

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 17-20594

In re: ROY WILLIAMS,

Movant

Motion for an order authorizing
the United States District Court for the
Southern District of Texas to consider
a successive 28 U.S.C. § 2254 application

Before SMITH, OWEN, and COSTA, Circuit Judges.

PER CURIAM:

Roy Williams, Texas prisoner # 828343, seeks authorization to file a second or successive 28 U.S.C. § 2254 application challenging his conviction for capital murder and sentence of life imprisonment. He primarily intends to raise a claim that his appellate counsel was ineffective for failing to raise a constitutional challenge to an evidentiary ruling of the trial court. Williams also cites the Supreme Court's decisions in *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), and *Martinez v. Ryan*, 566 U.S. 1 (2012), and suggests that he can show cause and prejudice to excuse his procedural default of a claim.

To obtain authorization, Williams must make a prima facie showing either (1) that his claims rely on "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable," or (2) that the factual predicate for his claims "could not have been discovered previously through the exercise of due diligence," and

the underlying facts, "if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2244(b)(2), (b)(3)(A), (C). Williams's claims do not meet those criteria. To the extent Williams is seeking to again raise his procedurally defaulted claim regarding the racial composition of the jury, we do not consider it. *See* § 2244(b)(1).

Accordingly, IT IS ORDERED that Williams's motion for authorization to file a successive § 2254 application is DENIED.

United States Courts
Southern District of Texas
ENTERED

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS FEB 25 2002
HOUSTON DIVISION**

Michael N. Milby, Clerk of Court

ROY WILLIAMS,
Petitioner,

VS.

JANIE COCKRELL,
Respondent.

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CIVIL ACTION NO. H-00-3131

MEMORANDUM AND OPINION

Petitioner Roy Williams seeks habeas corpus relief under 28 U.S.C. § 2254, challenging a 1998 capital murder conviction. Respondent filed a motion for summary judgment, (Docket Entry No. 14), and copies of the state court record. Petitioner filed a response. (Docket Entry Nos. 15-17). Based on the pleadings, the motion and response, the record, and the applicable authorities, this court grants respondent's motion, for the reasons stated below.

I. Background

A. The Procedural Background

Williams was initially tried in October 1997 for the capital murder of Ambrose Williams, Jr. The court declared a mistrial because of a hung jury. (Statement of Facts in Trial I, Vol. I, p. 111; Vol. VII, p. 63). A second jury found Williams guilty of the felony offense of capital murder, in Cause Number 741386, in

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the 179th Judicial District Court of Harris County, Texas. (Statement of Facts in Trial II, Vol. I, p. 196). Williams pleaded true to one enhancement paragraph relating to a prior conviction. (Cause Number 17,426). *Id.* On January 31, 1998, the jury sentenced Williams to life imprisonment. The First Court of Appeals of Texas affirmed Williams's conviction on June 10, 1999. *Williams v. State*, No. 01-98-00155-CR, slip op. (Tex. App. -- Houston [1st Dist.] 1998, no pet.)(not designated for publication). Williams did not file a petition for discretionary review in the Texas Court of Criminal Appeals.

Williams filed his first application for state habeas corpus relief on January 12, 1999. The Texas Court of Criminal Appeals dismissed the application on April 14, 1999, based on the pendency of Williams's direct appeal. *Ex parte Williams*, Application No. 41,123-01 at cover. Williams filed a second state habeas application on December 21, 1999. The Texas Court of Criminal Appeals denied that application, without a written order, on the findings of the trial court, without a hearing, on August 16, 2000. *Ex parte Williams*, Application No. 41,123-03 at cover.

On September 5, 2000, this court received Williams's federal petition. Williams contends that his conviction is void for the following reasons: (1) the trial court erred in failing to quash the jury panel; (2) the trial court erred in refusing to allow defense counsel to impeach a witness; (3) the trial court erred in denying

Williams's motion for a mistrial after the prosecutor commented on Williams's silence, in violation of the Fifth Amendment; and (4) the trial court failed to read back certain trial testimony after the jury requested the court to do so. (Docket Entry No. 1, Petition for Writ of Habeas Corpus, pp. 7-8).

Respondent argues that Williams's first claim is procedurally barred and that the remaining three claims either lack merit or are not cognizable on federal habeas review because they are based on errors in state law. This court considers each of these arguments and Williams's responses below.

B. The Factual Background

The evidence at trial showed that on December 10, 1996, a police officer was dispatched to a Houston motel. The police officer saw paramedics treating a man who was bleeding from the mouth and left hand. (Statement of Facts, Vol. III, p. 67). That man was later identified as Harold Anderson.

A manager of the maintenance department of the Houston Livestock Show and Rodeo testified that an employee had discovered two bodies near property owned by the Houston Livestock Show and Rodeo. *Id.* at 73-74. The bodies were in a vehicle found by an access road to a field near the motel where the police officer found Anderson.

Houston Police Department officers found a blue Nissan Sentra automobile in the field, off the access road. *Id.* at 183. The body of Ambrose Williams, Jr., was slumped over in the front passenger seat. The body of Walter Jackson was partially outside the driver's side of the vehicle. *Id.* at 100. At the trial, the assistant medical examiner for Harris County testified that Ambrose Williams had been shot four times, in the head, neck and back. (Statement of Facts, Vol. V, p. 16). Jackson died of two gunshot wounds to the head. *Id.* at 31.

