PETITION APPENDIX

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APPENDIX A

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
August 8, 2022
Lyle W. Cayce
Clerk

No. 20-70010

RONALD JEFFREY PRIBLE,

Petitioner—Appellee,

versus

BOBBY LUMPKIN, *Director*, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent—Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:09-CV-1896

Before DENNIS, ELROD, and DUNCAN, *Circuit Judges*.*

STUART KYLE DUNCAN, *Circuit Judge*:

Early in the morning of April 24, 1999, Esteban "Steve" Herrera and Nilda Tirado were shot to death in their Texas home. The killer doused Tirado's partially nude body with accelerants and set her on fire. Fumes from their mother's burning corpse asphyxiated the couple's three young

* JUDGE DENNIS concurs in the judgment only.

daughters, who were sleeping upstairs. The prime suspect was Ronald Jeffrey Prible, who was later indicted for capital murder.

A state jury heard evidence connecting Prible to the killings. Prible had been involved with Herrera in robbery and drug dealing. Prible was drinking and shooting pool in Herrera's garage on the night of the murders. Prible's semen was found in Tirado's mouth. And while in prison Prible confessed to the murders to Michael Beckcom, a murderer and repeat jailhouse snitch who admitted he was angling for a lower sentence in another case.

The jury convicted Prible and sentenced him to death. After a decade of federal proceedings, including extensive discovery and an evidentiary hearing, the district court issued Prible a writ of habeas corpus and granted him a new trial. We reverse.

I. Background

A. Murders and Investigation

In spring 1999, Prible and Herrera wanted to open a bar. To raise capital, Prible robbed banks and gave the proceeds to Herrera, who bought and sold drugs. Prible robbed six banks of about $46,000.

On the night of April 23, 1999, Herrera, his brother-in-law Victor Martinez, and Prible drank beer and shot pool in Herrera's garage. They went to a club and returned to Herrera's shortly after 2:00 a.m. They talked in the driveway as Herrera and Prible smoked marijuana. Sometime before 3:30 a.m., Martinez left, and Herrera and Prible returned to the garage to play pool.

Around 6:30 a.m., neighbors saw smoke pouring from Herrera's house and garage. They kicked open a door to the garage, found Herrera dead, face-down in a pool of blood, and called 9-1-1. First responders found Tirado dead, face-down on the couch in the den wearing only a t-shirt with

blood around her head. Her corpse was so burnt "it was hard to tell who she was." First responders also found the couple's three young daughters dead upstairs.

Prible immediately became a suspect. That day, police visited his parents' house, which was less than a mile away, and asked to speak with him. Prible accompanied police to the precinct, where he gave a DNA sample and two written statements. He first explained that he and Herrera played pool after Martinez left until about 4:00 a.m. when Tirado "came out into the garage and gave a look at [Herrera]." Prible "knew it was time to leave," so Herrera drove him to his parents' house, where he went directly to bed and slept until 1:30 p.m. But when asked, "[w]hat if some of your semen is in or on Nilda[?]," Prible changed his story. In his second statement, Prible said he and Tirado had sex and she performed oral sex on him in the bathroom while Herrera was outside. He said they had previously "mess[ed] around" and kissed a few times, but this was the first time they had sex. He did not initially tell the "entire story" to spare Tirado's reputation.

The ensuing investigation revealed no signs of forced entry. Herrera and Tirado were each executed with a close-range nine-millimeter gunshot to the back of the neck—which the medical examiner described as "assassin wound[s]." The bullets were fired from the same gun. The children died from soot and carbon monoxide inhalation.

Arson investigators determined a flashfire had been lit with accelerants in the den. They found next to Tirado's body a plastic gasoline container, a roll of paper towels soaked in an accelerant, an aerosol can, and a gallon-size metal can of Kutzit, an extremely flammable tile-glue solvent. They found more Kutzit cans in the garage and a storage shed behind the house. Tirado's burns indicated accelerants were poured on her and ignited after she was shot.

A consensual search of Prible's residence revealed guns, ammunition, a semi-automatic pistol magazine that did not fit any of the guns, and a pay stub for nine-millimeter ammunition. The magazine "could have" fit the murder weapon, and the pay-stub ammunition was consistent with the ammunition used to kill Herrera and Tirado.

Investigators examined the scene for "trace evidence," including blood, hair, and fingerprints. An arson investigator opined that the perpetrator could have traces of soot, smoke, or accelerants on his clothes, shoes, or skin. No such evidence linked Prible to the crime, however. And Prible had an alibi: a twelve-year-old next-door neighbor said she observed Prible and Herrera that night talking in Prible's driveway sometime after 1:00 a.m.

A swab of Tirado's mouth revealed sperm cells, the DNA of which matched Prible's. But Tirado's closest friends dismissed the notion of an affair. They claimed Tirado had recently told them that Prible "gave her the creeps," "[s]he didn't like him," and "she was tired of him being [at her home]."

B. State Trial Proceedings

1. *The State's case*

A month after the murders, Prible pled guilty to bank robbery in federal court. He was sentenced to 63 months' imprisonment and sent to the Federal Correctional Complex in Beaumont, Texas. In May 2001, the court reduced his sentence to 36 months, setting his release for May 2002.

The State of Texas charged Prible with capital murder in July 2001. A Harris County grand jury indicted him in August 2001. Assistant District Attorneys Kelly Siegler and Vic Wisner tried the case a year later.

The State presented evidence at trial that: (1) Prible was the last person seen with Herrera at the house before the murders; (2) Prible and Herrera's struggling business venture supplied a motive; (3) the bullets that killed Herrera and Tirado were fired from the same gun; (4) Prible's semen was deposited in Tirado's mouth shortly before her death; (5) a fire was set to destroy physical evidence, including Prible's DNA; and (6) Prible admitted to fellow inmate Michael Beckcom that he committed the murders. *Prible v. State*, 175 S.W.3d 724, 730 (Tex. Crim. App. 2005). Prible's claims in this habeas action center around Beckcom's testimony and the semen-DNA evidence. We describe that testimony and evidence in detail below.

2. *Beckcom's testimony*

At trial, Beckcom testified to his lengthy criminal history, including his murder of a federal witness. He explained that he had testified in several cases for sentence reductions and was testifying against Prible in exchange for Siegler's writing a letter to his prosecutor in California. He had been placed in protective custody once word spread that he was testifying against Prible.

Beckcom described the nature of his relationship with the prosecution as an informant. He learned of Siegler through his cellmate, Nathan Foreman, and first contacted her about Prible's case in October 2001. Beckcom understood from their conversation that "the only way for [Siegler] to be interested" was if he knew "[s]pecifics about the case, facts." So Beckcom "sought to find out as much as [he] could." After Prible confessed to him, Beckcom and Siegler met for about an hour in early December 2001. He gave her a letter with the information he had. They spoke "[t]wo or three times" thereafter about Siegler's recommending a sentence reduction.

Beckcom testified that he and Foreman met Prible through a shared acquaintance and the three eventually became close friends. They engaged in

"general conversation" before Prible asked about Beckcom's murder case. Prible slowly began to offer details of his own case "in bits and pieces of conversations." Prible mentioned police found his DNA on Tirado but "[e]verybody knew they were messing around." When Beckcom asked about the murder weapon, Prible replied, "asphalt's good some times for hiding things." Prible emphasized his service in the Marine Corps and implied he would murder for hire. As they grew closer, Beckcom asked more direct questions. Prible "softened up a little bit" and shared more details after Beckcom said he did not care if Prible committed the murders.

Prible confessed to Beckcom and Foreman on November 24, 2001. He described how during an argument he shot Herrera, Tirado ran into the den to call the police, Prible followed and shot her too, and then he set a fire "to cover his tracks." Prible explained, "[Herrera] took $250,000 of my hard-earned money" and "was going to kill me, so I handled my business." Prible looked in the house for the drug money, "but it wasn't there." When asked how he got in and out without being seen, Prible said "his parents lived a couple miles from there so it wasn't far." Referring to his military service, he added, "it was a high intensive, low drag maneuver. That's what I was trained for, in and out. I'm a ghost." Prible continued, "Anybody that can go in a house and take out a whole family and get out without being seen is a bad mother fucker and I'm that mother fucker." To corroborate Beckcom's relationship with Prible, the State introduced a photograph of Prible, Beckcom, and Foreman in the Beaumont visiting room the day Prible confessed.

The defense cross-examined Beckcom about his criminal record and history as an informant. Beckcom maintained that he learned the details of the crime only through Prible. A character witness doubted Prible confided in Beckcom because everyone in Beaumont, including Prible, knew Beckcom would snitch "falsely or truly" to help himself. A jailhouse lawyer testified

that Prible showed his probable-cause affidavit to several inmates at Beaumont: "He talked about his case so much. I told him people would come in and testify against him if he kept that stuff up. And 'lo and behold."

3. *Semen-DNA testimony*

Three witnesses testified about the semen in Tirado's mouth. Dr. Joye Carter, chief Harris County medical examiner, testified for the State that sperm can be found in a person's mouth "several hours" after ejaculation. She opined that it was unlikely, but possible, that the semen was deposited in Tirado's mouth after she died. She saw "no indication" of sexual assault.

Bill Watson, a PhD student who performed the DNA testing on the sperm cells, testified for the State that his ability to generate a full male DNA profile from the oral swab was "consistent with there being a great deal of sperm present." It was also "consistent with the male depositing the semen in [Tirado]'s mouth moments, if not seconds, before she was killed." He opined that the sperm was likely deposited within the hour before Tirado died.

Dr. Robert Benjamin, Watson's PhD advisor, testified for Prible. He said it was not "possible to extrapolate" from the "amount of DNA" found "roughly what time [it] was placed there." He warned such estimates are "dangerous," "hazardous," and "not scientifically valid." He claimed "no controlled scientific studies" supported Watson's opinion.

4. *Closing arguments*

The State relied on Beckcom's testimony and the semen-DNA evidence in closing arguments. Wisner claimed "Beckcom is telling the truth" but maintained the State "ha[s] enough evidence without him." He emphasized that Beckcom testified to details beyond Prible's probable-cause

affidavit, debunking theories that Beckcom learned facts from the affidavit or the prosecutors "fed him the information." Citing Watson's testimony, Wisner submitted, "There is no way in the world that th[e] semen wasn't deposited either moments before or seconds after [Tirado] died."

The defense attacked Beckcom's credibility, calling him a "self-admitting liar" and "snitch." The defense claimed Beckcom could have learned details about the case in talking with Siegler. Citing Dr. Carter's testimony, the defense argued the sperm in Tirado's mouth could have been deposited several hours before her death.

Siegler's rebuttal pressed, *inter alia*, the semen-DNA evidence and Beckcom's testimony: "if Jeff Prible had managed to control his ejaculation and his mouth, he might not have ever been caught." She submitted that Prible forced Tirado to perform oral sex on him at gunpoint before he killed her. She acknowledged a "deal [was] cut" with Beckcom but argued the jury could convict without believing him.

5. *Conviction and sentence*

The jury convicted Prible of capital murder. In accordance with the jury's answers to special issues, the court sentenced Prible to death. *See* TEX. CODE CRIM. PROC. ANN. art. 37.071 § 2. The Court of Criminal Appeals (CCA) affirmed. *Prible*, 175 S.W.3d 724, *cert. denied*, *Prible v. Texas*, 546 U.S. 962 (2005).

C. State and Federal Habeas Proceedings

1. *State habeas and* pro se *filings*

In November 2004, Prible filed a counseled state habeas application, claiming ineffective assistance of trial counsel and that the jury did not reflect a fair cross-section of the community. He did not challenge Beckcom's

testimony, allege prosecutorial misconduct, or otherwise raise informant issues.

During the proceedings, Prible inundated the CCA with *pro se* filings. In November 2005, he filed a *pro se* "supplemental writ," asserting, *inter alia*, a claim under *Brady v. Maryland*, 373 U.S. 83 (1963), based on Siegler's conspiring with Beckcom, Foreman, Larry Wayne Walker, and other inmates to offer false testimony against him and another Beaumont inmate, Hermilio Herrero. Weeks later, he filed a letter stating that he had misidentified Larry Wayne for Carl Walker Jr. Prible's counsel, Roland B. Moore III, discouraged Prible from pressing the informant conspiracy theory. He wrote in a letter to Prible that nothing "anybody could say . . . would help. . . . [Even] if the ideal witness came forward . . . nobody would believe it. I mean nobody." Moore advised Prible's sister in an e-mail that the conspiracy claim was meritless absent a recantation from Beckcom. Subsequent *pro se* filings and correspondence—including requests for an evidentiary hearing and production of the prosecutors' e-mails—fleshed out the conspiracy theory. Prible repeatedly complained of Moore's representation. In May 2007, the CCA responded to a *pro se* filing, advising Prible to address the matter to his attorney because the CCA "does not recognize hybrid representation."

In June 2007, Prible filed *pro se* a second state habeas application, asserting claims under *Brady* and *Massiah v. United States*, 377 U.S. 201 (1964). He claimed Siegler "hid her true ties" to Beckcom and other informants, who conspired to "give false testimony for time reduction[s]." He also claimed Siegler incentivized Beckcom to "get close to Prible and find any information that would aid her in making her case" by offering to write a sentence-reduction letter to Beckcom's prosecutor. Prible argued he satisfied the standard for filing a successive application. *See* TEX. CODE CRIM. PROC. ANN. art. 11.071 § 5.

In August 2007, Prible filed *pro se* a third state habeas application, claiming trial counsel was ineffective for failing to interview Herrero. Prible claimed Siegler prosecuted Herrero a month before him using "the same group of jailhouse informants." Prible alleged his trial counsel knew of this ring of informants but did nothing.

The CCA denied Prible's counseled application on the merits. *Ex parte Prible*, Nos. WR–69,328–01, WR–69,328–02, WR–69,328–03, 2008 WL 2487786, at *1 (Tex. Crim. App. June 18, 2008) (per curiam). It construed Prible's two later *pro se* applications as "subsequent applications," found that they did not "contain[] sufficient specific facts . . . [to] meet[] one of the exceptions set out in Art. 11.071, § 5," and dismissed them as abuses of the writ. *Ibid.* (citing TEX. CODE CRIM. PROC. ANN. art. 11.071 § 5).

Moore advised Prible that he "would not be adopting" the *pro se* application because "[n]one of it [wa]s useful." Prible wrote to the CCA, with Moore's letter attached, arguing "I did not, and will not be asking [Moore's] permission for [the application] to be added to my writ."

2. *Initial federal habeas petitions, subsequent state habeas filings, and state evidentiary hearing*

In June 2009, Prible timely filed a counseled federal habeas petition. He quickly amended it to add supporting affidavits as exhibits. The amended petition asserted eight claims, four of which related to the State's development and use of inmate testimony, including a *Brady* claim and a *Massiah* claim. Respondent argued the four claims were defaulted because they were unexhausted (*i.e.*, Prible did not present them in state court) and the state court would now reject them as abusive. The district court stayed the case to allow Prible to seek review of the claims in state court.

In September 2010, Prible filed a counseled, fourth state habeas application, asserting his *Brady* and *Massiah* claims. He claimed he obtained

"insider information" from Carl Walker. Walker stated, *inter alia*, that Beckcom and Foreman recruited him to inform on Prible, Siegler fed details of Prible's case to Foreman before Prible arrived at Beaumont, the photograph with Prible was staged, and Siegler orchestrated similar informant schemes in other murder cases. Prible argued his application should not be barred as successive because this new evidence was unavailable when he filed his first state habeas application.

The trial court sent Prible's fourth application to the CCA because it was successive. The CCA could not determine "whether the factual basis for the[] claims was unavailable on the dates that [Prible] filed his previous applications." *Ex parte Prible*, No. WR–69,328–04, 2010 WL 5185846, at *1 (Tex. Crim. App. Dec. 15, 2010) (per curiam). It remanded the matter so the "record c[ould] be supplemented with evidence relating to . . . when and how [Prible] obtained the evidence at issue and whether he exercised reasonable diligence to obtain this evidence at the earliest opportunity." *Ibid.*

In February 2011, Prible moved the state court for *in camera* review of privileged work product in the State's trial file. The State did not oppose the motion and produced letters to Siegler from Beaumont inmates Carl Walker, Jesse Gonzalez, and Mark Martinez, which the State had sealed, designated as "attorney work product," and not produced. In the letters, the inmates claimed Prible shared details of the crime while in prison and expressed a willingness to testify for "help" with their sentences.

The state trial court held an evidentiary hearing in June 2011. Moore testified that Prible told him "a [black] man named Walker" had information about Siegler's ring of informants at Beaumont before he filed the initial state habeas application. With little information on Walker, Moore considered the task of locating him "impossible" and "a complete fool's errand." Moore did not call or visit Beaumont, employ an investigator, issue a subpoena, seek

a court order to obtain information, or attempt to contact any inmates named Walker. Moore never spoke with Beckcom because his lawyer said he would not talk. Moore contacted Foreman, but he refused to talk. And despite Prible properly identifying Carl Walker and attempting to assert *Brady* and *Massiah* claims in his *pro se* applications, Moore did not seek to supplement or amend the initial application because he "did not feel [he] had adequate information" and "it would just be . . . harmful to Mr. Prible in the long run."

In its findings of fact, the trial court held Prible's fourth application was barred under article 11.071, section 5(a)(1), because Prible "fail[ed] to establish that the factual basis for his claims was unavailable on the dates that [he] filed his three previous applications." It found Walker's statements were "unpersuasive and ha[d] little evidentiary value" because they "consist[ed] almost entirely of hearsay and speculation and contain[ed] no direct evidence of [Prible's] conspiracy theory." It also found that although Moore had "very limited information regarding the identity of Walker" and had "investigated [Prible's] conspiracy theory," the factual basis for Prible's claims was available when he filed the initial application. It further found that the factual basis for the claims was available when Prible filed his *pro se* applications because they "explicitly raised the conspiracy theory," "identified witness Walker by name and federal inmate register number," and "indicated . . . that a witness had contacted [Prible's] trial counsel." The CCA affirmed and dismissed the fourth application as an abuse of the writ. *Ex parte Prible*, No. WR-69,328-04, 2011 WL 5221864, at *1 (Tex. Crim. App. Nov. 2, 2011) (per curiam).

3. *Subsequent federal habeas petitions and federal discovery*

In August 2012, Prible filed a second amended petition back in federal court. In November 2013, the district court granted Prible's opposed motion

for discovery to subpoena records from state and federal agencies. Prible filed a third amended petition in September 2015. The court granted Prible's opposed discovery motions to subpoena additional records; to depose Siegler, Wisner, Foreman, Beckcom, Walker, and Bureau of Prisons personnel, among others; and to compel production of the prosecution's "Work Product" files and e-mails after *in camera* review.

In March 2018, Prible filed a fourth amended petition—the operative petition. He alleged the State failed to disclose that Siegler received letters from informants about Prible; met with Beckcom, Foreman, and other informants months before Prible's trial; used these informants in Herrero's case; and wrote sentence-reduction letters for them. Prible also alleged the State failed to disclose that Pam McInnis, head of the Harris County crime lab, had told Siegler semen could live in an oral cavity for up to seventy-two hours, evidenced by a note discovered in the State's work-product folder. Prible asserted sixteen claims. Relevant here are claims two, three, four, five, six, and ten, which boil down to (1) ring-of-informants *Brady* claims, (2) a *Massiah* claim relating to Beckcom, and (3) a semen-DNA *Brady* claim.[1]

Respondent answered and moved for summary judgment. Prible cross-moved for an evidentiary hearing on Respondent's arguments that

[1] Specifically, those claims are: (2) the State suppressed evidence that Beckcom and Foreman were part of an organized attempt to fabricate a false confession in exchange for leniency (*Brady*); (3) the State suppressed evidence that Foreman gave a fabricated account different from Beckcom's (*Brady*); (4) the State suppressed evidence impeaching Beckcom's testimony about the circumstances of Prible's confession (*Brady*); (5) the State suppressed evidence the trial court had ordered produced (*Brady*); (6) the State employed Beckcom as a state agent to elicit incriminating statements from Prible (*Massiah*); and (10) the State suppressed evidence that McInnis advised Siegler that semen could survive seventy-two hours in an oral cavity (*Brady*).

Prible's claims are time-barred, unexhausted, and procedurally defaulted and on the merits of the claims. The court granted Prible's cross-motion.

4. *Federal evidentiary hearing*

At the three-day evidentiary hearing, the court heard testimony from Foreman, Walker, Beckcom, Siegler, and others. Foreman testified that he first learned facts about Prible's case in 2001 from inmate Jesse Moreno. Foreman, Beckcom, Moreno, and another inmate then contacted Siegler. In August 2001, Foreman met with Siegler about Prible, but he could not remember the content of the conversation. Foreman said Prible "didn't really talk about" his offenses and certainly never confessed to the murders. The court found Foreman credible. *Prible v. Davis*, No. H-09-CV-1896, 2020 WL 2563544, at *15 (S.D. Tex. May 20, 2020).

Walker testified that he learned "a plethora of information" about Prible's case from Foreman, Beckcom, and inmate Oscar Gonzalez before he met Prible. The group suggested Walker testify against Prible to get a sentence reduction. They "strategized" to befriend Prible and to send letters to the prosecutor asking to be witnesses. Walker said the group staged the photograph with Prible to create a perception that they had a "close connection." Walker sent his letter to Siegler offering to testify that Prible had confessed. He said the group sent the letters to "corroborate each other's story." To Walker's knowledge, "Prible never confessed." The court found Walker credible. *Id.* at *16.

Beckcom testified that he learned about Siegler from Foreman and called her to discuss a possible sentence reduction. Beckcom said he took notes on what Prible said to memorialize the information "Siegler asked [him] to get." Beckcom testified that during his experience as an informant, no prosecutor, including Siegler, ever fed him details about a crime. Beckcom and Foreman discussed "trying to get a confession" from Prible, but

Foreman never gave him information about Prible's case. Beckcom claimed Foreman was present when Prible confessed. Siegler led Beckcom to believe he would receive a significant time-cut for his testimony. Despite recognizing Beckcom's testimony was supported by the record, the court found, without explanation, that "Beckcom was not a credible witness" and "it [wa]s obvious that Beckcom was dishonest when it suited his needs." *Id.* at *18.

Siegler testified that her August 2001 meeting with Foreman was unrelated to her decision to seek an indictment. She said Foreman later tried calling her, but she "knew he was a liar." Siegler maintained she did not need to disclose her contacts with Foreman because he "was not a witness" at trial. Siegler recalled receiving the letters from Walker, Martinez, and Gonzalez but claimed she did not believe their accounts. She said they were in her file available to the defense. She remembered speaking to McInnis but could not recall if she relayed that conversation to the defense. The court found Siegler "was not credible on both minor and major points," highlighting inaccuracies in her testimony and noting she was "combative in demeanor and did not appear forthcoming." *Id.* at *19.

5. *District court grant of habeas relief*

In May 2020, the district court granted habeas relief on Prible's ring-of-informants *Brady* claims, his *Massiah* claim relating to Beckcom, and his semen-DNA *Brady* claim. *Id.* at *43; *see supra* note 1. The district court held Prible showed cause and prejudice to excuse the procedural default of his claims. *Prible*, 2020 WL 2563544, at *23, *37. As to cause, the court explained that Siegler suppressed evidence of her relationships with the informants and the McInnis note, that the informant evidence from Walker "was not available" to Prible "despite his diligent attempts to discover it," and that Prible and Moore had no reason to know Siegler suppressed evidence. *Id.* at *24–27, *37. As to prejudice, the court reasoned that "the suppressed

evidence taken as a whole would have allowed the defense to seriously undercut" the veracity of Beckcom's testimony and the State's theory that Prible deposited his semen in Tirado's mouth shortly before her death. *Id.* at *33–35, *39. The court held Prible established *Brady* violations because the suppressed evidence was favorable to him, *id.* at *27–35, and a *Massiah* violation because Beckcom deliberately elicited the confession while acting as a state agent, *id.* at *38–39. Respondent timely appealed.

II. Standard of Review

In reviewing a grant of habeas relief, we review issues of law *de novo* and findings of fact for clear error. *Hughes v. Vannoy*, 7 F.4th 380, 386 (5th Cir. 2021) (citation omitted). Whether a petitioner has shown cause and prejudice to excuse a procedural default is reviewed *de novo*. *See Gonzalez v. Thaler*, 623 F.3d 222, 224 (5th Cir. 2010) (citation omitted).

III. Discussion

Respondent challenges the grant of habeas relief on the grounds that (1) Prible has not overcome the procedural default of his claims, (2) 28 U.S.C. § 2254(e)(2) bars new evidence, and (3) Prible's claims fail on the merits. Because we conclude Prible has not overcome procedural default, we do not reach the latter two points.[2]

[2] The Supreme Court recently explained that, under section 2254(e)(2), a court improperly holds an evidentiary hearing or considers new evidence to determine whether cause and prejudice exist to overcome procedural default "if the newly developed evidence never would 'entitle the prisoner to federal habeas relief.'" *Shinn v. Ramirez*, 142 S Ct. 1718, 1739 (2022) (alteration omitted) (quoting *Schriro v. Landrigan*, 550 U.S. 465, 474 (2007)). Because we conclude Prible has not overcome procedural default even on the expanded record developed below and thus do not reach Respondent's section 2254(e)(2) arguments or the merits of Prible's claims, we express no view on the district court's decision to hold a hearing and consider new evidence.

