UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
SAN ANGELO DIVISION

LANNY MARVIN BUSH,

Petitioner,

v.

DIRECTOR, TDCJ-CID,

Respondent.

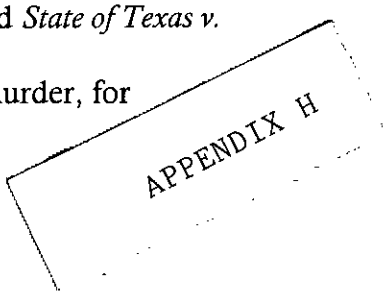
No. 6:19-CV-00006-H

ORDER

Petitioner Lanny Marvin Bush, a state prisoner proceeding pro se and *in forma pauperis*, filed this petition for writ of habeas corpus under 28 U.S.C. § 2254 to challenge his state-court conviction for capital murder and his resulting sentence of life in prison without the possibility of parole. He raises 24 claims divided into eight grounds for relief, alleging various errors in the process—starting with law enforcement's investigation of him and continuing through his jury trial and on appeal. Respondent filed an answer with copies of Petitioner's relevant state-court records, arguing that many of Petitioner's claims are partially unexhausted and procedurally barred, and the rest lack merit. Petitioner replied. As explained below, the Court finds that some of Petitioner's claims are unexhausted and procedurally barred. Otherwise, the Court finds that Petitioner has failed to overcome the difficult, deferential standard of 28 U.S.C. § 2254(d). Thus, the petition must be denied and dismissed with prejudice.

1. Background

Petitioner challenges his state-court conviction and prison sentence out of the 42nd District Court of Coleman County, Texas. In cause number 2602, styled *State of Texas v. Lanny Marvin Bush*, Petitioner was charged by indictment with capital murder, for



"intentionally caus[ing] the death of an individual, namely MICHELE MONIQUIE REITER, by means unknown . . . in the course of committing or attempting to commit the offense of kidnapping." (Dkt. Nos. 24-14 at 9; 24-62 at 41.) The State did not seek the death penalty. Petitioner pled not guilty, but a jury found him guilty, and the trial court sentenced him to life without parole. (Dkt. No. 24-14 at 107.)

Petitioner appealed his conviction, and the Eleventh Court of Appeals partially reversed and partially affirmed the judgment. (Dkt. No. 24-3.) Specifically, the intermediate court of appeals found that the evidence was insufficient to support the kidnapping element of the capital conviction, but the evidence was sufficient to support the lesser included offense of murder. (*Id.* at 1–2.) The State filed a petition for discretionary review (PDR), as did Petitioner. (*See* Dkt. Nos. 24-30, 24-29.)

The Texas Court of Criminal Appeals (TCCA) refused Petitioner's PDR.[1] But it granted the State's PDR, reversed the intermediate appellate court, and reinstated Petitioner's original conviction and sentence. (Dkt. No. 24-23.) The TCCA found that "the evidence and the inferences from it support the jury's finding that [Petitioner] killed Reiter while in the course of kidnapping her or attempting to kidnap her." (*Id.* at 14.)

Petitioner then filed a state application for habeas corpus. (Dkt. Nos. 24-61, 24-62.) In his state application, he raised eight grounds for relief, including claims that he received ineffective assistance of counsel (IAC) from both his trial and appellate attorneys. (Dkt. No. 24-61 at 11–18.) The TCCA initially remanded the case to the trial court for findings of fact and conclusions of law regarding Petitioner's IAC claims. (Dkt. No. 24-46.) The trial court obtained affidavits from Petitioner's counsel, found that Petitioner did not receive

[1] *See* https://search.txcourts.gov/Case.aspx?cn=PD-1012-16&coa=coscca (showing that Petitioner's pro se PDR was refused on January 11, 2017) (last visited February 28, 2022).

ineffective assistance from either trial counsel or appellate counsel, and recommended denial of Petitioner's habeas application. (Dkt. No. 24-59 at 4–5.) The TCCA denied relief without written order on January 9, 2019. (Dkt. No. 24-45.)

Petitioner filed his federal petition on February 6, 2019.[2] The Court understands Petitioner to raise the following grounds for review in his federal petition:

(1) the State unlawfully suppressed or withheld:

- (a) a statement from the victim's boyfriend that he spoke to the victim days after she was reported missing,
- (b) a statement from a witness who swore to seeing the victim days after she was reported missing,
- (c) evidence that a friend of the victim spoke to her after she was reported missing,
- (d) a statement from an eyewitness who saw the victim's car arrive days after she was reported missing,
- (e) information that the victim was seen in another town,
- (f) alibi evidence (video and receipt) showing that Petitioner was paying for gasoline 80 miles away when he was alleged to have been at the grave site, showing inconsistencies in the GPS mapping data, and
- (g) proof of a ghost phone or mirror phone;

(2) the evidence at trial was insufficient to prove that any crime occurred because:

- (a) the State did not prove the cause of death, and
- (b) the State did not prove that the victim was kidnapped;

(3) his statement to law enforcement was involuntary because:

- (a) Rangers threatened to jail Petitioner's girlfriend and nephew,
- (b) Rangers attempted to bribe Petitioner with the use of a loaner vehicle so they could search his truck, and
- (c) Rangers refused to allow breaks and "used threatening manners of [b]odily injury to intimi[d]ate" Petitioner into "giving them something";

(4) the trial court abused its discretion by:

- (a) denying Petitioner's request for a mistrial after his parole status was inadvertently mentioned in front of the jury,
- (b) denying a jury instruction on the voluntariness of his statement,

[2] *See Spotville v. Cain,* 149 F.3d 374, 378 (5th Cir. 1998) (providing that a prisoner's habeas petition is deemed to be filed when he delivers the papers to prison authorities for mailing).

(c) denying Petitioner's motion for a directed verdict,
(d) allowing the Brown County District Attorney to assist in prosecuting his case, and
(e) refusing two requests for DNA testing;

(5) he was denied due process when:

(a) law enforcement failed to investigate other possible suspects and test evidence they found,
(b) the trial court allowed unreliable and inaccurate "junk science"—GPS mapping data—to be introduced, and
(c) the Brown County District Attorney took an inconsistent position in his capital murder trial, using the ranger statement as evidence against him after telling the Brown County court that it was illegally obtained;

(6) the jury was allowed to consider evidence that was not introduced at trial through the trial court's answer to a jury note;

(7) the prosecutor improperly introduced his own opinion or personal knowledge into his closing argument by stating that he "knew how the gun was used"; and

(8) he received ineffective assistance of counsel when:

(a) his trial attorney had a conflict of interest because he represented a person on the State's witness list and then steered the trial away from his client testifying, and
(b) his appellate counsel failed to present a claim related to Petitioner's request for mistrial, which would have been a "dead bang winner" claim that would have resulted in reversal.

(Dkt. No. 1 at 6–8.) Petitioner seeks a new trial. (*Id.* at 7.)

Respondent argues that Petitioner's claims are partially unexhausted and procedurally barred, partially procedurally defaulted, and otherwise fail to overcome the deferential standard imposed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).

In reply, Petitioner contends that he fully exhausted each of his claims through either his PDR or his state habeas application, and he reiterates the merit of his claims. He asks that the Court overturn his conviction and grant him a new trial.

2. Legal Standard

Section 2254 provides federal courts with a limited, but important opportunity to review a state prisoner's conviction and sentence. *See Harrington v. Richter*, 562 U.S. 86, 103 (2011). This statute, as amended by AEDPA, creates a "highly deferential standard for evaluating state-court rulings, . . . which demands that state-court decisions be given the benefit of the doubt." *Woodford v. Viscotti*, 537 U.S. 19, 24 (2002) (per curiam) (internal quotation marks omitted).

The basic structure of the federal habeas statute is "designed to confirm that state courts are the principal forum for asserting constitutional challenges to state convictions." *Richter*, 562 U.S. at 103. First, the statute requires that a habeas petitioner exhaust his claims in state court. 28 U.S.C. § 2254(b). If the state court dismisses the claim on procedural grounds, then the claim is barred from federal review unless the petitioner shows cause and prejudice. *Richter*, 562 U.S. at 103. And if the state court denies the claim on the merits, then AEDPA's relitigation bar applies. *Lucio v. Lumpkin*, 987 F.3d 451, 464–65 (5th Cir. 2021).

A. Exhaustion and Procedural Default

Courts may not grant habeas relief unless the petitioner first exhausts all available state remedies. 28 U.S.C. § 2254(b)(1)(A). "The exhaustion requirement of § 2254(b) ensures that the state courts have the opportunity fully to consider federal-law challenges to a state custodial judgment before the lower federal courts may entertain a collateral attack upon that judgment." *Duncan v. Walker*, 533 U.S. 167, 178–79 (2001). Although unexhausted claims prevent courts from granting relief, courts may deny a petition on the merits despite the petitioner's failure to exhaust the state remedies. 28 U.S.C. § 2254(b)(2).

"The exhaustion requirement is satisfied when the substance of the federal habeas claim has been fairly presented to the highest state court." *Whitehead v. Johnson,* 157 F.3d 384, 387 (5th Cir. 1998), which in Texas is the TCCA. *Richardson v. Procunier,* 762 F.2d 429, 431–32 (5th Cir. 1985). More than mere presentation of claims to the high court is required. Raising a claim "in a procedural context in which its merits will not be considered" does not constitute "fair presentation"; thus, it cannot satisfy the exhaustion requirement. *Castille v. Peoples,* 489 U.S. 346, 351 (1989). To present claims to the TCCA, a petitioner must pursue his claims through direct appeal and a PDR or through a state habeas application. *See Myers v. Collins,* 919 F.2d 1074, 1076 (5th Cir. 1990).

Additionally, if a petitioner presents new legal theories or factual claims in his federal habeas petition, then he has not met the exhaustion requirement. *Nobles v. Johnson,* 127 F.3d 409, 420 (5th Cir. 1997) (citing *Anderson v. Harless,* 459 U.S. 4, 6–7 (1982)). "It is not enough that all the facts necessary to support the federal claim were before the state courts or that a somewhat similar state-law claim was made." *Harless,* 459 U.S. at 6 (internal citations omitted).

In the context of federal habeas proceedings, a resolution (or adjudication) on the merits is a term of art that refers to whether a court's disposition of the case was substantive, rather than procedural. *Miller v. Johnson,* 200 F.3d 274, 281 (5th Cir. 2000) (citing *Green v. Johnson,* 116 F.3d 1115, 1121 (5th Cir. 1997)). In Texas writ jurisprudence, a "denial" signifies that the state high court "addressed and rejected the merits of a particular claim," but a "dismissal" means that the court "declined to consider the claim for reasons unrelated to the claim's merits." *Ex parte Torres,* 943 S.W.2d 469, 472 (Tex. Crim. App. 1997); *Barrientes v. Johnson,* 221 F.3d 741, 780 (5th Cir. 2000).

Along with the exhaustion requirement, the doctrine of procedural default provides "[a] distinct but related limit on the scope of federal habeas review." *Nobles*, 127 F.3d at 420. Federal habeas courts are barred from reviewing a question of federal law decided by a state court "if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment," whether the ground is substantive or procedural. *Coleman v. Thompson*, 501 U.S. 722, 729–30 (1991). In Texas, the high court's dismissal of a habeas application as subsequent provides an adequate and independent state ground, barring federal review. *See Nobles*, 127 F.3d at 423.

"[A] habeas petitioner who has failed to properly present his federal constitutional claims to the state courts can still be considered to have exhausted his state remedies if the state courts are no longer open to his claim because of a procedural bar." *Busby v. Dretke*, 359 F.3d 708, 724 (5th Cir. 2004). But "the same procedural bar that satisfies the exhaustion requirement at the same time provides an adequate and independent state procedural ground to support the state judgment and thus prevents federal habeas corpus review of the defaulted claim." *Id.* A petitioner may overcome this bar only if he can show "cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Id.* at 750.

But if a federal claim was fairly presented to the state court, then the federal habeas court cannot assume that the state court overlooked the claim. *Johnson v. (Tara) Williams*, 568 U.S. 289, 298 (2013). Instead, the federal court must presume that the state court adjudicated the federal claim on the merits, and thus the relitigation bar of Section 2254(d) applies. *Lucio*, 987 F.3d at 464–65 (citing *(Tara) Williams*, 568 U.S. at 298).