The officers found bloodstains leading from the vehicle to the motel. (Statement of Facts, Vol. III, p. 86). Officers determined that bullets had been fired from inside the car. *Id.* at 99. The keys were found in the ignition. *Id.* at 103.

Harold Anderson testified at trial. Anderson had met Roy Williams in Natchitoches, Louisiana. *Id.* 137-38. On December 10, 1996, Anderson drove from Natchitoches, Louisiana to Houston with a friend, Ambrose Williams. In Houston, Anderson went to a house owned by Roy Williams's aunt. *Id.* at 144. Roy Williams, Anderson, and Ambrose Williams went to a liquor store. As they returned to the house, Roy Williams was having a heated argument with a man named Walter Jackson. Late that afternoon, at approximately 5:00 p.m. or 5:30 p.m., Roy Williams offered to drive Ambrose Williams and Anderson to meet a friend of Anderson's. They left in a blue Nissan Sentra. Ambrose Williams was in the front passenger seat;

Roy Williams was driving; Anderson was seated behind the driver's seat; and Walter Jackson was in the rear passenger seat.

Anderson testified that as the car entered the freeway, Roy Williams pulled out a gun and told Anderson to give all his money to Walter Jackson. *Id.* at 152. Roy Williams fired a bullet through the front passenger window to show that he was serious about the robbery. *Id.* at 155. Roy Williams and Walter Jackson took \$580 from Anderson and searched the car for additional money and valuables. *Id.* at 158.

Roy Williams told Jackson to drive, with Ambrose Williams remaining in the front passenger seat. Anderson sat behind the driver's seat, and Roy Williams sat in the rear passenger seat. Roy Williams told Jackson to turn off the road into a field. Roy Williams shot Ambrose Williams, then Jackson. The car went off the road and rolled partially into a ditch. Anderson tried to shield himself with his hand, but Roy Williams shot Anderson in the face. *Id.* at 162. When Anderson regained consciousness, he pulled Jackson out of the driver's seat and tried to drive the car out of the ditch. *Id.* at 166. When that failed, Anderson dragged himself to the motel and asked for help. *Id.* at 167. Anderson woke up in the hospital.

On December 30, 1996, Anderson told the police that Roy Williams had shot him. *Id.* at 177. Anderson also identified Roy Williams from a photo spread. At the trial, Anderson identified Roy Williams as the person who shot him.

Police officers searched the blue Nissan Sentra and recovered two fired full metal jacket bullets, seven cartridge casings, blood samples, and teeth fragments. *Id.* at 122. Roy Williams's fingerprints were found on the vehicle ownership documents in Jackson's car. *Id.* at 146. The crime scene was 6.8 miles from the house owned by Roy Williams's aunt, where Anderson, Roy Williams, and Ambrose Williams had been on the date of the shooting. (Statement of Facts, Vol. IV, p. 190).

Michael Wayne Murphy, a close friend of Roy Williams, testified at the first trial. (Statement of Facts, Vol. IV, pp. 157-58). Murphy stated that he received a telephone call from Roy Williams in July 1997, instructing Murphy to give Anderson a message. *Id.* In his testimony, Murphy started to quote Williams as saying "he had killed." Murphy stopped speaking for a moment. Murphy then continued testifying, stating that Roy Williams told him that he would give Anderson \$7,000 to drop the charges. During the second trial, Murphy admitted that he had previously testified about Roy Williams's message to Anderson. *Id.* at 160-62.

Allison Bolden, who was living with Jackson, testified that she had known Roy Williams for twenty-seven years. (Statement of Facts, Vol. V, p. 109).

Bolden became concerned when Jackson did not return on the afternoon of December 10, 1996. *Id.* at 112. Roy Williams came to Bolden's apartment the following day. Williams told Bolden that Jackson had driven away from Roy Williams's aunt's house with a "guy from New Orleans," Ambrose Williams, and Harold Anderson. *Id.* at 114-15. Later that day, Roy Williams returned to Bolden's apartment with the news that Walter Jackson had been found dead. Bolden began crying. Williams said that Bolden ought to be glad that Jackson was dead. *Id.* at 123. Several days later, Bolden asked Roy Williams how Anderson was recovering and whether he was able to identify the shooter. *Id.* at 125. Roy Williams said, "I wish that bitch, Harold, die." *Id.* at 133. When Bolden asked Roy Williams why he wanted Anderson dead, Roy Williams replied that Anderson could "pin" it to him, because Roy Williams "was the one that set it up." *Id.* at 133.

II. The Standard of Review

Williams's petition is governed by the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA). Subsections 2254(d)(1) and (2) of AEDPA set out the standards of review for questions of fact, questions of law, and mixed questions of fact and law that result in an "adjudication on the merits." An adjudication on the merits "is a term of art that refers to whether a court's disposition

of the case is substantive, as opposed to procedural.” *Miller v. Johnson*, 200 F.3d 274, 281 (5th Cir. 2000).

