

IN THE
Supreme Court of the United States

In re WILLIAM EARL RAYFORD,
Petitioner.

On Original Petition for a Writ of Habeas Corpus

PROOF OF SERVICE

I hereby certify that on the 29th day of January, 2018, a copy of **Respondent's Brief in Opposition to Petition for a Writ of Habeas Corpus and Application for a Stay of Execution** was sent by mail and electronic mail to: Bruce Anton, 2311 Cedar Springs Rd, Suite 250, Dallas, Texas 75201, ba@udashenanton.com and Nadia Wood, 525 S. Griffin St. Suite 629, Dallas, Texas 75202, nadia_wood@fd.org. All parties required to be served have been served. I am a member of the Bar of this Court.

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**RESPONDENT'S BRIEF IN OPPOSITION TO ORIGINAL PETITION
FOR A WRIT OF HABEAS CORPUS AND APPLICATION FOR A
STAY OF EXECUTION**

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QUESTION PRESENTED

Petitioner William Earl Rayford was found guilty and sentenced to death in 2000 for killing his ex-girlfriend Carol Hall. Rayford did not complain, however, until one week before his scheduled execution that his trial counsel were ineffective for eliciting improper testimony from the State's prison expert, Royce Smithey, urging the jury to find that Rayford was a future danger based on his race. Smithey's testimony, however, was not of the same type and does not resemble the kind of testimony at issue in *Buck v. Davis*, 137 S. Ct. 759, 769 (2017). Indeed, Smithey never testified that Rayford was more likely to be a future danger due to his race. Rayford's claim was dismissed by the state court as an abuse of the writ. The claim would be plainly successive if it was now raised in a motion for authorization.

In an effort to bypass procedural obstacles to his federal habeas claim, Rayford now requests this Court to grant him the extraordinary remedy of a writ of habeas corpus by way of an original petition. These facts raise the following question:

Should the Court exercise its original habeas corpus jurisdiction to consider Rayford's claim where Rayford had an adequate remedy in state court but nonetheless failed to justify the dilatory nature of his habeas claim and fails entirely to show that the State's prison expert witness presented improper testimony?

BRIEF IN OPPOSITION

Petitioner William Earl Rayford was convicted and sentenced to death in 2000 for his murder of his former girlfriend, Carol Hall. He is scheduled to be executed **after 6:00 p.m. (Central Time) on Tuesday, January 30, 2018**. Rayford has unsuccessfully challenged his conviction and death sentence in both state and federal court. His initial federal habeas proceedings concluded when the Court denied his petition for a writ of certiorari in 2015. *Rayford v. Stephens*, 186 S. Ct. 585. More than two years later, and seventeen years after trial, Rayford filed a subsequent state habeas application alleging that his trial counsel were ineffective for eliciting testimony from the State's prison expert, Royce Smithey, that Rayford was more dangerous because of his race. The Court of Criminal Appeals (CCA) dismissed the subsequent application as an abuse of the writ. *Ex parte Rayford*, No. 63,201-02 (Tex. Crim. App. Jan. 26, 2018) (published order).

Rayford now seeks the extraordinary remedy of a writ of habeas corpus by way of an original petition. *See generally* Petition. He argues that the Court should grant his petition to consider his claim that his trial counsel were ineffective for eliciting improper testimony from Smithey. Pet. 15. Rayford is not entitled to the extraordinary relief he requests.

First, Smithey *never* testified that Rayford was more likely to be a future danger because of his race. Indeed, Smithey did not testify at all as to Rayford's

likelihood for future dangerousness. For that reason alone, Rayford fails to justify the extraordinary remedy of a writ of habeas corpus by way of an original petition. Second, Rayford is concededly seeking to appeal the state court's determination through an original petition in an effort to avoid the limitations of the Anti-Terrorism and Effective Death Penalty Act (AEDPA). Consequently, Rayford is not entitled to a writ of habeas corpus or a stay of execution.

STATEMENT OF JURISDICTION

The Court has jurisdiction under 28 U.S.C. § 2241(a).