A. Cause and Prejudice Standards

We may not review the merits of procedurally defaulted claims absent a showing of cause and prejudice to excuse the default. *Dretke v. Haley*, 541 U.S. 386, 388 (2004); *Hughes v. Quarterman*, 530 F.3d 336, 341 (5th Cir. 2008); *accord Shinn v. Ramirez*, 142 S. Ct. 1718, 1732 (2022). Cause exists when "some objective factor external to the defense impeded counsel's efforts to raise the claim in state court." *Canales v. Stephens*, 765 F.3d 551, 562 (5th Cir. 2014) (quoting *McCleskey v. Zant*, 499 U.S. 467, 493 (1991)). "A factor is external to the defense if it 'cannot fairly be attributed to' the prisoner." *Davila v. Davis*, 137 S. Ct. 2058, 2065 (2017) (quoting *Coleman v. Thompson*, 501 U.S. 722, 753 (1991)).

It is well established that "a failure to raise a claim in an earlier habeas petition may not be excused for cause 'if the claim was reasonably available' at the time of the first petition." *Ford v. Davis*, 910 F.3d 232, 237 (5th Cir. 2018) (quoting *Fearance v. Scott*, 56 F.3d 633, 636 (5th Cir. 1995)); *see also Canales*, 765 F.3d at 562 (noting cause exists where "the factual or legal basis for a claim was not reasonably available to counsel" (quoting *McCleskey*, 499 U.S. at 494)). The cause requirement "is based on the principle that petitioner must conduct a reasonable and diligent investigation aimed at including all relevant claims and grounds for relief in the first . . . habeas petition." *McCleskey*, 499 U.S. at 498.[3] Cause can exist where "interference" by state officials makes it "impracticable" to raise the claim in state court. *Canales*, 765 F.3d at 562 (quoting *McCleskey*, 499 U.S. at 494); *see also Banks v. Dretke*,

[3] *See also* BRIAN R. MEANS, FEDERAL HABEAS MANUAL § 9B:51, Westlaw (database updated May 2022); 2 RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 26.3[b] n.28, LexisNexis (database updated Dec. 2021) (collecting cases).

540 U.S. 668, 691 (2004) (noting "the State's suppression of the relevant evidence" can be cause).

As to prejudice, the petitioner must show that the errors "worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *Smith v. Quarterman*, 515 F.3d 392, 403 (5th Cir. 2008) (quoting *Murray v. Carrier*, 477 U.S. 478, 493 (1986)); *see also* HERTZ & LIEBMAN, *supra* note 3, § 26.3[c]. Courts need not consider prejudice if the petitioner fails to show cause, and vice versa. *Matchett v. Dretke*, 380 F.3d 844, 849 (5th Cir. 2004) (citing *Rodriguez v. Johnson*, 104 F.3d 694, 697 (5th Cir. 1997)); *see Murray*, 477 U.S. at 494.

"A *Brady* violation can provide cause and prejudice to overcome a procedural bar on a habeas claim" because "cause and prejudice parallel two of the three components of the alleged *Brady* violation itself." *Guidry v. Lumpkin*, 2 F.4th 472, 486 (5th Cir. 2021) (first quoting *Thompson v. Davis*, 916 F.3d 444, 455 (5th Cir. 2019); then quoting *Strickler v. Greene*, 527 U.S. 263, 282 (1999)). The three components of a *Brady* violation are (1) "the evidence at issue is favorable to the defense, either because it is exculpatory or impeaching," (2) "the prosecution suppressed the evidence" (cause), and (3) "the evidence is material" (prejudice). *Murphy v. Davis*, 901 F.3d 578, 597 (5th Cir. 2018) (citing *United States v. Brown*, 650 F.3d 581, 587–88 (5th Cir. 2011)). A "*Brady* claim fails if the suppressed evidence was discoverable through reasonable due diligence." *Guidry*, 2 F.4th at 487 (quoting *Reed v. Stephens*, 739 F.3d 753, 781 (5th Cir. 2014)).

In reviewing habeas claims, we presume a state court's findings of fact are correct unless the petitioner rebuts this presumption with "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*, 910 F.3d at 234–35 (quoting *Garcia v. Quarterman*, 454 F.3d 441, 444

(5th Cir. 2006)). A state trial court's findings "survive an appellate court's review" if they were "adopted" or "incorporated into the appellate court's peremptory denial of relief." *Murphy*, 901 F.3d at 595 (quoting *Williams v. Quarterman*, 551 F.3d 352, 358 (5th Cir. 2008)).

B. Ring-of-Informants *Brady* Claims

We first consider Prible's ring-of-informants *Brady* claims (claims two, three, four, and five).[4] The district court held that these claims are defaulted[5] but that Prible showed cause and prejudice to overcome the bar.

[4] While Prible does not dispute that these claims are defaulted, he argues Respondent waived the argument that he did not show cause for the default by addressing claims two, three, four, and five together as if they "reduce to a single ring of informants claim." We disagree. The district court addressed the claims together because they "share a common core of operative facts." *Prible*, 2020 WL 2563544, at *21–23. Absent that finding, claims three, four, and five could not relate back to the original federal petition (claim two) and thus would have been time-barred. *See id.* at *21–23, *40 n.25. Prible cannot have it both ways: he cannot rely on relation-back doctrine below to overcome timeliness issues and now argue the claims are so factually distinguishable to require separate cause analyses. *See Mayle v. Felix*, 545 U.S. 644, 657 (2005). We accordingly assess the default of the four ring-of-informants *Brady* claims together.

[5] We agree that these claims are defaulted. A federal habeas claim is defaulted when either the state court denied a claim based on an adequate and independent state procedural rule, *Rocha v. Thaler*, 626 F.3d 815, 820 (5th Cir. 2010) (quoting *Nobles v. Johnson*, 127 F.3d 409, 420 (5th Cir. 1997)), or the claim is unexhausted and the state court would now find it procedurally barred, *Finley v. Johnson*, 243 F.3d 215, 220 (5th Cir. 2001) (citing *Sones v. Hargett*, 61 F.3d 410, 416 (5th Cir. 1995)). The state court dismissed claim two under Texas's abuse-of-the-writ doctrine, "a valid state procedural bar foreclosing federal habeas review." *Coleman v. Quarterman*, 456 F.3d 537, 542 (5th Cir. 2006) (citing *Kunkle v. Dretke*, 352 F.3d 980, 988–89 (5th Cir. 2003)). Prible did not raise claims three, four, and five in state court, so they are unexhausted. *See O'Sullivan v. Boerckel*, 526 U.S. 838, 842–48 (1999). But given the state court's finding that the factual basis for Prible's ring-of-informants theory was available when Prible filed his first three state habeas applications, the state court would now find these claims procedurally barred. *See Finley*, 243 F.3d at 220.

Prible, 2020 WL 2563544, at *24–27. We disagree. Prible has not shown the factual basis for these claims was unavailable and so cannot establish cause.

We begin with the findings made by the state trial court on remand from the CCA. The court determined that the factual basis for the ring-of-informant claims was "available when [Prible's] initial habeas petition was filed in November[] 2004" and "at the time of the filing of [Prible's] second subsequent application." The court's factual findings formed the basis of the CCA's denial of relief, *Prible*, 2011 WL 5221864, at *1, and thus survived appellate review, *see Murphy*, 901 F.3d at 595. The findings are accordingly presumed correct unless rebutted by clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1); *Ford*, 910 F.3d at 235; *see also Romero v. Davis*, 813 F. App'x 930, 933 (5th Cir. 2020) (per curiam).

The district court held that Prible rebutted this finding. Specifically, it found that the claims' factual basis was unavailable when Prible filed his state habeas applications because Siegler suppressed "notes memorializing meetings with Foreman and Beckcom" and the "letters from several inmates—including Walker—trying to inform on Prible." *Prible*, 2020 WL 2563544, at *24 n.20, *25–27. The court concluded that Siegler's suppressing these items "left Prible with no concrete evidence to support [his] claim[s] during [state] proceedings, despite Prible and [Moore's] diligent efforts to discover such evidence." *Id.* at *26.

We disagree. The record confirms the state court's finding that the factual basis for the ring-of-informants claims was available before Moore filed Prible's initial state habeas application. In his November 2005 *pro se* "supplemental writ," Prible alleged a *Brady* violation based on Siegler's purportedly conspiring with several Beaumont informants to present false testimony that Prible had confessed. Prible claimed that he had "told his attorneys about all of these issues numerous times" and he "believe[d] that

these issues should of [*sic*] been in his original writ." In a July 2006 *pro se* letter, Prible claimed information regarding Walker and the ring of informants was brought to his attention "over 3 years ago," meaning he was aware of the factual basis for the claims sometime in 2003—a year before Moore filed the initial application. And in his third state habeas application filed *pro se* in August 2007, Prible claimed Moore knew about the ring of informants "before he did my brief" but "never put it in my appeal." Moreover, Moore testified at the state evidentiary hearing that Prible had advised him of the ring-of-informants allegation *before* he filed the initial application.

In finding cause, the district court conflated availability of the factual basis for Prible's ring-of-informants claims with access to evidence supporting them. *See McCleskey*, 499 U.S. at 498 (noting district court erroneously conflated "[w]hether petitioner knew about or could have discovered the 21–page document" and "whether he knew about or could have discovered the evidence the document recounted"). In assessing the availability of a claim's factual basis, "the question is whether petitioner possessed, or by reasonable means could have obtained, a sufficient basis to allege a claim in the first petition and pursue the matter through the habeas process." *Ibid.* (citing Rules Governing Section 2254 Cases in the U.S. Dist. Cts., Rules 6 (Discovery), 7 (Expanding the Record), and 8 (Evidentiary Hearing)). "Omission of the claim will not be excused merely because evidence discovered later might also have supported or strengthened the claim." *Ibid.*

Our decision in *Robison v. Johnson*, 151 F.3d 256 (5th Cir. 1998), is instructive. Robison defaulted on his claim that trial counsel was ineffective for not following instructions Robison provided in a letter. *Id.* at 262. Robison argued that he showed cause because his habeas attorney did not have the letter when he filed his initial state habeas petition. *Id.* at 263. We rejected

this argument, reasoning "[i]t was Robison's instructions, however communicated, and not the letter itself, that form[ed] the 'factual basis of the claim.'" *Ibid.* (quoting *United States v. Guerra*, 94 F.3d 989, 993 (5th Cir. 1996)). Because "Robison was obviously aware of the letter and of the instructions . . . therein," he "knew of the factual basis of the claim before his current counsel's discovery of the letter." *Ibid.* We explained Robison's inability "to produce the best evidence of this communication until later does not constitute cause for the delay in bringing [the] claim." *Ibid.*

Similarly, here it was Siegler's alleged efforts to conspire with Beaumont informants to present false testimony, not her meeting notes or the inmates' letters, that formed the factual basis for Prible's ring-of-informants claims. Prible professed knowledge of these efforts long before he obtained the notes and letters. His inability to produce these items—the "best evidence" of the ring—is not cause for his delay in asserting the claims. *See McCleskey*, 499 U.S. at 498; *Robison*, 151 F.3d at 263. Prible's lack of "concrete evidence to support [his] claim[s]," *Prible*, 2020 WL 2563544, at *26, did not make their factual basis unavailable. Prible could have asserted the claims in his initial application and then acquired supporting evidence through state habeas proceedings. *See McCleskey*, 499 U.S. at 498; *see also, e.g.*, *Hall v. Thaler*, No. EP-10-CV-135-FM, 2011 WL 13185739, at *16, *31, *33–34 (W.D. Tex. Dec. 20, 2011) (explaining petitioner filed a "skeletal state habeas corpus application," asserting grounds for relief in "rather cryptic terms" that "did not allege any specific facts in support," and then developed claims at an evidentiary hearing).

But Prible's cause argument would fail even if we assume his preexisting knowledge did not provide a basis for asserting the ring-of-informants claims initially. Prible still cannot show cause because "other known or discoverable evidence could have supported the claim in any event." *McCleskey*, 499 U.S. at 497. Contrary to the district court's view,

Siegler's failure to disclose her ties with Beaumont informants did not make the factual basis for Prible's informants claims "unavailable." There is no "suppression," and thus no cause, where facts are "available from other sources" or "can be discovered by exercising due diligence." *Rector v. Johnson*, 120 F.3d 551, 558–59 (5th Cir. 1997) (collecting cases). Here, factual support for these claims was available from another source known to Prible—Walker—but Prible did not diligently pursue it.[6]

Prible knew Walker might have information about the alleged conspiracy before he filed his initial state habeas application. Prible told Moore that a black man named Walker "was privy to the activities of [Siegler] with respect to this group of cooperating inmates" and to "what efforts were being made to recruit witnesses against Mr. Prible in federal prison." Walker was willing to share information about, *inter alia*, the letters to Siegler, the specific inmates involved, the alleged plot against Herrero, and his belief Siegler was "feeding them the information." As the district court recognized, Prible's claims "relied heavily" on information from Walker. *Prible*, 2020 WL 2563544, at *10.

But Moore did not diligently pursue Walker or otherwise investigate Prible's ring-of-informants story. Moore tried to interview Foreman, who declined to talk, but that was it. Moore did not look for Walker because he considered it "a complete fool's errand." He did not call, visit, or send an investigator to Beaumont because he "firmly believe[d]" "it would be a complete waste of time" and the Bureau of Prisons "would not do anything

[6] The district court emphasized that Siegler did not disclose her contacts with Foreman in response to pretrial *Brady* motions. *Prible*, 2020 WL 2563544, at *26. That is mistaken. The evidence Siegler did not disclose fell outside those motions, which related to Beckcom and "any State witnesses." Foreman and other Beaumont inmates with whom Siegler allegedly conspired were not "witnesses" in Prible's trial.

for [him] without something more." He did not issue a subpoena or seek assistance from the state court for the same reasons. He also did not attempt to speak with Beckcom because he thought Beckcom would not talk.[7] Moore's lack of diligence in failing to purse the ring-of-informants *Brady* claims is "chargeable" to Prible. *Holland v. Jackson*, 542 U.S. 649, 653 (2004) (per curiam). And it precludes finding cause to excuse Prible's default. *See Coleman*, 501 U.S. at 753 (explaining counsel's negligence "is not 'cause' because the attorney is the petitioner's agent . . . and the petitioner must 'bear the risk of attorney error'" (collecting cases)).

The district court found that Moore made "diligent attempts" to investigate the ring of informants. *Prible*, 2020 WL 2563544, at *26. We disagree. The court overlooked the fact that Moore consciously failed to pursue Walker despite knowing he might have key information. *See Henderson v. Cockrell*, 333 F.3d 592, 606–07 (5th Cir. 2003) (finding

[7] The record plainly shows Moore was skeptical of Prible's theory from the beginning. In a September 2005 e-mail to Prible's sister, Moore wrote that "testimony about a 'conspiracy' is not relevant" absent a recantation from Beckcom, who Moore thought was "a reliable snitch." In a July 2006 e-mail, Moore told her it was not worth revisiting informant issues because "[n]o one would believe it" and "Beckhom [*sic*] is not going to retract what he said." In a July 2006 letter, Moore dissuaded Prible from pushing the conspiracy theory because he thought "nobody would believe it." And when Prible filed *pro se* a second state habeas application asserting the ring-of-informants claims, Moore refused to adopt it, believing "[n]one of it [wa]s useful." At the state evidentiary hearing, Moore testified he did not believe Prible and viewed him as the "typical inmate who says things all the time." Only once the State produced the inmates' letters to Siegler did Moore think "there's some credence to be given to what [Prible was] saying." But even assuming Moore erred in failing to trust Prible, it would not create cause. *See Coleman*, 501 U.S. at 753 (explaining "[a]ttorney ignorance or inadvertence is not 'cause' because the attorney is the petitioner's agent when acting, or failing to act, in furtherance of the litigation" (collecting cases)). And while the letters may have provided "some evidence" corroborating Prible's story, as explained above, the factual basis for Prible's claims was available long before Prible obtained the letters. *See McCleskey*, 499 U.S. at 498; *Robison*, 151 F.3d at 263.

undebatable district court's finding of no cause where "evidence showed a lack of due diligence on the part of [petitioner's] initial state habeas counsel, who made no attempt to interview [a lead witness]").[8]

The district court credited Moore's belief that finding Walker was "a fool's errand." *Prible*, 2020 WL 2563544, at *26. And Prible maintains that efforts to find Walker would have been in vain. But we cannot assume that to be so. Diligence "depends upon whether the prisoner made a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court; it does not depend . . . upon whether those efforts could have been successful." *Williams v. Taylor*, 529 U.S. 420, 433, 435 (2000) (applying diligence standard for "failing to properly assert a federal claim in state court" to 28 U.S.C. § 2254(e)(2)); *see Henderson*, 333 F.3d at 607 (rejecting argument that witness would not have talked even if counsel had tried to interview him). While locating Walker may have seemed unlikely to Moore, it was incumbent on Moore to try.

Prible claims he was diligent because he personally raised the informant issues in his *pro se* filings. But he did so *after* filing the initial state habeas application. In any event, Prible's *pro se* efforts are irrelevant because they

[8] *See also Osborne v. Purkett*, 411 F.3d 911, 916 (8th Cir. 2005) (finding no due diligence where counsel learned rape victim had sex with her boyfriend before forensic examination but did not interview the boyfriend or fully investigate their relationship); *Hutchison v. Bell*, 303 F.3d 720, 748 (6th Cir. 2002) (finding no due diligence where petitioner failed to investigate claims despite "aware[ness]" that an individual "possessed relevant information"); *Barnes v. Thompson*, 58 F.3d 971, 976–77 (4th Cir. 1995) (deferring to state court's finding that claim was available prior to filing state habeas petition because record showed reasonably diligent counsel could have obtained underlying facts by interviewing witnesses); *Sterling v. Cockrell*, No. Civ.A. 3:01–CV–2280, 2003 WL 21488632, at *51–52 (N.D. Tex. Apr. 23, 2003) (Fitzwater, J.) (finding no cause for default due to lack of diligence where, *inter alia*, petitioner "ha[d] not demonstrated that his habeas counsel made any effort to interview Deputy Jones or to investigate further his statements").

were procedurally improper. *See Ramirez*, 2022 WL 1611786, at *7 (alteration omitted) (noting doctrine of procedural default requires claims be "presented to the state courts 'consistent with the State's own procedural rules'" (quoting *Edwards v. Carpenter*, 529 U.S. 446, 453 (2000))); *Dupuy v. Butler*, 837 F.2d 699, 702 (5th Cir. 1988) (noting, for exhaustion purposes, the habeas applicant must "present his claims before the [state] courts in a procedurally proper manner according to the rules of the state courts" (quoting *Carter v. Estelle*, 677 F.2d 427, 443 (5th Cir. 1982))). As it advised Prible, the CCA does not recognize hybrid representation. *See Landers v. State*, 550 S.W.2d 272, 279–80 (Tex. Crim. App. 1977).[9]

In short, Prible "possessed, or by reasonable means could have obtained, a sufficient basis to allege [the ring-of-informants *Brady*] claim[s] in the first petition and pursue the matter through the [state] habeas process." *McCleskey*, 499 U.S. at 498. Contrary to the district court's view, Prible did not rebut the state court's findings on this point at all, much less by clear and convincing evidence as required by the federal habeas statute. *See* 28 U.S.C. § 2254(e)(1). Prible therefore has not shown cause to excuse the default of these claims. And because he has not shown cause, we need not consider prejudice. *See Murray*, 477 U.S. at 494.

[9] *See also Robinson v. State*, 240 S.W.3d 919, 922 (Tex. Crim. App. 2007) (noting "a trial court is free to disregard any *pro se* motions presented by a defendant who is represented by counsel"); *Marshall v. State*, 210 S.W.3d 618, 620 n.1 (Tex. Crim. App. 2006) (declining to address points in appellant's *pro se* brief submitted after counsel filed a brief because "appellant has no right to hybrid representation" (citing *Scheanette v. State*, 144 S.W.3d 503, 505 n.2 (Tex. Crim. App. 2004))); *Rudd v. State*, 616 S.W.2d 623, 625 (Tex. Crim. App. 1981) (finding *pro se* briefs "present[ed] nothing for review" where appellant was "represented by counsel who filed a brief in the case").

C. *Massiah* Claim

We next consider Prible's *Massiah* claim relating to Beckcom (claim six). The district court determined this claim is defaulted[10] but Prible showed cause and prejudice. *Prible*, 2020 WL 2563544, at *37. We disagree as to cause and so need not reach prejudice.

The state court found that the factual basis for this claim was available to Prible when he filed his first three state habeas applications. The district court held that Prible rebutted this finding based on "Siegler's suppression of information regarding the extent of her relationship with Beckcom and other inmates, and the nature of the arrangement between her and Beckcom." *Ibid.* We disagree.

As already discussed, Prible knew about the alleged ring of informants before he filed his initial state habeas application. Prible eventually asserted the *Massiah* claim himself in his first *pro se* application, alleging Siegler "encouraged Beckcom with the incentive of a letter to the prosecutor asking for a time reduction to get close to Prible and find any information that would aid her in making her case." Like the *Brady* claims, the *Massiah* claim "relied heavily" on information from Walker. *Id.* at *10; *see id.* at *37. Despite knowing about the alleged ring of informants, Beckcom's allegedly acting as an agent of Siegler, and Walker's knowledge of pertinent information, Prible and Moore did not diligently investigate and pursue Walker or the *Massiah* issue.

Furthermore, and separate from the *Brady* claims, the factual basis for the *Massiah* claim was available at trial. Beckcom testified to his arrangement with Siegler that she would write a sentence-reduction letter to his

[10] The state court dismissed this claim under Texas's abuse-of-the-writ doctrine, which makes it defaulted. *See Coleman*, 456 F.3d at 542; *supra* note 5.

prosecutor in exchange for his testimony. He also chronologized their interactions: he called Siegler in October 2001; at that time, he "didn't really [have] too much information" on Prible's case; when they spoke, Siegler explained that she would only be interested if Beckcom knew "[s]pecifics about the case, facts;" so, "in that regard" Beckcom "sought to find out as much as [he] could" from Prible; then, after obtaining the alleged confession, Beckcom met with Siegler in December 2001 and gave her a letter with the information he had (Beckcom's letter).

Prible effectively conceded that the trial record alone provided a factual basis to assert a *Massiah* claim. In his fourth amended federal petition, he claimed trial counsel and Moore were ineffective for failing to raise a *Massiah* objection. Prible argued "reasonably competent trial counsel would have realized immediately from the answers to the State's preliminary questions on direct examination that he should have lodged an objection based on *Massiah*." Prible claimed the December 2001 letter Beckcom gave to Siegler "shows that Beckcom was a State agent working *quid pro quo* to pry information from Prible from the time he first conversed with Prible in late October or early November 2001."

The district court nonetheless found that "Siegler's suppression of evidence . . . impeded the development of Prible's *Massiah* claim[]." *Id.* at *37. It reasoned that only after interviewing "Walker and other inmates [did] Prible's *Massiah* claim bec[o]me anything more than speculative." *Ibid.* We again disagree.

As with the *Brady* claims, the district court wrongly conflated knowledge of the factual predicate for the *Massiah* claim with evidence supporting the claim. *See McCleskey*, 499 U.S. at 498. In *McCleskey*, the Supreme Court held that the factual basis for a *Massiah* claim was available when the petitioner filed his first petition based on trial testimony that he confessed to

a jail-house informant and the informant told the police about their conversations. *Id.* at 498–99. Thus, a previously unavailable document with the informant's statement to police "d[id] not establish that [the petitioner] had cause for failing to raise the *Massiah* claim at the outset." *Id.* at 498.

So too here. Beckcom's trial testimony, together with information Prible later learned about the alleged informant ring, "put [Prible] on notice to pursue the *Massiah* claim in his first [state] habeas petition." *Id.* at 499. Siegler's concealing specifics about her relationship and arrangement with Beckcom cannot establish cause because, given Prible's "knowledge of the information in the [concealed items], any initial concealment would not have prevented him from raising the claim in the first [state] petition." *Id.* at 502.

Accordingly, Prible has not shown cause to excuse the default of his *Massiah* claim. Therefore, "we need not consider whether he would be prejudiced by his inability to raise the alleged *Massiah* violation at this late date." *Ibid.* (citing *Murray*, 477 U.S. at 494).

D. Semen-DNA *Brady* Claim

Finally, we consider Prible's semen-DNA *Brady* claim (claim ten). The district court found the claim defaulted[11] but concluded Prible showed

[11] Prible never raised this claim in state court, so it is unexhausted. *See O'Sullivan*, 526 U.S. at 842–48. The district court accepted without explanation Respondent's argument that the claim is defaulted because the state court would dismiss it as an abuse of the writ if Prible asserted it now. *Prible*, 2020 WL 2563544, at *23 n.19; *see Coleman*, 501 U.S. at 735 n.1; *Finley*, 243 F.3d at 220; *see also* TEX. CODE CRIM. PROC. ANN. art. 11.071 § 5. Prible does not dispute the district court's decision that the claim is defaulted. Because neither party contends otherwise, we accept that the claim is defaulted. *See Norman v. Stephens*, 817 F.3d 226, 231 n.1 (5th Cir. 2016) (noting the State may waive the argument that a claim is merely unexhausted but not procedurally defaulted); *see also Bledsue v. Johnson*, 188 F.3d 250, 254 & n.8 (5th Cir. 1999); *Jackson v. Johnson*, 194 F.3d 641, 652 & n.35 (5th Cir. 1999).

cause and prejudice. *Prible*, 2020 WL 2563544, at *25–27, *34–35. We disagree as to prejudice and so need not reach cause.

Suppressed evidence is material and causes prejudice "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985). We consider "not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). "If the evidence provides only incremental impeachment value, it does not rise to the level of *Brady* materiality." *Miller v. Dretke*, 431 F.3d 241, 251 (5th Cir. 2005) (citing *Drew v. Collins*, 964 F.2d 411, 419–20 (5th Cir. 1992)).

Prible's semen-DNA *Brady* claim is premised on the State's failure to disclose a note suggesting that McInnis, head of the Harris County crime lab, advised Siegler about the lifespan of sperm cells.[12] The note states: "Pam McInnis – semen lives up to 72 hrs." Prible claims this note "supports his defense that he had consensual sexual contact with [Tirado] earlier in the night" and "impeaches the State's argument that semen deposited in the mouth disappears in 'moments, if not seconds.'" We disagree.