In ruling on a motion for summary judgment, this court views the evidence through “the prism of the substantive evidentiary burden.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986). Under the AEDPA, the substantive evidentiary burden differs depending upon whether the issue is one of law, fact, or both. *See Drinkard*, 97 F.3d at 767-68. The AEDPA provides as follows, in pertinent part:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)

(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

A state court determination of questions of law and mixed questions of law and fact is reviewed under 28 U.S.C. § 2254(d)(1) and receives deference unless it “was contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States.” *Hill v. Johnson*, 210 F.3d 481, 485 (5th Cir. 2000). A state court decision is “contrary to” Supreme Court precedent if: (1) the state court’s conclusion is “opposite to that reached by [the Supreme Court] on a question of law” or (2) the “state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent” and arrives at an opposite result. *Williams v. Taylor*, 120 S. Ct. 1495 (2000). A state court unreasonably applies Supreme Court precedent if: (1) it unreasonably applies the correct legal rule to the facts of a particular case; or (2) it “unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply.” *Id.* at 1495. In deciding whether a state court’s application was unreasonable, this court considers whether the application was “objectively unreasonable.” *Id.* at 1495; *Penry v. Johnson*, 215 F.3d 504, 508 (5th Cir. 2000). Questions of fact found by the state court are “presumed to be correct . . . and [receive] deference . . . unless it ‘was based on an unreasonable determination of the

facts in light of the evidence presented in the State court proceeding.” *Hill*, 210 F.3d at 485 (quoting 28 U.S.C. § 2254(d)(2)).

III. The Claim Based on the Trial Court’s Failure to Quash the Jury Panel

Williams complains that the trial court denied him a trial by a jury that represented a fair cross-section of the community. (Docket Entry No. 1, Petition for a Writ of Habeas Corpus, p. 7). Williams’s counsel objected to the racial composition of the jury panel. Williams states that his attorney did so in compliance with TEX. CODE CRIM. PROC. art. 35.06, which required that the challenge be made before significant questioning of the potential jurors. The record reflects the following:

[DEFENSE COUNSEL]: Judge, I have one more thing about the jury panel I just thought of. May I proceed? I would like the record to reflect this jury panel is composed of sixty potential jurors, of whom I believe that five are African/American. This county is between twenty and twenty-five percent African/American. This jury panel was less than ten percent African/American. And we would object to the entire panel, because it is not a representative group of Harris County.

THE COURT: Objection is noted.

(Statement of Facts, Vol. II, p. 52).

After both sides exercised their strikes and the jury was chosen, defense counsel restated his objection:

[DEFENSE COUNSEL]: I'm going to object to this panel, because the county is almost twenty-five percent black, and there were only two eligible black jurors. . . .

THE COURT: . . . Denied.

(Statement of Facts, Vol. II, p. 212).

Respondent argues that this claim is procedurally barred because Williams did not file a petition for discretionary review. (Docket Entry No. 14, Respondent's Motion for Summary Judgment, pp. 5-6). The procedural default doctrine and related "cause and prejudice" standard are "grounded in concerns of comity and federalism." *Coleman v. Thompson*, 501 U.S. 722, 730 (1991). The doctrine applies whether the default occurred at trial, on appeal, or on state collateral attack. *Murray v. Carrier*, 477 U.S. 478, 490- 492 (1986). "[A] habeas petitioner who has failed to meet the State's procedural requirements for presenting his federal claims has deprived the state courts of an opportunity to address those claims in the first instance." *Coleman*, 501 U.S. at 732.

A petitioner's procedural default precludes federal habeas corpus review "if the last state court rendering a judgment in the case rests its judgment on the

procedural default.” *Harris v. Reed*, 489 U.S. 255, 262 (1989); *Boyd v. Scott*, 45 F.3d 876, 880 (5th Cir. 1994), *cert. denied*, 514 U.S. 1111 (1995). The exhaustion requirement is satisfied if the claims are procedurally barred under state law. *Gray v. Netherland*, 518 U.S. 152, 161 (1996).

Williams did not file a petition for discretionary review. His direct appeal included the claim of trial court error based on the failure to quash the jury panel. Williams also raised the issue in his state habeas petition. The state trial court, on habeas review, concluded that Williams should have obtained review through a petition for discretionary review, because Williams had previously presented the claim on direct appeal. *Ex parte Williams*, Application No. 41,123-03 at 38. The Texas Court of Criminal Appeals denied Williams’s state habeas application, without a written order or hearing, on the findings of the trial court. *Id.* at cover.

In *Ylst v. Nunnemaker*, 501 U.S. 797 (1991), the Supreme Court held that when a federal court reviews a state court order rejecting a habeas application without giving reasons, the “look through” doctrine applies. Under that doctrine, the federal court is “looks through” the unexplained state court habeas denial and evaluates the last state court decision that includes a reason for the result reached. *Bledsue v. Johnson*, 188 F.3d 250, 256 (5th Cir. 1999). When a reasoned state court decision rejects the claim later urged before a federal habeas court, subsequent unexplained

state court decisions upholding that result or rejecting the same claim are considered to rest on the same ground.