STATEMENT OF THE CASE

I. Facts of the Crime

A. The capital murder

The (CCA) summarized the facts of the capital murder as follows:

[Rayford] was Carol Hall's former boyfriend and had lived with Hall and her children for about three years. A couple of months before the offense, Hall asked [Rayford] to move out and ultimately removed him from her home with the help of her uncle. Hall's twelve[-]year-old son, [B.T], testified that Hall was afraid of [Rayford]. About 6:30 on the morning of the offense, [Rayford] entered Hall's house with a key. [Rayford] and Hall began to argue about [Rayford] having a key to the house. The argument escalated, and Hall began screaming for [B.T.]. When [B.T.] woke up and came out of his room, [Rayford] stabbed him in the back with a knife. Hall fled the house and ran down the street toward her mother's house. [Rayford] ran after her and caught her before she reached the next house. Hall was wearing her nightclothes and was barefooted.

[B.T.,] who ran from the house after them, saw [Rayford] pick up Hall and throw her over his shoulder. Hall was screaming and beating on [Rayford] as he carried her toward a creek behind the house. [B.T.] ran to a neighbor's house and called the police. Dwayne Johnson, a bus driver who was parked at the intersection by Hall's house, saw a woman and a man run from Hall's house. Johnson testified for the defense that when the man caught the woman he beat her severely in the head area to the point that she became "lifeless." The man then dragged her behind the house where Johnson could no longer see them.

Police arrived on the scene and began searching for Hall. About an hour later, [Rayford] appeared in Hall's backyard. He was wet and shivering and complaining of an injury to his knee, and he appeared to have grass and blood on his clothes. [Rayford] was arrested and taken to the hospital for treatment of his injuries. He consented to a search of his person which included giving samples of blood, saliva, and trace evidence.

Hall's body was found shortly thereafter about 300 feet inside a culvert pipe. There was a large blood stain on the concrete wall of the pipe about 150 feet from the entrance. Water was running through the bottom of the pipe. The floor of the pipe, especially where the water was deepest, was covered with broken bottles, objects, metal, rocks, sticks and other debris.

Dallas County Medical Examiner Jennie Duvall testified to Hall's injuries. There was evidence of both ligature and manual strangulation. There were blunt force injuries including blows to the face and scalp and injuries to the knees, upper chest, and shoulder. There were sharp force injuries inflicted by a sharp object such as a knife, including a stab wound on the inside of the elbow. There were also numerous superficial cuts and scrapes about the head and body. The injuries to the head were consistent with striking or slamming against concrete. There were no cuts or other injuries to Hall's feet, suggesting she was carried through the culvert. Duvall testified that Hall was alive when strangled. The cause of death was determined to be strangulation, with blunt and sharp force injuries. Hall could have died from the strangulation alone, the blunt force injuries to her head alone, or the combination of these injuries. Duvall further testified that it

was her opinion that Hall died in the culvert because the culvert was the most likely surface to have caused the head injuries and no blood was found until some 150 feet inside the culvert. She conceded on cross-examination, however, that Hall could have been strangled anywhere.

Swabs of trace blood taken from [Rayford's] lip, head, and neck matched Hall's DNA. Blood on [Rayford's] shirt matched Hall's DNA. The blood stain on the concrete in the culvert also matched Hall's DNA. The DNA expert testified that the probability of the DNA belonging to someone other than Hall was one in 116 billion.

Rayford v. State, 125 S.W.3d 521, 525–26 (Tex. Crim. App. 2003).

B. The State's punishment case

The CCA summarized on direct appeal the State's evidence for future dangerousness:

[T]he evidence presented at the guilt or innocence trial showed that [Rayford] pursued a terrified Hall as she ran from him, caught her and forcibly carried her away to a concrete drainage culvert where he brutally murdered her, slamming her head against the concrete, and stabbing and strangling her. He stabbed Hall's son in the back when the child responded to his mother's screams. Hall's mother testified at punishment that [Rayford] had threatened her with a hammer. In addition, [Rayford] had pled guilty to and was convicted of murdering his previous wife in 1986. The evidence reflected that she suffered eleven stab wounds, six of which were fatal. The evidence also reflected that [Rayford] committed the prior murder in the presence of the previous wife's children. Finally, [Rayford] was a habitual drug user and had been unsuccessfully discharged from several substance-abuse programs while on parole.

