial guarantee:

1. Preventing oppressive pre-trial incarceration
2. Minimizing the anxiety and concern of the accused, and
3. Limiting the possibility that the defense will be impaired.

Barker v. Wingo, 407 U.S. at 532. Speer takes exception to the state courts' conclusion that he was not prejudiced, contending that in his case the 611 day delay in his case infringed upon all three interests. Regarding whether the delay resulted in oppressive pre-trial incarceration, Speer concedes that he was incarcerated for reasons unrelated to the offense at issue in this case. He contends, however, that he was placed in Administrative Segregation for the entire time from the date of the incident until his trial. Speer provides no evidence that Administrative Segregation is significantly more oppressive than incarceration among the general population, so the delay in this case did not result in oppressive pre-trial incarceration.

Regarding whether the delay increased Speer's anxiety and concern, while the Court agrees with Speer's contention that "there is no doubt that he experienced a certain amount of anxiety while he waited for trial," it is not clear that proceeding to trial sooner would have significantly lessened his anxiety and concern. Whatever anxiety and concern Speer experienced before his trial would seem likely less than the anxiety and concern he experienced once sentenced to death. The trial court's rapid response to Speer's motion to dismiss the indictment suggests that he could have proceeded to trial sooner had he so desired. The delay in this case did not result in additional anxiety and concern for Speer.

Regarding whether the delay impaired Speer's ability to defend against the charges, he contends that one of the letters used as evidence against him was allegedly provided to prison authorities by an inmate named Ellis, who, by the time of Speer's trial, was out of prison and could not be located. The letter in question, State's exhibit 34, was admitted based upon testimony by inmate Michael Constandine, who stated that he recognized Speer's signature on the document, and testimony by Charles Parker, a latent print examiner for the Austin Police Department. *See* RR Vol. 10, pp. 16-17. Speer does not establish how locating Ellis, or calling him as a witness, could have helped his defense, so the Court finds that Speer's ability to defend against the capital murder charges in his case was not impaired by the delay in bringing him to trial. Because Speer can establish none of the three prongs of the fourth element of the *Barker v. Wingo* test, this element weighs against Speer.

The first two parts of the *Barker v. Wingo* test weigh in favor of finding a speedy trial violation, and the second two parts weight against finding a violation. In light of these findings, the state court's rejection of Speer's speedy trial claim was neither contrary to, nor the result of

an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States in *Barker v. Wingo*. This Court should deny Speer's fourth claim.

Claim 5: Speer's fifth and final claim is that the prosecution deprived him of Due Process of Law when it withheld material evidence and knowingly allowed false testimony to be presented. This claim was first raised in the State court in a successive petition. The Texas Court of Criminal Appeals dismissed the petition as an abuse of the writ because Speer's allegations failed to satisfy the requirements of TEX.CRIM.PROC. Art. 11.071 §5 (a). This section has three parts: Subsection (a)(1) provides that the merits of the claim may not be considered and relief on the claim may not be granted unless the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application. Subsection (a)(2) provides that the merits of the claim may not be considered and relief may not be granted unless the application contains sufficient specific facts establishing that by a preponderance of the evidence, but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt. Subsection (a)(3) provides that the merits of the claim may not be considered and relief may not be granted unless the application contains sufficient specific facts establishing that by a preponderance of the evidence, but for a violation of the United States Constitution, no rational juror could have answered in the state's favor one or more of the special issues that were submitted to the jury in the applicant's jury trial under Article 37.071 or 37.0711.

When the Texas Court of Criminal Appeals dismisses a subsequent petition for

post-conviction relief and gives no reason beyond citing to Art.11.071 §5 (a), it is unclear whether the State court decided the claims on procedural grounds or on the merits. *See Balentine v. Thaler*, 626 F.3d 842, 851-57 (5th Cir. 2010), *cert. denied*, ___ U.S. ___, 131 S.Ct. 2992 (2011). In this circumstance the Court must determine whether the state court's decision fairly appears to rest primarily on federal law, or appears to be interwoven with the federal law, and the adequacy and independence of any possible state law ground is not clear from the face of the opinion. If these elements are met, it will treat the state's decision as being on the merits. Otherwise, it will treat the claim as having been procedurally defaulted.