B. AEDPA's Relitigation Bar

Once a state court has rejected a claim on the merits, a federal court may grant relief on that claim only if the state court's decision was (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or (2) was "based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C. § 2254(d); *Adekeye v. Davis*, 938 F.3d 678, 682 (5th Cir. 2019). And "[t]he question under AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable—a substantially higher threshold." *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007).

A state-court decision is contrary to clearly established federal law if "it relies on legal rules that directly conflict with prior holdings of the Supreme Court or if it reaches a different conclusion than the Supreme Court on materially indistinguishable facts." *Busby*, 359 F.3d at 713. A decision constitutes an unreasonable application of clearly established federal law if "the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Williams v. Taylor*, 529 U.S. 362, 413 (2000); *see also Pierre v. Vannoy*, 891 F.3d 224, 227 (5th Cir. 2018) (explaining that a petitioner's lack of "Supreme Court precedent to support" a ground for habeas relief "ends [his] case" as to that ground).

"[A] state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance." *Wood v. Allen*, 558 U.S. 290, 301 (2010). Federal habeas relief is precluded even when the state court's factual determination is debatable. *Id.* at 303. State-court factual determinations are entitled to a "presumption of correctness" that a petitioner may rebut only by clear and

convincing evidence. 28 U.S.C. § 2254(e)(1). This "deference extends not only to express findings of fact, but to the implicit findings of the state court." *Ford v. Davis*, 910 F.3d 232, 234–35 (5th Cir. 2018).

The focus of federal review under Section 2254(d) "should be on the ultimate legal conclusion that the state court reached and not on whether the state court considered and discussed every angle." *Neal v. Puckett*, 286 F.3d 230, 246 (2002). State courts need not provide reasons for their decisions, and even summary denials of relief are entitled to substantial deference. *Richter*, 562 U.S. at 100–01.

Of course, when the state high court "explains its decision on the merits in a reasoned opinion," then the federal court's review is straightforward—it "simply reviews the specific reasons given by the state court and defers to those reasons if they are reasonable." *Wilson v. Sellers*, 584 U.S. ___, 138 S. Ct. 1188, 1192 (2018). But when reviewing a summary denial, "the federal court should 'look through' the unexplained decision to the last related state-court decision that does provide a relevant rationale." *Id.* If the lower court's rationale is reasonable, the federal court must "presume that the unexplained decision adopted the same reasoning." *Id.* This presumption may be rebutted, however, by evidence that the summary decision "relied or most likely did rely on different grounds." *Id.* And when the lower state court decision is unreasonable, then it is more likely that the state high court's single-word decision rests on alternative grounds. *Id.* at 1196.

In short, a reviewing court cannot "overlook[] arguments that would otherwise justify the state court's result." *Richter*, 562 U.S. at 102. A federal habeas court "must determine what arguments or theories supported, or . . . could have supported, the state court's decision" before considering "whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent" with Supreme Court precedent. *Id.* "As a

condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id.*

Moreover, "federal habeas relief does not lie for errors of state law," and "it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions." *Estelle v. McGuire,* 502 U.S. 62, 67–68 (1991); *West v. Johnson,* 92 F.3d 1385, 1404 (5th Cir. 1996). AEDPA "modified a federal habeas court's role in reviewing state prisoner applications in order to prevent federal habeas 'retrials' and to ensure that state court convictions are given effect to the extent possible under law." *Bell v. Cone*, 535 U.S. 685, 693 (2002). Federal habeas review is reserved only as a "guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction through appeal." *Richter*, 562 U.S. at 102–03. This standard is intentionally "difficult to meet." *Id.*

Finally, federal habeas review is limited "to the record that was before the state court that adjudicated the claim on the merits." *Cullen v. Pinholster*, 563 U.S. 170, 181–82 (2011). In short, to overcome AEDPA's highly deferential, difficult standard, a petitioner "must show, based on the state-court record alone, that any argument or theory the state habeas court could have relied on to deny . . . relief was contrary to or an unreasonable application of clearly established federal law as determined by the Supreme Court." *Evans v. Davis*, 875 F.3d 210, 217 (5th Cir. 2017).

3. Analysis

A. Some of Petitioner's claims are unexhausted and procedurally barred from federal review.

First, the parties dispute the extent to which Petitioner exhausted his claims. Respondent asserts that Petitioner never presented some of his claims to the state courts, and he raises them for the first time in his federal petition. (Dkt. No. 25 at 8–9.) Specifically, Respondent argues that parts of Petitioner's first, third, fourth, and fifth grounds for relief were not properly presented to the state court and cannot be presented now because of Texas's abuse-of-the-writ doctrine. Thus, Respondent argues that these claims are unexhausted and procedurally barred from federal review.

After carefully reviewing the records, the Court finds that Petitioner presented each of his claims in some form to the TCCA. But some of his claims were raised only in a procedural context that likely precluded a review of the merits of those claims. For example, Petitioner's claims 4(d) and 5(c), which allege errors related to the Brown County District Attorney's participation in Petitioner's Coleman County prosecution, were raised for the first and only time in Petitioner's pro se PDR. "[T]he presentation of claims on discretionary review to the state's highest court does not," necessarily, "constitute 'fair presentation' for exhaustion purposes." *Satterwhite v. Lynaugh*, 886 F.2d 90, 92 (5th Cir. 1989) (citing *Castille*, 489 U.S. at 349). In the TCCA, discretionary review is limited to the issues that were properly presented to the intermediate court of appeals. *See Satterwhite*, 886 F.2d at 92 n.2. As a result, claims presented "for the first and only time in a petition for discretionary review" do not satisfy the exhaustion requirement of Section 2254. *Myers v. Collins*, 919 F.2d 1074, 1077 (5th Cir. 1990).

Petitioner's grounds 4(d) and 5(c) were not properly presented to the TCCA in his PDR because he did not first raise them in his direct appeal. He also failed to raise these

claims in his state habeas application, and he is barred from doing so now by Texas's abuse-of-the-writ doctrine. *See Nobles*, 127 F.3d at 423. Thus, Petitioner's claims 4(d) and 5(c) are unexhausted and procedurally barred.

Similarly, Petitioner raised some of his claims only in the memorandum of law that he submitted in support of his state habeas application. But the TCCA "will *not* consider grounds for relief set out in a memorandum of law that were not raised on the form." *See Ex parte Walton*, 422 S.W.3d 720, 721 (Tex. Crim. App. 2014) (emphasis in original). This aligns with Texas Rule of Appellate Procedure 73.1, which sets out the requirements for state habeas applications. Rule 73.1 explains that the TCCA requires a specific form for habeas applications and that "[a]ny ground not raised on the form will not be considered." Tex. R. App. P. 73.1(a), (c). The required form, which Petitioner filled out, reiterates this admonishment. (*See* Dkt. No. 24-61 at 10: "You must present each ground on the form application and a brief summary of the facts. *If your grounds and brief summary of the facts have not been presented on the form application, the Court will not consider your grounds.*") (emphasis in original).

Here, Petitioner raised claim 4(e), alleging that the trial court erred in refusing Petitioner's requests for additional DNA testing, in his memorandum but not in his form application. He did not properly present this claim to the TCCA, and the Court finds that it is unexhausted and procedurally barred. Three more of Petitioner's claims—claims 1(c), 1(e), and 3(c)[3]—were presented improperly both in Petitioner's PDR, without inclusion in

[3] In these claims, Petitioner alleges that the State withheld evidence that the victim's friend spoke to her after she was reported missing and evidence that the victim was seen in another town after she was reported missing (claims 1(c) and (e)), and Petitioner alleges that his statement to law enforcement was involuntary and inadmissible because the police did not give him breaks and used threats of injury and intimidation to elicit information (claim 3(c)).

his direct appeal, and in Petitioner's memorandum but not on his form habeas application. The Court must likewise find these claims to be unexhausted and procedurally barred.

Petitioner makes no argument for cause and resulting prejudice to excuse his failure to exhaust these claims, nor has he shown that the Court's failure to review them will result in a fundamental miscarriage of justice. Thus, the Court concludes that claims 1(c), 1(e), 3(c), 4(d)–(e), and 5(c) are unexhausted and procedurally barred.

Respondent also asserts that Petitioner's claim 1(d) is unexhausted. But Petitioner did raise this claim in his state form application. (Dkt. No. 24-61 at 11.) Thus, the Court finds that Petitioner's claim 1(d)—alleging that the State withheld evidence that a witness saw the victim's car arrive at the ballpark after she was reported missing—was fairly presented to the TCCA. The Court will address this claim more fully below.

Finally, Respondent argues that one of Petitioner's claims—claim 2(a), that the evidence was insufficient to prove murder because the victim's cause of death is unknown—is procedurally defaulted. Respondent acknowledges that Petitioner raised this claim in his state habeas application. But Respondent contends that the TCCA did not consider the claim because it is well established that sufficiency-of-the-evidence claims are not cognizable on habeas review in Texas. (Dkt. No. 25 at 12); *see also Ex parte Grigsby*, 137 S.W.3d 673, 674 (Tex. Crim. App. 1997). The Court agrees that Petitioner did not properly present this claim in his state habeas application. But the Court finds that Petitioner also raised this claim in both his PDR and in his direct appeal.

Petitioner raised three issues on direct appeal. One of those issues was the sufficiency of the evidence to prove that he murdered the victim. Petitioner's argument focused on the insufficiency of the evidence linking Petitioner to the murder. But in support of that argument, he contended that "[n]o evidence of the murder weapon or cause of death

was introduced, much less evidence linking [Petitioner] to a weapon or the cause of death." (Dkt. No. 24-16 at 9–10.) The Eleventh Court of appeals discussed the cause-of-death issue before finding the evidence was sufficient to support murder. (Dkt. No. 24-3 at 17–18.) The court noted that "although [the medical examiner] could not determine Reiter's cause of death, . . . there was strong evidence of foul play," and thus, "a rational jury could have found beyond a reasonable doubt that [Petitioner] murdered Reiter." (*Id.*) Petitioner raised this claim again in his pro se PDR, (Dkt. No. 24-29 at 2, 4–5), which the TCCA refused. Moreover, the TCCA considered the sufficiency of the evidence in its written opinion on the State's PDR. While focusing on the kidnapping element of the capital charge, the TCCA expressly found that the evidence was sufficient for a rational jury to conclude that Petitioner murdered the victim in the course of kidnapping or attempting to kidnap her. (Dkt. No. 24-23 at 15–16.)

Based on the record, the Court concludes that Petitioner fairly presented his insufficiency-of-the-evidence claim to the TCCA. Moreover, the Court finds that the TCCA considered the merits of Petitioner's claim. Petitioner's claim has shifted over time—from his initial argument that the State couldn't prove he murdered the victim, to his current argument that the State can't prove that the victim was murdered at all. But the state court's findings on the narrower issue (that the evidence shows Petitioner murdered the victim) necessarily resolve the broader issue (that the evidence shows the victim was murdered). Thus, "it is fair to assume that further state proceedings would be useless." *Castille*, 489 U.S. at 351.

B. Petitioner has not overcome AEDPA's relitigation bar as to his exhausted claims.

i. Ground One: Withheld Evidence

In his first ground for relief, Petitioner asserts that the State unlawfully withheld evidence in violation of *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Specifically, he alleges that the prosecutor suppressed evidence that (a) the victim's boyfriend spoke to her days after she was reported missing, (b) a witness swore to seeing the victim days after she was reported missing, (c) a friend of the victim spoke to her after she was reported missing, (d) an eyewitness saw the victim's car arrive days after she was reported missing, (e) the victim was seen in another town, (f) alibi evidence (including a video and a receipt) showing that Petitioner was paying for gasoline 80 miles away when he was alleged to have been at the grave site, showing inconsistencies in the GPS mapping data, and (g) proof of a ghost phone or mirror phone.

As discussed above, two of these claims, (c) and (e), are unexhausted and procedurally defaulted. Regardless of whether the claims are exhausted, however, the Court finds that these claims are without merit. *See* 28 U.S.C. § 2254(b)(2) (providing that a court may deny habeas relief on the merits notwithstanding the petitioner's failure to exhaust state remedies).