The *Ylst* Court explained:

The maxim is that silence implies consent, not the opposite--and courts generally behave accordingly, affirming without further discussion when they agree, not when they disagree, with the reasons given below. The essence of unexplained orders is that they say nothing. We think that presumption which gives them no effect--which simply "looks through" them to the last reasoned decision--most nearly reflects the role they are ordinarily intended to play.

Ylst, 501 U.S. at 804.

This court looks to the last state habeas court decision that includes a reason for the result reached to determine whether that decision was based on a procedural default. To prohibit federal habeas review, the state court must have expressly relied on the procedural bar as the basis for its decision. In *Bledsue v. Johnson*, 188 F.3d 250, 256 (5th Cir. 1999), the Fifth Circuit held that if the state court did not clearly and expressly rely on a state procedural rule in rejecting the claim, the federal habeas court could review that claim.

In this case, the state trial court denied relief on the first ground Williams asserted for habeas relief on the basis that Williams should have challenged the

appellate court's decision in a petition for discretionary review.¹ The state habeas court relied on the state procedural rule in rejecting Williams's claim. By denying Williams's state habeas application without written order on the findings of the trial court, without a hearing, the Texas Court of Criminal Appeals denied relief on the basis of an independent and adequate state procedural ground.

Applying the look-through doctrine, the state appellate court's decision also leads to the conclusion that Williams's first claim is procedurally barred. (Docket Entry No. 14, Respondent's Motion for Summary Judgment, pp. 5-6). Williams raised the claim of an improper jury panel in his direct appeal. The state court concluded that Williams had failed to preserve the issue for review on direct appeal because his counsel had failed properly to object at trial. The state appellate court held that Williams should have filed a written motion objecting to the jury panel, supported by an affidavit, as required under state law. *Ex parte Williams*, No. 41,123-03 at 12-13.

The Fifth Circuit has held that the Texas contemporaneous objection rule is strictly or regularly applied and is an adequate procedural bar. *Corwin v. Johnson*, 150 F.3d 467, 473 (5th Cir. 1998). "The 'Texas contemporaneous objection rule

¹ Rule 68.1 of the Texas Rules of Appellate Procedure provides that the Texas Court of Criminal Appeals may review an appellate court's decision upon petition by either party.

constitutes an adequate and independent state ground that procedurally bars federal habeas review of a petitioner's claims.” *Styron v. Johnson*, 262 F.3d 438, 454 (5th Cir. 2001)(quoting *Jackson v. Johnson*, 194 F.3d 641, 652 (5th Cir. 1999)). When the Texas Court of Criminal Appeals denied Williams’s state habeas application, that court implicitly rejected Williams’s claims on the same ground relied on by the First Court of Appeals. *Id.* at cover. Williams’s first claim for federal habeas review is procedurally barred because the last state court rendering a judgment in the case rested its judgment on the procedural default.

“In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.” *Coleman v. Thompson*, 501 U.S. 722, 750 (1991).

Williams concedes that it was error for his counsel not to file a written objection supported by an affidavit, as state law required. (Docket Entry No. 17, Petitioner’s Brief, p. 3). Williams argues that his counsel’s error is cause for the default that overrides the procedural bar. *Id.* Williams also asserts that because an

indigent defendant has the right to appointed counsel who is effective, an error of this magnitude also constitutes prejudice. *Id.* at 3-4.

The Supreme Court has acknowledged that in certain circumstances, counsel's ineffectiveness in failing properly to preserve a claim for review is "cause" that excuses procedural default. *Murray v. Carrier*, 477 U.S. 478, 488-89 (1986). Counsel's error must result in representation so ineffective as to violate the Constitution. *Id.* Ineffective assistance that establishes cause for a procedural default of a constitutional claim is in itself an independent constitutional claim. "[A] claim of ineffective assistance" generally must "be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default." *Carrier*, 477 U.S. at 489. Williams did not meet this exhaustion requirement.

Williams would now be foreclosed from bringing his claim of ineffective assistance based on counsel's failure to object properly to the jury array in a state habeas petition because of Texas's abuse of the writ doctrine. *Ex parte Carr*, 511 S.W.2d 523, 525-26 (Tex. Crim. App. 1974). A procedural rule that acts as a bar must be "firmly established and regularly followed." *Ford v. Georgia*, 498 U.S. 411, 423 (1991) (quoting *James v. Kentucky*, 466 U.S. 341, 348 (1984)). Texas strictly and regularly applied the abuse of the writ doctrine when Williams filed his habeas petition. *Emery v. Johnson*, 139 F.3d 191, 195, 201 (5th Cir. 1997); *see also*

Fearance v. Scott, 56 F.3d 633, 642 (5th Cir. 1995). Williams would be precluded from asserting his unexhausted claim in a successive habeas petition in Texas state court.

In *Edwards v. Carpenter*, 529 U.S. 446 (2000), the Supreme Court considered whether *Carrier's* exhaustion requirement for a claim of ineffective assistance, asserted as cause excusing procedural default, is immune from the exhaustion requirement. The Court reviewed some of its earlier decisions in discussing whether an ineffective assistance claim that is presented to the state courts, although not in the manner that state law requires, permits federal habeas review.