The analysis begins with reviewing the subsequent petition to determine upon what subsection of Art. 11.071 §5 (a) the petitioner relied in arguing that his claims should be considered on the merits. *See Balentine*, 626 F.3d at 854. Speer contended in his state petition that the factual basis of this claim was not available to him at the time he filed his application for state post conviction relief, because the state did not disclose, until after Speer's federal *habeas corpus* proceedings had been initiated, that it offered incentives to inmate witnesses in exchange for their testimony. Because the basis of the state court's dismissal was subsection 5 (a)(1), the claim is procedurally defaulted. Speer contends, however, that he can establish cause for failing to present his claims to the state court in either his direct appeal or in his state post-conviction proceedings. As he points out, his claim is based upon *Brady v. Maryland*, 373 U.S. 83 (1963), and the Supreme Court of the United States has held that the elements of a *Brady* claim are indistinguishable from the elements of the "cause and prejudice" exception to the procedural default bar:

> We set out in *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999), the three components or essential elements of a Brady prosecutorial misconduct claim: "The evidence at issue must be favorable to the accused, either because it is

> exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." 527 U.S. at 281-82. "[Cause and prejudice" in this case "parallel two of the three components of the alleged *Brady* violation itself." Id., at 282. Corresponding to the second *Brady* component (evidence suppressed by the State), a petitioner shows "cause" when the reason for his failure to develop facts in state-court proceedings was the state's suppression of the relevant evidence; coincident with the third *Brady* component (prejudice), prejudice within the compass of the "cause and prejudice" requirement exists when the suppressed evidence is "material" for *Brady* purposes. 527 U.S. at 282.

Banks v. Dretke, 540 U.S. 668, 691 (2004). The Court must conduct a *de novo* review of the prejudice component of Canales's claim.

"Prejudice" sufficient to overcome a procedural default has the same test as "materiality" under *Brady* - whether there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *United States v. Bagley*, 473 U.S. 667, 684 (1985).

After the authorities determined that Dickerson had been murdered, they questioned the inmates but received no information. An inmate named Bruce Innes, who knew about the reason for the killing, asked Canales and Speer to write him letters telling him what happened, and he received letters back from both of them. Innes was already serving a long sentence, and was at that point facing a serious charge of possessing a weapon and assaulting an officer. He decided to use the letters to get a plea bargain on the charges and get declassified as a gang member, which would have improved the conditions of his confinement.

Innes turned Canales's and Speer's letters over to his attorney, who negotiated a deal. Investigators for the Special Prosecutions Unit ("SPU") asked Innes to keep in written contact with Texas Mafia gang members, so that they could learn of other criminal activity. Innes went along with this request, both to help with his declassification, and in order to keep the gang

members from knowing that he had turned state's evidence.

Speer contends that at the time Innes solicited written statements from Canales and Speer, Innes was acting as an undercover agent of the State. The evidence, however, is that Innes did not agree to work with the State until after he had turned over the statements to his attorney and they negotiated a plea bargain on his pending charges. *See* Deposition of Bruce Innes, pp. 131-138.

Speer next contends that the prosecution suppressed evidence that Innes's renunciation of his gang affiliation was untrue and he was simply seeking the benefits conferred by not being labeled a gang member. This is one possible inference from the fact that Innes stayed involved with gang activities between the time he disclosed his desire to the authorities to be reclassified and the time he testified against Canales and Speer. The other possible inference is that, as the evidence shows, Innes was asked by the SPU to continue collecting information about the gang during this time period and did not want to tip off the gang about his pending betrayal in order to remain an effective informant. Of these two possible explanations, Speer's is so much less likely that its value as further impeachment of Innes would have been negligible.

Speer next contends that Innes received favorable treatment beyond the plea bargain on the two pending charges, specifically, the SPU decided not to prosecute him for a second weapons charge. This allegation is true, but because the benefit was simply an additional example of benefits Innes admitted receiving, there is not a reasonable probability that it would have significantly further impeached his credibility. Similarly, while Innes received some general assistance from the Special Prosecutions Unit regarding the conditions of his confinement and parole, and the assistance he received was related to his cooperation, which

included soliciting incriminating statements from Texas Mafia gang members, the assistance was much less significant than the benefits of the plea agreement, so that its disclosure would not have significantly further impeached Innes's credibility.