A federal habeas petitioner must show three elements to establish a *Brady* violation: (1) the prosecutor suppressed or withheld evidence (2) that was favorable and (3) material to the defense. *Castillo v. Johnson*, 141 F.3d 218, 222 (5th Cir. 1998) (citing *Moore v. Illinois*, 408 U.S. 786, 794–95 (1972)). Contrary to Petitioner's argument that the evidence was suppressed, much of this evidence was presented at Petitioner's trial.

For example, Petitioner alleges that video evidence of his "alibi" was suppressed, but he also cites the record where the video was admitted. In fact, the video—showing

Petitioner at a gas station in Ballinger, Texas, on the evening on September 10, 2012—was published to the jury, and two witnesses discussed it. (*See* Dkt. Nos. 24-10 at 101; 24-11 at 68–69.) Likewise, Petitioner contends that the State withheld evidence that the victim was seen in another town after she was reported missing, but this evidence was discussed at trial too. (*See* Dkt. No. 24-11 at 74–76.) Moreover, defense witness Joel Gongora testified at trial that he thought he saw the victim in Brady, Texas, after seeing news of her disappearance. (*See* Dkt. No. 24-11 at 116.)

As to these claims, Petitioner has failed to show the elements of a *Brady* violation. The evidence was not withheld. In fact, it was discussed at trial in front of the jury. He has also not shown that the evidence was favorable. For example, a law enforcement officer testified that he investigated a reported sighting of the victim, viewed surveillance videos, and determined the report to be inaccurate. (*See* Dkt. No. 24-11 at 75) ("And we followed that up, sir. There was no evidence that she was ever there.") Petitioner may disagree with how the State presented the evidence, or how his attorney used the evidence, but it *was* presented.

The record also shows that Petitioner's counsel was at least aware of evidence related to Petitioner's claims, even though the evidence was not specifically discussed at trial. While cross-examining a law enforcement witness, Petitioner's counsel alluded to information about "activity" where the victim's vehicle was found on the day after her disappearance. (*See* Dkt. No. 24-9 at 80.) In fact, in his supplemental reply to Respondent's answer, Petitioner admits that his attorney knew about the car statement, and he argues that his counsel must have "acted in concert with the Prosecution to suppress it." (Dkt. No. 36.) But again, Petitioner's complaint now seems to be that his attorney failed to effectively use the evidence—a claim never presented to the state courts—rather than that the State

concealed it. Similarly, counsel demonstrated knowledge of two statements given by the victim's boyfriend, although counsel's focus was establishing that the boyfriend had lied to police. (*See* Dkt. No. 24-9 at 86–89.)

Otherwise, Petitioner's claims of withheld evidence are conclusory. It is well established that "[m]ere conclusory statements do not raise a constitutional issue in a habeas case." *Schlang v. Heard*, 691 F.2d 796, 799 (5th Cir. 1982). Petitioner has not provided any of the statements or other evidence he claims was suppressed. He has not shown that the evidence exists, much less that it was suppressed, favorable, and material to his defense. Thus, the Court finds that the TCCA reasonably rejected Petitioner's *Brady* claims.

ii. Ground Two: Insufficient Evidence

Petitioner raised sufficiency-of-the-evidence claims at every stage of his state-court reviews. On direct appeal and in his PDR, Petitioner alleged that the evidence was insufficient to show that he murdered the victim or that he did so while kidnapping or attempting to kidnap her. The TCCA only granted the State's PDR to review the sufficiency of the evidence on the kidnapping element. But in refusing Petitioner's PDR, the TCCA left undisturbed the finding of the intermediate court of appeals that Petitioner murdered the victim.

While focusing on the kidnapping element of the capital murder charge, the TCCA examined "the combined and cumulative evidence, including all inferences," and found that "when viewed in the light most favorable to the prosecution, a rational jury could conclude that [Petitioner] murdered Reiter in the course of kidnapping or attempting to kidnap her." (Dkt. No. 24-23 at 2, 15–16.) This express finding is entitled to substantial deference under Section 2254(d) and (e). *See also Callins v. Collins*, 998 F.2d 269, 276 (5th Cir. 1993)

(explaining that when "a state appellate court has conducted a thoughtful review of the evidence, . . . its determination is entitled to great deference").

The Supreme Court set out the appropriate standard for reviewing sufficiency-of-the-evidence questions in federal habeas proceedings in *Jackson v. Virginia*, 443 U.S. 307 (1979). "[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 319 (emphasis in original). Well before Petitioner's conviction, the TCCA determined that the *Jackson* standard "is the only standard that a reviewing court should apply in determining whether the evidence is sufficient to support each element of a criminal offense," eliminating any distinction between legal and factual sufficiency. *Brooks v. State*, 232 S.W.3d 893, 895 (Tex. Crim. App. 2010).

Here, consistent with *Brooks*, the TCCA identified and applied the relevant standard provided by the Supreme Court in *Jackson*. And the court applied the *Jackson* standard with the appropriate deference to the jury's role as the fact-finder and consistent with federal principles informing *Jackson*'s application. Reviewing courts may not substitute their view of the evidence for that of the fact-finder but must consider the evidence in the light most favorable to the prosecution to determine whether *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Alexander v. McCotter*, 775 F.2d 595, 597–98 (5th Cir. 1985); *see also United States v. Nguyen*, 28 F.3d 477, 480 (5th Cir. 1994) (explaining that "[a]ll credibility determinations and reasonable inferences are to be resolved in favor of the jury's verdict").

The TCCA refused Petitioner's PDR, thus summarily denying review of his sufficiency claim as to the murder element of his conviction. Thus, the Court finds it helpful

to look through to the opinion of the intermediate court on this claim. The Eleventh Court of Appeals—applying the appropriate *Jackson* standard—carefully examined the evidence and determined that it was sufficient for a rational jury to find that Petitioner murdered the victim. (Dkt. No. 24-3 at 16–18.) The court of appeals considered whether the evidence supported the jury's finding that Petitioner "intentionally or knowingly killed Reiter," referring to the substantive elements of murder as a lesser included offense of capital murder under Texas Penal Code §§ 19.02, 19.03. (*Id.* at 16); *See Alexander*, 775 F.2d at 598 (explaining that courts must "refer to the substantive elements of the criminal offense[] as defined by state law").

The court of appeals noted what was absent from the evidence, including, among other things, "evidence of a murder weapon or cause of death," but found that "other evidence, including circumstantial evidence," was enough to prove that Petitioner murdered Reiter. (Dkt. No. 24-3 at 16.) Specifically, the Eleventh Court relied on evidence that Petitioner had the opportunity to kill Reiter—that "[h]is phone and her phone were in the same locations throughout the evening of her disappearance, and the last place for which her phone provided location data was the location where her body was found." (*Id.* at 16–17.) As a result, the court concluded that "the record supports a reasonable inference that [Petitioner] was the last person to see Reiter alive." (*Id.* at 17.) The court noted "[i]n fact, these phone records were the means by which Reiter's body was found." (*Id.* at 9.)

The court also discussed evidence showing Petitioner's motive to kill Reiter, noting that he "had a difficult time dealing with his breakup with Reiter" and "that he wanted to hurt Reiter as bad as she hurt him." (*Id.* at 17.) And the court discussed the circumstances surrounding Reiter's death, including that her "unclothed body was found in a shallow grave under a bridge." (*Id.* at 9.) The court considered that although the medical examiner

could not determine a definite cause of death, he testified that he "could not rule out asphyxiation" and "that there was strong evidence of foul play." (*Id.*) Finally, the court pointed to evidence that refrigerant, like that found in Petitioner's truck, could cause death by asphyxiation. (*Id.* at 17.) After examining the evidence, the Eleventh Court found that it was sufficient for a rational jury to find beyond a reasonable doubt that Petitioner intentionally or knowingly killed Reiter. (*Id.* at 17–18.)

The TCCA refused Petitioner's request to revisit the sufficiency of the evidence to support the murder element of his capital murder charge. But it did review the sufficiency of the evidence to prove the kidnapping element, necessary to support Petitioner's capital charge and sentence. In doing so, the TCCA reasonably applied *Jackson* to the evidence presented at trial and reinstated the jury's finding of guilt.

The TCCA discussed evidence that Reiter was scared of Petitioner and that she "told her friends that she would not get into a car with him or meet him alone, and had asked friends to call the police if they did not hear from her for a certain period of time." (Dkt. No. 24-23 at 14.) It also noted evidence that Petitioner created a fake identity as a "ruse to trick Reiter into meeting him on the night of her disappearance." (*Id.*) The court also focused on evidence showing that Petitioner "laid the groundwork for kidnapping" Reiter, including evidence that he "researched how to make knock-out drops, purchased refrigerant and ammunition, and had a belt in his truck." (*Id.*) The TCCA noted that Petitioner had control over Reiter's phone as it traveled to her burial site, evidenced by his admission that he sent a fraudulent text from her phone at 7:56 pm on the evening of her disappearance. (*Id.*) After thoughtfully considering the evidence, and applying the relevant Supreme Court standard, the TCCA determined that the evidence was sufficient to support the jury's finding of guilt on capital murder.

Petitioner has not shown that the state court's determination, based on a thoughtful review of the evidence, was either contrary to, or involved an unreasonable application of, Supreme Court precedent, or that it was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Thus, Petitioner is not entitled to federal habeas relief on his sufficiency-of-the-evidence claims.

iii. Ground Three: Voluntariness of Statement

Petitioner alleges that the trial court erred when it admitted the video of his statement to law enforcement because it was involuntary because of "bribes, coercion and th[re]ats by the [r]angers." (Dkt. No. 1 at 7.) Petitioner moved to suppress his statement in the trial court. (Dkt. No. 24-14 at 15.) The trial court held a brief hearing, (Dkt. No. 24-13), reviewed the video, and entered a letter ruling denying the motion to suppress and finding that the statement was voluntary. (Dkt. No. 24-14 at 52.) The Eleventh Court of Appeals affirmed this finding after considering "the totality of the circumstances surrounding" the interrogation to determine whether Petitioner was in custody. (Dkt. No. 24-3 at 3, 5.) The TCCA summarily denied Petitioner's involuntary-statement claims in both his PDR and in his state habeas application.[4]

The admissibility of a confession[5] is a mixed question of law and fact. *Miller v. Fenton*, 474 U.S. 104, 112 (1985). The voluntariness determination is a legal conclusion that

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[4] As discussed above, Petitioner's claim 3(c), that his statement was involuntary because the rangers refused to allow him breaks and used threats of bodily injury to coerce him into talking, was not presented to the TCCA in a procedurally correct manner and is thus unexhausted and procedurally defaulted. Even so, as explained in this section, Petitioner's claims about the voluntariness of his statement lack merit.

[5] Petitioner did not confess to murder. He did confess, however, to online impersonation—admitting that he created a fake profile on social media to communicate with the victim in the days before her disappearance. He was arrested for that crime nearly three hours into the interview. And he made other admissions that were used to corroborate separate evidence. For example, he admitted that he sent a text message from the victim's phone the evening of her disappearance,

is entitled to independent federal review. *See id.* But under Section 2254(d), the federal habeas court will defer to the state court's determination of voluntariness unless it was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court." 28 U.S.C. § 2254(d)(1); *Barnes v. Johnson*, 160 F.3d 218, 222 (5th Cir. 1998).

But voluntariness turns on the facts of each case. *United States v. Posada-Rios*, 158 F.3d 832, 866 (5th Cir. 1998). Determining whether officers used coercive tactics to elicit the confession is a question of fact, and the state court's factual findings are entitled to deference when supported by the record. *Pemberton v.Collins*, 991 F.2d 1218, 1225 (5th Cir. 1993); *Self v. Collins*, 973 F.2d 1198, 1204 (5th Cir. 1992); *see also Miller*, 474 U.S. at 112 (noting that "subsidiary factual questions" such as whether the police engaged in coercive tactics or intimidation are afforded the presumption of correctness).