Rayford, 125 S.W.3d at 527.

C. Rayford's punishment evidence

The defense introduced testimony describing Rayford's upbringing. One of nine children who were fathered by three men, Rayford grew up primarily without the guidance of a father, although for a short time Rayford's father, Andrew Hardin, did live with them. One of Rayford's sisters described Hardin as "a pretty good man until he started drinking." 46 RR at 40–41.¹ When Rayford was eleven or twelve, his mother started a relationship with John Henry Steel, a violent man who beat Rayford's mother in the presence of her children. 46 RR 46, 65–66; 47 RR 30.

Rayford's mother worked long hours, so he and his siblings were often without supervision. 46 RR 47, 66. During this time, Rayford's family lived in the projects and, over the years that Rayford lived there, their neighborhood became infected with "more crime, more violence, more drugs, more rapes, more murders." 46 RR 60; *see also* 46 RR 139–40. Rayford was described as "a concerned brother and father," as someone who always tried to take care of other people's problems for them. 46 RR 68; *see also* 47 RR 56.

Dr. Gilda Kessner testified as to Rayford's propensity for future dangerousness. Before coming to any conclusion, Dr. Kessner reviewed "over a

¹ "RR" refers to the "Reporter's Record," the state record of transcribed trial and punishment proceedings, preceded by volume number and followed by the internal page number(s). "CR" refers to the "Clerk's Record," the transcripts of pleadings and documents filed in the trial court, followed by the internal page number(s).

thousand” pages of documents and interviewed Rayford and seven members of his family. 46 RR 111–12. She concluded that Rayford’s childhood was marked by “[t]roubled interpersonal relationships.” 46 RR 117. She found his family to have suffered “multigenerational substance abuse. It was accepted, it was part of celebration and attainment of daily living in some cases.” Rayford also had a problem with substance abuse. 46 RR 120, 139, 141; *see also* 46 RR 130–32. Additionally, Dr. Kessner discussed the impact on Rayford of his witnessing the domestic violence against his mother and his growing up without a father, or even a father figure. 46 RR 121, 138–39. Among the effects Rayford suffered as a result of this upbringing were depression and anger. 46 RR 123; *see also* 46 RR 142.

Dr. Kessner also testified that Rayford had not been a disciplinary problem while incarcerated in the Dallas County Jail for the instant offense and that he had a “positive adjustment” during his prior incarceration in prison. 46 RR 173–74, 181–82; 47 RR 35–38, 144–48. Ultimately, she concluded that Rayford would not pose a future danger to prison society. 46 RR 185.

II. Procedural History

Rayford was convicted and sentenced to death for the murder of his former girlfriend, Carol Hall. CR 130, 137–38, 142–44; 45 RR 72; 47 RR 207. The CCA upheld Rayford’s conviction and death sentence on direct appeal. *Rayford v. State*, 125 S.W.3d at 534, *cert. denied*, 543 U.S. 823 (2004). Rayford

filed his initial state habeas application in March 2003, which the CCA denied based on the trial court’s findings of fact and conclusions of law. *Ex parte Rayford*, No. 63,201-01 (Tex. Crim. App. May 24, 2006) (unpublished order); SHCR-01 at 3213–321.²

Rayford later filed a federal habeas petition. The magistrate judge issued his Findings and Recommendations (F&R), recommending that relief be denied. *Rayford v. Thaler*, Civ. Act. No. 3:06–CV–978, 2011 WL 7102282 (N.D. Tex.) (unpublished). The district court adopted the F&R and denied Rayford’s petition. *Rayford v. Thaler*, 2012 WL 215321 (unpublished order).

Rayford then appealed to the Fifth Circuit seeking a certificate of appealability (COA). During the pendency of Rayford’s appeal, the Court issued its opinion in *Trevino*. 133 S. Ct. at 1911. The Fifth Circuit remanded Rayford’s case to this Court “for full consideration of [Rayford’s] ineffective assistance of counsel claim in accordance with both *Trevino* and *Martinez*.” *Rayford v. Stephens*, 552 F. App’x 367, 367–68 (5th Cir. 2014) (unpublished). The district court ordered further briefing regarding Rayford’s IATC claim and the Court’s holdings in *Martinez* and *Trevino*. After briefing, the court denied Rayford’s petition. *Rayford v. Stephens*, 2014 WL 4744632.