Speer next contends that Innes was allowed to speak to other state witnesses and corroborate their stories. The evidence he offers in support of this allegation is that an inmate named Larry Whited wrote in a letter to the SPU investigator that while he and Innes were riding in a bus to a hospital "we got to talk the whole way down there (and no, we didn't coach one another on our stories. Smile)" *See* Successive Application for Writ of Habeas Corpus, Ex. 24.[1] Whited's use of the word "smile" in this context suggests that although he was instructed not to discuss the case with Innes, he did not take the admonition seriously. The problem with this allegation is that since Whited did not testify in Speer's trial, Speer was not harmed by any unauthorized conversations between Innes and Whited.

Speer next points out that inmate Steven Canida testified that he had obtained no benefits in exchange for his testimony, but just weeks after he testified against Speer, the SPU wrote a letter to the Board of Pardons and Paroles on his behalf. Speer concedes that his allegations are made "upon information and belief" and that "the extent of Canida's involvement and cooperation with authorities has not yet been fully revealed." This is insufficient support for the Court to accept his allegation that Canida made an agreement with the state before he testified.

Speer next contends that inmate Whited received benefits from the state in exchange for "developing and investigating the case against Mr. Speer." Because Whited did not testify at trial, however, and evidence of any benefits he received would not have impeached the

[1] The copy of Exhibit 24 attached to Speer's successive state petition, and the electronic copy filed with this Court are both missing the first page, where the passage at issue is located. The page can be found in the electronic copy of the letter submitted as exhibit 27 to

credibility of the witnesses who did testify. Speer also points out that Richard Driver was accused of being involved with the gang's discussions about whether to kill Dickerson, but he cooperated with authorities and was not charged. Speer does not contend that evidence of this agreement was suppressed, but he does contend that the prosecution failed to reveal that the inspector for the SPU pledged to see what they could do with respect to Driver's classification and housing. Because Driver did not testify at Speer's trial, this pledge would not have been admissible.

Because Speer fails to establish that there is a reasonable probability that, had the evidence he claims was withheld been disclosed to the defense prior to trial, the result in either the guilt-determination phase or the punishment-determination phase of his capital murder trial would have been different, he cannot establish either the "materiality" element of his substantive *Brady* claim, or the "prejudice" element of the "cause and prejudice" exception to the procedural default of his *Brady* claim. Therefore, this Court should deny his fifth and final claim.

Conclusion

Because it does not appear that Speer is entitled to relief on any of his five claims, this Court should deny his application for a writ of *habeas corpus*.

Within fourteen (14) days after receipt of the Magistrate Judge's Report and Recommendation, any party may serve and file written objections to the findings and recommendations within.

A party's failure to file written objections to the proposed findings, conclusions and recommendations contained in this Report and Recommendation within fourteen days after

---

the Amended Petition for a Writ of Habeas Corpus filed on July 14, 2011 in *Canales v. Thaler*, No.2:03cv069 (EDTX).

being served with a copy thereof shall bar that party from *de novo* review by the District Judge of those findings, conclusions and recommendations and, except on grounds of plain error, from appellate review of unobjected to factual findings and legal conclusions accepted and adopted by the District Court. *Douglass v. United States Auto Ass'n*, 79 F.3d 1415, 1430 (5th Cir. 1996) (*en banc*).

SIGNED this 28th day of November, 2012.

ROY S. PAYNE
UNITED STATES MAGISTRATE JUDGE

Appendix K

SHARON KELLER
PRESIDING JUDGE

LAWRENCE E. MEYERS
TOM PRICE
PAUL WOMACK
CHERYL JOHNSON
MIKE KEASLER
BARBARA P. HERVEY
CHARLES R. HOLCOMB
CATHY COCHRAN
JUDGES

COURT OF CRIMINAL APPEALS

P.O. BOX 12308, CAPITOL STATION
AUSTIN, TEXAS 78711

6/30/2004

TROY C. BENNETT, JR.
CLERK
512 463-1551

EDWARD J. MARTY
GENERAL COUNSEL
512-463-1597

Presiding Judge
5th Judicial District
Bi-State Justice Bldg.
Texarkana TX 75501

No.: WR-59,101-01
Trial Court No.: 99F0506-005-A
Styled: SPEER, WILLIAM v. The State of Texas

Dear Judge:

Enclosed herein is an order entered by this Court regarding the above-referenced applicant.