Trial testimony disputed how long semen, and in turn sperm cells, can be *found* in an oral cavity after being deposited, not how long the cells *remain alive* there. For instance, Dr. Carter testified sperm could "stay in the

[12] Respondent argues that while the State did not disclose the McInnis note, there was no "suppression" for *Brady* purposes because other sources of evidence regarding the lifespan of sperm cells were available at the time of trial and introduced at trial. Because we conclude Prible has not shown prejudice, we assume suppression and express no view on this argument.

mouth" or "remain present" for "several hours" before normal "bodily processes" eliminated it. These processes, however, "would be immediately curtailed" by "a sudden death, such as from one of these assassin [gun]shots to the neck," leaving detectable sperm present for a longer period. She admitted, however, that she "couldn't say with medical certainty the exact time of the semen." Watson testified that a DNA profile "[a]bsolutely" can be obtained from dead sperm cells, adding that the cells "don't have to be alive . . . for them to be useful in [his] analysis." Like Carter, Watson testified that the usual "active elimination" of sperm from the mouth "end[s] if the victim dies." This led Watson to opine that the DNA profile he obtained "certainly would be consistent" with Prible "depositing the semen in [Tirado]'s mouth moments, if not seconds, before she was killed." Dr. Benjamin contradicted Watson on this point, however. He opined that sperm deposited as a result of sexual assault would usually be eliminated more quickly than sperm deposited from consensual oral sex.

As the record shows, then, the experts disputed how long Prible's sperm could have been present in Tirado's mouth before she was shot, not how long the cells might have remained alive there. We therefore fail to see how a note merely suggesting sperm cells "live[] up to 72 hours" is pertinent to Prible's defense.[13]

Furthermore, testimony of two of the three experts, including one of the State's witnesses (Dr. Carter), actually supported Prible's theory that Tirado consensually performed oral sex on him earlier that night. Moreover, Prible did not claim that Tirado performed oral sex on him "up to 72 hours" before the murders. He only claimed she did so "after [h]e came back from

[13] Furthermore, the district court appears to have mistakenly read the note to suggest that sperm cells can live up to seventy-two hours *in an oral cavity*. *See Prible*, 2020 WL 2563544, at *32 & n.23. The note says nothing of the sort.

the club," within a few hours of her death. So the McInnis note's specifying "72 hours" is not even material to confirming Prible's own theory. We thus fail to see how the absence of the that note could have undermined confidence in the verdict.[14] At most, the note was cumulative of other evidence already in the record that supported Prible's theory but that was evidently rejected by the jury. *See United States v. Sipe*, 388 F.3d 471, 478 (5th Cir. 2004) (alteration omitted) (noting "when the undisclosed evidence is merely cumulative of other evidence in the record, no *Brady* violation occurs" (quoting *Spence v. Johnson*, 80 F.3d 989, 995 (5th Cir. 1996))).

Accordingly, Prible has not shown prejudice to excuse the default of his semen-DNA *Brady* claim. We thus need not consider cause. *See Murray*, 477 U.S. at 494.

* * *

Because Prible has failed to show cause and prejudice to overcome his procedural default, we need not decide whether 28 U.S.C. § 2254(e)(2) barred new evidence nor need we reach the merits of Prible's claims.

IV.

We VACATE the judgment granting Prible a writ of habeas corpus and RENDER JUDGMENT denying the writ.

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[14] *See Reed*, 739 F.3d at 775–76 (finding no prejudice on ineffective assistance claim for failing to challenge DNA evidence where expert's testimony about survival time of sperm cells supported petitioner's argument that he had consensual sex with victim); *Jackson v. Day*, 121 F.3d 705, 1997 WL 450202, at *2 (5th Cir. 1997) (finding "no reasonable probability that a 'battle of the experts' would have been sufficient to raise a reasonable doubt").

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

RONALD JEFFERY PRIBLE, Petitioner,	§ § §	
v.	§	H-09-CV-1896
LORIE DAVIS, Director, Texas Department of Criminal Justice, Correctional Institutions Division, Respondent.	§ § § §	

FINAL JUDGMENT

For the reasons set forth in the Memorandum Opinion and Order of May 20, 2020, Ronald Jeffery Prible's Petition for Writ of Habeas Corpus is **CONDITIONALLY GRANTED**. A writ of habeas corpus shall issue unless, within 180 days, the State of Texas either begins new proceedings against Prible or releases him from custody. The 180-day time period shall not start until the conclusion of any appeal from the Memorandum Opinion and Order, either by exhaustion of appellate remedies or the expiration of the time period in which to file such appellate proceedings. The Court **DENIES** certification of any issue for appellate consideration.

This is a final judgment.

SIGNED at Houston, Texas, on this 17th day of August, 2020.

KEITH P. ELLISON
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

RONALD JEFFERY PRIBLE, Petitioner,	§ § §	
v.	§	H-09-CV-1896
LORIE DAVIS, Director, Texas Department of Criminal Justice, Correctional Institutions Division, Respondent.	§ § § § §	

MEMORANDUM OPINION AND ORDER

In 2002, a Texas jury convicted Ronald Jeffery Prible of capital murder. He was sentenced to death. After unsuccessfully seeking state appellate and post-conviction remedies, Prible filed a federal petition for a writ of habeas corpus in 2009. Now before the Court is Prible's Fourth Amended Petition for Writ of Habeas Corpus. The matters raised by Prible's petition have required significant factual development, extensive briefing, and serious judicial consideration. For the reasons described below, the Court finds that Prible is entitled to federal habeas corpus relief.

I. BACKGROUND

A. The Murders, The Investigation, and Prible's Arrest

At around 6:00 a.m. on April 24, 1999, a neighbor saw smoke pouring from Esteban "Steve" Herrera's house. Authorities found Herrera lying in the middle of the garage in a pool of blood. Four bodies were found inside the smoky house. Herrera's girlfriend Nilda Tirado lay face-down on a couch inside, naked from the waist down. Three children were found dead in the bedrooms.

A forensic investigation revealed that the assailant had used an accelerant to create a flashfire that self-extinguished, but not before suffocating the sleeping children. Both Tirado and

Herrera had died from a single gunshot to the back of the head. Both adults had died before the fire started.

Prible, a friend of Herrera and Tirado, was quickly identified as a suspect. The police investigation established that Prible had spent the evening with Herrera. Herrera's brother-in-law had accompanied Prible and Herrera to a club until around 2:00 a.m. on the morning of the murders. They returned to the Herrera home. Herrera and Prible were in the garage playing pool when the brother-in-law left.

Scientific evidence confirmed that Prible had been present in the Herrera home. A forensic examination uncovered sperm cells from oral, vaginal, and anal swabs taken from Tirado's corpse. Herrera's DNA matched the anal and vaginal swabs. DNA testing identified Prible as the source of the semen found on the oral swab.

The police questioned Prible, but he disclaimed any involvement in the murder. Prible admitted that he had been in the Herrera home after returning from the club, but said that Herrera drove him home at around 4:00 a.m. When the police asked what he would do if they found his DNA at the scene, he added that he had been having an affair with Tirado and had engaged in consensual oral sex with her.

Police searched the home of Prible's parents, where Prible also resided. The search uncovered guns and ammunition. A firearms examiner later testified at trial that a magazine found at Prible's residence could hold bullets similar to those found at the crime scene. But the murder weapon was never recovered. Investigators could not find blood stains, accelerant, or any forensic evidence on Prible or his clothing.

In addition, Prible had an alibi. A teenage neighbor saw Herrera drop Prible off at his parents' home in the early morning hours.

Prible's DNA alone was not enough to pursue prosecution. Prible was not arrested, let alone indicted, in connection with the murders for two years. The case went cold.

In early 2001, Harris County Assistant District Attorney Kelly Siegler was asked to review the cold case. By that point, no new information had been developed that would come out at trial. The State, nonetheless, charged Prible with capital murder on July 5, 2001.

At that time, Prible was housed in the federal prison FCI Beaumont Low for a federal bank robbery conviction.[1] Rather than be transferred to Harris County custody for the state capital murder charges, however, on the day Prible was charged he was transferred to FCI Beaumont Medium. That same day, Nathan Foreman was also transferred to FCI Beaumont Medium and eventually became cellmates with Michael Beckcom. Beckcom would later testify at trial that Prible had confessed the murders in detail to him and Foreman.

Siegler presented Prible's case to the grand jury on August 29, 2001, without calling any witnesses. The grand jury returned an indictment. The State of Texas tried Prible for capital murder in 2002. The State's case against Prible was not strong. As summarized on direct appeal, the State's case rested on six main facts:

> The State presented evidence that: 1) [Prible] was the last person seen with Steve at the house prior to the murders; 2) he had a motive to kill Steve; 3) the bullets that killed Nilda and Steve were fired from the same weapon; 4) [Prible's] sperm was deposited in Nilda's mouth at some point prior to her death; 5) a fire was set to destroy physical evidence, including evidence of [Prible's] DNA; and 6) [Prible] admitted to Beckcom that he committed the murders.

Prible v. State, 175 S.W.3d 724, 730 (Tex. Crim. App. 2005).

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[1] In June 1999, Prible pled guilty to bank robbery in violation of Title 18 U.S.C. § 2113(a). *United States v. Prible*, No. 4:99-cr-348-1 (S.D. Tex. June 17, 1999) (Doc. No. 6). Prible was sentenced in federal court in September 1999. *Id.* (Doc. No. 13).

Most of this evidence, however, does not explicitly inculpate Prible in the murders. At issue in the instant proceedings are the two factors that the State argued directly incriminated Prible: the State's use of inmate testimony and the DNA evidence.

B. The State's Use of Inmate Testimony Against Prible

The star witness for the State was Michael Beckcom, a "jailhouse snitch" who was housed with Prible at FCI Beaumont Medium. Beckcom's key inculpatory testimony was that Prible confessed to him and his cellmate, Nathan Foreman, on November 24, 2001. Before trial, the trial court held a conference devoted largely to discussing the State's interaction with its anticipated witness Beckcom. Trial counsel requested that the State provide (1) information about Beckcom's criminal record and any sentence reductions he had received; (2) information about "the date, time, place, and manner of the State's contacts with [Beckcom], including a statement of how the contact was first issued and with whom it was made"; (3) information about any other cases in which he had provided testimony; (4) a copy of Beckcom's statement to prosecutors and any notes related to conversations between Beckcom and prosecutors; and (5) a copy of any agreement about what Beckcom would receive for his testimony. 2 RR 4, 6, 8.[2] The trial court ordered the release of the first category of information, Beckcom's prior history of testifying, and information about any deals with the prosecution.

The prosecution balked at providing information about its contacts with Beckcom. Siegler stated:

> I'll agree to tell Mr. Gaiser how we came into contact and the times that we've met. I don't remember the dates. I didn't take any notes. And the best that I can remember, I'll let him know what they are, but I'm not going to write it all down. He can come to my office and I'll sit down and tell him what I can remember.

[2] The Court will refer to the Reporter's Record from Defendant's Appeal from the 351st District Court of Harris County, Texas, No. 75587, as _ RR _.

Id. at 5–6. The trial court granted the second request "as to Siegler's oral transmission of the information to Mr. Gaiser as described on the record." *Id.* at 6. The prosecution provided the defense a summary of Beckcom's statement, but the trial court agreed that any notes constituted attorney work product. *Id.* at 7. The prosecution also agreed to tell the defense about any disciplinary violations Beckcom may have committed. *Id.* at 24.

The prosecution also provided some information about any deals it made with Beckcom in exchange for testifying. At the hearing, Siegler stated:

> [I]n exchange for his cooperation and truthful testimony, when this trial is completely over with and resolved I will notify his Assistant United States Attorney [whose] name is Mark Cullers, in Fresno, California, that [Beckcom] cooperated in this case, what the level of his cooperation was, the extent of his cooperation, and whether or not I believe that it was truthful. At that time it will be Mark Cullers' decision as to whether or not to file a [Federal Rules of Criminal Procedure] Rule 35 reduction. Even if he files that Rule 35 reduction, it will be his superior's decision whether or not to proceed with it. And even if they decide to proceed with it, it will be his Federal Judge in California's decision whether or not to give him any kind of reduction in his sentence.

Id. at 29. In that same pre-trial conference, the parties discussed the admission of any written and oral statements the prosecution intended to use. The prosecution had already given the defense all written statements. *Id.* at 27. Siegler told the defense that Prible "made comments and statements to other people in the Beaumont prison" but she already "gave [the defense] their names." *Id.* She told the defense that Beckcom was the only federal inmate the prosecution would use at trial. *Id.* at 28.

The State's opening statement at trial discussed extensively Beckcom's proposed testimony. The State bluntly told jurors that Beckcom is a "vial [sic], disgusting man himself. Who is himself an ex-con several times over. Who is himself convicted of murder on a case that was at one time a capital murder. . . . You're not going to like him. He's going to make you sick to your stomach." 21 RR 79. The State then informed the jury that Beckcom hoped for, but was

not guaranteed, a benefit from his testimony. *Id.* at 79–81. The State's emphasis on Beckcom foretold his importance to their case because only Beckcom would "tell you all of the details of everything that Jeff Prible told him about how he did it that night, including the fact that he was proud of the fact that he killed the whole family." *Id.* at 82.

Beckcom was the State's penultimate witness in its case-in-chief. After preliminary questions regarding his background, the State asked Beckcom about his extensive criminal history. At the time of trial, Beckcom had been incarcerated in federal prison for five years. 26 RR 9. Beckcom explained that he had previously testified against others in exchange for deals with the government. *Id.* at 12–13. Beckcom explained the deal he made with the State that resulted in his testimony against Prible: "[I]f I testify truthfully to this Court that you will reciprocate by calling my Federal prosecutor. At that point it's out of your hands, but just to let him know what I've done." *Id.* at 14. Otherwise, testified Beckcom, the State made him no other promises. *Id.* at 17. Beckcom testified that he could not return to FCI Beaumont because other inmates knew about his testimony against Prible. *Id.* at 19–20. He had, in fact, already been put into protective custody. *Id.* at 21.

When asked when he had heard about Siegler, Beckcom responded: "I didn't learn about your name until . . . probably the end of September, early October of 2001." *Id.* at 22. Beckcom testified that "[p]rior to that I had heard of the case just briefly, something about a guy coming from the [FCI Beaumont] Low charged with murder. I didn't really get too much information on it." *Id.* Beckcom testified that he got Siegler's name from Nathan Foreman who "lived in [his] unit at the prison and then ultimately became [his] cellmate." *Id.* at 23. When he learned about Siegler, Beckcom stated, he did "[n]othing immediately," but eventually called her in "the first half of October 2001." *Id.* at 23, 24. He told her that he "had information regarding this case

involving a murder." *Id.* at 24. Siegler visited him in "either late November or early December." *Id.* Siegler brought investigator Johnny Bonds with her. *Id.* at 24–25. Beckcom thought Siegler was "probably a little skeptical of another inmate maybe spinning a yarn to [her]." *Id.* at 25. Beckcom gave her a letter dated December 10, 2001, detailing his knowledge of the crime. *Id.* Beckcom testified that he had "spoken" with Siegler on the phone "two or three times" and that the phone calls were mostly about her recommending a sentence reduction. *Id.* at 26–27.

In his direct testimony, Beckcom testified as follows regarding his interactions and conversations with Prible:

Beckcom and Prible met in the recreation yard through a shared acquaintance. *Id.* at 28–29. Prible began exercising with the two men, but did not engage Beckcom in conversation for "weeks or maybe a month." *Id.* at 31. Initially, they engaged in "general conversation" mostly about people they both knew. *Id.* at 32. Beckcom had previously "heard bits and pieces of information when [Prible] got there," but he "still really didn't know who he was." *Id.* Eventually, Beckcom asked Prible about the capital charges. *Id.* The two men initially had general conversations about the capital prosecution, but Prible disclaimed any involvement in the crime. *Id.* at 33–34. Beckcom claimed that he "wasn't paying a lot of attention" to Prible's statements about his case, "because it's not something [he] care[d] to relive, [his] capital murder case." *Id.* at 34.

In "bits and pieces of conversations," Prible began to provide Beckcom with details about the crime. *Id.* at 33. Details came out in "[s]everal conversations" over "weeks if not a month." *Id.* at 37. In the beginning, when Prible "was still struggling with actually confiding a lot," he told Beckcom: "'I'm not a sane man'. . . . 'Your deepest, darkest reaches of your worst nightmares

don't come close to me, don't come close to what I am capable of.'" *Id.* at 42. Prible also implied that he would murder for hire. *Id.* at 42–43.

At first, Beckcom "was getting information . . . with no intention of even using it. I was actually curious, trying to find out what the situation looked like." *Id.* at 37. Prible told Beckcom that "they got DNA on [Tirado]," but "everybody knew [he] was having an affair with her," because she and Herrera "had some kind of open relationship." *Id.* at 33–34. Prible also said that the police "were looking for a .38 caliber pistol that they knew he had had, but he had sold it." *Id.* at 34. At any rate, "[i]t was clean. That wasn't the [murder] weapon." *Id.* Still, Prible described Herrera as "his best friend." *Id.* at 39.

Beckcom "at one point . . . actually became interested in" contacting Siegler so he "began prodding [Prible] into conversations at times." *Id.* at 36. When Beckcom asked Prible if he was "sure [the murder weapon] can't be found," Prible answered, "asphalt's good some times for hiding things." *Id.*

Eventually, Beckcom contacted Siegler. From her, Beckcom learned that he would have to know "[s]pecifics about the case, facts," so he "sought to find out as much as [he] could." *Id.* at 37.

After speaking with Siegler for the first time, Beckcom told Prible that he did not care whether Prible had committed the murders, and Prible "softened up a bit" and gave Beckcom more details. *Id.* at 47–48. Prible described how "Steve was shot in the pool room. Nilda was face down on the couch, shot in the back of the head, she was partially clothed." *Id.* at 48. Prible said the children died from smoke inhalation. *Id.* at 49. Prible "gave [Beckcom] the impression" that he had sex with the victim "in the bathroom" on the night of the murder. *Id.* at 44. At the time, Herrera was "[i]n the pool room, in the garage." *Id.* at 45. Prible told Beckcom that he had "a

witness that saw [Herrera] take me home that night." *Id.* at 40. "[A] child of maybe 12 or 13 years . . . had gotten up in the middle of the night to use the restroom and saw him through the window with [Herrera] out in front of his parents' home." *Id.* at 41.

Prible increasingly gained confidence in Beckcom and Foreman. Beckcom said: "He became close to Foreman and I. He called us his brothers and said he loved us . . . . [A]t one point he told us he's told us things that only he and God knows." *Id.* at 49. The two men expressed interest in forming a business with Prible after their incarceration. Beckcom specifically testified that "Foreman was interested. Foreman was interested in investing in the business so we were actually making plans on something to do when we got out." *Id.* at 35.

The last, and most important, conversation was on November 24, 2001. *Id.* at 53. That day, Beckcom, Foreman, and Prible took a photograph together with their parents. *Id.* at 56. Later that night, Prible "really poured it all out." *Id.* at 53. Prible had "finally gotten used to us and relaxed. He felt like, you know, we were going to help him out. We told him we would give him any help we could. We planned on doing business." *Id.* Beckcom described the circumstances under which Prible finally described the murders:

> We were sitting out in the rec yard that particular evening. It was getting dark, we were sitting under—we had these little pavilions out on the rec yard with tables underneath where you can play cards and dominoes.
>
> And [Prible] was just sitting there and he got pretty quite [sic] for a while and I could tell he was thinking about some things. So, he pulled Foreman and I aside and that's when he gave me the information . . . .
>
> He said, "You know, Steve screwed me. He screwed me out of $250,000.00. That was my money." And then he gave me the story about, you know, they were planning to buy some drugs. . . .
>
> Well, [Prible] was very agitated especially when he got to the part, "Well, he was going to steal my money and he's going to kill me, fuck him." And he was literally spitting on us. He was pretty agitated. I could tell he was thinking back to the scene like he was thinking back to the actual event.

Id. at 53–54. Prible said that Herrera "was going to kill [him], so [he] handled [his] business." *Id.* at 51. Prible described how, while they were arguing, he shot Herrera, then when Tirado ran into the house to call the police, Prible shot her. *Id.* Prible looked for the stolen money, but could not find it. *Id.* at 52. Prible lit a fire to cover evidence, but "it didn't take." *Id.* at 51–52.

Beckcom asked Prible: "How the hell did you get in and out of this house without being seen?" Prible responded: "Anybody that can go in a house and take out a whole family and get out without being seen is a bad mother fucker and I'm that mother fucker." *Id.* at 52–53. Referring to his military service, Prible "said that his parents lived a couple of miles from there so it wasn't far. And he said it was a high intensive, low drag maneuver. That's what I was trained for, in and out. I'm a ghost." *Id.* at 55.

Beckcom's direct testimony ended with a confirmation of Prible's confidence in his prison friends. Prible said: "You know, I trust you guys. You're my brothers. You're the only ones that could convict me, but basically he had made his peace. He said, If you do that you'll have to live with it. I'm prepared to die." *Id.* at 54–55.

In cross-examination, trial counsel reviewed Beckcom's extensive criminal history, including prior times he had assisted the Government to get a lesser sentence. *Id.* at 64–69, 77–80. Beckcom admitted: "Oh, I've told lies in the past," but assured that he was now "just telling. . . what [Prible] told me." *Id.* at 62. Beckcom admitted that he had lied under oath before. *Id.* at 91.

When trial counsel questioned why Prible would trust Beckcom and confess after only a few months, Beckcom said: "[O]ne of the first things I told him is you shouldn't be talking about a case that's pending." *Id.* at 70–71. Beckcom admitted that there were similarities between Prible's crime and a capital murder charge which Beckcom had faced, leaving Beckcom with the

impression that Prible "seemed to want to try to understand how they were going to approach him, how long this thing might play out how, how long he might be in jail. And I told him mine took, you know, a year." *Id.* at 72. Beckcom admitted that he made notes about Prible's story. *Id.* at 75.

Trial counsel also asked Beckcom about the written statement that he provided to Siegler after Prible's alleged confession in order to impeach his credibility:

Trial counsel:	And you knew at that point in time, from the time you wrote this statement from a previous conversation you had with Ms. Siegler that what she wanted was details, right?
Beckcom:	I pretty much had them all by that time.
Trial Counsel:	But you knew—well, he had left by that time, but you knew what you needed to make this story come to life, right?
Beckcom:	I didn't necessarily know what I needed. I just gave her what he gave me.
Trial Counsel:	So, you had to put the details, specific details of the murder itself so that—
Beckcom:	So that she would believe me, sure.

Id. at 84. Beckcom stated that he had not seen or heard anything from any person or media about Prible's case, except for Prible's own statements. *Id.* at 85 ("Q: [N]obody talked to you about the case, you didn't know anything about it . . . all the knowledge you acquired, you acquired from Jeff Prible? A: Yes."). Beckcom said that he received Siegler's name from Foreman, and that he understood that Foreman had provided other informants to Siegler. *Id.* at 82. He also confirmed that he and Foreman knew that they were planning to provide Siegler with information about Prible when they took the photo together the day of Prible's confession to corroborate that they knew him. *Id.* at 83. Beckcom clarified that, while Prible told them about his case "[i]n bits and pieces" over two months, he "pretty much had [all the details] by" the time he talked to Siegler. *Id.* at 84.

On redirect, Siegler had Beckcom review numerous details from the crime and affirm that he learned them from Prible. *Id.* at 92–95.

C. Testimony About Prible's DNA

The jury also heard evidence about the DNA found in Tirado's mouth. The State presented two witnesses. The Chief Harris County Medical Examiner, Dr. Joye Carter, testified that sperm cells can be found in a person's mouth at least several hours after ejaculation, and maybe longer. She testified that "semen is a very sticky substance and some of it could actually adhere or stick to like placque that's on the teeth or in the recesses of the mouth [and] not fully be cleaned out." 23 RR 68. She also stated that there was "no indication" that Tirado had been sexually assaulted. *Id.* at 128.

William Watson also testified for the State. At the time of trial, Watson held a master's degree in biology. He performed DNA testing on the sperm cells found on Tirado. Watson testified that a "microscopic" amount of DNA was collected on the swabs taken from Tirado's mouth. This DNA was Prible's. 24 RR 118. In the report that he prepared after the murders, Watson did not try to estimate exactly how long before death the sperm had been deposited in her mouth. Watson testified that he had never developed a DNA profile from an oral swab and had not seen it in the literature. *Id.* at 100, 112. However, Watson stated that the fact that he could develop a profile from the oral swab was "consistent with there being a great deal of sperm present." *Id.* at 94. Watson testified that the fact that he was able to generate a full and complete male profile from the oral swab was inconsistent with the semen being deposited into Tirado's mouth a long time before she was killed. He also said that the fact that he was able to obtain the male profile "certainly would be consistent with" Prible depositing the semen in Tirado's mouth "moments, if not seconds, before she was killed." *Id.* at 101–03.

Dr. Robert Benjamin, a molecular biologist, testified for Prible. Dr. Benjamin said that he did not agree with Watson's testimony because there were too many variables and Watson made too many assumptions. Dr. Benjamin stated that, if the semen had been deposited in a consensual act, the recipient may not take steps to remove it from the mouth. 27 RR 118–21. Dr. Benjamin also stated that using quantities of DNA to estimate time since ejaculation is "just not scientifically valid." *Id.* at 123–24. He said that "there were no controlled scientific studies" to support Watson's conclusions. *Id.* at 136.