² “SCHR” refers to the Clerk’s Record of pleadings and documents filed with the state habeas court. *See generally Ex parte Rayford*, No. 63,201–01.

Rayford again appealed to the Fifth Circuit. The Fifth Circuit denied Rayford's request for a COA. *Rayford v. Stephens*, 622 F. App'x 315 (5th Cir. 2015). Rayford then filed a petition for a writ of certiorari, which the Court denied. *Rayford v. Stephens*, No. 136 S. Ct. 585 (2015).

One week prior to his scheduled execution, Rayford filed a subsequent state habeas application. The CCA dismissed the application as an abuse of the writ. *Ex parte Rayford*, No. 63,201-02.

On January 26, 2018, Rayford filed a motion for relief from judgment in district court. *Rayford v. Davis*, Civ. Act. No. 3:06-CV-978 (N.D. Tex.). The motion remains pending. Rayford also filed on January 26, 2018, an original petition for a writ of habeas corpus. The instant brief in opposition follows.

ARGUMENT

Rayford asks the Court to grant relief on his claim of ineffective assistance of trial counsel (IATC). Pet. Cert. 15. But he fails to justify the extraordinary remedy he seeks.

Supreme Court Rule 20.4(a) provides that, “[t]o justify the granting of a writ of habeas corpus, the petitioner must show that exceptional circumstances warrant the exercise of the Court’s discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court. This writ is rarely granted.” *See Felker v. Turpin*, 518 U.S. 651, 665 (1996) (explaining that Rule 20.4(a) delineates the standards under which the Court grants such

writ). For the reasons explained below, Rayford fails to advance a compelling or exceptional reason for the Court to exercise its discretionary powers to issue a writ of habeas corpus in this case.

I. Rayford Is Not Entitled to the Extraordinary Remedy He Seeks.

First, Rayford is not entitled to the extraordinary remedy of a writ of habeas corpus by way of an original petition because he had a remedy in state court. Rayford filed his initial state habeas application in 2003 and it was denied in 2006. *Ex parte Rayford*, 63,201-01 (Tex. Crim. App.). Prior to that application, and indeed prior to Rayford's trial, Texas confessed error in several cases in which its expert psychologist, Dr. Walter Quijano, testified that the defendant's race increased his likelihood for future dangerousness. *See Buck*, 137 S. Ct. at 769–70 (discussing Dr. Quijano's testimony and its aftermath); *Saldano v. Texas*, 530 U.S. 1212 (2000). Nonetheless, Rayford did not raise any claim in his initial state habeas application alleging that a witness provided similarly improper testimony in his case or that his trial counsel were ineffective for eliciting such testimony.³ Such a claim was raised in state court seventeen years after trial and only one week prior to his

³ By way of comparison, Buck alleged in 2002 that his trial counsel were ineffective for introducing Dr. Quijano's testimony that Buck was more likely to be a future danger because of his race. *Buck*, 137 S. Ct. at 770.

scheduled execution. As explained in the concurring opinion regarding the state court's dismissal of Rayford's subsequent state habeas application,

When *Buck* was before the United States Supreme Court, [Buck] argued that his case should be controlled by *Saldano*, even though it was in a different procedural posture. In other words, Buck's claim was based on *Saldano* (a 2000 case). After *Buck* was decided, Rayford filed the instant subsequent writ application, and he alleges that his claim could not have been reasonably formulated before *Buck*. Logic, however, belies that assertion. If Buck's claim was based on *Saldano*, and Rayford's claim is based on *Buck*, then Rayford could have reasonably formulated his claim before *Buck*. As a result, the Court cannot consider the merits of his subsequent writ application.

Ex parte Rayford, 63,201-02 (Hervey, J., concurring).