If you should have any questions concerning this mater, please do not hesitate to contact me.

Sincerely,

Edward Marty
General Counsel

EJM/bh
cc: Bowie County District Clerk
P O Box 248
New Boston, TX 75570-0248

Bruce Thayler
Records & Classifications
P. O. Box 99
Huntsville, TX 77340

Craig L Henry
ATTORNEY AT LAW
P O Box 3226
723 MAIN ST
Texarkana, TX 75504-3226

District Attorney Bowie County
P.O. Box 3030
Texarkana, TX 75504

Gena Bunn
Assistant Attorney General
Enforcement Division
PRICE DANIEL, SR. BUILDING 7TH FLOOR
Austin, TX 78701

WILLIAM SPEER
C/O CRAIG L. HENRY
P. O. BOX 3226
Texarkana, TX 75504

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. 59,101-01

EX PARTE WILLIAM SPEER

ON APPLICATION FOR WRIT OF HABEAS CORPUS FROM BOWIE COUNTY

Per Curiam.

ORDER

This is an application for writ of habeas corpus filed pursuant to the provisions of Article 11.071, TEX. CODE CRIM. PROC.

On October 30, 2001, Applicant was convicted of the offense of capital murder. The jury answered the special issues submitted pursuant to Article 37.071, TEX. CODE CRIM. PROC., and the trial court, accordingly, set punishment at death. This Court affirmed Applicant's conviction and sentence on direct appeal. *Speer v. State*, No. 74,253 (Tex. Crim. App. October 8, 2003).

In his application, Applicant presents four allegations in which he challenges the validity of his conviction and resulting sentence. The trial court did not hold an evidentiary hearing. The trial court entered findings of fact and conclusions of law and recommended that the relief sought be denied.

This Court has reviewed the record with respect to the allegations made by Applicant. We adopt the trial judge's findings and conclusions. Based upon the trial court's findings and conclusions and our own review, we deny relief.

IT IS SO ORDERED THIS THE 30TH DAY OF JUNE, 2004.

Do Not Publish

Appendix L

FILED FOR RECORD
04 NOV -3 PM 4:47
DIST. CO TX
Dean Middlebrook

COURT OF CRIMINAL APPEALS
STATE OF TEXAS

NO. 74,253

5TH DISTRICT COURT OF BOWIE COUNTY
STATE OF TEXAS

NO. 99F0506-005-A

EX PARTE WILLIAM SPEER

Applicant,

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On October 31, 2003, the Court, having reviewed the Application for Writ of Habeas Corpus filed by William Speer and the State's Response thereto, determined that no unresolved factual issues material to the legality of the applicant's confinement exist. Pursuant to §8(a) of Art. 11.071, Code of Criminal Procedure, the Court entered its written order making that determination and directing the parties to file proposed findings of fact and conclusions of law for the Court to consider. The State filed its Proposed Findings of Fact and Conclusions of Law on December 2, 2003. The Defendant filed no proposed findings or conclusions.

The Court, having considered the State's Proposed Findings of Fact and Conclusions of Law, the transcript of trial, the clerk's file and the Petitioner's Application and the State's Response, makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. The applicant, Williams Speer, was indicted and convicted of the felony offense of capital murder on Cause Number 99F0506-005 in the 5th District Court of Bowie County, Texas. [CR, VI, Pp. 21-22]

2. The Applicant was represented during trial by counsel David Carter and counsel Richard Dodson. [CR, VI, Pp. 21-22]

3. On October 31, 2001, after the jury affirmatively answered the first and second special issues, the trial court assessed punishment at death by lethal injection. [CR, VI Pp. 154-163]

4. The Court of Criminal Appeals affirmed the appellant's conviction in an unpublished opinion. Speers v. State, No. 74,253 (Tex. Crim. App. 2003).