"[T]he Due Process Clause of the Fourteenth Amendment [prohibits] states from securing criminal convictions through the use of involuntary confessions resulting from coercive police conduct." *Self v. Collins,* 973 F.2d at 1205 (citing *Miller,* 474 U.S. at 109). "Coercive police conduct is a necessary prerequisite to the conclusion that a confession was involuntary, and the defendant must establish a causal link between the coercive conduct and the confession." *Carter v. Johnson*, 131 F.3d 452, 462 (5th Cir. 1997) (citing *Colorado v. Connelly,* 479 U.S. 157, 163–67 (1986)). "Neither mere emotionalism and confusion, nor mere trickery will alone necessarily invalidate a confession." *Self,* 973 F.2d at 1205. The Fifth Circuit has explained that such tactics are "only prohibited to the extent that it deprives the defendant of knowledge essential to his

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which corroborated the cell phone records that placed his phone in the same location as the victim's phone at that time.

ability to understand the nature of his rights and the consequences of abandoning them." *Bell,* 367 F.3d at 461 (citing *Soffar v. Cockrell,* 300 F.3d 588, 596 (5th Cir. 2002) (en banc) and *Self,* 973 F.2d at 1205).

Both the trial court and the court of appeals expressly found Petitioner's statement voluntary. The TCCA summarily denied Petitioner's claims, so the Court looks through that summary denial to the reasoning of the Eleventh Court of Appeals. The court of appeals determined that "[t]he entire conversation between the rangers and [Petitioner] indicated that they all believed that [he] was free to leave" and that "the initial portion" of Petitioner's statement was voluntary. (Dkt. No. 24-3 at 4, 5.) Then, after his arrest for online impersonation, the rangers read Petitioner his *Miranda* rights, and the court found that Petitioner voluntarily waived those rights and continued the interview. (*Id.* at 5.) Petitioner has not shown that the state court's voluntariness determination was contrary to or involved an unreasonable application of Supreme Court precedent.

The state court also implicitly found that the officers' tactics were not coercive. This subsidiary fact finding is entitled to the presumption of correctness under Section 2254(e)(1). *See Valdez v. Cockrell*, 274 F.3d 941, 948 n.11 (5th Cir. 2001) (explaining that "[t]he presumption of correctness not only applies to explicit findings of fact, but it also applies to those unarticulated findings which are necessary to the state court's conclusions of mixed law and fact"); *see also Ford v. Davis*, 910 F.3d 232, 234–35 (5th Cir. 2018). Petitioner has not overcome the presumption of correctness with clear and convincing evidence.

At the suppression hearing, the parties disputed the effect of certain facts on the voluntariness determination. Petitioner argued that "he was asked to do more than just answer questions. He was bartered things like cigarettes, would not provide them until he provided more information." (Dkt. No. 24-13 at 6.) The State answered, "[a]s far as the

cigarettes, I believe the Court will see at the end of the video that not only did they offer him breaks, which he declined, they also offered to get him cigarettes and a lighter." (*Id.* at 8.)

The parties also disputed the effect of the ranger's words at the beginning of the interview. The State argued that the ranger "simply got tongue-tied" and used a double negative, explaining that he was not telling Petitioner that he was under arrest, or that he was not free to leave. (*Id.* at 7.) The State asserted that "when the court watches the video it is blatantly obvious that everybody understood the terms and conditions." (*Id.*) Petitioner argued that "[w]ords have meaning" and that regardless of "what was intended," the ranger told Petitioner he was not free to leave. (*Id.* at 8.)

Ultimately, however, the court of appeals discussed "several facts [that] indicate" that the interview was voluntary. (Dkt. No. 24-3 at 4.) The court found that Petitioner "requested to meet with the rangers," and that he "drove himself and came with his girlfriend to the police station." (*Id.*) "The rangers permitted [Petitioner's] girlfriend to enter the interview room, discuss the situation with him, leave, and wait for [him] in another room." (*Id.* at 5.) The court also discussed the fact that Petitioner did get up and leave at some point; "[h]owever, by the time [he] made it outside the station, the rangers had decided to place him under arrest for online impersonation." (*Id.*) The state court resolved these fact questions in favor of the prosecution, implicitly finding that the officers' tactics were not coercive. This subsidiary fact determination is supported by the record, and Petitioner has not overcome the presumption of correctness.

The state court reasonably rejected Petitioner's arguments that his statement was coerced. And notably, Petitioner did not confess to the murder. "Absent police conduct causally related to the confession, there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law." *Colorado v. Connelly*, 479 U.S.

157, 164 (1986). Thus, Petitioner has failed to show that the state court's denial of this claim was unreasonable.

iv. Ground Four: Trial Court Error

Petitioner also alleges that the trial court erred when it denied (a) his request for a mistrial, (b) a jury instruction on the voluntariness of his statement, and (c) his motion for a directed verdict. (Dkt. No. 1 at 7.) Additionally, Petitioner alleges two unexhausted claims of trial court error—in (d) allowing the Brown County prosecutors to assist in his capital murder prosecution, and (e) denying his request for additional DNA testing.

The TCCA's judgment is a final and authoritative answer to Petitioner's claims that the trial court violated or misapplied state law. This Court will not reexamine state-court determinations on state-law questions. *See Estelle*, 502 U.S. at 67–68. Thus, to the extent that Petitioner bases his grounds for relief on the application of a state procedural rule, his claims are not cognizable under Section 2254.

Petitioner requested a mistrial after the jury heard a fleeting mention of his parole status in his video-recorded statement, due to a redaction error. (Dkt. No. 24-9 at 106.) The trial court denied the motion. (*Id.* at 108.) Later, the trial court asked Petitioner to consider whether he wanted the court to instruct the jury to disregard the mention of his parole status. (Dkt. No. 24-10 at 5–6.) The trial judge explained that he was "willing to . . . explain it to them," but acknowledged that Petitioner may not want to emphasize it by bringing it up again. (*Id.*) After discussing it with his attorney, Petitioner opted "to make no further mention of it" to the jury, "because . . . it might reinforce the idea in their mind." (Dkt. No. 24-11 at 113.)

Petitioner's mistrial claim hinges on state-law grounds. And as explained above, federal habeas relief will not issue to correct errors of state law, unless a federal issue is also

present. *Estelle*, 502 U.S. at 67–68. To the extent that this claim implicates due process, "[t]he erroneous admission of prejudicial evidence will justify habeas relief only if the admission was a crucial, highly significant factor in the defendant's conviction." *Neal v. Cain*, 141 F.3d 207, 214 (5th Cir. 1998).

It is clear from the record that the inadvertent, brief mention of parole was not "so unduly prejudicial that it render[ed] the trial fundamentally unfair." *Payne v. Tennessee*, 501 U.S. 808, 825 (1991). While discussing the pros and cons of giving a limiting instruction after the fact, the trial judge described it as "just a quick reference to maybe parole" and explained that he "was listening and [he] didn't pick up on it." (Dkt. No. 24-10 at 6.) The inadvertent admission of a brief reference to Petitioner's parole status does not implicate the Due Process Clause. Petitioner has no right to federal habeas relief on this ground.

Likewise, improper jury instructions in a state criminal trial will generally not support federal habeas relief. *Estelle*, 502 U.S. at 72 (explaining that a petitioner has no right to federal habeas relief simply because a jury instruction was deficient under state procedural law). Rather, the only question for the federal court is "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." *Id.* (quoting *Cupp v. Naughten*, 414 U.S. 141, 147 (1973)). And "[a]n omission, or an incomplete instruction, is less likely to be prejudicial than a misstatement of the law." *Henderson v. Kibbe*, 431 U.S. 145, 155 (1977).

Here, Petitioner did ~~not request~~ a jury instruction on the voluntariness of his statement. Nor did he object to the jury instructions as prepared by the trial court. (Dkt. No. 24-12 at 4.) And, as discussed above, the trial court conducted a hearing on the voluntariness of the statement and determined it to be voluntary. The Court has found the state court's voluntariness finding to be reasonable. Petitioner has not shown that the trial

court's failure to give a voluntariness instruction—that he did not request—so infected his trial as to render his conviction unconstitutional. The state court's rejection of this claim was reasonable.

Additionally, Petitioner claims the trial court abused its discretion by denying his motion for directed verdict. "Under Texas state law, alleged errors regarding the denial of a motion for a directed verdict are construed as a challenge to the legal sufficiency of the evidence." *Barley v. Stephens*, No. CV H-15-1529, 2016 WL 739848, at *11 (S.D. Tex. Feb. 25, 2016) (citing *Williams v. State*, 937 S.W.2d 479, 482 (Tex. Crim. App. 1996)). The Court has already discussed Petitioner's sufficiency-of-the-evidence claims and found no constitutional error. Petitioner had "no federal constitutional or statutory right to a directed verdict in state court." *See Howard v. Davis*, No. CV H-18-2436, 2019 WL 291980, at *5 (S.D. Tex. Jan. 23, 2019). Thus, the trial court's denial of a directed verdict does not create a viable claim for federal habeas relief.

Petitioner's remaining claims of trial-court error, related to DNA testing and the disqualification of the prosecuting attorneys, are unexhausted and procedurally barred. But the Court denies them anyway because they are also without merit. Again, Petitioner's claims stem from alleged errors of state law. Petitioner had no federal right to post-conviction DNA testing. *See Dist. Attorney's Off. for Third Jud. Dist. v. Osborne*, 557 U.S. 52, 73 (2009). "Any right to post-conviction DNA testing arises only under Texas law and does not raise a federal constitutional issue." *Glenn v. Stephens*, No. 3:14-cv-3403-D-BH (N.D. Tex. Mar. 17, 2015) (collecting cases).

Finally, Petitioner's claim that the trial court abused its discretion by allowing two prosecutors from Brown County to help prosecute his Coleman County capital murder charge must fail. The record reflects that the elected District Attorney of Coleman County,

Heath Hemphill, appointed two prosecutors from Brown County, Michael Murray and Sam Moss, as Assistant District Attorneys "to perform any and all acts and things necessary in" Petitioner's Coleman County trial. (Dkt. No. 24-14 at 95.) This deputation was authorized by Texas Government Code §§ 41.102–105. The record does not show that Petitioner ever objected to the deputation of the Brown County prosecutors.

Further, the trial court could not have disqualified the lawfully appointed assistant district attorneys. "A trial court judge is without legal authority to remove a District Attorney from a case and, as such, any order attempting to do so is void." *State ex rel. Eidson v. Edwards*, 793 S.W.2d 1, 5 (Tex. Crim. App. 1990). If a conflict of interest arises, the responsibility of recusal lies with the prosecutors, not with the trial court judge. *State ex rel. Eidson v. Edwards*, 793 S.W.2d 1, 6 (Tex. Crim. App. 1990). "A trial court may not disqualify a district attorney or his staff on the basis of a conflict of interest that does not rise to the level of a due process violation." *Id.*

Here, there is no evidence of a conflict of interest, much less one that rises to the level of a due process violation. Brown County and Coleman County are neighbors. The State alleged that Petitioner's crime began in Brown County, when he kidnapped or attempted to kidnap the victim. From there, Petitioner traveled with the victim to Coleman County, where her body was later discovered. The record reflects that law enforcement from both counties were involved from early in the case. (*See* Dkt. No. 24-59 at 6.) As a result, Hemphill, Massey, and Moss had a shared interest in prosecuting Petitioner.

In sum, Petitioner's allegations of trial court error have failed to state any viable claim for federal habeas relief.

v. Ground Five: Due Process

Petitioner claims that his federal due process rights were violated when (a) law enforcement failed to investigate other suspects and test all of the physical evidence, (b) his conviction was premised on "junk science," i.e., GPS mapping data that was unreliable and inaccurate, and (c) the Brown County District Attorney relied on his ranger interview in his Coleman County trial after telling the Brown County court that he believed it was unlawful.

"Defendants do not enjoy a general constitutional right to a proper or thorough investigation of the offense with which they are charged." *Riley v. Quarterman*, No. H-07-2087, 2008 WL 4425366, at *7 (S.D. Tex. Sept. 24, 2008). In federal habeas review, this type of claim invokes due process only if the petitioner can show that that the police investigation was so inadequate that it was "tantamount to a suppression of relevant evidence." *Owens v. Foltz*, 797 F.2d 294, 296 (6th Cir. 1986) (citing *Brady*, 373 U.S. 83). When a petitioner alleges "nothing more than negligence on the part of the police investigators," without evidence that investigators acted in bad faith by failing to preserve evidence, he has failed to state a viable due process claim. *Riley*, 2008 WL 4425366, at *7 (citing *Holdren v. Legursky*, 16 F.3d 57, 60 (4th Cir. 1994)).

