

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

Brian Norwood — PETITIONER
(Your Name)

vs.

Lorie Davis — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Fifth Circuit Court of Appeals
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Brian Norwood
(Your Name)

10071 F.M. 3522
(Address)

Abilene, Tx 79601
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

Concerning when direct review of a state court conviction is considered to have ended for purposes of determining when the AEDPA's one-year time limit for filing §2254 petitions begins, did the Fifth Circuit Court of Appeals err in denying Norwood a Certificate of Appealability on whether:

If a state court dismisses a petition for discretionary review ("PDR") as untimely in arbitrary fashion, does the arbitrary nature of the dismissal render the date the PDR was dismissed as the date the AEDPA's one-year period of limitation begins, rather than the date the PDR was due? And, if so, should a district court assess whether the state court did in fact dismiss the PDR in arbitrary fashion, when the result of the assessment would mean the difference between a timely and timebarred §2254 petition?

LIST OF PARTIES

☒ All parties appear in the caption of the case on the cover page.

☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

TABLE OF CONTENTS

OPINIONS BELOW	1
JURISDICTION.....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	10
CONCLUSION.....	21

INDEX TO APPENDICES

- APPENDIX A - Order of the Fifth Circuit Court of Appeals Denying Norwood a Certificate of Appealability (No. 16-11209)
- APPENDIX B - Order of the United States District Court Dismissing Norwood's §2254 Petition as Timebarred (USDC No. 7:14-CV-003-D)
- APPENDIX C - ~~Order~~ ^{Notice} of the Texas Court of Criminal Appeals' Dismissing Norwood's Petition for Discretionary Review as Untimely (PD-0056-12)
- APPENDIX D
- APPENDIX E
- APPENDIX F

TABLE OF AUTHORITIES CITED

CASES

PAGE NUMBER

Buck v. Davis, 137 S.Ct. 759 (2017)	16
Campbell v. State, 320 S.W.3d 338 (Tex.Crim.App. 2010)	13, 14, 16
Coleman v. Thompson, 501 U.S. 722 (1991)	10
Dretke v. Haley, 541 U.S. 386 (2004)	10
Eby v. State, 165 S.W.3d 703 (Tex.App.- San Antonio 2005)	18
Estelle v. McGuire, 502 U.S. 62 (1991)	14, 15
Ford v. Georgia, 498 U.S. 411	17
Howlett v. Rose, 496 U.S. 356 (1990)	15
James v. Kentucky, 466 U.S. 341 (1984)	10
Jernigan v. State, 585 S.W.2d 701 (Tex.Crim.App. 1979)	18

STATUTES AND RULES

28 U.S.C. § 2254(d)(1)(A)	10, 11, 16, 17
28 U.S.C. § 2254(d)(2)	11, 16-17
28 U.S.C. § 2253(c)(1)	13
28 U.S.C. § 2253(c)(2)	13

OTHER

TABLE OF AUTHORITIES (Cont.)

Cases	Page
Macias v. State, 959 S.W.2d 332 (Tex. App. - Houston [14th Dist.] 1997)	19
Manning v. Blackburn, 786 F.2d 710 (5th Cir. 1986)	14, 15
Manning v. Scott, 65 F.3d 405	14
Miller-El v. Cockrell, 537 U.S. 322 (2003)	13
Phillips v. State, 22 Tex. App. 139, 2 S.W. 601 (1886)	18
Rosales v. Dretke, 444 F.3d 703 (5th Cir. 2006)	10, 15
Slack v. McDaniel, 529 U.S. 473 (2000)	13
Stewart v. Estelle, 634 F.2d 998 (5th Cir. 1981)	14, 15
Strickland v. Washington, 466 U.S. 668 (1984)	18
United States v. Irvin, 87 F.3d 860 (5th Cir. 1996)	19
Winn v. State, 937 S.W.2d 124 (Tex. App. - Amarillo 1996)	18

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was October 6, 2017.

☒ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A .

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from **state courts**:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A .

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2244(d)(1)(A) - 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 date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review.