First Ground for Relief

Counsel failed to investigate or present evidence which would have mitigated against the imposition of the death penalty.

5. Applicant's trial counsel investigated Mr. Speer's past criminal record, psychological evaluations, and family history to develop mitigating evidence during the punishment phase of the trial. [Affidavit of David Carter and Richard Dodson]

6. Applicant's trial counsel interviewed prospective witnesses for purposes of mitigation during the punishment phase of the trial to included family members and friends. [Affidavit of David Carter and Richard Dodson]

7. Applicant's trial counsel advised and consulted with applicant regarding the punishment phase of the trial and the mitigation evidence available for this purposes prior to and during trial of this cause. [Affidavit of David Carter and Richard Dodson]

8. This Court finds that applicant's trial counsel conducted interviews and investigated facts relating to mitigation issues during the punishment phase of the trial.

9. This Court finds that applicant's trial counsel presented mitigating evidence during the trial of this cause.

Second ground for relief

Prospective Juror Louis Viramontes was erroneously removed for cause thus violating Petitioner's rights under the Sixth Amendment to the United States Constitution.

10. At the beginning of the individual voir dire of Juror Louis Viramontes, Viramontes stated that it was difficult for him to believe in the death penalty based on his religious beliefs. [RR, V8, Pp. 30]

11. When filling out his written jury questionnaire, Juror Louis Viramontes answered "I believe the death penalty is appropriate in some murder cases, but I could never return a verdict which assessed the death penalty. [RR, V8, Pp. 32]

12. During voir dire, Juror Louis Viramontes at one point advised Applicant's counsel that he could in fact answer the special issues. [RR, V8, P41]

13. At the conclusion of the individual voir dire of Louis Viramontes and after his answer noted in 9 above, Viramontes responded to a question from counsel as to whether he could answer the special issue questions knowing he would have to give the death penalty that he could not do that. [RR, V8, P.41]

14. The Court finds, based on the entire voir dire of Juror Louis Viramontes, that the answers given by Viramontes were vacillating between the ability to answer the special issues based on the evidence and the inability to answer the special issues if it would result in the death penalty. [RR, V8, PP. 30-49]

Third ground for relief

A. Prosecutor misconduct deprived Petitioner of his right to Due Process by impermissibly vouching for various witnesses' credibility.

15. During the prosecutor's cross-examination of a witness, applicant's trial counsel objected to a question asked by the prosecutor – "Who do you think we're talking about here? Does that mean anything to you?" [RR, V11, P. 33]

16. Following the applicant's trial counsel's objection to this question an exchange occurred between the court, prosecutor, and applicant's counsel and in response to applicant's trial counsel's statement – "I'm objecting to him asking this witness to speculate what that means without some foundation of some term as an inmate, he recognizes" to which the prosecutor replied – "I'm not even asking for the truth of the matter. I think the man is lying and I want to see if he is going to tell the truth." [RR, V11, P33]

17. Following the prosecutor's statement noted in 13 above, the applicant's attorney then objected to the prosecutor's remark as a side bar remark. [RR, V11, P.34]

18. After this exchange, the trial judge sustained the objection as to the side bar remark. [RR, V11, P. 34]

19. The Court finds that the remark made was made in response to argument invited by the applicant in response to the first question made by applicant's counsel.

B. Prosecutor's Opinion as to Witness' Veracity through facial expressions.

20. Applicant's counsel lodged an objection that during the examination of the applicant's witness Abbot, the prosecutor "made a face and was shaking his head" after asking questions of the witness. [RR, V11, P36]

21. The objection was sustained and the prosecutor was ordered no to shake his head or make a face. [RR, V11, P36]

22. the objection to shaking the head and making a face was made at the conclusion of the testimony of Mr. Abbott.

23. The Court finds that the objection was made and the requested instruction was given and that the applicant's counsel made no further record or indicated problems with his conduct from the prosecutor during the remainder of the applicant's presentation of evidence during the guilt/innocence phase or during any of the remainder of the trial.