Here, Petitioner raised issues related to the deficiencies in the investigation as part of his defense at trial, including law enforcement's early focus on him as the primary suspect to the exclusion of other possibilities and the failure to test certain items of physical evidence.[6] The jury was free to consider these arguments in determining whether the State proved its

[6] And law enforcement witnesses explained that because of limited resources, they chose only to test evidence that they believed would produce probative results, rather than confirming undisputed information. For example, a detective testified that he chose not to test evidence from the victim's car for DNA or fingerprints because it was undisputed that the victim, Petitioner, and the victim's boyfriend had all been inside the vehicle. (Dkt. No. 24-9 at 68–69.) So law enforcement did not believe that testing the evidence would aid their investigation as to who was responsible for the victim's death. (*Id.*)

case beyond a reasonable doubt. Now, Petitioner speculates, in conclusory fashion, that if law enforcement had conducted a more thorough investigation, or had tested more of the physical evidence, he would not have been convicted. Petitioner's inadequate-investigation claim fails to rise to the level of a constitutional violation. The TCCA reasonably rejected this claim.

Petitioner's claims that the GPS technology used to map the locations of his phone and the victim's phone was unreliable "junk science." Aside from his own conclusions, Petitioner has offered no support for his claim that this type of evidence has been discredited. And his conclusory statements do not present a constitutional issue for federal review. *Schlang*, 691 F.2d at 799. Nor is there any "clearly established federal law" that entitles Petitioner to raise his challenge here. *See Pedraza v. Davis*, No. 2:17-CV-190-Z-BR, 2020 WL 4720093, at *5 (N.D. Tex. July 23, 2020), *report and recommendation adopted,* No. 2:17-CV-190-Z-BR, 2020 WL 4698325 (N.D. Tex. Aug. 13, 2020); *Williams v. Taylor*, 529 U.S. 362, 377–80 (2000) (requiring a federal court to deny habeas relief that depends on a rule of law not clearly established when the state conviction became final). The Court also notes that Petitioner did not object to the evidence at trial. (*See* Dkt. No. 24-10 at 112–58.) He vaguely referred to the expert testimony in discussing his pretrial motion in limine, but the trial court denied the motion because counsel did not ask for a "Daubert, Robinson or any of that business exclusion." (Dkt. No. 24-6 at 10.) For all of these reasons, the TCCA reasonably rejected Petitioner's challenge to the reliability of the cell-phone location evidence.

Petitioner also asserts that his due process rights were violated when the Brown County prosecutors introduced his ranger statement in his Coleman County trial, despite previously telling the Brown County court that they would not introduce it because it was

unlawfully obtained. But as explained above, Petitioner failed to properly raise this judicial estoppel[7] argument in the state courts. Thus, it is unexhausted and procedurally barred from federal review. The Court cannot grant relief on this claim. 28 U.S.C. § 2254(b). Neither can the Court deny this claim on the merits. The record before the Court is limited to his Coleman County capital murder proceedings and does not include transcripts or other records from Petitioner's related, but distinct, Brown County criminal proceedings. Thus, the Court lacks the records necessary to determine the merits in the first instance.

vi. Ground Six: Jury Misconduct

In his sixth ground for relief, Petitioner complains that the jury was permitted to consider evidence not presented at trial. Although Petitioner characterizes this as jury misconduct, he really complains that the judge improperly influenced the jury with supplemental instructions. Specifically, Petitioner challenges the trial court's response to a jury note. After deliberations began, the jury sent out written questions about the victim's boyfriend, Kemper Croft. (Dkt. No. 24-14 at 96.) The note read, "Was Kimper Croft interrgated – What is his status today? – Was his phone record looked at [all sic]." (*Id.*) The trial judge responded by writing on the note, "1. Mr. Croft was questioned. 2. There was no evidence on his 'status.' 3. There was no evidence on Croft's phone records."

Petitioner alleges that the trial court permitted the jury to consider evidence outside the record. The Supreme Court has explained that a trial judge may comment on the testimony offered at trial when instructing a jury, but he "may not either distort it or add to it." *Quercia v. United States*, 289 U.S. 466, 470 (1933). The Court emphasized a judge's

[7] Judicial estoppel is "a common law doctrine by which a party who has assumed one position in his pleadings may be estopped from assuming an inconsistent position. The purpose of the doctrine is to protect the integrity of the judicial process, by preventing parties from playing fast and loose with the courts to suit the exigencies of self interest." *In re Coastal Plains, Inc.*, 179 F.3d 197, 205 (5th Cir. 1999) (internal citations and quotations omitted).

obligation to communicate with the jury in a way that is neither misleading nor one-sided. *Id.* So a trial judge should respond to jury questions "with concrete accuracy." *Bollenbach v. United States*, 326 U.S. 607, 613 (1946). When a jury seeks guidance after deliberations have begun, "the court must exercise special care to see that inaccuracy or imbalance in supplemental instructions do not poison an otherwise healthy trial." *United States v. Carter*, 491 F.2d 625, 633 (5th Cir. 1974). The Fifth Circuit has observed that "the touchstone of the inquiry might be described as whether there was prejudice to the defendant." *United States v. Le*, 512 F.3d 128, 132 (5th Cir. 2007). Petitioner cannot show any prejudice here, because the record betrays his contention that the jury considered evidence outside the record.

The trial court's response to the jury's questions accurately reflected the evidence introduced during trial. The fact that law enforcement questioned Kemper Croft, at least twice, was discussed at length during the trial. (*See* Dkt. No. 24-9 at 63, 78, 86–89.) Moreover, the trial court's other responses—that no evidence was introduced to answer their questions—did not provide the jurors with any information outside the record.[8] Additionally, there is no indication that Petitioner objected to the court's response at the time.

In sum, the court's responses to the jury questions were neither misleading nor one-sided. And most importantly, the responses did not prejudice Petitioner. Petitioner has not shown that the trial court's response to the jury's note improperly influenced the jury or in any way deprived him of a fair trial. The TCCA reasonably rejected this claim in light of clearly established federal law.

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[8] In fact, the testimony at trial at least strongly suggested that law enforcement looked at Kemper Croft's cell phone records in ruling him out as a suspect. (Dkt. No. 24-9 at 89.) So if the trial court's response to the jury's note was inaccurate at all, that inaccuracy was favorable, rather than prejudicial to Petitioner.

Not what was said

vii. Ground Seven: Improper Jury Argument

Similarly, Petitioner claims that the prosecutor improperly argued to the jury that he "knew how the gun was used," even though "there was no mention of any weapon ever being introduced or used" at trial. (Dkt. No. 1 at 8.) But Petitioner's claim misrepresents the evidence. The prosecutor first summarized the evidence that the jury heard, including evidence that Petitioner (1) recently asked his nephew about where a deceased relative's .32 caliber gun ended up, and (2) bought .32 caliber ammunition on the day of the victim's disappearance. (Dkt. No. 24-12 at 34–35.) The prosecutor acknowledged to the jury that law enforcement never found the gun or the ammunition but reminded them of the relevant testimony they had heard and the surveillance video of Petitioner purchasing the ammunition—using his girlfriend's debit card and having recently removed the sewn-on name tag from his shirt. (*Id.* at 35.)

Later, the prosecutor discussed the State's theories for why the victim may have left with Petitioner, despite evidence that she was afraid of him and had told her friends she would not get into a car with him. (*Id.* at 37.) The State suggested two theories and asked the jury to consider what made sense in light of the evidence they had seen. "Could it have anything to do with a .32 caliber pistol?" Or "was it the big deception of" promising to return the victim's personal property? (*Id.*) Discussing the kidnapping element of the charged crime, the prosecutor concluded that "whether he . . . gets her into the truck by deception, or whether he puts a gun in her face and forces her into the vehicle, it matters not which one." (*Id.*)

Under Texas law, "[i]t is well established that proper jury argument must fall within one of the following categories: (1) summary of the evidence; (2) reasonable deduction from the evidence; (3) in response to argument of opposing counsel; and (4) plea for law

enforcement." *Borjan v. State*, 787 S.W.2d 53, 55 (Tex. Crim. App. 1990). Thus, a prosecutor may "draw from the facts in evidence all inferences which are reasonable, fair and legitimate, but he may not use the jury argument to get before the jury, either directly or indirectly, evidence which is outside the record." *Id.* at 57. For purposes of federal habeas review, "[t]he relevant question is whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974)).

The TCCA's summary denial of this claim includes an implicit finding that the State's jury argument was proper. Indeed, the TCCA could have reasonably found that the prosecutor's comments fell into permissible categories of arguments—summarizing the evidence and drawing reasonable deductions from the evidence. The record disproves Petitioner's claim that the prosecutor mentioned evidence that the jury had not heard. The State's arguments recalled the testimony of Petitioner's nephew, two employees of the sporting goods store where Petitioner bought ammunition, as well as surveillance footage and a time-stamped receipt. Then, the State asked the jury to draw reasonable inferences from that evidence, all while acknowledging that some of the details remain unknown. The prosecutor's comments were well within the limits of a proper jury argument. Thus, the Court cannot conclude that the State's closing argument rendered Petitioner's trial unfair or resulted in a denial of due process. The TCCA reasonably rejected this claim.

viii. Ground Eight: Ineffective Assistance of Counsel

In his final ground for relief, Petitioner asserts that he received ineffective assistance of counsel at trial and on appeal. First, he claims that his trial attorney had a conflict of interest because he also represented a person listed as a possible State's witness but who

never testified. (Dkt. No. 1 at 8.) Then, he claims his appellate attorney was ineffective for failing to raise a "Dead Bang winner" of a claim—related to the denial of his request for mistrial—that he contends would have resulted in reversal. (*Id.*)

The well-known standard for judging Petitioner's contentions is articulated in *Strickland v. Washington*, 466 U.S. 668, 689 (1984). Under the two-pronged *Strickland* test, a petitioner must show that counsel's performance was both deficient and prejudicial. *Id.* at 687. An attorney's performance was deficient if the attorney made errors so serious that the attorney was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment to the United States Constitution. *Id.* That is, counsel's performance must have fallen below the standards of reasonably competent representation as determined by the norms of the profession.

A reviewing court's scrutiny of trial counsel's performance is highly deferential, with a strong presumption that counsel's performance falls within the wide range of reasonable professional assistance. *Id.* at 689. A strong presumption exists "that trial counsel rendered adequate assistance and that the challenged conduct was reasoned trial strategy." *Wilkerson v. Collins*, 950 F.2d 1054, 1065 (5th Cir. 1992) (citing *Strickland*, 466 U.S. at 694).

Additionally, a petitioner must show that counsel's deficient performance prejudiced the defense. To establish this prong, a petitioner must show that counsel's errors were so serious as to deprive petitioner of a fair trial. *Strickland*, 466 U.S. at 687. Specifically, to prove prejudice, a petitioner must show "(1) there is a reasonable probability that, but for counsel's unprofessional errors, the ultimate result of the proceeding would have been different . . . and (2) counsel's deficient performance rendered the trial fundamentally unfair." *Creel v. Johnson*, 162 F.3d 385, 395 (5th Cir. 1998). "Unreliability or unfairness does not result if the ineffectiveness of counsel does not deprive the defendant of any

substantive or procedural right to which the law entitles him." *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993). This is a heavy burden that requires a "substantial," and not just a "conceivable," likelihood of a different result. *Richter*, 562 U.S. at 112; *see also Pinholster*, 563 U.S. at 189.

In the context of § 2254(d), the deferential standard that must be given to counsel's representation must also be considered in tandem with the deference that must be accorded state-court decisions, which has been called "doubly" deferential. *Richter*, 562 U.S. at 105. "When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Id.* Additionally, if a petitioner fails to show either the deficiency or prejudice prong of the *Strickland* test, then the Court need not consider the other prong. *Strickland*, 466 U.S. at 697.

Here, Petitioner's ineffective-assistance-of-counsel claim was adjudicated on the merits in his state-court proceeding, and the denial of relief was based on a factual determination that will not be overturned unless it is objectively unreasonable in light of the evidence presented in the state-court proceeding. *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003). As part of the state habeas review process, the trial court gathered affidavits from Petitioner's attorneys and made findings of fact and conclusions of law, recommending that the TCCA deny Petitioner's ineffective-assistance-of-counsel claims.