28 U.S.C. § 2244(d)(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.

STATEMENT OF THE CASE

I. PRIOR PROCEEDINGS

On April 15, 2008, Norwood was convicted for the offense of murder, and sentenced to 99 years in prison and a \$10,000.00 fine. (Docket Entry #3 at 2). On April 23, 2009, his conviction was affirmed on direct appeal. ID. at 3. Norwood was later granted leave to file an outof-time Petition for Discretionary Review ("PDR"). Ex parte Norwood, App. No. AP-76,680, WL 5437550 (Tex.Crim.App. 2011). The deadline for filing the PDR was January 4, 2012. Norwood tendered his PDR to prison officials on January 4, 2012. (Docket Entry #19 at 1-2, Exhibit A), but it was dismissed on March 7, 2012 as untimely. Norwood-V-State, PD-0056-12. Norwood filed a State habeas application on January 2, 2013. Ex parte Norwood, App. No. WR-76,614-02. Such was denied on December 18, 2013. (Docket Entry #17-9 at 1). Norwood then filed his §2254 petition on January 1, 2014.

II. OVERVIEW FACTS

A little after midnight on June 28, 2005, Da'Milla Walker and her sister Damisha, Dominique Murray, Shytinka Combs, Meisha mcbee, and Unique Johnson were conversating by the sidewalk in front of a house at 710 Welch Street in Wichita Falls, Texas. (RR 4: 24, 136-37, 150; 5:91; 6:180). Two cars (described as a small car followed by a Lincoln (RR. 4:40, 141)) traveling on Cleveland Street pulled up to the intersection of Welch, turned onto Welch, and approached the house. (RR 4:139; 5:94). According to Damisha, Combs, and Johnson, as the cars approached 710 Welch, occupants in the cars began spraying gunfire at the house. (RR 4:25-26, 144- 5:94). The cars continued past the house to the next intersection, and tunred right on Rosewood. (RR. 5:101). In the minutes that followed, Da'Milla was found dead in the front yard. (RR 4:33, 76-77, 147; 5:103). She had been shot in the back, apparently as she bent over to avoid the volley of shots. (RR 4:37, 5:128).

Damisha, Combs, and Johnson all claimed Norwood, a.k.a. "Red Nose," (RR 4:27, 141), was one of the occupants of the cars shooting at the house.

But, their accounts of which car he was in, or his actions, varied greatly. For instance, Damisha saw Norwood in the first car sitting in the first car sitting in the passenger-side windowsill firing handgun, (RR 4:27, 30), whereas Combs placed Norwood in the second car's passenger-side window-sill, hanging over the roof of the car with a long-gun. (RR 4:243-44). Johnson recalled the second car stopping, Norwood leaning over the trunk and shooting a gun, (RR 5:99-100), and then running around the corner of the street onto Rosewood. (RR 5:101).

In any event, the ensuing police investigation resulted in the collection of numerous .223 casings trailing down the right gutter of Welch Street, and two more just around the corner on Rosewood. (RR 5:12). Police recovered a .22-caliber handgun on Rosewood, and also found the Lincoln, which was abandoned after it hit a pole. (RR 4:221, 237). The casings were swabbed for possible DNA, and tested for fingerprints. (RR 4:246-47). It was never stated whether DNA testing was ordered, but it was clear that no fingerprints were found. (RR 4: 247). The Lincoln was processed, inside and out, for fingerprints. (RR 5:51). Three fingerprints were found, which were then compared to, and matched, known prints of Norwood's. (RR 5:34-35). One fingerprint was located on the exterior of the front passenger side door, and was facing up towards the roof of the vehicle. (RR 5:35). The two others were located on the exterior of the rear passenger-side door, and were facing down. Id. However, it could not be determined when the prints were placed on the car. They could have been placed there a day, week, or month before the shooting. (RR 5:54). No prints of Norwood's were found inside the car. (RR 5:55). After learning that police were looking for him in connection with the shooting, Norwood turned himself in at the Wichita Falls Police Department. (RR 6:22-24, 107-08). at that time, Norwood was accompanied by his father-in-law, Juan Contreras, his mother, Patricia, and his wife Vanessa. (RR 6:22-23). These family members told detective Greg Burt that Norwood could not have been involved in the shooting, for he was at home, sick. (RR-6: 24-25). Although Detective Burt admitted that he was told such, neither he nor any other detective working the case investigated this claim. (RR 6: 25-26).

Norwood's alibi carried over to trial as his primary defense. Contreras told the jury that approaching midnight, June 28, he and William Mims rushed to the beer store before it closed. (RR 6:98). In addition to getting beer, Contreras bought Norwood a Gatorade. Id. Contreras then went to Norwood's house, which was "two or three minutes" away away. (RR 6: 99). Contreras first knocked on the door and then, after receiving no response, knocked on a window unit in Norwood's bedroom. Id. He then went back to the front door, which was located by the driveway where Contreras parked, and Norwood opened it. Id. When Contreras went in, Norwood was in the bed. (RR. 6:100).