C. Prosecutor's Reference to a Defense Witness as a Liar in Closing Argument

24. During closing arguments of the guilt/innocence phase of trial the prosecutor made the following statement – "And you heard from Richie Rich, the biggest liar of all that you heard from, and he had no good excuse why this was written to Ellis, when the order was to write it to Innes. Why? Because it was a lie. There was no order. He killed him. He took credit for it." [RR V12, P19]

25. Prior to the prosecutor's comments referring to this witness, applicant's counsel made the following comments as to the State's witnesses –

    What do we learn from the evidence about inmates? They are not to be trusted. [RR, V 12, P 19]

    Investigator Dodson told you, they lie to me everyday. . . They lie. Every inmate that I asked on the stand said, yes, they're liars. {RR, V12, P20]

    They Lied to you on the witness stand, Ladies and Gentlemen. All five of them did, and I'll take them one at a time. [RR, V12, P20]

26. In addition to the comments noted in 22 above, the applicant's closing argument continued to direct attention to the fact the witnesses called by the state were liars.

27. The Court finds that the comments made by the prosecutor came after those comments made by applicant's attorney during closing argument.

Fourth Ground for Relief

Petitioner's Constitutional right to a speedy trial was violated.

28. Gary Dickenson, the victim in this case, was killed on July 11, 1997. [CR, VI, P2]

29. William Speer was indicted on November 4, 1999. [CR, V1, P2]

30. On December 1, 1999, the Court requested legal representation for William Speer pursuant to Article 26.051(d) of the Texas Code of Criminal Procedure. [CR, V1, P15]

31. On January 31, 2000, Carol Helms with State Counsel for Offenders, who was appointed as a result of the request pursuant to Article 26.051(d) filed a Motion to Withdraw from representation of William Speer. [CR, V1, PP. 16-17]

32. On February 4, 2000, Carol Helms' Motion to Withdraw was granted. [CR, V1, P19]

33. On February 7, 2000, applicant was served a copy of the indictment in this cause. [CR, V1, P20]

34. On March 31, 2000, Richard Dodson and David Carter were appointed to represent applicant. [CR, V1, PP. 21-24]

35. On April 20, 2000, a pretrial hearing in this cause combined with co-defendants established that the co-defendant Anibal Canales would be tried before applicant. [CR, V1, PP.10-14; 25-35; 43-50; 66-84; 86-88; 172-199]

36. Between March 31, 2000 and August 20, 2001, counsel for applicant engaged in discovery and pretrial matters on behalf of the applicant. [CR, V1, PP. 10-14; 25-35; 43-50; 66-84; 86-88; 172-199]

37. On August 20, 2001, a Motion to Dismiss for Lack of Speedy Trial was filed by applicant's counsel. [CR, V1, PP.86-87]

38. A hearing on the Motion to Dismiss for Lack of Speedy Trial was heard on August 23, 2001. [CR, V1, PP. 84]

39. The Court denied the applicant's Motion to Dismiss for Lack of Speedy Trial and set the case for trial October 16, 2001.

40. The Court finds that from the date of indictment to the date of trial a total of 611 days passed.

41. The Court finds that from the date counsel was finally appointed and trial on the merits began, a total of 564 days had passed.

42. The Court finds that no request for speedy trial was ever filed.

43. The Court finds that between the time the Motion to Dismiss for Lack of Speedy Trial was filed and the hearing on the motion was 3 days.

44. The Court finds that the trial was set on October 16, 2001.

45. The Court finds that at the time of the trial the applicant was serving a life sentence in the Texas Department of Criminal Justice for murder.

CONCLUSIONS OF LAW

First Ground for Relief

Counsel failed to investigate or present evidence which would have mitigated against the imposition of the death penalty.

1. The applicant has failed to show that his counsel's performance was deficient. *Strickland v. Washington*, 466 U.S. 668 (1984).

2. Even if counsel's performance had been deficient, the applicant has failed to show that counsel's performance resulted in egregious errors which deprived applicant of a fair trial. *Strickland* at 691.