D. Arguments and Conviction

The arguments made by the prosecutors in closing foreshadowed the issues raised in the instant proceedings. Prosecutor Vic Wisner's closing focused on two factors: Beckcom's testimony and the DNA evidence. On one hand, Wisner bolstered Beckcom's testimony, urging jurors that "Mike Beckcom is telling the truth." 28 RR 7. On the other hand, Wisner guaranteed that "[w]e've got enough without him. Beckcom just kind of fleshes out what happened, fills in some of the details. We have enough evidence without him, but I suggest to you everything he's telling you about what happened is the truth." *Id.* Wisner told jurors that, in order to believe the defense's case, jurors would have to find that "this Defendant is the unluckiest, unluckiest [sic] criminal defendant who's ever set foot in a courtroom. And there has been a conspiracy to frame this Defendant both in the free world and prison, so audacious it makes any frame up that has ever been conducted in the annals of crime look like child's play." *Id.* at 9. In particular, Prible was unlucky "from a practical hands-on perspective," because the semen found in Ms. Tirado's mouth "had to come right before she was killed or after she was killed." *Id.* at 10. In fact, "[t]here is no way in the world that that semen wasn't deposited either moments before or seconds after Nilda died." *Id.* at 11.

In their closing argument, the defense tried to bolster their DNA testimony and detract from Beckcom's credibility.

But jurors heard last from Siegler. In an emotionally charged argument, Siegler attempted to dismantle the defense's case. Siegler dismissed the claim that Prible and Tirado had an affair, because "appearance is what leads to affairs" and Prible "is creepy and gives you the creeps." *Id.* at 55. Siegler challenged the defense DNA expert's testimony by being "crude for a minute" and suggesting that it depended on Prible having "some kind of magic semen, magic sperm that somehow lives longer than any of y'alls or any other man's in this whole universe." *Id.* Siegler continued that, to believe the defense, jurors would have to assume that "his semen is so tasty that she walked around savoring the flavor of it in her mouth for a couple hours." *Id.* at 55–56. In crass language, Siegler described Prible as someone so depraved that he could kill Tirado while sexually excited. *Id.* at 59. Siegler summed up her argument: "[I]f Jeff Prible had managed to control his ejaculation and his mouth, he might not have ever been caught." *Id.* at 72.

Siegler's argument eventually turned to Beckcom's testimony, arguing: "Is there any evidence in this trial that Michael Beckcom got any facts about what happened anywhere except out of the mouth of this Defendant?" *Id.* at 75. She also told jurors: "[Y]ou can believe everything Mike Beckcom said and find him guilty of capital murder. You can hate his guts and think he's a creep and believe he's telling the truth and find this Defendant guilty of capital murder or you cannot believe one word he had to say and still find Jeff Prible guilty of capital murder." *Id.* at 77. After addressing problems with Beckcom's credibility, Siegler said:

> But the most important thing, how would Mike Beckcon [sic] know all the things that he does know unless the killer told him? Whose fault is it that Mike Beckcom came to court? It's Jeff Prible's for telling him. And whose fault is it that Mike Beckcom knew all the details? Jeff Prible's for telling him. And how did Mike Beckcom know all the details? Because Jeff Prible did it. That's how he knows all these details.

Id. at 81.

The jury convicted Prible of capital murder.

E. Punishment

Under Texas law, a jury decides a capital convict's sentence by answering special issue questions. In this case, the jury had to answer two questions: (1) would Prible be a future threat to society and (2) did mitigating circumstances warrant a life sentence? The State presented testimony from Prible's former wife, a Harris County Sheriff's deputy, and a former business partner whom Prible threatened. The State also relied on evidence of Prible's prior bank robberies. The defense presented testimony from a correctional counselor and family members, and evidence about Prible's good character. The jury answered Texas' special issues in a manner requiring the imposition of a death sentence.

II. PROCEDURAL BACKGROUND

A. State Litigation

On direct appeal, Prible claimed that the evidence supporting his capital-murder conviction was insufficient. Prible emphasized that "Beckcom's testimony was questionable because he testified in the hope of having his own sentence reduced and he could have learned the details of the alleged offense through the probable cause affidavit in [Prible's] possession." *Prible v. State*, 175 S.W.3d 724, 730 (Tex. Crim. App. 2005) (internal quotation marks omitted). The Texas Court of Criminal Appeals found that,

> Beckcom, however, testified about some details that were not contained in the probable cause affidavit. For example, he knew that there was a pool table in the garage and [Prible] had drops of catsup on his shoe. Beckcom's testimony also contradicted or excluded some details that were contained in the probable cause affidavit. He testified that [Prible] told him that Steve "took $250,000 of [his] hard-earned money," but the amount recited in the probable cause affidavit was $45,000. He knew that the police had DNA evidence and that [Prible] claimed to have had

> an affair with Nilda, but he apparently did not know about [Prible's] and Nilda's alleged sexual encounter in the bathroom while Steve was in the garage. The jury was free to take these discrepancies into account and to believe or disbelieve Beckcom's testimony based on their evaluation of his credibility.

Id. (alterations in original). The Court of Criminal Appeals concluded that, "[b]ased on the evidence at trial, a rational jury could have concluded beyond a reasonable doubt that [Prible] committed the murders of Nilda Tirado and Steve Herrera during the same criminal transaction." *Id.*

Prible's initial state habeas application, which was filed by state habeas counsel on November 19, 2004, did not raise any issues relating to Beckcom's testimony or mention anything about an alleged ring of informants. Then, while on death row, Prible started to hear about other defendants—including a man named Hermilo Herrero—who had been prosecuted by Siegler using what seemed to be an overlapping set of prison informants. (Doc. No. 17, at 19). Suspecting that something similar had happened in his case, Prible filed two *pro se* applications in 2007, raising *Brady*,[3] *Giglio*,[4] *Massiah*,[5] and *Strickland*[6] issues relating to the use of inmate testimony in his case. In one application, Prible alleged that "the prosecution (Kelly Siegler) hid her true ties to Mike Beckom [sic] and her jailhouse informants in Beaumont Federal Prison" and was "using Beckom [sic] and his group of friends from Federal Prison to aid her in making cases." (Doc. No. 99, at 44 (citing Ex. 24, at 00384)). Prible argued that, had he "been made aware of the ties [Siegler] had to Beckcom and his group of friends who aided Siegler in other cases," he could have used that as impeachment evidence in his case. (*Id.* (citing Ex. 24, at 00386)). In the other

[3] *Brady v. Maryland*, 373 U.S. 83 (1963).

[4] *Giglio v. United States*, 405 U.S. 150 (1972).

[5] *Massiah v. United States*, 377 U.S. 201 (1964).

[6] *Strickland v. Washington*, 466 U.S. 668 (1984).

application, Prible alleged that his trial counsel was ineffective for not investigating Hermilo Herrero as a potential witness. (*Id.* at 45 (citing Ex. 25, at 00411–15)).

The Court of Criminal Appeals denied Prible's initial state habeas application and construed the second and third *pro se* pleadings as subsequent applications, found that they did not meet the requirement for merits review because neither application contained "sufficient specific facts establishing that the application meets one of the exceptions set out in in Art. 11.071, § 5," *see* TEX. CODE CRIM. PRO. art. 11.071, § 5, and dismissed them as abusive. *Ex parte Prible*, Nos. WR-69,328-01, WR-69,328-02, WR-69,328-03, 2008 WL 2487786, at *1 (Tex. Crim. App. June 18, 2008).

B. Initial Stages of Federal Litigation

Prible timely filed his original federal habeas petition on June 18, 2009. (Doc. No. 1). The petition raised numerous claims, four of which related to the State's development and use of inmate testimony for trial:

- The State intentionally sponsored false and misleading testimony in violation of Prible's due process rights, as established in *Giglio v. United States*, 405 U.S. 150 (1972).
- The State violated Prible's due process rights by suppressing evidence of the nature of the arrangement between Beckcom, Foreman, and the lead prosecutor, contrary to *Brady v. Maryland*, 373 U.S. 83 (1963).
- The State violated Prible's rights under the Sixth Amendment and *Massiah v. United States*, 377 U.S. 201 (1964), by employing Beckcom as a state agent.
- Trial and habeas counsel provided ineffective representation under *Strickland v. Washington*, 466 U.S. 668 (1984), for not raising a *Massiah* objection.

(Doc. No. 1). Unlike some of Prible's other claims,[7] the above four claims had not been properly exhausted in state court.

Prible filed an amended petition on August 17, 2009. (Doc. No. 7). Respondent then moved for summary judgment. (Doc. No. 12). On April 30, 2010, the Court denied the summary judgment motion without prejudice and stayed this action to allow Prible to seek state court review of his unexhausted claims. (Doc. No. 23, at 3). This Court's stay order noted that "Prible secured the affidavits supporting his unexhausted claims after state habeas review had concluded," raising the possibility that the state court might allow Prible to file a successive state habeas action. (*Id.*).

C. Successive State Proceedings

On September 8, 2010, Prible filed a successive application for habeas relief in the 351st District Court of Harris County, raising the following claims:

- Whether "[t]he State violated Prible's rights guaranteed by the Sixth Amendment" and *Massiah*;
- Whether "[t]he State intentionally sponsored false and misleading testimony in violation of Prible's due process rights," as established in *Giglio*;
- Whether "[t]he State violated due process by concealing the nature of the arrangement between Beckcom, Foreman and the lead prosecutor," contrary to *Brady*;
- Whether "[i]n violation of due process, the State permitted its key witness to mislead the jury about the existence and extent of the benefits he expected to receive for testifying against Prible," contrary to *Giglio*; and
- Whether "Prible is actually innocent of capital murder." U.S. Const. amends. VIII, XIV.

[7] Prible's original petition also included claims of improper admission of testimony about the children's deaths, ineffective representation in the handling of DNA evidence, violation of his right to a jury composed of a fair cross-section of society, withholding of information by the prosecution from the defense, and actual innocence.

1. Factual Basis of Prible's Successive State Litigation

The above five claims were based on allegations that Beckcom and Foreman were part of a ring of informants at FCI Beaumont whom Prosecutor Kelly Siegler had recruited and fed information to assist her in securing a conviction against Prible. The allegations relied heavily on an August 26, 2010, interview that Prible's federal habeas counsel had with a federal inmate, Carl Walker, Jr. Federal counsel did not secure an affidavit memorializing Walker's story, but prepared a transcription of the interview. (Doc. No. 99, Ex. 2).

In the interview, Walker described how informants were "recruited" at FCI Beaumont Medium to testify in particular cases, including Prible's. (*Id*. at 4). Walker recounted that, not long after he arrived at FCI Beaumont in the summer of 2000, Beckcom and Foreman approached him in an attempt to bring him into the informant circle. Walker assumed that "the prosecutor was working directly with Foreman," but he was not sure whether Foreman or Beckcom "had more direct control or direct communication with the prosecutor." (*Id*. at 9, 29).

According to Walker, Beckcom and Foreman knew from Siegler that Prible was coming to FCI Beaumont even before Prible arrived. (*Id*. at 9). Walker described how Beckcom and Foreman "s[at] me down, they t[old] me these various events and supposedly details of [Prible's] case and whose [sic] who, and what's what." (*Id*. at 11). Beckcom and Foreman then gave Siegler's number to Walker and directed Walker to call Siegler so that she could assess whether Walker was "a candidate" to testify against Prible. (*Id*. at 13). Walker said he called Siegler "[o]nce or twice." (*Id*.). The other men were "always on the phone" with Siegler. (*Id.* at 23). Foreman was "on the phone almost on a daily basis" regarding the case. (*Id.* at 28). Walker also said that the recruiters directed him to "write a letter" to be sent to Siegler describing "details about [Prible's] case" that Beckcom and Foreman had told him. (*Id*. at 13). Walker claimed that

"common sense" told him that "someone high on the food chain was feeding these guys the information because [Prible] wasn't telling" Walker facts about the crime. (*Id*. at 14, 15). "[T]he whole plot was made out before it was actually executed." (*Id*. at 14).

The understanding was always that informants would be rewarded with "time off, or benefits." (*Id*. at 16). Overall, Walker described a ring of "five or six" informants who were trying to incriminate inmates like Prible. (*Id.* at 22). That same ring, Walker explained, was simultaneously involved in setting up another inmate, Hermilo Herrera, for another cold case murder. (*Id.* at 21–22). According to Walker, "this is how you have [the] miraculous coincidence that the same group of guys . . . have been confessed to by two different people on two different murders, totally different murders." (*Id.* at 21). Walker further described how the informants associated with Prible, including Beckcom and Foreman, got Prible drunk and high, and took group pictures with him to create at least the appearance of a bond with Prible. The men's role was to "get . . . information, then bank it, bank, it." (*Id*. at 20).

To Walker's knowledge, however, Prible never actually confessed. (*Id*. at 16). Walker did not think that Prible had committed the murders. (*Id*. at 18). Ultimately, Walker did not testify against Prible. He said he came to a "moral . . . crossroad" when he asked himself: "[Am I] going to openly lie about information I had no idea about and send this man to his death?" (*Id.* at 30). He added: "I just know these guys is guilty of conspiring against him and working to recruit me and others or whomever that would listen to, actually, ah, get him on death row. I know that for a fact. I do know for a fact that Kelly Siegler was involved." (*Id.* at 49).

2. Litigation of Prible's Successive State Application

After Prible filed his successive habeas application in the trial court on September 8, 2010, the trial court forwarded his application to the Texas Court of Criminal Appeals. Under article

11.071 § 5(a) of the Texas Code of Criminal Procedure, a Texas inmate may file a successive state application only in limited circumstances, including when "the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application . . . because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application . . . ." The Court of Criminal Appeals remanded Prible's application for the convicting court to determine "whether the factual basis for these claims was unavailable on the dates that applicant filed his previous applications." *Ex parte Prible*, No. WR-69,328-04, 2010 WL 5185846, at *1 (Tex. Crim. App. Dec. 15, 2010). The Court of Criminal Appeals ordered that Prible "shall have the opportunity to show when and how he obtained the evidence at issue and whether he exercised reasonable diligence to obtain this evidence at the earliest opportunity." *Id.*

In January 2011, Prible moved for *in camera* review of the prosecutor's file.[8] The State did not oppose the motion and voluntarily provided some material for review. The State disclosed three letters that prosecutors had sealed in a letter-sized envelope that was designated "attorney work product."[9] The letters from federal inmates Jesse Gonzalez, Mark A. Martinez, and Walker each described how Prible provided details of the crime while in prison. (Doc. No. 99, Ex. 3). Each explained that Prible told them varying details about the killing. The men referred to prior conversations with Siegler and her interaction with all three. Walker's letter named Beckcom and Foreman, hinted at Siegler's "previous conversations" with them, described how Walker was

[8] During the pendency of the state habeas proceedings, this Court also authorized discovery of Bureau of Prisons telephone records which showed repeated phone calls between Beckcom and Siegler before trial. *Prible v. Quarterman*, No. 4:08-mc-316, Doc. 18 (S.D. Tex. 2018).

[9] The letters are not dated. Two envelopes with the letters were dated in April and May 2002, a few months before trial and a few months after Prible left federal custody.

"present on many occasions when [Prible] was telling his side of the story," and ended: "I'm more than willing to testify to these things in court. I'm currently serving a thirty year sentence for Possession w/Intent to Distribute. I will help you in any way I can and would appreciate any help you could give me." (*Id.* at 10).

The state trial level habeas court held an evidentiary hearing on June 8 and 9, 2011, to determine whether the factual basis for Prible's conspiracy and prosecutorial misconduct claims was unavailable when Prible filed his previous state habeas applications. At this hearing, the court heard testimony from an investigator who worked with Prible's trial counsel; an investigator who worked with defense attorneys who represented inmate Hermilio Herrero, a defendant in an unrelated case involving the same alleged ring of informants; Roland B. Moore, III, Prible's initial state habeas counsel; and Kurt Wentz, one of Prible's trial attorneys.

State habeas counsel Moore provided an affidavit in state habeas court explaining what efforts he made to develop evidence outside the trial record to contest the legality of Prible's capital conviction and sentence, including information regarding the ring of informants. Successive State Habeas Record at 411–16.[10] In his affidavit, Moore stated that, during the period of time that he represented Prible, he "suspected that Beckcom had perjured himself" and "that [Beckcom's] cellmate Nathan Foreman was involved with Mr. Beckcom in a scheme to give false testimony." *Id.* 412. Moore accordingly took "extraordinary measures to contact [Foreman, who was] the one person who had been identified as a possible member of such a ring or organization." *Id.* Trial counsel "had no leads to any other members of a ring or organization of informants" at the time of

[10] The Court will refer to the Record from Defendant's application for writ of habeas corpus in the 351st District Court of Harris County, Texas, No. 921126-B, as "Successive State Habeas Record at _."

trial. *Id*. Among those measures, state habeas counsel "subpoenaed Foreman and attached him to another case." *Id.* at 413. But Foreman "refused to say anything. Foreman refused to talk after he realized what [trial counsel] wanted to speak to him about." *Id.*

On June 24, 2011, the state habeas court issued its "Findings of Fact Pursuant to Tex. Code Crim. App. Art. 11.071, Sec. 5(a)(1)." *Id.* at 797–804. As the title suggests, the court did not rule on the substance of Prible's claims, but found, as a procedural matter, that Texas's abuse-of-the-writ doctrine foreclosed review. The court specifically found that "the factual basis for the instant claims were available when [Prible's] initial habeas petition was filed in November, 2004" and that "a factual basis for [Prible's] conspiracy theory may have been available at the time of [his] trial." *Id.* at 801, 803.

The state court's procedural determination was, nonetheless, intertwined with its assessment of the evidence Prible had provided for his claims. The court summarized that Prible "raise[d] five claims alleging a conspiracy among the lead prosecutor in his case and several federal prison inmates who were housed with [Prible] at FCI Beaumont." *Id.* at 798. The court's findings acknowledged Prible's allegations that Siegler had fed "otherwise-unknown details about [Prible's] case" to Foreman, who in turn "provided information with a ring of snitches he recruited to assist the lead prosecutor in obtaining a false confession from [Prible]," rendering Beckcom a "state agent" and his trial testimony "perjured." *Id.* at 799. The state court concluded that Prible's allegations were largely based on Walker's interview statement. *Id.* The state court, however, found Walker's statement not persuasive because it "consist[ed] almost entirely of hearsay and speculation and contain[ed] no direct evidence of [Prible's] conspiracy theory." *Id.* The state court further concluded that Prible "present[ed] no evidence establishing that State's witness Michael Beckcom has recanted his testimony regarding [Prible's] confession that he committed

the capital murder," and, in fact, Beckcom "denies [Prible's] claim that he was provided with information about [Prible's] case from Nathan Foreman or the lead prosecutor." *Id.* at 800. In the end, the court concluded that Prible was not entitled to successive habeas proceedings because he failed to show that "the factual basis for his claims was unavailable on the dates that [Prible] filed his three previous applications, as required by TEX. CODE CRIM. PRO. art. 11.071 § 5(a)(1)." *Id.* at 803.

In reaching its conclusion, however, the state habeas court did not consider the new supporting and corroborating evidence developed during state habeas review. For instance, the state court did not discuss the impact of the letters suppressed in Siegler's work product file. Instead, the decision focused on the facts presented in the state habeas application filed before factual development occurred, centering its analysis on Walker's statement. Based on this circumscribed analysis, the habeas court found that "the factual basis for the instant claims were available when [Prible's] initial habeas petition was filed in November, 2004." *Id.* at 801.

Without explicitly adopting the lower court's findings, the Court of Criminal Appeals held that "the allegations fail[ed] to satisfy the requirements of Article 11.071, § 5(a)" and dismissed Prible's successive application as an abuse of the writ. *Ex parte Prible*, No. WR-69,328-04, 2011 WL 5221864, at *1 (Tex. Crim. App. Nov. 2, 2011).

D. Prible's Fourth Amended Federal Petition

Prible returned to this Court and requested additional discovery to develop his claims. This Court granted additional discovery, including allowing Prible to access additional portions of Siegler's work product file. (Doc. No. 134). Federal habeas counsel also conducted various authorized interviews and depositions of the prosecution team, FCI Beaumont informants, and Bureau of Prisons personnel throughout 2017.

On March 26, 2018, Prible filed his Fourth Amended Petition for Writ of Habeas Corpus, which is now before the Court. (Doc. No. 181). In his Fourth Petition, Prible raised sixteen claims for relief:

> Claim 1: The State violated due process by sponsoring false and misleading testimony that minimized the State's contact with key witnesses and communications with, and use of, other informants as state agents, to develop evidence incriminating Prible. (Doc. No. 181, at 162).
>
> Claim 2: In violation of due process guaranteed under *Brady*, the State suppressed material evidence that Beckcom and Foreman were part of an organized attempt to secure favors in return for fabricating a false confession. (Doc. No. 181, at 177).
>
> Claim 3: In violation of *Brady* and due process guaranteed by the Fourteenth Amendment, the prosecution suppressed evidence that Foreman, who Beckcom represented could corroborate his story, gave a different account, and was, in fact, fabricating evidence against Prible. (Doc. No. 181, at 196).
>
> Claim 4: In violation of *Brady*, the State suppressed evidence impeaching Beckcom's testimony regarding the circumstances of the alleged "confession" and his motives for questioning Prible. (Doc. No. 181, at 199).
>
> Claim 5: The State withheld evidence that the trial court ordered produced pursuant to *Brady*. (Doc. No. 181, at 203).
>
> Claim 6: The State violated Prible's rights guaranteed by the Sixth Amendment and *Massiah*. (Doc. No. 181, at 233).
>
> Claim 7: Prible was denied his Sixth Amendment right to effective assistance of counsel. (Doc. No. 181, at 237).
>
> Claim 8: In violation of *Massiah*, the State suppressed evidence that independently established that it had deployed Beckcom and Foreman as agents to pry incriminating information from Prible, even though the State was aware Prible was represented by counsel. (Doc. No. 181, at 242).
>
> Claim 9: Prible was deprived of his Fourteenth Amendment right to due process by the admission of evidence documenting the deaths of the complainants' children. (Doc. No. 181, at 244).
>
> Claim 10: In violation of due process under *Brady*, the State suppressed material evidence that Siegler had consulted the head of the Harris County Crime Lab to ask how long semen could remain in the oral cavity and was told it lives up to 72 hours. (Doc. No. 181, at 233).

> Claim 11: The State violated due process by sponsoring false and misleading testimony, and engaging in false and misleading argument, concerning the amount of time that semen could persist in the oral cavity, after being advised by the head of the Harris County Crime Lab that it could live up to 72 hours. (Doc. No. 181, at 256).
>
> Claim 12: Prible received ineffective assistance of counsel, as a matter of federal constitutional law, where trial counsel failed to effectively address and rebut the testimony of William Watson that the semen found in Tirado must have been deposited in her mouth near or at the time of her death, where there was no scientific basis for this expert conclusion. (Doc. No. 181, at 258).
>
> Claim 13: Prible was denied his constitutional right to an impartial jury because the venire did not reflect a fair cross-section of the community. (Doc. No. 181, at 269).
>
> Claim 14: Prible is actually innocent of capital murder and may receive relief through the actual innocence gateway under *Schlup v. Delo*, 513 U.S. 298 (1995). (Doc. No. 181, at 276).
>
> Claim 15: In violation of due process, the State sponsored false testimony to bolster its rape/murder theory and to prevent corroboration of Prible's alibi witness. (Doc. No. 181, at 282).
>
> Claim 16: Trial counsel's failure to utilize Prible's phone records and failure to exclude or refute the foundation of the state's rape theory violated Prible's Sixth Amendment right to effective assistance of counsel. (Doc. No. 181, at 266).

Respondent filed a Motion for Summary Judgment and Answer to Petitioner's Fourth Amended Petition. (Doc. No. 191). Prible filed an opposed motion for an evidentiary hearing to further explore his habeas claims on August 8, 2018. (Doc. No. 199). The stated purpose of the hearing was to explore relevant procedural issues, including whether Prible could establish cause and prejudice to overcome the procedural default of his prosecutorial misconduct claims. (*Id.* at 2–3). The Court granted the motion for evidentiary hearing on February 25, 2019. (Minute Entry 2/25/2019).

The Court held an evidentiary hearing in which the parties presented testimony and evidence relating to the claims involving the prosecution's use of inmate testimony at trial.

III. EVIDENTIARY HEARING

The Court held a three-day evidentiary hearing from April 29, 2019 to May 2, 2019. At this hearing, the Court heard live testimony from Nathan Foreman, Carl Walker, Kelly Siegler, and Terrence Gaiser (Prible's trial attorney). The Court also viewed portions of the depositions of Michael Beckcom, Johnny Bonds (Siegler's investigator on Prible's case), Victor Wisner (the other prosecutor on Prible's case), and Siegler. The Court summarizes the testimony as it applies to Prible's federal habeas claims, as follows.

A. Testimony of Nathan Foreman

At the evidentiary hearing, Foreman's testimony served two purposes: (1) provide background into the ring of informants and their interaction with Siegler, and (2) "testify that Beckcom's story of him and Foreman hearing a confession from Prible was not true." HT1-21.[11]

While incarcerated in FCI Beaumont in 2001, Foreman was held in the Special Housing Unit ("SHU"), which is "like, somewhat solitary, but only difference is there you have, like, two other cellmates." HT1-37. There, he met inmate Jesse Moreno, from whom he had learned some facts about Prible's case. HT1-39.[12] Moreno suggested that Foreman contact Siegler. HT1-40.

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[11] The transcript for the three-day evidentiary hearing is located at docket entries 234, 235, and 236. The Court will cite to the transcript as HT_-__.