Norwood was wearing some boxers and a t-shirt, and appeared sick, Id, just as he was when Contreras went by the house around 4:00 p.m. the previous afternoon. (RR 6: 102).

Contreras stayed in the house for about 20 - 30 minutes, then went back to the truck. He and Mims, stayed in the truck until Vanessa arrived home from work after 1:00 a.m. (RR 6:103-05). During this time, Norwood never left the house. (RR 6:105).

Likewise, Mims told the jury that he and Contreras went to the beer store right before midnight, and then went straight to Norwood's house. (RR- 6: 215,218). When they got to Norwood's, Mims stayed by the truck, but saw Norwood answer the door. (RR 6: 219). He, too, never saw Norwood come out of the house from the time he and Contreras arrived at the house until the time Vanessa come home from work. (RR 6: 220-22). Both Contreras and Mims testified the house two front doors and no side or back doors, (RR 6: 100, 220), thus they would have seen if Norwood left.

Finally, Vanessa Contreras testified that from the time she just got up at 10:00 a.m., June 27, until she left for work at 4:00 p.m., Norwood was in bed, sick. (RR 6: 235, 37). When she arrived home from work sometime after 1:00 a.m., Juan and Mims were sitting in the driveway. (RR 6: 238-39). Norwood was in bed asleep. (RR 5: 205).

Police searched the house the day after Norwood turned himself in. (RR 5: 205). No indication was given as to whether anything of evidentiary value in connection with the shooting was collected; thus it can readily be inferred that nothing was. Also, other than the .22-caliber handgun found on Rosewood, no other guns were found during the investigation of the shooting. (RR 5: 174-75).

THE STATE'S GANG EVIDENCE AS MOTIVE

Prior to trial, it became clear that the State was going to contend at trial that the drive-by was gang-related, motivated by Norwood's purported affiliation with a gang rival to the gang whose were associated with 710 Welch Street. Defense counsel filed a pre-trial Motion to exclude any gang evidence, and the court heard arguments on the matter. (RR 2:7).

At the hearing, the State contended that the drive-by, and Norwood, were gang related. (RR 2:10). Counsel countered that there was nothing in the previous trial of Norwood's codefendant that indicated that the shooting was gang affiliated. (RR. 2: 10-12). Essentially, counsel's argument centered around the fact that no evidence was given to suggest a problem with any gang member associated with the house, or that any gang member was outside, or even at, the house. Id. Counsel believed the State just "want[ed] to toss in gang" with no other basis than individuals at the house, and Norwood, may have been gang members. (RR 2:12). Thus, according to counsel, gang-related evidence would not be probative, would not show motive, and would be "far more prejudicial than - than I think the Court would imagine." (RR 2:-12-13). After further argument that nothing indicated that this was a gang-related shooting, counsel again argued that such evidence was "way too prejudicial." (RR 2:14).

In reply, the State asserted that any distinction about whether any individual slept at the house was irrelevant. (RR 2:14). The State argued that the house was associated with certain individuals, and that it was common for them to be there. Id. The State further argued that it was well-determined that the two gangs had ongoing problems. (RR 2:15). The State asserted that it would prove that Norwood was a member of an opposing gang, and that gang members target specific houses based on who is associated with that house. Id.

After further argument from defense counsel, the judge inquired of the State as to what evidence it intended to proffer "that this was in fact gang related." (RR 2:16). The State replied that it had evidence that Norwood was a member of the KEP gang, that certain individuals associated with the house were opposing gang members, that the two gangs were hostile toward

each other, and that houses themselves can be targets of drive-bys. (RR 2:16-17). The State then informed the court that if the court was asking if the State had anyone specifically saying that this was why Norwood did the drive-by, the answer was no - the evidence of motive was going to be based just on "the gang membership." (RR 2:17).

Interestingly, although in response to the court's question the State essentially replied that it did not have evidence that this was "in fact" gang related, the court nonetheless overruled motion to exclude the gang evidence. (RR 2:18).

During Shytinka Combs' testimony, the State began its trek of establishing its gang-related theory of motive. Combs testified that Anthony Daugherty, Cedric Rose, Frederick Rose, and Jermarcus Williams were also at 710 Welch that night. (RR 4:137). Combs had seen Williams and Cedric "throw up" gang signs affiliated with the Bloods. (RR 4:161-62). Also, she knows that the color red is associated with the Blood gang, and that both Williams and Cedric wore red. (RR 4:162). Combs then testified that the KEPs were a rival gang of the Bloods. (RR 4:162-63).