3. The applicant fails to show deficient performance, much less harm, based on the allegation of ineffective assistance of counsel for failure to adequately investigate and interview witnesses for punishment. *Strickland.*

4. Counsel cannot be considered ineffective for making reasonable, strategic decisions after consultation with applicant, not to present certain evidence for purposes of mitigation.

5. The applicant fails to show that he received ineffective assistance of counsel, in violation of U.S. CONST. amends VI, VIII, and XIV and TEX. CONST. art. I, §§ 10, 13, 19.

///

Second Ground for Relief

Prospective Juror Louis Viramontes was erroneously removed for cause thus violating Petitioner's rights under the Sixth Amendment to the Untied States Constitution.

6. The applicant has failed to show that the trial court's granting of a challenge for cause as to Juror Viramontes was error. TEX. CODE CRIM. PROC. ANN. Art. 35.16 (Vernon's Ann. 1989).

7. The applicant has failed to show that the trial excused Juror Viramontes simply because his beliefs on the death penalty might influence the decision making process. *Wainwright v. Witt*, 469 U.S. 412 (1985).

8. After viewing Juror Viramontes' demeanor and listing to his responses to questioning by trial counsel for applicant and the state, the court correctly excused Juror Viramontes for his vacillating, unclear and contradictory answers. *Rocha v. State*, 16 S.W.3d 1, 6 (Tex. Crim. App. 2000) and *Soria v. State*, 933 S.W.2d 46, 66 (Tex. Crim. App. 1996).

9. The Court correctly determined that Juror Viramontes' views on capital punishment were such that they would prevent or substantially impair his performance of his duties as a juror in accordance with his instructs and his oath as a juror. *Feldman v. State*, 71 S.W.3d 738 (Tex. Crim. App. 2002); see also, *Clark v. State*, 929 S.W.2d 5, 6-7 (Tex. Crim. App. 1996), cert denied, 520 U.S. 1116 (1997).

Third Ground for Relief

A. Prosecutorial misconduct deprived Petitioner of his right to Due Process by impermissible vouching for various witnesses' credibility.

10. The applicant fails to show that the remark –"I'm not even asking for the truth of the matter. I think the man is lying, and I want to see if he is going to tell the truth" – made by the prosecutor was of a nature to interfere with applicant's right to a fair trial. *In Re W.G.W.*, 812 S.W.2d 409, 416 (Tex. App. - - Houston [1st Dist.] 1991, no writ).

11. The Court correctly sustained the objection to the remark noted in 7 above on the grounds that the comment was a sidebar remark by the prosecutor.

12. Applicant, while making the objection to the comment set forth in seven (7) above, has failed to take all steps necessary to establish error has occurred as a result of the comment.

B. Prosecutor's Opinion as to Witness' Veracity through facial expressions.

13. The trial court properly instructed the prosecutor to refrain from making facial expressions in response to testimony from a witness for the defense.

14. The applicant has failed to establish that the facial expression made by the prosecutor were manifestly improper or so prejudicial as to deny appellant a fair trial. *United States v. Adam*, 70 F.3d 776, 780 (4th Cir. 1995); see also, *United States v. Mitchell*, 1 F.3d 235, 240 (4th Cir. 1993) and *Bell v. State*, 742 S.W.2d 780, 802.

15. The Court properly found that the remark set forth in seven (7) above were isolated and did not divert the jury's attention to extraneous matters.

C. Prosecutor's Reference to a Defense Witness as a Liar in Closing Argument.

16. The trial court properly found that the remarks – "And you heard from Richie Rich, the biggest liar of them all. . . Because it was a lie" - - made by the prosecutor during closing arguments was provoked by the applicant's counsel during closing argument. United States v. Cooper, 827 F.2d 991 (4th Cir. 1987) and McDuffie v. State, 854 S.W.2d 195 (Tex. App. - - Beaumont, 1993).

17. The trial court properly concluded that the remarks as noted in thirteen (13) above, were proper responses to applicant's arguments.

Fourth Ground for Relief

Petitioner's Constitutional right to a speedy trial was violated.

18. The length of delay of more than two years from the date of indictment to the date of trial is presumptively prejudicial and requires the court to review all factors set forth in Barker v. Wingo, 407 U.S. 514 (1972).