[12] Respondent succinctly summarized Moreno's initial interaction with Siegler as follows:

> On April 4, 2001, Jesse Moreno, an inmate at FCI Beaumont-Medium wrote a letter to Kelly Siegler, a prosecutor with the Harris County District Attorney's (HCDA) Office, stating that he had information that could be helpful in one of her unsolved cases. Pet.'s Hrg. Ex. 6. Moreno served as an informant for Siegler several years prior in a case against Jason Morales. *Id.* Siegler met with Moreno on July 3, 2001, at FCI Beaumont-Medium. 2 EHRR 23–25. Moreno was housed in the Special Housing Unit (the "SHU") at the time. *Id.*; *see also* Pet.'s Hrg. Ex. 7. During the interview, which Siegler recorded, Moreno provided her with information implicating fellow-inmate Hermelio Herrero in the murder of Albert Guajardo. Pet.'s Hrg. Ex. 11. Moreno told Siegler that when Herrero confessed his

Foreman, Moreno, Beckcom, and another inmate named Rafael Dominguez all contacted Siegler from the unit manager's phone. HT1-45.

Foreman did not remember when he contacted Siegler but recalled meeting her at the Federal Detention Center in Houston. HT1-44. Siegler and her investigator, Johnny Bonds, met with Foreman at the Federal Detention Center in Houston on August 8, 2001. HT1-14. Foreman did not remember the content of that conversation. HT1-44, 80–81.

Foreman testified that, after he became cellmates with Beckcom in October 2001, they met Prible in the recreational yard. HT1-47. By that point, however, Foreman already knew some facts about Prible's case and had relayed them to Beckcom. HT1-51, 54. Foreman had gotten his information from Moreno and Siegler. HT1-54.

Foreman and other inmates were trying to "roll[] over on" Prible in exchange for "time cuts." HT1-49. But Prible would not talk about the crime—"he didn't really talk about what he was accused of," other than to say that "they were trying to accuse him for something that he didn't do." HT1-51.

Prible's federal habeas attorneys took Foreman line-by-line through the December 10, 2001, letter that Beckcom wrote to Siegler relating to Prible's alleged confession. Foreman directly contradicted Beckcom's account and denied that Prible had ever made inculpatory statements. Importantly, Foreman testified that he did not recall the November 24, 2001,

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> involvement in this murder to him, fellow inmates Raphael Dominguez and Nathan Foreman were also present. Pet.'s Hrg. Ex. 11 at 17. It appears from the transcript that this is the first time Siegler learned of Nathan Foreman. *See* Pet.'s Hrg. Ex. 11 at 18–19. Two days later, on July 5, 2001, Siegler charged Herrero with the murder, specifically referencing the inculpatory information provided by Moreno. 6 Resp.'s Hrg. Ex. 6.

(Doc. No. 240, at 4–5) (footnote omitted).

conversation in which Prible had allegedly confessed to the murders in his presence. HT1-59–60. On the day that Beckcom said that Prible confessed, Foreman testified that the group of inmates used homemade wine to try to get Prible to talk. HT1-71. Prible eventually got so drunk that Foreman had to help him back to his unit, but Prible did not confess. HT1-71–72. Foreman said that he would have remembered if Prible had said anything inculpatory, because he would have used that to inform on Prible. HT1-63.

Foreman convincingly and unwaveringly challenged the basis for Beckcom's trial testimony. Foreman unequivocally and credibly testified that Beckcom did not provide truthful testimony at trial. HT1-64, 70. Foreman testified that Beckcom "should have been a book writer or something," because his testimony was "not true" and completely fictional. HT1-64. The Court finds that Foreman was a credible witness.

B. Testimony of Carl Walker, Jr.

The constitutional claims in Prible's federal petition find their origin in the interview Carl Walker Jr. gave to Prible's attorney in 2010.[13] Walker was incarcerated in FCI Beaumont contemporaneously with Prible. Walker testified credibly about his involvement in the ring of informants vying to inform on Prible. Walker testified that he was "approached or recruited" by some inmates who asked "if [he] wanted a blessing, opportunity to get out of jail without having to do all [his] sentence." HT1-95. The men offered him an opportunity to get a time cut by testifying against Prible. HT1-97. Walker said that he thought that Foreman approached him, but it could also have been Beckcom or his cellmate Oscar Gonzalez. HT1-95, 126. Prible was to be

[13] Counsel had difficulty finding Walker because of confusion over an inmate with a similar name. HT1-119–20.

"a mark . . . [i]n every sense of the word. . . . [H]e was going to be a scapegoat for several individuals to have an opportunity to get out of prison sooner than later." HT1-106.

The men already had a "plethora of information about Mr. Prible's case" when they approached Walker—"details, locations, what was found, where the body was, what happened." HT1-95. The men concocted a plan to "collaborate as if we became prison buddies or pals or et cetera [with Prible], and then he, all of a sudden, feel compelled to confess all these horrific things." HT1-98. The men would then "writ[e] letters to the prosecutor asking to be a witness or—or volunteering to be a witness because we was just so overwhelmed about the information he supposedly give us." *Id.* The two main people involved in this plan were Beckcom and Foreman. HT1-99. Walker was given instructions to call Siegler and tell her what he had supposedly found out from Prible. HT1-100.

In the meantime, a grand jury returned an indictment against Prible on August 29, 2001. Prible would be transferred from FCI Beaumont Medium to the Harris County Jail on November 29, 2001. Before he left, however, on November 24, 2001, the group staged a photo "to create a picture of close intimacy with Mr. Prible, a close connection. . . . to show that . . . he would be comfortable enough or confident enough in your friendship to give you this information." HT1-111. Walker said that everyone in the photo was involved in the plot against Prible, as well as against other inmates. HT1-102, 103.

Walker testified that the group made a batch of wine specifically for Prible and drank it with him. The men intended for him to get so drunk that he would provide details about the murders. HT1-114. However, Walker said that it "really didn't matter" if Prible actually confessed, because "the knowledge was already there, you know. That was more of a formality,

like, you would go through the motions. You would set it up." HT1-114–15, 127. To Walker's knowledge, Prible never actually confessed. HT1-115.

Walker, nonetheless, sent Siegler a letter offering to testify that Prible had confessed. Walker testified that he did not write it himself, he only signed it. HT1-116. Walker's letter was among those kept in the work product folder. Walker explained that the inmates' letters were designed to corroborate each other. HT1-117. He believed that Beckcom wrote the letters, primarily because "[t]he only place to type letters is either in the law library, or maybe if you, like, a teacher or instructor or something teaching a class, you could have privacy or you'll have the exclusivity to have access to a typewriter." HT1-132. Beckcom was the only inmate in the conspiracy with that access.

Walker was a credible witness who was unwavering in his testimony. Walker provided trustworthy testimony that corroborated Foreman's rejection of Beckcom's trial testimony.[14]

C. Deposition Testimony of Johnny Bonds

Bonds was Siegler's investigator on the Prible case. Bonds provided some general background information about the investigation into Prible. He also noted that, initially, there was

[14] Respondent argues that "Prible's conspiracy theory alleging a state-run ring of informants rests almost entirely on speculative statements made by Carl Walker." (Doc. No. 240, at 12). Respondent supports that argument with a factual finding by the state habeas court that "Walker's statements . . . consist almost entirely of hearsay and speculation and contain no direct evidence of [Prible's] conspiracy theory," and that Walker's statements "are unpersuasive and have little evidentiary value with respect to the validity of [Prible's] habeas claims regarding any alleged conspiracy involving the lead prosecutor and federal inmates." (Doc. No. 191, at 13) (quoting Successive State Habeas Record at 799–800). Respondent fails to consider important differences between the allegations in the state habeas proceedings and those as they have developed in the instant case. The state court only considered Walker's statement, which included hearsay and speculation. His federal evidentiary hearing testimony, however, provided substance to his speculation and first-hand knowledge about the events. Walker's evidentiary hearing did not provide much testimony placing Siegler at the head of a ring of informants, but more than confirmed that a conspiracy existed at least among the inmates themselves. The state factual findings, therefore, addressed a much different issue than that considered by this Court.

not enough information to charge Prible. HT1-143. Bonds's experience with the case, however, was somewhat limited. Bonds said that he had never spoken to Beckcom. HT1-140. Bonds also explained that he never saw Walker's letter to Siegler. HT1-154–55. However, after reviewing the informant letters, he acknowledged that it looks like the same person typed them, because they look identical. HT1-180–81.

Bonds testified that, during the August 2001 meeting with Foreman at the Federal Detention Center, "two minutes into his conversation, I'm like, This [sic] guy is lying. He doesn't know anything about this case." HT1-140. Bonds said that Siegler felt the same way. HT1-172.

When confronted with his own notes documenting a visit that he and Siegler had with Foreman at FCI Beaumont in December 2001, Bonds was surprised. HT1-160–62. He only recalled meeting Foreman once. Bonds did not know why they would meet with Foreman when they knew he was a liar. HT1-162–63. Bonds assumed that his notes reflect Siegler's report to him about a meeting that she had with Foreman, rather than a meeting both Bonds and Siegler were in. HT1-164.[15]

Bonds acknowledged that Foreman and Beckcom "might have colluded to get more information." HT1-169. He also acknowledged that it was unlikely that Prible would talk about his crime to other inmates after he was indicted. HT1-171–72.

[15] Respondent concedes that "[n]either Bonds, Siegler, nor Foreman recalled that meeting, but handwritten notes from Bonds suggest the meeting likely occurred." (Doc. No. 240, at 8).

D. Deposition Testimony of Vic Wisner

Wisner was Siegler's co-counsel on the Prible case. Wisner, however, did not have much information directly relevant to this case. For example, Wisner did not know about Foreman. HT1-190. From Wisner's testimony, it was obvious that Siegler guided the prosecution and trial.

Although Wisner said that, as a defense attorney, he would have wanted to know about Foreman and the other inmates who wrote letters in the case, he placed the greatest weight on the presence of Prible's semen in Tirado's mouth. HT1-200–10. He acknowledged that, without the semen, the evidence about the informants would be much more important. HT1-204.

E. Deposition Testimony of Michael Beckcom

Beckcom's testimony was presented from a video deposition. In many ways, Beckcom's hearing testimony mirrored that which he gave at trial. Beckcom found out about Siegler's connection to Prible's case from Foreman after they became cellmates. HT1-215. Beckcom said that he called Siegler from the unit manager's phone. HT1-214. The purpose of Beckcom's first phone call was to discuss the possibility of arranging for a reduction in his sentence. HT1-238. Siegler made clear in that conversation that he needed to get specifics about the case. HT1-238. From then on, Beckcom took notes after conversations with Prible "[t]o have the information that Kelly Siegler asked [him] to get." HT1-239. Beckcom, however, said that a prosecutor has never given him details about a crime in connection with his work as an informant, HT3-7, and that Siegler specifically did not give him details about the facts of Prible's case, HT3-12–13.

At trial, Beckcom testified that he found out that Prible was coming to FCI Beaumont Medium before he arrived. HT1-221. Beckcom and Foreman talked about trying to get a confession from Prible "plenty." HT1-220. But Beckcom did not recall Foreman telling him facts about Prible's case. HT3-17.

Beckcom explained that he was one of "a group of guys from Houston, which after this whole thing got set in motion, it kind of became evident to me that this whole group of, like, fricking ten guys were trying to get information, and somehow I ended up with the information." HT1-218. Beckcom, however, did not know at the start of a conspiracy against Prible; he "kind of surmised that later on." HT1-220.

Beckcom confirmed that Foreman was with him every time Prible talked about his case. HT1-239. Beckcom explained, "[t]he details Jeff Prible gave me, he gave completely and explicitly to me and Nathan Foreman one night. He just rolled it out." HT1-218. Beckcom opined that Foreman's affidavit stating that Prible never confessed is false. HT1-249.

From the beginning, Beckcom testified that Siegler led him to believe that he would "get walked out . . . for [his] testimony" against Prible. HT1-214. Siegler told Beckcom, "[t]his probably will get you out of prison." HT1-213. Beckcom thought that Siegler told him that she had talked to the federal prosecutors about his own case and they would "play ball." HT1-230–31. He said that he had no other reason to develop evidence against Prible other than to receive a Rule 35 letter for a sentence reduction. HT1-236. Beckcom "knew [Siegler] had lied" because he only received one year off of his sentence for his testimony. HT1-214.

In many ways, Beckcom was not a credible witness. From the Court's review of the record and its observation of his live testimony, it is obvious that Beckcom was dishonest when it suited his needs. In other areas, however, Beckcom's testimony corroborated other testimony and the timeline of events. While the Court finds that Beckcom was generally not a credible individual, certain areas of his testimony can be confirmed when compared to the record.

F. Testimony of Kelly Siegler

Siegler testified both by deposition and in live examination before the Court. Siegler testified about her meeting with Foreman at FDC in August 2001. While she brought the Prible case to the grand jury after she met with Foreman, Siegler testified that her decision had nothing to do with him. HT2-45. She did not tell the grand jury that there was a prison informant in Prible's case. HT2-47.

Siegler testified that she never met with Foreman after the FDC meeting. Siegler said that Foreman probably tried to call her, but she did not remember "what we talked about for very long because I knew he was a liar." HT2-95. Siegler claimed that she simply did not believe Foreman and would not have wanted more information from him. HT2-40–41. Siegler conceded, however, that even though she similarly did not believe Foreman in Herrero's case and accordingly did not use his testimony at trial, she nonetheless wrote a Rule 35 letter for him. HT2-52–53, 56–57. When confronted with the evidence that she requested a second meeting with Foreman in December 2001, after she received a letter from Foreman's attorney stating that Foreman knew where the murder weapon was, she said she did not remember why she wanted the second meeting. HT2-105–09.

Siegler recalled receiving the letters from Gonzalez, Walker, and Martinez, but she claimed that she did not believe their accounts. HT2-67–70. As Respondent observes, "Siegler did not use Forman [sic], Gonzalez, Martinez, or Walker as witnesses, because she did not find them credible." (Doc. No. 240, at 9). Curiously, Siegler said that the letters were in the file open for Prible's defense attorneys to read. HT2-71. This, of course, turned out to be untrue.

Siegler acknowledged that she reached out to Beckcom's federal prosecutor months before Prible's trial to introduce herself. HT2-115–16. She discussed a possible Rule 35 for Beckcom in

those pretrial conversations. HT2-117. Siegler said she told Beckcom about the conversations she had with his prosecutor to reassure him about the Rule 35 letter. HT2-118–19.

Consistent with her deposition testimony, Siegler maintained in her live examination that she did not find Foreman credible and did not need to disclose information about her meetings with him to Prible's defense counsel. HT3-38, 42–43. She opined Foreman was a liar "in a category all by himself." HT3-49. She also reiterated that she did not need to disclose information about Moreno to Prible's defense counsel. HT3-35–43.

Siegler testified that she did not give any inmate at FCI Beaumont information about Prible's case or encourage any inmate to obtain information against Prible. HT3-46–47. Siegler said that, to the best of her knowledge, this was the only capital case in which she used prison inmates who were in the same facility as the accused as witnesses. HT3-47.

Siegler acknowledged that she first spoke to Pam McInnis, head of the Harris County crime lab, about the semen and DNA evidence. HT2-144–45. McInnis said that semen could live up to 72 hours in the oral cavity. HT2-145. Siegler thought this evidence was in the trial, but she could not remember if she told Prible's counsel about McInnis's conclusion. *Id.*

Siegler's testimony was not credible on both minor and major points. Siegler made several statements that the record directly refutes. For example, when asked about the SHU (which is where Foreman met Jesse Moreno), she claimed she did not know what the SHU was and that she had never heard the term before. HT2-25. In addition to the fact that SHU is a well-known term, Siegler herself referred to the SHU at Prible's trial. HT3-26 (quoting 26 RR 96). She also testified that the letters from the other inmates trying to inform on Prible were in the open file; it is now undisputed that they were in her work product file and were not disclosed to defense counsel. She testified that she never saw Foreman after the August 2001 FDC meeting; yet, there is unrefuted

evidence that she had a meeting with him in December 2001 at FCI Beaumont. She testified that this was the only capital case in which she used prison inmates as witnesses; in fact, she has done so in numerous other cases. (Doc. No. 241, at 39–40). Siegler was also combative in demeanor and did not appear forthcoming with many of her answers.

G. Testimony of Terry Gaiser

Gaiser, Prible's trial attorney, was appointed on September 28, 2001. HT2-155. Gaiser confirmed that he had not seen the note about McInnis's conclusions on the semen evidence before the federal habeas proceedings. HT2-193. Gaiser said that he asked Siegler for information about how she came into contact with Beckcom. HT2-164. However, Siegler never told him that she had communicated with Foreman or that she had determined that Foreman was lying. HT2-165. In fact, Siegler did not tell Gaiser anything about Foreman; Gaiser was aware of Foreman only because of Beckcom's statements. HT2-165–66. Siegler also did not tell Gaiser that she wrote a Rule 35 letter for Foreman in connection with other cases. HT2-172. Siegler never mentioned Jesse Moreno to Gaiser either. HT2-166.

Gaiser said he would have wanted the letters and evidence about the other inmates because that evidence "brings into question the credibility of these people in the Beaumont facility in terms of people wanting to give information to get consideration for doing this." HT2-179. However, he never saw any of these pieces of evidence before trial. HT2-179–80.

Gaiser confirmed that Siegler had previously told him that she could not contact inmates at FCI Beaumont by phone. HT2-187–88. Gaiser said that the knowledge that she could, in fact, call them was important so he could ascertain "who was cultivating who? . . . [W]ho precipitated the—the information? Who—who was the instigator of the—the informant's testimony?" HT2-188.

With that background, the Court will consider the constitutional claims raised in Prible's fourth amended petition.

IV. LEGAL STANDARDS

"The writ of habeas corpus stands as a safeguard against imprisonment of those held in violation of the law." *Harrington v. Richter*, 562 U.S. 86, 91 (2011). Federal habeas corpus review provides an important, but limited, examination of state criminal judgments. Because "state courts are the principal forum for asserting constitutional challenges to state convictions," *id.* at 103, concerns for comity, federalism, and finality define the contours of federal habeas review. *See Calderon v. Thompson*, 523 U.S. 538, 555–56 (1998); *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983); *Engle v. Isaac*, 456 U.S. 107, 128 (1982).

Accordingly, federal jurisprudence sets procedural hurdles to federal habeas review of state criminal proceedings. "[T]wo fundamental tenets" govern federal review of state convictions:

> First, a state prisoner must exhaust available state remedies before presenting his claim to a federal habeas court. . . . Second, a federal court may not review federal claims that were procedurally defaulted in state court—that is, claims that the state court denied based on an adequate and independent state procedural rule.

Davila v. Davis, 137 S. Ct. 2058, 2064 (2017). "These requirements ensure that the state courts have the first opportunity to correct any error with a state conviction and that their rulings receive due respect in subsequent federal challenges." *Skinner v. Switzer*, 562 U.S. 521, 541–42 (2011) (Thomas, J., dissenting). In the case of procedural default, however, the bar to federal review may be lifted "if the prisoner can demonstrate cause for the [procedural] default [in state court] and actual prejudice as a result of the alleged violation of federal law." *Maples v. Thomas*, 565 U.S. 266, 280 (2012) (internal quotation marks omitted) (alterations in original).

If an inmate has presented his claims in a manner allowing the state courts to resolve their merits, AEDPA provides for a highly deferential federal review. AEDPA "bars relitigation of any

claim adjudicated on the merits in state court, subject only to the exceptions in [28 U.S.C.] §§ 2254(d)(1) and (d)(2)." *Richter*, 562 U.S. at 98 (internal quotation marks omitted). Under those provisions, "a federal court may not grant a habeas corpus application . . . unless the state court's decision '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.'" *Berghuis v. Thompkins*, 560 U.S. 370, 380 (2010) (first quoting 28 U.S.C. § 2254(d)(1), then quoting *id.* § 2254(d)(2)).[16] "The 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) (citing *Williams v. Taylor*, 529 U.S. 362, 409–10 (2000)); *see also Morrow v. Dretke*, 367 F.3d 309, 313 (5th Cir. 2004); *Foster v. Johnson*, 293 F.3d 766, 776 (5th Cir. 2002). Simply put, "AEDPA prevents defendants—and federal courts—from using federal habeas corpus review as a vehicle to second-guess the reasonable decisions of state courts." *Renico v. Lett*, 559 U.S. 766, 779 (2010). Federal courts also generally presume that the state courts have made correct factual findings, unless rebutted by clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1).

[16] The Supreme Court has clarified that relief lies under § 2254(d)(1) if (1) "the state court arrives at a conclusion opposite to that reached by this Court on a question of law," (2) "the state court decides a case differently than this Court has on a set of materially indistinguishable facts"; or (3) "the state court identifies the correct governing legal principle from this 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 Thaler v. Haynes*, 559 U.S. 43, 47 (2010); *Bell v. Cone*, 535 U.S. 685, 694 (2002); *Early v. Packer*, 537 U.S. 3, 7–8 (2002).

V. ANALYSIS

A. *Brady* Claims (Claims 2, 3, 4, 5, and 10)

Claims 2 through 5 and 10 rely on *Brady v. Maryland*, 373 U.S. 83 (1963), in which the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87. "There are three components of a true *Brady* violation: (1) the evidence at issue, whether exculpatory or impeaching, must be favorable to the accused; (2) that evidence must have been suppressed by the State, either willfully or inadvertently; and (3) prejudice must have ensued." *Canales v. Stephens*, 765 F.3d 551, 574 (5th Cir. 2014) (quoting *Strickler v. Greene*, 527 U.S. 263, 281–82 (1999)). In evaluating whether the evidence was material, the evidence is "considered collectively, not item by item." *Kyles v. Whitley*, 514 U.S. 419, 436 (1995). Impeachment evidence must also be disclosed under *Brady*. *See United States v. Bagley*, 473 U.S. 667, 676 (1985). Evidence that enables the defense to "attack[] the reliability of the investigation" is also *Brady* material. *Kyles*, 514 U.S. at 446.

The extensive factual development in this case has created a rich and complicated portrait of what happened at trial and what was not known to the defense. Years of litigation have resulted in a dense record full of complex arguments and detailed allegations, often branching out into different cases and implicating various incarcerated individuals.

But the ultimate facts of this case are simple. The State's case rested on two facts: (1) a single witness who testified that Prible confessed to the murders and (2) testimony suggesting that Prible's DNA had entered Tirado's mouth only a short while before her death. As the Court will discuss further below, the State did not disclose the full extent of its interaction with its star

witness, Michael Beckcom. The State also failed to disclose evidence which would enable the defense to argue that Beckcom had fabricated his story, conspired with others to inculpate Prible, and tried to corroborate his contrived story by typing letters for other inmates to sign. Given the weakness of the State's case against Prible, stopping the defense from developing impeachment evidence against its star witness is unconstitutional.

The State also hid evidence about its DNA evidence. Prible admitted that he had sexual relations with Tirado. He claimed, however, that they had done so hours before the murder happened. The State's case depended on showing that the sexual acts occurred moments before Tirado died. The State did not disclose that it had developed evidence supporting the defense's expert testimony on the DNA, but still presented testimony with directly opposite scientific conclusions. The suppression of information from the defense hampered, if not prevented, the development of a defense to counter the two facts that supported Prible's conviction.

As previously discussed, no matter how egregious the underlying constitutional violation, certain procedural requirements curb federal habeas review. Before turning to the merits of Prible's *Brady* claims, the Court must decide whether he has presented those arguments in a timely and procedurally proper manner.

1. Procedural Reviewability

Respondent argues that procedural defects preclude federal review of Prible's *Brady* claims. First, Respondent contends that Prible did not file some of those claims in federal court in a timely manner, rendering them time-barred by the AEDPA one-year limitations period. Second, Respondent argues that Prible failed to litigate his claims in compliance with state law, rendering

them procedurally unreviewable. As discussed below, the Court finds that all of Prible's *Brady* claims are available for federal review.

a. Limitations Period

Respondent argues that Prible filed Claims 3, 4, 5, and 10 outside the time period allowed under AEDPA's limitations period. AEDPA established a one-year deadline, subject to statutory and equitable tolling, in which an inmate must raise his federal habeas claims after the conclusion of state review.[17] Prible filed a timely federal habeas petition on June 18, 2009. On March 26, 2018, Prible filed his Fourth Amended Habeas Petition raising Claims 3, 4, 5, and 10 for the first time. Because Prible raised those claims almost nine years after his original petition, Respondent contends that they are barred from federal consideration. As discussed below, the Court finds that

[17] AEDPA provides:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—
>
> > (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
> > (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
> > (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
> > (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d).

the claims are available for federal consideration because (1) Claims 3, 4, and 5 relate back to the original petition and (2) the facts leading to Claim 10 could not have been discovered previously.

Prible argues that Claims 3, 4, and 5 relate back to the seventh claim in his original petition. A federal habeas court may consider the merits of an otherwise untimely claim if it relates back to a timely filed federal habeas petition. *See Mayle v. Felix*, 545 U.S. 644, 656 (2005). A claim in an amended federal habeas petition relates back under Federal Rule of Civil Procedure 15(c) if the timely claim and the proposed claim to be added by amendment "are tied to a common core of operative facts." *Id*. at 664. "An amended habeas petition . . . does not relate back . . . when it asserts a new ground for relief supported by facts that differ in both time and type from those the original pleading set forth." *Id.* at 650.

Prible's seventh claim, the only *Brady* claim in the original petition, focused on the State suppressing evidence of its relationship with Foreman, Beckcom, and other informants, and the impact this suppression had on the defense's ability to impeach Beckcom's credibility at trial. Specifically, the seventh claim's "core of operative facts" asserted that the State suppressed:

- evidence that Siegler had contacted Foreman, Beckcom's cellmate, on numerous occasions;
- evidence that Siegler was using a circle of informants (including Beckcom and Foreman) at the prison to investigate and provide testimony against Prible;
- evidence that Foreman and his crew were told specifics about the offense that the State was trying to prove against Prible; and
- evidence that Siegler used the ring of informants to prosecute defendants in other cases.