The trial court found that Petitioner's trial attorney notified Petitioner of the ~~potential~~ whether conflict if the witness were called to testify ~~and~~ that Petitioner waived the potential conflict, choosing to continue with his lawyer. (Dkt. No. 24-59 at 4.) The trial court further found that no actual conflict ever arose because the witness was not called to testify. (*Id.*) The court also found that Petitioner's lawyer could not have "steered" the trial away from

his client being called as a witness, and no evidence suggested that the witness could have provided any evidence or testimony that would have helped Petitioner had he been called.[9] (*Id.* at 4–5.) Based on these facts, the trial court determined that Petitioner had not shown that his lawyer's performance was deficient or that he was harmed as a result. (*Id.* at 5.)

Similarly, the trial court found no error in appellate counsel's failure to raise the mistrial claim. After reviewing the record and the affidavit of Petitioner's appellate attorney, the trial court found that the decision not to raise the mistrial issue "was a studied and conscientious strategic decision made by appellate counsel." (Dkt. No. 24-59 at 5.) The court also found that the decision was reasonable and supported by legal authority, in light of the trial court's offer of a limiting instruction as an alternative remedy for the inadvertent mention of Petitioner's parole status and Petitioner's declining to request the instruction. (*Id.*) And the trial court found that Petitioner's appellate attorney made him aware of the decision not to raise this issue on appeal. (*Id.*) So the trial court concluded that Petitioner was unable to establish either deficient performance by his appellate attorney or resulting prejudice. (*Id.*) The trial court submitted these findings of fact and conclusions of law to the TCCA, and the TCCA denied Petitioner's habeas application without written order. (Dkt. No. 24-45.)

Section 2254(e)(1) provides that a factual finding made by a state court must be presumed to be correct. The petitioner has the burden of rebutting this presumption of correctness by clear and convincing evidence. *Hill v. Johnson*, 210 F.3d 481, 485 (5th Cir. 2000). This type of state-court factual determination is not unreasonable even if the federal

[9] The affidavit of Petitioner's lawyer also explains that the prosecutor had a habit of adding current or former clients of defense counsel to State's witness lists to obtain the withdrawal of defense counsel. (*See* Dkt. No. 24-59 at 7.) And there was no indication that the State ever intended to call the witness to testify because he was not a fact witness and no subpoena was ever issued for his presence at trial. (*Id.*)

habeas court would have reached a different conclusion in the first instance. *Burt v. Titlow*, 571 U.S. 12, 18 (2013).

Moreover, when, as here, "a state court has already rejected an ineffective-assistance claim, a federal court may grant habeas relief [only] if the decision was 'contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.'" *Yarbrough v. Gentry*, 540 U.S. 1, 5 (2003) (quoting 28 U.S.C. § 2254(d)(1)). *See Santellan v. Cockrell*, 271 F.3d 190, 193 (5th Cir. 2001) ("[A] federal court's authority under AEDPA is . . . limited to determining the reasonableness of the ultimate decision," even if the state court has rejected an ineffective-assistance claim with no reasoning.).

Given the circumstances, the state habeas court's finding that counsels' performance was not deficient is reasonable based on the state-court records. Petitioner has not presented clear and convincing evidence to rebut any of the trial court's findings. He has not rebutted the finding that he knowingly waived his trial attorney's potential conflict. And more importantly, he has not shown that an actual conflict of interest arose or that he was harmed in any way by his attorney's representation. The state court reasonably concluded, consistent with the Supreme Court's *Strickland* standard, that Petitioner failed to show that his trial attorney's performance was deficient or that he suffered any harm as a result.

The *Strickland* standard applies equally to claims against appellate counsel. *See Smith v. Murray*, 477 U.S. 527, 535–36 (1986). As discussed above, Petitioner's mistrial claim is flimsy. The error itself—the quick, inadvertent mention of Petitioner's parole status—was relatively minor. Despite his repeated contention that the claim is a "Dead Bang winner," Petitioner has not shown, at any level of review, that the trial court erred in denying his request for mistrial. In any event, the "process of winnowing out weaker arguments on

appeal and focusing on those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy." *Smith*, 477 U.S. at 536 (1986) (internal quotation marks omitted) (quoting *Jones v. Barnes*, 463 U.S. 745, 751–52 (1983)). The TCCA reasonably concluded that Petitioner failed to satisfy either prong of *Strickland*'s test for ineffective assistance of counsel.

Because reasonable arguments could support the state court's finding that Petitioner's counsel satisfied both prongs of *Strickland*'s deferential standard, Petitioner has no right to relief under Section 2254(d).

4. Conclusion

After carefully reviewing the state court records and the pleadings, the Court finds that an evidentiary hearing is unnecessary to resolve the instant petition. *See Young v. Herring*, 938 F.2d 543, 560 n. 12 (5th Cir. 1991) ("[A] petitioner need not receive an evidentiary hearing if it would not develop material facts relevant to the constitutionality of his conviction."). For the reasons discussed above, the Court finds that Petitioner is not entitled to federal habeas relief. His claims are partially unexhausted and procedurally barred, and he has otherwise failed to show that the state-court adjudication of his claims was contrary to or involved an unreasonable application of clearly established federal law as determined by the Supreme Court of the United States, or was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d).

The Court therefore orders:

(1) The petition for writ of habeas corpus is denied and dismissed with prejudice.

(2) All relief not granted is denied, and any pending motions are denied.

(3) Under Rule 22 of the Federal Rules of Appellate Procedure and 28 U.S.C. § 2253(c), this Court finds that a certificate of appealability should be denied. Petitioner has failed to show that reasonable jurists would find (1) this Court's "assessment of the constitutional claims debatable or wrong," or (2) "it debatable whether the petition states a valid claim of the denial of a constitutional right" and "debatable whether [this Court] was correct in its procedural ruling." *Slack v. McDaniel,* 529 U.S. 473, 484 (2000).

The Court will enter judgment accordingly.

Dated March 28, 2022.

James Wesley Hendrix
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
SAN ANGELO DIVISION

H

LANNY MARVIN BUSH,

Petitioner,

v.

DIRECTOR, TDCJ-CID,

Respondent.

No. 6:19-CV-00006-H

JUDGMENT

For the reasons stated in the Court's order entered today, it is ordered, adjudged, and decreed that this petition for writ of habeas corpus is dismissed with prejudice.

Dated March 28, 2022.

James W. Hendrix

James Wesley Hendrix
United States District Judge

NOVEMBER 03rd, 2022

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

OFFICE OF THE CLERCK
Lyle W. Cayce

RE: Document: oo516523544; Filed 10/26/22; Casw: 22-10345

Dear Mr. Cayde:

Please be advised that the ORDER was received and I would like to point out the following:

- Judge Jerry F. Smith GRANTED motion to file a supplemental brief; This brief was filed in the 5th Cir. on July 20, 2022. (Please see your records for this document.)
- A motion to leave was also filed in the 5th Cir. on July 20, 2022. These were mailed postage paid at the same time to the court.

Elements of the Judges findings per the ORDER are ambiguous at best and leaves question as to exactly what the Court seeks for the requested relief. Namely, page 3 of document 00516523655, papagraph 2; "To obtain a COA, Bush must make '"a substantial showing of the denial of a constitutional right."' Said information is unequivocally present in: Document 31, Filed 05/23/19 in the Northern District of Texas, San Angelo Division, which was mailed to this honorable Court with the other aforementioned documents.

I am requesting your office to inform me if new copies must be mailed, or will the copies I have already submitted be entered into the record. I would appreciate your attention in these matters and advising me accordingly.

Respectfully,

Lanny M. Bush-1917810
3201 FM 929 Hughes Unity
Gatesville, Texas 76597-0001

APPENDIX I

UNITRED STATES COURT OPF APPEALS
5th CIRCUIT
NEW ORLEANS, LA

LANNY M. Bush; Petiotioner (
)
V. (CAUSE NO: 00-10345
BOBBY Lumpkin; Director, TDCJ)
Respondent (

PETITIONERS SUPPLEMENTAL BRIEF

Honorable Justices of Said Court;

Comes, Petitioner in this cause whom files this his supplemental brief for Additional consideration on the Merits along woith his Original Brief. Petitioner will contend the following;

I.

Issues Prsented

1. Insufficent Evidence to support a Capitol Conviction
2. Due Process Violation, Not allowed to rebutt Addversail proceedings .
3. Conflict of Intrest- betewwen the Attorney and States witness whom was also a client of the Attorney of record
4. In-Effectcive assisitance of Counsel; Counsel labored under conflcict, Didnot Invetigate, Failed to object to Closing arguments Failed to Object, allowed junk science to be intorduced
5. Colletreal Estoppel- District attorney abused his Powerby introducing a Ranger Statement that he had Previously stated in open court that was Illegal and woiuld not be using it, in another Court then usewd the Statement in this Prosecution.
6. Suppressed Evidence- State suppressed evidence and statements thaT HAD THE Jury been awaare of would have resulted in a different outcome. Statements that would have created a reasonable doubt.
7. Miranda violations- used and extracted a Illegal statement with coercion, thraets and Bribes without given Miranda Warrings.

Petitioner contends that these Violation deprived him of a Fair and Impartial Trial.

APPENDIX J

II.

Insufficient evidence to support a Capitol Murder conviction(Kidnapping)

Petitioneercontends that the Conviction for capitol Murder, does not support the Canvisctionby evidence. I Order for a Capitol murder to be Legal an underlying felony must be Proven. In this case Kidnsapingis supposely the uidrrlying felony. However Kidnapping requires proof pf rerstraint and use of force... Both the CoC.A and the District court rukled on the fact of the Soft Robe belt that was founf in the Petitioners Truck someweeks later. Neither Couer took into considerationm that petitioner had recently moved from one city to another and the soft Robe belt could have been the remaints of the Move. Both copurts speculated to the Illegal Use of the Robe belt w/o and evidence to support kidnapping.

Both Courts also considered Freon in the Petitioners truck as Part of the act of Kidnapping. Neither court considered the Proper use of the Freon, instaed speculated on illegal use. The CCA desenting Opinion, went into great lenghts to show how impossible that ideal would be to restrain the Victum, use the Freon and NOT get himself Intoxicated in the Process.(See CCA Diosenting Opinion of J. Walker and J. Alaala). The 11th Court of appeals got it right when thay reversed the convictioin and remanded to trial court for resentcing on punishemnt , citing evidence was insufficent to support capiool murder. The legal defenition of Capitol murder is defined as; Under denal code 19.03(a)(2),... aperson commits capitol murder if the person Intentionslly commits the Murder in the course of commoitting or attempting to commitKidnapping,Burglary, Robbery,Aggrevated sexual as-ualt arson, or terroristic threat..... in this case the state was burdenb with proving both that the appellant intentionally caused the death, and did so in the course of Kidnapping.(CR-9)(Clerks record). Kidnapping is intentionally or knowlingly restricing a person movements, by either moving a person from one place or another, or confining a pereson wotout that persons consent..Penal code §20.01(1)(A),(B) (A)and(B) and 20.03.(a).requires that both restraint and intent be p proven. Petitioners case doinot do that. Instaed CCa and the district Court Speculated on Issues that were never proven to be Illegal,(ie-Freon amd Robe belt) In Ordder to prove capitol Murder, that State is Required to prove beyong a resaonable doubt that the Petitioner had the specific intent to commit kidnappiung and he committed an ACTTHAT amounted to more than mere preperation.. The State does not

focus on the fact of no direct evidence and merely relies on speculation and Could Have's . The State and the CCa along with the District Court wants this Court to Blindly accept all possible Inferences and speculation without any evidence, direct or circumstantial to support the Underlying felony. The 11th court of appeals stated that :"even under a defenterial standard inferences alone cannot be held to support a verdit of capitol murder when there is a absence of Evidence. Inferences are not on the samne level as evidence. In the States Brief, they admitted that ghere was No Direct evidencethat victum was moved, or held agiasnd her will. There is no evidence to establish Petitioner kidnapped victum at the Baseball field where the victum car was found, There is no eveidence to substaibn any struggle took place(vol6p100).The only remotely evidence that victum and Petitioner were in the same general location is the ZCellPhone date(Vol-7,p19). Cell Phone date that isnot proven to be Reliable ar accurate, acnnot be construed as evidence. Even so Cell phone data is not idicutive of kidbappingand does not saatisfy the element of the offense of kidnapping. The standard for reviewing legal sufficency clams is Jackson V. Virginia,443 UW 307(1977), esatblishing that the evidence is sufficent if viewed in the light most favorable to the verdict, any ratiomaal trier of fact could have found the elements of the offense beyong a reasonable doubt . The offense of Kidnapping is complete when the restraint is accomplished and there is evidence that the defendant intented to restrain the Victu.. The State offered no evidence in this case that there was a Kidnapping. The Circumstal evidence and ZInferences does not support the necessary requirements. (1) the existance and timing of appellant?petitioners Intent to kidnappe victim(2) theaccomplishmnet or attempted restraint(3) the lack of consent by victim to moved from one place to another, by Petitioner. To substain a conviction of Capitol murder, Petitiomner mustr have been in the Course of kidnappingwhen he commited Murder. Where thre is no evidence that to support kidnapping. There is no evidence to substaniate retaraint or use of deadly force, no evidence of struggle, (direct of circumstanial)noisigns of foukiplay at the scene where the car was found, or otherwise. Considering all the possible scenarios any plausable thing could have happend. Celll phone data alone cannot supporta conviction for capitol Murder based on the Untested and in-accurate science.