19. The applicant failed to assert his right to a speedy trial prior to filing his motion to dismiss for failure to hold a speedy trial.

20. There was no deliberate attempt by the state to prejudice the defense. Dragoo v. State, 96 S.W.3d 308, 313 (Tex. Crim. App. 2003).

21. The court properly determined that the appellant was not prejudiced by the length of time from indictment to the time of trial. *Dogget v. United States*, 505 U.S. 647 (1992).

22. The court properly determined that the applicant has suffered no harm pursuant to the delay from indictment to trial.

23. The applicant fails to demonstrate that his conviction was unlawfully obtained. Accordingly, it is recommended to the Texas Court of Criminal Appeals that relief be denied.

Signed and entered this 30th day of April, 2004.

Ralph K. Burgess
District Judge, 5th Judicial District
Bowie County, Texas

Appendix M

Fifth Circuit Cases Explicitly Relying on a "Double-Edged" Analysis to Find No Prejudice from Failing to Uncover/Present Mitigating Evidence

1. **Balentine v. Lumpkin,**
   No. 18-70035, 2021 WL 3376528 (5th Cir. Aug. 3, 2021).

2. **Reynoso v. Lumpkin,**
   854 F. App'x 605 (5th Cir. 2021).

3. **Speer v. Lumpkin,**
   824 F. App'x 240 (5th Cir. 2020).

4. **Ibarra v. Davis,**
   786 F. App'x 420 (5th Cir. 2019).

5. **Jennings v. Davis,**
   760 F. App'x 319 (5th Cir. 2019).

6. **Trevino v. Davis**,
   861 F.3d 545 (5th Cir. 2017).

7. **Canales v. Davis,**
   740 F. App'x 432 (5th Cir. 2018).

8. **Freeney v. Davis,**
   737 F. App'x 198 (5th Cir. 2018).

9. **Chanthakoummane v. Stephens,**
   816 F.3d 62 (5th Cir. 2016).

10. **Martinez v. Davis**,
    653 F. App'x 308, 322 (5th Cir. 2016), cert. granted, judgment vacated on other grounds, 137 S. Ct. 1432 (2017).

11. **Masterson v. Stephens,**
    596 F. App'x 282 (5th Cir. 2015).

12. **Beatty v. Stephens,**
    759 F.3d 455 (5th Cir. 2014).

13. **United States v. Bernard,**
    762 F.3d 467 (5th Cir. 2014).

14. **United States v. Fields,**
761 F.3d 443 (5th Cir. 2014).

15. **Charles v. Stephens,**
736 F.3d 3d 380 (5th Cir. 2013).

16. **Clark v. Thaler,**
673 F.3d 410, 423 (5th Cir. 2012).

17. **Brown v. Thaler,**
684 F.3d 482 (5th Cir. 2012).

18. **Woods v. Thaler,**
399 F. App'x 884 (5th Cir. 2010).

19. **Gray v. Epps,**
616 F.3d 436 (5th Cir. 2010).

20. **Vasquez v. Thaler**
389 F. App'x 419 (5th Cir. 2010).

21. **Martinez v. Quarterman,**
481 F.3d 249 (5th Cir. 2007).

22. **Cole v. Dretke,**
99 F. App'x 523 (5th Cir. 2004).

23. **Johnson v. Cockrell,**
306 F.3d 249 (5th Cir. 2002).

24. **Zimmerman v. Cockrell,**
No. 01-40591, 2002 WL 32833097 (5th Cir. Aug. 1, 2002).

25. **Neal v. Puckett,**
386 F.3d 230 (5th Cir. 2002).

26. **Ladd v. Cockrell**,
311 F.3d 349 (5th Cir. 2002).

27. **Dowthitt v. Johnson**,
230 F.3d 733 (5th Cir. 2000).

28. **Kitchens v. Johnson**, 190 F.3d 698 (5th Cir. 1999).

29. **Cockrum v. Johnson**, 119 F.3d 297 (5th Cir. 1997).

30. **Ransom v. Johnson,** 126 F.3d 716 (5th Cir. 1997).

31. **Faulder v. Johnson**, 81 F.3d 515 (5th Cir. 1996).