Rayford's failure to raise his IATC claim despite its availability did not render the state habeas process inadequate. Because Rayford has not attempted to show that "adequate relief [could] not be obtained in any other forum or from any other court," Rayford is not entitled to the extraordinary relief he seeks in this Court. *Felker*, 518 U.S. at 652.

Rayford is also not entitled to the extraordinary relief he seeks because his original petition is, in effect, an effort to circumvent AEDPA's restriction on successive habeas petitions. Indeed, Rayford concedes that his original petition seeks to avoid the limitations imposed by AEDPA. Pet. 8. But knowing he is statutorily precluded from obtaining authorization to raise this claim in a federal habeas petition or from appealing the Fifth Circuit's denial of

authorization,⁴ he has sought relief through an original petition. Rayford’s attempt to circumvent AEDPA should not be condoned. Indeed, the Court in *Felker* held that while 28 U.S.C. § 2244(b)(3)(E) did not repeal the Court’s authority to entertain original habeas petitions, § 2244(b)(1)–(2) “inform [the Court’s] consideration of original habeas petitions. *Felker*, 518 U.S. at 662–63.

Rayford’s IATC claim is plainly successive and does not satisfy § 2244(b)(2). First, the claim does not rely on a new retroactive rule of constitutional law. *Tyler v. Cain*, 533 U.S. 656, 662–63 (2001) (“We thus conclude that a new rule is not ‘made retroactive to cases on collateral review’ unless the Supreme Court holds it to be retroactive.”). And because Rayford raises an IATC claim, he necessarily cannot show that he relies on a new rule of constitutional law. *See Williams v. Taylor*, 529 U.S. 362, 382 (2000) (“Where the beginning point is a rule of this general application, a rule designed for the specific purpose of evaluating a myriad of factual contexts, it will be the infrequent case that yields a rule so novel that it forges a new rule, one not dictated by precedent.”) (citing *Wright v. West*, 505 U.S. 277, 308–09) (1992) (Kennedy, J., concurring in judgment). Therefore, Rayford’s IATC claim is impermissibly successive under § 2244(b)(2)(A).

⁴ 28 U.S.C. § 2244(b)(3)(E).

Rayford's IATC claim is also impermissibly successive under § 2244(b)(2)(B) because the claim addresses only his punishment, not his guilt. Moreover, Rayford plainly lacked diligence in raising this IATC claim. As discussed above, the predicate (i.e., Smithey's testimony) for the claim has existed since the time of Rayford's trial. Nothing has occurred since that time to form the basis for Rayford's claim. *See Buck*, 137 S. Ct. at 770 (noting that Buck raised an IATC claim in 2002 alleging his trial counsel elicited improper testimony from Dr. Quijano). To the extent argues he has "recently uncovered that Smithey's testimony is false," such an assertion itself demonstrates a lack of diligence. Pet. 14. Rayford poses no reason he could not have requested information from TDCJ years ago.⁵ Consequently, Rayford's IATC claim is impermissibly successive under § 2244(b)(2)(B).

⁵ Rayford's allegation that Smithey's testimony was false is entirely spurious. Rayford purportedly requested information from TDCJ regarding "how racial makeup of a prison unit in [TDCJ] is related, connected, or tied to [the] number of assaults committed by inmates against either other inmates or staff from 1995 to 2001." Appendix C. The response from TDCJ stated it had "nothing responsive to [his] request." Appendix C. As Smithey's testimony made abundantly clear, he was not testifying regarding rates of prison violence. 47 RR 66–72. Smithey testified that he did not have, nor was he testifying about, the percentage of inmates who commit assaults or the percentage of inmates who assault female staff. 47 RR 67–69, 87 (trial counsel arguing that Smithey was not qualified as an expert because "[h]e's not testifying from any statistics. It's no different than the attorneys in this room telling stories they have heard as common knowledge"), 131 (Smithey's testimony on cross-examination that the numbers of prison assaults he provided to the jury were system wide and did not "differentiate as to which type of unit an assault occurred at"), 132–33 (Smithey's testimony on cross-examination that he did not know the percentage of assaults that are committed per inmate). Nor did Smithey work for TDCJ. 47 RR 74. Smithey's testimony that the presence of gangs, the racial makeup of a unit, and the