On cross examination, Combs stated that Norwood was wearing red the night of the shooting. (RR 4:168). Moreover, she never seen Norwood "throw" a gang sign, nor does she personally know whether Norwood was a gang member. (RR 4:169).

Next, through Raymond Schultz, custodian of records for the Wichita County Sheriff's Department, (RR 5:23), the State introduced State's Exhibit 42, which is a jail record kept by the Sheriff's Department. (RR 5:24). Although the State never questioned Schultz about the contents of the record in front of the jury, defense counsel's voir dire questioning in front of the jury, and ensuing argument at the bench, revealed: 1) the record was a jail booking sheet which contained a notation written by a detention officer that Norwood was a KEP gang member, 2) that Norwood signed the record, and 3) that the detention officer would not have had personal knowledge of whether Norwood was, in fact, a KEP. (RR 5:25-27). Over objection, State's Exhibit 42 was admitted and published to the jury. (RR 5:29).

After Schultz was Tommy Smythe, a Wichita Falls police officer who has extensive gang experience and training. (RR 5:71). Smythe was familiar with the KEP gang. (RR 5:72). Smythe knew Cedric Rose, Frederick Rose, and Jermarcus Williams to be Blood gang members. (RR 5:74, 80). Smythe stated that gangs often do "drive-bys," which can involve either shooting at individuals or houses. (RR 5:75-76). However, he had no knowledge as to whether Norwood was gang affiliated. (RR 5:76). Also, at the time of the drive-by, Smythe had no personal knowledge of whether Norwood or his codefendant had a "brief," or problems, with any other gang member. (RR 5:79). Finally, Smythe related that Bloods predominately wear red, and that a KEP shouldn't wear red for it is a sign of disrespect to wear rival colors. Thus, you expect to find a KEP wearing red. Id.

This was the sum total of the State's gang-related evidence. Norwood was eventually convicted for the murder of Da'milla Walker, and sentenced to 99 years and a \$10,000.00 fine.

REASONS FOR GRANTING THE PETITION

BY DENYING NORWOOD A CERTIFICATE OF APPEALABILITY, THE COURT OF APPEALS PANEL HAS EFFECTIVELY DENIED—ON A "THRESHOLD INQUIRY" AN IMPORTANT QUESTION OF FEDERAL LAW THAT WARRANTED FULL REVIEW AND CONSIDERATION AND ULTIMATELY, IS OF SUCH WIDESPREAD PUBLIC IMPORTANCE, THAT IT SHOULD BE CONSIDERED AND/OR DECIDED BY THIS COURT TO DETERMINE WHETHER THE COURT OF APPEALS ERRED IN DENYING NORWOOD A CERTIFICATE OF APPEALABILITY.

If a §2254 petitioner has defaulted a federal claim in state court pursuant to an adequate and independent state procedural rule, federal courts will generally refuse to review that claim. See Dretke-V-Haley, 541 U.S. 386, 388 (2004); Coleman-V-Thompson, 501 U.S. 722, 750 (1991). But, if the state procedural rule is not "adequate," then federal courts can review the claim. To be considered "adequate" by a federal court, the state procedural rule must be both "firmly established and regularly followed." Ford-V-Georgia, 498 U.S. 411, 427 (1991). In other words, the rule must be "clear [and] closely hewn to" by the state for the federal court to find it adequate. See James-V-Kentucky, 466 U.S. 341, 348 (1984). If the rule is not firmly established, or if it is applied in an arbitrary or unprecedented fashion, then it is not adequate to prevent federal review of that claim. Rosales-V-Dretke, 444 F.3d 703, 707 (5th Cir. 2006).

Under the procedural bar doctrine, a state court can dismiss a prisoner's petition for discretionary review ("PDR") that contains a federal claim, as untimely. The prisoner can then timely file a §2254 petition raising the claim that he raised in the PDR. In that instance, under Ford, James, et al., a federal court is not precluded from reviewing the claim if the State court's dismissal was arbitrary, and the federal court should assess the state court's dismissal to determine if it was done arbitrarily.

But what about instances where the state court has dismissed a PDR as untimely, and the timeliness of a §2254 petition is questioned as a result? As this court is well-aware, the Antiterrorism and Effective Death Penalty Act ("AEDPA") imposes a one-year limitation period for filing §2254 petitions, which begins from "the date on which the judgement became final by the conclusion of direct review or the expiration of the time for seeking such review." §2244(d)(1)(A).