In *Coleman*, the Supreme Court had recognized the relationship between the exhaustion rule and the procedural default doctrine:

In the absence of the independent and adequate state ground doctrine in federal habeas, habeas petitioners would be able to avoid the exhaustion requirement by defaulting their federal claims in state court. The independent and adequate state ground doctrine ensures that the States' interest in correcting their own mistakes is respected in all federal habeas cases.

Coleman, 501 U.S. at 732.

In *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999), the Supreme Court again considered the interplay between exhaustion and procedural default. The Court concluded that the procedural default doctrine was necessary to “ ‘protect the

integrity' of the federal exhaustion rule," and that the purpose of the exhaustion requirement would be defeated if a prisoner were able to obtain federal habeas review simply by " 'letting the time run' " so that state remedies were no longer available. *Id.* at 848.

The Supreme Court in *Edwards* concluded that the purpose of exhaustion would also be frustrated if a prisoner could obtain federal habeas review by presenting his claim to the state court, but in such a manner that the state court could not entertain it under its own procedural rules. In such a circumstance, the State would not receive a fair opportunity to pass on the prisoner's claims. The Supreme Court held that an ineffective assistance of counsel claim asserted as cause for the procedural default of another claim can itself be procedurally defaulted. The *Edwards* Court noted that the procedural default may itself be excused if the prisoner can satisfy the cause-and-prejudice standard with respect to that claim.

In response to the respondent's argument that Williams's challenge to the jury panel was procedurally barred, Williams argued that his counsel's error was cause for the default that should have overcome the procedural bar. (Docket Entry No. 17, Petitioner's Brief, p. 3). Williams reasonably was aware of a potential ineffective assistance claim when the appellate court rejected his ground of error based on a challenge to the racial composition of the jury. The appellate court

explained that counsel failed to preserve the issue for review on direct appeal by not objecting properly at trial. Williams has not shown cause, under the law, for his failure to raise his claim of ineffective assistance as an independent claim in his state application for habeas corpus relief. *Coleman*, 501 U.S. at 753.

Williams may argue that he is proceeding *pro se* and was unaware of the need to raise his ineffective assistance claim as a separate ground for relief in his state application. Proceeding *pro se*, however, is not a “rare and exceptional” circumstance because it is typical of those bringing a § 2254 claim. *Cf. United States v. Flores*, 981 F.2d 231, 236 (5th Cir. 1993)(holding *pro se* status, illiteracy, deafness, and lack of legal training are not external factors excusing abuse of the writ); *Barrow v. New Orleans S.S. Ass’n*, 932 F.2d 473, 478 (5th Cir. 1991)(holding equitable tolling of limitations within the Age Discrimination in Employment Act not warranted by plaintiff’s unfamiliarity with legal process, his lack of representation, or his ignorance of his legal rights). “[I]gnorance of the law, even for an incarcerated *pro se* petitioner, generally does not excuse prompt filing.” *Felder v. Johnson*, 204 F.3d 168, 173 (5th Cir. 2000)(quoting *Fisher v. Johnson*, 174 F.3d 710, 714 (5th Cir. 1999)).

Williams has not demonstrated actual prejudice or that a “fundamental miscarriage of justice” will result from this court’s failure to consider his claim.

Harris, 489 U.S. at 262. The prosecution presented overwhelming evidence of Williams's guilt. Williams has not shown that a jury of a different racial make-up would have rendered a different verdict. Respondent is entitled to judgment as a matter of law on the claim based on the jury panel.

IV. The Claim Based on Improper Denial of Impeachment Testimony

Williams claims that the trial court erroneously denied defense counsel's request to impeach a prosecution witness, Harold Anderson, on a prior misdemeanor conviction for theft. Anderson was the only surviving victim of the aggravated robbery. Williams complains of the following exchange during his counsel's cross-examination of Anderson:

THE COURT:

My understanding is, from what we have heard here today and in the past, is that you have convictions for the felonies, the two felonies you went up on at the same time, correct?

[ANDERSON]:

Yes.

THE COURT:

And what other convictions?

[THE PROSECUTOR]:

Misdemeanor probation for theft and misdemeanor carrying a weapon.

THE COURT:

We know about that.

[THE PROSECUTOR]:

Probation, also, that ran concurrently. Is that right, Mr. Anderson?

[ANDERSON]: Yes, sir.

[THE PROSECUTOR]: He testified to it in the last hearing. [Defense counsel] knows that probation is not a conviction, even if there were a felony, and he's trying to get the witness to answer. So I'd ask the Court to instruct the witness then when [defense counsel] asks this question, other than the two felonies that you've talked about, he's never had a conviction for a misdemeanor involving moral turpitude.

THE COURT: You want to wrap it all up into one question?

[DEFENSE COUNSEL]: Have you previously testified that you've been convicted of theft?

[ANDERSON]: Yes.

[DEFENSE COUNSEL]: Okay. I would ask that that answer be admitted in front of the jury.

[THE PROSECUTOR]: Judge, and then he goes on to say he got probation in that case. And that's improper impeachment.

THE COURT: Okay. You make your record. You're not going to ask it, period. I'm not going to hear anymore about it. I'm tired of it. I am really sick and tired of it. You don't know how much I'm tired of it.

[DEFENSE COUNSEL]: I can tell.