The original petition alleges that the suppressed evidence was material, because "defense counsel would have completely undermined the integrity of the State s [sic] case if he had information that would have allowed him to demonstrate that the State was involved in a conspiracy to violate Mr.

Prible's right to counsel and was trying to incriminate Mr. Prible with the testimony from members of this conspiracy." (Doc. No. 1, at 44).

Claims 3, 4, and 5 in the Fourth Amended Petition cover substantially the same allegations. Specifically, the Fourth Amended Petition describes the challenged claims as follows:

- **Claim 3**: In violation of *Brady* and due process guaranteed by the Fourteenth Amendment, the prosecution suppressed evidence that Foreman, whom Beckcom represented could corroborate his story, gave a different account, and was, in fact, fabricating evidence against Prible. (Doc. No. 181, at 196).

- **Claim 4**: In violation of *Brady*, the State suppressed evidence impeaching its [Beckcom's] testimony regarding the circumstances of the alleged "confession" and his motives for questioning Prible. (Doc. No. 181, at 199).

- **Claim 5**: The State withheld evidence that the trial court ordered produced pursuant to *Brady*. (Doc. No. 181, at 203).

The only difference between the *Brady* claim in the original petition and those in the Fourth Amended Petition is that, as a result of additional discovery in the case, the new claims specify with greater particularity the evidence that Siegler suppressed. In other words, the original and amended claims share a common core of operative facts: they concern suppression of exculpatory evidence that (1) originates from the same time (a five-month period between July and December, 2001), (2) was suppressed by the same actor (Siegler), (3) concern the same subject matter (the State's relationship to Foreman and Beckcom and their motives and roles in the ring of informants), and (4) is material for the same reason (impeachment of Beckcom's testimony regarding the alleged confession).

Mandacina v. United States, 328 F.3d 995 (8th Cir. 2003), which the Supreme Court in *Mayle* cited with approval in laying out the relation back standard, is instructive. In *Mandacina*, the inmate's original federal habeas petition raised a *Brady* violation involving the suppression of "evidence of other suspects obtained by the Gladstone Police Department." *Id.* at 1001. The

inmate then sought to amend his habeas petition to include suppression of a particular report—to which the original petition made no reference—that documented a witness interview implicating other persons in the victim's murder. The Eighth Circuit held that the amended pleading related back to the original pleading. *See id.* *Mayle* suggests that relation back was appropriate in *Mandacina* because "[b]oth pleadings related to evidence obtained at the same time by the same police department." *Mayle*, 545 U.S. at 664 n.7. The relationship between Claims 3, 4, and 5 and the original seventh claim closely resembles the relationship between the original and amended pleadings in *Mandacina*. The only difference between the allegations in the original petition and the challenged ones is that, as a result of additional discovery in the case, the later claims specify with greater particularity the evidence that was suppressed by Siegler. As in *Mandacina*, the suppressed evidence that is mentioned for the first time in the new claims falls directly under the category of suppressed evidence already identified in the original petition and, thus, those claims relate back to the original petition. The Court thus finds that Claims 3, 4, and 5 relate to a common core of facts that do not differ in substantial thrust from the allegations made in Prible's earlier filings.[18]

[18] In the alternative, Prible argues that the Court can reach any procedurally defaulted claims through the *Schlup v. Delo*, 513 U.S. 298 (1995), actual innocence gateway. In *Schlup*, the Supreme Court held that prisoners seeking review of defaulted claims on the ground of actual innocence must establish that "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt" in light of "new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence." *Id.* at 324, 327. A *Schlup* claim of innocence is "not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." *Id.* at 315 (quoting *Herrera v. Collins*, 506 U.S. 390, 404 (1993)). However, because the Court determines that Prible's amended pleadings relate back to his original pleadings and are thus are not barred by AEDPA's limitations period, the Court need not reach Prible's actual innocence claim.

Respondent also argues that Prible failed to raise Claim 10 in a timely manner. Claim 10 argues that, "[i]n violation of due process under *Brady*, the State suppressed material evidence that Siegler had consulted the head of the Harris County Crime Lab to ask how long semen could remain in the oral cavity, and was told it lives up to 72 hours." (Doc. No. 181, at 233). Habeas counsel learned of the suppressed evidence only through Siegler's own notes, which were disclosed on May 11, 2017, pursuant to this Court's order. The suppressed evidence is material, Prible argues, because "it supports his defense that he had consensual sexual contact with Nilda earlier in the night before she was murdered, rather than immediately prior to her execution." (*Id.*) Prible highlights the fact that "Petitioner could not have discovered these notes earlier; it took a court order for the HCDA [Harris County District Attorney's] Office to finally let Petitioner see them." (Doc. No. 198, at 56).

Section 2244(d)(1)(D) provides that the AEDPA limitations period begins to run from "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." Because the State kept information about Siegler's interaction with the crime lab hidden in the attorney work product file, Prible could not have known of the facts that would have supported a *Brady* claim until at least May 11, 2017, when the State finally disclosed Siegler's work product file. Prible could not have discovered the factual basis of that claim earlier because the State only disclosed Siegler's work product material pursuant to court order. Prible filed his amended habeas petition on March 26, 2018, within one year of the disclosure. Thus, Prible filed Claim 10 in a timely manner under 28 U.S.C. § 2244(d)(1)(D).

The Court therefore concludes that Claims 3, 4, 5, and 10 are not barred by AEDPA's limitations period.

b. Procedural Default

Respondent next argues that Prible's *Brady* claims are procedurally unreviewable because Prible failed to litigate his claims in compliance with state law. A federal constitutional claim raised on federal habeas is procedurally defaulted and may not be reviewed if the last state court to consider that claim expressly relied on an adequate and independent state procedural bar for denial of relief. *See Coleman v. Thompson,* 501 U.S. 722, 750 (1991). A procedural default may be excused, however, if a petitioner can show cause and prejudice to overcome the default. *Id.* at 750–51. The Court finds that Prible's *Brady* claims are procedurally defaulted, but that Prible has shown cause and prejudice to overcome the default.

i. *Prible's* Brady *Claims Are Procedurally Defaulted*

The Court agrees that Prible's second *Brady* claim is procedurally defaulted. As discussed above, the state court dismissed Prible's successive state habeas application, which included Claim 2, under Texas's "abuse of the writ doctrine," codified at Texas Code of Criminal Procedure Article 11.071 § 5(a). A dismissal pursuant to Article 11.071 "is an independent and adequate state ground for the purpose of imposing a procedural bar" in a subsequent federal habeas proceeding. *Hughes v. Quarterman*, 530 F.3d 336, 342 (5th Cir. 2008).

The Court further agrees with Respondent that Prible's other *Brady* claims are procedurally defaulted. "A procedural default also occurs when a prisoner fails to exhaust available state remedies and 'the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred.'" *Nobles v. Johnson*, 127 F.3d 409, 420 (5th Cir. 1997) (quoting *Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991)); *see also Finley v. Johnson*, 243 F.3d 215, 218 (5th Cir. 2001). Without distinguishing between individual claims, the state trial level habeas court dismissed Prible's successive state

habeas petition because it concluded that the "factual basis" for Prible's ring-of-informants "conspiracy theory" was "available" when Prible filed his original state habeas petition in 2004. (Doc. No. 90-1 ¶¶ 26, 32, 34). Given the breadth of this conclusion, as well as the similarities between Claims 3–5 and Claim 2, which was included in the successive petition, it is clear that the state court would apply the same procedural bar to Claims 3–5 if presented with those claims. Respondent reaches the same conclusion. For Claims 3–5, Respondent avers that "the Texas abuse-of-the-writ doctrine, set out in Tex. Code Crim. Proc. Art. 11071 § 5, would procedurally bar Prible's attempt to raise this unexhausted claim in a subsequent writ application." (*Id.* at 32). Respondent similarly asserts that Claim 10 "would be dismissed as an abuse of the writ if he were to raise [it] in a subsequent state habeas application." (Doc. No. 191, at 150). Prible's *Brady* claims are procedurally defaulted.[19]

[19] Respondent also briefly argues that Claims 3–5 are unreviewable because they are unexhausted, (Doc. No. 191, at 32), though Respondent does not raise the same argument against Claim 10, (*Id.* at 150; Doc. No. 240). However, by acknowledging the procedural default of Claims 3–5 and 10, Respondent has effectively waived any nonexhaustion argument. *See Thompson v. Wainwright*, 714 F.2d 1495, 1501 (11th Cir. 1983) ("[W]hen the state affirmatively acknowledges futility [of exhaustion] . . . its statement is often considered under the rubric of waiver."); *see also McGee v. Estelle*, 722 F.2d 1206, 1212–13 (5th Cir. 1984) (citing *Thompson* for the proposition that "the state may waive exhaustion"). Treating an acknowledgement of procedural default as a waiver of exhaustion makes sense because exhaustion is a matter of comity, not jurisdiction, and comity does not require that a federal court force a case back into the state system when the state itself has determined that review would be procedurally barred. *See Felder v. Estelle*, 693 F.2d 549, 551–54 (5th Cir. 1982) (discussing waivers of exhaustion and comity). Moreover, waiver aside, nonexhaustion does not bar review of Claims 3–5 and 10 because "exhaustion is not required if it would plainly be futile." *Graham v. Johnson*, 94 F.3d 958, 969 (5th Cir. 1996). Exhaustion is futile if "there is no opportunity to obtain redress in state court . . . ." *Id.* (quoting *Duckworth v. Serrano*, 454 U.S. 1, 3 (1981)). The procedural default of Claims 3–5 and 10 renders redress in state court unavailable. *See Coleman v. Thompson*, 501 U.S. 722, 732 (1991) ("A habeas petitioner who has defaulted his federal claims in state court meets the technical requirements for exhaustion; there are no state remedies any longer 'available' to him."). Thus, ultimately, it is the procedural default, and not the nonexhaustion, of Claims 3–5 and 10 that presents a procedural hurdle to their federal review.

ii. *Cause and Prejudice Overcomes Default*

A procedural default may be excused upon a showing of cause and prejudice. *Fisher v. State*, 169 F.3d 295, 301 (5th Cir. 1999). "The resolution of 'when and how defaults in compliance with state procedural rules can preclude federal court consideration of a federal question is itself a federal question.'" *Barrientes v. Johnson*, 221 F.3d 741, 763 (5th Cir. 2000) (alterations omitted) (quoting *Fairman v. Anderson*, 188 F.3d 635, 641 (5th Cir.1999)). "To the extent, therefore, that the Texas Court of Criminal Appeals decided issues of cause and prejudice in dismissing [defendant's] [successive] State Petition, we are not bound by its decision."[20] *Id.*

"[T]he existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Murray v. Carrier*, 477 U.S. 478, 488 (1986). "[A] showing that the factual or legal basis for a claim was not reasonably available to counsel, or that

[20] The situation in *Barrientes* closely parallels that here. Barrientes's federal habeas petition contained prosecutorial misconduct claims, including a *Brady* claim, related to exculpatory evidence from a sheriff's file that Barrientes alleged was unavailable to him when filing his state court habeas application. *See Barrientes*, 221 F.3d at 752, 764. Barrientes was sent back to state court to exhaust his prosecutorial misconduct claims. *Id.* at 750. The Texas Court of Criminal Appeals denied his successive petition as an abuse of the writ, rendering his claims procedurally defaulted. *Id.* In considering whether Barrientes had shown cause and prejudice to overcome the default, the Fifth Circuit held that it was "not bound" by the Texas Court of Criminal Appeals' abuse-of-the-writ decision and that the district court should have held an evidentiary hearing to reach its own findings as to cause and prejudice. *Id.* at 763, 768.

Still, Respondent argues that 28 U.S.C. § 2254(e)(1)—which provides that "a determination of a factual issue made by a State court shall be presumed to be correct" unless rebutted by "clear and convincing evidence"—nonetheless requires that this Court, in conducting its cause analysis, apply a presumption of correctness to the state court's underlying factual determinations articulated in its "Findings of Fact Pursuant to Tex. Code Crim. App. Art. 11.071, Sec. 5(a)(1)." Respondent cites no binding precedent for this claim. Even so, the Court finds, as discussed *infra*, that Prible has rebutted with clear and convincing evidence the state court's key findings of fact in support of its decision to apply the abuse of the writ doctrine to his successive state court habeas petition.

some interference by officials made compliance impracticable, would constitute cause under this standard." *Id.* (citations omitted). "A *Brady* violation can provide cause and prejudice to overcome a procedural bar on a habeas claim." *Thompson v. Davis*, 916 F.3d 444, 455 (5th Cir. 2019); *see also Banks v. Dretke*, 540 U.S. 668, 691 (2004).

The Supreme Court has recognized overlap between a substantive *Brady* claim and the showing required to overcome the procedural bar of a *Brady* claim. For a defaulted *Brady* claim, "cause and prejudice parallel two of the three components of the alleged *Brady* violation itself." *Strickler v. Greene*, 527 U.S. 263, 282 (1999); *see also Banks*, 540 U.S. at 691. There are three elements of a substantive *Brady* claim: "The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler*, 527 U.S. at 281–82. "Corresponding to the second *Brady* component (evidence suppressed by the State), a petitioner shows 'cause' when the reason for his failure to develop facts in state-court proceedings was the State's suppression of the relevant evidence." *Banks*, 540 U.S. at 691. "[C]oincident with the third *Brady* component (prejudice), prejudice within the compass of the 'cause and prejudice' requirement exists when the suppressed evidence is 'material' for *Brady* purposes." *Id.*

The Court will discuss the favorable evidence that Siegler suppressed, and its materiality under *Brady*'s prejudice prong, at length in addressing the merits of Prible's *Brady* claims, *see infra* V.2.a & V.2.b. Here, the Court focuses on how Siegler's suppression of that evidence prevented Prible from developing his *Brady* claims in state court, thus providing cause to overcome their default.

"Under *Banks*, a petitioner shows 'cause' if 'the reason for his failure to develop facts in state-court proceedings was the State's suppression of the relevant evidence.'" *Murphy v. Davis*, 901 F.3d 578, 597 (5th Cir. 2018) (quoting *Banks*, 540 U.S. at 691). It is beyond serious dispute that the prosecution withheld critical information from the defense in this case. Siegler knew that Beckcom was associated with several other inmates intent on gaining favor by securing evidence against Prible, and that some of these same inmates were involved in the case against Hermilo Herrero. Yet the State did not divulge that other inmates sought out the prosecution to inform against Prible. Nor did Siegler disclose the extent of her interactions with Beckcom or the precise nature of the deals made for his testimony. Nor did she reveal the extent of her interactions with Foreman or divulge that Foreman—who, without testifying, still loomed over the trial testimony—had twice given patently false accounts of Prible's supposed confession to her.

In the end, the Court need not look further than the State's own file to demonstrate that Siegler prevented the defense from learning about exculpatory material evidence. In her deposition, Siegler claimed that she had an "open file" policy and did not maintain a separate work product file. (Doc. No. 181, Ex. 4-A, at 112, 147). In reality, however, the State maintained a dense work product file containing a significant amount of exculpatory information that was not disclosed to the defense, including notes memorializing meetings with Foreman and Beckcom concerning Prible's case, letters from several inmates—including Walker—trying to inform on Prible, and a note revealing that Siegler had consulted Pam McGinnis, the head of the Harris County Crime Lab, who told her semen could live up to seventy-two hours in the mouth.[21] These

[21] As discussed in this Court's order compelling production of certain materials contained in Siegler's work product file, the work product doctrine does not excuse Siegler's suppression. (Doc. No. 154, at 2). As an attorney representing a client, a prosecutor is entitled to rely on the work product, within constitutional limitations. The work-product doctrine protects "documents

materials came to light only because of court proceedings and court orders occurring after Prible filed his initial federal petition.

The State's suppression of evidence prevented Prible from developing his *Brady* claims in state court proceedings. Prible's trial attorney, Terrence Gaiser, brought several pre-trial *Brady* motions requesting that the State furnish, among other things, the date, place, and manner of all contacts with Beckcom, a statement of how contact with Beckcom was first initiated, a copy of all statements made by Beckcom, notes of any conversations had with Beckcom, and any agreements made with Beckcom concerning benefits in exchange for testimony. 2 RR 4, 6, 8. In response, Siegler provided a handwritten note from Beckcom and indicated that he had been the one to initiate contact. HT2-165. At a pre-trial hearing, Siegler disclosed that she had had four or five telephone conversations with Beckcom. Siegler did not, however, disclose that she had initiated some of those contacts, that she had long been communicating with Beckcom's cellmate Foreman, or that she found Foreman's testimony regarding Prible's confession to not be credible. *Id*. Gaiser testified at the evidentiary hearing that he had reviewed everything in the State's file on Prible, but that the file did not include the letters from Walker and other inmates concerning Prible's case, or any other information that would have alerted him to Siegler's contacts with the other informants.

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and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative []including the other party's attorney . . . ." Fed. R. Civ. P. 26(b)(3). "[T]he work product doctrine insulates a lawyer's research, analysis of legal theories, mental impressions, notes, and memoranda of witnesses' statements from an opposing counsel's inquiries." *Dunn v. State Farm Fire & Cas. Co.*, 927 F.2d 869, 875 (5th Cir. 1991). But "[t]he privilege derived from the work-product doctrine is not absolute." *United States v. Nobles*, 422 U.S. 225, 239 (1975). "Because *Brady* is based on the Constitution, it overrides court-made rules of procedure. Thus, the work-product immunity for discovery . . . prohibits discovery . . . but it does not alter the prosecutor's duty to disclose material that is within *Brady*." *See* 2 Charles Alan Wright, Federal Practice and Procedure § 254.2 (3d ed. 2000); *see also Dickson v. Quarterman*, 462 F.3d 470, 479 n.7 (5th Cir. 2006) (quoting Wright § 254.2). The work-product doctrine cannot excuse Siegler's efforts to hide relevant and exculpatory information from the defense, including information about her contacts with inmates and letters inmates sent to her claiming that Prible confessed.

Indeed, Siegler's co-counsel, prosecutor Victor Wisner, attested that even he was not made aware of Siegler's communications with the other informants, or the letters they sent her. HT1-189–97. Because of the evidence Siegler suppressed, Prible's defense team had no knowledge of her contacts and communications with other FCI Beaumont informants, or even the full extent and nature of her contacts with Beckcom.

Similarly, evidence of a larger ring of informants was not available to Prible's state habeas counsel, Roland Moore, despite his diligent attempts to discover it. Siegler's suppression of evidence left precious little for Moore to work with in investigating suspicions of prosecutorial misconduct. The only information Moore had was the identities of Beckcom and Foreman, and Prible's suggestion that a man with the last name of Walker might have relevant information. (Doc. No. 198-1, at 57–59). Beckcom and Foreman refused to speak with Moore. (*Id.* at 57). And though Moore tried to find a person named Walker, with no other identifying information, that effort quickly became "a fool's errand." (*Id.* at 59). With no concrete evidence to support such claims, Moore did not include any prosecutorial misconduct claims in Prible's original federal habeas application.

Prible later sought to discover Walker's identity and whereabouts on his own, but mistakenly assumed that a different person, Larry Wayne Walker, was the Walker with information about the ring of informants. Prible sent Larry Walker several letters through Ward Larkin, a layperson and anti-death penalty advocate. (Doc. No. 181-51, at 14). Only through sheer coincidence did Prible learn Carl Walker's identity: after Larry Walker was transferred from FCI Beaumont to a BOP facility in Yazoo, Mississippi, where Carl Walker had also since been transferred, he realized Carl Walker might be the intended recipient of the letters and shared them with him. (*Id.* at 48); HT1-121. Although Carl Walker did alert Larkin that he was the Walker

being sought, Carl Walker did not respond to further inquiries at the time, (Doc. No. 181-51, at 48), and Prible had no way to contact him further (Doc. No. 198, at 15–16). Thus, even though Prible identified Carl Walker before he filed his 2007 *pro se* petition, he had no way to obtain supporting evidence from him.[22] Only after federal proceedings commenced did Walker change his mind and provide a statement.

Respondent argues that Prible cannot establish cause to overcome the default of his *Brady* claims because he, like the defendant in *Robison v. Johnson*, 151 F.3d 256 (5th Cir. 1998), "confuses knowledge of the factual predicate of the claim with access to the best evidence supporting that claim." (Doc. No. 191, at 37). But the facts adduced at the evidentiary hearing as just described clearly undermine this argument. Although Prible may have suspected prosecutorial misconduct, including *Brady* violations, during the course of state court proceedings, Siegler's efforts to suppress evidence of her contacts with Beckcom and the other informants left Prible with no concrete evidence to support such a claim during those proceedings, despite Prible and his counsel's diligent efforts to discover such evidence. Prible may not be penalized for failing to raise claims for which he lacked any evidence. *Strickler*, 527 U.S. at 286 ("Proper respect for state procedures counsels against a requirement that all possible claims be raised in state collateral proceedings, even when no known facts support them."). Relatedly, because Prible has shown by clear and convincing evidence that the factual predicates for his *Brady* claims were not available until after he had filed his state court habeas applications, Prible has refuted any presumption of correctness owed to the State court's findings to the contrary.

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[22] Prible also had no means to compel Walker's testimony through court-ordered process. Texas law does not authorize discovery on subsequent applications unless a court finds that the application meets the requirements of Article 11.071 § 5, and the Texas Court of Criminal Appeals found that Prible did not meet those requirements.

In sum, Siegler's suppression of evidence created an external obstacle that impeded Prible's ability to bring his *Brady* claims during state habeas proceedings. Siegler's actions in this case therefore provide cause to forgive the procedural default of Prible's *Brady* claims.

In addition to cause for the default, Prible must show actual prejudice. As discussed above, the prejudice inquiry in this context overlaps with *Brady*'s materiality standard. *See Banks*, 540 U.S. at 698 ("Unless suppressed evidence is material for *Brady* purposes, its suppression does not give rise to sufficient prejudice to overcome a procedural default." (quotation and alterations omitted)). The test for materiality and prejudice is whether "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Strickler*, 527 U.S. at 280; *see Banks*, 540 U.S. at 698. As the Court will discuss *infra* in connection with the underlying *Brady* claim, Prible has shown actual prejudice from the State's withholding of information.

Accordingly, the Court finds that Prible's *Brady* claims are procedurally reviewable. The Court first reviews Prible's *Brady* claims stemming from the prosecution's use of informants (Claims 2–5) and then Prible's *Brady* claim relating to the State's investigation into DNA evidence (Claim 10). Because the state courts did not adjudicate the merits of Prible's *Brady* claims, this Court's review of those claims is *de novo*.

2. The Suppressed Evidence Was Favorable to Prible's Defense

a. Prible's Ring of Informants *Brady* Claims (Claims 2–5)

Prible's four interrelated *Brady* claims concern the suppression of evidence about the group of FCI Beaumont informants. Prible claims that:

- Claim 2: In violation of due process guaranteed under *Brady*, the State suppressed material evidence that Beckcom and Foreman were part of an organized attempt to secure favors in return for fabricating a false confession. (Doc. No. 181, at 177).

- Claim 3: In violation of *Brady* and due process guaranteed by the Fourteenth Amendment, the prosecution suppressed evidence that Foreman, whom Beckcom represented could corroborate his story, gave a different account, and was, in fact, fabricating evidence against Prible. (Doc. No. 181, at 196).

- Claim 4: In violation of *Brady*, the State suppressed evidence impeaching [Beckcom's] testimony regarding the circumstances of the alleged "confession" and his motives for questioning Prible. (Doc. No. 181, at 199).

- Claim 5: The State withheld evidence that the trial court ordered produced pursuant to *Brady*. (Doc. No. 181, at 203).

At their core, each of the four claims relate to Prible's purported confession and Siegler's interaction with FCI Beaumont inmates.

i. *Information about Nathan Foreman*

The State suppressed substantial evidence about Nathan Foreman, who, although he did not testify at trial, was used by the state to corroborate Beckcom's testimony. At trial, the State based its case in large part on inmate witness Beckcom, without calling any other witnesses to corroborate his testimony that Prible confessed to other inmates. Even so, the State sought to implicitly bolster Beckcom's testimony by emphasizing that Prible told Foreman, and others, about the murders.

Beckcom testified at trial that he received Siegler's name from his cellmate, Foreman, and that Foreman was present for each of his relevant conversations with Prible. Beckcom was able to create a more convincing story by adding Foreman to his narrative because it gave the impression that someone else had heard the same confession, thereby making it less likely that Beckcom fabricated the story. Foreman was, in essence, a non-testifying corroborating witness to Beckcom's story about Prible's confession—and the prosecution implied as much. For instance, when countering the defense's argument that Beckcom derived information about Prible's

probable cause statement, Siegler argued in closing that other inmates "never saw Jeff Prible show it to Mike Beckcom or Nathan Foreman." 28 RR 83.

The facts developed through the federal habeas process show, however, that the jury lacked significant information about Foreman, and consequently, about Beckcom's credibility. Well before Prible was indicted, Siegler anticipated using inmate testimony. (Doc. No. 181, at 19–20). Jesse Moreno, an inmate who had acted as an informant in the past, suggested that Siegler and investigator Johnny Bonds seek out the assistance of Foreman. In a pre-trial hearing, Siegler stated that Foreman first contacted her in October of 2001 and that she did not meet with him until December of 2001. 20 RR 12. Not until this Court ordered the disclosure of Siegler's work product notes, however, was it verified that Siegler and Bonds met with Foreman at the Federal Detention Center in Houston on August 8, 2001.

After charges were filed on Prible, he was moved from FCI Beaumont Low to FCI Beaumont Medium on July 25, 2001. Around this time, Foreman was moved from FCI Beaumont Medium's SHU back into general population. (Doc. No. 181, Ex. 17, 18). Foreman and Beckcom became cellmates.

On August 8, 2001, Siegler and Bonds met with Foreman at the Federal Detention Center in Houston to find out what Foreman knew about Prible (the "August 8 Meeting"). They learned that Foreman was looking for a deal to testify against Prible. However, both Siegler and Bonds testified that they believed that Foreman not only lacked credibility, but also was fabricating evidence against Prible before he had even met him.