Shouldn't the date a federal court considers the "judgment [to have become] final" be dictated by whether the state court's dismissal was done so arbitrarily? Just as a pending state habeas application tolls the AEDPA's one-year limitation period so long as it was "properly filed" (see §2244(d)(2)), shouldn't the period that the PDR was pending be tolled if it was arbitrarily dismissed as untimely, since it was actually "properly filed?"

Ultimately, then, when the timeliness of an entire §2254 petition is questioned, shouldn't a federal court assess whether the state court's dismissal of the PDR was arbitrary before determining what date direct review has concluded under §2244(d)(1)(A), as a federal court would do in order to determine whether the federal claim raised in the PDR was procedurally barred from federal review?

Without full review or consideration, the Fifth Circuit Court of Appeals decided that the answer to these questions of first impression was "no" by denying Norwood a certificate of appealability ("COA") to appeal the district court's dismissal of his PDR as untimely. The district court had rejected Norwood's argument that because the Texas Court of Criminal Appeals ("TCCA") erroneously dismissed his PDR as untimely, the date of the dismissal--rather than the date the PDR was due--should be the date his direct review is considered to have concluded under §2244(d)(1)(A). The district court's rejection was based on its notion that Norwood's complaint was based on a violation of state procedural law, of which federal courts do not sit to enforce and which would not entitle Norwood to federal habeas relief. Thus, Norwood sought a COA to appeal the district court's assessment on the matter. Nevertheless, although this court has concluded that a federal court should assess whether a state procedural rule is "adequate" or arbitrarily applied in analogous contexts involving the procedural bar of a single claim, the Fifth Circuit concluded that reasonable jurists could not debate whether that same principle applies to areas where the timeliness of an entire §2254 petition is concerned.

Because the issue is one of first impression, and is supported by this court's holdings in closely analogous contexts, Norwood submits that reasonable jurists could debate the point and that the issue should have received full appellate review and consideration by the Fifth Circuit Court of Appeals.

Because the issue is of such widespread public importance involving whether arbitrarily applied state procedural rules impact the begin-date of the AEDPA's one-year period of limitations, which could mean the difference between a timely or timebarred §2254 petition in any given case, Norwood submits the issue should be considered and/or decided by this court. Accordingly, Norwood petitions this Court to grant certiorari to review the ~~XXXXXX~~ Fifth Circuit panel's judgment denying him a COA on the matter to determine whether he is entitled to one.

A. STANDARD OF REVIEW

Before Norwood can appeal the district court's dismissal of his §2254 petition as timebarred, he must first obtain a COA from a circuit justice or judge. See 28 U.S.C. §2253(c)(1). A COA may issue only if the applicant has made a "substantial showing of the denial of a constitutional right." §2253(c)(2). Until Norwood secures a COA, the Court of Appeals may not rule on the merits of his case. Miller-El-V-Cockrell, 537 U.S. 322, 336 (2003).

Where, as here, a §2254 petition is dismissed on procedural grounds, a COA will 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." Slack-V-McDaniel, 529 U.S. 473, 484 (2000).

Although the district court dismissed Norwood's §2254 petition without ruling on the merits of his constitutional claim, Miller-El, is nonetheless instructive here. The Miller-El court emphasized that, at the COA stage, the only question is whether the petitioner has shown that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." 537 U.S. at 327. This threshold question should be decided without "full consideration of the factual or legal bases adduced in support of the claims." *Id.* at 336.

Thus, a "court of appeals should limit its examination [at the COA stage] to a threshold inquiry into the underlying merit of [the] claims," and ask "only if the District Court's decision was debatable." *Id.* at 327, 348. Norwood submits he meets the standard for obtaining a COA on the district court's dismissal of his §2254 petition as timebarred.

B. REASONABLE JURISTS CAN DEBATE WHETHER THE DISTRICT COURT PROPERLY DISMISSED NORWOOD'S §2254 PETITION AS TIMEBARRED WITHOUT REGARD TO WHETHER THE STATE COURT'S PROCEDURAL RULING WAS APPLIED ARBITRARILY.