2. DUE PROCESS VIOLATIONS ;

Petitioner contends that he has a right under the 14th Ammendment of the United states Consitution, to due Process in any adversal porceeding and should not be deprived of Life liberty or Property without such Due Process. During Petitioners Habeaus corpus petition, The Court of Criminal Appeals issued a Order to the Trial Court to Hold a Fact finding hearing to determine the Content of Petitioners Claim of In-effective Assistance of Counsel, and Conflict of Intrest with His Attorneys of Record. Atttorneys both submitted Statement to the Court, which ruled than sent the Facts and conclusion to the Court of Criminal appeals. That Court dismissed any relief without written Order. Trail court didnot allow Petitioner the Oppertunity to Respond to the Attorenys Statement BEFORE ruling, which greatly deprived Petitrioner of the right to Due Process. CCA then Issued a Ruling before the petitioner could Get a Response in. In-Effective assistance of Counsel and conflict of Interst are grounds in which a Hearing should have been Issued to Detremine the facts.

(b) Petitioner also contends that He has a Right to Testing of DNA when the Idneity of Perpertratior is in question. State had several tyes of Evidence to test, including Biological and Class evidence. State is bound by the Seneate Bill-3 to test any and all Dna when requested. Petitionet requested sucj test but was denied, By the Trial Jude stating:"case on Appeal". State did take a sample of Petitioners Dna for comparision and there was no Match , from the crime Scene, From the Body, or From the Alledged Abduction site. If DNA can convcit witout Question, why Cant Dna Exonarate? Petitioner Asserts that Had there been a Full testing of DNA that was availabe, A guilty Conviction would not have happen, Instaed withoput Full Testing, Petitioner was denied his Consitutional right to due Process. A Famous Frenc Criminaligst Named Stephen Locard, intoduced the Locard Principal, which is Proven that "there is always and exchange of Evidence between Victim and Perp." In the case at Bar, Not one piece of DNA if found that matches the Petitioner. Court must ask themself why? Could it be that maybe the Petitioner is in fact Innocent If Not why isnt there some type of DNA matching to the Petitioner?

3. Conflict of intrest==; Petitioner contends that hee was denied hid right to Effective assistance of Counsel because of the conflict on Intrest between the attorney of recoed and the states witness, whom had been Placed on the State switness list some 10 daty prior oo Trial. Attorney submitted a Affivdavit that Stated that he had spoken with the Petitioner prior to triua about such conflcit. However petitioner contends that no such meeting ever took place. For One, Cpunsel could have only learned of such witness on the 27th of March-2014, and any such refrence before that date would have heen premature.Secondly, Why would Counsel attempt to bring a Subjectthat has not arisen yet?

Staee and District court also have stated that no conflict arose because the witness was not called. Petitioner asserts, that this is notTrue, because the Attorney was laboring under the conflict. Attorney copuld not and Would not calll his client so as to expose the "DEAL" between The DA and the wirness for Lesser criminal charges in exchange for testimny afgianst the Petitioner. Such examination coull have and Would have produced the oppertunity to discreedit and impeach other witness. By the Conflict as decribed in the Attorneys Statement, (see attorneys Affivdate) It was acommon Practice foe the Da to craate a Conflict in efforts tp get the attorneys to withdraw. Just One examole of the Underhanded Tactiss of the Prosecutron. In Johnson v. Hopper 639 F.2d 236(5thyCir);THAT Court held that...Ineffective representation by a Lawer Laboring under Conflict of Coarest renders the Trial fundamentally Unfair wether the KJudge knew of the Conflict of Not.(citing Johnson-Supra). A consitutional Implication occurs when defense attorney is Placed in a sisuation inherently conductive to decied loyalties. When a actual conflict exist, Prejudice need not be shown or Proven.. Citing JohnsonSupra. In Cyler v. Sullivan;466 US348, The Suprem Court ruled that a Defendant can show a 6th ammnedemnet violation by proving that .. counsel was actively representinh conflict of Intrest...Also US v. Nickleson;475 F.3D241)

In this case not only has it been stated and Proven that a Conflcit actually existed, but that the Attorney was operating inder such Conflcit, and Did Steer the trial away from calling such witness, therefore depriving petitioner of the right to Cross Examing witness agianst him and denied the Right to Compell witness in his Favor. Both A consitutional right.

4. In-Effective assistance of Counsel;

As Stated Prior to in the Aboveeparagraph, Counsel Labored under Conflcit of Intrest and threefor deprived Petitioner the right to effective assistance of Counsel due to that conflcit.

It was a catch 22 operation designed by the District Attorney knowling that If the counsel called the Witness, It would be a Conflict, and If the Counsel; Didnot call the Witness, that Counsel would deprive the Petitioner of the Right to Cross examne and Compell witness in his favor. The only attertative was for the attorney to steer the Trrial away from calling his Client as a witnesss. Counsel chooose to sway toward the Retained client to protect his rights and Deny Petition his.

(b) Counsel didnot investigate witness for impeachment, or acll any expoert witness or defense witness, Counsel didnot Objcet to Closing argumnets by the District attorney at the Mention od a weapon, and "how It was allege;ly use". Did not object to the SECOND Mention of Prior criminal history, even after altercatinn with the first instance. See Exhibit 41). Counsel allowed Junk science to he intorduce,(GPS MAPPING) when it was proven in Court to be faulty and innaccurate. Counsel Did not object to the District Attorney using the Ranger Statenet agians the Petitioner when the Attorney was the Same one who was in the 35th Court when the DA said that the Ranger was statement was Illgal and would not be using it. Attorney knew colleteral estoppal should have been ineffect, but did nothing.

C. Appellate Counsel; Rendered ineffective assistance of counsel by the starined relainship between Petitioner and Counsel. Attorney would not Communicate with Petitioner, Untill he notified the State Bar in which theCounsel then attempted to withdraw. The Court of

Criminal Appeals refused and Order the Attorney to continue. Then the Communication became hostile. Attorney was instructed to include the mention of Prior criminal History in the appeal Brief, and refuse to do so. Appeal Attorney cited some case law that had nothing remotely to do with the Issue. However It is a Atorneys duty to follow the Clients command. Petitioner had even had issue about the Attorneys Qualifications, since she was mostly a Family lawer and had no experence with Capitol Murder cases.

Appeal Attorney cause the Petitioner to be denied the right to a Fair and right appeal by not including Mention of Priors in the Appeal Brief which is mostly commonly considered a"DEAD bAng winner"

5. Colleteral Estoppel;

Petitioner has repeately complained abouit the District Attorney using the Ranger Statement in another Court when he first said that it was Illegal and would not be using it. However Petitioner did not know that it wass Called Colleteral Esstoppel. Petitioner only knew that it was not right. Petitioner broughyt up the Issue ant every stage of appeal. Petitioner even attempted to get the District court to EXpand the record, to include this thru Motions to expand and Discovery, but was denied by the districf Court.(See Distrcit court Doc#15,28,36,41,43) Petitioner did all that was inhis knowwledge to have the record expanded to include this issue, District Court was not allowing this to proceed.

6. Suppressed Evidence;

State Suppressed statements that ahd they been intorduced would have alterated at least one or more jurors. Statements from the Victims Current Married Boyfrien, that swore he had talked to the victim on at least two seperate times and was"Positive of the days" afetr the Victim had allegely disappeared. Then there was that satement from a Co-Worker and friend who told police that the Victims car was not at the Ball prak that Motnig but was at the Park that eveiniong, whioch would suggerst that the Victim was not abducted as the States so suggested. Takeb into account that the Victim had accepted new friend on face book that following eveingod 09/13/2014. The Two statements alone would have convinced the Jurors that kidnapping was not inthent. It woulkd have created reasonable Doubt.

It is not for thr district attorney to decied what the juoy hears but for the Jury to hear all the evidence favorble to the defendabt. District Court Cited that the Stee fely that the Victims boyfrien was lieing and therefore not truthfull and nou pertaint to the case. But on the other hand, Investigator felt that Petitioner waas lieing also but submitted it to the Court.Juro is entitled to hear all the evidence and decied accordlingly, Not just what the State wants them to thear.

Then Lets look at the Unidentified Witness. WQile it was mentioned in the Trial, The Attorney didnot bring forth the Identification of the witness for cross exameign. This witness gave a deescription of a Man and Woman(who matched the Victim) at the Bal park on 9/2014. What is so suppressed about the Statement id the fact that the witness saw a Pickup (gold in color) and a Man ther aslo. Petitioner asserts that the Pickup could ahve been Idntified if the wiitness had been called. Victims Boyfriend Drove a Gold Pickup with a Ladder rack, But this was not intordued. Petitioners truck was actually sandy Color. Still the Wieness could have identified one or the other Trucks, therfore creating reasonable doubt and altering the Mind of at leastrone juor. Why wasnt this Witness Idnetified and/Or called? Agian In-Effective assistance of counsel.

To date the Petitioner still does not know the Identif of this Witness. Police and State refuse to Idnetify this wirness. Once agian Petitioner sought to Include and gain idenity of this person thru expanding the record. District Court refused.

7. Miranda Violations.

Petitioner contends that he was in custody from the time that he arrived at the Station. What this court does not know is that Petitioner didnot dribe to the Police station. Petitioner founds out that the Rangers had his Girlfriend in the sation for questioning, and knowing that the Rangers werersome-waht carrupt, felt in fear for his Girl ftiend, and asked her to come and get him and take him to the station while they talked to her. Needless to say that one.ce he arrived at the Station all attention turned to Petitioner and the rangers no longer wanted to talk to the Woman. Petitioner and the Lady wuee seperated upon

III.

CONCLUSION

Petitioner that through out the entire appeals process, he has attempted to submitt his errors and grounds in complisnce with the rules. Some grounds have been submitted under diffrent titles, but the Subject is the same, Petitioner moves this court to accept petiotioner ssupplemental Brief, Original Brief, and all other Submitted Plaeding for comsderation in this Matter. Petitioner firmly believed that his rights were and have been violated and this court ahas they POWER And Authority to grant relief as Deemed necassary. Petitioner has never asked for Aquittal, ONLY to have A new Trial, Failrly and Equally.

IV.

RELIF

Petitioner moves this Court to grant rilif in the from of a New Trail On the Merits of this Case and/or reform the conviction to murder and Order A new Trial on punishment only, as the capitol Murder is Illegal.

Petitiomner will forever Pray.

s
se

Lanny M. Bush Pro-Se
3201 Fm 0292
Gatesville Tx 76597

CCERTIFICATE OF SERVICE

I do hereby certify that a tue and correct copt of the Petitinnesr Supplemental Brief ahs been mailed to the United State District Court Correctly Addressed, properly Addressed and postage pre-Paid.

Done this _____day of_____2022

Lanny M. Bush Pro-Se
3201 Fm 929
Gatesville, Texas 76597

UNITED STATES DISTRICT COURT
5TH CIRCUIT
NEW ORLEANS , LA.

K

LANNY M. BUSH: PETITIONER

v.