Rule 20.4(a) and 28 U.S.C. § 2242 state that an original habeas petition in the Supreme Court must set forth “reasons for not making application to the district court.” In this case, the reasons are clear: Rayford’s original habeas petition is actually a successive habeas petition. He is, therefore, actually seeking to circumvent the Fifth Circuit because he could not meet the successive petition requirements of 28 U.S.C. § 2244 in that court. Notwithstanding § 2244, Rayford’s claim would also fail under the pre-AEDPA cause-and-prejudice standard this Court adopted in *McCleskey v. Zant*, 499 U.S. 467, 493–94 (1991). In order to avoid dismissal of his claim for abuse of the writ, Rayford must show that “some objective factor external to the defense impeded counsel’s efforts” to raise the claim previously. *Id.* at 494 (quoting *Murray v. Carrier*, 477 U.S. 478, 488 (1986)). Rayford fails to make any such showing.

Moreover, Rayford’s request that the Court should transfer his petition to the district court should be refused. Pet. 15. While the Court ordinarily has the statutory authority to transfer a petition for a writ of habeas corpus to a district court, 28 U.S.C. § 2241(b), as noted above, Rayford’s claim could now only be presented to the circuit court because it is plainly successive. 28 U.S.C.

inmates’ cities of origin affect the rate of prison violence was not purported to be based on TDCJ statistics. Rather, the testimony was plainly based on Smithey’s fifteen years of experience as an investigator for the Special Prosecution Unit.

§ 2244(b)(3)(A). The relief Rayford requests is, consequently, statutorily impermissible. And even if Rayford were permitted to seek permission of the Fifth Circuit to raise his claim in the district court, permission would concededly be denied. 28 U.S.C. § 2241(b)(2). Again, Rayford is attempting to circumvent the plain language of AEDPA by avoiding filing his successive claim in the Fifth Circuit. His attempt to do so should not be condoned and his petition should be denied.

II. Rayford’s Claim Speciously Conflates Testimony in His Case with the Testimony Presented in *Buck*.

Rayford alleges he was denied effective assistance of trial counsel because counsel elicited improper testimony from the State’s prison expert, Royce Smithey. *See generally* Pet. Specifically, Rayford argues that trial counsel elicited testimony from Smithey that “Rayford constitutes a future danger because of his race.” Pet. 13, 14 (alleging that Rayford “may have been sentenced to death in part because of his race”) (citing *Buck*, 137 S. Ct. at 778). He alleges trial counsel’s conduct “is strikingly similar” to that found unacceptable in *Buck*. A brief review of *Buck* and the testimony provided by Smithey plainly demonstrates that Smithey’s testimony was not improper.

Buck’s trial was one of several in which psychologist Dr. Quijano testified that the defendant’s race increased his propensity for violence. *Buck*, 137 S. Ct. 767. Buck’s trial counsel also introduced into evidence Dr. Quijano’s written

report, which stated in part, “**Race.** Black: Increased probability [for future dangerousness].” *Id.* at 768. The Court found trial counsel deficient for presenting Dr. Quijano’s testimony and report despite knowing Dr. Quijano’s “view that race disproportionately predisposed him to violent conduct.” *Id.* at 775. “Given that the jury had to make a finding of future dangerousness before it could impose a death sentence, Dr. Quijano’s report said, in effect, that the color of Buck’s skin made him more deserving of execution. . . . No competent defense attorney would introduce such evidence about his own client.” *Id.* The Court also found that Buck was prejudiced by the testimony because Dr. Quijano’s testimony told the jury that Buck’s immutable characteristic, “the color of [his] skin, . . . carried with it an increased probability of future violence.” *Id.* at 776 (quotation marks and alteration omitted). Notably,

No comparable testimony was presented in Rayford’s case. Roy Smithey was the chief investigator for the Special Prosecution Unit (SPU). 47 RR 58. He was not an employee of TDCJ. 47 RR 74. In his position with SPU, Smithey investigated and assisted in the prosecution of felonies committed within Texas prison units. 47 RR 59. During voir dire examination, Smithey testified that he had not reached any opinion on Rayford’s future dangerousness and would only testify regarding prison violence. 47 RR 60.