In 2010, the TCCA announced in Campbell-V-State, 320 S.W.3d 338 (Tex. Crim.App. 2010), that "the pleadings of pro se inmates shall be deemed filed at the time they are delivered to prison authorities for forwarding to the

court's clerk." Id. at 344. Subsequent to Campbell, Norwood's PDR to the TCCA was due January 4, 2012. (Appendix B at 2). As Norwood demonstrated to the district court, his PDR was processed by the prison unit mailroom on that day. (Reply - docket entry #19 at Exhibit A). Pursuant to Campbell, it should have been deemed filed on the date it was due and thus, timely. Yet, on March 7, 2012, the TCCA summarily dismissed Norwood's PDR as untimely without further explanation. (Appendix C).

After exhausting state collateral proceedings, Norwood filed a §2254 petition. (Appendix B at 2). Because the TCCA dismissed Norwood's PDR as untimely the district court concluded that Norwood's conviction became final on January 4, 2012, (Appendix B at 2), and that his one-year deadline for filing his §2254 petition was January 4, 2013. Id. at 3. Factoring in the time Norwood's state habeas application was pending, the district court further concluded that Norwood's §2254 petition was "12 days late." Id.

The district court acknowledged Norwood's argument that because he tendered his PDR to prison officials on the date it was due, the TCCA erroneously dismissed his PDR as untimely in light of the "Mailbox rule." Id. The district court correctly construed Norwood's argument to be that, because he timely filed his PDR, the date that the TCCA dismissed the PDR, "March 30, 2012,"¹ should be considered the date which his conviction became final for purposes of calculating AEDPA's one-year period of limitation. Id.

But, the district court rejected Norwood's argument, reasoning:

"Federal habeas relief is available only to rectify violations of federal constitutional rights. See Manning-V-Scott, 65 F.3d 405, 418-20 (5th Cir. 1995). Federal habeas relief will not issue to correct alleged errors of state constitutional, statutory, or procedural law. See Estelle-V-McQuire, 502 U.S. 62, 67-68 (1991); Manning-V-Blackburn, 786 F.2d 710, 711 (5th Cir. 1986). Norwood claims that, pursuant to the mailbox rule, his PDR was timely filed and that the Texas Court of Criminal Appeals erred in dismissing it as untimely. This claim implicates an alleged violation of a state procedural rule. Failure to comply with the requirements of a state procedural rule does not, of itself, raise a federal constitutional question cognizable in a federal habeas corpus proceeding. Federal courts do not sit to enforce state procedural rules. Stewart-V-Estelle, 634 F.2d 998, 999 (5th Cir. 1981).

¹
The PDR was actually dismissed on March 7, 2012. See e.g. Appendix B at 1.

But, the district court plainly has it backwards; its reasoning is misplaced. The foundation of the district court's reasoning, and the cases it cites in support thereof, relates to the proposition that claims of state statutory or procedural law violations are not cognizable in federal habeas proceedings even if the claims were not procedurally defaulted in state court. For example, McQuire involved this court's reversal of the 9th Circuit Court of Appeals' conclusion that federal habeas relief was warranted because certain evidence had been incorrectly admitted pursuant to California law. 502 U.S. at 67-68. Manning claimed a state statute violation concerning the misjoinder of offenders at trial as a ground for habeas relief. 786 F.2d at 711. And, Stewart, also claimed a violation of state statute as a ground for habeas relief, 634 F.2d at 999.

Inapposite to the district court's reasoning is the true underpinning of Norwood's complaint: Whether state procedural rulings affected federal review of a cognizable claim in §2254 proceedings. Or, more precisely in Norwood's case, whether an arbitrarily applied state procedural ruling affects him a federal court calculates the AEDPA's one-year limitation period for filing a §2254 petition.

Indeed, Norwood never claimed that the TCCA's erroneous dismissal of his PDR entitled him to relief. Accordingly, the district court's refusal to consider whether the TCCA's dismissal was arbitrary, or whether March 7, 2012 vis-a-vis January 4, 2012 is the date his direct review ended as a result, was misguided by its misplaced reasoning.

In short, and contrary to the district court's reasoning, "[t]he adequacy of a state law ground to preclude federal court review of federal constitutional claims is a federal question which is reviewed by a federal court de novo." Rosales-V Dretke, 444 F.3d 703, 707 (5th Cir. 2006)(citing Howlett-V-Rose, 496 U.S. 356, 366 (1990)). As demonstrated at the beginning of these reasons for granting the petition, had the timeliness of Norwood's §2254 petition not been an issue, and had he presented his constitutional claim in his PDR to the PDR to the TCCA, the district court would have been obligated to assess whether the TCCA's dismissal of his PDR was arbitrary in nature to determine whether the claim was procedurally barred from federal

review. Norwood submits that the district court was just as obligated to appraise the TCCA's dismissal to properly determine the date his direct review ended.