Board of Prisons (BOP) records indicate that Foreman continued to speak with Siegler after the August 8 Meeting. (Doc. No. 181, Ex. 21). Foreman's attorney also contacted Siegler. (Doc.

No. 181, Ex. 23). Siegler's notes show that even Foreman's wife contacted her. (Doc. No. 181, Ex. 19).

Bonds' notes show that Siegler met with Foreman again on December 10, 2001, immediately before an interview she had with Beckcom, in which Beckcom drafted a ten-page document describing his alleged conversation with Prible. (Doc. No. 181, at 26). The notes memorializing that meeting were placed in the work product file. (Doc. No. 181, Ex. 20). Siegler maintains that they did not find Foreman credible throughout the interaction. HT3-38–39.

Siegler did not tell the defense about her interactions with Foreman, other than to mention that he called her "around October of 2001" and that they did not "go see him until December." 20 RR 12. Respondent argues that, "[d]espite what Prible contends . . . the prosecutor was under no duty to disclose this information" primarily because "Forman [sic] did not testify against Prible. Th[e] nature and extent of his meetings with the State is [sic] not, therefore, likely to impact the jury's verdict on guilt-innocence." (Doc. No. 191, at 113–14).

Respondent's argument relies on a constricted view of Foreman's explicit and implicit influence in this case. Before even meeting Prible, Foreman claimed to have knowledge about him. The prosecution continued communicating with Foreman, even though Siegler professed to find him lacking credibility.

Importantly, Foreman's credibility was not independent from Beckcom's testimony. Foreman was the only other man present when Prible allegedly confessed; he was the only person who could vouch for Beckcom's testimony. Because Beckcom's testimony turned on conversations witnessed by Foreman, information about Foreman and his credibility would be central to the jury's assessment of the only testimony describing the crime. Yet for reasons not completely apparent on federal habeas review, the prosecution found Beckcom credible while

determining that Foreman was not. Evidence that Foreman had previously claimed, falsely, that Prible confessed; that Foreman was working with Beckcom and other inmates to provide evidence against Prible in exchange for a sentence reduction; that Siegler provided Foreman with information about Prible's case (namely, the existence of the DNA evidence); that Siegler had written Foreman a Rule 35 letter in another case even though she determined that he was not credible; and that Foreman worked with Beckcom to orchestrate a confession, all had substantial impeachment value. The information about Foreman also casts doubt on the State's method of investigation: it demonstrated that Siegler was willing to meet with, take evidence from, and do favors for inmates she deemed not credible. Siegler kept that information from the defense. HT2-165, 186–87. Simply put, the State suppressed exculpatory and material evidence about Foreman.

ii. *Letters from Other Inmates*

During his successive state proceedings, Prible sought *in camera* review of the State's file. The State did not oppose that motion, but still did not turn over the whole file. For the first time in February 2011, the State provided Prible with three letters that prosecutors had sealed in a letter-sized envelope designated "attorney work product." The letters to Siegler were from inmates Carl Walker, Mark Martinez, and Oscar Gonzalez. These letters all indicated that several inmates had heard Prible confess to the murders. As described in Walker's letter, "[a]s you may, or may not, know from previous conversations with Nathan Foreman, myself, Mark Martinez, Jesse Gonzalez, his father Felix Gonzalez and Beckcom were all close friends of Pribble [sic]." (Doc. No. 99-3, at 10). Each letter offered to testify against Prible in exchange for a time cut. (Doc. No. 99-3). The letters each told a similar story and provided corroboration for the others.

At a minimum, the letters reveal that a ring of informants was engaged in a collective, coordinated effort to secure sentence reductions in return for providing the State with incriminating

evidence in the form of manufactured confessions. Testimony developed on federal habeas review has shown that the corroboration was likely due to Beckcom's calculated efforts. The inmates testified in the evidentiary hearing that they did not write the letters. Walker testified that although he signed a letter, he did not write it. HT1-116. Martinez denied altogether signing the letter bearing his name. (Doc. No. 181, at 121). According to Walker, the inmates' letters were designed to corroborate each other, HT1-117, and he believed that they were all written by Beckcom. Walker explained that Beckcom was the only inmate in the conspiracy with access to a typewriter, and all of the letters were typewritten. HT1-132. Each letter misspells Prible's name as "Pribble," (Doc. No. 99-3), and Beckcom's deposition suggests that he believed that this latter spelling, "Pribble," was the correct one, HT1-233. It goes without saying that evidence showing that the State's star witness was fabricating statements by other witnesses, especially those the prosecutor apparently did not deem credible, is favorable to the defense.

Disclosure of these letters would have prompted a reasonable attorney to interview each of the inmates. Both Gaiser and Wisner testified at the evidentiary hearing that the letters would have been relevant and useful to argue that a group of men engaged in a coordinated attempt to obtain and/or manufacture incriminating evidence against Prible.

Respondent argues that "[t]he State had no duty to produce these letters to the defense because they are not 'favorable' as contemplated under *Brady*." (Doc. No. 191, at 45). Respondent, however, bases this argument on a confined view of the benefit the documents would have had to the defense. Respondent argues:

> Each of the letters contain the assertion that Prible confessed to the murders. Nor are they impeachment evidence. They do not, as Prible claims, prove his ring-of-informants claim or undermine the credibility of Beckcom's testimony. The fact that multiple federal inmates wrote to the prosecutor regarding another fellow inmate seeking to trade incriminating information for a reduction in their sentence does not prove the State solicited their help, or that Beckcom's testimony is false.

> Nor does the fact that Beckcom was not the only inmate looking to inform on Prible prove a state-run conspiracy. And, as acknowledged by the state court in the habeas hearing "everyone knows" that it is not uncommon for federal inmates to come forward to testify against other inmates in order to reduce their sentences.

(*Id.*). True, the letters themselves do not establish that Siegler guided a ring of informants that would fabricate testimony against Prible. As shown in the evidentiary hearing, however, and as discussed *supra*, the letters could certainly have been the first steps toward showing a conspiracy formed by the inmates themselves.

Had the letters not been hidden away in the work product file, the defense could have pointed out similarities in the letters, both in form and in content. Testimony from the evidentiary hearing suggested that only Beckcom would have had the opportunity to type the letters for other inmates. And disclosing the letters would have allowed the defense to develop testimony, such as that from Walker in the evidentiary hearing: that Prible never confessed but was in fact set up by other inmates and that someone, likely the State's star witness Beckcom, wrote letters for the other inmates saying that Prible had in fact confessed.

The evidentiary hearing testimony uncovered that the letters were likely fabricated. From that information, as evinced by the federal evidentiary hearing, the defense could have developed rich, credible evidence that would have challenged the content and reliability of testimony from the State's star witness. On federal review, disclosure of the false letters, along with suppressed information about the State's dealings with Foreman, shows that Beckcom was committed to creating a false narrative about Prible's confession. Indeed, the State did not believe Foreman, who was said to corroborate Beckcom's testimony against Prible. Armed with full knowledge of Beckcom's efforts, a reasonable jury may well have reached a different outcome. The Court thus concludes that this evidence would have been favorable to the defense.

iii. *Other Information from the Work Product File*

Prible has identified significant amounts of information that was not previously available to the defense. Such information consists of, among others, BOP records and records from other trials. Most problematic, however, is the information contained in the prosecutor's work product file. In October 2015, the State also provided for the first time other documents from the work product file. As described by Prible, these documents included:

- The November 12, 2001, letter from Nathan Foreman's attorney, Alan Percely, to Siegler, in which Percely conveys Foreman's desire to provide evidence against Prible in exchange for Siegler's assistance in getting Foreman's sentence reduced.

- Texas Crime Information Center (TCIC)/National Crime Information Center (NCIC) criminal background reports for Foreman and Rafael Dominguez, dated December 6, 2001. These reports were produced from a folder of privileged material containing TCIC/NCIC reports for potential witnesses and testifying witnesses at Prible's trial.

- A sticky note attached to would-be informant Mark Martinez's April 30, 2002, letter to Siegler, which appears to memorialize a March 7th voicemail from Martinez regarding the Prible case. It directs Siegler to call Martinez's counselor at FCI Beaumont.

- An undated letter from Beckcom to Siegler referencing his upcoming testimony in Prible's trial and expressing concern that he could not count on his California AUSA to assist him, and proposing that Siegler help him secure a Rule 35 sentence reduction by arranging for him and another FCI Beaumont inmate named Anton Davi to inform on even more FCI Beaumont inmates.

- A letter from the HCDA to Lt. Robert Clark at FCI Beaumont, asking for permission for Siegler and Bonds to interview Beckcom and Anton Davi, as Beckcom requested, in May 2002, five months before Prible's trial.

- Documents showing that, after Prible's trial, Siegler strenuously lobbied Beckcom's AUSA for a time cut and evidently even recruited an AUSA working out of the Houston office to weigh in on Beckcom's behalf.

(Doc. No. 181, at 73–74). These suppressed documents reveal the extent of Siegler's involvement with the ring of informants and, in particular, Beckcom. Indeed, the documents indicate that, in exchange for information on Prible and other inmates, Siegler lobbied to reduce the informants'

sentences. They also reveal that Beckcom in fact proposed to Siegler that he inform on other FCI Beaumont inmates in exchange for a Rule 35 sentence reduction. This information tends to impeach Beckcom's credibility and the manner in which the State assembled its case against Prible. The withholding of these documents further solidifies the Court's finding that the State in this case withheld important, favorable information from the defense.

Prible has accordingly demonstrated that the suppressed evidence would have been favorable to his defense for the purposes of his third, fourth, and fifth *Brady* claims.

b. Prible's DNA Evidence *Brady* Claim (Claim 10)

Long before Prible was charged with capital murder, the prosecution knew that Prible's semen had been found in Tirado's mouth. That fact alone was not necessarily inculpatory. The evidence did not suggest that Tirado had been sexually assaulted, and while Prible admitted that he had sexual relations with Tirado, he claimed that it was consensual and had occurred long before the murders. The prosecution thus needed to prove that "[t]here is no way in the world that that semen wasn't deposited either moments before or seconds after [Tirado] died." 28 RR 11. Accordingly, at trial the prosecution's case in chief relied heavily on evidence about the longevity of semen to prove that Prible had been in the house around the time of the killings. Indeed, Prible's DNA evidence was one of two pillars upon which the prosecution's case relied almost exclusively, the other being Beckcom's testimony.

At trial, the State called two expert witnesses to testify as to the DINA evidence. Testimony from the first witness, Chief Harris County Medical Examiner Dr. Joye Carter, did not help the State's theory that Prible's sexual contact with Tirado had to have occurred seconds before she was killed. Dr. Carter testified that sperm cells can be found in a person's mouth for hours after ejaculation, possibly because "it could actually adhere or stick to like plaque that's on the teeth or

in the recesses of the mouth." 23 RR 68. The State instead bolstered its theory with testimony from William Watson, an expert in molecular biology. Watson did not try to estimate an exact perimortem interval (PMI) between oral sex and death, but still testified that the quantity of the DNA sample was inconsistent with the semen being deposited into Tirado's mouth as long as an hour before she was killed. He also said that the fact that he was able to obtain the male profile "certainly would be consistent with" Prible depositing the semen in Tirado's mouth "moments, if not seconds, before she was killed." 24 RR 101–03.

The defense responded with testimony from a molecular biologist, Dr. Robert Benjamin, who disagreed with Watson's testimony because there were too many variables and Watson made too many assumptions. Dr. Benjamin testified that using quantities of DNA to estimate time since ejaculation is "just not scientifically valid" and "no controlled scientific studies" supported Watson's conclusions. 27 RR 123–24, 136. The prosecution, nonetheless, heavily emphasized Watson's testimony in its closing argument.

In Claim 10, Prible argues that the State suppressed *Brady* evidence relating to Watson's testimony. Factual development on federal habeas review has added important new dimensions to the DNA evidence at trial. Recent evidence refutes Watson's methodology and conclusions.[23]

[23] Prible attaches to his petition a report from Dr. Elizabeth A. Johnson, an expert in molecular biology and DNA analysis. Dr. Johnson's report rejects both Watson's methodology and conclusions. Dr. Johnson states that Watson "could not reliably" state that the oral swab was "consistent with there being a great deal of sperm present" because he did not perform either a microscopic evaluation of the sample to assess the number of spermatozoa present or a test for the P30 protein. (Doc. 181, Ex. 114 ¶¶ 14–16). She states that, using Watson's stated yield of DNA in the oral swab, the volume of seminal fluid "is far less than the volume of seminal fluid that would be found in someone's mouth if ejaculation had occurred moments if not seconds before the victim was killed as Mr. Watson testified upon direct examination." (*Id.* ¶ 16). Dr. Johnson also points out that there was literature at the time of trial "on the duration of spermatozoa in the mouth after ejaculation into the oral cavity of live individuals," which confirms that "[t]he removal and dilution of spermatozoa from any body cavity occurs faster in a live individual than a deceased

Even more importantly, however, factual development has revealed that the State suppressed evidence that the prosecution had information that contradicted Watson's testimony, but did not turn it over to the defense.

This Court performed an *in camera* review of the State's work product file. Siegler's notes revealed that she had investigated the survival period for semen to determine a PMI. Siegler's notes revealed that she had contacted Pam McInnis, the head of the Harris County Crime Lab. McInnis told Siegler that semen can survive in the mouth for up to seventy-two hours. Siegler made a note about this but buried it in her work product file rather than reveal it to the defense. (Doc. No. 181, Ex. 20).

Prible contends that the State violated *Brady* by hiding the State's knowledge about the PMI in the work product folder. There is no question that the prosecution kept that information from the defense. This evidence is favorable to Prible because it supports his assertion that the oral sex was consensual and took place many hours before the murder. It also impeaches Watson's testimony that semen survives for only minutes, if not seconds, which the State relied heavily on at trial.

Respondent advances two arguments, however, as to why the suppression of this evidence did not amount to a *Brady* violation that warrants habeas relief. First, Respondent argues that "[a]lthough the evidence appears to be impeachment evidence, it lacks foundational support."

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individual due to activity." (*Id.* ¶¶ 18–19). She concludes from this that "Mr. Watson could not have reliably testified as he did at trial regarding the amount of spermatozoa on the oral swab taken from [Tirado] or the timing of the deposit of semen into her mouth relative to the time of her death." (*Id.* ¶ 20). Accordingly, Prible argues Dr. Johnson's expert testimony meets the *Schlup* standard for innocence and that an evidentiary hearing is necessary to determine how the report and its impeachment of Watson's testimony would affect a jury. (Doc. No. 199, at 21). However, because the Court grants Prible habeas relief on his *Brady* claims, as discussed *infra*, the Court need not address Prible's actual innocence claim.

(Doc. No. 191, at 152). True, neither party has produced any evidence that would support the position that the semen may exist inside the victim's mouth for seventy-two hours. However, the veracity of McInnis's opinion is not the issue. The value in divulging that material to the defense would be proving that the prosecution knew that DNA samples could last longer, possibly much longer, than the seconds or minutes testified to by Watson. Also, disclosure would allow Prible to argue that the State had information that would support his defense, but hid it and instead, shopped for an expert who would support its theory.

Second, Respondent contends that the suppressed evidence is "immaterial." (*Id.* at 153). Respondent argues that, because Dr. Carter testified that semen could exist in the victim's mouth for some time and Dr. Benjamin testified that scientific research did not support Watson's testimony, "the testimony offered at trial was sufficient to refute [Watson's] testimony for Prible's purposes." (*Id.*). The Court disagrees. Further evidence undercutting one of the State's principal arguments, especially when that evidence is from the head of the Harris County Crime Lab, could have been of paramount importance to the defense.

The DNA testimony was critical to the State's case, as the State was able to argue that Prible killed Tirado immediately after ejaculating in her mouth. Evidence that Siegler received McInnis's contradicting opinion undercuts both the veracity of the State's DNA theory and Siegler's method of investigation. The defense could have used the suppressed note about McInnis's opinion to show that Siegler shopped around for someone willing to say that Prible was lying about the timing of the oral sex, even though she knew that Prible's version was scientifically plausible. Accordingly, this evidence is favorable under *Brady* because it both refutes the validity of Watson's testimony and undermines the integrity of the State's investigation of Prible's case.

3. Prejudice

To establish prejudice, Prible must show that the nondisclosed information was material. The test for materiality is whether "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Strickler*, 527 U.S. at 280; *see Banks*, 540 U.S. at 698. "[T]he materiality standard for *Brady* claims is met when 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" *Banks*, 540 U.S. at 698 (quoting *Kyles*, 514 U.S. at 435). "[M]ateriality must be assessed collectively, not point by point." *Banks v. Thaler*, 583 F.3d 295, 328 (5th Cir. 2009) (citing *Kyle*, 514 U.S. at 436).

The cumulative effect of the suppressed evidence in this case is such that it can "reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id*. Had this evidence been disclosed to the defense, it would reasonably have undercut the two pillars upon which the prosecution's case against Prible solely rested: Beckcom's testimony and Prible's DNA evidence.

The Court turns first to the suppressed evidence relating to Beckcom's testimony. As discussed *supra*, the prosecution at trial relied heavily on Beckcom's testimony that Prible had confessed to him and Foreman about the murders. Beckcom's testimony was bolstered by his claim that Foreman was present at each interaction with Beckcom. Yet, as the Court has discussed at length *supra*, the suppressed evidence—the letters to Siegler, the new information about Foreman, and the numerous other documents uncovered in Siegler's work product folder—reveals an orchestrated effort by a ring of informants to fabricate a confession from Prible in return for sentence reductions. Had this evidence been disclosed, the defense could have argued not only that Beckcom was part of a ring of informants that sought to obtain incriminating evidence against

Prible for their own gain, but also that Beckcom, the State's star witness, had in fact fabricated and falsified evidence against Prible.

Indeed, the suppressed evidence could have been used to impeach Beckcom's credibility. Armed with the letters to Siegler from several would-be informants that echoed Beckcom's testimony regarding Prible's confession, the defense could have emphasized Siegler's curious decision to present only Beckcom at trial. Such evidence, as Gaiser testified at the hearing, would have raised questions as to what made Beckcom unique amongst the corroborating informants and, accordingly, cast doubt on his motivations and credibility. HT2-180–81. Moreover, as Gaiser testified, the defense could have used documents showing that Beckcom proposed informing on even more FCI Beaumont inmates in exchange for Siegler's help securing a Rule 35 sentence reduction, to highlight the extent to which Beckcom was willing to go to receive personal benefit. HT2-194–95; *supra* at 61–62. This evidence would have certainly impugned Beckcom's motivations and credibility.

Not only could the defense have used this evidence to impeach the State's star witness individually, but indeed, it could have been used to uncover a broad, orchestrated effort to manufacture confessions against Prible and others, like Herrera. For instance, the defense could have invoked the curious similarity in the form and content of the letters—including consistently misspelling Prible's name as "Pribble," (Doc. No. 99, Ex. 3)—to show that the letters were written by the same person or, at a minimum, in a deliberately coordinated effort. Indeed, as Gaiser testified, the letters could have been used to demonstrate just how many inmates were willing to act for personal benefit. HT2-179. To bolster this presentation of a ring of informants, the defense could have pointed to the suppressed evidence that Siegler wrote and lobbied for Rule 35 sentence reductions for Beckcom, Foreman, and numerous other informants. Moreover, the defense could

have used suppressed evidence that Foreman was apparently present during all critical interactions between Prible and Beckcom to cast doubt on the veracity of Beckcom's testimony and the trustworthiness of the State's assembly of its case against Prible, especially in light of Siegler's professed distrust of Foreman. Using this evidence, in conjunction with the other documents suppressed in Siegler's work product file, the defense could have developed a compelling argument around the ring of informants and cast doubt both on Beckcom's testimony and the manner in which the State investigated and constructed its case against Prible. Without the suppressed evidence, the defense at trial was left to attempt to impeach Beckcom with only his past conduct.

Taken as a whole, these efforts would have, at the very least, cast serious doubt on the veracity of the State's star witness and, in turn, one of the State's two pillars against Prible. The materiality standard for *Brady* prejudice requires that there be a reasonable probability that the outcome would have been different. *Banks*, 540 U.S. at 699. That standard is certainly met here. This is especially true when considering the additional impact of the suppressed evidence related to the State's second pillar—DNA evidence—to which the Court turns next.

At trial, the prosecution's case in chief relied heavily on using Prible's semen to prove that he had been in the house at the time of the killings. Critical to the State's theory of the case was Watson's testimony that Prible likely deposited the semen in Tirado's mouth "moments, if not seconds, before she was killed." 24 RR 101–03. Suppressed evidence from Siegler's work product file, however, revealed a contradicting opinion from McInnis, the head of the Harris County Crime Lab, that semen can survive in the mouth for up to seventy-two hours. (Doc. No. 181, Ex. 20). Had this evidence been disclosed to the defense, it would have bolstered the defense's theory that Prible's sexual encounter with Tirado occurred hours, not seconds, before she was killed, and that

Prible had returned home by the time of the killing. Indeed, that this evidence came from the head of the Harris County Crime Lab, which is connected with law enforcement, may have lent more credibility to McInnis and accordingly may well have held more sway in the eyes of a reasonable jury.

Where, as here, the suppressed evidence taken as a whole would have allowed the defense to seriously undercut the two main arguments the prosecution relied upon, the Court has no trouble finding that a reasonable jury may well have reached a different outcome. The Court thus concludes that the suppressed evidence is material and, accordingly, that Prible has shown prejudice to overcome any procedural default and to satisfy the third prong of his *Brady* claims.

4. Conclusion of *Brady* Claims

Unlike a civil attorney representing a client, there is a "special role played by the American prosecutor in the search for truth in criminal trials." *Strickler*, 527 U.S. at 281. A prosecutor may litigate with zeal, but the Constitution ensures that, "though the attorney for the sovereign must prosecute the accused with earnestness and vigor, he must always be faithful to his client's overriding interest that justice shall be done. He is the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer." *United States v. Agurs*, 427 U.S. 97, 110–11 (1976) (quotation omitted).

"Courts, litigants, and juries properly anticipate that 'obligations [to refrain from improper methods to secure a conviction] . . . plainly rest[ing] upon the prosecuting attorney, will be faithfully observed.'" *Banks*, 540 U.S. at 696 (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)). Here, it plainly was not. Without question, the prosecution in this case engaged in a pattern of deceptive behavior and active concealment. And the evidence suppressed sufficiently serves to controvert the primary basis for Prible's conviction. Simply put, the prosecution withheld

material evidence. The Constitution requires far more, especially in the case of a man sentenced to death. The Court will grant habeas relief on Claims 2, 3, 4, 5, and 10.

B. *Giglio* Claims (Claims 1 and 11)

Prible also contends that the State sponsored false and misleading testimony through Beckcom and Watson in violation of *Giglio v. United States*, 405 U.S. 150 (1972). In Claim 1, Prible focuses on Beckcom's testimony that Beckcom and Foreman had learned of the crime only from Prible himself. Prible relies on an array of sources—testimony from the other inmates, records showing extensive contacts between the inmates and Siegler, and documents from other cases—to demonstrate that Siegler gave Beckcom the information that served as the basis of his trial testimony. In Claim 11, Prible argues that the prosecution adduced false and misleading testimony because Watson's DNA testimony was scientifically baseless and likely wrong.

In *Giglio*, the Supreme Court held that "deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with rudimentary demands of justice." *Id.* at 153 (quotation omitted). "To establish a due process violation based on the State's knowing use of false or misleading evidence, [petitioner] must show (1) the evidence was false, (2) the evidence was material, and (3) the prosecution knew that the evidence was false." *Nobles v. Johnson*, 127 F.3d 409, 415 (5th Cir. 1997) (citing *Giglio*, 405 U.S. at 153–54). The Court "will not tolerate prosecutorial participation in technically correct, yet seriously misleading, testimony which serves to conceal the existence of a deal with material witnesses." *Blankenship v. Estelle*, 545 F.2d 510, 513 (5th Cir. 1977).

Prible has made a strong showing that he can meet the first two prongs of the *Giglio* test with regards to Beckcom's testimony. As discussed *supra*, testimony and evidence developed after trial have shown that the defense could have developed a strong and possibly successful

argument that Beckcom testified falsely. Additionally, Beckcom's testimony, as one of two main pieces of evidence that the prosecution relied on, was certainly material.

However, the Court finds that Prible has not satisfied the third *Giglio* criterion. Prible has presented evidence supporting the assertion that Siegler knew that she was presenting false evidence. The record undeniably shows that Siegler contacted Beckcom's prosecutor several times in an effort to secure him a sentence reduction. Siegler minimized and hid the extent and content of those contacts. Siegler and Beckcom even disclosed to the jury that Beckcom's goal in testifying was to obtain a sentence reduction. As already discussed, Siegler certainly suppressed material that would have significantly undercut Beckcom's story. Beckcom acted as her agent in securing information from Prible. However, while this evidence may not reflect well on Siegler, the Court finds that, taken as a whole, the evidence is not conclusive as to whether Siegler knew she was presenting false or seriously misleading testimony.

Likewise, Prible has not shown that Siegler knew that Watson's DNA testimony was false or seriously misleading. Siegler was aware that experts had different views on the amount of time that semen could survive in the oral cavity. As discussed *supra*, she was obligated under *Brady* to disclose to Prible the information that she found. However, Siegler's failure to disclose does not necessarily mean that she knew Watson's testimony was false or seriously misleading.

This Court does not endorse the cavalier attitude Siegler has displayed regarding her constitutional duty to preserve the fundamental fairness of the trial proceedings. Siegler intentionally and knowingly withheld information with the defense, was deceptive about her efforts to do so, and was far from credible in her federal court testimony. But the evidence has not shown that she knew that Beckcom was lying or that the scientific evidence was indisputably false. Although the issue is not free from doubt, the Court must deny Prible's *Giglio* claims.