THE COURT:

Sit down. You ask this question about the felony, and you stop. And if you want to sit in jail tonight, that's fine. I'll put you there. I don't have any qualms about it. But we've been over this and over that.

(Statement of Facts, Vol. III, pp. 223-25).

Williams argues that the trial court erred in refusing to allow defense counsel to impeach Harold Anderson with a prior misdemeanor conviction. (Docket Entry No. 1, Petition for a Writ of Habeas Corpus, p. 7). Williams asserts that during the first trial, his counsel had been permitted to impeach Anderson with the misdemeanor theft conviction. Williams contends that this impeachment evidence prevented the jury from reaching a verdict. *Id.*

This claim is predicated on a violation of state law. A state prisoner seeking federal court review under 28 U.S.C. § 2254 must assert a violation of a federal constitutional right. *Fierro v. Johnson*, 197 F.3d 147, 156 (5th Cir. 1999). Federal habeas corpus relief will not issue to correct errors of state constitutional, statutory, or procedural law, unless a federal issue is also presented. *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). The question before a federal habeas corpus court is not whether the state court correctly applied its own interpretation of state law; rather, the question is whether the petitioner's federal constitutional rights were

violated. *Neyland v. Blackburn*, 785 F.2d 1283, 1293 (5th Cir.), *cert. denied*, 479 U.S. 930 (1986); *Coleman v. Thompson*, 501 U.S. 722, 730 (1991).

The Texas appellate court rejected Williams's argument, stating as follows:

Texas Rule of Evidence 609(c)(2) states, "Evidence of a conviction is not admissible under this rule if ... probation has been satisfactorily completed for the crime for which the person was convicted. . . ." The undisputed evidence showed that appellant successfully completed the terms of his misdemeanor probation. The trial court, therefore, did not err in refusing to allow appellant to impeach Anderson on the probated, misdemeanor theft conviction. We overrule point of error two.

Williams v. State, No. 01-98-00155-CR, slip op. at 4 (Tex. App. -- Houston [1st Dist.] 1998, no pet.)(not designated for publication).

In a habeas action, a federal court does not review the admissibility of evidence under state law unless the error in the evidentiary rulings was so extreme as to result in a denial of a constitutionally fair proceeding. The erroneous admission of prejudicial testimony does not justify habeas relief unless the evidence played a "crucial, critical, and highly significant" role in the jury's determination. *Little v. Johnson*, 162 F.3d 855, 862 (5th Cir. 1998).

Williams claims that Anderson's testimony concerning his misdemeanor theft conviction would have played a "crucial, critical, and highly significant" role in the jury's determination. The record does not support this argument.

At the trial, defense counsel introduced evidence that Anderson had two prior felony convictions. (Statement of Facts, Vol. III, p. 184). Defense counsel also cross-examined Anderson on his ability to communicate that Roy Williams had shot him after Anderson was hospitalized; his reasons for coming to Houston on December 10, 1996; his failure to let the paramedics know that Roy Williams had shot two other people; his ability to identify Roy Williams in the photo spread; and his account of the robbery. (Statement of Facts, Vol. III, pp. 184-238). In light of the extensive impeachment evidence that defense counsel was able to use, including two prior felony convictions, there is no basis to conclude that the inability to impeach Anderson with a misdemeanor theft conviction would have played a “crucial, critical, and highly significant” role in the jury's determination.

The state court's decision to deny relief on this ground was not contrary to clearly established federal law as determined by the Supreme Court of the United States. Williams's claim is without merit. 28 U.S.C. § 2254(d)(1).

V. The Claim Based on the Alleged Violation of Williams's Fifth Amendment Right to Remain Silent

Williams alleges that the trial court erred in not granting a mistrial after the prosecutor asked a question about his pre-arrest silence. (Docket Entry No. 1,

Petition for a Writ of Habeas Corpus, p. 7). While the prosecutor was questioning a witness named David Glen Johnson, the following exchange occurred:

[Prosecutor]: Did you ever see the defendant go down to the police station and give a statement and talk to the police officers?

[Witness]: No, ma'am.

[Defense Counsel]: Your Honor, I'm going to object to that.

THE COURT: Sustained.

[Defense Counsel]: I'd ask the jury be instructed to disregard that.

THE COURT: Disregard the last question and response, ladies and gentlemen.

[Defense Counsel]: I'd ask for a mistrial.

THE COURT: Denied.

(Statement of Facts, Vol. V, pp. 249-50).

The Fifth Amendment guarantees an accused the right to remain silent during his criminal trial and prevents the prosecution from commenting on the silence of a defendant who exercises that right. *Griffin v. California*, 380 U.S. 609, 614 (1965). The Supreme Court has held that comments about a defendant's preindictment, precustodial silence for impeachment purposes do not violate a

defendant's right to a fair trial. *Jenkins v. Anderson*, 447 U.S. 231 (1980); *United States v. Zanabria*, 74 F.3d 590, 593 (5th Cir. 1996).