On direct examination, Smithey testified regarding TDCJ’s efforts to control prison violence. 47 RR 90–97. Despite those efforts, violent offenses

occur in prison even in the most secure areas. 47 RR 92, 152. Smithey testified that TDCJ has maximum and medium security units. 47 RR 92. He also testified that in the year preceding Rayford's trial, there were 2,100 assaults by prison inmates against staff and 1,700 reported assaults by prison inmates against other inmates.⁶ 47 RR 93. Further, during that year there were 112,000 major disciplinary offenses and 200,000 minor disciplinary offenses committed by inmates within TDCJ. 47 RR 94. Smithey also testified that male inmates have contact with females (e.g., guards, medical staff, secretarial staff) and have access to illicit drugs in prison. 47 RR 95.

On cross-examination, trial counsel asked Smithey about the limited opportunity inmates in maximum security have to be violent. 47 RR 125. Trial counsel then demonstrated that the statistics that Smithey provided on direct examination regarding the total number of assaults and disciplinary offense were gross totals and that the statistics were not broken down, e.g., by prison unit or per inmate. 47 RR 128–31. Smithey acknowledged that some units experience more violence than other units. 47 RR 131. Smithey was unable to testify as to the percentage of the staff assaults that were committed against female staff and was unable to testify what percentage of inmates commit

⁶ Smithey relied on statistics provided by TDCJ's Emergency Action Center (EAC). 47 RR 65.

assaults. 47 RR 135. Trial counsel demonstrated that the gross total of assaults statewide did not indicate that violence in prison is, in fact, so pervasive:

Q: What I'm asking you is if you're in a maximum security or a high security or a unit for troublemakers, and you commit a bunch of assaults, that figure is applicable to the system as a whole, isn't it. It doesn't differentiate as to which type of unit an assault occurred at.

A: Not in those figures, no, sir.

Q: So you could have units that were relatively assault free, and some that were disproportionate in the amount of assaults that occurred, correct?

A: Yes

Q: And in fact that's the way it shakes out. Some are relatively assault free and some have way more assaults than the rest of the system, right?

A: That's correct.

Q: And there's factors that [a]ffect that such as gangs and other things, is that correct?

A: Yes, sir.

Q: The racial makeup of the unit is also something that goes to the number of assaults or what have you, is that correct?

A: It has a factor on it, even though under general Federal guidelines the racial breakdown of the units are predominantly the same or as close as they can get to it.

Q: Also sometimes a factor that [a]ffects the assaults are violence of a unit, that can also be attributed to the cities of origin of the inmates, is that correct?

A: They have in the past, yes.

47 RR 131–32.

Smithey did not offer any testimony regarding Rayford’s future dangerousness. *See* 47 RR 137 (Smithey’s testimony on cross-examination that he did not review any of Rayford’s records). As the four-judge concurrence of the CCA explained, “[t]he expert in this case did not tie any likelihood of future dangerousness to Rayford’s race. Smithey did not meet personally with Rayford and form a specific opinion about his propensity for violence, nor did he give any opinions about any particular race or how race factored into the violence in prison.” *Ex parte Rayford*, No. 63,201-02 (Hervey, J., concurring). Further, the prosecution did not refer to the complained-of testimony during closing argument. The prosecution’s only reference to Smithey’s testimony was in regard to the total number of assaults in prison and the fact that inmates commit violent acts despite TDCJ’s efforts to control violence. 47 RR 200–01.

Rayford asserts that the prosecutor’s reference to the total number of prison assaults told the jury “that some prison units are much more violent than others, that the racial makeup of a unit is linked to the amount of violence within that unit, and, by obvious implication, that people like Mr. Rayford—a black man—are the cause of the violence.” Pet. 12. There is nothing “obvious” about the inference Rayford draws from Smithey’s testimony. Again, none of Smithey’s testimony even implied that African-Americans are more likely than

others to be violent or that Rayford himself was a future danger. Nor did Smithey's testimony appeal "to a potent racial stereotype—that of black men as violence prone." Pet. 14 (citing *Buck*, 137 S. Ct. at 776) (quotation marks omitted).