Nevertheless, despite the Fifth Circuit's precedent regarding the adequacy of a state ground to preclude review being a federal question, the Fifth Circuit panel concluded that Norwood failed to demonstrate that reasonable jurists could debate whether the district court properly dismissed his §2254 petition as timebarred without assessing whether the TCCA had arbitrarily dismissed his PDR as untimely, and that reasonable jurists could debate whether Norwood's petition stated a valid constitutional claim. (Appendix A at 2). In doing so, the court of appeals necessarily decided that one or both of these aspects of Norwood's request for a COA was meritless. See Buck-V-Davis, 137 S.Ct. 759, 774 (2017)("[W]hen a court of appeals properly applies the COA standard and determines that a prisoner's claim is not even debatable, that necessarily means the prisoner has failed to show that his claim is meritorious."). As Norwood establishes in section C below, his ineffective assistance of counsel claim is grounded in over-one-hundred-year old case-law, he was plainly prejudiced by counsel's error, and his claim was not adjudicated by the state court. Because Norwood clearly states a valid constitutional claim (of which the district court did not address), he submits that the court of appeals panel's denial of a COA was based on the district court's procedural holdings. Norwood further submits the court of appeals panel erred in denying him a COA.

Under the circumstances, any reasonable jurist would certainly question the TCCA's summary dismissal of Norwood's PDR as untimely two years after implementing a "mailbox rule" such as the one it did in Campbell,. Moreover, with federal courts being obligated by this court to assess whether a state court dismissed a PDR as untimely in arbitrary fashion to determine if a federal claim presented therein was procedurally barred in federal court, reasonable jurists can certainly debate whether a federal court can or should assess whether a state court dismissed a PDR as untimely in arbitrary fashion to determine the proper date direct review is considered to have ended under §2244(d)(1)(A). And, because the one-year period of limitation is tolled while a "properly filed" state habeas application is tolled, reasonable

jurists can debate whether the time a "properly filed" PDR is pending should be tolled when it is arbitrarily dismissed as untimely by the state court.

Because (1) the above questions present an issue of first impression, (2) the issue is clearly supported by this court's holdings in the closely analogous "procedural bar" context wherein arbitrarily applied state procedural rules are not "adequate" to preclude federal review of a particular claim, and (3) Norwood's §2254 petition so clearly states a valid ineffective assistance of counsel claim (as demonstrated in section C below), Norwood submits that the court of appeals panel could not have properly concluded that the issue was meritless on a "threshold inquiry." For the same reasons, Norwood submits that he satisfied the standards for obtaining a COA, and the issue warranted full review and consideration by the Fifth Circuit Court of Appeals.

Accordingly, because the issue presented impacts federal court's determination of when a §2254 petitioner's one-year time limit begins under §2244(d)(1)(A)—which, as is the case here, could mean the difference between a timely and timebarred §2254 petition—Norwood submits that the issue is of such widespread public importance that this court should grant certiorari to review the court of appeals panel's denying Norwood a COA to appeal the district court's dismissal of his §2254 petition as timebarred.

C. NORWOOD'S PETITION STATED A VALID CONSTITUTIONAL CLAIM

As to whether Norwood's petition states a valid claim of the denial of a constitutional right, Norwood alleged that trial counsel was ineffective for failing to make the most obvious objection in his quest to have the State's gang evidence excluded from the trial. Specifically, during a pretrial hearing, the State indicated that it was going to present evidence that (1) individuals associated with 710 Welch Street were members of the Bloods gang, (2) Norwood was a member of the KEP gangs, (3) the two were rival gangs, and (4) that gangs target each others' houses. (RR 2: 15-17). The State intended to proffer this evidence as to Norwood's motive for shooting at 710 Welch. Id. Counsel sought to have this evidence excluded on the basis that there was no evidence that the driveby was gang-related vis-a-vis drug-related (RR 2: 13-14).

Counsel never objected pretrial, or during trial, on the basis of well-known Texas Law that had clearly been in effect for over 120 years-- that is, that the State could not prove that Norwood knew anyone associated with 710 Welch were Bloods or rival gang members.