The prosecution's reference to Williams's pre-arrest silence, "neither induced by nor a response to any action by a government agent," *Zanabria*, 74 F.3d at 593, to impeach Williams's credibility, does not violate the Constitution. *United States v. Rodriguez*, 43 F.3d 117, 120 (5th Cir. 1995); *United States v. Laury*, 985 F.2d 1293, 1302 (5th Cir. 1993). The state appellate court found that the prosecution's question, even if improper, was cured when the trial court sustained the objection and gave an instruction that the jury should disregard the question. *Williams v. State*, No. 01-98-00155-CR, slip op. at 5 (Tex. App. -- Houston [1st Dist.] 1998, no pet.)(not designated for publication). The state appellate court held that the trial court did not err in denying Williams's request for a mistrial. *Id.* The state court's decision to deny relief was not contrary to clearly established federal law, as determined by the Supreme Court of the United States. Williams's third ground for habeas relief lacks merit. 28 U.S.C. § 2254(d)(1).

VI. The Claim Based on the Trial Court's Refusal to Read Back Testimony

Williams complains that the trial court erred in refusing to read back certain testimony for the jury during deliberations. The jury asked the court reporter to read back the testimony of Harold Anderson concerning "what time the blue

Nissan [Sentra] left from the defendant Roy Williams' house ..." In response to the jury's request, the court stated, "there is no such testimony from witness Harold Anderson re: the time the Nissan left defendant's house." (Statement of Facts, Vol. I, p. 195).

Williams correctly points out that Anderson did testify that Roy Williams had driven away in the blue Nissan Sentra on December 10, 1996, at approximately 5:00 or 5:30 p.m. A defense witness, David Johnson, testified that he called Roy Williams at 5:30 p.m. Roy Williams told Johnson that Ambrose Williams and Harold Anderson had already left with Walter Jackson. (Statement of Facts, Vol. V, p. 245). Roy Williams argues that another defense witness, Iesha Winslow, testified that she saw Roy Williams at his aunt's house at around 6:00 p.m. Williams argues that the court prevented the jury from evaluating all the alibi evidence by refusing to read back the requested testimony. (Docket Entry No. 6, Amended Petition for a Writ of Habeas Corpus, pp. 3-4). Williams asserts that the trial court misstated Anderson's testimony and violated Williams's right to a fair trial.

Texas law provides that:

In the trial of a criminal case in a court of record, if the jury disagree as to the statement of any witness they may, upon applying to the court, have read to them from the court reporter's notes that part of such

witness testimony or the particular point in dispute, and no other; but if there be no such reporter, or if his notes cannot be read to the jury, the court may cause such witness to be again brought upon the stand and the judge shall direct him to repeat his testimony as to the point in dispute, and no other, as nearly as he can in the language used on the trial.

TEX. CODE CRIM. PROC. ANN. § 36.28 (Vernon 1996).²

Article 36.28 of the Code of Criminal Procedure “controls and limits the reading of testimony to the jury during their deliberations.” *Jones v. State*, 706 S.W.2d 664, 667 (Tex. Crim. App. 1986); see TEX. CODE CRIM. PROC. ANN. art. 36.28 (Vernon 1981). Before allowing a witness’s testimony to be read to a deliberating jury, the trial court must first interpret the jury’s request and decide “what sections of the testimony will best answer the query, and limit the testimony accordingly.” *Jones*, 706 S.W.2d at 667. “Where the jury indicates a specific and limited portion of testimony to be read, the trial court does not abuse [its] discretion by only providing the requested information.” *Robison v. State*, 888 S.W.2d 473, 481 (Tex. Crim. App. 1994), *cert. denied*, 512 U.S. 1162 (1995).

²Two competing concerns give rise to this statute. On the one hand, there is the concern that the trial court not comment on the weight of the evidence. *DeGraff v. State*, 962 S.W.2d 596, 598 (Tex. Crim. App. 1998). On the other hand, there is the concern that the jurors have the means of resolving any factual disputes they might have. *Id.*

The manner in which the trial court determines whether a dispute exists is within its sound discretion. *Rodriguez v. State*, 995 S.W.2d 876, 878 (Tex. App. -- Houston [1st Dist.] 1999, pet. filed). A simple request for testimony does not by itself reflect disagreement and is not a proper request under article 36.28. In this case, however, the jury certified that it was in disagreement over Anderson's testimony as to when he and others left Roy Williams's house in the blue Nissan Sentra. (Statement of Facts, Vol. I, p. 195). The record also shows that Anderson did testify about the time he and the others left in the blue Nissan Sentra. Anderson testified that at approximately 5:00 or 5:30 p.m., Roy Williams and the others drove away in the blue Nissan Sentra. (Statement of Facts, Vol. III, p. 150). The trial court incorrectly told the jury that Anderson had not testified as to the time of departure.

The trial judge has broad discretion in responding to a jury request to reread testimony. *United States v. Sandoval*, 847 F.2d 179, 185 (5th Cir. 1988)(citing *United States v. Alfonso*, 552 F.2d 605, 619 (5th Cir.), cert. denied, 434 U.S. 857 (1977)); see also *United States v. Alonzo*, 681 F.2d 997, 1003 (5th Cir. 1982), cert. denied, 459 U.S. 1021 (1983). In examining a judge's response, the proceedings must be viewed as a whole. *United States v. Dobbs*, 63 F.3d 391, 398 (5th Cir. 1995). The critical inquiry is "whether the judge's behavior was so

prejudicial that it denied [the petitioner] a fair, as opposed to a perfect trial.” *United States v. Johnston*, 127 F.3d 380, 388 (5th Cir. 1997)(quoting *United States v. Williams*, 809 F.2d 1072, 1086 (5th Cir. 1987)).