C. *Massiah* Claims (Claims 6, 7, and 8)

Prible raises three claims relating to the State's influence over inmates as they sought information from Prible. In Claims 6 and 8, Prible argues that Beckcom and Foreman unconstitutionally acted as agents of the State in securing information against him. In Claim 7, Prible argues that he was denied his Sixth Amendment right to effective assistance of counsel at trial and on state habeas because his trial counsel failed to object to Beckcom's testimony under *Massiah* and his state habeas counsel failed to make an ineffective-assistance claim on that basis. (Doc. No. 181, at 215–19).

As previously discussed, the prosecution's ability to convict Prible hinged on the testimony of a single informant. The use of informant testimony is constitutionally permissible. The Constitution, however, requires that the informant acquire information independently, not as an agent for the State. Under *Massiah v. United States*, 377 U.S. 201 (1964), a government agent may not seek information from a criminal defendant outside the presence of the defendant's counsel once the Sixth Amendment's right to counsel has attached. *See Thompson v. Davis*, 916 F.3d 444, 454 (5th Cir. 2019).

"A *Massiah* violation has three elements: (1) the Sixth Amendment right to counsel has attached; (2) the individual seeking information from the defendant is a government agent acting without the defendant's counsel's being present; and (3) that agent 'deliberately elicit[s]' incriminating statements from the defendant." *Henderson v. Quarterman*, 460 F.3d 654, 664 (5th Cir. 2006) (quoting *Massiah*, 377 U.S. at 206). "Under the Fifth Circuit's two-prong test for determining whether an agency relationship exists between the government and a jailhouse informant, the defendant bears the burden of showing that 'the informant: (1) was promised, reasonably led to believe, or actually received a benefit in exchange for soliciting information from

the defendant; and (2) acted pursuant to instructions from the State, or otherwise submitted to the State's control." *United States v. Bates*, 850 F.3d 807, 810 (5th Cir. 2017) (quoting *Creel v. Johnson*, 162 F.3d 385, 393 (5th Cir. 1998)).

When Prible first filed his federal habeas petition, he alleged that Siegler had recruited inmate informers who, at her direction, set into motion circumstances in which they could extract a confession from Prible. Although extensive factual development in the years since has lent support to this ring-of-informants theory, not all of Prible's allegations have been completely verified. Yet, even on Beckcom's and Siegler's accountings of the facts, Beckcom still acted as an agent of the State by taking Prible's uncounseled statements with the promise of a reward from Siegler. Before turning to the merits of Prible's *Massiah* claims, however, the Court will discuss procedural concerns raised by Respondent.

1. Procedural Bar

Respondent argues that Prible defaulted his *Massiah* claims by litigating them in a manner that did not comply with state law. Prible first raised a *Massiah* claim in his *pro se* application that the Court of Criminal Appeals found to be an abuse of the writ. Prible raised the *Massiah* issue again in his federal petition in 2009. By that point, Prible had developed additional evidence supporting his allegation that Siegler had used inmates as agents to gather information against him. As discussed above, this Court stayed proceedings in 2010 to allow Prible to exhaust state court review of several claims, including his *Massiah* claim, by filing a successive state habeas application. The subsequent actions of the state habeas court in reviewing Prible's *Massiah* claim mirror those already discussed above in relation to Prible's *Brady* claims: the state court allowed some factual development of the *Massiah* claim, but ultimately did not reach the claim's merits after finding the claim procedurally barred by Texas's abuse-of-the-writ doctrine. Respondent

argues that this state-imposed procedural bar renders Prible's *Massiah* claim procedurally defaulted. The Court agrees. Prible has shown, however, that he can establish cause and prejudice to overcome the procedural default.

As discussed *supra* in connection with Prible's *Brady* claims, an inmate can meet the cause requirement by showing that "some objective factor external to the defense impeded [the defense's] efforts to comply with the State's procedural rule," *Murray v. Carrier*, 477 U.S. 478, 488 (1986), or that "the factual or legal basis for a claim was not reasonably available to counsel," *Coleman v. Thompson,* 501 U.S. 722, 753 (1991). As with his *Brady* claims, Prible's ability to develop his *Massiah* claims in state court proceedings was hobbled by Siegler's suppression of information regarding the extent of her relationship with Beckcom and other inmates, and the nature of the arrangement between her and Beckcom. During trial, direct appeal, and state habeas proceedings, Prible and his attorneys had no reason to know that Siegler was suppressing evidence of her relationship with informers. As with Prible's *Brady* claim, it was only after federal habeas counsel was finally able to conduct interviews with Walker and other inmates that Prible's *Massiah* claim became anything more than speculative. Indeed, the full nature of Beckcom's interaction with the prosecution only came into focus with Beckcom's interview, clarified and contextualized by later testimony from other inmates. Only in his deposition did Beckcom finally acknowledge that the only reason he acted was to get himself a sentence reduction. In sum, only once federal review began was Prible able to remove the obstacle that Siegler's suppression of evidence had created for the development of his *Massiah* claims. Because Siegler's suppression of evidence was an "objective factor" that impeded the development of Prible's *Massiah* claims, Prible has shown cause to overcome the default of those claims. Moreover, as discussed further below, prejudice is clear given the critical import of Beckcom's testimony at trial. The Court finds cause

and prejudice to allow federal review of Prible's *Massiah* claims. Because the state courts never adjudicated the merits of his claims, federal review of those issues is *de novo*.

2. Prible's *Massiah* Claim: Beckcom (Claim 6)

In Claim 6, Prible argues that the State violated *Massiah* because:

> Beckcom's testimony leaves little doubt that (1) his initial phone call to Siegler in early October 2001 was for the purpose of reaching an agreement for him to serve as an agent to investigate Prible, and (2) Beckcom had learned very little about the case from Prible until after he and Siegler had worked out a deal that would reward him for informing on Prible.

(Doc. No. 181, at 213). From this, Prible concludes that "[t]he State and Beckcom thereafter conspired to violate Prible's constitutional rights by eliciting statements about the crime in the absence of defense counsel." (*Id.* at 214). The issue before the Court is thus whether Beckcom acted as an agent of the state in deliberately eliciting incriminating evidence from Prible after his right to counsel had attached. For the purposes of analyzing this issue, the Court assumes that Beckcom testified credibly at trial and that Prible did indeed confess to the murder, because even under these assumptions, the Court finds that Beckcom was in an agency relationship with Siegler in violation of Prible's constitutional rights.

Prible's Sixth Amendment right to counsel had attached by the time Prible's trial counsel was appointed on September 28, 2001. *See United States v. Gouveia*, 467 U.S. 180, 189 (1984) ("[T]he right to counsel attaches at the initiation of adversary judicial criminal proceedings."). Beckcom acknowledged that he first contacted Siegler in October 2001 to discuss the possibility of receiving a sentencing reduction in exchange for information. HT1-238.

The second question under *Messiah* is whether Beckcom sought out information from Prible as an agent of the State. Under Fifth Circuit law, Beckcom must have solicited information because he was "promised, reasonably led to believe, or actually received a benefit," and "acted

pursuant to instructions from the State, or otherwise submitted to the State's control." *United States v. Bates*, 850 F.3d 807, 810 (5th Cir. 2017) (quotation omitted); *see Thompson v. Davis*, 941 F.3d 813, 816 (5th Cir. 2019).

As Beckcom's testimony shows, he entered into an agency relationship with the State during that first conversation with Siegler. At the time of the initial meeting, Beckcom did not have any real information about Prible. HT1-236. Beckcom said that the purpose of his initial call with Siegler was to see whether he could arrange for a reduction in his sentence *even though he did not have any evidence at that time*.[24] At trial, Beckcom testified that Siegler told him that she would be interested only if he knew "[s]pecifics about the case." 26 RR 37; HT1-238. Beckcom left that meeting on a mission to secure information from Prible, knowing that he would receive a benefit if he obtained a confession and testified against Prible. Thus, at a minimum, Beckcom was "reasonably led to believe" that he would receive a Rule 35 letter in exchange for getting information from Prible, and then acted pursuant to instructions from Siegler to get details about the crime from Prible.

Beckcom's conversations and meetings with Siegler after the first phone call in October 2001 provide further evidence that Beckcom was acting based on promises of relief from Siegler. As described above, in her deposition, Siegler testified that she reached out to the Assistant U.S. Attorney working on Beckcom's federal criminal case to talk about a Rule 35 reduction before Beckcom even testified. Beckcom testified that he asked for assurances and wanted to make sure

[24] Respondent emphasizes that "Beckcom, the informant who testified at Prible's trial, also indicated that he was the one to reach out to the prosecutor with information, not the other way around." (Doc. No. 240, at 30). Whether Beckcom or Siegler initiated contact, however, is not the inquiry. Even if Beckcom initiated contact, he was subsequently led to believe that he would benefit in exchange for informing on Prible and acted pursuant to Siegler's instructions that he obtain specific incriminating information about Prible. The Court thus concludes that Beckcom was a state agent.

that Siegler was in contact with the AUSA. Beckcom said Siegler told him he would probably get out. And indeed, although Beckcom wanted a greater reduction, he did eventually receive a year off his sentence as a result of his testimony. All this evidence indicates that Beckcom was in an agency relationship with Siegler, which predated Beckcom's substantive conversations with Prible.

Finally, Prible has shown that Beckcom "deliberately elicited" incriminating statements while acting as the State's agent. Beckcom acknowledged that he talked about trying to get a confession from Prible with Foreman; accordingly, he was not merely a passive recipient of information. Even in his testimony at trial, he admitted to asking questions about the evidence in the case to gather the "specifics" Siegler requested. Beckcom acted deliberately in seeking out a confession from Prible, in hopes of obtaining a reduction to his own sentence. Thus, Prible has shown that the State violated *Massiah* when it used Beckcom to elicit incriminating statements from Prible.

Prejudice is not a close question. Beckcom's testimony was plainly the most compelling evidence that the jury heard at trial. Although the defense could and did impeach Beckcom's credibility as a jailhouse snitch, they did not have strong impeachment evidence about the actual substance of what he relayed to the jury about Prible's confession. Prible has made a strong case that there is more than a "reasonable probability" that exclusion of Beckcom's testimony would have altered the outcome of the trial.

3. Prible's *Massiah* Claim: Foreman (Claim 8)

Prible has also raised a *Massiah* claim based on Foreman's alleged work as a state agent. Prible argues that the State suppressed evidence that Foreman was a state agent before and during the time that he and Beckcom were trying to obtain a confession from Prible. Prible primarily

bases this claim on the meeting that Foreman had with Siegler and Bonds at FDC in August 2001. Although it is undisputed that the State did not disclose this meeting and that Foreman tried to inform on Prible, Foreman did not testify that Siegler gave him any instructions at that meeting or made any promises to him. Prible has not shown that there was any agency relationship or *quid pro quo* between Foreman and the State. Accordingly, Prible has not shown that the State violated *Massiah* in Siegler's dealings with Foreman.

4. Prible's *Massiah* Claim: Ineffective Assistance of Trial Counsel (Claim 7)

Prible also argues that trial counsel provided ineffective assistance for not raising a *Massiah* claim at trial. "An ineffective assistance claim has two components: A petitioner must show that counsel's performance was deficient, and that the deficiency prejudiced the defense." *Wiggins v. Smith*, 539 U.S. 510, 521 (2003). "To establish deficient performance, a petitioner must demonstrate that counsel's representation fell below an objective standard of reasonableness." *Id.* (quotation omitted). The Court must apply "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland v. Washington*, 466 U.S. 668, 689 (1984). To establish prejudice, a petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. 413 (2013), provide a limited exception to the procedural default rules when state habeas counsel was ineffective for failing to assert a substantial ineffective assistance of trial counsel claim in the petitioner's first state habeas petition. In order to successfully assert a *Strickland* claim for appellate counsel, Prible must also have a reasonable probability that he would have prevailed on appeal but for his counsel's deficient performance. *See Smith v. Robbins*, 528 U.S. 259, 285–86 (2000).

The root of this claim is that trial counsel knew that Beckcom tried to obtain a confession and information from Prible while both were in detention, starting in late October or early November 2001.[25] At this time, Prible's Sixth Amendment right to an attorney had already attached, and Beckcom had already spoken with the lead prosecutor. Despite having information about this timeline, Prible's trial counsel failed to object to Beckcom's testimony or to request a *Massiah* hearing. Prible argues that, had his counsel objected, the trial court would have excluded Beckcom's testimony. Since Beckcom's testimony was critical to the prosecution's case, Prible argues that it is "reasonably probable" that the outcome of the trial would have been different if Beckcom's testimony had been excluded. *Strickland*, 466 U.S. at 693–94. Similarly, state habeas counsel had the same information but failed to make an ineffective-assistance claim in the first state habeas application based on trial counsel's failure to make a *Massiah* objection. Respondent argues that Prible's trial counsel was not ineffective for failing to object to Beckcom's testimony at trial because there was no evidence that Beckcom was an agent of the state: "Counsel is not deficient for, nor can prejudice result from, the failure to raise a baseless objection." (Doc. No. 191, at 98).

While the record developed through Prible's state and federal habeas proceedings has enabled Prible to show successfully that Beckcom was an agent of the State, the information at trial was not so clear. At trial, Beckcom seemed to suggest that Prible confessed to him before he contacted Siegler. 26 RR 23–24; 36–37, 47. According to Beckcom, after Prible had made inculpatory statements, Beckcom then found out that Siegler would need specifics. *Id.* at 37.

[25] Respondent claims that Prible failed to raise this claim in a manner consistent with AEDPA's limitations period. As with Prible's *Brady* claims, the Court finds that this claim relates back to the earlier petitions and, at any rate, the circumstances discussed *supra* also prevented Prible from advancing this claim in a timely manner. *See supra* V.A.1.a.

Beckcom testified about the November 24, 2001, conversation in which Prible allegedly confessed as if Prible had voluntarily and without solicitation told Beckcom about the crime. *Id.* at 53–54. In fact, Beckcom also testified that he counseled Prible not to talk about his case. *Id.* at 70–71.

Much more information about the agency relationship emerged only during habeas proceedings. While trial counsel knew that Beckcom reached out to Siegler well before he had any substantive conversations with Prible, the full extent of Beckcom's efforts to secure a confession was not apparent to them at that time. While an attorney could have raised a *Massiah* objection, it does not appear that Beckcom would have been so forthcoming at trial to describe his efforts to communicate with Siegler and secure information from Prible. Further, even if Prible's state habeas counsel should have been aware of the potential *Massiah* issues, Prible has not shown that the state habeas court would have granted relief absent the full record developed in federal habeas proceedings. The Court finds that Prible is not entitled to relief on his ineffective assistance of counsel claim.

5. Conclusion of *Massiah* Claims

"[T]he prosecutor and police have an affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel." *Maine v. Moulton*, 474 U.S. 159, 171 (1985). Prible's initial complaint was that Siegler orchestrated a trap wherein Prible would become entangled in a web of informers who, having gained his confidence, would extract from him a confession. Prible alleged that Siegler not only seeded this conspiracy with facts about the murder, but somehow caused the federal prison to place within his orbit the men

who would take advantage of him. Prible argued that Siegler then maintained regular contact with, and control of, the informers.

The evidence has not completely verified all of Prible's allegations. Still, the evidence sufficiently proves a *Massiah* claim in relation to Beckcom. Siegler promised Beckcom time off his sentence if he got information from Prible. Nothing suggests that Siegler instructed Beckcom to be a passive listener. *Cf. Kuhlmann v. Wilson*, 477 U.S. 436, 460 (1986) (finding no *Massiah* violation when the police instructed the inmate informant "only to listen to" the defendant). Siegler must have known that, by telling Beckcom she needed specifics, Beckcom "would take affirmative steps to secure incriminating information" and that "such propinquity [between the inmates] likely would lead to that result." *United States v. Henry*, 447 U.S. 264, 271 (1980). Siegler regularly communicated with Beckcom after their initial meeting and, when he claimed to have created a situation in which Prible confessed, again made promises to him. Beckcom acted as an agent of the State in taking Prible's uncounseled statements. The Court therefore grants relief on Claim 6.

D. Due Process (Claim 9)

In Claim 9, Prible argues that the trial court improperly admitted evidence at trial. The State only charged Prible with killing Herrera and Tirado. The trial court, however, allowed the State to introduce guilt/innocence phase evidence that their three children also died in the fire. On direct appeal, Prible argued that the evidence of the children's deaths was inadmissible under Texas Evidence Code § 404(b) and the due process clause. Under Texas law, evidence of other crimes is generally inadmissible, but exceptions exist to prove motive, provide context, or corroborate statements. The Court of Criminal Appeals provided two justifications for the admission of those deaths: (1) "the State used the evidence of the children's deaths to support the testimony of a jailhouse informant, Michael Beckcom . . . detailing the manner in which the crimes

were committed with information that Beckham [sic] could not have obtained except from [Prible] himself" and (2) "the evidence was admissible as same-transaction contextual evidence . . . [which was] so intertwined with the State's proof of the charged crime that avoiding reference to it would make the State's case incomplete or difficult to understand." *Prible*, 175 S.W.3d at 731, 732.

Federal habeas courts do not "sit to review the mere admissibility of evidence under state law." *Little v. Johnson*, 162 F.3d 855, 862 (5th Cir. 1998); *see also Derden v. McNeel*, 978 F.2d 1453, 1458 (5th Cir. 1992) ("[E]rrors of state law, including evidentiary errors, are not cognizable in habeas corpus . . . ."). The Court of Criminal Appeals found on direct appeal that evidence of the children's deaths was admissible under state law. The Supreme Court has "repeatedly held that a state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus." *Bradshaw v. Richey*, 546 U.S. 74, 76 (2005). The Court's sole inquiry, then, is whether the admission of this evidence violated the Constitution, *see Estelle v. McGuire*, 502 U.S. 62, 68 (1991), which only provides relief from an evidentiary ruling that is "so unduly prejudicial that it render[ed] the trial fundamentally unfair," *Payne v. Tennessee*, 501 U.S. 808, 825 (1991); *see also Hafdahl v. Johnson*, 251 F.3d 528, 536 (5th Cir. 2001) ("If evidence of an extraneous offense is wrongly admitted, however, habeas corpus relief is proper only if the error is of such magnitude that it resulted in 'fundamental unfairness.'").

Here, Texas law allowed the prosecution to introduce the extraneous evidence as an exception to general evidentiary principles. Evidence of the deaths filled in gaps that would otherwise exist in the evidentiary picture for jurors:

> First, evidence of the children's deaths was part of the crime scene. That evidence was necessary to fully understand the situation as neighbors and firefighters found it. . . . Second, the children's deaths were a direct consequence of [Prible's] conduct of setting fire to Nilda. Thus, Steve and Nilda's murders are so intertwined with

> the deaths of their children that the State's case might well be incomplete without some mention of the children's presence in the home. Under these circumstances, testimony about the children's deaths fills in gaps of the interwoven events and consequences of a defendant's criminal conduct and thus helps the jury to understand the case in context.

Prible, 175 S.W.3d at 732. The state court reasonably found that any error was not a denial of "fundamental fairness" under the Due Process Clause. Prible has not shown that the state court's rejection of this claim was contrary to, or an unreasonable application of, federal law. *See* 28 U.S.C. § 2254(d)(1).

E. Ineffective Assistance of Counsel: DNA Claim (Claim 12)

In addition to his claims that the State violated *Brady* by suppressing DNA evidence regarding how long semen could remain in the victim's mouth and sponsoring false and misleading testimony about the DNA evidence, Prible contends that trial counsel provided ineffective representation by not effectively rebutting the testimony of the State's expert. Trial counsel secured expert assistance to refute Watson's testimony and strongly disputed Watson's conclusions in closing argument. It is true that counsel could have crafted Siegler's withheld note into a theory that the State had shopped experts until finding one who would agree with their timeline of the evidence. However, such information was not available to Prible's trial counsel at the time of trial. Prible has not shown that, given the information available to them, trial counsel was unreasonable in how they approached the evidence or deficient in their efforts.

F. Fair Cross-Section (Claim 13)

Prible claims that he was denied his right to a jury drawn from a fair cross-section of the community because Harris County systematically excludes Hispanics from jury service. In order to demonstrate a prima facie violation of the fair cross-section requirement for juries, a petitioner must show: "(1) that the group alleged to be excluded is a 'distinctive' group in the community;

(2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process." *Duren v. Missouri*, 439 U.S. 357, 364 (1979). Prible argues that Harris County's process of selecting jurors underrepresents Hispanics for various reasons, such as low jury pay and the use of stale address lists.

Prible raised this claim on state habeas review. The state habeas court found that Prible defaulted judicial consideration of this claim by failing to lodge a trial objection to the jury panel. Successive State Habeas Record at 465. The state habeas court relied on Texas's contemporaneous rule which requires "a party to preserve an issue for appellate review" by making "a timely objection with specific grounds for the desired ruling." *Livingston v. Johnson*, 107 F.3d 297, 311 (5th Cir. 1997). Texas's contemporaneous objection rule is an adequate and independent state law bar to federal review. *See Hughes v. Johnson*, 191 F.3d 607, 614 (5th Cir. 1999) (citing *Amos v. Scott*, 61 F.3d 333, 345 (5th Cir. 1995)). Because Prible has not shown cause or prejudice for the default of this claim, federal review is barred. *See Roberts v. Thaler*, 681 F.3d 597, 604–05 (5th Cir. 2012).

G. Actual Innocence (Claim 14)

Prible raises a stand-alone claim of actual innocence. "Actual innocence" is not an independent ground for habeas corpus relief. *See Herrera v. Collins*, 506 U.S. 390, 400 (1993); *In re Raby*, 925 F.3d 749, 755 (5th Cir. 2019); *Foster v. Quarterman*, 466 F.3d 359, 367 (5th Cir.

2006). Insofar as Prible argues that his actual innocence entitles him to relief separate from any other constitutional issue, he does not raise a cognizable habeas claim.

H. Final Claims (Claims 15 and 16)

Prible's fifteenth claim argues that the State sponsored false testimony in order to mislead the jury, bolster the argument that he had raped Tirado, and detract from Prible's alibi witnesses. Prible argues that the State knowingly presented false testimony about the period between oral sex and Tirado's death, crime scene evidence regarding burn patterns and sexual assault, his relationship with Tirado, Tirado's personal opinion of Prible, and phone calls made from the Herrera home. In his sixteenth claim, Prible faults trial counsel for not developing defensive efforts to counteract the false testimony he outlines in Claim 15.

Respondent observes that Prible raised these claims for the first time in his Fourth Amended Petition. On that basis, Respondent argues that the claims are procedurally unreviewable. The Court agrees and finds that Prible has not shown that he can overcome the procedural default. Claims 15 and 16 are thus procedurally unreviewable.

VI. CERTIFICATE OF APPEALABILITY

Respondent does not need permission to appeal from the grant of habeas relief. Under AEDPA, however, a prisoner cannot seek appellate review from a lower court's judgment without receiving a Certificate of Appealability ("COA"). *See* 28 U.S.C. § 2253(c). Prible has not yet requested that this Court grant him a COA on the denied claims; however, this Court "must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." *See Soliz v. Davis*, 750 F. App'x 282, 287–89 (5th Cir. 2018). "The COA statute establishes procedural rules and requires a threshold inquiry into whether the circuit court may entertain an appeal." *Slack*

v. McDaniel, 529 U.S. 473, 482 (2000). A court may only issue a COA when "the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

The Fifth Circuit holds that the severity of an inmate's punishment, even a sentence of death, "does not, in and of itself, require the issuance of a COA." *Clark v. Johnson*, 202 F.3d 760, 764 (5th Cir. 2000). The Fifth Circuit, however, anticipates that a court will resolve any questions about a COA in the death-row inmate's favor. *See Hernandez v. Johnson*, 213 F.3d 243, 248 (5th Cir. 2000). The Supreme Court has explained the standard for evaluating the propriety of granting a COA on claims rejected on their merits as follows: "Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack*, 529 U.S. at 484; *see also Miller-El v. Cockrell*, 537 U.S. 322, 336–38 (2003). On the other hand, a district court that has denied habeas relief on procedural grounds should 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." *Slack*, 529 U.S. at 484; *see also Miller-El*, 537 U.S. at 336–38. Unless the prisoner meets the COA standard, "no appeal would be warranted." *Slack*, 529 U.S. at 484.

Having considered the merits of the denied claims, and in light of AEDPA's standards and controlling precedent, this Court declines to grant a COA.

VII. CONCLUSION

Prible is entitled to federal habeas relief on claims two, three, four, five, six, and ten. The Court **DENIES** the State's Motion for Summary Judgment and **CONDITIONALLY GRANTS**

federal habeas relief as discussed above. It is therefore **ORDERED** that a writ of habeas corpus shall issue unless, within 180 days, the State of Texas either begins new proceedings against Prible or releases him from custody. The 180-day time period shall not start until the conclusion of any appeal from this Memorandum and Order, either by the exhaustion of appellate remedies or the expiration of the time period in which to file such appellate proceedings. The 180-day period may also be extended on further order of the Court. The Court **DENIES** a certificate of appealability for all claims.

The Clerk will deliver a copy of this Memorandum and Order to the parties.

SIGNED at Houston, Texas, on this 20th day of May, 2020.

HON. KEITH P. ELLISON

UNITED STATES DISTRICT JUDGE

APPENDIX D

United States Court of Appeals for the Fifth Circuit

No. 20-70010

RONALD JEFFREY PRIBLE,

Petitioner—Appellee,

versus

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

Respondent—Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:09-CV-1896

ON PETITION FOR REHEARING
AND REHEARING EN BANC

Before DENNIS, ELROD, and DUNCAN, *Circuit Judges*.

PER CURIAM:

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