BOBY LUMPKIN, DIRECTOR, T.C.J., RESPONDANT

CAUSENO:22-10345

MOTION FOR RECONSIDERASTION

Honorable Justices of said Court;

COMES NOW, Petitioner, lanny M. Bush, in the above styled and numbered caused who filees this Mo•ion for reconsideration for Ce•tificate of Appealabilty in this cause. On 10/26/22, this Court issues an Order denying COA to the Petitioner, stating that Petitioner needed to" make a substainal showing of Denial of Consitutional right" to obtain a COA. Petitioner brings to the attention of the Court, the Following;

1. Several Pleadings, SUPPORTING petitioners request for COA were filed in this Court, Only to be filed as "NO ACTION" by the Clerk. Each of these Pleadings supported the Consitutioinal Right Violations as well as the Alledged procedural Bar issue.(see case no 6;17-cv-0000-6-H Document 31)Case no 22-10345,Objection to District courts Ruling, Petitioners response, as well as Merits of appeal expanded).

2. Petitioner filed his supplemental brief with the Court and was told that Leave of the Court was required. Petitioner filed this Leave of the Court.

3. Petitioners Supplemental brief outlined the Consitutional Violations that were had in this cause, as also in the merits of appeal expanded.

4. Petitioners Claims are NOT procedural bar and Have not Presented for the zfirst time on appeal, as noted in his Response to respondants awnser (Document 31,6-19-cv)and 11.07 PGR, and 22.54

5. DNA Lab results were mailed to the Court showing innocence of the crime, and was not considered. No Appeals court has considered the DNA in this case, even though it was brought to the attention of Each and Every coutt. This in its self is a Violati of due process, where the Guilt or innoncence is in question.

APPENDIX K

Prayer

Petitioner moves this court to Re-Consider Petitioner Request

for Certificate of appeallibilty in this cause based on the Consitutional Violations.

Petitioner will forever Pray.

Lanny M. Bush Peo-Se

CERTIFICATE OF SERVICE

I, do hereby certify that a True and Correct Copy of this Motiuon for reconsideration has been Maile to the Honorable Court of Appeals in the 5Th Circuit, of New oeleans, la. On this day. By plkacing same in the US postal service, potage pre-paid, correctly addressed.

Done this 3 day of Nov 2022.

Lanny M. Bush-Pro-Se
3201 Fm 929
Gatesville. Texas 76597

UNITED STATES DISTRICT COURT
5TH CIRCUIT
NEW ORLEANS, LA.

Danny M. Bush;
Petitioner, (

v.) Cause no; 22-10345
(
Boby Lumpkin, Director,TDCJ,)
Respondant; (

SUPPORTING GROUNDS FOR RECONSIDERATION

TO THE HONORABLE JUSTICES OF SAID COURT:

COMES NOW, petitioner in the above styled and numbered cause, whom files this Suppoting Grounds for re-Consideration inn this Pleading. Petitioner asserts the following as reasons for re-consideration.

I.

This Court Isssued a ruling on Oct /26/22 stating that several issues were"raised for the first time on appeal", and that Petitioner didnot dispute District Courts Determinarion that"his Claims were Procedurally bar" (see Page 2 of Order)

In the issue of "First time presented: This honorable Court Is mistaken. If the court will look at the Petitioners State habeaus Corpus Form, ground one is suppressed evidence
Page-2- Ground two ;is Insufficent evidence to support the
Page- Crime,(Including Kidnapping)
Page-8 Ground three;Voluntariness of the Statement
Page-9 Ground Four; Abuse of descretion,(Mention of priors) (Denial of Mistrial)(Including a State law requiring Instruction on voluntariness
Page-10 Grond Five; Due process, Violation(including not testing DNA)including Junk science (GPS)
Page-11 Ground six; Jury misconduct; Jury allowed to consider evidence not introduce
Page-12 Ground Seven;Improper jury closing; Prosecutor injected personal opinion in to closing not supported by Evidence
Page-12Page12 Ground Eight; Ineffective assistance of Counsel,Including Conflict

Records tkaen from Original State Habeaus(11.07) and experts from Clerks reocrd Exhibit B

In The Orde the Court satted that Petitioner"had to make a substianal showing of the Denial of hgis consitutional Right"
Petitioner contends that, 1. The right to a fair trial is a substinal right, Whent he State supress evidence or Concelas evidence, it can not be said that Petitioner recieved a Fair trial. 2. The right to have effective assistance of counsel, at every stage of the Proceding is a bedrock right.=When Counsel does not perform his duties to a client or is BURDEN under a Conflict, no matter how small that conflict it deprives a defendant of the right to Counsel.

On Page 6 of the State Habeaus Corpus, this court will find55 Listed grounds of well established Consitutional rights that any Juorist would find errours of the Verdict.

Suppressed evidence is a Brady violation handed down by the Supremw Court. Right to Counsel is a right set forth in the 6th Ammendment. Abuse of decretion is a right to a Fair Trial set forth in the 6th Amm endment.Attorney Conflict is also Protected by the 6 th ammedment. Reasonable doubt is ghverned by the Jackson Stamdard set forth by the Supreme Court as well establishewd law.

APPENDIX L

Petitioner has presnted the issue to the Court of Criminal Appeala in his State Habeaus Corpus, Therefore the Claims are not Procedural bar, and Have been previously presented.

In content to the Issue of Due process violation by not holding a hearing about the Conflict of Intrest. Petitionercould not object or claim violation of Due process before it happens. Once the Due process violation occured, then petitioner could have merit, NOT before. That is aking the petitionet to Foresee the Future. Proper remendy would have been for thr Trial court to Hold a Hearing and give the Petitioner the oppertunity to rebutt. Instead the Trial court denied the Petitionet the right to Rebutt and Due process, to protect his LIFE and Liberty.(14 th Ammendment)

In BUSBY v. Drelke;359 F. 3d 208(5th Cir-2004) This Court stated that ' A Habeaus Petitioner who has failed to properly present his Federal Consitutional Claim to State Court will be considered to exhaut his State rem,edies if the State Court are no longer open to his claims because of pprocedural Bar" See Busby (supra)

Petitioner contends that he has presnted his clsaims to the State Court as well as theis Court and Is no longer open to any other avenue of relief, therfore not being Procedural bar.

Petitioner has repeately claimed that he has submitted the ground to the state court with no action or Written Order.

II.

Relief

Petitioner moves this Honorable Court to Issue a Certificate of Appealiblity OR/ send this Action back to the Lower court for Re-Consideratic or action. petitioner Moves this court in the intrest of Justice and Fairness.

III.

Prayer

Petitioner moves this Court to grant the Rekief reqiested herin Petitioner will forever pary.

Lanny M. BUsh Pro-Se
32012 Fm 929
Gates ville, texas 76597

CERTIFICATE OF SERVICE.

I do herby certify that sa True and Correct copp fot his Motion has been properly mailed VIA US postaal Service, correctly addressed tot he UNited sates District court, 5th Circuit of New Oeleans La.
Done this 4 day of December 20122.

Lanny M. Bush Pro-Se
3210 FM 929
Gatesville, Texas 76597

UNITED STATES COURT OF APPEALS
5TH CIRCUIT
New ORLEANS, LA.

Lanny. BUsh; Movant	(	
	)	
v.	(	Cause No; 22-10345
	)	
Bobby Lumpkin,Director,TDCJ Respondant	(	

EN BANC DECISION REVIEW

TO THE HONORABLE JUSTICES OF SAID COURT:

COMES NOW,Lanny m. Bush, Movant in the above numbered cause whom files this request for EN BANC Review of the dismissal of Petitioners Request for certificate of Appealiblity. This Court entered judgment on October/26/2022. Petitioner had already filed his supplemental brief, and promply filed his Motion for consideration,Nov 03/2-22,along with a Letter to the Clerk.On Nov/04/2022Petitioner filed a Motion entitled supporting grounds for reconsideration, citing error in the Honorable Justices Smith decision. Movant/Petitioner moves this court to review the Decision for reconsideration En Banacbefore the Court, as Movant feel that slight error has been applied and that all elements of the request for Certificate of Appealiblity has been met as well as his Consitutional Claims.

I

II.

Prayer

Movant herein moves this Court to Apply and Review the Disnissal of Petitioners Request for Certificate of Appealiblity En Banc.

Movant/Petitioner will forever Pary.

Lanny M. Bush

Certificate of Service

I, Do here By certify that a True and Correct copy of ther plading EN banc Decision Review, has been mailed to the US court of appeals,5Th Cuircit, New Orleans, La.

APPENDIX M

Done this 15 Day of Nov 2022

Lanny M. Bush Pro-Se

United States Court of Appeals for the Fifth Circuit

No. 22-10345

United States Court of Appeals
Fifth Circuit
FILED
October 26, 2022
Lyle W. Cayce
Clerk

LANNY MARVIN BUSH,

Petitioner—Appellant,

versus

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

Respondent—Appellee.

Application for Certificate of Appealability from
the United States District Court
for the Northern District of Texas
USDC No. 6:19-CV-6

ORDER:

Lanny Bush, Texas prisoner #1917810, seeks a certificate of appealability ("COA") to appeal the denial and dismissal of his 28 U.S.C. § 2254 application challenging his conviction of capital murder in the course of kidnapping or attempted kidnapping, for which he was sentenced to life imprisonment.

Bush raises the following issues: (1) The state unlawfully withheld a police report containing statements by witnesses regarding seeing or speaking with the victim, not seeing the victim's vehicle, and the victim's seeing more

APPENDIX N

than one man; (2) the evidence was insufficient to support the conviction; (3) Bush's statement to rangers violated *Miranda v. Arizona*, 384 U.S. 436 (1966), and was coerced by threats and bribery; (4) the trial court abused its discretion by allowing his criminal history to be mentioned at trial and denying a mistrial regarding this issue, failing to give a jury instruction regarding the voluntariness of his statement to rangers, and denying his motion for a directed verdict for insufficient evidence; (5) his due process rights were violated because rangers failed to collect and/or test DNA, fingerprints, and other biological matter found at the kidnapping and burial sites and because his conviction was based on "junk science" because GPS mapping data introduced at trial was flawed and unreliable; (6) the jury was unconstitutionally permitted to consider evidence that was not presented at trial; (7) the prosecutor engaged in misconduct by improperly injecting his personal opinion into closing argument; and (8) trial counsel was ineffective because of a conflict of interest involving a state witness, and appellate counsel was ineffective for failing to challenge the denial of Bush's request for a mistrial regarding the mention of his criminal history at trial.

For the first time on appeal, Bush also avers that (1) the state habeas court violated his right to due process by not allowing him the opportunity to respond and by not holding a hearing before ruling on his ineffective-assistance claims; (2) trial counsel was ineffective for failing to raise certain objections and by failing to take various actions in order to raise a proper defense; and (3) the prosecutor engaged in misconduct by allowing the mention of Bush's criminal conduct before the jury. These newly raised arguments will not be considered. *See Black v. Davis*, 902 F.3d 541, 545 (5th Cir. 2018).

Bush does not dispute the district court's determination that six of his claims were procedurally barred. Thus, he has abandoned any challenge to them. *See Hughes v. Johnson*, 191 F.3d 607, 613 (5th Cir. 1999); *Yohey v. Col-*

lins, 985 F.2d 222, 224–25 (5th Cir. 1993); *Brinkmann v. Dallas Cnty. Deputy Sheriff Abner*, 813 F.2d 744, 748 (5th Cir. 1987).

To obtain a COA, Bush must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). For claims denied on the merits, he must show that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Where the denial of federal habeas relief is based on procedural grounds, this court will issue a COA "when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.*

Bush has not met that standard. Accordingly, a COA is DENIED. Bush's motion to file a supplemental brief is GRANTED. All remaining outstanding motions are DENIED.

JERRY E. SMITH
United States Circuit Judge

N

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

November 16, 2022

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 22-10345 Bush v. Lumpkin
USDC No. 6:19-CV-6

Enclosed is an order entered in this case.

Sincerely,

LYLE W. CAYCE, Clerk

By: _____
Casey A. Sullivan, Deputy Clerk
504-310-7642

Mr. Lanny Marvin Bush
Ms. Jennifer Wren

APPENDIX N

United States Court of Appeals for the Fifth Circuit

No. 22-10345

LANNY MARVIN BUSH,

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 Northern District of Texas
USDC No. 6:19-CV-6

Before KING, JONES, and SMITH, *Circuit Judges.*

PER CURIAM:

A member of this panel denied a certificate of appealability. The panel has considered appellant's motion for reconsideration, which is DENIED.

Appendix N

Additional material from this filing is available in the Clerk's Office.