As the Court in *Buck* made clear, Dr. Quijano's testimony was unacceptable because it told the jury that the defendant was more likely to be a future danger due to *his* race. 137 S. Ct. at 767 ("But [Dr. Quijano] also stated that one of the factors pertinent in assessing a person's propensity for violence was his race, and that Buck was statistically more likely to act violently because he is black."), 775 ("Dr. Quijano's report said, in effect, that the color of Buck's skin made him more deserving of execution. It would be patently unconstitutional for a state to argue that a defendant is liable to be a future danger because of his race."), 778 ("[O]ur holding on prejudice makes clear that Buck may have been sentenced to death in part because of his race."). None of Smithey's testimony told the jury Rayford was more likely to be a future danger in *any* sense, much less that Rayford was more prone to violence because of *his* race. Rather, Smithey's testimony served to rebut the defense's expert Dr. Gilda Kessner's testimony that told the jury that prison violence is infrequent. *See, e.g.*, 47 RR 156 (Dr. Kessner's testimony that 93% of inmates convicted of aggravated assault had no serious disciplinary infractions).

Rayford fails to show that Smithey's testimony encouraged the jury to find Rayford to be a future danger because of his race. Because Smithey's testimony was not objectionable or improper, Rayford cannot show that his trial counsel were deficient for eliciting it. For the same reason, Rayford cannot show he was prejudiced by Smithey's testimony. Therefore, Rayford's petition should be denied.

III. Rayford Is Not Entitled to a Stay of Execution.

A request for a stay "is not available as a matter of right, and equity must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." *Id.* (citing *Nelson v. Campbell*, 541 U.S. 637, 649–50 (2004)). Rather, the inmate must satisfy all of the requirements for a stay, including a showing of a significant possibility of success on the merits. *Id.* (citing *Barefoot v. Estelle*, 463 U.S. 880, 895–96 (1983)). When the requested relief is a stay of execution, a court must consider:

(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceed; and (4) where the public interest lies.

Nken v. Holder, 556 U.S. 418, 434 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)).

Importantly, a federal court must consider “the State’s strong interest in proceeding with its judgment” and “attempt[s] at manipulation,” as well as “the extent to which the inmate has delayed unnecessarily in bringing the claim.” *Nelson*, 541 U.S. at 649–50. Indeed, “there is a strong presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay.” *Id.* at 650.

As demonstrated above, Rayford’s IATC claim is plainly successive and without merit. Thus, Rayford cannot demonstrate the likelihood of success on the merits of his claim on appeal; nor can he demonstrate that his ground for relief amounts to a substantial case on the merits that would justify the granting of relief.⁷

Further, “[b]oth the State and the victims of crimes have an important interest in the timely enforcement of a sentence.” *Hill v. McDonough*, 547 U.S. 573, 584 (2006). Rayford’s challenges to his death sentence have persisted since 2003, and he seeks further unjustifiable delay through his litigation here. Most importantly, as discussed above, Rayford simply fails to identify any improper testimony by Smithey. Moreover, Rayford posits no credible reason for having

⁷ For the same reason, Rayford fails to show that he would suffer irreparable harm if denied a stay of execution. As the Fifth Circuit has explained, “the merits of [the movant’s] case are essential to [the court’s] determination of whether he will suffer irreparable harm if a stay does not issue.” *Walker v. Epps*, 287 F. App’x 371, 375 (5th Cir. 2008). As discussed above, Rayford’s IATC claim is plainly without merit. Consequently, he cannot show that he would be irreparably harmed if denied additional process to which he has no entitlement.

delayed raising this claim until seventeen years after his trial and only one week before his scheduled execution. In light of the significant delay in Rayford's first raising this IATC claim, Rayford cannot overcome the strong presumption against granting a stay or demonstrate that the balance of equities entitles him to a stay of execution. Lastly, Rayford filed his original petition only four days before his scheduled execution. Consequently, equity does not favor a stay of execution.

CONCLUSION

The petition for a writ of habeas corpus should be denied.

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