Williams argues that the issue of the time Anderson and the others drove away was important to the alibi defense Williams raised. Williams presented two alibi witnesses, Carry Ann Rogers and Iesha Winslow. Carry Rogers was married to one of Williams’s cousins. Rogers testified that on December 10, 1996, she was visiting her cousin, Iesha Winslow, who lived next door to Roy Williams’s aunt. (Statement of Facts, Vol. VI, p. 60). Rogers testified that she saw Harold Anderson and Ambrose Williams drive off in a blue car, leaving Roy Williams behind. (Statement of Facts, Vol. VI, pp. 61, 69-70). She did not testify as to the time they left.

Iesha Winslow testified that she went to the house where Roy Williams and his aunt lived to borrow a compact disk between 6:00 and 6:30 p.m. on December 10. Roy Williams was at the house at that time. Winslow went back to the house to return the compact disk at approximately 7:00 p.m. Roy Williams was still at the house. Winslow did not think the blue Sentra was still parked in front of the house when she returned the compact disk. *Id.* at 84-86.

Respondent argues that even if the jury disagreed as to Anderson's testimony about the time he drove away from Roy Williams's house, and even if the judge incorrectly told the jury that Anderson did not give such testimony, no prejudice occurred. Rogers testified that she did not know what time the blue car left Williams's house, but did know that Roy Williams remained behind. (Statement of Facts, Vol. VI, pp. 69-70). Even if the court had read back Anderson's testimony to the jury, it would have had no bearing on the weight given to Rogers's testimony. (Docket Entry No. 14, Respondent's Motion for Summary Judgment, p. 13).

Winslow did testify as to the time she saw Roy Williams in the house after the blue car had driven away. However, on cross-examination, the prosecutor effectively impeached Winslow with the testimony she gave in Roy Williams's first trial. In that trial, Winslow testified that at 7:00 p.m., Walter Jackson, Ambrose Williams, Harold Anderson, and Roy Williams were still at Roy Williams's house. In the first trial, Winslow also testified that she saw Roy Williams talking to the other three men outside the house between 3:50 to 4:00 p.m., stay for approximately thirty minutes, then leave. (Statement of Facts, Vol. VI, pp. 89-98). Winslow gave two conflicting accounts of the same events at two different trials.

The jury asked only for Anderson's testimony on the time the Nissan Sentra drove away. The jury did not ask for Anderson's testimony as to who was

in the car with him when he drove off. Anderson testified that when he left, Roy Williams was with him in the blue Nissan Sentra, along with Ambrose Williams and Jackson. The 'alibi' witnesses, Johnson, Winslow, and Rogers, testified that Anderson had driven away in the Nissan Sentra, while Roy Williams remained in the house. That testimony, rather than the testimony as to the precise time Anderson drove away, was neither requested by the jury nor mischaracterized by the trial judge.

The jury heard conflicting testimony concerning Roy Williams's alibi defense, deliberated, and by its verdict of guilty, chose to disbelieve those witnesses' account of the events of December 10, 1996. Williams has not shown that had the trial court read back the specified portion of Anderson's testimony, limited to the subject of the time he left the house, Williams's alibi defense would have been strengthened or the outcome of the case altered. This court has examined the entire trial transcript and concludes that, although the trial court erred in its response to the jury's request to have testimony read back, the response did not substantially prejudice the defense.

The state court's decision to deny relief was not contrary to clearly established federal law as determined by the Supreme Court of the United States. The relief Williams seeks is denied. 28 U.S.C. § 2254(d)(1).

VII. Conclusion

Respondent's Motion for Summary Judgment, (Docket Entry No. 14), is GRANTED. Williams's petition for a writ of habeas corpus is DENIED. This case is DISMISSED. Williams's motions for default judgment, (Docket Entry Nos. 9 & 13), are DENIED as moot. Any remaining pending motions are DENIED as moot.

The Supreme Court stated the showing necessary for a Certificate of Appealability is a substantial showing of the denial of a constitutional right. *Hernandez v. Johnson*, 213 F.3d 243, 248 (5th Cir. 2000)(citing *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000)). Under that standard, an applicant makes a substantial showing when he demonstrates that his application involves issues that are debatable among jurists of reason, that another court could resolve the issues differently, or that the issues are suitable enough to deserve encouragement to proceed further. See *Clark v. Johnson*, 202 F.3d 760, 763 (5th Cir. 2000).

Specifically, where a district court has rejected a prisoner's constitutional claims on the merits, the applicant must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. *Slack*, 529 U.S. 484. "When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it

debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.*

This court denies Williams's petition after careful consideration of the merits of his constitutional claims. This court denies a COA because Williams has not demonstrated that reasonable jurists would find that this court's assessment of the constitutional claims is debatable or wrong.

SIGNED on February 23, 2002, at Houston, Texas.



Lee H. Rosenthal
United States District Judge

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