To prevail under Strickland-V-Washington, 466 U.S. at 687, the petitioner must show (1) that his trial counsel's performance fell below the prevailing standard of practice, and (2) that counsel's deficient performance prejudiced the defense. With respect to the former, scrutiny of counsel's performance must be deferential, and counsel's conduct is presumed to fall within the "wide range" of reasonable professional assistance. Id. at 689. Regarding the latter, prejudice is shown if there is a "reasonable probability" that, but for counsel's errors, the outcome of the trial would have been different. Id. at 694. Norwood submits that reasonable jurists can readily debate whether counsel's failure to voice the most logical objection satisfies the Strickland, standard.

First, the state clearly specified in the pretrial hearing that it intended to offer the gang evidence as motive. Counsel clearly decided prior to trial to attempt to have the gang evidence excluded. Such was his strategy. Second, Texas courts have adhered to the long-standing rule that evidence showing on accused's motive is admissible only if accompanied by proof showing that, at the time of the killing, the accused had knowledge of the facts constituting the motive. Eby-V-State, 165 S.W.3d 703, 737 (Tex.App.-San Antonio 2005)(citing Jerrigan-V-State, 585 S.W.2d 701, 704 (Tex.Crim.App. 1979); Winn-V-State, 937 S.W.2d 124, 128 (Tex.App.- Amarillo 1996, no pet.). As the Winn Court noted, this has been the Texas rule "[a]t least since Phillips-V-State, 22 Tex.App. 139, 2 S.W. 601 (1886). 937 S.W.2d at 128.

This rule is based on logic and common sence--if the accused is not aware of a certain fact, then that fact cannot possibly be what motivated the accused to commit murder. For example, in the Jernigan case, the TCCA held that evidence of the wife's extramarital relationship was not admissible to show motive because it was never established that the defendant-husband was aware of the relationship. 585 S.W.2d at 704.

Here, although the State indicated that it planned to introduce Norwood's gang affiliation as evidence of his motive to shoot at 710 Welch, it never contended that it had any evidence that Norwood knew anyone associated with 710 Welch was a rival gang member.

Moreover, the state did not present any such evidence during trial. Consequently, it cannot be said that Norwood's purported gang affiliation motivated him to shoot at 710 Welch, and counsel should have objected on that ground.

Given that it was counsel's strategy to have the gang evidence excluded, reasonable jurists can certainly debate whether counsel was deficient for not voicing an objection based on over century-year-old law, and common sense.

Likewise, reasonable jurists would have no problem debating whether counsel's deficiency prejudiced Norwood. From the outset, Norwood would point out that during its deliberations, the jury sent out a note:

We have deliberated for approximately 5 hours and taken a vote 3 times. Each time the result has been 7 to 5. Should we continue?

CR: 401.

Plainly, at least five jurors had reasonable doubt, even considering the state's gang evidence -- evidence commonly known to be highly prejudicial. As Justice Hudson said in his dissenting opinion in Macias-V-State, 959 S.W.2d 332, 341 (Tex.App.-Houston [14th Dist] 1997)(Hudson, J., dissenting), "[G]ang activity has become virtually synonymous with 'violent crime.'" Id. (citing United States-V-Irvin, 87 F.3d 860, 865 (7th Cir.), cert. denied, 117 S.Ct. 259 (1996). Justice Hudson went on to state, "[G]angs generally arouse negative connotations and often invoke images of criminal activity and deviant behavior." Id. The 7th Circuit in Irvin, Justice Hudson's source, continued:

There is therefore always the possibility that a jury will attach a propensity for committing crimes to defendants who are affiliated with gangs or that a jury's negative feelings toward gangs will influence its verdict. Guilt by association is a genuine concern wherever gang evidence is admitted.

Irvin, 87 F.3d at 865.

Thus, the gang evidence alone already carried an inherent tendency to provoke the jury into conviction. But, then, the state highlighted the gang/violent

Clearly, even with the State's gang evidence, at least five jurors harbored reasonable doubt as to Norwood's guilt for over five hours. Given that the heart and soul of the State's case involved portraying Norwood as a gang member, and the driveby as gang motivated, related, any reasonable jurist can debate there is a reasonable probability that, at the very minimum, those five jurors would have stood fast in their doubt had counsel properly had the gang evidence excluded from the jury's consideration.

[illegible]

I, Brian Norwood, being presently incarcerated at the French M. Robertson, of the Texas Department of Criminal Justice, in Jones County, Texas, do declare under penalty of perjury that the above foregoing facts are true and correct to the best of my knowledge.

Brian Norwood

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Brian Norwood

Date: January 4, 2018